IN THE SUPREME COURT OF THE STATE OF NEVADA

CALVIN ELAM, Appellant, v. STATE OF NEVADA, Respondent.	Docket No. 85421	Electronically Filed Mar 27 2023 06:13 PM Elizabeth A. Brown Clerk of Supreme Court

APPELLANT'S APPENDIX
Volume V

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Findings of Facts, date 9/16, 2023 1239-1283

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 27th day of March, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT MONIQUE MCNEILL

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

Calvin Elam

By:____/S/ Monique McNeill _____
MONIQUE MCNEILL
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Q And it was very clear from the way she told it to you that it was not Mr. Elam who had the alleged stun gun?

A No, it was the second suspect.

Q And it was very clear from the way she recounted what happened that the alleged second suspect is the one who had the broomstick and made threats to her with the broomstick; is that correct?

A Yes, sir.

Q And the way that you describe what she had told you was I believe you used the words that the second alleged suspect had tapped her on the rear end with the broomstick; is that correct?

A Yeah, on her buttocks.

Q And she -- she specifically told you that there was no penetration, correct, in your interview with her?

A She -- I asked her about that, and specifically, and she stated that she couldn't be sure because she thought that somehow during the ordeal she might have passed out and become, you know, not -- unconscious.

MR. ERICSSON: Okay. And, Counsel, I'm looking at page 36 of the interview.

BY MR. ERICSSON:

Q Do you recall her in response to your question, What do you mean started touching you with the broomstick, her responding, He -- I -- they didn't put no penetration, and then

you say, Uh-huh, and then her -- then she -- or she told you, but they act like they wanted to, you know, I thought they were going to do it. Do you remember her telling you that?

A Yes.

Q And then she told you that her pants and underwear were pulled down and that she was beaten with a belt, correct?

A Yes.

Q And how many times did she indicate to you that she was beaten with a belt?

A I believe it was in the area of, like, 20. I'd have to refer to my report to be sure, sir.

Q Oh, okay.

A I believe it was 20 or 25.

Q So if my notes indicate that she indicated it was over 25 strikes with a belt, does that sound accurate?

A That would be accurate. Yes, sir.

Q And she told you she had been tased with this alleged stun gun approximately six or seven times, right?

A That is correct.

Q Now, in your investigation it's important to try to document independent evidence of injuries; is that right?

A That's correct.

Q Did you personally or have somebody else look for any injuries consistent with tasing with the stun gun?

A I directed Crime Scene Analyst Grover to document her

injuries.

Q Okay. Did you personally observe either through photographs or looking at her yourself any injuries that you thought were consistent with someone been tased with a stun gun six or seven times?

A I did not.

Q Did you direct any of the crime scene analysts to attempt to document evidence of her being struck with a belt in excess of 25 times?

A I directed Crime Scene Analyst Grover to document her injuries. I think it was probably vague like that, not specific.

Q Okay. Do you remember her telling you that -- that she had -- that paramedics had seen the marks from the belt injuries?

A I do recall that, yes.

Q And I don't know if you were aware, but did you notice that there were AMR medical personnel there at the Smith's location when you were doing the interview?

A By the time that I arrived, they had already left.

Q Okay.

A I was informed by Officer Kroening that that occurred though.

Q So Officer Kroening had verified to you that AMR personnel had --

A Attended to her, yes, sir.
Q Sure. Thank you. Did you obtain any of the reports from the AMR analysis of her injuries?
A No, I did not.
MR. ERICSSON: Your Honor, I believe that the State will stipulate to the admission of Defendant's Exhibit A, which is -- which has been previously marked as AMR records from this event.
THE COURT: Any objection to A, State?
MS. LUZAICH: No. No objection.
THE COURT: All right. We'll admit A then.
(Defense Exhibit No. A admitted.)
MR. ERICSSON: Thank you, Your Honor.
BY MR. ERICSSON:
Q Detective, I'm going to approach and give you a copy --
A Okay.
Q -- of the records that I'm holding here, which are Defense Exhibit A, and it's probably unlikely that you have seen -- I will submit to you that these are the records from the (unintelligible) AMR report from this incident, and I would ask you on the second page to read to yourself. There's a narrative section there in the middle of the page.
A Okay. I see it.
Q You can just read that to yourself, and then I'll ask

you some questions about it.

A I've read it, sir.

Q Okay. Detective, any indication from this report that you see of injuries consistent with the stun gun?

A No, sir, there's not.

Q And any reports from this narrative that there were injuries consistent with her being beaten with a belt?

A No, sir, there's not.

Q And specifically as to the allegations of the tasing, had she told you that she had been tased in her neck, legs and back?

A I believe she just told me it was all over her body in different spots.

Q Okay.

A I don't remember specifically if she told me body parts.

MR. ERICSSON: Okay. And, Counsel, I'm going to show on page 45 of the interview.

BY MR. ERICSSON:

Q Detective, I know this has been quite a while ago, and you've I'm sure done a lot of investigation since then. So I'm not expecting you to remember everything word for word. If you can just read this bottom part of page 5 -- excuse me, page 45.

A Where would you like me to start?

Q The bottom half.
A Okay. Read out loud or read to myself?
Q No. I'm sorry. Just read it to yourself.
A Okay.
Q See if that refreshes your memory.
A Okay. I've read, sir.
Q Okay. Does that refresh your memory as to whether she had told you the areas of her body that she claims she had been --
A It does.
Q -- struck with the stun gun?
A Yes, sir.
Q And what parts of her body does she say she had been hit with the stun gun?
A The neck, legs and back.
Q Thank you. Is it accurate to say that towards the end of the interview you were summarizing the event and making sure that you understood what she was describing to you?
A Yes, sir.
Q And do you remember specifically asking her did they ever sexually assault you at all?
A Yes, sir.
Q And do you remember what she responded to that question?
A I believe it was no.

Q And then did she also say, but I just thought they would?

A Right. And then she also -- and to be fair, she also mentioned that she had blacked out. So she couldn't be certain about that.

Q Okay. But she -- when she was asked if she was sexually assaulted, she told you that night that she just thought they would?

A Yes, sir.

Q Did you later find out the results of the sexual assault exam that was conducted on, I believe it was the 12th of March?

A I did from another detective.

Q Okay. And were you aware of there being alleged inconsistencies with what she had reported to the sex assault nurse examiner?

A That I can't be sure of.

Q Did it ever come to your attention that she had according to the sex assault nurse examiner reported that she had been penetrated vaginally by a perpetrator's penis, finger and tongue?

A Again, I can't be sure of that. I know another detective handled that aspect of the investigation, and I was given a brief summary of what had occurred.

Q So as you sit here today, you don't recall if you had

heard that information?

A Correct.

Q When you were asked about your interview with her by Ms. Luzaich, she asked if you observed any evidence of her being under the influence, and you indicated, I believe, that you thought she may have been drinking; is that correct?

A Yeah, as I recall -- again, it was two years ago -- I do remember a scent of an alcoholic beverage on her breath.

MR. ERICSSON: Okay. Detective, thank you very much. I have no further questions at this time.

THE WITNESS: Thank you, sir.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MS. LUZAICH:

Q Detective Nelson, when you say scent of alcohol on her breath, that could very well have been post this traumatic incident, correct?

A Yes, ma'am.

Q Now, you indicated that you know that AMR had been there, but they were already gone when you left?

A That's correct.

Q Or when you, sorry, arrived?

A Yes, ma'am.

Q So you have no idea what if anything they did?

A That's correct.

Q And the reports in front of you indicated that she refused to be transported. You know, she didn't want to. Correct?

A That is correct.

Q And, in fact, there is a last page that says refusal of service, and it indicates that it was signed by two paramedics and Arrie?

THE WITNESS: I'm reviewing the document, Your Honor, if that's okay?

THE COURT: Sure.

THE WITNESS: And that is correct.

BY MS. LUZAICH:

Q When Mr. Ericsson was talking about the cell phones and the call detail records, you said that the examination had reflected a call log, so lists of phone calls that were made?

A Yes, ma'am.

Q And phone calls were, in fact, made during the time frame that Arrie alleged --

A There was.

Q -- from the defendant's phone, correct? And when you say you didn't get the call detail records, what specifically does that mean?

A Well, request call detail records from the phone companies what they do is they not only give us the call logs of all the incoming and outgoing phone calls and text, but

additionally they let us know tower information, and what they typically would do is indicate somebody's presence in a specific area at the time that the call or the text message was placed.

Q Okay. And would that have helped you here?

A I mean, I think --

Q It wouldn't have given -- would it have --

A -- it could be overkill. You know, it's like we've got witnesses that say that everybody was there at this time. The victim saying it was there. Could I have done it? Sure. I don't think that it would have changed the facts and circumstances of the case.

Q It wouldn't have really added much to your investigation.

A Yes, ma'am.

Q And then finally talking about the videos, she had indicated that the girl, one or more of the girls were the ones that were videotaping, correct?

A She stated it was one female, yes, ma'am.

Q Were you ever able to identify who any of those females were?

A No, ma'am.

Q So when you took the phones from the apartment, you took them, I mean, hoping, but you weren't really expecting to find any of those videos in the phones in 6300 Lake Mead?

A That's correct.

MS. LUZAICH: I have nothing -- oh. Sorry. I can't read my handwriting. I have nothing further.

THE COURT: Mr. Ericsson, anything else?

MR. ERICSSON: No. Thank you.

THE COURT: Do we have any juror questions for this witness?

All right, Detective, I see no additional questions. Thank you for your testimony. Please do not discuss your testimony with any other witnesses. Thank you.

THE WITNESS: Thank you, Your Honor.

THE COURT: And you are excused.

State.

MS. LUZAICH: Your Honor, the State rests.

THE COURT: All right. Defense.

MR. ERICSSON: Your Honor, the defense will not be calling any additional witnesses.

THE COURT: Defense rests?

MR. ERICSSON: Yes, Your Honor.

THE COURT: All right. Ladies and gentlemen we're going to go ahead then and take our lunch break. We will be in recess for the lunch break until 1:15.

During the lunch break you're reminded that you're not to discuss the case or anything relating to the case with each other or with anyone else. You're not to read, watch or

listen to any reports of or commentaries on the case, person or subject matter relating to the case. Do not do any independent research by way of the Internet or any other medium. Do not visit the location at issue. Do not conduct any experiments on any subject connected with this trial, and please don't form or express an opinion on the case.

Following our lunch break I will be reading to you the instructions on the law, and that will be followed by the closing arguments from the attorneys.

So if everyone will please place your notepads in your chairs and follow the bailiff through the double doors.

(Jury recessed 11:48 a.m.)

THE COURT: Krystal has printed out two copies of the jury instructions for you guys. Do you guys want to just number those now?

MS. LUZAICH: That's fine.

THE COURT: Are you going to have any objections to any of them?

MR. ERICSSON: No, Your Honor. I've gone through them. No.

THE COURT: All right. So -- or we can go to lunch and just come back, like, five minutes earlier and do them then.

MS. LUZAICH: Whatever the Court wants.

THE COURT: All right. Let's be back then at 1:10.

And you have no objection to the verdict form; is that right?

MR. ERICSSON: Your Honor, as long as there hasn't been any changes to that -- I had seen what --

MS. LUZAICH: Here let me --

MR. ERICSSON: -- previously, and it was fine.

THE COURT: Okay. All right. So, Kenny, go get the copies of the jury instructions from Krystal.

MR. ERICSSON: Yeah. There you go.

THE COURT: We'll just hand you each a copy.

MR. ERICSSON: Yeah. The last time I saw the verdict form it was fine.

THE COURT: The verdict form normally comes with the jury instructions. So it should've been printed out just now. Is that going to give you enough time?

MS. LUZAICH: I don't know. I'll see. That's the problem with working at home is --

THE COURT: Right.

MS. LUZAICH: -- not everything saves properly.

THE COURT: All right. Take your lunch break, and we'll number them when we get back from the lunch break. Unless you want to do it now.

MS. LUZAICH: After is fine.

THE COURT: Okay. All right. Well, see you after. See you after lunch.

MR. ERICSSON: Yeah. Thank you.

THE COURT: 1:10.

(Proceedings recessed 11:50 a.m. to 1:13 p.m.)

THE COURT: -- in the order she wants them. Any objection, Mr. Ericsson?

MR. ERICSSON: Your Honor, not to the order, and I apologize for the oversight, and I brought this to Ms. Luzaich's attention shortly after we took the break. One area that I do have a dispute with the instructions is in the definition of a deadly weapon, more specifically in the instructions it indicates that if the jury were to find the use of a broomstick and/or a belt that that could constitute use of a deadly weapon, and I don't believe that the broomstick or the belt, and in the normal course I would also add the alleged stun gun because I don't think that in the normal course of its use that it results in death. So I do think that we need to do some narrowing of the instructions as to the deadly weapon.

THE COURT: Do we have an instruction -- are you asking -- oh, we have it in here. Are you asking for the one regarding his right not to testify?

MS. LUZAICH: It's in there.

THE COURT: It is in there.

MR. ERICSSON: Yes.

THE COURT: And are you requesting it?

MR. ERICSSON: Yes, Your Honor. Thank you.

THE COURT: Okay. All right. It's already in there.

MR. ERICSSON: Thank you.

MS. LUZAICH: Yes.

THE COURT: Ms. Luzaich, as to -- it might have been nice if we brought this up earlier.

MR. ERICSSON: And I apologize. I did not realize that in the body of the -- of the counts that those items were listed as deadly weapons.

MS. LUZAICH: I think that that -- oh, I'm sorry. Were you --

THE COURT: No it's your turn.

MS. LUZAICH: -- asking for my response?

THE COURT: Yeah.

MS. LUZAICH: I think that that would be the subject of a writ, and he could challenge whether or not it's a deadly weapon by way of a writ. He didn't do that. So I think that now it's a question of fact for the jury and --

THE COURT: Well, except if it's not a deadly weapon as a matter of law. Then I --

MS. LUZAICH: That's what I was getting to.

THE COURT: -- shouldn't be instructing them on it.

MS. LUZAICH: When we get to -- once the instructions are numbered, it will be Instruction No. 12, and under the law a deadly weapon means any instrument which if used in the ordinary manner contemplated by its design and construction,

maybe not, but it also says any weapon, device, instrument, material or substance which under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing substantial bodily harm or death, and I would suggest that a stun gun and a broom could definitely --

THE COURT: Yeah. I -- I'm --

MS. LUZAICH: A belt is on the cusp.

THE COURT: Yeah, I'm not sure --

MS. LUZAICH: I'm not going to argue that.

THE COURT: -- about a belt. I mean, I think the stun gun and definitely a broom, I mean, handle because, like, any kind of a wooden -- what's this broom made out of?

MS. LUZAICH: Wood.

THE COURT: Yeah, any kind of a wooden --

MS. LUZAICH: Object.

THE COURT: -- pole, if you're beating somebody with it could cause death.

MS. LUZAICH: Beating or inserting. You could rupture. I actually -- we had a case where an object like that was inserted into somebody's rectum, and it rupture -- it was a male. So obviously there was no vagina, but it ruptured, and he almost bled out. So it is possible.

THE COURT: Yeah. I'm just saying, like, beating somebody with a broom, I think that could cause death. I mean,

a wooden stick, which essentially is what a broom handle is. The belt, I mean, yes, you could kill somebody with a belt. You could strangle somebody with a belt. You could -- I think that's getting a little --

MS. LUZAICH: I'm not going to argue the belt, just for the record it's, like, I have it included under deadly weapon in my PowerPoint. I'm not going to argue it. It is -- and don't get -- in the indictment language, it's and/or, and/or, and/or. So.

THE COURT: Mr. Ericsson.

MR. ERICSSON: I would request this for clarification, especially if the State's not going to argue it that it not be included in the instructions. I do think that that --

THE COURT: You mean you want to take it out of the -- out of Instruction 3?

MS. LUZAICH: That's the indictment instruction.

THE COURT: Right.

MS. LUZAICH: Just for his edification.

MR. ERICSSON: Yes, it -- yeah, if you're looking at under Count 2, is that where you're looking at? Page --

THE COURT: Well, wherever she's --

MS. LUZAICH: Well, all the counts.

THE COURT: All the counts where she said and/or.

Can we agree then just to take out and/or the belt?

MS. LUZAICH: That's fine. I don't care.

THE COURT: All right. So No. 1, Members of the jury.

2, If in these instructions.

3, An Indictment is but.

MS. LUZAICH: And just for the record.

THE COURT: Although the way it's pled out, I don't know that we can really edit it out right now because it's kind of also not necessarily pled as the deadly weapon. It's pled, you know, somebody is hitting her with this or that or -- okay. Because assault with a deadly weapon is the shotgun.

MS. LUZAICH: Correct.

THE COURT: So we're good with that. Unlawful use of a stun gun device, we're fine with that. Count 2, First-degree kidnapping. I think it's fine if Ms. Luzaich just argues that the deadly weapon is either the broomstick or --

MS. LUZAICH: Shotgun or the --

THE COURT: -- the stun gun.

MS. LUZAICH: Or the shotgun.

THE COURT: Or the shotgun, and so I think that's easier than trying to edit this whole thing right now because again, I mean, you could've done as a writ or -- and I think if she argues it, because part of this is pled as, like, the aider and abettor. You know, somebody's beating her with a belt or somebody's doing this or that. So it's kind of important for

that purpose as well. Does that make sense?

MR. ERICSSON: Yes. I --

THE COURT: You know what I mean? They're acting in concert. Maybe somebody has the stun gun and somebody else has the broom, and so it's --

MR. ERICSSON: Right and --

THE COURT: They're entitled to plead it as part of their aiding and abetting language, which is what they've done.

MR. ERICSSON: Yes. And I agree with that. It was just the -- in my mind the confusion that could arise that the belt and/or --

THE COURT: Well, Ms. Luzaich says she's not going to argue it. So I think if she doesn't argue it --

MS. LUZAICH: I'm not.

THE COURT: I mean --

MS. LUZAICH: If the case comes down to whether or not they find a leather belt is a deadly weapon, then we've all done a really bad job here.

THE COURT: All right. Right. I mean, there's a -- there's a shotgun alleged.

MS. LUZAICH: Right.

THE COURT: So. All right. So 3 is, The indictment is but.

4 is --

MS. LUZAICH: And just for the record, I did take the

ex-felon in possession out of the language both in the heading and in the count and in the verdict form.

THE COURT: 4, A conspiracy is an agreement.

5, It is not necessary.

6, Each member of.

7, Where two or more persons.

8, Mere presence.

9, Every person who.

10, When it is impossible.

11, A person who.

12, Deadly weapon means.

13, In order to use.

14, If more than one.

15, Assault means.

16, It is unlawful.

17, Battery means.

18, In order for you to find.

19, A person who.

20, Physical force.

21, A person is not.

22, Submission is.

23, There is no requirement.

24, The elements of.

25, To constitute the crimes.

26, The defendant is presumed.

27, It is a constitutional right.
28, You are here to determine.
29, The evidence which.
30, The flight of.
31, The credibility or believability.
32, A witness who.
33, Although you are to consider.
34, In your deliberation.
35, During the course of this trial.
36, When you retire.
37, If during your deliberation.
And 38, Now you will listen.
All right. If there's nothing else, Kenny can bring the jury in.
Just to let you guys know, it may take me till 2:00 o'clock to read these.
MS. LUZAICH: Yeah.
THE COURT: If it does, we're going to take -- and I thought we would finish before lunch on all this. I scheduled a brief hearing on a TRO on a civil case for 2:00. So if I finish and it's right at 2:00 and the people are here, I'm going to take a break then, deal with the civil people, and then we'll do the closings.
How long is your opening, closing?
MS. LUZAICH: I have absolutely no idea, 20, 30.

THE COURT: Okay.

MS. LUZAICH: Not more than 30.

THE COURT: Okay. So then if we start your opening that's fine, too, and then we'll take a break, and I'll deal with the civil people.

Okay. Kenny, bring them in.

MS. LUZAICH: I had said that the defendant's statement where I highlighted what was to be taken out, I just ask that this be marked as --

THE COURT: A court's --

MS. LUZAICH: A court's exhibit, right.

THE COURT: Right. That's just a court's exhibit.

MS. LUZAICH: Thank you. And I showed it to Mr. Ericsson, how it was highlighted and what was taken out.

THE COURT: And they'll of course have a question if we could please give them a copy of the statement.

(Jury entering 1:24 p.m.)

THE COURT: All right. Court is now back in session. The record should reflect the presence of the State through the deputy district attorney Ms. Luzaich. The presence of the defendant Mr. Elam, along with his counsel Mr. Ericsson, the officers of the court, and the ladies and gentlemen of the jury.

Ladies and gentlemen, as I told you before the lunch break, both sides in this case have rested, and in a moment I'm

going to read to you the instructions on the law. Following the instructions on the law the attorneys will make their closing arguments. Because the State has the burden of proof in this case, they both open and close the closing arguments.

It is important that I read these written instructions to you exactly as they are written. I'm precluded from trying to expound upon them or clarify them in my own words in any way. You will have a number of copies of these written jury instructions back in the jury deliberation room with you so that you can refer to them throughout your deliberations. Each instruction has been numbered for ease of reference.

(Reading of the instructions not transcribed.)

THE COURT: Ladies and gentlemen, that concludes the instructions on the law.

Ms. Luzaich, are you ready to proceed with your closing argument?

MS. LUZAICH: Yes.

Can you put the --

THE COURT RECORDER: It should be on.

MS. LUZAICH: All right. I can't get it on there. Do you know how?

Kenny, can you get me on the --

THE COURT: Oh.

MS. LUZAICH: He did it last time.

(Opening statement for the State.)

MS. LUZAICH: I would first like to thank you all for your time, your attention, and especially your patience. Being jurors is absolutely a difficult job. It calls for many sacrifices, and those of us who are directly involved in this case find all of our cases to be important, but this case is important not only to us, but it's important to our criminal justice system. Without people like yourselves that are willing to take time out of your life and sit as jurors our system simply couldn't function. So for that we all thank you.

As this is a criminal case, in every criminal case, in every courtroom in every state in this country, the prosecutor has to prove to you two things. So there are two questions that you must answer. One, was a crime or crimes committed? And two, who committed those crimes?

Now, in this particular case, the who isn't all that difficult. First, Instruction No. 28 tells you -- and remember, like the Court indicated, you're going to have all of these instructions back in the deliberation room to go over. So I'm just going to kind of direct your attention to which ones that you should definitely look at, all of them, but some of them we focus on.

So Instruction No. 28 tells you that you are only here to determine the guilt or not guilt of the defendant. Anybody else is not for you to determine. That may one day

happen somewhere else, but today all you are here to do is determine whether or not the State of Nevada proved the case against the defendant.

So who in this case did it? Clearly if anybody it's the defendant, and we know that for several reasons. One, Arrie told you that it was the defendant. He called her into his apartment. He did these things to her inside his apartment, but not only that, remember, Annie told you about how she saw the defendant call Arrie down to his apartment. Arrie went to his apartment, and after Arrie left his apartment, Annie found her hogtied, but not only that, Carl Taylor told you about how he found Annie (sic) kind of rolling out of the door of the defendant Calvin Elam's apartment. So who committed whatever crimes are charged here? Clearly it's the defendant.

The other question that you must answer is what crimes did he commit. The Indictment as you'll see, Instruction No. 3 tells you all of the charges in the Indictment. The defendant is charged with conspiracy to commit kidnapping, first-degree kidnapping with the use of a deadly weapon, assault with a deadly weapon, unlawful use of an electronic stun device, battery with intent to commit sexual assault, sexual assault with use of a deadly weapon, and attempt sexual assault with use of a deadly weapon.

So of course lawyers can never do anything the easy

way. So I'm not going to first talk about the conspiracy to commit kidnapping first. I'm going to talk to you about first-degree kidnapping with use of a deadly weapon which is Count 2, and Instruction No. 9 tells you that every person who basically confines another person for the purpose of committing sexual assault or for killing or for inflicting substantial bodily harm is guilty of first-degree kidnapping.

We know that Annie was -- or Arrie, sorry, that Arrie was hogtied. We know that for lots of reasons. We know that because Arrie told you about it. We know that because Debra Fox, who was dropping off her baby and came downstairs, saw Arrie rolling up the alley, and she also was hogtied. We know because Carl Taylor told you that Arrie when he came -- she came out of the defendant's apartment and was rolling up the streets was hogtied. We know that also because Annie told you that when she saw Arrie in the alley she was hogtied, and, in fact, Carl and Annie had to help and untie her.

Remember we talked a lot during jury selection about perceptions. So I know you're wondering, well, Arrie said she was tied with her hands behind her back and her feet behind her back. Some of the witnesses said hands in front, feet in front. Does it matter? Does it matter whether her hands were in front of her or behind her? It doesn't because either way, the defendant hogtied her. Perceptions -- did they actually see her hands in front of her or behind her? Like I said, it

doesn't matter. We know that she was hogtied. That demonstrates the kidnapping.

We also know because we saw on the photographs -- and as you were looking at the photographs that day, unfortunately all this great equipment that between the State of Nevada and the Court's have, but when you take the pictures in the back, you'll see both Brad Grover and Arrie talk to you about on her wrists there were the red marks from being tied. The nurse Jeri Dermanelian talked about she would have liked to have seen her that day because she saw indentations on her wrist. You saw the injuries to her legs. All of this demonstrates the fact that she was hogtied, kidnapped.

So for what purpose? Was it to inflict substantial bodily harm? To kill her? To sexually assault? You heard the defendant was angry she said. When he brought her into the apartment, everything was fine, and then all of a sudden his body language changed. His demeanor changed. He got loud. He got mean, and ultimately she was beat. She was beat with a belt. She was beat with a broom. She was beat with a -- or she was stunned. She had the shotgun in her mouth. What do you think the purpose was? The purpose was to either inflict substantial bodily harm or kill her, and then you heard about the broomstick. So first -- first-degree kidnapping was met.

In order to -- you must also decide whether or not a deadly weapon was used in the commission of the first-degree

kidnapping. You have several to choose from. I mean, I suggest that the shotgun alone is sufficient. He shoved the shotgun in her mouth at her face, in her face, whichever. The kidnapping was accomplished with use of a deadly weapon.

Instruction No. -- sorry -- 12 defines for you -- sorry -- we heard about, like I said, the shotgun to her mouth. We saw evidence of it. We saw the shotgun in the apartment. We saw the broomstick in the apartment. Instruction No. 12 defines for you what is a deadly weapon, and it tells you -- sorry. There it is. Instruction No. 12 defines for you a deadly weapon, and it tells you that any instrument which if used in the ordinary manner contemplated by its design and construction, so a shotgun, the ordinary manner contemplated by its design and its construction. If you use a shotgun, clearly that's a deadly weapon, but it's also likely to cause death or substantial bodily harm.

But Instruction No. 12 also tells you that any weapon, device, instrument or material which used under the circumstances in which it is used, attempted to be used or threatened to be used is capable of causing death or substantial bodily harm. So like I said -- I'm getting better at the clicker. Just it's going to take a minute -- we have the three options. Clearly the shotgun shoved into her mouth. The shotgun was found. The broomstick was found.

A shotgun, like I said, the way it's designed is

going to cause death or substantial bodily harm, but the broom, think about it. You can beat somebody with a broom. You can cause death or substantial bodily harm. You insert a broom into a rectum, you can clearly cause death or substantial bodily harm. Imagine if something is inserted all the way. Anything can rupture or bleed out, anything along those lines.

And Instruction No. 13 tells you that in order to use a deadly weapon there need -- there doesn't have to be conduct that actually produces death or substantial bodily harm. It only has to produce a fear of harm or force in order to use the deadly weapon. So he doesn't have to kill her. He doesn't have to shoot her. He doesn't have to beat her to death in order for the use of a deadly weapon to apply to the charge.

Additionally, Instruction No. 1 tells you that if more than one person commits a crime and one of them uses a deadly weapon, each person can be convicted of the use of a deadly weapon, and why is that important? When Arrie sat here, she described for you that she thought that it was the defendant who held the stun gun, who beat her and put it up to her, who held the broom and beat her with the broom. She did tell the detective that it was the other individual who held the stun gun who touched her with the stun gun, who beat her with the broom.

But either way because they are both liable for the crime legally, whichever one of them is holding it, the

defendant is still responsible for it. The defendant has still used it due to the way the defendant is charged, and remember when you were listening to the charges, both at the beginning of the trial and today when the Judge was explaining it to you, it kept saying the defendant is responsible under the following theories of liability, one, that he did it himself, that he pushed the shotgun in her mouth, that he hit her with the belt and broomstick, that he used the stun gun, either that way; or he is also liable under the aider and abettor theory of liability; or he's also liable under the conspiracy theory of liability.

And what -- sorry -- Instruction No. 4 tells you is that a conspiracy is an agreement or an understanding between two people to commit a crime. The defendant to be guilty of it must intend for the act and the crime to occur. So if more than one of -- oops, sorry --

Instruction No. 5 tells you that it is not necessary in proving a conspiracy to show a meeting of the conspirators. You don't have to show a meeting or the making of a formal agreement. You don't have to have the two of them sitting down and saying hey, let's go to the store. We're going to agree to rob the store owner, take the money and then go and spend it. You don't have to have an actual meeting. All you have to do is show by direct or circumstantial evidence that some sort of agreement occurred.

And think about it. The phone call, he calls his friend, says, I got one of them. Come on over. There is your conspiracy. The defendant is involved regardless because he's the one that brings her there, holds her there, ties her up and begins the whole thing, shotgun in mouth, but once the other person gets there, the unknown conspirator, who we don't know who he is yet, once that person gets there, whatever he did, the defendant is also liable because the defendant and he have this unspoken agreement. It's the defendant's idea. Come over. I got one.

Each member of a conspiracy, Instruction No. 6 tells you, is liable for the act of each other. So everything the other person did the defendant is also liable for. Remember I told you there were three different theories: That he personally did everything, that he either conspired with the other individual or that he aided and abetted.

Instruction No. 7 tells you where two or more persons are accused of committing a crime together -- and it's Arrie. It doesn't have to be the charging document. Remember, Arrie accused the two of them of doing this together. Their guilt may be established without proof that each one personally did every act constituting the offense charged.

So finally, Instruction No. 14 tells you that an unarmed offender uses -- and like I said, I'm talking about all of this because although Arrie told you that the defendant did

all that, she had told the detective that it was the other individual that had the stun gun. So an unarmed offender uses a deadly weapon when the unarmed offender is liable for the offense, so specifically, you know, the stun gun. The defendant is liable for the offense. He's the one that brought her in there, tied her up. The other person is liable for the offense, is armed with the weapon and uses the weapon. So if you believe that it was the other person who used the stun gun, the defendant is still liable for the use of that deadly weapon.

So then just to come back to the conspiracy to commit kidnapping, there was a conspiracy to commit kidnapping in that the defendant called up his friend, said, Come on over, I have one of them. Okay. So that's Counts 1 and 2.

Count 3, the assault with a deadly weapon, Instruction No. 15 defines for you that assault means intentionally placing another person in immediate bodily harm or of attempting to use physical force against another person. What do we have here? We have -- sorry -- he took the shotgun. He put it in her mouth. He held at her. He threatened her. He scared her to death. Remember Arrie described for you and how she was absolutely scared to death while she was sitting on the ground hogtied, and he breaks out the shotgun. That's an assault with a deadly weapon.

Count 4, unlawful use of an electronic device.

Instruction No. 16 describes it -- sorry -- for you, and basically just the device that emits an electrical charge. Remember how Arrie described for you that there was a thing, held it up to her eye for a minute. She could see it through the pillowcase, and she could see the current going back and forth. That emits a current, and it's designed to disable a person permanently or temporarily. We know that anything with electricity if put up to you can disable you temporarily or permanently. So guilty of Count 4 for possession of an electronic device.

Now, before you get to the sexual assault, he's guilty of the kidnapping. He can also be guilty of an associated offense -- that's what the law calls it -- of sexual assault if certain conditions are met. In this particular situation, Instruction No. 18 describes it for you, and it says that he can be guilty of both the kidnapping and the sexual assault that occurs during the kidnapping if, and when you look at No. 4, the victim is physically restrained, and such restraint substantially increases the risk of harm.

So think about it. She's lying on the floor. She's tied up. She's got something over her head. She can't go anywhere because he's there. Then before you know it the other guy and whatever the girls are are there, and they break out weapons. There's the shotgun there. There's the stun gun. There's the broom. So she is physically restrained, and the

fact that she is physically restrained substantially increases her risk of potentially death or substantial bodily harm because she can't get out. There's nowhere she can go while she's tied up and the thing is over her head while they're there and all these weapons are there. Therefore, you can find him guilty of the associated sexual assault as well.

And Instruction No. 19 defines for you, Anyone who subjects another person to sexual penetration against the person's will is guilty of sexual assault. Instruction 19 goes on to define sexual penetration for you, and this is again, this is where we talked a lot about in jury selection what if you don't agree with the law, are you going to follow the law?

You know, everybody thinks that the sexual assault is where somebody, you know, a guy grabs a girl, throws her down, tears her clothes off, forces his penis into her vagina. A broom it can be the object of a sexual assault. Instruction No. 19 tells you that any object manipulated or inserted into the genital or anal opening of another is sexual assault. And I'm sorry.

And what Instruction No. 19 tells you is that the penetration only need be however slight, and that's why when I was asking the nurse, you know, the difference between legal penetration and the penetration that anybody else thinks you would think that an object would need to be inserted all the way inside for there to be penetration. Legally it need only

break the plane, so however slight. When she described how, you know, between her butt cheeks, legally that is penetration.

MR. ERICSSON: I would object to that description of the legal definition just between the butt cheeks.

THE COURT: Well, ladies -- in terms of the legal instructions, the instructions speak for themselves, and as I said, I don't expound on them, nor can the lawyers. They can argue that, you know, the facts fit those legal instructions, and you can consider her argument for that, but she can't restate the instructions. As I said, the instructions speak for themselves.

Go on, Ms. Luzaich.

MS. LUZAICH: Thank you.

And what Arrie described for, maybe not to you here because it was difficult to get information from her, but she was very clear when she talked to Detective Ryland, between her cheeks and up to her anally the hole, right up to the hole. So you can find legal penetration based on that. But also everybody thinks that it's all about sex.

Sexual assault is not about sex. It's about power and control, and that's why I asked, whether you agree with the law or not, every single one of you promised that you were going to follow the law. So sexual assault doesn't have to be about sex. It's just about penetration without consent, and Arrie very clearly said she did not consent to any of that.

Instruction No. 20 tells you that physical force is also not an element of sexual assault. Remember power and control. It's penetration without consent. There does not need to be any force. She could have just stood there and said, no, don't do that, and that is sufficient. There does not have to be force.

Instruction No. 23 tells you that there is no requirement that the testimony of a sexual assault victim need be corroborated. If you believe her beyond a reasonable doubt, that is all you need. So when you heard from the nurse and the nurse says no, I didn't find any blunt force trauma; I didn't find lacerations or anything in her rectal, genital, whatever region; you can still find him guilty of sexual assault. There does not need to be physical evidence for there to be a sexual assault. If you believe Arrie beyond a reasonable doubt, that is all you need is Arrie saying that is what happened. That is what Instruction No. 23 tells you.

Attempt sexual assault, Instruction No. 24 defines for you, tells you the elements of an attempt are the intent to commit a crime, the performance of an act towards its commission and the failure to consummate its commission. So basically if you don't believe that there was penetration, so you don't think that between the butt cheeks and right up to the hole is sufficient for legal penetration, you can find him guilty of attempt sexual assault because it did not go all the

way in, but clearly the broomstick went up to her butt between her cheeks, up to her cheeks, however you want to describe it. That is an attempt sexual assault if you're not finding the actual penetration.

And then finally, battery, it's Count 7, battery with intent to commit sexual assault. Instruction No. 17 defines for you first that battery is a wilful and unlawful use of force or violence upon the person of another. So if -- that's a battery. Unlawful -- well, if that was a person. Unlawful use of force or violence upon the person of another.

Instruction No. 17 continues that anyone who commits a battery on another with an attempt to commit a sexual assault commits the crime of battery with intent to commit sexual assault. So the putting her down, whacking her with the broomstick and then putting the broomstick up at her butt, battery with intent to commit a sexual assault.

So those are all of the charges. What you have to do is decide what happened here. And one interesting piece of evidence that you have and Instruction No. 30 talks to you about it is the flight of a defendant. If a defendant flees with the intent to get away, you can use that as evidence of his guilt. That alone is not enough to convict him beyond a reasonable doubt Instruction No. 30 says, but you can absolutely use that as evidence of his guilt.

It goes on to say that the essence of the flight is

his going away on purpose to get away for the purpose of avoiding apprehension or prosecution. So think about what we heard. We heard that after they're able to get Arrie undone that the defendant is back there, and he's with other individuals, and he's laughing. He's looking right at them and laughing is what Annie told you. We know that he left after that.

We know that he left and went to Joanique Mack's apartment. We know that for a couple of reasons. One, that's where he's found hours later. We know that Joanique came to 1108, to the area, and we know that because she was interviewed by Detective Cardenas. Did he send Joanique there to find out what was going on because there's all these police there for hours? We know that Detective Cardenas called him on the phone. He admitted that he knew Arrie. He was offered to come back and, you know, hey, tell us what happened. He declined their invitation. Flight, flight to avoid prosecution.

So here's the bottom line -- credibility. Who are you going to believe and why? Instruction No. 31 tells you, it gives you some things that you can consider. Now, obviously you can consider anything you (unintelligible), anything you want. This gives you just a little bit of guidance, and it tells you that you should look at things like the manner of the individuals on the stand, their relationship to the parties, their fears, their motives, interests or feelings -- why are

they saying what it is they're saying -- their opportunity to observe, and the reasonableness of their statements and the weakness or strength of their recollections.

So first, Arrie. First of all -- I'm working on this clicker -- Arrie describes for you that the shotgun is shoved in her mouth, and here we see the bruise. Now, the defense asked the nurse could that have been a crack pipe, a burning crack pipe. Well, you know, she said there is this little tiny white line, little tiny white line right there, but all of that bruise, she said no. All of that is a bruise, and all of that has nothing to do with a crack pipe. All of that she said is consistent with, yes, a shotgun being shoved in her mouth or at her mouth. And look, lo and behold they find the shotgun in the defendant's apartment. So Arrie is corroborated.

Not only that, but we find in the dumpster all the items, and we heard from Carl and Annie that the defendant actually picked up those items that they cut off her and threw them in the dumpster. We found Arrie's shoe. I mean, think about it. Pretty much everything Arrie tells you is corroborated not only by independent witnesses, but by physical evidence.

Arrie described for you while she was in the kitchen that he bound her with the wires. We found the wires, and they were described to you as, like, the wires from the back of a TV. So look at the picture back there. That's exactly what it

is, the wires from the back of a TV.

She described that he shoved the toilet paper or paper towel or something like that in her mouth. Oh, look, there it is in the kitchen right next to the packaging tape that she described he put around her mouth, and that Carl Taylor and Annie found on her mouth after they took the hood off of her. She described that she was beat with a belt. Oh, look, there's a belt. How many people keep a belt on the counter in the kitchen by the frying pan? There's the broom that she described. Everything that Arrie described for you is right there, everything.

Think about the people also that you heard from. Okay. Annie is her friend, but is Annie going to lie for her? Like, what would Annie have to gain by making any of this up? And you heard from Annie this morning. She was scared to death. She thought that Arrie was going to die. She was gasping for breath. She thought she was going to die. It was something that you never expect to see, that you would see on TV or something like that.

Carl Taylor -- Carl's not even Arrie's friend. He's just somebody from the neighborhood. What does he have to gain by describing all of this or by lying about any of it. So literally, everything Annie tells you is corroborated.

But the big thing, the DNA, how did Annie's -- Arrie's DNA get on the shotgun barrel unless it happened

exactly the way she described? And it's not, you know, do we think maybe it is. One in 16.9 quintillion. I can't even remember how many zeros she said that was, 12 or 13. I only gave you 9 here.

There is no reason for Annie to make this up. There's no reason for Carl Taylor to make this up. There's no reason for Debra Fox to make this up, and truthfully, there's no reason whatsoever for Arrie to make this up. You don't have to like Arrie's lifestyle. You don't even have to like Arrie, but you do need to believe her because everything she told you is corroborated.

We've all heard the adage truth is stranger than fiction. This case absolutely demonstrates that for you because everything that you heard from there you get to see, and based on that, based on the evidence we would ask you to find the defendant guilty of all the charges.

Thank you.

THE COURT: All right. Thank you, Ms. Luzaich.

Mr. Ericsson, are you ready to make your closing argument?

MR. ERICSSON: Your Honor, may we approach?

THE COURT: Sure.

(Conference at the bench not recorded.)

THE COURT: Ladies and gentlemen, we're going to take a quick break until -- let's go till 2:40.

During the brief recess you're reminded that you're not to discuss the case or anything relating to the case with each other or with anyone else. You're not to read, watch or listen to any reports of or commentaries on the case, person or subject matter relating to the case. Do not do any independent research by way of the Internet or any other medium, and please don't form or express an opinion on the trial.

Please place your notepads in your chairs. Follow Officer Hawkes through the double doors.

(Jury recessed 2:25 p.m.)

THE COURT: You guys can take him in the back.

(Proceedings recessed 2:26 p.m. to 2:50 p.m.)

(In the presence of the jury.)

THE COURT: All right. Court is now back in session.

And, Mr. Ericsson, are you ready to proceed with your closing argument?

MR. ERICSSON: Yes, Your Honor. Thank you.

(Closing argument for the defense.)

MR. ERICSSON: Ladies and gentlemen, we've come to the point now where it's almost your turn to start going through this evidence and reviewing it together. I sincerely hope that you have been able to hold off from coming to any decisions until we close here and then you go back and start deliberating.

Now, on behalf of Mr. Elam, I'd like to, as did

Ms. Luzaich, want to express our gratitude for you taking the time to be here. It's obvious to us that you've been paying attention, and you've been taking this case very seriously.

Ms. Luzaich indicated that truth is sometimes stranger than fiction, and I certainly agree with that, and I am now going to go through -- and a lot of times questions that attorneys ask may not -- the significance or relevance of them may not really be apparent as you're hearing it from the witnesses, but I want to go back through the evidence as we know it from what's been presented here.

And I think that once we do that it's going to be clear that Ms. Webster is simply not a credible witness, and I'm going to go through the things, the physical things that we are able to match up or not match up with her story as well as the things that came out from the different times that she talked to different people, and many, many central inconsistencies that she had.

Now, it was brought up that, you know, it really doesn't matter whether she was tied in the front or tied in the back, you know, that overall you should believe her story. I will suggest after we go through all this evidence that it will be clear that the reason there are all these variations from her story is she could not keep it straight.

We know from her interview with Detective Ryland, she told Detective Ryland that she'd been smoking meth, that she'd

been doing spice during the approximate time period, I think she had told Detective Ryland four or five days before that interview, and then we know from Detective Nelson that he thought she may have been under the influence of alcohol when he was doing his interview with her on the day of the alleged incident, and we also know from the sex assault nurse examiner that two days later that she did not want to have the urinalysis done when she was there for the examination.

Now, I want to try as best I can to go through chronologically of the evidence and her story of what happened. We heard from the -- from the first investigating officer, and he signed, witnessed down at the bottom patrol Officer Kroening, that he had Ms. Webster prepare a handwritten voluntary statement about what had happened, and if you remember, he verified that in her statement she did not mention anything about a gun being involved in this statement that she made allegedly within a couple of hours of this event, no mention whatsoever of a gun in the first thing that was provided to that patrol officer.

A couple of things that came out from both Detective Nelson, he verified that when he interviewed her, when he was trying to ask about injuries and things, that she had told him AMR had -- she had been seen by the AMR personnel and that they had seen the injuries from the whippings. She also verified that through Detective Ryland, the same thing. She said

paramedics had seen evidence of the whipping injuries.

And again I'm going to go through a lot of minutia, a lot of detail, but we are in the position as the defense of trying to as best we can prove a negative, which is almost impossible to do sometimes. That is why the State has the burden of proof in a case like this, but I think as we go through you will see that proving a negative -- excuse me -- is possible from the evidence that we have.

So I want to show you the records from AMR. They were briefly shown to Detective Nelson. And this is -- you'll have this back with you. It's the Defense Exhibit A. I want to show you this section that we had Detective Nelson go through. It's on the second page, and again this is in context with her telling the investigating officers that she had shown the injuries to her rear supposedly to the paramedics. And I want to go through the narrative in full.

EMS called out for female complaining that she had been tied up and assaulted. On arrival, R43 was speaking with the female, requested that we enter the ambulance for privacy. So she went into, according to this, went into the ambulance with the paramedic personnel. Female states that she was hogtied and hit and tased multiple times.

Again it's important to note she mentions nothing about having a shotgun placed in her mouth or anything about a shotgun.

Female states that she does not feel that she has any injury that requires immediately medical attention and will speak with Metro and have her friend take her later if necessary. Female states that she is mainly concerned with Metro catching the guy who did this and him not getting away with it and retaliating or harming her again. Abrasions to bilateral knees were the only obvious visible injuries noted.

And you can go through and read the rest of that, but that is consistent with the nurse examiner indicating two days later on the 12th when she did a full body examination of Ms. Webster with that special light that helps to determine whether there are injuries to the body, that she did not see any injuries consistent with having been, according to what she had told detectives, whipped in excess of 25 times in the buttocks area with a belt, and equally important from every witness you heard up there, no evidence of Taser injuries from the allegations that she had been tased six or seven times in her neck, in her back, on her legs, no evidence of that.

And again the only thing that we can show is what these outside witnesses have, but I would ask that you pay close attention to the paramedics and what on the day of that examination that was done in privacy in that vehicle what they found, and that was evidence of injury to -- abrasions to her knees.

I know we spent a lot of time going through questions

with the nurse examiner, and I would submit to you that she is a very thorough, professional individual. She said she had done in excess of 6,000 examinations in her career, and she was very clear from her examination that Arrie had reported to her, quote, she states, That this force -- that this male forced penis, finger and tongue to her vagina, and that summary was from the checklist that she went through with Arrie under the section of penetration.

I would suggest to you that at some point when Arrie is thinking about what she has gotten herself in, the allegations that she has made against somebody who lives in the neighborhood she lives in, you heard from Annie that Annie -- it sounded like Annie was somewhat afraid of Mr. Elam when she was worried about Arrie even going down to talk with him, that Arrie realized that she had bitten off something very, very big, and because of that, her allegations increased. It's no longer that they tapped me on my rear, and I was scooting around, and I thought that they were going to possibly assault me with the broomstick. It's now that I was assaulted with a penis, with a tongue with a finger, that she's telling the nurse examiner two days later.

Very, very important from the findings of the nurse assault examiner, no physical corroboration whatsoever of injuries consistent with that type of assault, either an assault with a broom or an assault with a penis or a finger or

a tongue; no evidence of blunt force trauma or other injuries to either the vaginal or anal area of Ms. Webster was found by the nurse examiner.

The detectives had indicated that they asked the CSAs, the crime scene analysts to obtain a number of items for testing, and there's one area that comes back where they think that they have found a match of DNA, and Ms. Luzaich has gone through it, and I want to talk about it in quite a bit of detail, that being the alleged match of Arrie's DNA with the shotgun. I certainly am no DNA expert, but I wanted to go through with her, and we'll start with things that didn't match.

From the color-coded chart that was put together for this case, and it's Exhibit 73, they did the Lab Item 3, the swabbing from the ridge areas of the grip, ridge areas of the sides of the shotgun and the trigger on the shotgun. So I think it's -- a couple of things are very critical from this. One is that even though they allege that Mr. Elam had put the shotgun -- had been holding the shotgun, put it in Arrie's mouth, and Mr. Elam indicated that, yeah, there's a shotgun there, I've handled that shotgun, there is no match to even him from what the -- the swabbing that they did on the shotgun. It's -- it doesn't match alleles. I don't know how much you followed what she was going through, but those areas under Item 3 did not match either Calvin Elam or Arrie Webster.

But critically for an analysis of how accurate this DNA evidence is that's being presented to you, and we went through this in some detail with her testimony, but the CSA indicated that for this testing below 200 RFU unsuitable for comparison. Now, in the chart that she prepared for the swab of the end of the barrel, it was Lab Item No. 8, and this is Exhibit No. 72.

I think the State alleges this huge number that there's no, you know, 1 in 16.9 quintillion I think is the number that was used, but to get to that, the State has used numbers, a RFU number below 200, and most importantly it doesn't even say what the bottom number is that was used, and if you -- and they highlight the sections under 200 RFU in red, and when you look at all of the sections that had to be filled in to get this comparison in red, the vast majority of the different chromosome points are in red on this sample.

I would suggest to you that the State deciding which ones can be -- have to be above 200, which ones can be below 200 and having such a long list of sections under 200 that we don't know what they match to is not conclusive that there's a match in any way to the shotgun.

And when I went through the testimony of the detectives, especially Ryland about when she first interviewed her in the follow-up of what had happened, when she described how Annie (sic) told her that she was called over to the house;

she went in; Mr. Elam's voice became loud; he told her to get on her knees, put her hands behind her back; he tied her up, and he blindfolded her and put something in her mouth, it wasn't until quite a bit later in that testimony when the detective goes back and says, well, something to the effect, well, was there a gun? Oh, yeah. Oh, yeah. There was a gun.

That multiple times when she described what had happened, she goes through the steps that she goes in, his voice elevates, he tells her to get on her knees; she does; put your hands behind your back; he ties her up, gags her and blindfolds her, that is consistent with the handwritten statement she makes shortly after the incident, doesn't mention a gun.

It seems that at some point the detective is -- Detective Nelson that is -- is quite certain that they have the right suspect, that being Calvin and decides that he doesn't need to do follow-up testing on phone records, things like that, and he indicates that when I asked him questions about other investigations, don't you get cell phone tower records from the phone company, things like that so you can identify timing of when people are where, located with their cell phones, and he says that they do that in other cases, but he didn't feel it necessary in this case, and it wasn't done.

He verified that he had taken three cell phones into evidence and had run some type of testing on those cell phones,

and I would submit to you that we didn't see records or timestamps, things like that being presented as far as the cell phone evidence.

The suggestion that Arrie, or Ms. Webster, can come in here and earlier saying, Oh, yeah, it was Suspect No. 2 that did this, all of this stuff, various things and then come in here at trial and say that, no, it was Calvin that did everything. Calvin did all the tasing. Calvin did all the beating. Calvin did all the broom threats. I would suggest to you that that inconsistency is material. It goes to her trying to hold together a story that she cannot hold together, that that level of detail is critical to analyze as if her story holds up.

What we do know, and part of this comes from the interview with Calvin, he agreed to talk to the police officers. He was in custody. They had arrested him that night. He's down at the Metro headquarters chained to a bar, and he agrees to talk to them. After they read him his Miranda rights, he agrees to tell them what happened, and he acknowledges that he spoke with Arrie earlier that day.

He had a conversation because, yes, it is true he was upset that his dogs were missing, and he thought that people in the neighborhood either knew where they were or that somebody maybe had taken his dogs, and I would submit to you that when he had that conversation at the doorstep with her that that

scared her, and she recognized that he was somebody to be afraid of and that she comes up with this story.

And, to me, the suggestion of being tied in the front or the back goes to whether Arrie could've tied herself up, and I would ask you to look through the photographs of what was collected for her being tied up. There is not very much material. The amount of material that was found, they say that there was some found under a barbecue grill, and you'll see that in the photograph of that, and then there was material found in the dumpster. Look at how much material there was. I would suggest to you that that was an amount that Arrie could've tied herself in the front.

If you listen to the very first witness, Ms. Fox, she testified that she saw Arrie kind of running and yelling when she first noticed her, and then, you know, she was rolling around, the others said she was rolling around, and there's no doubt she scuffed up the front of her legs as she was rolling around, but I would suggest to you that at some point she realizes this guy is very scary. I know how I can come up with a story to put him in jail.

What we have, evidence that matches up, are injuries to her rolling around. We have no evidence matching up with her being beaten with a belt over 25 times, no evidence matching up that she was tased 6 to 7 times, no evidence matching up that she was sexually assaulted. Ladies and

gentlemen, truth sometimes is stranger than fiction. Arrie came up with this story. This little setup that she comes there with the neighbors, oh, I've been tied up, help me, he did this, and obviously the police have no reason initially to disbelieve her and they follow through.

But can you imagine what the detectives, what came into their mind when they realized the reports from the sex assault examination are that she's telling the nurse examiner that she was, you know, vaginally penetrated with a penis, the tongue and the finger? That matches up with nothing, nothing that she had indicated.

Ladies and gentlemen, please review this evidence very, very closely. Remember one of the things that was outlined in the instructions are what you can use to evaluate the credibility of a witness. Remember that -- and I'm not trying to hold this against her because of her drug habit, but as far as accuracy, Ms. Webster had told the detectives that she had been using meth. She'd been using spice. One of the detectives thought that she was possibly under the influence of alcohol when she was giving her statement.

The State has not met its burden of proof that Arrie's allegations are true. You have lots of physical evidence refuting what she told the police officers.

Ladies and gentlemen, I would ask that you follow the oath that each of you took, and that is to apply the law to

these facts, and when you do so, you will find that each and every one of the charges is not guilty.

Thank you very much.

THE COURT: All right. Thank you, Mr. Ericsson.

Ms. Luzaich, rebuttal.

(Rebuttal argument for the State.)

MS. LUZAICH: There is no evidence that refutes what Arrie said. There may not be much evidence that corroborates the sexual assault, but there is nothing that refutes what she said.

Mr. Ericsson is I wouldn't say taking liberties, but reading more into what some of the witnesses said than you should. She did not say that she was using drugs that day. What she said, what Arrie said to Detective Ryland was that four or five days earlier she had smoked spice or maybe some meth, but that was four or five days earlier, and two officers who are very experienced with people who are under the influence of a controlled substance and dealing with and recognizing, both who interviewed her, talked to her at length on the date that this happened said that she was not under the influence of a controlled substance.

Additionally, the detective, Detective Nelson, didn't say that she was under the influence of alcohol. All he said was there was an odor of alcohol. So after she comes rolling out of the apartment and -- the defendant's apartment -- and

Annie is able to get her free, remember, Annie had her for a little while at Annie's apartment, and then Arrie went home, and then she went and saw her friend Kunta Patterson, and it was reported. What do you think she was doing at home? Drinking. Of course. Think about the experience she just went through.

Now, when he talks about the fact that her statement wasn't the same to each of the individuals that she shared her statement with, well, of course it wasn't exactly the same. Look at what she had been through. She was through an extremely traumatic experience. So she's just jumbling, trying to get the information out.

While she didn't hand write the statement for Officer Kroening and say that there was a shotgun, she spoke to him verbally before she handwrote her statement, and she told him about the shotgun before she ever wrote the statement. So the very first police officer that she talks to, she tells him about the shotgun in the mouth. She didn't write it, but she told him.

The next police officer she talks to is Detective Nelson, and she tells him about the shotgun in the mouth. Maybe she didn't give a linear statement, and would it be nice and helpful if she was able to say, no, this happened in this order, A, B, C, D, E, but she had just been through a horrific experience. It is not a surprise that she was not able to do

that.

Now, the paramedics in their report say something about the only obvious injury was to the knees. Well, we know that there were injuries to her shins as well because you can see them in the pictures, but who knows what they actually saw. We don't know. Did they pull down her pants and look at her butt? We have no idea, but what we do know in the report is that on the very back page they fill out a refusal of service. They have her sign it, and they sign it. So maybe they didn't do anything other than just a quick visual and send her on her way because she doesn't want any help.

When Jeri Dermanelian, the nurse, she talks about that there was no blunt force trauma observable to her. Remember, the nurse saw her 53 hours later. She specifically told you that had there been, you know, physical penetration of her rectum or her vagina she would not have expected to see anything like that, and we know that also because, remember we saw in the picture Arrie's injury, the contusion inside Arrie's -- yeah, the contusion inside her mouth, but when the nurse saw her 53 hours later, that was gone. Her legs, no more injuries. She healed. So you wouldn't expect to see any injury to her butt, to her vagina, to whatever.

Now, why did she not remember telling or why did she say she didn't tell Jeri Dermanelian about a vaginal penetration? Maybe she just didn't want to talk about it. She

didn't want to talk about it then. Maybe she didn't want to talk about it. Who knows, but that's not the issue. The issue is pretty much everything she says is corroborated. That is the only thing that is not.

Mr. Ericsson talks about the fact that every time she tells her story her story gets bigger because she's afraid of the defendant because of how he talked to her. Well, first of all, Annie it didn't say anything about being afraid of the defendant. She said she had quite a pleasant contact with him and his kids earlier. Annie just told you that she had a bad feeling about Arrie's -- about Arrie going down there. It had nothing to do with being afraid.

When he also talks about the defendant's DNA not being on the shotgun, I mean, even the defendant himself expected his DNA to be on the shotgun because he came up with that story. I mean, listen to his statement again. Go back through it and think about it in light of Instruction No. 31, the credibility instruction, where it says, If you believe a witness has lied about any material fact in the case you can disregard their entire testimony or any portion that is not proved by other evidence.

The defendant in his statement to the police changed his story so many times I was getting dizzy going back and forth to where it was, but the one thing that he hung tough to was Arrie was never in his apartment. Well, we know that's not

possible for several reasons. One, Carl Taylor saw her come out the door of the defendant's apartment, but also how did her DNA get on the barrel of the shotgun if she wasn't in there and the gun wasn't in her mouth?

You know, Mr. Ericsson talks about the numbers and the red and the letters. Cassandra Robertson, she was very clear about why the in the swab of the shotgun Arrie's DNA being on it, that the under 200 was okay because that was the one where there was only one sample. There was only one profile in that swab. The other one, the shotgun or the -- is that what it was? The ridge area, the grip of the shotgun, the under 200 was not okay because it was a mixture. So there were several different profiles there. It wasn't the defendant.

But she also talked to you about the fact that anybody can touch something and not leave DNA. She talked about a lot of reasons. You know, are you a shedder? Is there sweat? Is it hot? What's the environment like? There are lots of reasons why you can touch something and not leave DNA.

But like I said, the defendant himself thought his DNA was going to be on the shotgun itself because he came up with that cockamamie story about how, well, he moved it. He cleaned it. Then, well, he didn't clean it when they tried to ask him where the items were that he was going to clean it, but he just kept going back and forth, but he was clear to say, yeah, he touched it earlier that day, but Arrie was not in his

apartment.

The defense wants you to believe that Arrie tied herself up and did all of this. I mean no disrespect to Arrie when I say this, but do you really think that Arrie is smart enough to come up with this whole -- concoct this whole story? If Arrie did this to herself and made all this up, how did her DNA get on the end of the shotgun barrel? How did Carl Taylor see her coming out the door? Why did the defendant lie about Arrie being in his apartment? Because Arrie didn't make it up. Because it happened just the way she said, and the defendant is guilty of these charges.

Thank you.

THE COURT: All right. Thank you.

The clerk will now charge the officer to take charge of the jury.

(Officer sworn.)

THE COURT: All right. Ladies and gentlemen, in a moment I'm going to ask all of you to collect your belongings and your notepads and follow the bailiff through the rear door. As you may know, a criminal jury is composed of 12 members. There are 14 of you. Two of you are the alternates who were seated in chairs designated prior to jury selection to make the selection of the alternates somewhat random. Those are Jurors No. 6 and 7, Ms. Garcia-Hatton and Mr. Meacham.

You are the alternates. I'm going to ask you to exit

with the other members of the jury. Before you leave, please provide a member of my staff with phone numbers where you can be reached today and tomorrow. If, God forbid, one of the other jurors becomes ill or something like that before a verdict is reached, you would be called in to deliberate with the other jurors.

For that reason, the prohibition about speaking about the case or doing anything else relating to the case is still very much in effect until you have been contacted by someone from my chambers and told that the jury in this case has reached a verdict and you are excused.

So if all of you would please collect your things and follow the bailiff through the rear doors.

(Jury recessed for deliberation 3:25 p.m.)

MS. LUZAICH: Like, I said, there's a clean computer there if they need it.

Would it be your intent to kind of feel them out at 5:00 o'clock and see if they want to stay?

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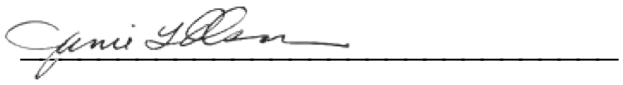
THE COURT: Yeah. He'll go in at 5:00 and see if they want to stay, but if they don't have a verdict by 6:00, then we excuse them at 6:00. So.

(Proceedings recessed for the evening 3:26 p.m.)

-oOo-

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case.



Janie L. Olsen
Transcriber

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Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA,	)	
	)	
Plaintiff,	)	CASE NO. C305949-1
	)	DEPT NO. XXI
vs.	)	
	)	
CALVIN THOMAS ELAM,	)	**TRANSCRIPT OF PROCEEDINGS**
	)	
Defendant.	)	

BEFORE THE HONORABLE VALERIE P. ADAIR, DISTRICT COURT JUDGE

TUESDAY, JUNE 27, 2017

JURY TRIAL - DAY 7

APPEARANCES:

FOR THE STATE: ELISSA LUZAICH, ESQ.
Chief Deputy District Attorney

FOR THE DEFENSE: THOMAS A. ERICSSON, ESQ.

RECORDED BY: SUSIE SCHOFIELD, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

Case Number: C-15-305949-1

LAS VEGAS, CLARK COUNTY, NEVADA, JUNE 27, 2017, 12:07 P.M.

*** * * * ***

(Jury entering 12:10 p.m.)

THE COURT: All right. Court is now back in session. The record should reflect the presence of the State through the deputy district attorney, the presence of the defendant and his counsel, the officers of the court and the ladies and gentlemen of the jury.

And who is the jury foreperson?

All right. Juror No. 5. Mr. Bohac, has the jury in this matter reached a verdict?

JUROR NO. 05: Yes, we have.

THE COURT: Would you please hand the forms of verdict to the bailiff.

The clerk will now read the verdict out loud and inquire if this is the verdict of the jury.

THE CLERK: District Court, Clark County, Nevada, the State of Nevada versus Calvin Elam, Case No. C305949, Department 21, verdict. We the jury in the above-entitled case find the defendant Calvin Elam as follows:

Count 1, Conspiracy to commit kidnapping, Guilty of conspiracy to commit kidnapping.

Count 2, First-degree kidnapping with use of a deadly weapon, Guilty of first-degree kidnapping with use of a deadly weapon.

Count 3, Assault with a deadly weapon, Guilty of assault with a deadly weapon.

Count 4, Unlawful use of an electronic stun device, Not guilty.

Count 5, Battery with intent to commit sexual assault, Guilty of battery with intent to commit sexual assault.

Count 6, Sexual assault with use of a deadly weapon, Not guilty.

Count 7, Attempt sexual assault with use of a deadly weapon, Not guilty.

Dated this 27th day of June, 2017, jury foreperson.

Ladies and gentlemen of the jury, are these are verdicts as read, so say you one so say you all?

THE JURY: Yes.

THE COURT: All right. Before the verdict is recorded into the minutes of the court, does either side desire to have the jury polled?

MR. ERICSSON: The defense does, Your Honor.

THE COURT: All right. The court clerk will now poll the ladies and gentlemen of the jury.

THE CLERK: Juror No. 1, is this your verdict as read?

JUROR NO. 01: Yes.

THE CLERK: Juror No. 2, is this your verdict as

read?

JUROR NO. 02: Yes.

THE CLERK: Juror No. 3, is this your verdict as read?

JUROR NO. 03: Yes.

THE CLERK: Juror No. 4, is this your verdict as read?

JUROR NO. 04: Yes.

THE CLERK: Juror No. 5, is this your verdict as read?

JUROR NO. 05: Yes.

THE CLERK: Juror No. 8, is this your verdict as read?

JUROR NO. 08: Yes.

THE CLERK: Juror No. 9, is this your verdict as read?

JUROR NO. 09: Yes.

THE CLERK: Juror No. 10, is this your verdict as read?

JUROR NO. 10: Yes.

THE CLERK: Juror No. 11, is this your verdict as read?

JUROR NO. 11: Yes.

THE CLERK: Juror No. 12, is this your verdict as read?

JUROR NO. 12: Yes.

THE CLERK: Juror No. 13, is this your verdict as read?

JUROR NO. 13: Yes.

THE CLERK: Juror No. 14, is this your verdict as read?

JUROR NO. 14: Yes.

THE COURT: All right. The clerk will now record the verdict into the minutes of the court.

Ladies and gentlemen, this concludes your service as jurors. I want to thank you very much for your service and your attentiveness during the past week and these few days. The prohibition about speaking about the case is now lifted. You're free to speak with each other or anyone else you choose.

Very often the lawyers like to speak to members of the jury to get feedback and what not. If one of these individuals or both wants to speak with you and you're willing, that's perfectly acceptable. Conversely, if you'd rather not talk to them, obviously they'll respect your wishes in that regard.

We had ordered lunch for you, which is now here I'm told. So you're welcome to stay and eat lunch, or you're free to leave.

If all of you would please collect your things and follow the bailiff through the rear door.

(Jury excused 12:14 p.m.)

THE COURT: All right. Yes. We'll go ahead and set an in-custody sentencing date.

THE CLERK: That would be August 15th at 9:30.

MS. LUZAICH: Thank you. I would also ask the Court, as the defendant's been convicted of not one at least mandatory life sentence, several mandatory prison sentences, I would ask you to remand him without bail.

THE COURT: All right. It's pretty academic since he's been in custody this time, but the Court will remand him without bail.

Oh. Great. Shoot, I forgot about the ex-felon in possession. Was the State going to go forward with that?

MS. LUZAICH: Well, you let them go.

THE COURT: We can just scream it right now. They're in the back. I'm sorry. I didn't --

MS. LUZAICH: I didn't bring the file with me.

THE COURT: I completely forgot about it. So do you want to just not proceed on that, or do you want to proceed and I'll just tell them never mind; we have another charge?

MS. LUZAICH: Can I have a minute?

THE COURT: Just go tell Kenny to hold them in the back and not to let them talk.

I mean, one thing, Ms. Luzaich, Counsel, is we --

MS. LUZAICH: We don't need to go forward. I mean,

we can reset.

THE COURT: Okay. I was going to say we don't have to dismiss it with prejudice, and that way if for some reason his conviction were overturned on appeal, you could reinstate the ex-felon in possession of firearm if you had to proceed to trial on these other charges. Let's just say the kidnapping is overturned or whatever.

MS. LUZAICH: That's fine.

THE COURT: See what I'm saying?

MS. LUZAICH: Yes. That's fine.

THE COURT: All right. That's what we'll do.

THE CLERK: What are we doing?

THE COURT: The State's electing not to proceed on the ex-felon at this time, but they can proceed against him on that if for some reason his conviction is overturned on appeal.

MS. LUZAICH: What I would ask the Court to do just for the record is conditionally dismiss it.

THE COURT: Right.

MS. LUZAICH: Just so long as those words are used, it's conditionally dismissed, and I can --

THE COURT: Right.

MS. LUZAICH: -- revive it if necessary.

THE COURT: If necessary, if again his conviction is overturned.

Is the minimum parole eligibility on a kidnapping

with use, is that 10 years?

MS. LUZAICH: No, it's 5.

THE COURT: 5 to life. Okay.

MS. LUZAICH: The kidnapping with use is potentially a 5 to 15 or a 5 to life with a consecutive 1 to 20.

THE COURT: Right.

MS. LUZAICH: But the battery with intent to commit sexual assault is a 2 to life. It can be more than 2, but it can't be less than 2, but it can only be life on top.

THE COURT: Right.

MR. ERICSSON: Your Honor, the date that you had given for the sentencing, I start a capital trial the day before that. Is it possible to do it either a week before that or maybe two weeks after that?

MS. LUZAICH: I wouldn't say before. P and P won't get it done.

THE COURT: Right. Because they won't have it done.

MS. LUZAICH: But after is fine.

THE COURT: That's fine. We can go out two additional weeks.

MR. ERICSSON: That would be great.

THE CLERK: Let me look at my calendar.

We said the 15th, correct?

MR. ERICSSON: Yes.

THE CLERK: Tuesday, the 29th of August.

THE COURT: Okay.

MR. ERICSSON: August 29th, and that's at 9:00?

THE CLERK: 9:30.

MR. ERICSSON: 9:30. Okay.

MS. LUZAICH: Thank you.

THE COURT: Okay. Thank you.

MS. LUZAICH: Now, do we know are they eating? Are they -- I would just like to talk if they can.

THE COURT: I don't know.

MS. LUZAICH: If they choose.

THE COURT: I mean, if -- yeah. I mean, I usually go back and just thank them.

MS. LUZAICH: You're going to talk to them?

THE COURT: Yeah. And then --

MS. LUZAICH: Send the ones that want out that way.

THE COURT: I'm sure they're not all going to want to stay.

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MS. LUZAICH: Yeah.

THE COURT: For fabulous Jason's Deli.

(Proceedings concluded 12:18 p.m.)

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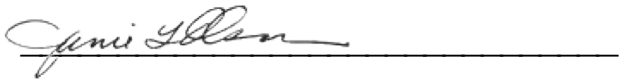
ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case.



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Transcriber

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CLERK OF THE COURT

RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. CALVIN ELAM, Defendant.	CASE NO. C-15-305949-1 DEPT. NO. XXI

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

TUESDAY, AUGUST 29, 2017

RECORDER'S TRANSCRIPT OF HEARING
SENTENCING

APPEARANCES:

For the State: DANIELLE K. PIEPER
Chief Deputy District Attorney

For the Defendant: THOMAS A. ERICSSON, ESQ.

RECORDED BY: SUSAN SCHOFIELD, COURT RECORDER

Case Number: C-15-305949-1

LAS VEGAS, NEVADA, TUESDAY, AUGUST 29, 2017, 9:33 A.M.

*****

THE COURT: State versus Calvin Elam and he is present in custody with Mr. Ericsson. This is the time set for rendition of sentence but we did get the email from Mr. Ericsson regarding the question in the PSI about the gang affiliation. Is that right?

MR. ERICSSON: Yes, Your Honor.

THE COURT: And we had a victim speaker notification. I don't know if the victim's here.

MS. PIEPER: I'm not sure. I know I'm just standing in for Ms. Luzaich.

THE COURT: Yeah, I don't see anybody from victim witness here with her.

State, are you --

MS. PIEPER: We are not opposing the continuance.

THE COURT: Okay. So you're going to provide those FI cards or whatever information Metro has that, or whatever law enforcement agency that causes them to believe Mr. Elam is a gang member.

MS. PIEPER: Yes.

THE COURT: How long will that take?

MS. PIEPER: Should take a week.

THE COURT: All right. We want --

MS. PIEPER: I don't know if you want to put it on next Tuesday or Thursday. I don't know what your calendar's like.

THE COURT: Okay. If the victim were here I'd ask if she was available but I don't see her. At least a week, but if our calendar's really crowded then it'll go past that.

MS. PIEPER: Right.

THE CLERK: The 7th? September 7th, 9:30?

MR. ERICSSON: September 7th, 9:30. And, Your Honor, one other issue that Mr. Elam brought to my attention --

THE COURT: Let's do this. Let's make that not the sentencing date but the status check date regarding the FI cards because if we need to have the PSI amended, then we're going to have to pass it and I don't want the victim to have to come back and not speak. So that'll just be a status check.

MS. PIEPER: Okay.

THE COURT: And then we'll set it -- give you a new sentencing date at that time.

MS. PIEPER: Okay.

MR. ERICSSON: And, Your Honor, one other issue. Mr. Elam has indicated that they have his race listed as black and he's indicated to me that he is Moorish American. I don't know if that is something that they're able to --

THE COURT: I don't think they have a category for Moorish. Aren't the Moors Northern African?

MR. ERICSSON: Yes, Your Honor, but just -- I wanted to bring that to your attention from his direction.

THE COURT: So he would categorize himself as -- I mean, basically, I think there's only four categories. And, I don't know, years ago they used to use M for Mexican which encompassed all Hispanics. I don't know if they've changed that to, you know, H, but my understanding is there's only, like, a few categories they use. But, you know, he can be black -- does he have self-identify as being as white?

MR. ERICSSON: Your Honor, I'm not sure, but --

THE COURT: Because I don't think Metro has, or the PSI, has gotten to the, I mean, couldn't he be Northern African American?

MS. PIEPER: Or (unintelligible)

MR. ERICSSON: Your Honor, why don't we do this? I will contact -- I'll contact P & P, find out what --

THE COURT: I mean, it's immaterial. Frankly, it's immaterial, obviously, to the Court. And, you know, I believe it should be accurate.

MR. ERICSSON: I will contact P & P and see what options there are category-wise --

THE COURT: All I'm saying is I don't think that it's broken down into subcategories to that degree of detail. That's all I'm suggesting. I don't think it's broken down into that degree of detail. And this comes up, obviously, with other ethnic and racial groups where the categories just don't seem to mix, so maybe that's something that they need to do going forward is eliminate the category, break it down better, or something like that. I don't know.

All I'm saying is that I think at this point in time we have to work with the framework that's been, that's established and is in place right now. So, obviously, I have no position on that one way or the other, and I'm assuming State has no position on it--

MS. PIEPER: The State does not.

THE COURT: -- I think our collective interest is in accuracy, so we can address that maybe down the road and we can find out what the parameters are.

MR. ERICSSON: And I will do that. I'll contact P & P and see what the options are.

THE COURT: All right. We'll give you a new date.

THE CLERK: September 7th, 9:30.

MS. PIEPER: Thank you.

MR. ERICSSON: Thank you.

THE COURT: Thank you.

*****

PROCEEDING CONCLUDED AT 9:39 A.M.

****

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Susan Schofield

SUSAN SCHOFIELD
Court Recorder/Transcriber

FILED

MAY 27 2020

CLERK OF COURT

Case No. C-305949
Dept. No.....

IN THE 8TH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

CALVIN ELAM
Petitioner,

v.

BEAN (warden)
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)

A-20-815585-W
Dept. 21

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you are not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: High Desert State Prison, Clark County.

2. Name and location of court which entered the judgment of conviction under attack: 8th Judicial District Court, Clark County, NV.

3. Date of judgment of conviction: on or about 4-12-2019

4. Case number: C-305949

5. (a) Length of sentence: Count I - 24 to 72 months Count II - (continued)

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5 (a) Length of Sentence: (continued)

5 Years to Life in Prison, Plus a Consecutive Term of 60 to 180 months For use of a Deadly Weapon, Count 2 Runs Concurrent with Count 1; Count III - 12 to 72 months, Count 3 Runs Consecutive to Count 2; Count IV - 2 Years to Life in Prison, Count 5 Runs Consecutive to Count 3.

(b) If sentence is death, state any date upon which execution is scheduled:....

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes ..... No ..X...

If "yes," list crime, case number and sentence being served at this time: .....

.....

.....

7. Nature of offense involved in conviction being challenged: ..First Degree Kidnapping.....

With use of a Deadly Weapon; and Battery with intent to commit Sexual Assault.

8. What was your plea? (check one)

(a) Not guilty ..X...

(b) Guilty .....

(c) Guilty but mentally ill .....

(d) Nolo contendere .....

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: .....N/A.....

.....

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

(a) Jury ..X..

(b) Judge without a jury .....

11. Did you testify at the trial? Yes .....No ..X..

12. Did you appeal from the judgment of conviction? Yes ..X.. No .....

13. If you did appeal, answer the following:

(a) Name of court: ..NEVADA SUPREME COURT.....

(b) Case number or citation: .....#74581.....

(c) Result: .....AFFirmed.....

(d) Date of result: ....April 12, 2019.....

(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: n/a

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ..... No X

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of court: .....

(2) Nature of proceeding: .....

.....

(3) Grounds raised: .....

.....

.....

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No .....

(5) Result: .....

(6) Date of result: .....

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

.....

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: .....

(2) Nature of proceeding: .....

(3) Grounds raised: .....

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No .....

(5) Result: .....

(6) Date of result: .....

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

.....

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes ..... No .....

Citation or date of decision: .....

(2) Second petition, application or motion? Yes ..... No .....

Citation or date of decision: .....

(3) Third or subsequent petitions, applications or motions? Yes ..... No .....

Citation or date of decision: .....

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.).....

.....

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify: NO

(a) Which of the grounds is the same: N/A

.....

(b) The proceedings in which these grounds were raised: .....

.....

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) .....

.....

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) GROUND ONE, INSUFFICIENT EVIDENCE; GROUND TWO, INSUFFICIENT EVIDENCE; GROUND THREE, PROSECUTORIAL

Misconduct; Ground Four, Failure to test state case; Ground Five, Cumulative Error.

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) ..... NO .....

.....

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ..... No ..X..

If yes, state what court and the case number: .....

.....

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: ..... Thomas A. Ericsson (Trial and Direct appeal) .....

.....

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ..... No ..X.....

If yes, specify where and when it is to be served, if you know: .....

.....

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground ONE: Trial Counsel Failed To move For Dismissal of the Complaint on the Basis of [redacted] insufficient evidence Presented At Trial To Support A Finding, Beyond A Reasonable Doubt, of A Factual Basis For The Necessary Element of Criminal Agency For Culpability For The offense (continued)

Supporting FACTS (Tell your story briefly without citing cases or law.): In order To Be Found Guilty of "Battery with intent To Commit Sexual Assault", Pursuant To NRS 200.400(4)(a), "The crime must Result in Substantial Bodily Harm To The Victim."

Pursuant To NRS 0.060(1)(2), in order To commit Substantial Bodily Harm There must Be a Substantial Risk of Death, or Prolonged Physical Pain. Therefore, Since The Victim was never in Any Danger of Death, we address the "Prolonged Physical Pain Definition. Collins V. State, 125 Nev. 60, 203 P3d 90 (Nev. 2009), is The controlling Nevada Authority on the issue of Prolonged Physical Pain. Collins will show That the Element of Substantial Bodily Harm was never met.

Further A "conviction of Battery with intent To commit Sexual Assault causing Substantial Bodily Harm Requires Proof of intent To commit sexual assault." Pursuant To Colley V. Sumner, 784 F.2d 984 (9th Cir. 1986). To Prove The Element of Sexual Assault, The State must Prove That There was Penetration or Substantial Bodily Harm To The Victim. Pursuant To The Trial Records And Collins V. State, Neither was Proven.

(a) GROUND ONE: (CONTINUED)

OF BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT, A VIOLATION OF PETITIONERS 5TH, 6TH, AND 14TH AMENDMENT RIGHT TO THE U. S. CONSTITUTION.

(b) Ground TWO: Petitioner's conviction on count 2 of the information is invalid under the constitutional guarantees of due process and a fair trial, as articulated by the 5th, 6th, and 14th Amendment to the U.S. constitution, Due to the absence of (continued)

Supporting FACTS (Tell your story briefly without citing cases or law.): For order to found guilty of kidnapping in the first degree, pursuant to NRS 200.310, 200.320, the crime **must** be committed "with the intent to hold or detain, or who holds or detains, the person for ransom, or reward, or for the purpose of committing sexual assault, extortion or robbery upon or from the person or for the purpose of killing the person or inflicting substantial bodily harm upon the person, or to exact **from** relatives, friends, or any other person any money or valuable thing for the return or disposition of the kidnapped person." In this case, first, during the trial, or anywhere else in the record will you find any mention of the victim being detained for the purpose of ransom or reward. Second, the Record makes it clear that the victim was never detained for the purpose [redacted] of committing sexual assault. Third, again the Record makes it clear that extortion or robbery was never the purpose. Fourth, the purpose was never to kill the victim or inflict substantial bodily harm. Lastly, the Record is clear as to the purpose of this crime, which was to find out the location of the missing puppies. The Record will show that everything else that happened in this case, was **ANCILLARY**, Recklessly misguided as it was, to locate the missing puppies. Therefore, the Evidence Presented at trial was insufficient to support A finding of First Degree Kidnapping.

(B) Ground Two (continued)

Evidence sufficient to support a finding of first degree kidnapping.

(c) Ground THREE: Petitioner was Denied His Right to Effective Assistance of counsel under the 6th and 14th Amendment of the U.S. Constitution, where counsel Failed to object to the Prosecutions improper Vouching and commentary at closing Argument.

Supporting FACTS (Tell your story briefly without citing cases or law.): In Weygandt V. Ducharme, 774 F2d 1491 (9th Cir 1985), The Circuit Court Held, "Trial counsel's Failure to object to improper closing Remarks Amounted to Performance Below the objective standard of Reasonableness." Id. In this case, Defense counsel Failed to object to the Following:

b. The Prosecutor improperly Expressed Her Personal opinion that the necessary elements of First Degree Kidnapping were met, when she stated,

"The **PURPOSE** was to either inflict substantial Bodily Harm or Kill Her -, So First - - First Degree Kidnapping was met." See, T.T., Closing Argument P. 118, Line 21-23. (Emphasis Added).

The Prosecutor improperly expressed His personal opinion that Petitioner's **PURPOSE** was to inflict substantial Bodily Harm or Kill Her. Opposed to the testimony of the Victim, and all other Pertinent witnesses, on numerous occasions the Victim, and other witnesses, expressed their understandings that the **PURPOSE** For this whole incident was to locate the missing puppies, See, T.T., Day 3, P. 28, P. 31-32, P. 35, P. 36, Thereby Denying Petitioner His 14th Amendment Right to A Fair Trial and Due Process of Law, and His 6th Amendment Right to confront The witness against him, and to an impartial Jury.

(continued)

(c) GROUND THREE: (CONTINUED)

SUPPORTING FACTS:

2. PETITIONER IS IN CUSTODY IN VIOLATION OF HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL AS GUARANTEED BY THE 5TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION DUE TO INSTANCES OF PROSECUTORIAL MISCONDUCT WHEN THE PROSECUTOR MAKES REFERENCES TO INCORRECT DEFINITION OF "BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT."

THE PROSECUTOR INCORRECTLY DEFINED BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT, WHEN SHE STATED,

"THE FACT THAT SHE IS PHYSICALLY RESTRAINED SUBSTANTIALLY INCREASED HER RISK OF POTENTIALLY DEATH OR SUBSTANTIAL BODILY HARM BECAUSE SHE CAN'T GET OUT." SEE T.T., CLOSING ARGUMENT, P.# 125, LINES # 1-3.

THE PROSECUTOR FURTHER STATED,

"SO THE PUTTING HER DOWN, WHACKING HER WITH THE BROOMSTICK AND THE PUTTING THE BROOMSTICK UP AT HER BUTT, BATTERY WITH THE INTENT TO COMMIT A SEXUAL ASSAULT." SEE, T.T., CLOSING ARGUMENT, P.# 128, LINES # 14-16.

IN MAKING THE ABOVE STATEMENT, THE PROSECUTOR GAVE THE JURY THE NECESSARY ELEMENTS NEEDED TO PROVE BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT, WITHOUT EVER ACTUALLY PROVING THE ELEMENTS NECESSARY TO SUPPORT A CONVICTION OF BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT.

(c) GROUND THREE: (CONTINUED)

SUPPORTING FACTS:

WHAT WAS MOST DAMAGING, AND FUNDAMENTALLY UNFAIR WAS, THE PROSECUTOR LACED HER DEFINITION OF BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT, WITH THE **RISK** OF MEETING THE ELEMENTS OF BATTERY WITH THE INTENT TO COMMIT SEXUAL ASSAULT IN ORDER TO GIVE THE JURY THE ILLUSION OF BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT, PROVEN. THE PROBLEM IS, YOU CANT HAVE "THE INTENT TO COMMIT SEXUAL ASSAULT", ACCIDENTALLY OR POTENTIALLY. MEANING, IN ORDER TO BE CONVICTED OF "BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT," YOU MUST HAVE THE SPECIFIC INTENT TO COMMIT SEXUAL ASSAULT.

FURTHER, THE CRIME MUST RESULT IN SUBSTANTIAL BODILY HARM TO THE VICTIM. HOWEVER, THE PROSECUTOR SAIDS, "THE FACT THAT SHEE IS PHYSICALLY RESTRAINED SUBSTANTIALLY INCREASED HER RISK OF POTENTIALLY DEATH OR SUBSTANTIAL BODILY HARM" THIS STATEMENT IS CLEARLY THE OPINION OF THE PROSECUTOR, SOMETHING WE SHOULD HAVE NEVER BEEN MADE AWARE OF, THEREFORE, ALL THE ABOVE CALLED FOR DEFENSE COUNSEL TO OBJECT TO THE PROSECUTOR INCORRECTLY DEFINING BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT, AND SUBSTANTIAL BODILY HARM, AND THE PROSECUTOR GIVING HER OPINION OF GUILT.

(c) GROUND THREE: (CONTINUED)

SUPPORTING FACTS:

3. COUNSEL WAS INEFFECTIVE FOR FAILING TO EITHER, REQUEST AN INSTRUCTION FOR SUBSTANTIAL BODILY HARM OR FOR FAILING TO OBJECT TO THE DENIAL OF AN INSTRUCTION FOR SUBSTANTIAL BODILY HARM, DUE TO LACK OF KNOWLEDGE OF APPLICABLE LAW.

COUNSEL'S FAILURE TO REQUEST AN INSTRUCTION DEFINING THE NECESSARY ELEMENTS OF SUBSTANTIAL BODILY HARM, WAS UNDENIABLY PREJUDICIAL IN LIGHT OF THE FACT THAT THE PROSECUTOR USED IT AS A HOOK LINE IN HIS CLOSING ARGUMENT, WHILE INTENTIONALLY LEAVING IT OUT OF THE PROFFERED INSTRUCTIONS.

THE PREJUDICIAL EFFECT IS ASTRONOMICAL AS THE INSTRUCTIONAL ERROR "HAD A SUBSTANTIAL AND INJURIOUS EFFECT [AND] INFLUENCE IN DETERMINING THE JURY'S VERDICT." BRECHT V. ABRAHAMSON, 507 U.S. 619, 637 (1993), BECAUSE THE JURY CANNOT FIND A DEFENDANT GUILTY OF BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT, WITHOUT FINDING THAT THE CRIME RESULTED IN "SUBSTANTIAL BODILY HARM." HOWEVER, THE JURY WAS NEVER INSTRUCTED ON WHAT CONSTITUTES "SUBSTANTIAL BODILY HARM."

THEREFORE, THIS COURT IS LEFT WITH SERIOUS DOUBT, AND CANNOT SAY WITH FAIR ASSURANCE THAT THE JURY, IF PROPERLY INSTRUCTED, WOULD HAVE FOUND BEYOND A REASONABLE

(c) GROUND THREE: (CONTINUED)

SUPPORTING FACTS:

Doubt That Petitioner Committed The crime of Battery With intent to commit Sexual ASSAULT, Resulting in Substantial Bodily Harm To The Victim.

Because the STATE clearly Relied on The Fact That There was no INSTRUCTION, Defining, Substantial Bodily Harm, coupled with The Fact the STATE new that the wording, SUBSTANTIAL Bodily Harm to the Victim, would Be seen By The Jury when They Read The "Battery INSTRUCTION". The STATE Did not want The Jurors To Feel TRepidation or ASK Revealing questions about the Definition of Substantial Bodily Harm, So the STATE, IN it's Closing ARGUMENT, INCORRECTLY Defined it For Them.

Therefore, Defense Counsel should Have INSISTED ON A SUBSTANTIAL Bodily Harm INSTRUCTION.

(d) Ground FOUR: Defense Counsel's Failure to subject the Prosecutors case to a meaningful Adversary Testing Process, Denied Petitioner of His 6th and 14th Amendments Right To The U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.): In U.S. V. CRONIC, 466 U.S. 648, 80 L.Ed.2d 657, 104 S.Ct. 2039 (1984), The Supreme Court found, TRIAL Counsel's Failure To subject The Prosecutor's case to A meaningful Adversary Testing Process may constitute A Denial of Due Process And Establish A Pro Se Violation of Defendants Right to Effective Assistance of Counsel.

In This case, Defense Counsel Failed to Do any Pretrial investigation. Outside of what the State Provided, There was no Pretrial Investigation Performed By The Defense To Support the Theory of the case. IT is Virtually impossible For A Defense Attorney to Defend A client without Doing Some Kind of Pretrial investigation. Even if that client is completely Guilty! Trial counsel's willingness to Accept The Governments Version of Facts, and Failed to File any Pretrial motions Because He Relied on the Governments Version of Facts and not His own Reasonable investigation.

Further, Defense Counsel Failed to File any of the Followings Pretrial motions:

1) motion to STRIKE [redacted] aggravators.

2) motion To Exclude Argument Constituting Prosecutorial misconduct.

3) motion to Suppress Evidence. (continued)

(d) GROUND FOUR: (CONTINUED)

SUPPORTING FACTS:

4) MOTION IN LIMINE TO Preclude Admission of Prejudicial evidence. Specifically, But not limited to: (Rape nurse Testifying That the victim Told her That she was Penetrated with a Penis, Finger, and Tongue, while the victim Denies ever Saying any of That).

5) MOTION TO DISMISS FOR INSUFFICIENT INFORMATION charging Petitioner with BATTERY with intent to commit sexual ASSAULT, and First Degree Kidnapping. As well as Sexual ASSAULT, which Elam was ultimately Found not Guilty of.

Defense Counsel Refused to Locate and subpoena The Two Female Eye witness without any attempts to investigate as to what they might Know about The case or their Reliability.

Defense counsel Failed to object to Damaging and Prejudicial statements During closing Argument.

Defense counsel Failed TO Request The Proper Jury instruction, (i.e. Defining the Elements of Substantial Bodily Harm), and when the

(d) GROUND FOUR: (CONTINUED)

SUPPORTING FACTS:

Defense Presented it's case, shockingly, no Testimony or evidence was ever offered on Behalf of the Defense.

For a charge of First Degree Kidnapping, and Battery with intent to commit Sexual Assault, Defense counsel's Performance was Disrespectful to the entire Justice system, and Denied Elam of His Right to Due Process and Effective Assistance of counsel.

Defense Counsel's Performance was unreasonable and Resulted in an outcome that is completely unreliable.

(c) Ground FIVE: CUMULATIVE ERRORS, A DENIAL OF The 14th Amendment of The U.S. CONSTITUTION.

Supporting FACTS (Tell your story briefly without citing cases or law.): In STRICKLAND V. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), The Supreme Court found That it must examine each error individually and then must also consider their cumulative effect in light of the totality of circumstances. STRICKLAND, 104 S.Ct. AT 2069.

On one hand, this means that an attorney's individual errors may not, looking at the trial as a whole, cast Doubt on the Reliability of the Result, and Therefore, would not merit Reversal. On the other Hand, Even if individual acts or omissions are not so grievous as to merit a Finding of incompetence or of Prejudice From incompetence, There cumulative effect may be substantial Enough to meet the STRICKLAND test.

In this case, in Grounds I THRU IV, the cumulative ERRORS and omissions by Elam's counsel are numerous.

Please Refer to Grounds I THRU IV, Respectively, For A complete and individual explination of each error and/or omissions.

Taken alone each ERROR might not establish Deficient Representation. However, the cumulative effect of each error underscores A Fundamental lack of Formulation and Direction To Present A COHERENT DEFENSE.

(continued)

(E) GROUND FIVE: (CONTINUED)

SUPPORTING FACTS:

Although the evidence of Guilt was SUFFICIENT, IT WAS NOT OVERWHELMING. Therefore, Counsel's INEFFECTIVENESS CONTRIBUTED TO Elam's CONVICTION, and Deprived Elam of His Right to Due Process and a Fair Trial.

WHEREFORE, petitioner prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding.

EXECUTED at **High Desert State Prison** on the 12 day of the month of April, 2020.

/s/ Calvin Elam

* Calvin Elam #1187304
High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

VERIFICATION

Under penalty of perjury, the undersigned declares that the undersigned is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true.

/s/ Calvin Elam

*Calvin Elam #1187304
High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

AFFIRMATION (Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceeding PETITION FOR WRIT OF HABEAS CORPUS filed in District Court Case Number C-305949 Does not contain the social security number of any person.

/s/ Calvin Elam

*Calvin Elam #1187304
High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

CERTIFICATE OF SERVICE BY MAIL

I, Calvin Elam, hereby certify pursuant to N.R.C.P. 5(b), that on this 12 day of the month of April, 2020, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

Warden High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070

Attorney General of Nevada
100 North Carson Street
Carson City, Nevada 89701

Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89155

/s/ Calvin Elam

*Calvin Elam #1187304
High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

* Print your name and NDOC back number and sign

Calvin T. Elam #1187304
High Desert State Prison
P.O. Box 650
Indian Springs, Nevada 89070-0650

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Las Vegas, Nevada 89155-1160

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High Desert State Prison
P.O. Box 650
Indian Springs, Nevada 89070-0650

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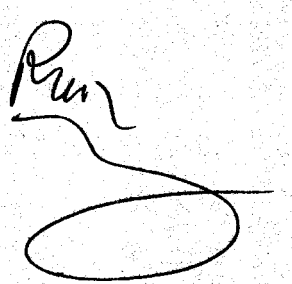

FILED
MAY 27 2020
CLERK OF COURT

CALVIN ELAM ID NO. 1187304

HIGH DESERT STATE PRISON
22010 COLD CREEK ROAD
P.O. BOX 650
INDIAN SPRINGS, NEVADA 89018

DISTRICT COURT

CLARK COUNTY, NEVADA

A-20-815585-W
Dept. 21

CALVIN ELAM
PETITIONER

v.

BEAN (WARDEN)
RESPONDENT

CASE NO.: C-305949

DEPT. NO.:

DOCKET:

MOTION TO WITHHOLD JUDGMENT ON PETITION FOR WRIT OF HABEAS CORPUS.

NOTICE OF SUPPLEMENTAL MEMORANDUM IN SUPPORT OF WRIT OF HABEAS CORPUS TO FOLLOW DUE TO CORONAVIRUS.

COMES NOW, Petitioner CALVIN ELAM, herein above respectfully moves this Honorable Court for an ORDER withholding Judgment ON THE ATTACHED Petition FOR WRIT OF HABEAS CORPUS

This Motion is made and based upon the accompanying Memorandum of Points and Authorities.

DATED: this 12 day of April, 2020

BY:

CALVIN ELAM #1187304
Defendant/In Proper Personam

RECEIVED
APR 20 2020
CLERK OF THE COURT

CALVIN ELAM, ASK This Honorable Court To Withhold Judgment on The ATTACHED PETITION For Writ of Habeas Corpus (Post-Conviction).

The Reason For This Request is; we Are Currently on QUARANTINE And unable To Go To the Law Library Therefore, Petitioner ASK this Court To withhold Judgment until I am able To Complete and mail in my Supplemental Memorandum in support of Writ of Habeas Corpus.

Dated this 12 Day of April 2020

Respectfully Submitted

CALVIN ELAM #1187304
P.O. BOX 650
Indian Springs, NV, 89070

Page __

CERTIFICATE OF SERVICE

I, CALVIN ELAM, hereby certify that I am the petitioner in this matter and I am representing myself in propria persona.

On this 12 day of April, 2020, I served copies of the MOTION TO WITHHOLD JUDGMENT ON WRIT OF Habeas Corpus., in case number: C-305949 and placed said motion(s) in U.S. First Class Mail, postage pre-paid:

Address: 200 Lewis Avenue, 3RD Floor
Las Vegas, Nevada 89155-1160
Sent to: Clerk of the Court

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the petitioner in the above-entitled action, and he, the defendant has read the above CERTIFICATE OF SERVICE and that the information contained therein is true and correct. 28 U.S.C. §1746, 18 U.S.C. §1621.

Executed at HIGH DESERT STATE PRISON on this 12 day of April, 2020.

1187304
CALVIN ELAM DOP#

PETITIONER -- In Proper Person

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

CALVIN ELAM,
#2502165

Defendant.

CASE NO: **A-20-815585-W**
C-15-305949-1

DEPT NO: **XXI**

STATE'S RESPONSE TO DEFENDANT'S POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS, MOTION TO WITHHOLD JUDGMENT, MOTION FOR APPOINTMENT OF COUNSEL, AND REQUEST FOR EVIDENTIARY HARING

DATE OF HEARING: **AUGUST 18, 2020**
TIME OF HEARING: **9:30 AM**

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney, and submits the following State's Response to Defendant's Post-Conviction Petition for Writ of Habeas Corpus, Motion to Withhold Judgment, Motion for Appointment of Counsel, and Request for Evidentiary Hearing.

This Response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

//

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On April 17, 2015, Calvin Elam (hereinafter "Petitioner") was indicted by way of grand jury as follows: one (1) count of CONSPIRACY TO COMMIT KIDNAPPING (Category B Felony – NRS 200.310, 199.480 – NOC 50087); one (1) count of FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.310, 200.320, 193.165 – NOC 50055); one (1) count of ASSAULT WITH A DEADLY WEAPON (Category B Felony – NRS 200.471 – NOC 50201); one (1) count of UNLAWFUL USE OF AN ELECTRONIC STUN DEVICE (Category B Felony – NRS 202.357 – NOC 51508); one (1) count of BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT (Category A Felony – NRS 200.400.4 – NOC 50157); one (1) count of SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.364, 200.366, 193.165 – NOC 50097); one (1) count of ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.364, 200.366, 193.330, 193.165 – NOC 50121); and one (1) count of OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony – NRS 202.360 – NOC 51460).

Appellant's jury trial started on June 19, 2017, and ended on June 27, 2017. The jury found Defendant guilty of Count 1— CONSPIRACY TO COMMIT KIDNAPPING (Category B Felony - NRS 200.310, 200.320, 199.480 - NOC 50087), guilty of Count 2— FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.310, 200.320, 193.165 - NOC 50055), Count 3—ASSAULT WITH A DEADLY WEAPON (Category B Felony - NRS 200.471 - NOC 50201), and Count 5— BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT (Category A Felony - NRS 200.400.4 – NOC 50157).

The jury found Appellant not guilty of Count 4—UNLAWFUL USE OF AN ELECTRONIC STUN DEVICE (Category B Felony - NRS 202.357 - NOC 51508), Count 6— SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.364, 200.366, 193.165 - NOC 50097), and Count 7— ATTEMPT SEXUAL ASSAULT

WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.364, 200.366, 193.330, 193.165 - NOC 50121). The State requested that the District Court conditionally dismiss Count 8— OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony - NRS 202.360 - NOC 51460).

On October 19, 2017, Appellant was adjudged guilty and sentenced as follows: as to Count 1 a minimum of twenty-four (24) months and a maximum of seventy-two (72) months in the Nevada Department of Corrections; as to Count 2—life with the eligibility for parole after five (5) years with a consecutive term of a minimum of sixty (60) months and a maximum of one hundred eighty (180) months for the use of a deadly weapon in the Nevada Department of Corrections to run concurrent with count 1; as to Count 3—to a minimum of twelve (12) months and a maximum of seventy-two (72) months in the Nevada Department of Corrections to run consecutive to Count 2; as to Count 5—life with the eligibility to parole after two (2) years to run consecutive to Count 3 in the Nevada Department of Corrections.

Appellant received nine hundred twenty-eight (928) days credit for time served. Counts 4, 6, and 7 were dismissed and Count 8 was conditionally dismissed. Additionally, the Court ordered a special sentence of lifetime supervision to commence upon release from any term of probation, parole, or imprisonment. Further, Appellant was ordered to register as a sex offender in accordance with NRS 199D.460 within 48 hours after release.

Appellant's Judgment of Conviction was filed on October 31, 2017. On November 13, 2017, Appellant filed a Notice of Appeal. On April 12, 2019, the Nevada Supreme Court affirmed Petitioner's judgment of conviction. Remittitur issued on May 7, 2019.

On May 27, 2020, Petitioner filed the instant Petition for Writ of Habeas Corpus.

STATEMENT OF FACTS

On March 10, 2015, Arrie Webster (hereinafter "Webster") visited Annie Gentile (hereinafter "Gentile") and Pamela Yancy (hereinafter "Yancy") her close friends and neighbors. Webster's friendship with Gentile was closer than with Yancy. When she went to visit she brought her puppy, Payton. Gentile also had a dog and Webster would take her dog to Gentile's house so the dogs could play every other day. Gentile lived off of Jones and

Carmen upstairs. Webster and Gentile were out on the deck while the dogs were socializing. Webster saw Appellant and he said, "what's up" and motioned for her to come over. He was downstairs in front of his apartment when Webster saw him.

Webster did not know Appellant's name was Calvin because she called him Cuz because he was in a dating relationship with Webster's cousin, Joanique, by marriage. She knew Appellant only for a few months before the incident took place. When he motioned for her to come over, Webster went because she wanted to explain the situation that occurred with his pit bull puppies that went missing.

Previously, while Webster was visiting her friend Edward Brown, who lived in the building next to Appellant, she discovered Appellant's girlfriend looking for the puppies. When Webster saw Appellant's girlfriend looking for the puppies she decided to help her look for them, but they could not find them and everyone went their separate ways. Webster understood that Appellant was upset and believed someone had taken his puppies so when he motioned for her to come over she wanted to explain that she had nothing to do with the missing puppies.

Webster left her dog Payton with Gentile and Yancy and went and talked with Appellant. As she walked up to the apartment, he was already in the apartment, so they started talking in the kitchen. She began to explain that she heard what had happened to the puppies and told Appellant she did not have anything to do with it. Appellant insisted that she did have something to do with it and Webster explained again that she did not. Webster testified that Appellant's voice changed in the tone. Appellant began to get aggressive, loud, and scary. He told her if she did not have anything to do with it, to not worry about it, but told her to turn around and get on her knees. She asked him if he was serious, but could tell by his voice that he was serious so she turned around and got on her knees.

Appellant then tied her up with electrical cords and tape, stuffed her mouth with fabric, covered her eyes up, and then put a pillow case over her head. Her arms were tied behind her back and to her feet. Before he put the stuffing in her mouth, he placed a black shotgun in her mouth, but she closed her mouth and he lifted her chin up saying "bitch it's not a game."

Appellant beat her with a belt multiple times, pulled her pants down, and took the broom and angled it as to stick it in her anus. The entire time he was beating her, he kept saying she had something to do with the missing dogs. 3 He then made a phone call, and within minutes there were three women and another male that came to the door. During the call Webster heard him saying, "I have one of them here. Come over." The individuals that came in starting videoing what was taking place. Webster started to hear laughter, and then Appellant pulled out a taser and came extremely close to her face with the taser and then tased her. There was two or three black males and one black female.

Webster described Appellant as a tall and lighter skinned man with a medium build. Webster believed Appellant was going to stick the broomstick in her anus, she was so distraught that she blacked out. The beating took place over a couple of hours. Appellant touched Webster with the broomstick on her buttocks area. While Appellant was doing this, Webster had her chest on the floor because she had fallen from her knees. She repeatedly told Appellant she had nothing to do with the missing dogs. The broomstick touched her behind in several places and Webster testified "at one point I just braced myself for him to just do it, and then I just blanked out." She believed Appellant was going to stick the broomstick in her anus. If he did do it, she did not remember because she passed out.

Appellant pulled Webster's shorts and underwear down and started beating her with a leather belt. Webster heard Appellant and the other man say things along the lines of "[w]e're going to put the bitch in the trunk and—and it's not just going to happen to you. We're going to go over there and get everybody else because the puppies are going to come up." At one point during the beating, Webster played dead so they would stop beating and tasing her and she heard them say, "is that bitch dead?" She then heard them say "wake her up, tase her again."

Appellant made a phone call about picking kids up from school. She realized the individuals were gone because they did not respond when she said something. Webster was then able to roll and scoot herself to the door and somehow got to her knees. She was able to unlock the door and threw herself outside and onto the pavement. Gentile was still on her deck,

saw Webster, and ran down to help her.

Gentile and two men helped untie her and take the stuffing out of her mouth. One of the individuals had to use a knife to untie Webster. Webster was so afraid that she told the individuals to help her faster because she wanted to get out of there. After she was untied, within seconds, Appellant retuned in a vehicle, noticed Webster and rolled right past her. Appellant went to Tony's house. Shortly thereafter, Webster saw Appellant walking towards his house. Appellant looked directly at Webster, throwing up signs and looked like Snoop Dogg in one of his videos. Webster left the area and met up with her friend Kunta Kinte Patterson. She explained to him what just happened and he immediately called the police.

When officers arrived Webster explained what happened. Webster had a bruise on her lip and injuries on her legs.

The next day or soon thereafter the incident Webster went to the UMC. Webster told the Sexual Assault Nurse Examiner that Appellant put the broom between her butt cheeks. She told Detective Ryland, a female detective, that her rectum felt sore. She also told Detective Ryland and another female detective that the broomstick went between the two butt cheeks, but she was not sure if it went into her anus. She told them she was touched anally, that is why she scooted repeatedly over and over again. She also told them she was so scared during the beating that she urinated herself.

Debra Fox (hereinafter "Fox") testified that Yancy, who lived with Gentile babysat Fox's four-year-old daughter while Fox worked. On March 10, 2015, Fox dropped her daughter off with Yancy in the early afternoon. After she dropped the baby off, Fox went downstairs and saw a tied-up lady, later identified as Webster, come running up to her yelling for help. Fox saw that Webster's arms were tied, her pants were pulled down, her legs were tied, and she had something wrapped around her mouth. Fox began to help her. Webster said, "please help me," and "please call the cops," in a panicked and scared voice.

Carl Taylor (hereinafter "Taylor"), who lived on 1204 North Jones, Apartment A lived near Gentile and Yancy. He also knew Appellant and Webster. On March 10, 2015, he saw Webster hopping, jumping, trying to get away and rolling. She was rolling away from

Appellant's apartment. Webster was tied up and her shorts were down to her ankles. Her mouth was wrapped with tape, with pads stuffed in her mouth and a pillowcase over her head. Gentile began cutting the wires and plastic off to free Webster.

Before he saw Webster come out of the apartment, he saw a black male, who was about 5'11'' to 6', with dark skin, weighing about 250 pounds. He also saw three women come out of the apartment. He had seen the black male before with Appellant. Id. However, he had never seen the females before. The four people left in a burgundy car with dark tinted windows. Then he saw Appellant come out of the apartment after the four people had left. Id. Appellant left in a car. He testified that he had previously seen Appellant drive in a small white four-door car. Appellant later in the day came back to the apartment complex in the white car. Appellant cleaned up the wire and the stuff that Taylor and Gentile had taken off of Webster, and Appellant threw it in the dumpster near his apartment.

Detective Elias Cardenas (hereinafter "Cardenas") was a robbery detective for the Las Vegas Metropolitan Police Department (LVMPD) on March 10, 2015. Cardenas interviewed Joanique in his vehicle at 1108 North Jones, near Appellant's apartment. Cardenas called a phone number for Appellant that he obtained. Appellant answered the phone and Cardenas asked him if he knew Webster. Appellant acknowledged knowing her. Cardenas asked him to come back to the crime scene and Appellant decided not to. Cardenas then participated in serving a search warrant on Appellant's apartment.

Bradley Grover, a senior crime scene analyst testified that on March 10, 2015, he took photos of Webster when he arrived on the scene. One of the photos depicted bruising on Webster's inner and lower lips. She had abrasions on her knees and shins. He testified that she complained of pain in her wrists and forearms and that there may be have some redness on her wrists.

He then went to 900 North Jones. He collected what he described as a fitted bed sheet and tape. Then Grover went to 1108 North Jones. Grover noticed there was a dumpster in the parking lot between buildings 1108 and 1112 and he collected a dark gray hose and black twine from the dumpster. He also collected a shoe in the parking lot east of Building 112. The

dumpster was in front of Appellant's apartment approximately 20-30 feet away. Inside the apartment, Grover found a shotgun, tape, broom, and black and brown leather belt. He also found some wadded up tissue or toilet paper. He recovered a prescription pill bottle with Appellant's name on it. He also found Appellant's ID in the east dresser in the northwest bedroom.

Grover then went to 6300 West Lake Mead, Building 16 at apartment 1011 where he located a Nissan Sentra. He recovered a blue LA hat on a shelf in the southeast bedroom. He also recovered an ID with Appellant's name on it. Grover swabbed the barrel of the shotgun and the end of the broomstick to later be tested for DNA.

Jeri Dermanelian (hereinafter "Dermanelian"), a sexual assault nurse examiner, performed a sexual assault evaluation on Webster. Webster chose to have the fourth examination which was the full forensic sexual assault exam, including requests for the criminal investigation of a sexual assault and the medical component. She testified that Webster told her she was a victim of a sexual assault, that she had been blindfolded and hogtied. Webster indicated that there was a possibility that a broomstick was inserted into her rectum. She explained she was blindfolded. Webster was unaware if there was sperm on her body. When asked if she passed out or lost consciousness during the assault, Webster stated she had. When shown a picture of the bruise on Webster's mouth, Dermanelian testified the injury was similar to other injuries she had observed where guns had been put into people's mouths. Webster did not have any marks on her wrists or ankles, but Dermanelian testified that was not abnormal considering it had been 50 hours since the incident. When shown pictures of Webster's legs that were taken right after the attack, she described there were abrasions on both patellas and kneecaps, and other marks on Webster's legs she would have been interested in looking at had those injuries been apparent when Webster came in.

Dermanelian classified the injuries she was shown in court as superficial, meaning they would not last long. During the vaginal examination she did not find signs of blunt force trauma. She explained that because she had seen Webster two days after the assault, it was likely that any injuries had healed such that she could not observe them. During the rectal

exam there were no injuries of blunt force trauma. She also testified that based on her past experience it did not appear that Webster was under the influence of a controlled substance.

Cassandra Robertson, a forensic scientist in the DNA biology section at the LVMPD lab, testified that she was asked to examine a swab from the end of a barrel of an H&R shotgun, for DNA along with three reference standards. She was asked to run the three reference standards for Webster, Gentile, and Appellant. The swab that came from the end of the shotgun barrel was consistent with Webster.

ARGUMENT

I. GROUND TWO IS PROCEDURALLY BARRED

A. Any Substantive Claims Were Waived

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).

Further, substantive claims are beyond the scope of habeas and waived. NRS 34.724(2)(a); Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). A defendant may only escape these procedural bars if they meet the burden of establishing good cause and prejudice:

> 3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
>
> (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
>
> (b) Actual prejudice to the petitioner.

NRS 34.810(3). Where a defendant does not show good cause for failure to raise claims of error upon direct appeal, the district court is not obliged to consider them in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975).

Petitioner brings substantive claims that should have been raised on direct appeal. In Ground Two, Petitioner alleges that his conviction is based upon insufficient evidence. Pet. at 7-7A. Such a substantive claim is waived for not bringing it on appeal. Further, to the extent this Court would read Ground Three as a claim of prosecutorial misconduct, such a claim is substantive and should have been raised on direct appeal. Therefore, unless Petitioner can demonstrate good cause and prejudice, these claims were waived pursuant to NRS 34.810

B. Petitioner Has Not Demonstrated Good Cause Sufficient to Overcome the Procedural Bar

A showing of good cause and prejudice may overcome procedural bars. "To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. In order to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and

substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

A petitioner raising good cause to excuse procedural default rules must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869-70, 34 P.3d at 525-26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. State v. District Court (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005). See also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Here, Petitioner has not even alleged, must less shown, good cause to overcome the procedural bar.[1] All the relevant facts and law necessary to present this claim were know to petitioner at the time he raised his direct appeal. As such, there is no good cause sufficient to over the procedural bar, and this ground should be denied.[2]

II. PETITIONER'S COUNSEL WAS NOT INEFFECTIVE

Grounds One, Three, and Four are all ineffective assistance of counsel claims. 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

[1] Petitioner also cannot show prejudice as this claim is without merit. See Section II(A).
[2] While the instant Petition was not filed until May 27, 2020 (eighteen days after the Petition became untimely), the State notes that the Clerk of the Court stamped the Petition as being received on April 20, 2020. As such, the Petition was received within the one (1) year time period required by statute.

(1993).

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

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices

between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

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

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

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS

34.735(6) states in relevant part, "[Petitioner] must allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

A. Counsel Was Not Ineffective for Not Moving to Dismiss the Complaint

In Ground One, Petitioner alleges that Counsel was Ineffective for failing to move to dismiss the complaint on the basis of insufficient evidence produced at trial. Pet. at 6. 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). The remedy for a finding of insufficient evidence presented at trial is not a striking of the indictment, but an acquittal. Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (stating: "where there is insufficient evidence to support a conviction, the trial judge may set aside a jury verdict of guilty and enter a judgment of acquittal."); NRS 175.381. The State interprets Petitioner's claim to therefore be that counsel was ineffective for not moving for a judgment of acquittal under NRS 175.381.

"In reviewing a claim of insufficient evidence, the relevant inquiry is 'whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Origel-Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998), (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)). "Clearly, this standard does not allow the district court to act as a "thirteenth juror" and reevaluate the evidence and the credibility of the witnesses." Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996).

A Motion for Acquittal due to insufficiency of the evidence would have been futile in the instant case. As the Nevada Supreme Court noted when affirming Petitioner's sentence, there was "overwhelming evidence that supported the jury's verdict, which included eyewitness and independent witness testimony, DNA evidence, physical injuries on the victim, and recovery of items used to bind and gag the victim." Order of Affirmance, at 3. Therefore, such a motion would have been futile. Under Ennis, counsel has no obligation to raise futile motions.

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Further, even if counsel's decision not to raise this motion had been unreasonable, Petitioner was not prejudiced. As the Nevada Supreme Court held when affirming Petitioner's conviction, there was such overwhelming evidence of Petitioners guilt introduced at trial that it was not plain error for the Court to allow alleged prior bad act evidence to be admitted. Given that the standard for prejudice under ineffective assistance of counsel is the same as the standard for plain error review, Petitioner cannot then demonstrate that he was prejudiced by his counsel's actions. See Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008). As such, Petitioner's counsel cannot be found ineffective and this claim should be denied.

Likewise, Petitioner's related claim under Ground Two that his conviction is invalid because of insufficient evidence is similarly without merit. Petitioner's chief complaint seems to be that there was no evidence admitted as to his intent sufficient to warrant a conviction for first degree kidnapping. However, first degree kidnapping is defined as "a person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps, or carries away a person … for the purpose of committing sexual assault… or for the purpose of killing the person or inflicting substantial bodily harm." NRS 200.310. Further, the State admitted evidence that Petitioner hogtied the victim, beat her, and placed a shotgun in her mouth. Jury Trial Day 3: June 21, 2017, at 33-36, filed February 13, 2018. Petitioner further angled a broomstick towards the victim's anal opening, as if to stick the broom handle in the victim's anal opening. Id. As such, and consistent with the Supreme Court of Nevada's holding, there is no doubt that sufficient evidence was introduced against Petitioner to support his conviction of first-degree kidnapping.

As such, this claim is without merit. Since this claim is without merit, Petitioner would not be prejudiced by its denial. Since Petitioner would not be prejudiced by this claims denial, nor has he shown good cause sufficient to overcome the procedural bars (see Section I(B)), this claim is must be denied under NRS 34.810.

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B. Petitioner's Counsel Was Not Ineffective for Not Objecting to the Prosecutor's Comments

Petitioner next argues that his counsel was ineffective for failing to object to various instances of alleged prosecutorial misconduct. Pet at 8- 8D. However, none of the instances mentioned by Petitioner amount to prosecutorial misconduct, and there was therefore nothing for counsel to object to.

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).

In resolving claims of prosecutorial misconduct, the Court undertakes a two-step analysis: determining whether the comments were improper; and deciding whether the comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172, 1188. The Court views the statements in context, and will not lightly overturn a jury's verdict based upon a prosecutor's statements. Byars v. State, 130 Nev. 848, 865 (2014). Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 365 (2001).

With respect to the second step, this Court will not reverse if the misconduct was harmless error. Valdez, 124 Nev. at 1188. The proper standard of harmless error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188-89. Misconduct may be constitutional if a prosecutor comments on the exercise of a constitutional right, or the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. 124 Nev. at 1189 (quoting Darden v. Wainright, 477 U.S. 168, 181 (1986)). When the misconduct is of constitutional dimension, this Court will reverse unless the State demonstrates that the error did not contribute to the verdict. Id. 124 Nev. at 1189. When the misconduct is not of constitutional dimension, this Court "will reverse only if the error substantially affects the jury's verdict." Id.

The State is permitted to offer commentary on the evidence that is supported by the record. Rose v. State, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007). In Rose, the prosecutor called the appellant a predator for using his daughter as a lure to reach other victims, but the Nevada Supreme Court accepted it as appropriate commentary supported by the evidence and as insufficiently prejudicial to warrant relief. Rose, 123 Nev. at 209–10, 163 P.3d at 418–19.

Further, the State may respond to defense theories and arguments. Williams v. State, 113 Nev. 1008, 1018-19 (1997). This includes commenting on a defendant's failure to substantiate his theory. Colley v. State, 98 Nev. 14, 16 (1982); See also Bridges v. State, 116 Nev. 752, 762 (2000), citing State v. Green, 81 Nev. 173, 176 (1965) ("The prosecutor had a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows."). Further, if the defendant presents a theory of defense, but fails to present evidence thereon, the State may comment upon the failure to support the supposed theory. Evans v. State, 117 Nev. 609, 630-631 (2001); see McNelton v. State, 115 Nev. 396, 408–09 (1999).

Petitioner objects to four different statements as alleged prosecutorial misconduct that his counsel should have objected to. Petitioner first takes issue with the State claiming during closing argument that: "The purpose was to either inflict substantial bodily harm or kill her -- so first – first degree kidnapping was met." Pet. at 8; Jury Trial Day 6: June 26, 2017, at 118, filed February 13, 2018. In context, the State's statement was as follows:

> All of this demonstrates the fact that she was hogtied, kidnapped. So for what purpose? Was it to inflict substantial bodily harm? To kill her? To sexually assault? You heard the defendant was angry she said. When he brought her into the apartment, everything was fine, and then all of a sudden his body language changed. His demeanor changed. He got loud. He got mean, and ultimately she was beat. She was beat with a belt. She was beat with a broom. She was beat with a – or she was stunned. She had the shotgun in her mouth. What do you think the purpose was? The purpose was to either inflict substantial bodily harm or kill her, and then you heard about the broomstick. So first -- first-degree kidnapping was met.

Jury Trial Day 6: June 26, 2017, at 118, filed February 13, 2018. The state's argument was clearly a commentary on the evidence adduced at trial. The State was arguing that Petitioner's intent could be deduced from the actions he undertook while he had the victim hogtied. Such

a commentary is proper during closing arguments, and is not prosecutorial misconduct.

Petitioner next takes issue with the State allegedly offering an incorrect definition of Battery with Intent to Commit Sexual Assault. Petitioner references page 125 and 128 of Jury Trial Day 6: June 26, 2017 and claims that the State defined Battery With Intent to Commit Sexual Assault as

> The fact that she is physically restrained substantially increased her risk of potentially death or substantial bodily harm because she can't get out.
>
> …
>
> So the putting her down, whacking her with the broomstick and the putting the broomstick up at her butt, Battery With the Intent to Commit a Sexual Assault.

Pet. at 8-A; Jury Trial Day 6: June 26, 2017 at 124-25, 128 respectively.

In regards to the first statement, the State was not even discussing the crime of Battery With Intent to Commit Sexual Assault. The State was arguing that Petitioner could be found guilty of both Kidnapping in the first-degree and Sexual Assault if the victim is physically restrained, and such restraint substantially increases the risk of harm. Jury Trial Day 6: June 26, 2017 at 124-25. Essentially, the State was arguing that given the facts of the case, the jury could find that Petitioner had committed kidnapping in the first degree by substantially increasing the risk of substantially bodily harm, and also find that Petitioner had committed Sexual Assault by penetrating Petitioner with a broomstick. Id. Further, nowhere in the excerpt does the State define any of these offenses. In fact, the State made regular mention to the jury instructions that properly defined these offenses. Id. As such, Petitioner's notion that the State incorrectly defined Battery with Intent to Commit Sexual Assault is belied by the record.

In regards to the second statement, the State was not defining Battery With Intent to Commit Sexual Assault. In fact, the State specifically referenced the jury to Jury Instruction 17 for a statement of the law regarding this crime. Id. at 128. The State was arguing that these were the actions that constituted Battery with Intent to Commit Sexual Assault. Given that proof of these actions had been admitted at trial, the State was entitled to argue that the evidence satisfied the elements of the crime charged.

Petitioner further takes issue with the State claiming "the fact that she is physically restrained substantially increases her risk of potentially death or substantial bodily harm." Pet. at 8-B; Jury Trial Day 6: June 26, 2017 at 124-25. Such a statement was clearly a commentary on the evidence. Pursuant to Rose v. State, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007), such a statement does not establish prosecutorial misconduct.

Given that trial counsel has the ultimate responsibility of deciding what objections to make, and that none of the statements Petitioner here complains of constituted prosecutorial misconduct, it was not unreasonable for Petitioner's counsel to not object to these statements.

Further, even if counsel's decision had been unreasonable, Petitioner was not prejudiced. As the Nevada Supreme Court held when affirming Petitioner's conviction, there was such overwhelming evidence of Petitioners guilt introduced at trial that it was not plain error for the Court to allow alleged prior bad act evidence to be admitted. Given that the standard for prejudice under ineffective assistance of counsel is the same as the standard for plain error review, Petitioner cannot then demonstrate that he was prejudiced by his counsel's actions. See Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008). As such, Petitioner's counsel cannot be found ineffective and this claim should be denied.

C. Counsel Was Not Ineffective for Not Requesting a Jury Instruction

Petitioner further argues in Ground Three that his counsel was ineffective for not requesting a jury instruction defining the necessary elements of substantial bodily harm. Pet at 8-C. Petitioner alleges that it was unreasonable for his counsel not to request an instruction reflecting this standard because the State had charged him with Battery with Intent to Commit Sexual Assault, which the State could not prove without showing that the crime resulted in substantial bodily harm. Id.

Such a claim is not true. In fact, a review of NRS 200.400(4)(b)-(c) reveals that an individual may be convicted of Battery with Intent to Commit Sexual Assault even when no substantial bodily harm occurs. In fact, the charging document reflects that Petitioner was only charged with Battery with Intent to Commit Sexual Assault, not Battery with Intent to Commit Sexual Assault Resulting in Substantial Bodily Harm. See Indictment. Petitioner's sentence

for this crime (life with the eligibility to parole after two (2) years) also reflects that he was only convicted of Battery with Intent to Commit Sexual Assault, not Battery with Intent to Commit Sexual Assault Resulting in Substantial Bodily Harm. See NRS 200.400(4); Recorder's Transcript Re: Sentencing, at 8, October 19, 2017. As such, there was no reason for Petitioner's counsel to request the jury instruction in question. Therefore, this decision was not an unreasonable one.

Further, even if counsel's decision had been unreasonable, Petitioner was not prejudiced. As the Nevada Supreme Court held when affirming Petitioner's conviction, there was such overwhelming evidence of Petitioners guilt introduced at trial that it was not plain error for the Court to allow alleged prior bad act evidence to be admitted. Given that the standard for prejudice under ineffective assistance of counsel is the same as the standard for plain error review, Petitioner cannot then demonstrate that he was prejudiced by his counsel's actions. See Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008). As such, Petitioner's counsel cannot be found ineffective and this claim should be denied.

D. Counsel Did Not Fail to Subject the Case to a Meaningful Adversary Process

Defendant next argues that counsel was ineffective for failing to (1) do any pretrial investigation; (2) failing to file the following motions: Motion to Strike Aggravators, Motion to Exclude Argument Constituting Prosecutorial Misconduct; Motion to Suppress Evidence; Motion in Limine to Preclude Admission of Prejudicial Evidence; Motion to Dismiss For Insufficient Information Charging Petitioner; (3) failure to object to damaging and prejudicial statements during closing arguments; and (4) failure to call any witnesses on Petitioner's behalf.

Each of these allegations is a bare and naked claim suitable only for summary dismissal. In regard to the failure to investigate claim, Petitioner does not even allege, much less show, what a better investigation would have turned up. Pursuant to Molina v. State, such a claim cannot support post-conviction relief. 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (stating that 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).

Regarding the various motions Petitioner alleges his counsel should have filed, Petitioner has neither alleged nor shown that any of these motions would have been successful. For some of these motions, Petitioner has only offered bare and naked assertions that counsel not filing them constitutes ineffective assistance of counsel. For example, Petitioner claims that his counsel should have filed a motion to suppress evidence. But he does not even articulate what evidence he claims should have been suppressed. On other motions, there was clearly no legal grounds to bring the motion (such as the motion to exclude argument constituting prosecutorial misconduct as more fully articulated in Section II(C)). Given that Petitioner has not alleged any grounds claiming why these Motions would have been successful, counsel's decision not to file them cannot constitute ineffective assistance of counsel.

Regarding counsel's alleged failure to object to prejudicial statements, Petitioner has not identified what statements he now complains of. To the extent he is referring to the statements he alleged constituted prosecutorial conduct under Ground Three, the state has already demonstrated that counsel cannot be found ineffective for not objecting to these statements. As such, this claim is either meritless for the reasons articulated in Section II(C), or this claim is a bare and naked allegation suitable only for summary dismissal under Hargrove. 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Similarly, Petitioner claim that counsel was ineffective for failing to call any witnesses on his behalf is a bare and naked allegation suitable only for summary dismissal. Petitioner does not articulate what witnesses were available to be called, why they should have been called, or how they would have assisted his case.

Further, even if Petitioner had alleged enough facts for this Court to consider whether it was unreasonable for counsel to engage in these courses of conduct, Petitioner would be unable to establish that any of these decisions would have prejudiced him at trial. As the Nevada Supreme Court held when affirming Petitioner's conviction, there was such overwhelming evidence of Petitioners guilt introduced at trial that it was not plain error for

the Court to allow alleged prior bad act evidence to be admitted. Given that the standard for prejudice under ineffective assistance of counsel is the same as the standard for plain error review, Petitioner cannot then demonstrate that he was prejudiced by his counsel's actions. See Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008). Therefore, counsel cannot be found ineffective for any of the reasons articulated in this section, and these claims should be denied.

III. THERE IS NO CUMULATIVE ERROR IN HABEAS REVIEW

Petitioner asserts a claim of cumulative error in the context of ineffective assistance of counsel. The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated; it is the State's position that they cannot. However, even if they could be, it would be of no moment as there was no single instance of ineffective assistance in Defendant's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Furthermore, Petitioner's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). A defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

Further, the factors articulated in Mulder do not warrant a finding of cumulative error. The issue of guilt in the instant case was not close. As the Nevada Supreme Court noted when it affirmed Petitioner's judgment of conviction, there was "overwhelming evidence that supported the jury's verdict." Order of Affirmance, at 3. In addition, the gravity of the crime charged was severe, as Petitioner was charged with multiple counts in connection with a first-degree kidnapping. Finally, there was no individual error in the underlying proceedings, and as such, there is no error to cumulate. Therefore, this claim should be denied.

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IV. PETITIONER'S MOTION TO WITHHOLD JUDGMENT SHOULD BE DENIED

Petitioner also filed a Motion to Withhold Judgment on Petition for Writ of Habeas Corpus. Petitioner claims that this Court should withhold judgment because he has not yet been able to complete and mail in his supplemental memorandum in support of writ of habeas corpus. Petitioner claims that this is due to being unable to access the law library due to being quarantined.

Pursuant to NRS 34.740, a petition for writ of habeas corpus must be "presented promptly" and examined expeditiously by the judge or justice to whom it is assigned." Further, Petitioner has not been granted leave to supplement his Petition. Pursuant to NRS 34.750, a supplement may be filed if counsel is appointed by the Court. However, except as otherwise stated in NRS 34.750, "[n]o further pleadings may be filed except as ordered by the court." NRS 34.750(5). Therefore, Petitioner is not even entitled to file a supplement to his Petition, let alone request this Court delay its lawful obligation to decide this matter expeditiously so that he may do so. As such, this Motion should be denied.

V. PETITIONER IS NOT ENTITLED TO COUNSEL

Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution…does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." McKague specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

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However, the Nevada Legislature has given courts the discretion to appoint post-conviction counsel so long as "the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily." NRS 34.750. NRS 34.750 reads:

> A petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily, the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
>
> (a) The issues are difficult;
>
> (b) The Defendant is unable to comprehend the proceedings; or
>
> (c) Counsel is necessary to proceed with discovery.

(emphasis added). Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel.

In the instant case, the factors articulated in NRS 34.750 do not merit appointing post-conviction counsel to Petitioner. First, the issues presented in this Petition are not difficult. All of Petitioner's claims are either bare and naked allegations suitable only for summary dismissal or fail as a matter of law. Second, Petitioner seems fully able to understand the current proceedings. Petitioner has filed multiple post-conviction motions illustrating that he is fully able to comprehend the current proceedings. Finally, counsel is unnecessary to proceed with discovery, as there is no need for an evidentiary hearing since all of Petitioner's claims are either bare and naked allegations or fail as a matter of law. Therefore, the factors articulated in NRS 34.750 do not weigh in favor of appointing Petitioner counsel and this motion should be denied.

VI. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.

> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
>
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the objective reasonableness of counsel's performance, not counsel's subjective state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

Here, Petitioner has offered no factual allegations that, even if true, would entitle him to relief. All of Petitioner's claims amount to either bare and naked allegations or arguments that counsel had the duty to file frivolous motions. Further, Petitioner is unable to overcome the fact that he cannot show he prejudiced by counsel's conduct on any of these grounds because the evidence of guilt admitted against him was overwhelming. See Order of Affirmance, at 3. As such, there in no need to expand the record, and Petitioner's request for an evidentiary hearing should be denied.

CONCLUSION

For the reasons set forth above, the court should deny Petitioner's Post-Conviction Petition for Writ of Habeas Corpus, Motion to Withhold Judgment, Motion for Appointment of Attorney, and Request for Evidentiary Hearing.

DATED this 6th day of July, 2020.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ James R. Sweetin*
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 6th day of JULY, 2020, to:

CALVIN ELAM, BAC#1187304
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NV 89070

BY */s/ Howard Conrad*
Secretary for the District Attorney's Office
Special Victims Unit

hjc/SVU

FFCO
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DISTRICT COURT
CLARK COUNTY, NEVADA

CALVIN ELAM,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: **A-20-815585-W**
C-15-305949-1

DEPT NO: ~~XXI~~ XV

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: **DECEMBER 1, 2020**
TIME OF HEARING: **1:45 PM**

THIS CAUSE having presented before the Honorable VALERIE ADAIR, District Judge, on the 1st day of December, 2020; Petitioner not present, proceeding IN PROPER PERSON; Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through JACOB VILLANI, Chief Deputy District Attorney; and having considered the matter, including briefs, transcripts, and documents on file herein, the Court makes the following Findings of Fact and Conclusions of Law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On April 17, 2015, Calvin Elam (hereinafter "Petitioner") was indicted by way of grand jury as follows: one (1) count of CONSPIRACY TO COMMIT KIDNAPPING (Category B Felony – NRS 200.310, 199.480 – NOC 50087); one (1) count of FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.310, 200.320, 193.165 – NOC 50055); one (1) count of ASSAULT WITH A DEADLY WEAPON (Category B Felony – NRS 200.471 – NOC 50201); one (1) count of UNLAWFUL USE OF AN ELECTRONIC STUN DEVICE (Category B Felony – NRS 202.357 – NOC 51508); one (1) count of BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT (Category A Felony – NRS 200.400.4 – NOC 50157); one (1) count of SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.364, 200.366, 193.165 – NOC 50097); one (1) count of ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.364, 200.366, 193.330, 193.165 – NOC 50121); and one (1) count of OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony – NRS 202.360 – NOC 51460).

Petitioner's jury trial started on June 19, 2017, and ended on June 27, 2017. The jury found Defendant guilty of Count 1— CONSPIRACY TO COMMIT KIDNAPPING (Category B Felony - NRS 200.310, 200.320, 199.480 - NOC 50087), guilty of Count 2—FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.310, 200.320, 193.165 - NOC 50055), Count 3—ASSAULT WITH A DEADLY WEAPON (Category B Felony - NRS 200.471 - NOC 50201), and Count 5— BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT (Category A Felony - NRS 200.400.4 – NOC 50157).

The jury found Petitioner not guilty of Count 4—UNLAWFUL USE OF AN ELECTRONIC STUN DEVICE (Category B Felony - NRS 202.357 - NOC 51508), Count 6— SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.364, 200.366, 193.165 - NOC 50097), and Count 7— ATTEMPT SEXUAL ASSAULT

WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.364, 200.366, 193.330, 193.165 - NOC 50121). The State requested that the District Court conditionally dismiss Count 8— OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony - NRS 202.360 - NOC 51460).

On October 19, 2017, Petitioner was adjudged guilty and sentenced as follows: as to Count 1 a minimum of twenty-four (24) months and a maximum of seventy-two (72) months in the Nevada Department of Corrections; as to Count 2—life with the eligibility for parole after five (5) years with a consecutive term of a minimum of sixty (60) months and a maximum of one hundred eighty (180) months for the use of a deadly weapon in the Nevada Department of Corrections to run concurrent with count 1; as to Count 3—to a minimum of twelve (12) months and a maximum of seventy-two (72) months in the Nevada Department of Corrections to run consecutive to Count 2; as to Count 5—life with the eligibility to parole after two (2) years to run consecutive to Count 3 in the Nevada Department of Corrections. Petitioner received nine hundred twenty-eight (928) days credit for time served. Counts 4, 6, and 7 were dismissed and Count 8 was conditionally dismissed. Additionally, the Court ordered a special sentence of lifetime supervision to commence upon release from any term of probation, parole, or imprisonment. Further, Petitioner was ordered to register as a sex offender in accordance with NRS 199D.460 within 48 hours after release.

Petitioner's Judgment of Conviction was filed on October 31, 2017.

On November 13, 2017, Petitioner filed a Notice of Appeal. On April 12, 2019, the Nevada Supreme Court affirmed Petitioner's judgment of conviction. Remittitur issued on May 7, 2019.

On May 27, 2020, Petitioner filed a Petition for Writ of Habeas Corpus. Also on May 27,2020, Petitioner filed a Motion to Withdraw Judgment on Petition for Writ of habeas Corpus and Motion for Appointment of Attorney. On July 6, 2020, the State filed its Response. On August 18, 2020, the Court granted Petitioner's Motion to Withdraw Judgment on Petition for Writ of Habeas Corpus, and allowed Petitioner to file a Supplemental Petition by October 20, 2020. Also on August 18, 2020, the Court denied Petitioner's Motion for Appointment of

Counsel without prejudice, and articulated that if issues were unduly complex counsel appointment would be considered. Petitioner never filed a Supplemental Petition. On December 1, 2020, the Court denied Petitioner's Petition. The Court's written Order follows.

STATEMENT OF THE FACTS

On March 10, 2015, Arrie Webster (hereinafter "Webster") visited Annie Gentile (hereinafter "Gentile") and Pamela Yancy (hereinafter "Yancy") her close friends and neighbors. Webster's friendship with Gentile was closer than with Yancy. When she went to visit she brought her puppy, Payton. Gentile also had a dog and Webster would take her dog to Gentile's house so the dogs could play every other day. Gentile lived off of Jones and Carmen upstairs. Webster and Gentile were out on the deck while the dogs were socializing. Webster saw Petitioner and he said, "what's up" and motioned for her to come over. He was downstairs in front of his apartment when Webster saw him.

Webster did not know Petitioner's name was Calvin because she called him "cuz" because he was in a dating relationship with Webster's cousin, Joanique, by marriage. She knew Petitioner only for a few months before the incident took place. When he motioned for her to come over, Webster went because she wanted to explain the situation that occurred with his pit bull puppies that went missing.

Previously, while Webster was visiting her friend Edward Brown, who lived in the building next to Petitioner, she discovered Petitioner's girlfriend looking for the puppies. When Webster saw Petitioner's girlfriend looking for the puppies she decided to help her look for them, but they could not find them and everyone went their separate ways. Webster understood that Petitioner was upset and believed someone had taken his puppies so when he motioned for her to come over she wanted to explain that she had nothing to do with the missing puppies.

Webster left her dog Payton with Gentile and Yancy and went and talked with Petitioner. As she walked up to the apartment, he was already in the apartment, so they started talking in the kitchen. She began to explain that she heard what had happened to the puppies and told Petitioner she did not have anything to do with it. Petitioner insisted that she did have

something to do with it and Webster explained again that she did not. Webster testified that Petitioner's voice changed in the tone. Petitioner began to get aggressive, loud, and scary. He told her if she did not have anything to do with it, to not worry about it, but told her to turn around and get on her knees. She asked him if he was serious, but could tell by his voice that he was serious so she turned around and got on her knees.

Petitioner then tied her up with electrical cords and tape, stuffed her mouth with fabric, covered her eyes up, and then put a pillow case over her head. Her arms were tied behind her back and to her feet. Before he put the stuffing in her mouth, he placed a black shotgun in her mouth, but she closed her mouth and he lifted her chin up saying "bitch it's not a game." Petitioner beat her with a belt multiple times, pulled her pants down, and took the broom and angled it as to stick it in her anus. The entire time he was beating her, he kept saying she had something to do with the missing dogs. 3 He then made a phone call, and within minutes there were three women and another male that came to the door. During the call Webster heard him saying, "I have one of them here. Come over." The individuals that came in starting videoing what was taking place. Webster started to hear laughter, and then Petitioner pulled out a taser and came extremely close to her face with the taser and then tased her. There was two or three black males and one black female.

Webster described Petitioner as a tall and lighter skinned man with a medium build. Webster believed Petitioner was going to stick the broomstick in her anus, she was so distraught that she blacked out. The beating took place over a couple of hours. Petitioner touched Webster with the broomstick on her buttocks area. While Petitioner was doing this, Webster had her chest on the floor because she had fallen from her knees. She repeatedly told Petitioner she had nothing to do with the missing dogs. The broomstick touched her behind in several places and Webster testified "at one point I just braced myself for him to just do it, and then I just blanked out." She believed Petitioner was going to stick the broomstick in her anus. If he did do it, she did not remember because she passed out.

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Petitioner pulled Webster's shorts and underwear down and started beating her with a leather belt. Webster heard Petitioner and the other man say things along the lines of "[w]e're going to put the bitch in the trunk and—and it's not just going to happen to you. We're going to go over there and get everybody else because the puppies are going to come up." At one point during the beating, Webster played dead so they would stop beating and tasing her and she heard them say, "is that bitch dead?" She then heard them say "wake her up, tase her again."

Petitioner made a phone call about picking kids up from school. She realized the individuals were gone because they did not respond when she said something. Webster was then able to roll and scoot herself to the door and somehow got to her knees. She was able to unlock the door and threw herself outside and onto the pavement. Gentile was still on her deck, saw Webster, and ran down to help her.

Gentile and two men helped untie her and take the stuffing out of her mouth. One of the individuals had to use a knife to untie Webster. Webster was so afraid that she told the individuals to help her faster because she wanted to get out of there. After she was untied, within seconds, Petitioner retuned in a vehicle, noticed Webster and rolled right past her. Petitioner went to Tony's house. Shortly thereafter, Webster saw Petitioner walking towards his house. Petitioner looked directly at Webster, throwing up signs and looked like Snoop Dogg in one of his videos. Webster left the area and met up with her friend Kunta Kinte Patterson. She explained to him what just happened and he immediately called the police. When officers arrived Webster explained what happened. Webster had a bruise on her lip and injuries on her legs.

The next day or soon thereafter the incident Webster went to the UMC. Webster told the Sexual Assault Nurse Examiner that Petitioner put the broom between her butt cheeks. She told Detective Ryland, a female detective, that her rectum felt sore. She also told Detective Ryland and another female detective that the broomstick went between the two butt cheeks, but she was not sure if it went into her anus. She told them she was touched anally, that is why she scooted repeatedly over and over again. She also told them she was so scared during the

beating that she urinated herself.

Debra Fox (hereinafter "Fox") testified that Yancy, who lived with Gentile babysat Fox's four-year-old daughter while Fox worked. On March 10, 2015, Fox dropped her daughter off with Yancy in the early afternoon. After she dropped the baby off, Fox went downstairs and saw a tied-up lady, later identified as Webster, come running up to her yelling for help. Fox saw that Webster's arms were tied, her pants were pulled down, her legs were tied, and she had something wrapped around her mouth. Fox began to help her. Webster said, "please help me," and "please call the cops," in a panicked and scared voice.

Carl Taylor (hereinafter "Taylor"), who lived on 1204 North Jones, Apartment A lived near Gentile and Yancy. He also knew Petitioner and Webster. On March 10, 2015, he saw Webster hopping, jumping, trying to get away and rolling. She was rolling away from Petitioner's apartment. Webster was tied up and her shorts were down to her ankles. Her mouth was wrapped with tape, with pads stuffed in her mouth and a pillowcase over her head. Gentile began cutting the wires and plastic off to free Webster.

Before he saw Webster come out of the apartment, he saw a black male, who was about 5'11'' to 6', with dark skin, weighing about 250 pounds. He also saw three women come out of the apartment. He had seen the black male before with Petitioner. Id. However, he had never seen the females before. The four people left in a burgundy car with dark tinted windows. Then he saw Petitioner come out of the apartment after the four people had left. Id. Petitioner left in a car. He testified that he had previously seen Petitioner drive in a small white four-door car. Petitioner later in the day came back to the apartment complex in the white car. Petitioner cleaned up the wire and the stuff that Taylor and Gentile had taken off of Webster, and Petitioner threw it in the dumpster near his apartment.

Detective Elias Cardenas (hereinafter "Cardenas") was a robbery detective for the Las Vegas Metropolitan Police Department (LVMPD) on March 10, 2015. Cardenas interviewed Joanique in his vehicle at 1108 North Jones, near Petitioner's apartment. Cardenas called a phone number for Petitioner that he obtained. Petitioner answered the phone and Cardenas asked him if he knew Webster. Petitioner acknowledged knowing her. Cardenas asked him to

come back to the crime scene and Petitioner decided not to. Cardenas then participated in serving a search warrant on Petitioner's apartment.

Bradley Grover, a senior crime scene analyst testified that on March 10, 2015, he took photos of Webster when he arrived on the scene. One of the photos depicted bruising on Webster's inner and lower lips. She had abrasions on her knees and shins. He testified that she complained of pain in her wrists and forearms and that there may be have some redness on her wrists.

He then went to 900 North Jones. He collected what he described as a fitted bed sheet and tape. Then Grover went to 1108 North Jones. Grover noticed there was a dumpster in the parking lot between buildings 1108 and 1112 and he collected a dark gray hose and black twine from the dumpster. He also collected a shoe in the parking lot east of Building 112. The dumpster was in front of Petitioner's apartment approximately 20-30 feet away. Inside the apartment, Grover found a shotgun, tape, broom, and black and brown leather belt. He also found some wadded up tissue or toilet paper. He recovered a prescription pill bottle with Petitioner's name on it. He also found Petitioner's ID in the east dresser in the northwest bedroom.

Grover then went to 6300 West Lake Mead, Building 16 at apartment 1011 where he located a Nissan Sentra. He recovered a blue LA hat on a shelf in the southeast bedroom. He also recovered an ID with Petitioner's name on it. Grover swabbed the barrel of the shotgun and the end of the broomstick to later be tested for DNA.

Jeri Dermanelian (hereinafter "Dermanelian"), a sexual assault nurse examiner, performed a sexual assault evaluation on Webster. Webster chose to have the fourth examination which was the full forensic sexual assault exam, including requests for the criminal investigation of a sexual assault and the medical component. She testified that Webster told her she was a victim of a sexual assault, that she had been blindfolded and hogtied. Webster indicated that there was a possibility that a broomstick was inserted into her rectum. She explained she was blindfolded. Webster was unaware if there was sperm on her body. When asked if she passed out or lost consciousness during the assault, Webster stated

she had. When shown a picture of the bruise on Webster's mouth, Dermanelian testified the injury was similar to other injuries she had observed where guns had been put into people's mouths. Webster did not have any marks on her wrists or ankles, but Dermanelian testified that was not abnormal considering it had been 50 hours since the incident. When shown pictures of Webster's legs that were taken right after the attack, she described there were abrasions on both patellas and kneecaps, and other marks on Webster's legs she would have been interested in looking at had those injuries been apparent when Webster came in.

Dermanelian classified the injuries she was shown in court as superficial, meaning they would not last long. During the vaginal examination she did not find signs of blunt force trauma. She explained that because she had seen Webster two days after the assault, it was likely that any injuries had healed such that she could not observe them. During the rectal exam there were no injuries of blunt force trauma. She also testified that based on her past experience it did not appear that Webster was under the influence of a controlled substance.

Cassandra Robertson, a forensic scientist in the DNA biology section at the LVMPD lab, testified that she was asked to examine a swab from the end of a barrel of an H&R shotgun, for DNA along with three reference standards. She was asked to run the three reference standards for Webster, Gentile, and Petitioner. The swab that came from the end of the shotgun barrel was consistent with Webster.

ANALYSIS

I. GROUND TWO IS PROCEDURALLY BARRED

A. Any Substantive Claims Were Waived

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).

Further, substantive claims are beyond the scope of habeas and waived. NRS 34.724(2)(a); Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). A defendant may only escape these procedural bars if they meet the burden of establishing good cause and prejudice:

> 3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
>
> (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
>
> (b) Actual prejudice to the petitioner.

NRS 34.810(3). Where a defendant does not show good cause for failure to raise claims of error upon direct appeal, the district court is not obliged to consider them in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975).

Petitioner brings substantive claims that should have been raised on direct appeal. In Ground Two, Petitioner alleges that his conviction is based upon insufficient evidence. Pet. at 7-7A. The Court finds that such a substantive claim is waived for not bringing it on appeal. Further, to the extent Ground Three is construed as a claim of prosecutorial misconduct, such

a claim is substantive and should have been raised on direct appeal. Therefore, the Court finds that unless Petitioner can demonstrate good cause and prejudice, these claims were waived pursuant to NRS 34.810.

B. Petitioner Has Not Demonstrated Good Cause Sufficient to Overcome the Procedural Bar

A showing of good cause and prejudice may overcome procedural bars. "To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. In order to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

A petitioner raising good cause to excuse procedural default rules must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869-70, 34 P.3d at 525-26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. State v. District Court (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005). See also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Here, the Court finds Petitioner has not even alleged, must less shown, good cause to overcome the procedural bar.[1] All the relevant facts and law necessary to present this claim were known to petitioner at the time he raised his direct appeal. As such, there is no good cause sufficient to over the procedural bar, and this ground is denied.

II. PETITIONER'S COUNSEL WAS NOT INEFFECTIVE

Grounds One, Three, and Four are all ineffective assistance of counsel claims. The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

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

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

[1] Petitioner also cannot show prejudice as this claim is without merit. See Section II(A).

competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

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

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

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

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

A. Counsel Was Not Ineffective for Not Moving to Dismiss the Complaint

In Ground One, Petitioner alleges that Counsel was Ineffective for failing to move to dismiss the complaint on the basis of insufficient evidence produced at trial. Pet. at 6. 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). The remedy for a finding of insufficient evidence presented at trial is not a striking of the indictment, but an acquittal. Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (stating: "where there is insufficient evidence to support a conviction, the trial judge may set aside a jury verdict of guilty and enter a judgment of acquittal."); NRS 175.381. The Court interprets Petitioner's claim to therefore be that counsel was ineffective for not moving for a judgment of acquittal under NRS 175.381.

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"In reviewing a claim of insufficient evidence, the relevant inquiry is 'whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Origel-Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998), (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)). "Clearly, this standard does not allow the district court to act as a "thirteenth juror" and reevaluate the evidence and the credibility of the witnesses." Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996).

The Court finds that a Motion for Acquittal due to insufficiency of the evidence would have been futile in the instant case. As the Nevada Supreme Court noted when affirming Petitioner's sentence, there was "overwhelming evidence that supported the jury's verdict, which included eyewitness and independent witness testimony, DNA evidence, physical injuries on the victim, and recovery of items used to bind and gag the victim." Order of Affirmance, at 3. Therefore, such a motion would have been futile. Under Ennis, counsel has no obligation to raise futile motions.

The Court further finds that even if counsel's decision not to raise this motion had been unreasonable, Petitioner was not prejudiced. As the Nevada Supreme Court held when affirming Petitioner's conviction, there was such overwhelming evidence of Petitioners guilt introduced at trial that it was not plain error for the Court to allow alleged prior bad act evidence to be admitted. Given that the standard for prejudice under ineffective assistance of counsel is the same as the standard for plain error review, Petitioner cannot then demonstrate that he was prejudiced by his counsel's actions. See Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008). As such, Petitioner's counsel cannot be found ineffective and this claim is denied.

Likewise, the Court finds that Petitioner's related claim under Ground Two that his conviction is invalid because of insufficient evidence is similarly without merit. Petitioner's chief complaint seems to be that there was no evidence admitted as to his intent sufficient to warrant a conviction for first degree kidnapping. However, first degree kidnapping is defined as "a person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals,

kidnaps, or carries away a person … for the purpose of committing sexual assault… or for the purpose of killing the person or inflicting substantial bodily harm." NRS 200.310. The State admitted evidence that Petitioner hogtied the victim, beat her, and placed a shotgun in her mouth. Jury Trial Day 3: June 21, 2017, at 33-36, filed February 13, 2018. Petitioner further angled a broomstick towards the victim's anal opening, as if to stick the broom handle in the victim's anal opening. Id. As such, and consistent with the Supreme Court of Nevada's holding, there is no doubt that sufficient evidence was introduced against Petitioner to support his conviction of first-degree kidnapping.

As such, this claim is without merit. Since this claim is without merit, Petitioner would not be prejudiced by its denial. Since Petitioner would not be prejudiced by this claims denial, nor has he shown good cause sufficient to overcome the procedural bars (see Section I(B)), this claim is denied under NRS 34.810.

B. Petitioner's Counsel Was Not Ineffective for Not Objecting to the Prosecutor's Comments

Petitioner next argues that his counsel was ineffective for failing to object to various instances of alleged prosecutorial misconduct. Pet at 8- 8D. However, the Court finds that none of the instances mentioned by Petitioner amount to prosecutorial misconduct, and there was therefore nothing for counsel to object to.

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).

In resolving claims of prosecutorial misconduct, the Court undertakes a two-step analysis: determining whether the comments were improper; and deciding whether the comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172, 1188. The Court views the statements in context, and will not lightly overturn a jury's verdict based upon a prosecutor's statements. Byars v. State, 130 Nev. 848, 865 (2014). Normally, the

defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 365 (2001).

With respect to the second step, this Court will not reverse if the misconduct was harmless error. Valdez, 124 Nev. at 1188. The proper standard of harmless error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188-89. Misconduct may be constitutional if a prosecutor comments on the exercise of a constitutional right, or the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. 124 Nev. at 1189 (quoting Darden v. Wainright, 477 U.S. 168, 181 (1986)). When the misconduct is of constitutional dimension, this Court will reverse unless the State demonstrates that the error did not contribute to the verdict. Id. 124 Nev. at 1189. When the misconduct is not of constitutional dimension, this Court "will reverse only if the error substantially affects the jury's verdict." Id.

The State is permitted to offer commentary on the evidence that is supported by the record. Rose v. State, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007). In Rose, the prosecutor called the appellant a predator for using his daughter as a lure to reach other victims, but the Nevada Supreme Court accepted it as appropriate commentary supported by the evidence and as insufficiently prejudicial to warrant relief. Rose, 123 Nev. at 209–10, 163 P.3d at 418–19.

Further, the State may respond to defense theories and arguments. Williams v. State, 113 Nev. 1008, 1018-19 (1997). This includes commenting on a defendant's failure to substantiate his theory. Colley v. State, 98 Nev. 14, 16 (1982); See also Bridges v. State, 116 Nev. 752, 762 (2000), citing State v. Green, 81 Nev. 173, 176 (1965) ("The prosecutor had a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows."). Further, if the defendant presents a theory of defense, but fails to present evidence thereon, the State may comment upon the failure to support the supposed theory. Evans v. State, 117 Nev. 609, 630-631 (2001); see McNelton v. State, 115 Nev. 396, 408–09 (1999).

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Petitioner objects to four different statements as alleged prosecutorial misconduct that his counsel should have objected to. Petitioner first takes issue with the State claiming during closing argument that: "The purpose was to either inflict substantial bodily harm or kill her -- so first – first degree kidnapping was met." Pet. at 8; Jury Trial Day 6: June 26, 2017, at 118, filed February 13, 2018. In context, the State's statement was as follows:

> All of this demonstrates the fact that she was hogtied, kidnapped. So for what purpose? Was it to inflict substantial bodily harm? To kill her? To sexually assault? You heard the defendant was angry she said. When he brought her into the apartment, everything was fine, and then all of a sudden his body language changed. His demeanor changed. He got loud. He got mean, and ultimately she was beat. She was beat with a belt. She was beat with a broom. She was beat with a – or she was stunned. She had the shotgun in her mouth. What do you think the purpose was? The purpose was to either inflict substantial bodily harm or kill her, and then you heard about the broomstick. So first -- first-degree kidnapping was met.

Jury Trial Day 6: June 26, 2017, at 118, filed February 13, 2018. The State's argument was clearly a commentary on the evidence adduced at trial. The State was arguing that Petitioner's intent could be deduced from the actions he undertook while he had the victim hogtied. The Court finds that such a commentary is proper during closing arguments, and is not prosecutorial misconduct.

Petitioner next takes issue with the State allegedly offering an incorrect definition of Battery with Intent to Commit Sexual Assault. Petitioner references page 125 and 128 of Jury Trial Day 6: June 26, 2017 and claims that the State defined Battery With Intent to Commit Sexual Assault as

> The fact that she is physically restrained substantially increased her risk of potentially death or substantial bodily harm because she can't get out.
> …
> So the putting her down, whacking her with the broomstick and the putting the broomstick up at her butt, Battery With the Intent to Commit a Sexual Assault.

Pet. at 8-A; Jury Trial Day 6: June 26, 2017 at 124-25, 128 respectively.

In regards to the first statement, the Court notes that the State was not discussing the crime of Battery With Intent to Commit Sexual Assault. The State was arguing that Petitioner could be found guilty of both Kidnapping in the first-degree and Sexual Assault if the victim

is physically restrained, and such restraint substantially increases the risk of harm. Jury Trial Day 6: June 26, 2017 at 124-25. Essentially, the State was arguing that given the facts of the case, the jury could find that Petitioner had committed kidnapping in the first degree by substantially increasing the risk of substantially bodily harm, and also find that Petitioner had committed Sexual Assault by penetrating Petitioner with a broomstick. Id. Further, nowhere in the excerpt does the State define any of these offenses. In fact, the State made regular mention to the jury instructions that properly defined these offenses. Id. As such, the Court finds that Petitioner's notion that the State incorrectly defined Battery with Intent to Commit Sexual Assault is belied by the record.

In regards to the second statement, the State was not defining Battery With Intent to Commit Sexual Assault. In fact, the Court notes that the State specifically referenced the jury to Jury Instruction 17 for a statement of the law regarding this crime. Id. at 128. The State was arguing that these were the actions that constituted Battery with Intent to Commit Sexual Assault. Given that proof of these actions had been admitted at trial, the State was entitled to argue that the evidence satisfied the elements of the crime charged.

Petitioner further takes issue with the State claiming "the fact that she is physically restrained substantially increases her risk of potentially death or substantial bodily harm." Pet. at 8-B; Jury Trial Day 6: June 26, 2017 at 124-25. Such a statement was clearly a commentary on the evidence. Pursuant to Rose v. State, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007), such a statement does not establish prosecutorial misconduct.

Given that trial counsel has the ultimate responsibility of deciding what objections to make, and that none of the statements Petitioner here complains of constituted prosecutorial misconduct, the Court finds that it was not unreasonable for Petitioner's counsel to not object to these statements.

Further, even if counsel's decision had been unreasonable, the Court finds that Petitioner was not prejudiced. As the Nevada Supreme Court held when affirming Petitioner's conviction, there was such overwhelming evidence of Petitioners guilt introduced at trial that it was not plain error for the Court to allow alleged prior bad act evidence to be admitted.

Given that the standard for prejudice under ineffective assistance of counsel is the same as the standard for plain error review, Petitioner cannot then demonstrate that he was prejudiced by his counsel's actions. See Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008). As such, Petitioner's counsel cannot be found ineffective and this claim is denied.

C. Counsel Was Not Ineffective for Not Requesting a Jury Instruction

Petitioner argues in Ground Three that his counsel was ineffective for not requesting a jury instruction defining the necessary elements of substantial bodily harm. Pet at 8-C. Petitioner alleges that it was unreasonable for his counsel not to request an instruction reflecting this standard because the State had charged him with Battery with Intent to Commit Sexual Assault, which the State could not prove without showing that the crime resulted in substantial bodily harm. Id.

Such a claim is not true. In fact, a review of NRS 200.400(4)(b)-(c) reveals that an individual may be convicted of Battery with Intent to Commit Sexual Assault even when no substantial bodily harm occurs. In fact, the charging document reflects that Petitioner was only charged with Battery with Intent to Commit Sexual Assault, not Battery with Intent to Commit Sexual Assault Resulting in Substantial Bodily Harm. See Indictment. Petitioner's sentence for this crime (life with the eligibility to parole after two (2) years) also reflects that he was only convicted of Battery with Intent to Commit Sexual Assault, not Battery with Intent to Commit Sexual Assault Resulting in Substantial Bodily Harm. See NRS 200.400(4); Recorder's Transcript Re: Sentencing, at 8, October 19, 2017. As such, there was no reason for Petitioner's counsel to request the jury instruction in question. Therefore, the Court finds that this decision was not an unreasonable one.

Further, even if counsel's decision had been unreasonable, Petitioner was not prejudiced. As the Nevada Supreme Court held when affirming Petitioner's conviction, there was such overwhelming evidence of Petitioners guilt introduced at trial that it was not plain error for the Court to allow alleged prior bad act evidence to be admitted. Given that the standard for prejudice under ineffective assistance of counsel is the same as the standard for plain error review, Petitioner cannot then demonstrate that he was prejudiced by his counsel's

actions. See Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008). As such, Petitioner's counsel cannot be found ineffective and this claim is denied.

D. Counsel Did Not Fail to Subject the Case to a Meaningful Adversary Process

Petitioner next argues that counsel was ineffective for failing to (1) do any pretrial investigation; (2) failing to file the following motions: Motion to Strike Aggravators, Motion to Exclude Argument Constituting Prosecutorial Misconduct; Motion to Suppress Evidence; Motion in Limine to Preclude Admission of Prejudicial Evidence; Motion to Dismiss For Insufficient Information Charging Petitioner; (3) failure to object to damaging and prejudicial statements during closing arguments; and (4) failure to call any witnesses on Petitioner's behalf.

The Court finds that each of these allegations is a bare and naked claim suitable only for summary dismissal. In regard to the failure to investigate claim, Petitioner does not even allege, much less show, what a better investigation would have turned up. Pursuant to Molina v. State, such a claim cannot support post-conviction relief. 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (stating that 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).

Regarding the various motions Petitioner alleges his counsel should have filed, Petitioner has neither alleged nor shown that any of these motions would have been successful. For some of these motions, Petitioner has only offered bare and naked assertions that counsel not filing them constitutes ineffective assistance of counsel. For example, Petitioner claims that his counsel should have filed a motion to suppress evidence. But he does not even articulate what evidence he claims should have been suppressed. On other motions, there was clearly no legal grounds to bring the motion (such as the motion to exclude argument constituting prosecutorial misconduct as more fully articulated in Section II(C)). Given that Petitioner has not alleged any grounds claiming why these Motions would have been successful, the Court finds that counsel's decision not to file them cannot constitute ineffective assistance of counsel.

Regarding counsel's alleged failure to object to prejudicial statements, Petitioner has not identified what statements he now complains of. To the extent he is referring to the statements he alleged constituted prosecutorial conduct under Ground Three, the Court has already articulated why counsel cannot be found ineffective for not objecting to these statements. As such, the Court finds that this claim is either meritless for the reasons articulated in Section II(C), or this claim is a bare and naked allegation suitable only for summary dismissal under Hargrove. 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Similarly, the Court finds that Petitioner claim that counsel was ineffective for failing to call any witnesses on his behalf is a bare and naked allegation suitable only for summary dismissal. Petitioner does not articulate what witnesses were available to be called, why they should have been called, or how they would have assisted his case.

Further, even if Petitioner had alleged enough facts for this Court to consider whether it was unreasonable for counsel to engage in these courses of conduct, Petitioner would be unable to establish that any of these decisions would have prejudiced him at trial. As the Nevada Supreme Court held when affirming Petitioner's conviction, there was such overwhelming evidence of Petitioners guilt introduced at trial that it was not plain error for the Court to allow alleged prior bad act evidence to be admitted. Given that the standard for prejudice under ineffective assistance of counsel is the same as the standard for plain error review, Petitioner cannot then demonstrate that he was prejudiced by his counsel's actions. See Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008). Therefore, counsel cannot be found ineffective for any of the reasons articulated in this section, and these claims are denied.

III. THERE IS NO CUMULATIVE ERROR IN HABEAS REVIEW

Petitioner asserts a claim of cumulative error in the context of ineffective assistance of counsel. The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated. However, even if they could be, it would be of no moment as there was no single instance of ineffective assistance in Petitioner's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate

only the effect of matters determined to be error, not the cumulative effect of non-errors."). Furthermore, Petitioner's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). A defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

Further, the Court finds the factors articulated in Mulder do not warrant a finding of cumulative error. The issue of guilt in the instant case was not close. As the Nevada Supreme Court noted when it affirmed Petitioner's judgment of conviction, there was "overwhelming evidence that supported the jury's verdict." Order of Affirmance, at 3. In addition, the gravity of the crime charged was severe, as Petitioner was charged with multiple counts in connection with a first-degree kidnapping. Finally, there was no individual error in the underlying proceedings, and as such, there is no error to cumulate. Therefore, this claim is denied.

IV. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.
>
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
>
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100

Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the objective reasonableness of counsel's performance, not counsel's subjective state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

Here, Petitioner has offered no factual allegations that, even if true, would entitle him to relief. All of Petitioner's claims amount to either bare and naked allegations or arguments that counsel had the duty to file frivolous motions.[2] Further, Petitioner is unable to overcome the fact that he cannot show he prejudiced by counsel's conduct on any of these grounds because the evidence of guilt admitted against him was overwhelming. See Order of Affirmance, at 3. As such, there is no need to expand the record, and Petitioner's request for an evidentiary hearing is denied.

//

[2] The Court notes that it previously granted Petitioner the opportunity to file a Supplemental Petition to expand upon his claims on August 18, 2020.

ORDER

THEREFORE, **IT IS HEREBY ORDERED** that the Post-Conviction Petition for Writ of Habeas Corpus shall be and is DENIED.

DATED this _____ day of January, 2021.

Dated this 19th day of January, 2021

DISTRICT JUDGE

4AA C9C C9A0 71F9
Joe Hardy
District Court Judge

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY _____
JACOB VILLANI
Chief Deputy District Attorney
Nevada Bar #011732

hjc/SVU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Calvin Elam, Plaintiff(s)	CASE NO: A-20-815585-W
vs.	DEPT. NO. Department 15
Bean, Warden, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

Electronic service was attempted through the Eighth Judicial District Court's electronic filing system, but there were no registered users on the case. The filer has been notified to serve all parties by traditional means.

IN THE SUPREME COURT OF THE STATE OF NEVADA

CALVIN THOMAS ELAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 82637
District Court Case No. C305949

FILED

MAR 15 2022

CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order."

Judgment, as quoted above, entered this 17th day of February, 2022.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this March 14, 2022.

Elizabeth A. Brown, Supreme Court Clerk

By: Sandy Young
Deputy Clerk

C-15-305949-1
CCJR
NV Supreme Court Clerks Certificate/Judgr
4985559

4

IN THE SUPREME COURT OF THE STATE OF NEVADA

CALVIN THOMAS ELAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82637

FILED

FEB 17 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a pro se appeal from a district court order denying a postconviction petition for a writ of habeas corpus.[1] Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Appellant filed a timely petition on May 27, 2020. In his petition, appellant claimed, among other things, that his counsel did not conduct an adequate pretrial investigation or file pretrial motions. The district court denied the petition without appointing counsel. We conclude that the district court abused its discretion in this regard.

NRS 34.750 provides for the discretionary appointment of postconviction counsel and sets forth the following factors which the court may consider in deciding whether to appoint counsel: the petitioner's indigency, the severity of the consequences to the petitioner, the difficulty of the issues presented, whether the petitioner is unable to comprehend the proceedings, and whether counsel is necessary to proceed with discovery. The decision is not necessarily dependent upon whether a petitioner raises

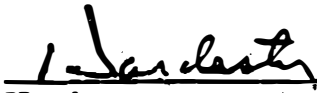
[1] This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. *See Luckett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

issues that, if true, would entitle the petitioner to relief. *Renteria-Novoa v. State*, 133 Nev. 75, 77, 391 P.3d 760, 762 (2017).

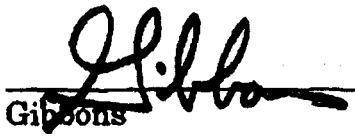
The factors in NRS 34.750 favored granting the motion to appoint counsel in this case. Appellant, alleging that he was indigent, requested the assistance of postconviction counsel at the same time he filed his pro se petition, stating that he did not know what he was doing and needed help to investigate and support the claims in his petition. Appellant is serving a significant sentence of life with the possibility of parole after serving 13 years. And some of appellant's claims require development of facts outside the record, including whether trial counsel was ineffective for not investigating or filing pretrial motions. The failure to appoint postconviction counsel prevented a meaningful litigation of the petition under these facts. For the reasons set forth above, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[2]

_____, C.J.
Parraguirre



_____, J.
Hardesty



_____, Sr.J.
Gibbons

cc: Hon. Joseph Hardy, Jr., District Judge
Calvin Thomas Elam
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

---

[2]The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.

IN THE SUPREME COURT OF THE STATE OF NEVADA

CALVIN THOMAS ELAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 82637
District Court Case No. C305949

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: March 14, 2022

Elizabeth A. Brown, Clerk of Court

By: Sandy Young
Deputy Clerk

cc (without enclosures):
Hon. Joseph Hardy, Jr., District Judge
Clark County District Attorney \ Alexander G. Chen, Chief Deputy District Attorney
Calvin Thomas Elam

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on MAR 15 2022.

HEATHER UNGERMANN
Deputy District Court Clerk

RECEIVED
APPEALS
MAR 15 2022
CLERK OF THE COURT

SPA
TERRENCE M. JACKSON, ESQ.
Nevada Bar No. 00854
Law Office of Terrence M. Jackson
624 South Ninth Street
Las Vegas, NV 89101
T: 702-386-0001 / F: 702-386-0085
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Counsel for Petitioner, Calvin T. Elam

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CALVIN THOMAS ELAM, ID# 1187304 Petitioner, v. STATE OF NEVADA, Respondent.	District Court Case No.: **C-15-305949-1** District Court Case No.: A-20-815585-W Dept. **XV**

SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF WRIT OF HABEAS CORPUS FOR POST CONVICTION RELIEF

COMES NOW the Petitioner/Defendant, CALVIN THOMAS ELAM, by and through his attorney, TERRENCE M. JACKSON, ESQ., and moves this court to enter an Order granting his Petition and Supplemental Points and Authorities in support of Defendant's Petition for Post Conviction Relief on the grounds that both his trial and appellate counsel were ineffective and Defendant was prejudiced thereby.

Defendant alleges as grounds for this petition that his conviction was unlawful in the following respects:

I. DEFENSE COUNSEL WAS INEFFECTIVE PRETRIAL;

A. Defense counsel was ineffective under *Strickland* because he did not do sufficient pretrial investigation or preparation including retaining necessary experts;

B. Defense counsel was ineffective under *Strickland* for failing to file meritorious Motions Pretrial;

(1). Defense counsel failed to file a meritorious Motion to Suppress;

(2). Defense counsel was ineffective for failing to file a Motion to Challenge or Dismiss the Weapon Enhancement under NRS 193.165;

II. DEFENSE COUNSEL WAS INEFFECTIVE AT TRIAL;

A. Defense counsel was ineffective during jury selection;

(1). Defense counsel was ineffective for failing to retain an expert jury consultant;

(2). Defense counsel was ineffective for not seeking individual sequestered voir dire;

B. Defense counsel was ineffective handling prosecutorial misconduct by not properly objecting to prosecutorial misconduct;

C. Defense counsel was ineffective during closing argument;

III. DEFENSE COUNSEL'S INEFFECTIVENESS UNDER *STRICKLAND* LED TO A CONVICTION ON MULTIPLE COUNTS DESPITE THE STATE NOT PROVING THE CHARGES BEYOND A REASONABLE DOUBT;

IV. DEFENSE COUNSEL'S INEFFECTIVE ASSISTANCE AT SENTENCING LED TO A LENGTHY AND OVERLY HARSH SENTENCE OF 13 YEARS TO LIFE IMPRISONMENT;

V. DEFENSE COUNSEL WAS INEFFECTIVE ON APPEAL;

VI. DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND*;

VII. CUMULATIVE ERROR REQUIRES REVERSAL OF THE CONVICTION.

Wherefore, Petitioner/Defendant prays this Honorable Court enter an Order directing the Clerk of the Court issue a Writ of Habeas Corpus directed at Calvin Johnson, Warden of High Desert State Prison commanding Warden Johnson to bring the above named Petitioner/Defendant before the court, and return cause of his imprisonment.

DATED this 8th day of June, 2022.

Respectfully submitted,

/s/ Terrence M. Jackson
TERRENCE M. JACKSON, ESQUIRE
Nevada State Bar 000854
624 South 9th Street
Las Vegas, Nevada 89101
T: (702) 386-0001 / F: (702) 386-0085
Terry.jackson.esq@gmail.com
Counsel for Petitioner/Defendant, Calvin Thomas Elam

INTRODUCTION

PROCEDURAL HISTORY

Defendant was charged by Grand Jury Indictment on April 17, 2015, with eight (8) felony charges including sexual assault with a deadly weapon, first degree kidnapping with a deadly weapon, attempt sexual assault with a deadly weapon, assault with a deadly weapon, conspiracy to commit kidnapping, unlawful use of an electronic stun device, battery with intent to commit sexual assault and ownership of a firearm by a prohibited person.

Defendant entered a not guilty plea on April 28, 2015. On June 18, 2015, the trial was agreed to be continued until January 25, 2016. Trial however did not begin until June 19, 2017.

On June 27, 2017, the jury returned a verdict finding Defendant guilty of four (4) counts including Count 1, conspiracy to commit kidnapping; Count 2, first degree kidnapping with use of a deadly weapon; Count 3, assault with a deadly weapon and Count 5, battery with intent to commit sexual assault. Defendant was found not guilty on four (4) counts: Count 4, unlawful use of stun device and Count 6, sexual assault with use of deadly weapon, and Count 7, attempt assault with use of deadly weapon.

Defendant was sentenced on October 19, 2017, to an aggregate sentence of 13 years to life imprisonment. Judgment of Conviction was filed on October 31, 2017. On November 13, 2017, Defendant filed Notice of Appeal. On April 12, 2019, the Nevada Supreme Court issued an Order of Affirmance, in case number 74581, affirming Defendant's conviction. Remittitur issued May 7, 2019. On May 15, 2019, defense counsel Thomas Erickson filed a Motion to Withdraw. That motion was granted on May 28, 2019.

On May 27, 2020, Defendant filed a *Pro Per* Petition for Writ of Habeas Corpus. On July 6, 2020, the State filed their response to the Petition. On August 18, 2020, the Court granted Defendant's Motion to Withdraw Judgment on the Petition for Writ of Habeas Corpus, thereby allowing Defendant until October 20, 2020, to file a supplemental petition. On August 18, 2020, the Court denied Defendant's Motion for Appointment of Counsel *without* prejudice, stating however if the issues were unduly complex counsel would then be appointed.

Defendant acting *pro per* could not file Supplementary Points and Authorities by the October 20, 2020 date and on January 19, 2020, the Court denied the Petition and ordered Findings of Fact, Conclusions of Law and Order, which denied the Petition. Defendant then appealed the Order denying his Post Conviction Petition, filing a *Pro Per* Notice of Appeal on February 26, 2021.

On February 17, 2022, the Supreme Court reversed the District Court's denial of Defendant's Petition and remanded to District Court for appointment of counsel in case number 82637. Counsel Terrence M. Jackson, Esq. was appointed on March 10, 2022 to represent Calvin Thomas Elam on further post conviction proceedings.

On June 9, 2022, Defendant through counsel filed Supplemental Points and Authorities to his Petition for Writ of Habeas Corpus in case number A-20-815585-W.

POINTS AND AUTHORITIES

I. DEFENSE COUNSEL WAS INEFFECTIVE PRETRIAL.

A. Defense Counsel was Ineffective under *Strickland* Because He Did Not Do Sufficient Pretrial Preparation and Investigation Including Retaining Necessary Defense Experts.

The American Bar Association (ABA) Standards on the prosecution and defense function emphasizes the crucial importance of investigation by criminal defense attorneys for their clients.

See, ABA Standards 4.1: Duty to Investigate

> **4.1 Duty to Investigate.**
>
> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include effort to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty. (Emphasis added)

. . .

The importance of this Standard has been recognized and cited by the Nevada Supreme Court. *See, Jackson v. Warden*, 91 Nev. 430, 537 P.2d 473 (1975). In the landmark case of *Strickland v Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court established a two pronged test for reversal based upon ineffective assistance of counsel. First, the defendant must show counsel's *performance was deficient*. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel"guaranteed by the Sixth Amendment. Second, counsel must show that the deficient

performance *prejudiced* the defense. This requires showing that counsel errors were so serious as to have deprived defendant of a fair trial, that is a trial where the result is reliable. Unless, a defendant makes both showings, he is not entitled to a reversal of the conviction.

In *Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (1991), the Nevada Supreme Court in reversing, recognized the importance of the *Strickland* standard, stating:

> "To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, *Sanborn* must demonstrate that trial counsel's performance fell below an objective standard or reasonableness and that counsel's deficiencies were so severe that they rendered the jury's verdict unreliable. *See Strickland v Washington*, 46 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Warden v. Lyons*, 100 Nev. 430, 683 F.2d 504 (1984) *cert. den.*, 471 U.S. 1004, 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985). Focusing on counsel's performance as a whole, and with due regard for the strong presumption of effective assistance accorded counsel by this court and *Strickland*, we hold that Sanborn's representation indeed fell below an objective standard of reasonableness.
>
> Trial counsel did not adequately perform pretrial investigation, failed to pursue evidence supportive of innocence or evidence which would establish reasonable doubt. Failing to establish a claim of self-defense, and failed to explore allegations of the victim's propensity towards violence. Thus, he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." " *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. *Id*. 403, 404 (Emphasis added)

. . .

In this case the defense counsel's failed to investigate and contact a necessary accident reconstruction expert to challenge the State's expert witness. This was not a strategic decision but merely was indifference to his client's rights.

Consider the case of *Wiggins v. Smith,* 539 U.S. 510, 527, 123 S.Ct. 2527, 156 L.Ed. 471 (2003): "It is evident from the PCRA record that counsel's limited investigation was not the result of such reasoned judgment, but merely the consequence of lackluster performance." (Emphasis added) *See also, Walker v. McQuiggans,* 656 F.3d 311 (6th Cir.2011), and the cases of *Elmore v.*

Ozmint, 661 F.3d 783 (4th Cir.2011) and *Blystone v. Horn,* 664 F.3d 397 (3rd Cir.2011). In *Elmore v. Ozmint, supra,* the court noted:

> "Because *Elmore's* lawyer's investigation never started, there could be no reasonable strategic decision to stop the investigation or forego use of evidence that the investigation could have uncovered." *Id*. 864 (Emphasis added)

. . .

In this case, as in Elmore, the investigation of potential exculpatory evidence never even began. *See generally, United States v. Durant,* 545 F.2d 823 (2d cir.1976), *United States v. Bass,* 477 F.2d 723 (9th Cir.1973).

It is therefore respectfully submitted that in this case if the Court had denied a defense motion for a necessary defense jury experts, it would likely have been reversible error. A properly presented Motion for appointment of necessary experts should have been granted. Defendant then would have gained very valuable resources for preparing for cross examination of the State's witnesses (See Issue II) and for selecting a fair and impartial jury. (See Issue **II A**)

B. Defense Counsel was Ineffective for Failing to File Necessary Pretrial Motions.

(1) Defense Counsel was Ineffective under *Strickland* for Failing to File a Meritorious Pretrial Motion to Suppress Defendant's Statements.

Defendant was arrested by the Las Vegas Metropolitan Police in March of 2015. While in custody and without counsel, Defendant was interrogated by police officers and made statements which were then used against him as evidence at trial. (T. T., Day 4, p. 11, State's Ex. 71)This statement was taken from the Defendant while he was without counsel and under extreme stress. Defense counsel however had not filed a Motion to Suppress these statements or even seek an evidentiary hearing to show that under the totality of circumstances, Elam's statements were involuntary because they were the result of hostile and coercive interrogation where Mr. Elam was unable to effectively exercise his Fifth Amendment right to avoid self incrimination.

It is respectfully submitted that Defendant Elam was led to make an incriminating statements

because of the intense and hostile nature of his interrogation. Even though Defendant had been read *Miranda* warnings before making his statement(s), it is respectfully submitted that he was "threatened, tricked or cajoled" into waiving his fundamental Fifth Amendment right to silence. Therefore, his purported waiver must be found to be invalid. *Miranda v. Arizona,* 384 U.S. 436 (1966). Id. 476

Miranda recognized that coercion can be metal as well as physical, stating:

> "Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically orientated. As we stated before, "Since *Chambers v. Florida,*309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716 (1940), this Court has recognized coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackborn v. State of Alabama,*361 U.S. 199, 206, 80 S.Ct.274, 279, 84 L.Ed. 916. Id. 448
>
> "Moreover, any evidence that the accused was threatened, tricked or cajoled into a waiver will show, of course, that the defendant did not voluntarily waive his privilege." Id. 477 (Emphasis added)

. . .

In this case the defense could have established that the government failed to meet its heavy burden to show that Defendant's uncounselled statements were voluntary and intelligently made. The record viewed in its totality suggests that the Defendant was unaware he was being secretly recorded. If Defendant knew that he was being recorded while he was interviewed, it likely would have influenced his decision on whether he should have made the lengthy statements he made without any counsel present.

Defendant directs the court to NRS 200.640, which limits the use of unauthorized wire or radio communication. The reason for that statutory limitation is clear. Unauthorized wiretapping can exploit a person by taking advantage of him while he is most vulnerable. Defendant submits by analogy, the unauthorized taping of a witness' statement, especially the statement of an unrepresented potential criminal defendant, should be considered to be a violation of NRS 200.640 because such a person is exceedingly vulnerable while he is being secretly taped. Defendant had no

legal training and a limited formal education. The totality of the evidence suggests that his statements were not freely or voluntarily given. The evidence shows that the LVMPD questioned Elam without counsel present. They easily intimidated Elam into making statements in which he admitted involvement in criminal activity. Even though Defendant had been read *Miranda* warnings before his statements, because he was "threatened, tricked or cajoled" into waiving his fundamental Fifth Amendment right to silence, his purported waiver must be found to be invalid. *Miranda v. Arizona,* 384 U.S. 436 (1966). *Id*. 476

The Nevada Supreme Court has held that to determine the validity of *Miranda* warnings, the court must consider the totality of facts and circumstances. *See, Anderson v. State,* 109 Nev. 1129, 1193, 865 P.2d 318, 320 (1993); *see also, Edward v. Arizona,* 451 U.S. 477 (1981); *Falcon v. State,* 110 Nev. 530, 874 P.2d 772 (1994). The State bears the burden of showing by a preponderance of evidence Defendant knowingly and intelligently waived his Fifth Amendment rights.

Evaluating the validity of any *Miranda* waiver in this case, significant evidence suggests there were obvious problems with Defendant's alleged waiver of rights. Since the landmark case of *Miranda v. Arizona,* 384 U.S. 436, 474 (1966) established that the burden rests with the government to demonstrate that the Defendant knowingly and intelligently waived his privilege against self-incrimination and the government would have had difficulty meeting that burden in this case if defense counsel had filed a Motion to Suppress, this Court should find that counsel was ineffective and Defendant was prejudiced thereby.

(2). Defense Counsel Erred in not Filing a Motion to Challenge or Dismiss the Deadly Weapon Enhancement under NRS 193.165.

The Defendant was found guilty of kidnapping with use of a deadly weapon and sexual assault with deadly weapon on June 27, 2017. Defendant submits the alleged deadly weapon, a broomstick, should not have been found to be a deadly weapon and that defense counsel should have filed a meritorious motion to strike the deadly weapon enhancement before trial in this case. The Defendant was greatly prejudiced by this error. The broomstick alleged as the deadly weapon in

Count 2 was not a deadly weapon under Nevada law.

In *Smith v. State,* 110 Nev. 1094, 881 P.2d 649 (1994), the Nevada Supreme Court ruled the district court erred in failing to dismiss the deadly weapon enhancement, holding in that case that a hammer was not a deadly weapon, even though the victim actually died because a hammer is not inherently a deadly weapon. The court in that case did not enhance the penalty for the murder. *Id*.1167 (Emphasis added)

Consider also the case of *Milton v. State,* 111 Nev. 1487, 908 P.2d 684 (1998), where the court applying the "inherently dangerous weapon" test held that scissors could not be considered a deadly weapon. It is respectfully submitted that if a hammer or scissors are not inherently deadly weapons under Nevada law, then it certainly can be true that a broomstick is not a deadly weapon.

Consider the case of *Zgombic v. State,* 106 Nev. 571, 798 P.2d 548 (1990), where the Supreme Court stated: . . .

> "In conclusion, a deadly weapon under NRS 193.165 is any instrumentality which is inherently dangerous. Inherently dangerous means that the instrumentality itself, if used in the ordinary manner contemplated by its design and construction, will, or is likely to, cause a life-threatening injury or death. *Hartford,* 636 P.2d at 1209 (quoting *State v. Gordon,* 584 P.2d 1163, 1167 (1978)). As a practical matter, three possible results flow from our definition of deadly weapon under NRS 193.165. First, some weapons can be determined, as a matter of law, to be inherently dangerous. The only remaining question the trier of fact will have to determine is if the deadly weapon was used in the commission of the offense. Other weapons, as a matter of law, are not inherently dangerous. Finally, in a few close cases where the court cannot determine as a matter of law whether the weapon is or is not a deadly weapon, the judge will need to submit the entire issue to the jury after instructing it on the previously stated definition of a deadly weapon. It these close cases, the jury must specifically and separately find the instrumentality at issue to be a deadly weapon and that it was used in the commission of the offense before the enhancement can be imposed. Once such findings are made, however, the sentence enhancement is mandatory under the terms of NRS 193.165.

> In this case, *Zgombic* was wearing a pair of boots with a reinforced toe. These standard construction-type boots were not modified in any way so as to facilitate their use as a weapon; the boots were simply reinforced with metal in the toe to prevent injury to the foot. We see nothing inherently dangerous in this instrumentality or any natural propensity of these boots to cause death or life-threatening injury. Therefore, we hold that, as a matter of law, the boots worn by *Zgombic* when he committed his crimes and which he used to kick the victim are not dangerous weapons as contemplated in this enhancement statute. Therefore, *Zgombic* was not subject to the enhancement penalty as set forth in NRS 193.165." (Id. 576, 77)

. . .

Considering all the cited Nevada case law it is clear that a broomstick also should not be considered a deadly weapon under NRS 193.165.

II. DEFENSE COUNSEL WAS AN INEFFECTIVE ADVOCATE DURING TRIAL.

A. Defense Counsel was Ineffective During the Jury Selection Process.

The right to trial by an impartial jury is a fundamental concept of due process. The importance of that right and the duty of strict inquiry into its application were discussed in *Irvin v. Dowd,* 366 U.S. 717. 81 S. Ct. 1639, 6 L.ed.2d 751 (1961), where the Supreme Court found that in holding pretrial publicity that had tainted the jury panel, stated:

> "England, from whom the Western world has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. . . .
>
> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent jurors. . . ." A fair trial in a fair tribunal is a basic requirement of due process. . . . In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as

> he stands unsworn."... His verdict must be based upon the evidence developed at the trial." (366 U.S. at 1642, 81 S.Ct. At 721, 6 L.Ed.2d at 755). (citations omitted) Id. 721, 722 (Emphasis added)

. . .

Despite the fundamental importance of obtaining a fair and impartial jury in this very serious case, counsel was grievously ineffective in preparing for the jury selection process and in selecting the jury. It is respectfully submitted there were at least two significant ways counsel was ineffective during the jury selection process: (1) failure to seek individual voir dire and (2) failure to retain a jury selection expert.

Defendant submits his counsel should have been extremely alert and sensitive to the important dynamics involved in a sexual assault case and while selecting the jury to cure any possible negative effects or prejudice that may have arisen during selection process.

(1). Defense Counsel was Ineffective Under *Strickland v. Washington* Because he Failed to Retain a Jury Selection Expert to Assist Him during Jury Selection Process.

It is respectfully submitted that the Defendant was entitled to a searching voir dire with the help of a Jury Selection Expert. Defendant's counsel, however, never retained a jury selection expert, despite the enormous benefits of such an expert. In this type of case the need for a juror selection expert was especially critical. An expert could have assisted with preparing voir dire questions designed to discover any possible biases. An expert could have also assisted in providing a profile of favorable jurors for the defense.

The District Court had the power to appoint a jury expert. *See, Ake v. Oklahoma,* 470 U.S. 68 (1985). Defense counsel however never even sought such an expert even though the refusal to supply an indigent with such a necessary defense tool has been held to be reversible error where such tools are essential to protecting the defendant's rights to a fair trial.

Defendant directs this Honorable Court to the Defense Manual of Jury Selection Practice, JURYWORK: Systematic Techniques, National Jury Project, 1979, which cites numerous cases where courts have appointed jury experts for the defense. *See for example, United States v. Crowdog,*

Holder, and Camp, CR 75-18, 75-19, 75-20 (ND Iowa, Cedar Rapids Division, 1975), *United States v. Butler and Robideau* (CR 76-11) (ND Iowa, Cedar Rapids Division, 1976) and *United States v. Gullion* (D Maine, 1977), and to conduct survey work in *United States v. Provost, et al.* (Consolidated Wounded Knee Cases CR 73-5017 South Dakota Southern Division). *See also, State of Minnesota v. Michael Stevens,* January, 1979 and *Commonwealth of Massachusetts v. Richard Picarello,* Suffolk County Superior Court, May 1978, where the court authorized payment of $500 for analysis of pretrial publicity and expert testimony regarding the potentially prejudicial nature of the publicity. It is respectfully submitted that Defendant would have benefitted greatly from a jury selection expert. Therefore counsel's failure to even request such an expert was error under *Strickland v. Washington* which requires reversal.

(2). Defense Counsel Was Ineffective for Not Seeking Individual, Sequestered Voir Dire.

The Defendant was entitled to a far reaching and thorough voir dire that could have adequately uncovered potential biases in jury panel members. The only way the Defendant could have intelligently exercised his peremptory challenges was to have had extensive and individual voir dire. The only way this could have been done was by individually questioning each juror outside the presence of other jurors.

Cases have held that a defendant did not receive effective assistance of counsel because trial counsel did not adequately protect the defendant's rights during the voir dire process to secure an impartial jury of his peers as guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

The fundamental component of the Sixth Amendment right to trial is the right to a fair and unbiased jury of peers. A defendant's constitutional right to counsel includes the right to question prospective jurors so the defendant may intelligently exercise peremptory challenges. *See, Powell v. Alabama,* 287 U.S. 45, 69, 53 S. Ct. 55, 77 L.Ed.158 (1932) (defendant requires counsel's guiding hand at every step of proceedings). The Sixth Amendment guarantees the "assistance of counsel." Part of this constitutional guarantee is an adequate voir dire to identify unqualified jurors. *Morgan*

v. Illinois, 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (citing *Dennis v. United States,* 339 U.S. 162, 171-72, 70 S.Ct. 519, 94 L.Ed. 734 (1950)).

A fair and unbiased jury cannot be taken for granted. Especially in a case of sexual assault where the possibility of prejudice may be high. In *State v. Chastain,* 947 P.2d 57 (Mont. 1997), the court stated:

> "A court must excuse a prospective juror if actual bias is discovered during voir dire. Bias can be revealed by a juror's express admission of the fact, but, more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence. We agree with the observation in *Kiernan v. VanSchaik,* 347 F.2d 775,781 (3rd Cir. 1965):
> "That men will be prone to favor that side of a cause with which they identify themselves either economically, socially or emotionally is a fundamental fact of human character." *United States v. Allsup,* 566 F.2d 68, 71 (9th Cir.1977).
> It is incumbent upon a party to develop information in the record that demonstrates a juror's bias as to the party or an issue in the case. Defense counsel had a clear duty to ensure *Chastain's* right to a fair trial by a panel of impartial jurors.
> The principal way in which this right to trial by "indifferent" jurors is secured is through the system of challenges exercised during voir dire. Inhibition of the right to challenge peremptorily of for cause is usually deemed prejudicial error, without showing actual prejudice." *Allsup,* 566 F.2d at 71. (Emphasis added)

. . .

Many years ago in the case of *United States v. Ridley,* 134 U.S. App. D.C., 412 F.2d 1126 (1969), the court recommended that crime victims be questioned at the bench so that other jury panel members not be tainted. The court recognized that the fundamental component of the Sixth Amendment right to trial is the right to a fair and unbiased jury of peers. A defendant's constitutional right to counsel includes the right to question prospective jurors so the defendant may intelligently exercise peremptory challenges. *See, Powell v. Alabama,* 287 U.S. 45, 69, 53 S. Ct. 55, 77 L.Ed.158 (1932) (defendant requires counsel's guiding hand at every step of proceedings). The Sixth Amendment guarantees the "assistance of counsel." Part of this constitutional guarantee is an

adequate voir dire to identify unqualified jurors. *Morgan v. Illinois,* 504 U.S. 719, 729. 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (citing *Dennis v. United States*, 339 U.S. 162 (1950).

The record in this case reflects numerous jurors had been victims of sexual assault or had close friends or family members who had been the victims of sexual crimes or crimes of violence. (T. T., Day 1, pgs. 68, 82, 89, 91) It is respectfully submitted that defense counsel should have been aware pretrial that many potential jurors in the jury panel may have been in the past victims of sexual abuse. Counsel therefore should have anticipated the likelihood that troubling possibly traumatic and prejudicial information, would likely have been brought before the jury panel during voir dire where there were discussions of such prior violent assaults. It was not just that a particular juror while being questioned may have been influenced by very explicit but necessary questions, but the whole panel in a criminal case would also be affected. That fact necessitated counsel take action to ensure getting a fair jury.

Again counsel erred under *Strickland* by not taking the necessary action to ensure a fair and impartial jury. This in cumulation with other errors was sufficient to require reversal because the possibility of an unfair or biased jury is enough to case doubt on the reliability of the conviction.

B. Defense Counsel Was Ineffective for Failing to Make Necessary Objections to Prosecutorial Errors and Misconduct During Trial.

The prosecutor engaged in multiple acts of misconduct during closing argument for which defense counsel did not make appropriate and timely objections. Consider the following acts of misconduct which occurred during closing argument when the prosecutor wrongly stated her personal opinion:

(1) "Does it matter whether her hands were in front of her or behind her? It doesn't matter either way. . . . <u>*We*</u> know she was hogtied." (T. T., Day 6, p. 117, 118)

The prosecutor then stated her opinion about the Defendant's intent, stating:

...

(2) "So for what purpose? Was it to inflict substantial bodily harm? To kill her? To sexually assault? Your heard the Defendant was angry she said. When he brought her into the apartment, everything was fine, and then all of a sudden his body language changed. His demeanor changed. He got loud. He got mean, and ultimately she was beat. She was beat with a belt. She was beat with a broom. She was beat with a - - or she was stunned. She had the shotgun in her mouth. What do you think the purpose was? The purpose was to either inflict substantial bodily harm or kill her, and then you heard about the broomstick. So first - - first-degree kidnapping was met." (T. T., Day 6, p. 118) (Emphasis added).

Finally, the prosecutor mistated or oversimplified the law regarding accomplice liability or the legal liability as co-conspirator, oversimplifying instruction number 14, the prosecutor stated:

(3) "So finally, Instruction No. 14 tells you that an unarmed offender uses - - and like I said, I'm talking about all of this because although Arrie told you that the Defendant did all that, she had told the detective that it was the other individual that had the stun gun. So an unarmed offender uses a deadly weapon when the unarmed offender is liable for the offense, so specifically, you know, the stun gun. The Defendant is liable for the offense. He's the one that brought her in there, tied her up. The other person is liable for the offense, is armed with the weapon and uses the weapon. So if you believe that it was the other person who used the stun gun, the Defendant is still liable for the use of that deadly weapon. (T. T., Day 6, p. 123) (Emphasis added).

The Defendant would not necessarily be liable of the actions of his purported co-conspirator unless the jury was convinced beyond a reasonable doubt he was in fact conspiring with the other individual.

Despite such clear and obvious misconduct by the prosecutor in argument, the defense counsel never objected appropriately or moved for a mistrial. Not one of the foregoing statements were objected to by defense counsel as improper comments. Each of the statements considered alone

may not have been sufficient grounds for reversal, but considering the totality of the misconduct, it is clear that each statement was improper and objectionable.

Defense counsel failed in his duty to object to all such misconduct. *Howard v. State,* 106 Nev. 713, 800 P.2d 175 (1991). The failure to make necessary objections in this case amounted to ineffective assistance of counsel. *Washington v. State,* 112 Nev.1054, 921 P.2d 1253 (1996). *See also, Warden v. Lyons,* 100 Nev. 430, 683 F.3d 269 (6th Cir. 2000).

Defense counsel never sought any corrective instructions. (*See,* T. T., Day 6, pgs. 117, 118, 123). The Nevada Supreme Court has often held that references to facts outside the record during closing argument to be improper. Such misconduct may be reversible error. *State v. City,* 50 Nev. 256, 256 P.793 (1927); *Collier v. State,* 101 Nev. 473, 478, 705 P.2d 1126 (1985). *See also, People v. Adcox,* 763 P.2d 906, 919 (Cal. 1988); *Downey v. State,* 103 Nev. 4, 731 P.2d 350 (1987); *Sanborn v. State,* 107 Nev. 399, 407-08, 812 P.2d 1279, 1286 (1991).

The prosecutorial misconduct in this case, which was uncorrected, may have prejudiced the jury because the jury may have given great weight to the prosecutor's improper statements. Consider the case of *Washington v. Hofbauer,* 228 F.3d 689 (6th Cir.2000), where the court noted:

> "We also agree with Petitioner that the prosecutor engaged in serious misconduct when he characterized Tamara's story as having been consistent over time when there was no evidence supporting that factual assertion.
>
> Misrepresenting facts in evidence can amount to substantial error because doing so "may profoundly impress a jury and may have a significant impact on the jury's deliberations." *Donnelly v. DeChristoforo,* 416 U.S. 637, 646 (1974). For similar reasons, asserting facts that were never admitted into evidence may mislead a jury in a prejudicial way. *Berger v. United States,* 295 U. S. 78, 84 (1935). This is particularly true when a prosecutor misrepresents evidence because a jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty." *See, Id.* at 700 (Emphasis added)

Defense counsel had a duty to be vigilant in guarding against excessive prosecutorial misconduct by making all necessary and timely objections along with requests for curative instructions. It is respectfully submitted that defense counsel's failure to make timely objections to the prejudicial prosecutorial misconduct in this case was ineffective assistance of counsel under *Strickland v. Washington* and grounds for reversal.

C. Defense Counsel's Closing Argument Was Ineffective under *Strickland V. Washington* and the Defendant Was Prejudiced.

Defense counsel's closing argument was not effective and did not effectively develop a reasonable doubt. (T. T., Day 6, p. 133-144) The United States Supreme Court has held that an inadequate closing argument may be grounds for reversal in the case of *Smith v. Spisak,* 558 U. S. 139, 130 S. Ct. 676, 175 L.Ed.2d 595 (2010). Attorney arguments are a critical stage of a criminal case, much more than an opening statement. The Nevada Supreme Court has actually found it an indicia of incompetency even when an attorney just fails to make an opening statement. *See, Buffalo v. State,* 111 Nev. 1139, 901 P.2d 647 (1995).

The closing argument was extremely important in this case, as in any criminal case, because it was the last opportunity for counsel to present a well structured, persuasive plea to the jury that the Defendant was innocent and that a reasonable doubt existed. That was especially important in this extremely serious case. A significant amount of energy and planning are necessary for counsel to prepare a competent, well reasoned closing argument that could have persuaded the jury. As the Nevada Supreme Court noted in *Buffalo, supra:*

> ". . . Defense counsel's failure to make an opening statement, failure to consider legal defenses of self defense and defense of others, failure to spend any time in legal research, and general failure to present a cognizable defense rather clearly resulted in rendering the trial "unreliable." " *Id*. 1149 (Emphasis added)

. . .

Defendant submits a careful review of counsel's very short closing argument shows no clear theory of the case for an acquittal. It showed a general failure to present a cognizable defense. In this case counsel's closing argument was ineffective under *Strickland* and it therefore rendered the trial 'unreliable' as in *Buffalo v. State, supra.*

III. DEFENSE COUNSEL'S INEFFECTIVENESS UNDER *STRICKLAND* LED TO A CONVICTION DESPITE THE STATE NOT ESTABLISHING DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT. THE STATE'S FAILURE TO MEET THIS BURDEN OF PROOF DURING TRIAL REQUIRES REVERSAL OF DEFENDANT'S CONVICTION.

The standard of proof for any criminal conviction is required to be proof beyond a reasonable doubt. *See, In re Winship,* 397 U.S. 358, 90 S. Ct. 1065 (1970); *see also, Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781 (1979).

It is respectfully submitted the State did not meet that burden of proof in this case. The defense counsel's ineffectiveness in this case led to a verdict of guilt despite the lack of necessary legal evidence of the offenses charged. Defense counsel failed in his duty under *Strickland* to be an effective advocate during trial and protect the Defendant's right to due process of law.

Defendant directs this Court to the American Bar Association (ABA) Standards relating to the Prosecution and Defense function, defining the role of defense counsel in section 1.1(b): Role of Defense Counsel which states:

> Advocacy is not for the timid, the meek or the retiring. Our system of justice is inherently contentious in nature, albeit bounded by the rules of professional ethics and decorum, and it demands that the lawyer have the urge for vigorous contest. Nor can a lawyer be half-hearted in the application of his energies to a case. Once he has undertaken the case, he is obliged not to omit any essential honorable step in the defense, without regard to his compensation or the nature of his appointment. (Emphasis added)

. . .

In this case however counsel for Defendant did not satisfy the ideals expressed in the ABA Standards, nor did defense counsel satisfy the minimum standards of acting as objectively reasonable counsel under *Strickland v. Washington.* Counsel's deficiencies moreover were highly prejudicial as they resulted in an unfair trial to the Defendant. Defendant was denied due process of law under the United States Constitution when he was convicted by evidence that amounted to less than proof beyond a reasonable doubt.

In *Carl v. State,* 100 Nev. 164, 678 P.2d 669 (1984), the Nevada Supreme Court, while affirming Defendant's conviction, recognized the Defendant had a due process right to proof beyond a reasonable doubt as the standard of proof necessary for conviction. (Emphasis added) *See also, Skinner v. Sheriff,* 93 Nev. 340, 566 P.2d 80 (1977). In this case it is respectfully submitted there was an actual and substantial doubt on many of the charges against Defendant, Calvin Elam. *See, Lipsitz v. State,* 135 Nev. Adv. Op. 17 (2019)

Reviewing the totality of evidence in this case it is clear that the State did not meet the burden of proof required by *In re Winship, supra* and *Jackson v. Virginia, supra*. The facts of this case show that there was insufficient evidence of guilt adduced during the trial of Defendant.

IV. DEFENSE COUNSEL'S INEFFECTIVE ASSISTANCE AT SENTENCING LED TO THE DISTRICT COURT ABUSING ITS DISCRETION IN SENTENCING DEFENDANT TO AN EXCESSIVE AND OVERLY HARSH SENTENCE.

The Defendant submits defense counsel's ineffectiveness at sentencing led to a sentence in violation of the Eighth Amendment to the United States Constitution as well as Article 1, Section 6 of the Nevada Constitution, which prohibit the imposition of cruel and unusual punishment. The Nevada Supreme Court has stated that "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.' " *See, Allred v. State,* 120 Nev. 410, 92 P.2d 1246, 1253 (2004) (quoting *Blume v. State,* 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting *Culverson v. State,* 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979).

. . .

Defendant was given an aggregate sentence of thirteen (13) years to life. Although the sentence in this case was within statutory limits, it is respectfully submitted the length of this sentence under the totality of circumstances should be considered to have been an abuse of discretion. It is respectfully submitted that this abuse of discretion occurred because of the ineffective assistance of counsel at sentencing.

Defendant does not dispute that case law grants a sentencing judge a broad discretion in imposing sentence. *Randell v. State,* 109 Nev. 5, 846 P.2d 278 (1993) (citing *Deveroux v. State,* 96 Nev. 388, 610 P.2d 722 (1980)). *See also, Glegola v. State,* 110 Nev. 344, 871 P.2d 950 (1994).

It is respectfully submitted however discretion is not unlimited and a district court must consider evolving standards of decency in determining a just sentence and in exercising its discretion. It is respectfully submitted that this was one of those cases where the lengthy sentence of imprisonment given the Defendant was not appropriate.

Consider *Kennedy v. Louisiana,* 554 U.S. 407, 128 S.Ct. 2541 (2008), where the Supreme Court noted:

> "[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments follows from the basic 'precept of justice and punishment for [a] crime should be graduated and proportioned to [the] offense.' " *See, Weems v. United States,* 217 U.S. 349, 367 (1910). (Emphasis added)

. . .

In analyzing whether a sentence is cruel and unusual punishment, a court should first make . . . "a threshold determination that the sentence imposed is grossly disproportionate to the offense committed." The court then considers . . . "the gravity of the offense and the harshness of the penalty." *Solem v. Helm,* 463 U.S. 277, 290-91 (1983). If the sentence is grossly disproportionate, the court then considers . . . "the sentence imposed on other criminals in the same jurisdiction . . . and the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 291. (Emphasis added)

Applying these principles of Eighth Amendment law to the instant case, Defendant respectfully submits the aggregate sentence the Defendant received in his case of 13 years to life was

excessive and disproportionate and it should therefore be reversed. Measuring this sentence against similar crimes and similar defendants, it is easy to see that Defendant's punishment was excessive. It must be held that in this case the district court wrongly exercised its discretion when the court sentenced the Defendant to that sentence which was excessive and disproportionate. The Defendant may actually serve life in prison if he is not fortunate to make parole. He will serve a minimum of 13 years and not inconceivably 18 to 20 years or more.

As the Court in *Weems, supra,* noted:

> "The Eighth Amendment is progressive, and does not prohibit merely the cruel and unusual punishments known in 1689 and 1787, but may acquire wider meaning as public opinion becomes enlightened by humane justice." *Id*. 351 (Emphasis added)

. . .

Defendant respectfully submits there has been little or no progress with prison reform in the more than one hundred and ten years since *Weems*. We are still waiting for the humane justice the Supreme Court was concerned about in 1910. The United States of America actually leads the world in the percentage of incarceration of its citizens. Any reforms which may have occurred recently certainly hasn't filtered down to Mr. Elam. Rather than reforming the criminal justice system, the response to crime in this country has instead usually been longer and longer sentences, no matter how overcrowded the prisons. It is respectfully submitted that under all the circumstances of this case, it was error to sentence the Defendant to such a lengthy sentence. It is also respectfully submitted a significant factor was his attorney's ineffectiveness at sentencing that caused his overly long sentence. This ineffectiveness of counsel at sentencing is another ground for reversal under *Strickland.*

V. DEFENSE COUNSEL WAS AN INEFFECTIVE ADVOCATE ON APPEAL BECAUSE HE CHOSE THE LEAST MERITORIOUS ISSUES ON APPEAL.

The failure of counsel to raise the best or most meritorious issues on appeal may be grounds for reversal of his conviction. *Banks v. Reynolds,* 54 F.3d 1508 (10th Cir. 1995). It is respectfully

submitted that counsel in this case failed to obtain a reversal of the conviction because he overlooked the more meritorious issues on appeal that would have reversed the conviction. The issues overlooked by defense counsel that may have been more meritorious included:

(1) Whether there was insufficient evidence of guilt as to the kidnapping count based upon *Jackson v. Virginia's* requirement of proof beyond a reasonable doubt;

(2) Whether there was insufficient evidence of guilt of battery with intent to commit sexual assault under *Jackson v. Virginia's* standard of proof beyond a reasonable doubt on the charge of Battery with Intent to Commit Sexual Assault;

(3) Whether Defendant was prejudiced by the favorable plea negotiations the State offered the alleged victim, Arrie Webster.

Effective appellate advocacy in any case requires several distinct but interrelated skills such as carefully reviewing and analyzing the entire record to recognize the important appellate issues. This requires a basic understanding of criminal law, constitutional law and the laws of evidence and trial procedures. Counsel must carefully collect and organize the record to include all the material facts and then synthesize the record to include the most relevant parts.

The next step is adequately researching and understanding the applicable law and then writing a persuasive appellate brief that incorporates all the material facts with the relevant case law and other authorities. Counsel must also be aware of recent changes in the law and be willing to challenge settled law and precedent when necessary.

Understanding the importance of precedent is essential for any appellate lawyer. Appellate counsel must examine and review the entire record with the view to selecting the most promising issues for review. *Jones v. Barnes,* 463 U.S. 745, 751-52 (1983); *Schaetzle v. Cockrell,* 343 F.3d 440, 445 (5th Cir.2003).

It is respectfully submitted counsel did not apply all of these important skills to render effective assistance of counsel in preparing Defendant's appeal. His lack of zeal in preparing the Defendant's direct appeal was ineffective assistance under *Strickland.*

In *Smith v. Robbins,* 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000), the Supreme Court found appellate counsel was ineffective for not effectively rebutting the prosecution's theory

of the case based on expert testimony. It is respectfully submitted that in this case counsel was also similarly ineffective under *Strickland* because there were several potential winning issues on appeal. Defendant was clearly prejudiced by his attorney's failure that could have resulted in reversing the conviction.

(1) Defendant respectfully submits one significant legal issue that likely would have resulted in reversal was the issue of insufficiency of the evidence of kidnapping because the essential elements of these crimes were not proved beyond a reasonable doubt. *See, Langford v. State,* 100 Nev. 293 (1979), and *Jackson v. Virginia, supra.* Compare *Hughes v. State,* 112 Nev. 84, 910 P.2d 254 (1996), where the Supreme Court affirmed because the child daughter of the defendant actually testified how she was endangered and therefore it was clear she may have suffered mentally. *Id.* 87, 88

Consider *Banks v. Reynolds,* 54 F.3d 1508 (10th Cir.1995), where the court in reversing stated:

> ". . . When a habeas petitioner alleges that his counsel was ineffective for failing to raise an issue on appeal, we examine the merits of the omitted issue. *Cook,* 45 F.3d at 392-93; *Dixon,* 1 F.3d at 1083. Failure to raise an issue that is without merit "does not constitute constitutionally ineffective assistance of counsel," *id.* at 1083 n.5, because the Sixth Amendment does not require an attorney to raise every nonfrivolous issue on appeal. *See, Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 3312-13, 77 L.Ed.2d 987 (1983). Thus, counsel frequently will "winnow out" weaker claims in order to focus effectively on those more likely to prevail. *Smith v. Murray,* 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986); *see Tapia v. Tansy,* 926 F.2d 1554, 1564 (10th Cir.), *cert. den.,* 502 U.S. 835, 112 S.Ct. 115, 116 L.Ed.2d 84 (1991). However, "an appellate advocate may deliver deficient performance and prejudice a defendant by omitting a 'dead-bang winner,' even though counsel may have presented strong but unsuccessful claims on appeal." *Cook,* 45 F.3d at 394-95 (citing *Page v. United States,* 884 F.2d 300, 302 (7th Cir.1989)).
>
> In this case, Mr. Banks' appellate counsel failed to raise either the *Brady* claim or the ineffective assistance of trial counsel claim on direct appeal. These were not frivolous or weak claims amenable to

being winnowed out of an otherwise strong brief. They were clearly meritorious." *Id*. 1515 (Emphasis added)

. . .

As in *Banks*, counsel here failed to raise several non-frivolous claims that would have been a likely winner on appeal. This was ineffectiveness under *Strickland.*

VI. DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND*.

In *Marshall v. State,* 110 Nev. 1328, 885 P.2d 603 (1994), the Nevada Supreme Court reversed *Marshall's* conviction because he was denied an evidentiary hearing on post-conviction. The Court there stated:

> "When a petition for post-conviction relief raises claims supported by specific factual allegations which, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing unless those claims are repelled by the record." *Hargrove v. State,* 100 Nev. 498, 686 P.2d 222 (1984). *Id*. 1331

The Court continued:

> "At most, the state presented evidence that appellant frequented an apartment that was rented to his brother and that appellant stored some of his personal belongings in the apartment. This evidence is not sufficient to establish that appellant, rather than one of the numerous other persons who frequented the apartment, possessed the cocaine and the marijuana the police found. Appellate counsel was ineffective for failing to raise this issue on appeal and counsel's failure prejudiced appellant. *Warden v. Lyons,* 100 Nev. 430, 683 P.2d 504 (1984), *cert. den.,* 471 U.S. 1004 (1985). The district court erred in refusing to provide appellant an evidentiary hearing on this issue and in denying appellant relief." *Id*. 1333 (Emphasis added)

. . .

In this case, as in *Marshall, supra*, Defendant was entitled to an evidentiary hearing on the disputed facts in his Petition.

Defendant in this case, as in *Marshall, supra,* raised factual claims which, if true, entitled him to an evidentiary hearing. Defendant submits an evidentiary hearing would have shown that counsel was ineffective because counsel did not seek necessary defense experts. An evidentiary hearing would also have shown there were sufficient weaknesses in the State's case that the State could not have met its burden of proof under *Jackson v. Virginia, supra.* The Defendant submits an evidentiary hearing would have shown counsel was ineffective for not filing a Motion to Suppress and a Motion to Dismiss the Weapon(s) Enhancement. Finally, an evidentiary hearing will establish that there existed mitigating evidence at sentencing that was not presented.

In *Mann v. State,* 118 Nev. 351, 46 P.3d 1228 (2002), the Nevada Supreme Court reversed for denial of an evidentiary hearing, stating:

> "Because the habeas provisions do not allow the State to expand the record via its answer unless the district court orders an evidentiary hearing and because petitioners are entitled to an evidentiary hearing if they plead specific facts not belied by the record that, if true, would entitle them to relief, we specifically hold that it is improper for the district court to resolve a factual dispute created by affidavits without conducting an evidentiary hearing. We conclude that *Mann's* petition set forth sufficient allegations to entitle him to an evidentiary hearing. *Mann* alleged that his trial counsel failed to file an appeal after *Mann* requested them to do so. The record does not belie this allegation; rather, as noted above, the record provides some support for his claim. Thus, the district court erred in failing to hold an evidentiary hearing on this issue. *Id.* 356 (Emphasis added)

. . .

In this case, as in *Mann,* Defendant submits he has alleged sufficient evidence of ineffective assistance of counsel in his *Pro Per* Petition dated May 27, 2020. Defendant alleged his counsel was ineffective for not moving to dismiss the charges for insufficient evidence and/or not making proper objections to prosecutorial misconduct and for not requesting a necessary jury instruction. The Defendant is alleging the totality of defense error has led to a denial of a meaningful adversarial process depriving Defendant of his Sixth Amendment rights.

. . .

This Honorable Court should grant him a full and fair hearing on the factual issues as he requested. After a full hearing Defendant submits this case will be reversed and remanded as required by state law.

VII. THE ACCUMULATION OF ERRORS IN THIS CASE REQUIRES REVERSAL OF THE CONVICTION.

The numerous errors and deficiencies of counsel in this case require reversal of the conviction. It can be argued that even considered separately, the errors or omissions of counsel were of such a magnitude that they each require reversal. It is clear, when view cumulatively, the case for reversal is overwhelming. *Daniel v. State,* 119 Nev. 498, 78 P.3d 890 (2003), *see also, Sipsas v. State,* 102 Nev. at 123, 216 P.2d at 235, stating: "The accumulation of error is more serious than either isolated breach, and resulted in the denial of a fair trial."

A greater prejudice may result from the cumulative impact of multiple deficiencies. *Cooper v. Fitzharris,* 586 F.2d 1325, 1333 (9th Cir. 1978) (*en banc*), cert. denied, 440 U.S. 970; *Harris by and through Ramseyer v. Wood,* 61 F.3d 1432 (9th Cir. 1995). The multiple errors of counsel in this case when cumulated together require reversal. A quantitative analysis makes that clear. *See,* Rachel A. VanCleave, When is Error . . . not an Error? Habeas Corpus and Cumulative Error, 46 Baylor Law Review 59, 60 (1993).

The Nevada Supreme Court has found that the relevant factors to consider in evaluating a claim of cumulative error are [1] whether the issue of guilt is close, [2] the quantity and character of the error, and [3] the gravity of the crime charged. *Mulder v. State,* 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000), citing *Leonard v. State,* 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998). *See also, Big Pond v. State,* 101 Nev. 1, 692 P.2d 1228 (1985), *Daniel v. State,* 119 Nev. 498, 78 P.3d 890 (2003). *See also, Mak v. Blodgett,* 970 F.2d 614 (9th Cir. 1992), where the Ninth Circuit stated:

> "We do not decide whether these deficiencies alone meet the prejudice standard because other significant errors occurred that, considered cumulatively, compel affirmance of the district court's

> grant of habeas corpus as to the sentence of death." *Id*.622 (Emphasis added) *See also, United States v. Tucker,* 716 F.2d 576, 595 (9th Cir. 1983)

. . .

The Defendant in this case has received a lengthy sentence and he needed effective assistance of counsel at every stage of representation. Significant errors by counsel pretrial, throughout the trial, and on appeal led to ineffective assistance of counsel under *Strickland.*

Based upon the multiple substantive errors enumerated in this Post Conviction Petition for Writ of Habeas Corpus, it is respectfully submitted that the prejudicial effect of each error when cumulated raised such substantial questions about the validity of the conviction that it must be reversed.

CONCLUSION

"If counsel entirely fails to subject the prosecution to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that make the adversary process itself presumptively unreliable." *United States v. Cronic,* 466 U.S. 648, 656-59, 104 S.Ct. 2039, 2045-47, 80 L.Ed.2d 657 (1984).

It is respectively submitted the Defendant/ Petitioner in this case did not receive his full Sixth Amendment right of effective assistance of counsel under *Strickland v. Washington*. The failure of Defendant Calvin Thomas Elam's counsel to zealously represent him prior to his trial, during trial and on appeal requires his conviction must be reversed.

Wherefore, it is respectfully submitted for the reasons stated above, Defendant Elam requests the Writ of Habeas Corpus be granted and the conviction be reversed with such other relief as this Court deems just. The case should therefore be remanded for new trial and with such other remedies as the court deems just.

DATED this 8th day of June, 2022.

Respectfully submitted,

/s/ Terrence M. Jackson

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CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esq., I am a person competent to serve papers and not a party to the above-entitled action and on the 8th day of June, 2022, I served copy of the foregoing: Defendant/ Petitioner, Calvin Thomas Elam's, SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF WRIT OF HABEAS CORPUS FOR POST CONVICTION RELIEF as follows:

[X] Via Electronic Service (CM/ECF) to the Eighth Judicial District Court and by United States first class mail to the Nevada Attorney General and Petitioner/Appellant as follows:

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DISTRICT COURT

CLARK COUNTY, NEVADA

CALVIN ELAM,
#2502165

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: **A-20-815585-W**
C-15-305919-1

DEPT NO: **XV**

STATE'S RESPONSE TO PETITIONER'S SUPPLEMENT TO HIS PETITION FOR WRIT OF HABEAS CORPUS

DATE OF HEARING: **AUGUST 25, 2022**
TIME OF HEARING: **9:30 AM**

The State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JONATHAN VANBOSKERCK, Chief Deputy District Attorney, submits the attached Points and Authorities in State's Response to Petitioner's Supplement to his Petition for Writ of Habeas Corpus.

This Response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On April 17, 2015, Calvin Elam (hereinafter "Petitioner") was indicted by way of grand jury as follows: one (1) count of CONSPIRACY TO COMMIT KIDNAPPING (Category B Felony – NRS 200.310, 199.480 – NOC 50087); one (1) count of FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.310, 200.320, 193.165 – NOC 50055); one (1) count of ASSAULT WITH A DEADLY WEAPON (Category B Felony – NRS 200.471 – NOC 50201); one (1) count of UNLAWFUL USE OF AN ELECTRONIC STUN DEVICE (Category B Felony – NRS 202.357 – NOC 51508); one (1) count of BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT (Category A Felony – NRS 200.400.4 – NOC 50157); one (1) count of SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.364, 200.366, 193.165 – NOC 50097); one (1) count of ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.364, 200.366, 193.330, 193.165 – NOC 50121); and one (1) count of OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony – NRS 202.360 – NOC 51460).

Petitioner's jury trial started on June 19, 2017 and ended on June 27, 2017. The jury found Petitioner guilty of Count 1— CONSPIRACY TO COMMIT KIDNAPPING (Category B Felony - NRS 200.310, 200.320, 199.480 - NOC 50087), guilty of Count 2—FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.310, 200.320, 193.165 - NOC 50055), Count 3—ASSAULT WITH A DEADLY WEAPON (Category B Felony - NRS 200.471 - NOC 50201), and Count 5— BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT (Category A Felony - NRS 200.400.4 – NOC 50157).

The jury found Petitioner not guilty of Count 4—UNLAWFUL USE OF AN ELECTRONIC STUN DEVICE (Category B Felony - NRS 202.357 - NOC 51508), Count 6— SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.364, 200.366, 193.165 - NOC 50097), and Count 7— ATTEMPT SEXUAL ASSAULT

WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.364, 200.366, 193.330, 193.165 - NOC 50121). The State requested that the District Court conditionally dismiss Count 8— OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony - NRS 202.360 - NOC 51460).

On October 19, 2017, Petitioner was adjudged guilty and sentenced as follows: as to Count 1 a minimum of twenty-four (24) months and a maximum of seventy-two (72) months in the Nevada Department of Corrections; as to Count 2—life with the eligibility for parole after five (5) years with a consecutive term of a minimum of sixty (60) months and a maximum of one hundred eighty (180) months for the use of a deadly weapon in the Nevada Department of Corrections to run concurrent with count 1; as to Count 3—to a minimum of twelve (12) months and a maximum of seventy-two (72) months in the Nevada Department of Corrections to run consecutive to Count 2; as to Count 5—life with the eligibility to parole after two (2) years to run consecutive to Count 3 in the Nevada Department of Corrections. Petitioner received nine hundred twenty-eight (928) days credit for time served. Counts 4, 6, and 7 were dismissed and Count 8 was conditionally dismissed. Additionally, the Court ordered a special sentence of lifetime supervision to commence upon release from any term of probation, parole, or imprisonment. Further, Petitioner was ordered to register as a sex offender in accordance with NRS 199D.460 within 48 hours after release.

Petitioner's Judgment of Conviction was filed on October 31, 2017.

On November 13, 2017, Petitioner filed a Notice of Appeal. On April 12, 2019, the Nevada Supreme Court affirmed Petitioner's judgment of conviction. Remittitur issued on May 7, 2019.

On May 27, 2020, Petitioner filed a Petition for Writ of Habeas Corpus. Also on May 27, 2020, Petitioner filed a Motion to Withdraw Judgment on Petition for Writ of habeas Corpus and Motion for Appointment of Attorney. On July 6, 2020, the State filed its Response. On August 18, 2020, the Court granted Petitioner's Motion to Withdraw Judgment on Petition for Writ of Habeas Corpus and allowed Petitioner to file a Supplemental Petition by October 20, 2020. Also on August 18, 2020, the Court denied Petitioner's Motion for Appointment of

Counsel without prejudice and articulated that if issues were unduly complex counsel appointment would be considered. Petitioner never filed a Supplemental Petition. On December 1, 2020, the Court denied Petitioner's Petition. The Court's written Order was filed on January 19, 2021.

On February 26, 2021, Petitioner filed a notice of appeal, appealing the District Court's denial of his Petition. On March 15, 2022, the Nevada Supreme Court reversed the District Court's decision and remanded the case to appoint post-conviction counsel and allow Petitioner to file a supplement to his original Petition.

On June 8, 2022, Petitioner filed the instant Supplemental Points and Authorities in Support of Writ of Habeas Corpus for Post-Conviction Relief.

STATEMENT OF THE FACTS

The following was taken from Petitioner's Presentence Investigation Report ("PSI"):

> On March 10, 2015, a detective was dispatched to a kidnap call at an apartment complex. The details of the call stated that the victim was kidnapped at a nearby apartment and had escaped her captors. Upon arrival, the detective began an investigation and interviewed the victim.
>
> The victim related that she has lived in this neighborhood for the past three months. On this date, she was walking her dog and stopped over at a friend's house. While there, she saw a neighbor, later identified as the defendant Calvin Thomas Elam, who recently had his pit bull dogs stolen. The defendant waved her over to his apartment next door, and she voluntarily went inside.
> As she waited in the kitchen, the defendant walked to the back of his apartment, came back to the kitchen and told her, "Turn around, put your hands behind your back and get on your knees." She complied, and he bound her hands behind her back with some cords and some plastic material. He next bound her feet together and then he hog tied her feet to her hands and put her face down on the kitchen floor.
>
> After tying her up, the defendant began to accuse her of stealing his dogs. When she denied taking his dogs, the defendant began to accuse her of knowing who took his dogs. He then retrieved a shotgun, put the barrel into her mouth and continued to accuse her of knowing who stole his dogs. When she told him it may have been a local thief by the name of RJ, he put toilet paper in her mouth to gag her and put tape around her head to hold the toilet paper in. He then covered her head with some sort of towel, and her vision was partially obscured.

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During this ordeal, the victim related that a female, the mother of the defendant's child, was in the apartment, as well as three other females. An unidentified male suspect also arrived and accused her of lying and told her that they were going to get to the bottom of it. The mother of the defendant's child left and did not return.

While everyone was there, the defendant told her to pull her shorts down; and as she was scared, she pulled her shorts and underwear down to her ankles. The defendant and the unidentified male then beat her approximately twenty-five times with a belt. The male then stated, "I know what she wants," and he grabbed a wood handled broom and tapped it on her buttocks. The victim believed the male was going to penetrate her with the broom handle and sexually assault her with it. She saw one of the three female was filming the assault with her cell phone.

Moments later, the unidentified male got a stun gun, put it up to her eyes and told her, "I'll put your eye out." He then electrocuted her six or seven times with the stun gun all over her body to include her neck, back, legs and arms. The victim tried to play dead so that the violence would stop; and while doing this, the male asked, "Is she dead?" The defendant replied, "Taze her one more time." The defendant told the male that his kids were going to be home from school and that he would have them play outside. He also told the male that he would take care of the victim later.
The victim stayed on the kitchen floor for a minute and then tried to make an escape. She was able to get to her feet, made it to the door and fell to the outside. She made to an alley while still hog tied and had her shorts down around her ankles. She fell to the ground; but her friend came to her aid, cut the cords off of her wrists and ankles and took the gag out of her mouth. Two other witnesses saw the victim bound and gagged and coming out from the defendant's apartment, and they corroborated the victim's statement. After she was set free, the victim saw the defendant and two women standing outside the defendant's apartment and laughing at her.

Detectives conducted a traffic stop on a vehicle occupied by the two females. Detectives learned that one of the females had a key to the defendant's apartment, and they were presumably going to clean up the evidence there. One female told the detective that the defendant was at her apartment where he was later taken into custody.

The defendant denied committing the offense or the victim coming inside his apartment. He, however, stated that he yelled at the victim to come over to his door where he questioned her about his missing dogs. When asked, he admitted to having a shotgun in his home and moving it because his kids were coming. He stated he moved the shotgun by the door.

During the course of the investigation, detectives learned that the defendant's pit bulls were taken by animal control on March 8, 2015.

PSI at 5-7.

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ARGUMENT

I. THIS PETITION IS PROCEDRUALLY BARRED

A. Application of the procedural bars is mandatory

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

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the District Court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. Ignoring these procedural bars is an arbitrary and unreasonable exercise of discretion. Id. at 234, 112 P.3d at 1076. The Nevada Supreme Court has granted no discretion to District Courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307 P.3d at 326. Accordingly, the Court reversed the District Court and ordered the defendant's petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The procedural bars are so fundamental to the post-conviction process that they must be applied by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074. Parties cannot stipulate to waive the procedural default rules. State v. Haberstroh, 119 Nev. 173, 180-81, 69 P.3d 676, 681-82 (2003).

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B. The Petition is time-barred

This Petition is time-barred pursuant to NRS 34.726(1):

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

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

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

Petitioner failed to file this Petition prior to the one-year deadline. Remittitur issued from Petitioner's direct appeal on May 7, 2019. Therefore, Petitioner had until May 7, 2020, to file a timely habeas petition. Petitioner filed the present Petition on May 27, 2020. This is past Petitioner's one-year deadline. As such, this court should deny the Petition as it is time-barred.

II. PETITIONER FAILS TO DEMONSTRATE OR EVEN ALLEGE GOOD CAUSE TO OVERCOME THE PROCEDURAL BARS

To avoid procedural default, under NRS 34.726, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or to otherwise comply with the statutory requirements, and that he will be

unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a); see Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). "A court ***must*** dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds ***both*** cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001) (emphasis added).

"To establish good cause, petitioners must show that an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003). The Court continued, "petitioners cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Examples of good cause include interference by State officials and the previous unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

Additionally, "bare" and "naked" allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record. 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. Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002) (citing Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001)).

Here, Petitioner has failed to demonstrate or even attempt to establish the existence of an impediment external to the defense that prevented him from bringing these claims in accordance with the mandatory deadline. As such, Petitioner should be prohibited from addressing good cause in any reply as allowing his to do so would deprive Respondent of any

meaningful opportunity to address his arguments. See, Righetti v. Eighth Judicial District Court, 133 Nev. 42, 47, 388 P.3d 643, 648 (2017) (declining to adopt a rule that "rewards and thus incentivizes less than forthright advocacy"). Regardless, all the facts and law necessary were available to Petitioner to bring these claims in a timely habeas Petition. Accordingly, Petitioner failed to show good cause for his delay in filing, thus the Court need not continue its analysis.

III. PETITIONER FAILS TO ESTABLISH PREJUDICE TO OVERCOME THE PROCEDURAL BARS

Petitioner cannot demonstrate the requisite prejudice necessary to ignore his procedural default because his underlying complaints are meritless.

In order to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

IV. PETITIONER DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL

A. Petitioner was provided effective pre-trial assistance of counsel

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

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

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against

allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

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

When a conviction is the result of a guilty plea, a defendant must show that there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985) (emphasis added); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996); Molina v. State, 120 Nev. 185, 190-91, 87 P.3d 533, 537 (2004).

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

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore,

claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] must allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

1. Claim 1: Counsel was not ineffective for failing to investigate

Petitioner claims counsel was ineffective for failing to "contact a necessary accident reconstruction expert to challenge the State's expert witness." Petition at 6. However, his claim fails for multiple reasons.

First, this claim is a bare and naked assertion. Hargrove, 100 Nev. at 502, 686 P.2d at 225. While Petitioner cites legal authority, Petitioner does nothing more than say counsel should have investigated and contacted an expert but does not say why. Petitioner only vaguely argues "to challenge the State's expert witness," but does not state how an expert would challenge the State's witness, what portion of their testimony was challengeable, or how he would have benefitted from his own expert witness. Petitioner fails to specifically demonstrate what a better investigation would have discovered or how it would have benefitted him. Molina, 120 Nev. at 190-91, 87 P.3d at 537. This claim is a bare and naked assertion only suitable for summary denial.

Second, which witness to call is a virtually unchallengeable strategic decision. "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. 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). Petitioner has failed to show that this was not a strategic assertion outside of his one-sentence claim that "[t]his was not a strategic decision." See Petition at 6-7. Therefore, the decision not to present an expert is almost unchallengeable and Petitioner fails to demonstrate otherwise. His claim must be denied accordingly.

2. Claim 2: Counsel was not ineffective for failing to file motions

a. Motion to Suppress

Petitioner claims his counsel was ineffective for failing to file a motion to suppress his statements to police. However, his claim is belied by the record because his statements to police were voluntary. Thus, any motions specifically arguing "fruit of the poisonous tree" / violations of Miranda v. Arizona, 384 U.S. 436, 86 S Ct. 1602 (1966), would have been futile. Therefore, counsel was not ineffective.

The Fifth Amendment of the United States Constitution affords an individual the right to be informed, prior to custodial interrogation, that:

> [H]e has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed to him prior to any questioning if he so desires.

Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 1630 (1966). Miranda's procedural safeguards are only prophylactic in nature, designed to advise suspects of their rights, and "not themselves rights protected by the Constitution." Michigan v. Tucker, 417 U.S. 433, 444, 94 S. Ct. 2357, 2364 (1974).

The United States Supreme Court has held that Miranda does not require some "talismanic incantation." California v. Prysock, 453 U.S. 355, 360, 101 S. Ct. 2806, 2809 (1981) (per curiam). Rather, the warning need only "reasonably convey to a suspect his rights as required by Miranda." Florida v. Powell, 559 U.S. 50, 60, 130 S. Ct. 1195, 1204 (2010) (internal quotations omitted). Thus, the Supreme Court has instructed reviewing courts that they need not examine the warning rigidly "as if construing a will or defining the terms of an easement." Duckworth v. Eagan, 492 U.S. 195, 203, 109 S. Ct. 2875, 2880 (1989).

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To be admissible, a confession must be made voluntarily. Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987). To be voluntary, the confession must be made as the result of a "rational intellect and a free will." Id. The question in each case is whether the defendant's will was overborne when he confessed. Id. at 214, 735 P.2d at 323. Once the issue of voluntariness is raised, the burden of proving voluntariness is on the State, by a preponderance of the evidence. Quiriconi v. State, 96 Nev. 766, 772, 616 P.2d 1111, 1114 (1980).

To determine whether a confession in voluntary, the court considers the totality of the circumstances. Passama, 103 Nev. at 213, 735 P.2d at 322. Factors include: "the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep." Id. A lower than average intelligence does not, however, render a confession involuntary. Young v. State, 103 Nev. 233, 235, 737 P.2d 512, 514 (1987) (citing Ogden v. State, 96 Nev. 258, 607 P.2d 576 (1980)). Nor do personality disorders, or a desire to please authority figures. Steese, 114 Nev. at 488, 960 P.2d at 327.

First, Petitioner's claims are bare and naked. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner only makes general claims that his "statements were involuntary because they were the result of hostile and coercive interrogation." Petition at 7-9. He does not state what the officers did to intimidate him, or how their interrogation was hostile and coercive, let alone so hostile and coercive that it violated his constitutional rights. The only factually specific assertion to support his claim is that he was secretly recorded. Petition at 8-9. However, he does not explain how secretly recording him created an intense and hostile interrogation environment or how his lack of awareness that he was being recorded amounts to tricking him or threatening him into waiving his rights. Therefore, his claim should be summarily denied under Hargrove because it is bare and naked.

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Second, Petitioner cites NRS 200.640, claiming the statute "limits the use of unauthorized wire or radio communication." Petition at 8-9. He claims that by taping the interview, the detective violated this statute. However, Petitioner intentionally misleads this Court. NRS 200.640 is completely irrelevant to the issue Petitioner raised. The plain language of NRS 200.640 prohibits individuals from tapping into the wire or radio communication facilities of a communications business without the consent of the business. See State v. Allen, 119 Nev. 166, 170-171, 69 P.3d 232, 235 (2003). Petitioner offers no statute or case law that states NRS 200.640 limits the use of recording devices by police during interviews. Therefore, Petitioner erroneously claims the statute limits the use of unauthorized wire or radio communication, even though the actual limitation of the statute is irrelevant to this case.

Third, whether Petitioner was informed the interview was being recorded does not entitle him to suppression of his statement on Miranda grounds or voluntariness grounds. Courts have held that defendants do not have a reasonable expectation of privacy, under the Fourth Amendment, in the back of police cars or at police stations. See, United States v. McKinnon, 985 F.2d 525 (11th Cir. 1993); People v. Califano, 5. Cal. App. 3rd 476, 85 Cal. Rptr. 292 (1970). Petitioner certainly had no reasonable expectation of privacy within the police car or while speaking with detectives in an interview room.

Fourth, Petitioner claims he involuntarily waived his Miranda rights and was likely "threatened, tricked, or cajoled" into waiving his rights. Petition at 7-9. The totality of the evidence supports the claim that his statements were made voluntarily and intelligently. During trial, Petitioner's statement was played for the jury and the transcription of Petitioner's voluntary statement, State's Exhibit #71, was projected for the jury so they could read along as the audio was played. Trial Transcript ("TT") Day 4 at 10-11. State's Exhibit #71 was Weirauch and Petitioner speaking on March 10, 2015, at 2300 hours:

> Q: Okay. Okay, Calvin. I'm going to read you something. Okay?
>
> A: Yes sir.
>
> Q: Calvin, you have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to the presence of an attorney. If you cannot afford an attorney, one will be appointed to you before questioning. Do you understand these rights?

A: Yes sir.

Petitioner's Voluntary Statement from 3/10/2015 at 2[1]. Petitioner does not cite any portion of his statement as evidence that his statements were not voluntary. Accordingly, the totality of the evidence, including his voluntary statement, supports the fact that his statement was voluntary. As such, counsel was not ineffective for failing to file a futile motion to suppress. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Lastly, counsel was not ineffective because the confession could not be legitimately suppressed. Counsel moved for suppression of Petitioner's statements under a stronger theory. The following exchange happened with Detective Weirauch on the witness stand during a hearing outside the presence of the jury:

THE COURT: Was the card the standard-issue card that was carried by Metro officers at that time?

THE WITNESS: Yes, it was.

THE COURT: Okay. And now they've given you another different card. Is that what's happened?

THE WITNESS: Yes.

THE COURT: Okay.

CROSS-EXAMINATION

BY MR. ERICSSON:

Q: And Detective—and you are a detective, correct?

A: Yes, I am.

Q: What is the difference with the card that you now carry compared to the one you had back in March of 2015?

A: I believe they added one more line for us to read off of.

Q: And can you pull out the card that you currently carry.

A: Yeah.

Q: Do you have that there?

[1] Petitioner fails to cite to this transcript in his brief. Therefore, this Court should presume that the Miranda warning did adequately inform Petitioner of his rights to an attorney, and Petitioner waived his rights knowingly and voluntarily. See Sasser v. State, 324 P.3d 1221, 1225 (2014) (citing Riggins v. State, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991) (concluding that if materials are not included in the record, the missing materials "are presumed to support the district court's decision.")

A: Yes.

Q: For the record, can you just read the card that you currently carry.

A: You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to consult with an attorney before questioning. You have the right to the presence of an attorney during questioning. If you cannot afford an attorney, one will be appointed to you before questioning. Do you understand these rights.

Q: Thank you. And what is the additional line to your belief that has been added to the card now compared to the one you carried in March of 2015?

MS. LUZAICH: Objection. Relevance.

THE COURT: Overruled.

THE WITNESS: It's—I'm assuming it's all worded the same. It's one of these two lines right here, the third or fourth line.

MR. ERICSSON: And, Your Honor, may I approach and—

THE COURT: Sure.

THE WITNESS: I think it's—I think it's this one they added right here. You have the right to consult with an attorney before questioning as opposed to before it might have just been you have the right to the presence of an attorney during questioning. I don't think they added that one.

BY MR. ERICSSON:

Q: Okay. So to your knowledge, the new line on this card is the line that reads—

A: Go ahead. It's this third one right here I believe is the one that they added is you have the right to consult with an attorney before questioning.

THE COURT: I think that's right.

THE WITNESS: I think.

BY MR. ERICSSON:

Q: Okay. So to your knowledge, you did not provide Mr. Elam with that sentence when you gave him a Miranda warning back in—

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A: No, I wouldn't have. I would've read it just verbatim off the card of the day.

MR. ERICSSON: Thank you. Your Honor, I've been doing a fair amount of litigation in federal court on that issue. I would move to prevent to [sic] the statement being introduced in this trial. I think that that is a necessary warning for it to be an effective Miranda warning, and since that was not given—

THE COURT: Ms. Luzaich.

MS. LUZAICH: The United States Supreme Court disagrees with that. It was one bad ruling in federal court that I believe may have either since been overruled or something like that, but the United States Supreme Court doesn't agree, and neither does the Nevada Supreme Court.

THE COURT: Anything else, Mr. Ericsson?

MR. ERICSSON: No. And this is—obviously I'm first time learning that he's got a different card. So, you know, whatever your ruling is now I—I may—

THE COURT: Well, yeah—

MR. ERICSSON: --may supplement tomorrow.

THE COURT: --it's denied. I mean, I think the reason they have the new card is to address that issue to the extent some judges may be granting those motions or what have you. That doesn't mean that it was wrong before. I think they just changed the cards because various opinions. So the request is denied.

TT Day 3 at 177-181.

This was a much stronger argument than a bare and naked motion to suppress with no evidence that his statement was involuntary to support it. Counsel cannot be deemed ineffective for failing to file futile motions. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, his present claim should be denied.

b. Motion to dismiss weapon enhancement

Petitioner claims counsel was ineffective for failing to file a "motion to strike the deadly weapon enhancement" because a broomstick should not be considered a deadly weapon. Petition at 9-11. However, Petitioner's claim is meritless because they are belied by the record.

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Petitioner cites the "inherently dangerous" test from Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990) as the test for whether something could be considered a deadly weapon. Petition at 10-11. However, Petitioner fails to cite controlling law. Petitioner fails to recognize the Legislature changed the test from inherently dangerous to the functionality test. NRS 193.165(6)(b). Thomas v. State, 114 Nev. 1127, 1146, Footnote 4, 967 P.2d 1123, Footnote 4 (1998). NRS 193.165(6)(b) defines a deadly weapon as "[a]ny weapon, device, instrument, material or substance which under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death."

Here, a broomstick satisfies the definition of a deadly weapon, especially considering the way Petitioner used it. NRS 193.165(6)(b). Petitioner tied up the victim with fabric and tape, put tape over her mouth, beat her with a belt, then pulled her pants down and angled the broomstick as if he was going to penetrate her anus with it. TT Day 3 at 35-36. While there was no evidence at trial that Petitioner actually penetrated the victim with the broomstick, if he had, he almost certainly would have caused substantial bodily injury. See NRS 193.165(6)(b). This satisfies the requirements of NRS 193.165(6)(b).

Petitioner did not need to penetrate the victim, he only needed to threaten to use it, which he did. Specifically, the victim testified:

THE STATE	…How did he use [the broomstick]?
THE VICTIM	He – the – he used it – the top of it, he used it to touch me with.
THE STATE	Where did he touch you with it?
THE VICTIM	On my butt area.

TT Day 3 at 42-43. Therefore, the evidence presented at trial satisfied the statutory requirement for a deadly weapon. Counsel cannot be ineffective for failing to file futile motions, which is exactly what any motion to dismiss the weapon enhancement would have been. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Accordingly, Petitioner's claim must be denied.

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B. All of Petitioner's trial counsel ineffective assistance claims are without merit

1. Failure to utilize a jury selection expert

Petitioner claims his trial counsel was ineffective for failing to retain a "Jury Selection Expert" to assist in preparing voir dire questions and providing a profile of favorable jurors. Petition at 12-13. However, this is a bare and naked claim only suitable for summary denial.

Petitioner's claim is bare and naked. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner never states with specificity how a jury selection expert would have been helpful outside of general and vague claims that counsel should have consulted an expert. Petitioner fails to show how such an expert would have led to a different result as to specific venire persons in this case. Petitioner's claim is devoid of all specific factual reference to venire persons. Petitioner's claim is not cognizable and as such, is only suitable for summary denial pursuant to Hargrove.

2. Failure to file a Motion for Sequestered Voir Dire

Petitioner claims his trial counsel was ineffective for failing to file a Motion for Sequestered Voir Dire because "numerous jurors had been victim of sexual assault or had close friends or family members who had been the victims of sexual crimes or crimes of violence." Petition at 13-15. However, his claim should be denied because it is without merit.

The district court has discretion in deciding a request for individual voir dire. See Haynes v. State, 103 Nev. 309, 316, 739 P.2d 497, 501 (1987); see also Mu'Min v. Virginia, 500 U.S. 415, 427, 114 L. Ed. 2d 493, 111 S. Ct. 1899 (1991). Absent an abuse of discretion or a showing of prejudice to the defendant, this court will not disturb the district court's decision. Haynes, 103 Nev. at 316, 739 P.2d at 501. Counsel cannot be ineffective for failing to make futile objections or arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Petitioner's claim that trial counsel was ineffective for failing to request a sequestered jury during voir dire is without merit. The voir dire process is up to the discretion of the trial court. Sequestering a jury during voir dire places a heavy burden on judicial economy and is only utilized where absolutely necessary. Any request to sequester a jury without a compelling reason would have been denied. Petitioner has not offered any compelling reasons that would

have caused this Court to order a sequestered voir dire. All Petitioner has done is surmise that some of the prospective jurors tainted the entire pool by stating they had previous encounters with violence in the presence of other potential jurors. Petition at 13-15. Petitioner did not state how this prejudiced other prospective jurors or why any prospective juror speaking about their past history of violence would prejudice a potential juror in this case.

Leonard v. State, 117 Nev. 53, 64, 17 P.3d 397, 404 (2001), noted the lack of prejudice due to collective voir dire when all jurors with potential bias or knowledge were not empaneled. Petitioner fails to even make a showing of the kind presented in Leonard, where there was extensive pretrial publicity and thus potential bias. Id. To the contrary, there is no merit to his claim. Petitioner has not shown that any of the jurors who heard his case were biased against him, let alone that the statements by other prospective jurors had any effect on the empaneled jurors in this case.

This claim is insufficient to support the position that this Court would have granted a request to sequester the voir dire process. Petitioner's counsel cannot be ineffective for failing to file a futile motion so his claim must be denied. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

3. Failure to object during closing arguments

Petitioner claims his counsel was ineffective for failing to object to alleged prosecutorial misconduct during closing argument. Petition at 15-17. However, Petitioner fails to put forth any meritorious claim of prosecutorial misconduct, and his counsel cannot be ineffective for failing to raise a claim in futility. Thus, the claim must be denied.

The court employs a two-step analysis when considering claims of prosecutorial misconduct in the context of improper argument. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, the court determines if the conduct was improper. Id. Second, the court determines whether misconduct warrants reversal. Id. As to the first factor, argument is not misconduct unless "the remarks … were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (quoting Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). While a prosecutor may not make disparaging comments about defense counsel pursuant to Butler, 120 Nev. 898, 102 P.3d 84, "statements by a prosecutor, in

argument, … made as a deduction or conclusion from the evidence introduced in the trial are permissible and unobjectionable." Parker v. State, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1993) (quoting Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971)). The prosecution may also respond to defense's arguments and characterization of the evidence. See Williams v. State, 113 Nev. 1008, 1018-19, 945 P.2d 438, 444-45 (1997), receded from on other grounds, Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). A prosecutor may also offer commentary on the evidence that is supported by the record. Rose v. State, 123 Nev. 194, 163 P.3d 408 (2007), rehearing denied (Dec. 6, 2007), reconsideration en banc denied (Mar. 6, 2008), cert. den., 555 U.S. 847, 129 S.Ct. 95 (2008). In determining prejudice, this Court considers whether a comment had: 1) prejudicial impact on the verdict when considered in the context of the trial as a whole; or 2) seriously affects the integrity or public reputation of the judicial proceedings. Rose, 123 Nev. at 208-209, 163 P.3d at 418.

Here, Petitioner claims three instances of improper argument that trial counsel was ineffective for failing to object to. In the first and second claims, Petitioner submits the prosecutor stated her personal opinion regarding whether the victim was hogtied, and what Petitioner's intent was. Petition at 15-16. A review of the record shows the prosecutor did not state her personal opinion or belief in either instance. As to both claims, the prosecutor argued the evidence. The prosecutor argued that based on the evidence, Petitioner hogtied the victim and when Petitioner beat her with a belt and a broomstick, Petitioner intended to inflict substantial bodily harm. TT Day 6 at 117-118. All of these facts were in evidence. Statements by a prosecutor, in argument, made as a deduction or conclusion from the evidence introduced in the trial are permissible and unobjectionable. Parker v. State, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1993). It was then up to the jury to weigh the evidence and decide whether it was Petitioner in the videos or not. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). It is by no means improper for the State to argue that a defendant committed a crime based on the evidence. Thus, the State's arguments made in closing were made as a conclusion from the evidence presented at trial and were unobjectionable pursuant to Parker.

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In Petitioner's third claim, he argues the prosecutor "misstated or oversimplified the law regarding accomplice liability or the legal liability as co-conspirator," when the prosecutor argued that Petitioner was liable for using a deadly weapon, even though someone else was actually the person who used the stun gun. Petition at 16. However, this claim should be denied because it is without merit.

First, the claim is belied by the record. The portion of the prosecutor's closing argument Petitioner complains about is:

> So an unarmed offender uses a deadly weapon when the unarmed offender is liable for the offense, so specifically, you know, the stun gun. The Defendant is liable for the offense…So if you believe that it was the other person who used the stun gun, the Defendant is still liable for the use of that deadly weapon.

TT Day 6 at 123.

This is exactly what jury instruction number fourteen (14) says.

> If more than one person commits a crime, and one of them uses a deadly weapon in the commission of that crime, each may be convicted of using the deadly weapon even though he did not personally himself use the weapon.
>
> An unarmed offender "uses" a deadly weapon when the unarmed offender is liable for the offense, another person liable for the offense is armed with and uses a deadly weapon in the commission of the offense, and the unarmed offender had knowledge of the use of the deadly weapon.

Jury Instruction No. 14. The prosecutor's statement was a correct statement of law. Therefore, the claim is belied by the record and only suitable for summary denial under Hargrove. 100 Nev. at 502, 686 P.2d at 225.

Regardless, in all three claims, the record shows that each alleged mistake was insufficiently prejudicial to warrant reversal in light of the overwhelming evidence of guilt, as found by the appellate court on direct appeal. There, the Court said, "[w]e conclude that there was no plain error given the overwhelming evidence that supported the jury's verdict, which included eyewitness and independent witness testimony, DNA evidence, physical injuries on the victim, and recovery of the items used to bind and gag the victim." Order of Affirmance at 3. Therefore, Petitioner fails to show prejudice.

Lastly, when to object is a virtually unchallengeable strategic judgment. Ennis, 122 Nev. at 706, 137 P.3d at 1103. 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). Even if there was a legitimate objection, which as addressed above there was not, counsel may have made the strategic decision not to object so as not to draw attention to the prosecutor's arguments and thereby exacerbate any potential prejudice. Counsel cannot be ineffective for making a strategic decision not to object and counsel cannot be ineffective for failing to offer futile objections. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claims fail and should be denied accordingly.

4. Counsel's closing argument offered a clear theory of the case

Petitioner claims counsel was ineffective for failing to have a "clear theory of the case for an acquittal" during their "very short" closing argument. Petition at 18-19. However, Petitioner's claim is without merit because it is belied by the record.

First, to note, Petitioner does not clarify how counsel's closing argument was "very short." Petition at 18-19. He fails to state what counsel should have argued or what other evidence he should have argued during closing. Moreover, counsel's closing argument spanned roughly fifteen (15) pages of trial transcript. TT Day 6 at 133-145. Therefore, his claim that the closing argument was too short is bare and naked and only suitable for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Regardless, counsel's theory during closing argument was straightforward, the victim was not credible because she was a drug user who was using drugs at the time, and because she offered multiple versions of her story that she could not keep straight. TT Day 6 at 133-145. This matches the theory defense counsel argued during opening statements. There, counsel told the jury that they were going to hear about the multiple statements the victim made every time she spoke about the incident, and how each statement would be different from the last. TT Day 2 at 191-192. Counsel even stated, "it is my very sincere belief that you will determine that Arrie is not telling the truth of what happened that day." Id. Therefore, the

record is clear that counsel had a clear theory of their defense. The defense was that the victim was not credible, and counsel argued that theory from the beginning of the trial to the end. Petitioner's claim is belied by the record and should be denied accordingly.

C. The evidence presented at trial was overwhelming

Petitioner claims that deficient performance at trial caused Petitioner's conviction even though the State did not meet its burden of proving the crime beyond a reasonable doubt. Petition at 18-20. However, his claim is bare, naked, and without merit.

First this claim is bare, naked, and suitable for summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner's contention is devoid of reference to any facts in this case. Petitioner does not make any specific reference to what part of counsel's argument or trial strategy was deficient, or what defenses they should have presented at trial. Therefore, it is a naked assertion that should be summarily denied.

Second, the evidence at trial was overwhelming, thus Petitioner's claim is belied by the record. "When reviewing a criminal conviction for sufficiency of the evidence, this Court determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution." Brass v. State, 128 Nev. 748, 752, 291 P.3d 145, 149-50 (2012) (internal citations omitted). When there is substantial evidence in support, the jury's verdict will not be disturbed on appeal. Id. A court may not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Further, circumstantial evidence alone may support a conviction. Collman v. State, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000) (citing Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980)).

Petitioner's conviction was not the result of ineffective assistance of counsel. Petitioner was convicted because the evidence in this case was overwhelming. At trial, the victim testified and gave specific details about exactly what happened during the incident, including the fact that Petitioner tied her up, tased her, beat her with a belt, put a broom handle between the cheeks of her buttocks as if he was going to penetrate her with it, and videotaped the entire

incident. TT Day 3 at 33-46. The victim had a bruised lip and injuries on her legs when the police met her, and the photographs of her injuries were presented at trial. TT Day 3 at 58-59. Witnesses testified at trial that they saw the victim come out of Petitioner's apartment with her arms and legs tied, fabric wrapped around her mouth, her pants pulled down, and she was begging them to call the police. TT Day 3 at 200-202. Another witness testified at trial that before he saw the victim come out of the apartment, he saw a black male and three (3) women come out of Petitioner's apartment. TT Day 4 at 25-26. This matched the description that the victim gave when she testified she heard a male and three (3) women in the apartment with Petitioner when she was tied up. TT Day 3 at 36. The witness also testified he had seen the male with Petitioner before. TT Day 4 at 26. Inside Petitioner's apartment, detectives found a shotgun, tape, a broom, and a black and brown leather belt. TT Day 3 at 156.

The evidence at trial was overwhelming. Every piece of evidence and every witness who testified supported the victim's version of events. Ultimately, the victim was correctly found to be credible, and all of the evidence presented at trial supported Petitioner's conviction. Therefore, this Court should not disturb the jury's conviction and Petitioner's claim should be denied.

Furthermore, as the Nevada Supreme Court noted when affirming Petitioner's sentence, there was "overwhelming evidence that supported the jury's verdict, which included eyewitness and independent witness testimony, DNA evidence, physical injuries on the victim, and recovery of items used to bind and gag the victim." Order of Affirmance at 3. This finding is law of the case and as such, this Court can do nothing but deny his sufficiency of the evidence claim. Re-litigation of this issue is precluded by the doctrine of res judicata. Exec. Mgmt. v. Ticor Titles Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998) (citing Univ. of Nev. v. Tarkanian, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994)). "The doctrine is intended to prevent multiple litigation causing vexation and expense to the parties and wasted judicial resources…" Id.; see also Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005) (recognizing the doctrine's availability in the criminal context); York v. State, 342 S.W. 3d 528, 553 (Tex. Crim. App. 2011); Bell v. City of Boise, 993 F.Supp.2d 1237 (D. Idaho 2014) (finding res

judicata applies in both civil and criminal contexts). Therefore, the claim must be denied.

D. Counsel was not ineffective at sentencing

Petitioner claims counsel was ineffective at sentencing and this somehow caused the Court to sentence Petitioner to a cruel and unusual sentence in violation of his constitutional rights. Petition at 20-22. However, Petitioner's claim is bare, naked, and without merit. Therefore, it must be denied.

The Eighth Amendment to the United States Constitution as well as Article 1, Section 6 of the Nevada Constitution prohibit the imposition of cruel and unusual punishment. The Nevada Supreme Court has stated that "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" Allred v. State, 120 Nev. 410, 92 P.2d 1246, 1253 (2004) (quoting Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979).

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

Petitioner's sentence is not "so unreasonably disproportionate to the offense as to shock the conscience." Allred, 120 Nev. 410, 92 P.2d at 1253. Petitioner was sentenced to an aggregate total a minimum of thirteen (13) years in the Nevada Department of Corrections, and a maximum of life imprisonment. Transcript from Sentencing ("Sentencing") at 8. This

sentence was appropriate in light of the facts of this case. At trial, the victim testified that Petitioner told her to get on her knees and then tied her up with electrical cords and tape. TT Day 3 at 33. He tied her hands behind her back and tied them to her feet. Id. Then, he put a double-barrel shotgun in her mouth and said "Bitch, it's not a game." TT Day 3 at 34. After that, he shoved "stuff" in her mouth and down her throat. TT Day 3 at 35. The entire time, Petitioner antagonized the victim telling her that she stole his dogs and repeatedly beat her with a belt. TT Day 3 at 35-36. He also shocked her with a taser. TT Day 3 at 40. As if beating her was not enough, he then pulled her pants down, grabbed a broom, and angled the handle to "stick it in [her] anal." Id. The victim eventually passed out due to trauma. TT Day 3 at TT Day 3 at 42. Petitioner and his friends videotaped the entire incident, laughing and tormenting the victim the entire time. TT Day 3 at 46. The sentence in this case was not unreasonably disproportionate to the offense. In fact, the sentence was warranted in light of the facts of the case. Petitioner fails to show that the sentence was so disproportionate as to shock the conscience and his claim must be denied.

Therefore, the record shows the sentence was appropriate and thus insufficiently prejudicial to warrant ignoring Petitioner's procedural defaults. As such, his claim must be denied.

E. Appellate counsel was not ineffective

Petitioner claims his appellate counsel was ineffective for failing to raise the following claims: 1) whether there was insufficient evidence of guilt as to the kidnapping count; 2) whether there was insufficient evidence of guilt of battery with intent to commit sexual assault; and 3) whether he was prejudiced by the favorable plea negotiations the State offered to the victim. Petition at 22-25. However, Petitioner's claims should be denied because they are bare, naked, and belied by the record.

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 that a defendant 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.

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First, each of Petitioner's assertions are bare and naked and should be summarily denied pursuant to Hargrove. 100 Nev. at 502, 686 P.2d at 225. Petitioner does not apply law to the facts of this case to show how the evidence was insufficient. Nor does he explain how he was prejudiced by any favorable plea negotiations the victim allegedly received. Therefore, these claims are devoid of any argument supported by specific facts and are bare and naked.

Second, as to the insufficient evidence claims, Petitioner's claims are belied by the record and suitable only for summary denial under Hargrove. 100 Nev. at 502, 686 P.2d at 225. Petitioner's claim that counsel was ineffective for failing to raise the claim that there was insufficient evidence of guilt as to the kidnapping charge is belied by the record. Kidnapping is defined as:

> A person who willfully seizes, confines…abducts, conceals, kidnaps, or carries away a person by any means whatsoever with the intent to hold or detain…or for the purpose of committing sexual assault…or for the purpose of killing the person or inflicting substantial bodily harm upon the person.

NRS 200.310.

Here, there was substantial evidence of kidnapping. At trial, the victim testified that Petitioner told her to come into his apartment, then forced her to her knees and tied up her hands, feet, and mouth. TT Day 3 at 33. Witnesses testified that they found the victim with her hands, feet, and mouth bound and that she was begging them to call the police. TT Day 3 at 200-202. The tape that Petitioner used to tie up the victim was found at Petitioner's apartment. TT Day 3 at 156. Lastly, the victim had injuries consistent with being tied up. TT Day 3 at 139.

There was sufficient evidence that Petitioner kidnapped the victim presented at trial. It is clear Petitioner lured her into his apartment, then tied her up, beat her, and videotaped it to get revenge for allegedly stealing his dogs. Appellate counsel did not have to raise an insufficient evidence claim as to the kidnapping charge because counsel is not required to raise futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claim should be denied.

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Next, Petitioner claims his counsel was ineffective for failing to argue there was insufficient evidence of battery with intent to commit sexual assault. Petitioner's claim is belied by the record.

A battery is defined as any willful and unlawful use of force or violence upon another person. NRS 200.400. However, "Battery with intent to commit sexual assault includes a specific intent element and does not include the element of penetration, whereas sexual assault does not include the element of intent but does include the element of penetration." Howard v. State, 129 Nev. 1123; NRS 200.366; NRS 200.400. At trial, the victim testified while she was tied up, Petitioner pulled her pants down and placed the handle of a broomstick between the cheeks of her buttocks as if he was going to penetrate her anus with it. TT Day 3 at 43-44. When witnesses found her, her pants were pulled down exposing her buttocks. TT Day 3 at 200-202.

The State was not required to prove that the broomstick actually penetrated the victim's anus, just that Petitioner intended to commit a sexual assault. As stated above, Petitioner pulled the victim's pants down and placed a broomstick between her buttock's cheeks. There is no other intent to commit that kind of act other than sexual assault. There was substantial evidence that Petitioner committed a battery with intent to commit a sexual assault. Therefore, there was no reason for appellate counsel to raise a futile claim. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claim should be denied.

Lastly, Petitioner claims his counsel was ineffective for failing to raise the claim that Petitioner was prejudiced by the favorable plea negotiations offered by the State to the victim. Petition at 23. However, this claim is bare and naked because Petitioner does not state how the negotiations were favorable or how those negotiations caused any prejudice to Petitioner. Further, this claim is belied by the record. At trial, referring to the victim's ongoing criminal case, the victim testified:

THE STATE	And when you were negotiating that case, do you know if – did they talk to you about testifying in this case against Mr. Elam?
WEBSTER:	Not at all.

THE STATE:	Okay. Did you have your attorney talk to the prosecutor on that other case about the case you have with Mr. Elam?
WEBSTER:	No.
THE STATE:	No. And did it come up in any way that you were a victim in this case here?
WEBSTER:	No, sir.
THE STATE:	Okay. Have you been told that if you come in and testify against Mr. Elam that that will help you in the case that you have being brought against you?
WEBSTER:	No, not at all.

TT Day 3 at 11-12.

Counsel cannot be ineffective for failing to raise a claim that is bare, naked, and belied by the record. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Regardless, appellate counsel is most effective when weeding out weaker issues in order to keep the attention on the stronger issues. Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). Therefore, Petitioner's claim is bare, naked, and belied by the record. It should be denied accordingly.

F. There are no errors to accumulate

Petitioner argues that ineffective assistance of his trial and appellate counsel resulted in cumulative error. Petition at 27-28. However, since Petitioner fails to show any instances of error, his argument regarding cumulative error is without merit.

The Nevada Supreme Court has not endorsed application of its direct appeal cumulative error standard to the post-conviction Strickland context. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009). Nor should cumulative error apply on post-conviction review. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134, 1275 S. Ct. 980 (2007) ("a habeas petitioner cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test.")

Nevertheless, even where available a cumulative error finding in the context of a Strickland claim is extraordinarily rare and requires an extensive aggregation of errors. See, e.g., Harris By and through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). In fact,

logic dictates that there can be no cumulative error where the defendant fails to demonstrate any single violation of Strickland. See Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007) ("where individual allegations of error are not of constitutional stature or are not errors, there is 'nothing to cumulate.'") (quoting Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993)); Hughes v. Epps, 694 F.Supp.2d 533, 563 (N.D. Miss. 2010) (citing Leal v. Dretke, 428 F.3d 543, 552-53 (5th Cir. 2005)). Because Petitioner has not demonstrated any claim warrants relief under Strickland, there is nothing to cumulate. Therefore, Petitioner's cumulative error claim should be denied.

Petitioner fails to demonstrate cumulative error sufficient to warrant reversal. In addressing a claim of cumulative error, the relevant factors are: 1) whether the issue of guilt is close; 2) the quantity and character of the error; and 3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000). As discussed *supra*, the issue of guilt was not close as the evidence against Petitioner was overwhelming. Further, even assuming that some or all of Petitioner's allegations of deficiency have merit, he has failed to establish that, when aggregated, the errors deprived him of a reasonable likelihood of a better outcome at trial. Therefore, even if counsel was in any way deficient, there is no reasonable probability that Petitioner would have received a better result but for the alleged deficiencies.

Further, even if Petitioner had made such a showing, he has certainly not shown that the cumulative effect of these errors was so prejudicial as to undermine the court's confidence in the outcome of Petitioner's case. Therefore, his claim of cumulative error is without merit.

V. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

Petitioner claims he is entitled to an evidentiary hearing because he raised factual claims "which, if true, entitled him to an evidentiary hearing." Petition 25-27. However, an evidentiary hearing is not required.

After reviewing the filings, a judge or justice determines if an evidentiary hearing is required. NRS 34.770(1). "If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing." NRS 34.770(2).

A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994); see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

If a petition can be resolved without expanding the record, no evidentiary hearing is necessary. Marshall, 110 Nev. 1328, 885 P.2d 603; Mann, 118 Nev. at 356, 46 P.3d at 1231. It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.")**.**

The United States Supreme Court has held an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

This Court can resolve Petitioner's claims without expanding the record. All of his claims are without merit, and he fails to demonstrate any credible claim of ineffective assistance of counsel. Further, he fails to demonstrate that the record should be expanded. Thus, there is no cognizable reason for an evidentiary hearing. Petitioner has failed to show

that an evidentiary hearing is warranted pursuant to NRS 34.770, and his request should be denied.

CONCLUSION

Based on the foregoing the State respectfully requests that Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction) be DENIED.

DATED this 11th day of August, 2022.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Jonathan VanBoskerck*
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 11th day of AUGUST 2022, to:

TERRENCE M. JACKSON, ESQ.
terry.jackson.esq@gmail.com

BY */s/ Howard Conrad*
Secretary for the District Attorney's Office
Special Victims Unit

hjc/SVU

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

CALVIN ELAM, Petitioner, vs. THE STATE OF NEVADA, Respondent.	CASE NO.: A-20-815585-W C-15-305949-1 DEPT. NO.: XV

BEFORE THE HONORABLE JOE HARDY, DISTRICT COURT JUDGE

THURSDAY, AUGUST 25, 2022

RECORDER'S TRANSCRIPT RE:
ARGUMENT

APPEARANCES:

For the State: ROBERT STEPHENS, ESQ.

For the Defendant: MICHAEL TERRENCE JACKSON, ESQ.

TRANSCRIBED BY: MATTHEW YARBROUGH, COURT RECORDER

LAS VEGAS, NEVADA, THURSDAY, AUGUST 25, 2022, 8:55 A.M.

* * * * *

THE COURT CLERK: State of Nevada versus Calvin Elam.

THE COURT: I think I left this file back in chambers.

MS. RINETTI: Your Honor, I think we are waiting for the Specialty Team. I don't have this one - - this one is a Specialty Team.

THE COURT: Okay.

MR. JACKSON: So, I'll take a seat and wait until we get everybody together?

THE COURT: Yeah, including the papers on my desk. So, we'll trail you.

MR. JACKSON: Okay.

THE COURT: Thanks.

[Matter trailed at 8:56]

[Matter recalled at 9:51]

THE COURT CLERK: Recalling page number three. State of Nevada versus Calvin Elam.

MR. STEPHENS: Rob Stephens for the State, Your Honor.

THE COURT: Good morning.

MR. JACKSON: Terrence Jackson, for Mr. Elam.

THE COURT: Good morning. Are we waiving his presence?

MR. JACKSON: I believe that he is in custody in a prison, so he won't be here today.

THE COURT: Okay.

MR. JACKSON: I can advise him of the status of this matter after the Court's approval of this hearing.

THE COURT: Any objection to waiving his presence?

MR. STEPHENS: No, Your Honor, not for today's hearing.

THE COURT: Thank you, presence waived. Bear with me a moment. So, I've reviewed the Petitioners Supplemental Points and Authorities and Support of Writ of Habeas Corpus for Post-Conviction Relief, filed June 8. The State's Response on August 11, and the Petitioner's Reply on August 17. Welcome arguments, beginning with Mr. Jackson.

[Defense Augument]

MR. JACKSON: Well, my comments are going to be brief. The State's seemed like their main argument was Procedural Bars in this case. And I think they sometimes do that, without being facetious, of when they have a weak case on the merits. And in this particular case, I think that they have a weak argument on the procedural part because we are talking about a very short delay for someone who was a prisoner. Who had good cause for his delays, as I outlined in my Petition.

He was twenty days late in filing this; he was in prison. He had the normal difficulties in prison trying to submit something outside of cases from the United States Supreme Court and other states; these kinds of delays are not uncommon. And they should be excused, especially when they cause a fundamental kind of injustice to a defendant, which I think is the case here. This kind of procedural default, I think, should be excused in this particular case. Because, number one, it would lead to a fundamental miscarriage of justice, and the other thing is there certainly no prejudice to the State in this matter. They are not delayed by - - in any way. We can resolve this case on the merits and decide whether or not if the Defendant was denied due process or

denied his Sixth Amendment Rights in this case because his attorney did everything he should have done.

I've asked for an evidentiary hearing to deal with some of the issues here, but some of the things I think should have been done were simple motions that could have assisted him in putting a motion to suppress and statements. A motion to challenge the weapon's enhancement. The State says that the law has changed, and they seem to argue that a broomstick is sufficient to be a deadly weapon. I've cited a number of cases of things like scissors or things like, you know, heavy boots - - reinforced booths are deadly weapons.

The Legislature tried to change the law and make an attempt to rewrite the law a few years ago. But still, there is nothing that shows that a broomstick was used in a way to try to hurt this woman. And I don't know of any cases where a broomstick is - - landed someone in UMC with serious injuries or death. They saw deadly weapon or weapon that could cause death. I think it's a misconception by the State that this broomstick would have caused deadly injuries. They suggested because it could have been used in - - to be inserted into her, that would have been or caused deadly results or severe bodily injury. It's possible, but they did not establish that.

In any event, I think the attorney should have challenged that before that went to trial. Certainly prejudicial to go to trial with this allegation hanging over this Defendant's head. I think that the totality of issues involving counsel's failure to investigate and failure to adequately assist in the trial, including the failure to make proper objections and failure to raise his defenses at trial. Suggesting he did not get the proper kinds of assistance

required by *Strickland*. And there was cumulative error which requires reversal of the conviction. I'll submit with my points and authorities both in the supplemental and the points and authorities in the reply brief, and I'll submit it, and with that and answer any questions you might have.

THE COURT: No, thank you very much. I might have a question or two on the rebuttal - - no questions right now. Thank you. Mr. Stephens, go ahead.

[State's Argument]

MR. STEPHENS: Thank you, Your Honor. The Procedural Bars are there for a reason. For two primary reasons, one is to ensure finality to some cases at some point. These cases do not continually extend forever and ever by filing late motions or petitions in order to try to strike a judgment of conviction. And secondary, Your Honor, they exist in order to ensure that things happen in a timely and functional manner. Here the State has cited case law where in two days can be determined late, and there the Procedural Bars are upheld.

This one was twenty days late, and the State admits that it is not a ton of time late, but it is late. And the rules are there; they are statutory rules that are there for a reason, in order to ensure that procedures are followed. I would also note that, you know, there is an exception within that rule, and that requires the defense to present some sort of good cause as to why it was late. You know, maybe if the defendant was in a comma or was sick or something, that would be extraneous, not simply that he was in prison. In fact, the vast majority of petitions are filed while the petitioner is in prison. So, here they have not presented any good cause as to why the Procedural Bar should be overcome.

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Your Honor, I am only going to address the broomstick argument that Mr. Jackson brought up, and then I will also submit on our written statements. The broomstick, Your Honor, it is the functionality test now, so if it's - - can be or was used in a manner in which it could cause substantial bodily harm or death, then it can be determined to be a deadly weapon. And in this case, that's absolutely what could be inferred, the jury's heard the evidence, listened to the testimony, and they determined that it was a deadly weapon and it could have been or was used in a manner that could have caused death, or substantial bodily harm.

And then last, Your Honor, I would just note that the ineffective assistance of counsel argument. I think Mr. Ericsson was effective here because he actually was successful at trial on defeating some of the counts and proving - - or at least showing the State did not prove beyond a reasonable doubt some counts. And with that, Your Honor, I will also submit on the written motion, and if you have any other questions, I am happy to answer those questions for you.

THE COURT: No questions, thank you. Mr. Jackson.

[Defense Rebuttal Argument]

MR. JACKSON: Just on - - one more thing on the Procedural Bars - - I think that if any case that should be excused for Procedural Bars, this is one. I mean, there are some cases where Procedural Bars have been excused for ten, fifteen, twenty years, or more. Or in this - - even in this State of Nevada, they have been excused for more than several years. In this particular case, I don't think that the Procedural Bars should apply, and I think it should be decided on the merits and that counsel did not do his job under - - as *Strickland* would

require. And I think the Court should decide that, and I'll submit it with that.

THE COURT: Thank you both very much.

[Court's Ruling]

THE COURT: So, I am going to rule on the merits, notwithstanding the late filing of the Petition. And it's, you know, undisputed that the Petition was late, undisputed in the, you know. Well, let me back up. In the grand scheme of things, if you will, the Petition is not that late, especially compared with many other cases. And, so - - I can't even really say, and I'll put on the record. I can't really say that there is a good cause for it being twenty or so days late, but I think justice requires a decision on the substance, and therefore, I am going to decide it on the substance.

The arguments on both sides were well briefed; like I said, I reviewed the Supplemental Points and Authorities and support of the Writ, the State response, and the reply. At the end of the day, however, I am going to deny the Writ for the reasons set forth in detail by the State. Other than the Procedural Bar with some reaching for substance.

And, you know, just going through the Petitioner's Supplemental Points and Authorities, you know, defense counsel was effective both pretrial and trial. Shown partly by, you know, ultimately the verdict, but also, you know, the view of everything. It shows to me that he was effective; you know, the quote-unquote failure to retain an accident reconstruction expert does not arise to an ineffective level.

You know the statements made by the Defendant were understandably used against him because he waived his *Miranda Rights.* That's, you know, sometimes counsels is left with what the client had done prior to them being

counsel, and that was certainly was the case here.

The deadly weapon enhancement, I - - you know, had we been back before the amendments to the statute, maybe that would have been a good argument, but here, I agree with the State's argument, and at least with me anyway, probably the defense counsel. The amendments negated the argument that the Petition now says defense counsel is ineffective for not filing a motion on the deadly weapon enhancement. Given the revision or the amendments of the statute, I think that argument fails here.

Picking the jury, there's no, you know, requirement or even a standard of practice or anything of that nature that requires defense counsel to retain a jury selection expert. And that's even in a case such as this, so applying, you know, the facts of the law that's still not ineffective. Same kind of issues, you know, allegation that defense counsel was ineffective for not seeking an individual sequester Vior Dire. Again, denying it and State addressed that in detail, but, you know, sequester Vior Dire, there's no requirement for that, and Vior Dire appears to have been properly done by defense counsel, and therefore, not ineffective.

The prosecutorial errors of misconduct during trial, non of that, I don't find comes close to raising - - to raising to, you know, the error of misconduct rather their arguments based on the evidence. It's certainly not, you know, similar to the *Washington v. [find this cse]* cited there out of the 6th circuit. And even the Nevada Supreme Court case cited this was not - - it was easily was distinguishable from those cases, as the State argues.

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Closing argument, again, you know, the cases cited that would give rise to ineffective assistance there, you know. Closing argument was made here; it's not a case where counsel did not make an argument or anything like that. Let's see, *Strickland's* argument, again, fails as addressed by the State in detail. Sentencing - - sentencing happened - - counsel was effective there, you know, the Judge sentenced within the statutory minimums and maximums and concurrent versus consecutive, and the Judge has the discretion doing that. And that kind, despite arguments by defense counsel for a lesser time. The appellate was properly raised and made, so again, not ineffective.

On the evidentiary hearing the, you know, there has not - - and this goes to a lot of arguments too, as the State points out. A lot of the arguments, including the request for an evidentiary hearing, are very generalized. And without, you know, factual allegations that would merit holding an evidentiary hearing on this, and given that there weren't any ineffective barriers overall, that accumulation argument also fails, as pointed out by the State.

So, for those reasons, the Petition is denied. Mr. Stephens prepare a detailed Order and put, you know, all the arguments in your brief. That is the Court's Order and all the things I said here as well. Any questions?

MR. STEPHENS: Not from the State.

MR. JACKSON: I have a question and an issue I would like to bring to the Court. I am going to be retiring from the practice of law soon. So, I am probably be filing a Motion to Withdraw in this case and probably asking that counsel be appointed to handle whatever appellate relief that the Defendant might seek. He might - - I will send him a letter advising him of the Court's decision as soon as I get the Order from the counsel of the State. And I hope

that the Court or the State, or Drew Christensen, will appoint proper counsel for him. He may want to do an appeal; it's his decision. I am not going to tell him he should or he shouldn't, but technically, I do appeals in these cases, but I don't really want to waste the appeal, and I will do the Motion to Withdraw, and I will file that as soon as I get the Order from the State.

THE COURT: Yeah, anything - -

MR. JACKSON: - - But I want to protect his appellate rights.

THE COURT: Yeah, anything from the State?

MR. STEPHENS: Mr. Jackson, were you appointed on this case?

MR. JACKSON: Yeah, I was appointed on this case. So, I need to withdraw. But I do want to protect the Defendant's appellate rights. I am actually closing my office this week and next week. So, I will be in my office next week, and I am going to be moving out boxes and everything. But this is maybe the last case I am going to argue.

THE COURT: Okay. And I agree with you; given the directive to appoint counsel to begin with on the Petition, it makes sense to appoint counsel, you know, to follow up on any potential appeal.

MR. JACKSON: I mean, I could file a Notice of Appeal and then move to withdraw. Or I could withdraw and hope that an attorney files a notice within thirty days of the Order; I'll talk to Drew Christensen about it - -

THE COURT: - - Yeah, if you could do that, that would probably be the easiest, and then - -

MR. JACKSON: - - I'll put it back in the Court for next week a Motion to Withdraw as soon as I get the Order from the State.

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THE COURT: How long is it going to take for that?

MR. STEPHENS: To be honest, I am not going to draft it.

THE COURT: We can give you a hearing date right now. If you think you can file that motion and talk to - -

MR. JACKSON: - - A week from today? What is today, Thursday?

THE COURT: Yeah, if that works for you, that's fine.

MR. JACKSON: What's that date?

THE COURT CLERK: September 1st.

MR. JACKSON: All right.

THE COURT: Yeah, just file - -

MR. JACKSON: - - Nine, one, twenty-two. Status - - Motion to Withdraw, and hopefully, the State will have an Order for me. But I will go ahead and file the Motion to Withdraw.

THE COURT: And, like I said, I think it makes sense - -

MR. JACKSON: - - And I will talk to Drew Christensen, and maybe he can have someone take over and be responsible for doing any appeal.

THE COURT: Thank you very much.

MR. JACKSON: Thank you.

MR. STEPHENS: Thank you, Your Honor.

THE COURT: Thank you.

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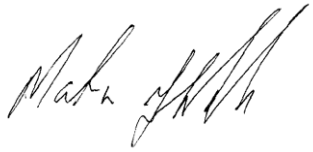
[Proceedings concluded, 10:12 a.m.]

* * * * *ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



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DISTRICT COURT

CLARK COUNTY, NEVADA

CALVIN ELAM, #1187304, Petitioner, -vs- THE STATE OF NEVADA, Respondent.	CASE NO: **A-20-815585-W** **C-15-305949-1** DEPT NO: **XV**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: **AUGUST 25, 2022**
TIME OF HEARING: **8:30 AM**

THIS CAUSE having presented before the Honorable JOE HARDY, District Judge, on the 25th day of AUGUST, 2022; Petitioner not present, represented by TERRENCE M. JACKSON, ESQ.; Respondent represented by STEVEN B. WOLFSON, District Attorney, by and through ROBERT STEPHENS, Chief Deputy District Attorney, and having considered the matter, including briefs, transcripts, testimony of witnesses, arguments of counsel, and documents on file herein, the Court makes the following Findings of Fact and Conclusions of Law and Order:

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PROCEDURAL HISTORY

On April 17, 2015, Petitioner was indicted by way of grand jury as follows: one (1) count of CONSPIRACY TO COMMIT KIDNAPPING (Category B Felony – NRS 200.310, 199.480 – NOC 50087); one (1) count of FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.310, 200.320, 193.165 – NOC 50055); one (1) count of ASSAULT WITH A DEADLY WEAPON (Category B Felony – NRS 200.471 – NOC 50201); one (1) count of UNLAWFUL USE OF AN ELECTRONIC STUN DEVICE (Category B Felony – NRS 202.357 – NOC 51508); one (1) count of BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT (Category A Felony – NRS 200.400.4 – NOC 50157); one (1) count of SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.364, 200.366, 193.165 – NOC 50097); one (1) count of ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.364, 200.366, 193.330, 193.165 – NOC 50121); and one (1) count of OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony – NRS 202.360 – NOC 51460).

Petitioner's jury trial started on June 19, 2017 and ended on June 27, 2017. The jury found Petitioner guilty of Count 1— CONSPIRACY TO COMMIT KIDNAPPING (Category B Felony - NRS 200.310, 200.320, 199.480 - NOC 50087), guilty of Count 2—FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.310, 200.320, 193.165 - NOC 50055), Count 3—ASSAULT WITH A DEADLY WEAPON (Category B Felony - NRS 200.471 - NOC 50201), and Count 5— BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT (Category A Felony - NRS 200.400.4 – NOC 50157).

The jury found Petitioner not guilty of Count 4—UNLAWFUL USE OF AN ELECTRONIC STUN DEVICE (Category B Felony - NRS 202.357 - NOC 51508), Count 6— SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.364, 200.366, 193.165 - NOC 50097), and Count 7— ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.364, 200.366,

193.330, 193.165 - NOC 50121). The State requested a conditional dismissal of Count 8—OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony - NRS 202.360 - NOC 51460).

On October 19, 2017, Petitioner was adjudged guilty and sentenced as follows: as to Count 1 a minimum of twenty-four (24) months and a maximum of seventy-two (72) months in the Nevada Department of Corrections; as to Count 2—life with the eligibility for parole after five (5) years with a consecutive term of a minimum of sixty (60) months and a maximum of one hundred eighty (180) months for the use of a deadly weapon in the Nevada Department of Corrections to run concurrent with count 1; as to Count 3—to a minimum of twelve (12) months and a maximum of seventy-two (72) months in the Nevada Department of Corrections to run consecutive to Count 2; as to Count 5—life with the eligibility to parole after two (2) years to run consecutive to Count 3 in the Nevada Department of Corrections. Petitioner received nine hundred twenty-eight (928) days credit for time served. Counts 4, 6, and 7 were dismissed and Count 8 was conditionally dismissed. Additionally, this Court ordered a special sentence of lifetime supervision to commence upon release from any term of probation, parole, or imprisonment. Further, Petitioner was ordered to register as a sex offender in accordance with NRS 199D.460 within 48 hours of release.

Petitioner's Judgment of Conviction was filed on October 31, 2017.

On November 13, 2017, Petitioner filed a Notice of Appeal. On April 12, 2019, the Nevada Supreme Court affirmed Petitioner's judgment of conviction. Remittitur issued on May 7, 2019.

On May 27, 2020, Petitioner filed a Petition for Writ of Habeas Corpus. Also on May 27, 2020, Petitioner filed a Motion to Withhold Judgment on Petition for Writ of habeas Corpus and Motion for Appointment of Attorney. On July 6, 2020, the State filed its Response. On August 18, 2020, this Court granted Petitioner's Motion to Withhold Judgment on Petition for Writ of Habeas Corpus and allowed Petitioner to file a Supplemental Petition by October 20, 2020. Also on August 18, 2020, this Court denied Petitioner's Motion for Appointment of Counsel without prejudice and articulated that if issues were unduly complex counsel

appointment would be considered. Petitioner never filed a Supplemental Petition.

Defendant acting pro per could not file Supplementary Points and Authorities by the October 20, 2020 date and on January 19, 2020, the Court denied the Petition and ordered Findings of Fact, Conclusions of Law and Order, which denied the Petition. Defendant then appealed the Order denying his Post-Conviction Petition, filing a Pro Per Notice of Appeal on February 26, 2021. On February 17, 2022, the Supreme Court reversed the District Court's denial of Defendant's Petition and remanded to District Court for appointment of counsel in case number 82637. Counsel Terrence M. Jackson, Esq. was appointed on March 10, 2022 to represent Calvin Thomas Elam on further post-conviction proceedings. On March 15, 2022, the Nevada Supreme Court reversed the District Court's decision and remanded the case to appoint post-conviction counsel and allow Petitioner to file a supplement to his original Petition. On June 9, 2022, Defendant through counsel filed Supplemental Points and Authorities to his Petition for Writ of Habeas Corpus in case number A-20-815585-W. On August 11, 2022, the State filed its Response to Petitioner's Supplement to his Petition for Writ of Habeas Corpus. On August 17, 2022 Petitioner filed his Reply.

FACTUAL BACKGROUND

The following was taken from Petitioner's Presentence Investigation Report ("PSI"):

> On March 10, 2015, a detective was dispatched to a kidnap call at an apartment complex. The details of the call stated that the victim was kidnapped at a nearby apartment and had escaped her captors. Upon arrival, the detective began an investigation and interviewed the victim.
>
> The victim related that she has lived in this neighborhood for the past three months. On this date, she was walking her dog and stopped over at a friend's house. While there, she saw a neighbor, later identified as the defendant Calvin Thomas Elam, who recently had his pit bull dogs stolen. The defendant waved her over to his apartment next door, and she voluntarily went inside.
> As she waited in the kitchen, the defendant walked to the back of his apartment, came back to the kitchen and told her, "Turn around, put your hands behind your back and get on your knees." She complied, and he bound her hands behind her back with some cords and some plastic material. He next bound her feet together and then he hog tied her feet to her hands and put her face down on the kitchen floor.

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After tying her up, the defendant began to accuse her of stealing his dogs. When she denied taking his dogs, the defendant began to accuse her of knowing who took his dogs. He then retrieved a shotgun, put the barrel into her mouth and continued to accuse her of knowing who stole his dogs. When she told him it may have been a local thief by the name of RJ, he put toilet paper in her mouth to gag her and put tape around her head to hold the toilet paper in. He then covered her head with some sort of towel, and her vision was partially obscured.

During this ordeal, the victim related that a female, the mother of the defendant's child, was in the apartment, as well as three other females. An unidentified male suspect also arrived and accused her of lying and told her that they were going to get to the bottom of it. The mother of the defendant's child left and did not return.

While everyone was there, the defendant told her to pull her shorts down; and as she was scared, she pulled her shorts and underwear down to her ankles. The defendant and the unidentified male then beat her approximately twenty-five times with a belt. The male then stated, "I know what she wants," and he grabbed a wood handled broom and tapped it on her buttocks. The victim believed the male was going to penetrate her with the broom handle and sexually assault her with it. She saw one of the three female was filming the assault with her cell phone.

Moments later, the unidentified male got a stun gun, put it up to her eyes and told her, "I'll put your eye out." He then electrocuted her six or seven times with the stun gun all over her body to include her neck, back, legs and arms. The victim tried to play dead so that the violence would stop; and while doing this, the male asked, "Is she dead?" The defendant replied, "Taze her one more time." The defendant told the male that his kids were going to be home from school and that he would have them play outside. He also told the male that he would take care of the victim later.

The victim stayed on the kitchen floor for a minute and then tried to make an escape. She was able to get to her feet, made it to the door and fell to the outside. She made to an alley while still hog tied and had her shorts down around her ankles. She fell to the ground; but her friend came to her aid, cut the cords off of her wrists and ankles and took the gag out of her mouth. Two other witnesses saw the victim bound and gagged and coming out from the defendant's apartment, and they corroborated the victim's statement. After she was set free, the victim saw the defendant and two women standing outside the defendant's apartment and laughing at her.

Detectives conducted a traffic stop on a vehicle occupied by the two females. Detectives learned that one of the females had a key to the defendant's apartment, and they were presumably going to clean up the evidence there. One female told the detective that the defendant was at her apartment where he was later taken into custody.

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> The defendant denied committing the offense or the victim coming inside his apartment. He, however, stated that he yelled at the victim to come over to his door where he questioned her about his missing dogs. When asked, he admitted to having a shotgun in his home and moving it because his kids were coming. He stated he moved the shotgun by the door.
>
> During the course of the investigation, detectives learned that the defendant's pit bulls were taken by animal control on March 8, 2015.

PSI at 5-7.

ANALYSIS

I. PETITIONER'S PETITION IS PROCEDURALLY BARRED

A. Application of Procedural Bars is Mandatory

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

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the District Court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. Ignoring these procedural bars is an arbitrary and unreasonable exercise of discretion. Id. at 234, 112 P.3d at 1076. The Nevada Supreme Court has granted no discretion to District Courts regarding whether to apply the statutory procedural bars; the rules must be applied.

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307 P.3d at 326. Accordingly, the Court reversed the District Court and ordered the defendant's petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The procedural bars are so fundamental to the post-conviction process that they must be applied

by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074. Parties cannot stipulate to waive the procedural default rules. State v. Haberstroh, 119 Nev. 173, 180-81, 69 P.3d 676, 681-82 (2003).

B. Any Substantive Claims Were Waived

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).

Further, substantive claims are beyond the scope of habeas and waived. NRS 34.724(2)(a); Id. at 646–47, 29 P.3d 498, 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059.

Petitioner brought substantive claims that should have been raised on direct appeal. In Ground Two of the Petition, Petitioner alleged that his conviction is unsupported by sufficient evidence. Pet. at 7-7A. Such a substantive claim was waived for failure to bring it on direct appeal. Further, to the extent this Court would read Ground Three of the Petition as a claim of

prosecutorial misconduct, it is also substantive and should have been raised on direct appeal.

C. Petitioner's Petition is Time-Barred

Petitioner's Petition is time-barred pursuant to NRS 34.726(1):

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

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

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

Remittitur issued from Petitioner's direct appeal on May 7, 2019. Therefore, Petitioner had until May 7, 2020, to file a timely habeas petition. Petitioner filed his Petition on May 27, 2020, in excess of the one-year deadline. Accordingly, this Court denies the Petition as it is time-barred.

II. PETITIONER HAS FAILED TO PROVIDE GOOD CAUSE TO OVERCOME THE PROCEDURAL BAR

To avoid procedural default, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or to otherwise comply with the statutory requirements, and that he will be unduly

prejudiced if the petition is dismissed. NRS 34.726(1)(a); see Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). "A court ***must*** dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds ***both*** cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans, 117 Nev. at 646–47, 29 P.3d at 523 (emphasis added).

"To establish good cause, petitioners must show that an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003). The Court continued, "petitioners cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Examples of good cause include interference by state officials and the previous unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. 192, 198 275 P.3d 91, 95 (2012). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

Additionally, "bare" and "naked" allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record. 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. Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002) (citing Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001)).

This Court finds Petitioner has failed to establish the existence of an impediment external to the defense that prevented him from bringing these claims in accordance with the mandatory deadline. Further, all facts and law necessary were available for Petitioner to bring these claims in a timely habeas Petition. Given Petitioner's failure to show good cause for his delay in filing, this Court concludes consideration of this issue here.

III. PETITIONER HAS FAILED TO ESTABLISH PREJUDICE TO OVERCOME THE PROCEDURAL BAR

To establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

Given that Petitioner's underlying complaints are meritless, this Court finds Petitioner is unable to establish the requisite prejudice for discounting his procedural default.

A. Petitioner Did Not Receive Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-

part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

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

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after

thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

When a conviction is the result of a guilty plea, a defendant must show that there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985) (emphasis added); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996); Molina v. State, 120 Nev. 185, 190-91, 87 P.3d 533, 537 (2004).

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

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

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