**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

# APPELLANT'S APPENDIX
## Volume VI

Monique McNeill, Esq.
Nevada Bar No. 9862
P.O. Box 2451
Las Vegas, Nevada 89125
Phone: (702) 497-9734
Email: Monique.mcneill@yahoo.com
**Attorney for Appellant Elam**

# INDEX

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

STEVEN WOLFSON

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
State Bar # 9862

**1. Counsel Was Not Ineffective in Not Moving for Dismissal of the Complaint**

Petitioner alleged in Ground One of the Petition 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. This Court therefore finds Petitioner's claim asserts that counsel was ineffective for failure to move for an 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.

Further, even if counsel's decision to not 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 Petitioner's 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 thus cannot 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, this Court cannot find Petitioner's counsel to have been ineffective and this claim is denied.

Likewise, Petitioner's related claim under Ground Two of the Petition that his conviction is invalid because of insufficient evidence is similarly without merit. Petitioner's chief complaint seems to be that the evidence admitted regarding his intent was insufficient 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. Given the claim is meritless, denial thereof could not prejudice Petitioner. Since Petitioner would not be prejudiced by this claim's 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.

**2. Counsel was not ineffective for failing to investigate**

Petitioner's Supplement alleged counsel was ineffective for failing to "contact a necessary accident reconstruction expert to challenge the State's expert witness." Supp. 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 asserts only that counsel should have investigated and contacted an expert, while offering no justification for the assertion. Petitioner vaguely argues "to challenge the State's expert witness," but does not state how an expert for the defense would have challenged the State's witness, what portion of the 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 that demands 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 demonstrate why this does not constitute a strategic decision, but instead merely provides a one-sentence claim that "[t]his was not a strategic decision." See Petition at 6-7. Therefore, Petitioner has failed to establish grounds for this Court to deviate from the presumption that this decision is nearly unchallengeable. Accordingly, this claim is denied.

**3. Counsel Was Not Ineffective for Failing to File Motions**

**i. Motion to suppress**

Petitioner claimed in his Supplement counsel was ineffective for failing to file a motion to suppress his statements to police. Supp. At 7. However, this 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 could not have been ineffective for this failure.

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).

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 is 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 makes only general claims that his "statements were involuntary because they were the result of hostile and coercive interrogation." Pet. at 7-9. He did 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. Pet. at 8-9. However, Petitioner failed to explain how covertly recording him created an intense and hostile interrogation environment or how his ignorance of being recorded amounts to a waiver of his rights through threats or trickery. Therefore, Petitioner's claim is denied as bare and naked under Hargrove.

Second, Petitioner Supplement cited NRS 200.640, claiming the statute "limits the use of unauthorized wire or radio communication." Supp. at 8-9. He claimed that the detective violated this statute by taping the interview. Yet, in this claim, Petitioner appears to have sought to mislead this Court. 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 offered no statute or case law for interpreting NRS 200.640 to limit the use of recording devices by police during interviews. Therefore, the true limitation of this statute has no bearing on the instant case.

Third, whether Petitioner was informed the interview was being recorded does not entitle him to suppression of his statement on either Miranda 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 claimed he involuntarily waived his Miranda rights and was likely "threatened, tricked, or cajoled" into waiving his rights. Supp. 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 did not cite any portion of his statement as evidence that his statements were involuntary. Accordingly, the totality of the evidence, including his voluntary statement, supports the fact that his statement was voluntary. As such, this Court finds counsel was not ineffective for failing to file what would have been a futile motion to suppress.

Lastly, counsel was not ineffective because the confession could not legitimately be 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:

---

[1] Petitioner failed to cite to this transcript in his brief. Therefore, this Court presumes 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.")

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?

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—

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.

Counsel advanced a stronger argument than what would have been a bare and naked motion to suppress with no evidence that his statement was involuntary to support it. Given that counsel cannot be ineffective for failing to file futile motions, this Court denies this claim.

**ii. Motion to dismiss weapon enhancement**

Petitioner's Supplement claimed 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. Supp. at 9-11. However, Petitioner's claim is belied by the record.

Petitioner cited 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. Pet. at 10-11. However, Petitioner failed to cite controlling law. Petitioner appears unaware of the legislative amendment of the test for a deadly weapon 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."

A broomstick indeed satisfies the definition of a deadly weapon in this case due to the Petitioner's manner of usage. 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 to penetrate her anus with it. TT Day 3 at 35-36. While there was no evidence at trial that Petitioner ultimately penetrated the victim with the broomstick, if he had, he almost certainly would have caused substantial bodily injury. See NRS 193.165(6)(b). The statute

thus requires the Petitioner, not to have in fact penetrated the victim, but rather only to have threatened to do so, 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. Consequently, any motion to dismiss the weapon enhancement would have been futile, and counsel may not be found ineffective for failing to file one. Accordingly, Petitioner's claim is denied.

**iii. Motion for sequestered voir dire**

Petitioner's Supplement alleged 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." Supp. at 13-15.

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 meritless. The voir dire process is at the discretion of the trial court. Sequestering a jury during voir dire places a heavy burden on judicial economy and is utilized only 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. Petitioner has simply surmised that some of

the prospective jurors tainted the entire pool by sharing that they had previous encounters with violence in the presence of other potential jurors. Pet at 13-15. Petitioner did not state how this prejudiced other prospective jurors or why any prospective juror's articulation of a 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 failed 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.

**iv. 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.

Each of these allegations is a bare and naked claim suitable only for summary dismissal pursuant to Hargrove. 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). 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 of the pro per pleading, as noted elsewhere in this order counsel cannot be found ineffective for not objecting to these statements. As such, this claim is either meritless or a bare and naked allegation suitable only for summary dismissal. Hargrove. 100 Nev. at 502, 686 P.2d at 225.

Similarly, Petitioner's 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 Petitioner's 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. 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.

**4. Counsel Was Not Ineffective for Failure to Utilize a Jury Selection Expert**

Petitioner's Supplement claimed 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. Supp. at 12-13. However, Petitioner never stated with any specificity how a jury selection expert would have been helpful beyond a vague and unsupported insistence that counsel should have consulted an expert. Petitioner failed to show how such an expert would have led to a different result regarding specific venire persons in his case. Petitioner's claim is devoid of all specific factual reference to venire persons. Therefore, Petitioner's claim is not cognizable and is suitable only for summary denial pursuant to Hargrove.

**5. Counsel Was Not Ineffective for Not Objecting to Prosecutor's Comments**

Petitioner's Petition claimed his counsel was ineffective for failing to object to alleged prosecutorial misconduct. Pet. at 8-8D. However, Petitioner failed to assert a single meritorious claim of prosecutorial misconduct, and his counsel cannot be ineffective for failing to raise a claim in futility.

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. 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). 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, 123 Nev. at 209, 163 P.3d at 418. 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's pro per pleading objected to four different statements as alleged prosecutorial misconduct to which his counsel should have objected. Petitioner first took 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.

As to the first statement, 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, Petitioner's notion that the State incorrectly defined Battery with Intent to Commit Sexual Assault is belied by the record.

Regarding 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.

Petitioner's Supplement further claimed his counsel was ineffective for failing to object to alleged additional instances of prosecutorial misconduct during closing argument. Supp. at 15-17. Here too, Petitioner failed to put forth any meritorious claim of prosecutorial misconduct, and his counsel cannot be ineffective for failing to raise a claim in futility.

Petitioner alleged three instances of improper argument during closing argument that trial counsel was ineffective for failing to object to. In the first and second claims in the Supplement, Petitioner submits the prosecutor stated her personal opinion regarding whether the victim was hogtied, and what Petitioner's intent was. Supp. 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.

The Supplement's third claim asserted 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. Supp. 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.

**6. Failure to Request a Jury Instruction**

Petitioner further argued in Ground Three of his Petition that counsel was ineffective for not requesting a jury instruction defining the necessary elements of substantial bodily harm. Pet at 8-C. Petitioner alleged it was unreasonable for his counsel to not 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.

//

However, this assertion is fallacious. 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 charged only 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 convicted only 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. Thus, Petitioner's counsel had no cause to request the jury instruction in question. Counsel's refrain from issuing this request was accordingly not unreasonable.

Moreover, 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 Petitioner's 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 is unable to 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, this Court cannot find Petitioner's counsel was ineffective on this basis, and this claim is denied.

**7. Counsel's Closing Argument Advanced a Clear Theory of the Case**

Petitioner's Supplement claimed counsel was ineffective for failing to have a "clear theory of the case for an acquittal" during their "very short" closing argument. Supp. at 18-19. However, Petitioner's claim is without merit because it is belied by the record.

First, of note, Petitioner failed to clarify how counsel's closing argument was "very short." Supp. at 18-19. He failed 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, suitable only 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 is consistent with defense counsel's argued theory 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 clearly indicates that counsel's defense theory, which was consistently argued throughout the trial, was the victim was not credible. Having found this claim is belied by the record, this claim is denied.

**8. The Evidence Presented at Trial Was Overwhelming**

Petitioner's Supplement asserted that a deficient trial performance resulted in Petitioner's conviction despite the State's failure to meet its burden of proving the crime beyond a reasonable doubt. Supp. at 18-20.

First, Petitioner's contention is devoid of reference to any facts in this case. Petitioner failed to 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. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

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 is 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.

**9. Counsel Was Not Ineffective at Sentencing**

Petitioner's Supplement claimed 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. Supp. at 20-22. However, Petitioner's claim is bare, naked, and without merit. Hargrove, 100 Nev. at 502, 686 P.2d at 225. 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.

//

//

//

**10. Appellate Counsel Was Not Ineffective**

Petitioner claimed in his Supplement that 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. Supp. 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.

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 is denied.

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 ultimately 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. Pet. 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). Petitioner's claim is therefore without merit and is denied.

//

//

//

**B. There is No Cumulative Error in Habeas Review**

Through his Supplement, Petitioner asserted a claim of cumulative error in the context of ineffective assistance of counsel. Supp. at 27-28. However, since Petitioner failed to demonstrate any error, his cumulative error argument is meritless.

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 is denied.

Petitioner failed 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.

//

//

The Mulder factors do not warrant a finding of cumulative error. First, the issue of guilt in the instant case was not close; as discussed, the evidence was immense and compelling. 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. Second, the gravity of the crime charged was severe, as Petitioner was charged with multiple counts in connection with a first-degree kidnapping. Third, there was no individual error in the underlying proceedings, and as such, there is no error to cumulate. Finally, even under the theory that some of or all 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 more favorable trial outcome. 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. Accordingly, this claim is denied.

## IV. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

In his Petition, Petitioner claimed he is entitled to an evidentiary hearing because he raised factual claims "which, if true, entitled him to an evidentiary hearing." Pet. 25-27. However, an evidentiary hearing is not required.

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 which, even if true, would entitle him to relief. All Petitioner's claims amount to either bare and naked allegations or assertions that counsel had the duty to file frivolous motions. Further, Petitioner is unable to overcome the fact that he cannot show he was 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.

//

**ORDER**

It is HEREBY ORDERED that Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction) and supplements thereto and Request for Evidentiary Hearing are DENIED.

**Dated this 16th day of September, 2022**

**F2A 892 1B53 01F5**
**Joe Hardy**
**District Court Judge**

STEVEN B. WOLFSON
DISTRICT ATTORNEY
Nevada Bar #001565

BY _____
ROBERT STEPHENS
Chief Deputy District Attorney
Nevada Bar #011286

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**

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 9/16/2022

| | |
|---|---|
| Terrence Jackson | terry.jackson.esq@gmail.com |
| Jonathan VanBoskerck | jonathan.vanboskerck@clarkcountyda.com |