IN THE SUPREME COURT OF THE STATE OF NEVADA

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CALVIN ELAM, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 85421

RESPONDENT'S ANSWERING BRIEF

Appeal From Post-Conviction Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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STATEMENT OF THE ISSUE(S)

1. Whether the Petition for Writ of Habeas Corpus was procedurally barred.
2. Whether Appellant failed to demonstrate good cause to ignore his procedural default.
3. Whether Appellant failed to demonstrate prejudice sufficient to ignore his procedural default.
4. Whether Appellant was not entitled to an evidentiary hearing.

STATEMENT OF THE CASE

The District Court's decision denying habeas relief summarized the procedural history of this case:

On April 17, 2015, Appellant 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 Appellant 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 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, 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 of 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 Appellant's judgment of conviction. Remittitur issued on May 7, 2019.

On May 27, 2020, Appellant filed a Petition for Writ of Habeas Corpus. Also on May 27, 2020, Appellant 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, the Court granted Appellant's Motion to Withhold Judgment on Petition for Writ of Habeas Corpus and allowed Appellant to file a Supplemental Petition by October 20, 2020. Also on August 18, 2020, the Court denied Appellant's Motion for Appointment of Counsel without prejudice and articulated that if issues were unduly complex counsel appointment would be considered. Appellant never filed a Supplemental Petition.

Appellant acting pro per could not file Supplementary Points and Authorities by the October 20, 2020, date, and on January 19, 2021, the Court denied the Petition and ordered Findings of Fact, Conclusions of Law and Order, which denied the Petition. Appellant 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 Appellant'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 Appellant to file a supplement to his original Petition. On June 9, 2022, Appellant 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 Appellant's Supplement to his Petition for Writ of Habeas Corpus. On August 17, 2022, Appellant filed his Reply.

5 Appellant's Appendix (AA) 1240 - 42.

On August 25, 2022, the Court denied Appellant's Petition for Writ of Habeas Corpus. 5 AA 1233-35. On September 16, 2022, the Court filed a Findings of Fact, Conclusions of Law and Order Denying Petition for Writ of Habeas Corpus (Post-Conviction). 5 AA 1239 – 6 AA 1283.

STATEMENT OF THE FACTS

The District Court summarized the factual background of this case as follows:

> 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.

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.

5 AA 1242 - 44.

SUMMARY OF THE ARGUMENT

The District Court did not abuse its discretion in denying Appellant's petition for writ of habeas corpus, post-conviction. Appellant's petition was procedurally barred without evidence of good cause. Appellant has shown insufficient prejudice to ignore his procedural default. Pursuant to Mendoza v. State, 122 Nev. 267, 275, 130 P.3d 176, 181 (2006), Appellant's actions fall within the purview first-degree

kidnapping, assault with a deadly weapon, and battery with intent to commit sexual assault. Further, the prosecutor did not misstate the law in closing argument. Finally, Appellant has not asserted any specific factual allegations which would entitle him to relief. As such, there was no need for an evidentiary hearing.

ARGUMENT

This Court reviews a district court's application of the law de novo, and gives deference to a district court's factual findings in habeas matters. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013). This Court reviews a district court's denial of a habeas petition for abuse of discretion. Rubio v. State, 124 Nev. 1032, 1047, 194 P.3d 1224, 1234 (2008). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). This Court must give deference to the factual findings made by the district court if they are supported by the record. Little v. Warden, 117 Nev. 845, 854, 34 Pd. 3d 540, 546 (2001).

I. THE PETITION FOR WRIT OF HABEAS CORPUS WAS PROCEDURALLY BARRED.

Initially, Appellant has failed to address the procedurally barred nature of his habeas petition in his Opening Brief. His failure to do so amounts to an admission that the decision below was correct. See, Polk v. State, 126 Nev. 180, 184-86, 233 P.3d 357, 360-61 (2010) (finding confessed error by failing to address a material

issue); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is Appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). Further, Appellant should be barred from addressing good cause in any reply since to do so would allow him to short circuit the adversarial process by denying Respondent any opportunity to respond. This Court should not tolerate such litigation practices. See, Righetti v. Eighth Judicial District Court, 133 Nev. 42, 47, 388 P.3d 643, 648 (2017) (declining to adopt a rule in a capital case that "rewards and thus incentivizes less than forthright advocacy").

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 the 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 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 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. Appellant'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 Appellant's direct appeal on May 7, 2019. 5 AA 1241. Therefore, Appellant had until May 7, 2020, to file a timely habeas petition. Appellant filed his Petition on May 27, 2020, in excess of the one-year deadline. Id. Accordingly, the district court denied Appellant's Petition as time barred. 5 AA 1246.

II. APPELLANT FAILED TO DEMONSTRATE GOOD CAUSE TO IGNORE HIS PROCEDURAL DEFAULT.

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)).

The District Court found Appellant 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. 5 AA 1247. Further, all facts and law necessary were available for Appellant to bring these claims in a timely habeas Petition. Id. Thus, Appellant's claims are procedurally barred.

III. APPELLANT FAILED TO DEMONSTRATE PREJUDICE SUFFICIENT TO IGNORE HIS PROCEDURAL DEFAULTS.

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).

As discussed *infra*, Appellant's underlying complaints are meritless. Thus, Appellant is unable to establish the requisite prejudice to ignore his procedural default.

A. The District Court did not err in holding Appellant Counsel was not ineffective.

Appellant complains the District Court erred in finding that appellate counsel was not ineffective for failing to properly litigate his conviction for first degree kidnapping. AOB at 11-14.

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 v. Washington, 466 U.S. 668,688, 104 S. Ct. 2052, 2064, 80 L.Ed. 2d 674 (1984). 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). The Nevada Supreme 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.

Initially, Appellant's complaint that direct appeal counsel was remiss for not challenging his kidnapping conviction based on Mendoza is waived as it was never raised below. Appellant's pleadings below did not argue Mendoza in any way. 5 AA 1077-1100, 1163-91. Instead, he complained that direct appeal counsel should have argued that the kidnapping conviction failed to meet the beyond a reasonable doubt standard and thus was supported by insufficient evidence. 5 AA 1182-87. Appellant's failure to raise this issue below precludes appellate review. Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds, Means v. State, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004) ("This ground for relief was not part of appellant's original petition for post-conviction relief and was not considered in the district court's order denying that petition. Hence, it need not be considered by this court."). Appellant's failure to raise this argument in the lower court waives all but plain error. Martinorellan v. State, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015); Maestas v. State, 128 Nev. 128, 146, 275 P.3d 74, 89 (2012); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); Patterson v. State, 111 Nev.

1525, 1530, 907 P.2d 948, 987 (1995); Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995). Plain error review asks:

> "To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" Vega v. State, 126 Nev. ----, ----,_236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543, 170 P.3d at 524). In addition, "the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Valdez, 124 Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003))). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Martinorellan, 131 Nev. at 49, 343 P.3d at 593.

Appellant complains appellate counsel was ineffective for failing to argue that his conviction of first degree kidnapping did not have independent significance apart from his other offenses, created a substantially greater risk of danger, or involved movement that substantially exceeded that necessary to complete the other offense pursuant to Mendoza. AOB at 11-14. Appellant further contends that "[w]hether, the movement was incidental or substantially increased the risk of harm are questions generally left for a jury in all but the clearest of cases, pursuant to Guerrina v. State, 134 Nev.__,__,419 P.3d 705, 710 (2018)." AOB at 12. (internal quotation marks omitted).

Appellate counsel was not ineffective for not challenging Appellant's conviction for first-degree kidnapping because counsel is not required to raise futile

arguments. Ennis v. State, 122 Nev. 694, 705, 137 P.3d 1095, 1103 (2006). Appellant's convictions are: 1) First Degree Kidnapping with use of a Deadly Weapon; 2) Assault with a Deadly Weapon; and 3) Battery with Intent to Commit Sexual Assault. 5 AA 1240 - 41.

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.

Convictions for kidnapping and another offense are permissible; "where the movement or restraint serves to substantially increase the risk of harm to the victim over and above that necessarily present in an associated offense, *i.e.,* robbery, extortion, battery resulting in substantial bodily harm or sexual assault, or where the seizure, restraint or movement of the victim substantially exceeds that required to complete the associated crime charged, dual convictions under the kidnapping and robbery statutes are proper." Mendoza, 122 Nev. at 275, 130 P.3d at 180. Dual culpability is permitted where the movement, seizure or restraint stands alone with independent significance from the underlying charge. Id at 275-76, 130 P.3d 180-81. In Mendoza the Court provided a jury instruction setting out the requirements for dual convictions:

> "in order for you to find the defendant guilty of both first-degree kidnapping… and an associated offense of robbery, you must also find beyond a reasonable doubt either: (1) That any movement of the victim was not incidental to the robbery; (2) That any incidental movement of the victim substantially increased the risk of harm to the victim over and above that necessarily present in the robbery; (3) That any incidental movement of the victim substantially exceeded that required to complete the robbery; (4) That the victim was physically restrained and such restraint substantially increased the risk of harm to the victim; or (5) The movement or restraint had an independent purpose or significance.

Id at 275-76, 130 P.3d 181. The Mendoza Court defined "physical restraint" as including but not limited to tying, binding, or taping. Id at 277, 130 P.3d 182. Furthermore, Mendoza held it was proper for a defendant to be committed of both first-degree kidnapping and robbery after the victim was seized, taken inside a residence, severely beaten, and had his keys and wallet taken from him. Id at 271, 276, 130 P.3d 178.

Similar to Mendoza, the evidence against Appellant justifies a conviction of first-degree kidnapping, assault with a deadly weapon, and battery with intent to commit sexual assault. At trial, the victim testified Appellant told her to come into his apartment, forced her to her knees, tied up her hands and feet with electrical cord, stuffed her mouth with fabric, and covered her eyes. 3 AA 572. Prior to having her mouth stuffed the victim testified Appellant put a gun in her mouth and stated, "Bitch, it's not a game." 3 AA 573-74. Appellant pulled down her pants, took a broom and angled it in a way to stick it in her anal cavity. 3 AA 575. Witnesses

found the victim with her hands, feet, and mouth bound and recalled she was begging them to call the police. 3 AA 527-29. The tape Appellant used to tie up the victim was found in his apartment. 3 AA 695. Lastly, the victim had injuries consistent with being tied up. 3 AA 678.

The jury had sufficient evidence to determine that the kidnapping went beyond being merely incidental to the other offenses. There was sufficient evidence presented at trial that Appellant kidnapped the victim. It is clear Appellant lured her into his apartment, tied her up, beat her, and pulled her pants down to get revenge for allegedly stealing his dogs. Indeed, Appellant's conduct went far beyond a mere kidnapping and did in fact increase the danger the victim faced well beyond what was necessary to complete the kidnapping.

In short, Appellant seized, physically restrained, and assaulted the victim similar to the victim in Mendoza. Appellant's actions resulted in increased danger and injury to his victim. Thus, Appellant's actions fall within the purview of permissible convictions for first-degree kidnapping along with assault with a deadly weapon, and battery with intent to commit sexual assault. Accordingly, Appellant's complaint is meritless.

B. The District Court did not err in holding that Trial Counsel was not ineffective.

Appellant complains the District Court erred in finding that trial counsel was not ineffective for not objecting to an alleged misstatement of the law by the

prosecutor. AOB at 14-15. However, this claim should be denied because it is without merit.

Counsel cannot be ineffective for failing to make futile objections or arguments. 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).

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).

Appellant's claim is belied by the record. The portion of the prosecutor's closing argument Appellant 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.

5 AA 1032. Appellant concedes this is a correct statement of law. AOB 14-15. Therefore, Appellant admits that the prosecutor's statement was a correct statement of law. Thus, the claim is belied by the record and only suitable for summary denial under Hargrove. 100 Nev. at 502, 686 P.2d at 225.

Moreover, even if the prosecutor oversimplified the law, Appellant's admission that jurors were properly instructed amounts to a concession that any mistake was insufficiently prejudicial to warrant ignoring his procedural default since jurors are presumed to follow the instructions of the court. AOB 14 - 15; Newman v. State, 129 Nev. 222, 237, 298 P.3d 1171, 1182 (2013); Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004).

Regardless, the record shows that Appellant's complaint is 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." Elam v. State, Nevada Supreme Court Case Number 7451, Order of Affirmation, filed April 12, 2019, p. 3. Therefore, Appellant 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, 118 Nev. at, 8, 38 P.3d at 167. 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, Appellant's claim fails, is meritless, and should be denied accordingly.

IV. THE DISTRICT COURT DID NOT ERR IN DENYING AN EVIDENTIARY HEARING.

Appellant complains the District Court erred by denying his request for an evidentiary hearing. AOB at 15-16. This claim also fails.

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, 562 U.S. 86, 105, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (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. Strickland at 466 U.S. 688, 104 S. Ct. at 2065.

Appellant has not asserted any specific factual allegations which would entitle him to relief. Appellant argues, "in a case where the evidence was comprised almost entirely of [victim's] testimony, any information that was relevant or germane to impeaching her should have been sought." AOB at 16. However, this complaint fails as a fishing expedition. Additionally, Appellant had the opportunity to cross-exam the victim at trial. 3 AA 611-38. There were several other witnesses at Appellant's trial that he had the opportunity to exam. 2 AA 329; 3 AA 541, 725; 4 AA 816, 911. Thus, Appellant had ample opportunity to challenge the victim's testimony.

Ultimately, Appellant's complaints were correctly resolved without expanding the record. Appellant complains that the victim's puppy story should have been further investigated. AOB at 16. Again, Appellant's trial counsel had the opportunity to cross-exam the victim and witnesses regarding the victim's puppy story. Appellant argues the District Court should have inquired into counsel's investigation. Id. However, this would have been an abuse of discretion because 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, 562 U.S. at 105, 131 S. Ct. at 788. Thus, Appellant has failed to show that an evidentiary hearing was warranted pursuant to NRS 34.770.

Dated this 26th day of April, 2023.

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 7,050 words and 27 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 26th day of April, 2023.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 26th day of April, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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