IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY HARRIS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 86029

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

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

STATEMENT OF THE ISSUES

I. Whether Appellant's right to be present at a post-conviction evidentiary hearing was not denied where his attorney waived his presence.
II. Whether effective representation does not require Appellant make strategic decisions.
III. Whether trial counsel was not ineffective for failing to pursue review of the denial of a pretrial writ when it would have delayed Appellant's trial against his wishes.
IV. Whether cumulative error review is inapplicable and relief is unwarranted.

STATEMENT OF THE CASE

District Court summarized the procedural history of this case:

On January 17, 2018, BARRY HARRIS (hereinafter, "Petitioner") was charged by way of Information, as follows: Count 1 – BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony – NRS 205.060); Count 2 – FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Category A Felony – NRS 200.310, 200.320, 193.165); Count 3 – ASSAULT WITH A DEADLY WEAPON (Category B Felony – NRS 200.471); Count 4 – BATTERY WITH USE OF A DEADLY WEAPON CONSTITUTING DOMESTIC VIOLENCE (Category B Felony – NRS 200.481, 200.485, 33.018); Count 5 – BATTERY CONSTITUTING DOMESTIC VIOLENCE – STRANGULATION (Category C Felony – NRS 200.481, 200.485, 33.018); Count 6 – BATTERY RESULTING IN SUBSTANTIAL BODILY HARM CONSTITUTING DOMESTIC VIOLENCE (Category C Felony – NRS 200.481, 200.485, 33.018); Count 7 – PREVENTING OR DISSUADING WITNESS OR VICTIM FROM REPORTING CRIME OR COMMENCING PROSECUTION (Category D Felony – NRS 199.305); Count 8 – CARRYING CONCEALED FIREARM OR OTHER DEADLY WEAPON (Category C Felony – NRS 202.350(1)(d)(3)); and Count 9 – OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony – NRS 202.360) for his action on or about August 22, 2017. On April 9, 2018, the State filed an Amended Information, removing Count 9.

On April 9, 2018, Petitioner proceeded to jury trial. After five (5) days of trial, on April 16, 2018, the jury returned its Verdict, as follows: Count 1 – Not Guilty; Count 2 – Guilty of First Degree Kidnapping Resulting in Substantial Bodily Harm; Count 3 – Guilty of Assault; Count 4 – Guilty of Battery Constituting Domestic Violence; Count 5 – Not Guilty; Count 6 – Guilty of Battery Resulting in Substantial Bodily Harm Constituting Domestic Violence; Count 7 – Not Guilty; and Count 8 – Not Guilty.

On August 14, 2019, Petitioner appeared for sentencing. Petitioner was adjudged guilty, consistent with the jury's verdict, and was sentenced, as follows: Count 2 – LIFE in the Nevada Department of Corrections ("NDC"), with the possibility of parole after fifteen (15) years; Count 3 – six (6) months in the Clark County Detention Center ("CCDC"), concurrent with Count 2; Count 4 – six (6) months in CCDC, concurrent with Count 3; Count 6 – twenty-four (24) to sixty (60) months in NDC, concurrent with Count 2. The Court credited

> Petitioner with 351 days time served. Petitioner's Judgment of Conviction was filed on August 16, 2018.
>
> On August 21, 2018, Petitioner filed a pro per Notice of Appeal. On December 19, 2020, the Nevada Supreme Court affirmed Petitioner's conviction. Remittitur issued on January 16, 2020.
>
> On February 7, 2020, Petitioner filed a second Notice of Appeal. On March 6, 2020, the Nevada Supreme Court dismissed Petitioner's second appeal. Remittitur issued on April 1, 2020.
>
> On April 21, 2020, Petitioner filed a pro per Petition for Writ of Habeas Corpus (Postconviction) and Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing. The State filed its Response on October 2, 2020. On November 3, 2020, the Court granted Petitioner's Motion for Appointment of Counsel, and on November 24, 2020, Mr. Allen Lichtenstein, Esq. confirmed as counsel for Petitioner.
>
> On April 8, 2021, Petitioner, through counsel, filed his Supplemental Petition for Writ of Habeas Corpus (Postconviction) (his "Supplement"). On June 10, 2021, the State filed its Response. On August 26, 2021, this Court held an evidentiary hearing. Findings of Fact, Conclusions of Law and Order denying habeas relief were filed on September 28, 2021. Notice of Entry of Order was filed on September 30, 2021.
>
> Notice of Appeal was filed on September 14, 2021. On August 29, 2022, the Nevada Supreme Court issued an Order Dismissing Appeal disposing of appellate proceedings because the September 28, 2021, Findings of Fact, Conclusions of Law and Order "did not address all of the claims raised in Harris' pleadings below." Order Dismissing Appeal, filed August 29, 2022.

I Appellant's Appendix (AA) p. 3-5.

In obedience to the order dismissing the appeal from the denial of habeas relief, District Court filed an Amended Findings of Fact, Conclusions of Law and Order on January 4, 2023. I AA 3-22. Appellant filed his Notice of Appeal on January 25, 2023. I AA 1-2.

STATEMENT OF FACTS

District Court summarized the underlying facts of this case:

On August 22, 2017, officers responded to a residence in reference to a call that came into 911 where they heard a female victim screaming. “Help me, help me.” The officers made contact with the victim who told officers she was scared to death of her boyfriend, the defendant, Barry Harris because he had just tried to kill her and that he had left the residence in his vehicle.

The victim told officers that they had been dating for six years and have lived together on and off as well. She stated that on that day she was arguing with him on phone while she was at work. She went home and found the defendant lying on her bed. She reported that she gave him a key to the residence but was not living there. She sat next to him and they started arguing again. The victim told him to leave the residence and he replied, "I'm not going nowhere bitch". She told the defendant that if he continued to disrespect her that she would call the police. She reported that things escalated and the defendant grabbed her around her throat with both hands and began squeezing. He continued doing this until she could not breathe and felt as she was going to pass out. He then slammed her down on the bed and began punching her in the head. The defendant threw her on the floor and continued to punch her. The victim was able to get up and ran into the living room screaming for help. The victim stated that the defendant removed a firearm from his pants pocket and quickly approached her. He shoved the firearm in her mouth telling her he would blow her brains out and if she made any noise, he would kill her. She stated that she continued to scream for help. The defendant began hitting her again on top of the head and the face as she fell to the ground where he continued to hit and kick her. Afterwards, he put the gun to her head and forced her to a bathroom telling her to be quiet and to stop yelling or he would pull the trigger. The victim stated that the defendant made her go into the restroom to keep her hostage so she wouldn't run or call the police. She stated that he continued to hit her during this and then poured a bottle of juice all over her while calling her names. The defendant told her that he hated her and that if she contacted the police that he would be back to kill her. He then gathered his belongings and left the residence.

> She stayed sitting on the bathroom floor and police arrived by the time she got up.

I AA 3-4.

SUMMARY OF THE ARGUMENT

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

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

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

The assorted complaints Appellant labels cumulative errors are meritless. When appellate counsel pursued several potentially meritorious claims on direct appeal, she was not ineffective for failing to dilute her argument with every colorable

claim Appellant demanded. Appellate counsel bore the responsibility of weeding out weaker claims to best showcase stronger arguments.

ARGUMENT

When adjudicating an appeal from the denial of habeas relief this Court gives deference to a district court's factual findings, but reviews the court's application of the law to those facts de novo. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013).

I. APPELLANT'S RIGHT TO BE PRESENT AT A POST-CONVICTION EVIDENTIARY HEARING WAS NOT DENIED WHERE HIS ATTORNEY WAIVED HIS PRESENCE

Appellant did not have a constitutional right to be present at the evidentiary hearing. While he did have a statutory privilege to attend, his absence amounted to mere harmless error at most.

Appellant claims a right to be present at all levels of legal proceedings. Appellant's Opening Brief (AOB), p. 12 (*citing* Gallego v. State, 117 Nev. 348, 367, 23 P.3d 227, 240 (2001), abrogated by Nunnery v. State, 127 Nev. 749, 263 P.3d 235 (2011), and Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658 (1987)).[1]

[1] The AOB is not paginated in violation of Rule 32(a)(4) of the Nevada Rules of Appellate Procedure (NRAP). To effectively cite this Court's attention to the appropriate pages of the AOB Respondent refers to the pages of the AOB as if they had been correctly paginated in compliance with NRAP 32(a)(4). Specifically, Respondent paginated the AOB with page 1 starting on the page containing

A. Appellant had no Constitutional Right to be Present

The right to be present does not apply to all levels of legal proceedings as argued by Appellant; rather, it applies to the stages of the criminal trial. Under Nevada law, "the defendant must be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence." NRS 178.388(1) ("setting forth the constitutionally protected critical stages of trial." Evans v. State, 130 Nev. 1175 (2014)). This statute refers to trial stages on its face, not to post-conviction evidentiary hearings.

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

A defendant does not have an unlimited right to be present at every proceeding:

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

Appellant's Statement of the Case and continuing therefrom in sequential numerical order.

Gallego, 117 Nev. at 367-68, 23 P.3d at 240 (quoting Kirksey v. State, 112 Nev. 980, 1000, 923 P.2d 1102, 1115 (1996).

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

Similarly, in Stincer, the defendant protested his absence from hearings to determine the competency of his child victims. 482 U.S. at 745, 107 S. Ct. at 2660. The Supreme Court of Kentucky held Stincer's rights were compromised because the federal and state constitutions provided a right to face the witnesses against him. Id. at 735, 107 S. Ct. at 2662-63. The United States Supreme Court reversed, holding Stincer's confrontation rights were not violated because his attorney was able to ask questions at the competency hearing and the children then testified in front of him at trial. Id. at 744, 107 S. Ct. at 2667. "Respondent has given no indication that his presence at the competency hearing in this case would have been useful in ensuring a more reliable determination as to whether the witnesses were competent to testify." Id. at 747, 107 S. Ct. at 2668. The Supreme Court held that nothing occurred during the competency hearings that affected the defendant's ability to defend against the *actual criminal charges* at trial.

Where the court did not make a ruling at a pre-trial hearing, the defendant was not prejudiced by his absence. Thomas v. State, 114 Nev. 1127, 1140, 967 P.2d 1111,

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

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

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

A post-conviction evidentiary hearing is not an arraignment, trial stage, or sentencing. Appellant's absence from the evidentiary hearing does not raise the constitutional concerns of a trial in absentia.

B. Appellant Waived the Statutory Right to Appear

Appellant had a statutory right to attend the hearing. Gebers v. State, 118 Nev. 500, 503-04, 50 P.3d 1092, 1094 (2002). In Gebers, the petitioners were not present at evidentiary hearings where evidence was adduced "regarding the merits of the claims raised," nor were they represented by counsel. Id. at 501, 50 P.3d at 1092-93. The district court made no effort to procure their presence. Id. at 502, 50 P.3d at 1093. This Court remanded the matters for evidentiary hearings on the merits of the petitioners' claims. Id. at 506, 50 P.3d at 1095-96.

Here, the facts differ greatly from those in Gebers. Appellant was represented at the hearing by appointed counsel. I AA 42, 44-45. Although a transport order had been signed directing that Appellant be brought to court, he was not transported. I AA 44-45. District Court allowed habeas counsel to decide whether to go forward, reset the hearing and/or bifurcate the hearing. I AA 46. Habeas counsel opted to waive Appellant's presence. I AA 45-46. Counsel likely made this decision because he had an out of state witness present and strategically determined that getting her back to court at future date might be problematic. I AA 46. Further, habeas counsel

made the strategic decision to not call Appellant as a witness at the evidentiary hearing. I AA 46.

None of the salient features of Geber are present here. Further, the particular facts of this case preclude a finding of error.

C. Counsel Validly Waived Appellant's Presence

Habeas counsel's decision to waive Appellant's presence precludes a finding of error. District Court deferred the question of whether to go forward or not to the strategic judgment call of habeas counsel. Since the Court allowed Appellant's attorney to make the choice there can be no error. Alternatively, any alleged error was invited error and as such this Court should decline to review it.

Appellant is bound by his attorney's waiver of his presence. An attorney represents a client and actions taken by counsel on the client's behalf bind the client:

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

Gonzalez v. United States, 553 U.S. 242, 248, 128 S. Ct. 1765, 1769 (2008).

An attorney may waive his client's presence. In Schultz v. State, 91 Nev. 290, 535 P.2d 166 (1975), the appellant argued his attorney was not authorized to waive his presence at a continuance hearing. Id. at 292, 535 P.2d at 167. Schultz rejected this contention: "We find no error in the district court's acceptance of the waivers

proffered by appellant's counsel or in its denial of appellant's motion to dismiss." Id. Similarly, in Bates v. State, 84 Nev. 43, 45, 436 P.2d 27, 28 (1968), counsel waived his client's speedy trial rights in his absence, and also waived his absence. This Court found the waivers to be valid. Id. at 46, 436 P.2d at 29.

The record shows habeas counsel validly waived Appellant's presence. Further, the record demonstrates that counsel had a legitimate reason for doing so, the presence of an out of state witness and a determination that Appellant's testimony was not required. I AA 46. Thus, there was no error.

Alternatively, any error was invited since habeas counsel waived Appellant's presence and made the decision to go forward with the hearing. This Court has determined that "when a defendant participates in the alleged error, he is estopped from raising any objection on appeal." Rhyne v. State, 118 Nev. 1, 38 P.3d 163 n.12 (2002), (*citing* Jones v. State, Nev. 613, 617, 600 P.2d 247, 250 (1979); Sidote v. State, 94 Nev. 762, 762-63, 587 P.2d 1317, 1318 (1978) (holding that defendant who invites district court action perceived as favorable to him may not then claim it as error on appeal)). In Rhyne, the defendant specifically asked the district court a to let him call a witness, and the district court complied. Id. 118 Nev. at 9, 38 P.3d at 168. When he later raised the issue of calling that witness on appeal, this Court held that he was estopped from doing so because it was invited error. Id. Habeas counsel made the decision to go forward with the hearing and opted to not call Appellant as

a witness. I AA 44-46. As such, any error in excluding Appellant from the hearing was invited and is not reviewable.

D. Any Error was Harmless

Appellant cannot demonstrate that any error had a substantial and injurious effect or influence on the outcome of the habeas proceeding.

"Violations of the right to be present are reviewed for harmless error." Rose v. State, 123 Nev. 194, 208, 163 P.3d 408, 417 (2007). Under NRS 178.598, any "error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Non-constitutional trial error is reviewed for harmlessness, based on whether the error had substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008). On the other hand, constitutional error is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967). The test under Chapman for constitutional trial error is "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001).

Since Appellant did not have a constitutional right to be present at the evidentiary hearing, he must demonstrate that any error had a substantial and injurious effect or influence on the outcome of the habeas proceeding. Regardless, under any standard, Appellant's complaints demonstrate nothing more substantive

than mere harmless error. Appellant alleges he was prejudiced because he was unable to challenge the testimony of trial and appellate counsel. AOB, p. 13-14. However, Appellant admits "[i]t is speculation whether such testimony would ultimately result in a different ruling[.]" AOB, p. 14. This admission precludes a finding that the alleged error had a substantial and injurious effect or influence on the outcome of the habeas proceeding.

E. Appellant Cannot Demonstrate Prejudice

Appellant cannot demonstrate prejudice because any harm flows not from judicial encroachment upon his rights, but from habeas counsel's strategic decisions. Since Appellant did not have the right to the effective assistance of habeas counsel, he cannot demonstrate prejudice for any purpose. Even assuming he had such a right, habeas counsel's decisions were reasonable and thus would not warrant habeas relief.

While Appellant presents his claims as ones of judicial error, he really is attacking the strategic decisions of habeas counsel. It is undisputable that 1) District Court allowed habeas counsel to decide whether to go forward, reset the hearing and/or bifurcate the hearing; 2) habeas counsel opted to waive Appellant's presence; and 3) habeas counsel made the strategic decision to not call Appellant as a witness. I AA 45-46. In this case, any harm to Appellant flows not from judicial

encroachment upon Appellant's rights, but from habeas counsel's strategic decisions.

This distinction requires affirmance of the decision below. Appellant did not have the right to the effective assistance of habeas counsel. Halbert v. Michigan, 545 U.S. 605, 610, 125 S.Ct. 2582, 2587 (2005) (The right of assistance of counsel extends only to "first appeals as of right … however, … a state need not appoint counsel … in discretionary appeals"); Brown v. McDaniel, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014) ("there is no constitutional or statutory right to the assistance of counsel in noncapital post-conviction proceedings"); McKague v. Whitley, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996) ("no right to effective assistance of counsel, let alone any constitutional or statutory right to counsel at all, [exists in] post-conviction proceedings"). Thus, any harm flowing from habeas counsel's decisions to go forward with the evidentiary hearing, waive Appellant's presence and decline to present Appellant's testimony is simply not cognizable. Claims premised upon the actions of habeas counsel must be denied.

Even if this Court decides to ignore precedent without the requisite compelling need to do so, Appellant would still not be entitled to relief. City of Reno v. Howard, 130 Nev. 110, 113-14, 318 P.3d 1063, 1065 (2014); Armenta-Carpio v. State, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013). Habeas counsel made a strategic decision to focus his efforts on demonstrating trial counsel was ineffective

for failing to bring the issue of the continuance in Justice Court to the Nevada Supreme Court's attention and appellate counsel was ineffective for failing to raise the issue of the continuance on direct appeal. What Appellant alleges he would have testified to is irrelevant and/or unhelpful to those issues. As such, Appellant cannot demonstrate prejudice.

Appellant's claims of prejudice rest on the assertion he intended to testify. AOB, p. 13-14. He alleges he would have testified as follows:

1. That Harris did wish to file a writ of mandamus to the Nevada Supreme Court and that his counsel told him he would do so, stated to the district court that he would do so, and that no appeal was filed;

2. That Harris was told he could not invoke his speedy trial rights and independently pursue a Writ of Mandamus;

3. That his trial counsel did not provide certain body cam footage so he could be prepared for trial and/or make an informed decision whether to testify; and,

4. That he specifically directed his appellate counsel to raise the issue of the State's Bustos violations granting of continuances.

5. That he specifically directed his appellate counsel to raise the issue of his denial of a speedy trial and perjury claim (Grounds 8 and 9 of his Pro Per Petition).

AOB at 13-14. Appellant contends this purported testimony would have been in direct contradiction to the testimony of trial and appellate counsel. AOB, p. 13.

Initially, the third and fifth areas of purported testimony were not relevant to the issues habeas counsel was pursuing. The decision as to what claims to raise

belongs to counsel. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) (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"). Since those areas were not relevant or helpful to habeas counsel, he could reasonably decline to present testimony related to them.

The first and second areas of purported testimony are marginally more relevant. That Appellant now contends he would have offered self-serving testimony that contradicted that of his trial and direct appeal lawyers is unsurprising. More importantly, habeas counsel could wisely decide it would not be in Appellant's best interest to engage in a credibility contest. Appellant is a convicted criminal who committed shocking acts of violence. Trial and appellate counsel are respected members of the legal community. Such a credibility contest would not have ended well for Appellant. Indeed, habeas counsel did not present trial and appellate counsel as witnesses, they were called by the State. I AA 48.

Instead, habeas counsel opted to focus attention on the underlying claim, whether the continuance was inappropriately granted and thus should have been pursed through a writ to the Supreme Court and on direct appeal. At the evidentiary hearing, habeas counsel used Dotson's testimony to demonstrate the Justice Court erred in granting a continuance for her presence. I AA 52-55. Habeas counsel

explicitly argued the alleged erroneous grant of a continuance should have been presented to the Supreme Court through a writ and/or on direct appeal. I AA 56-57.

Finally, the fourth area of purported testimony is of little relevance. Whether Appellant asked appellate counsel to raise the issue of the continuance on direct appeal did little to help habeas counsel's argument. Whether to raise an issue on appeal is a strategic determination left to the judgment of appellate counsel. See, Jones v. Barnes, 463 U.S. 745, 751-54, 103 S.Ct. 3308, 3313-14 (1983). Further, District Court was not concerned with whether Appellant asked appellate counsel to raise a particular claim. Instead, District Court was concerned with whether not doing so amounted to ineffective assistance. Here, District Court made a factual determination that "Appellate Counsel reviewed the entire record and strategically chose not to raise this issue, as she did not believe there was a reasonable probability of success on appeal." I AA 9-10. Whether Appellant disagreed with appellate counsel's assessment of the record is of no importance.

F. The Record is Insufficient to Support Relief

If this Court opts to ignore its own precedent regarding the lack of a right to the effective assistance of habeas counsel and/or concludes that the strategic decisions of habeas counsel can be transmuted into judicial error, the record as it stands is simply insufficient to support relief regardless of the avenue used to request it.

Even Appellant admits that "[i]t is speculation whether such testimony would ultimately result in a different ruling[.]" AOB, p. 14. What would elevate Appellant's claims to a point where it could be determined whether his purported testimony would have changed the outcome of the habeas proceeding is an evidentiary hearing where both he and habeas counsel testified.

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

Here, habeas counsel would need to be questioned regarding his waiver of Appellant's presence and Appellant's intention to testify. This Court could issue a limited remand for the purposes of holding an evidentiary hearing or, more appropriately, it could affirm the judgment below and direct Appellant to file a another habeas petition.

II. EFFECTIVE REPRESENTATION DOES NOT REQUIRE APPELLANT MAKE STRATEGIC DECISIONS

Appellant complains he was denied the autonomy to make fundamental choices about his own defense. AOB, p. 14. Appellant wrongly conflates the objective of representation with strategic decisions that are the preview of counsel.

Appellant asserts he wanted certain issues pursued:

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

AOB, p. 17-18.

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

strategic decisions left to counsel's discretion. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) (conferring the responsibility of deciding defenses on trial counsel). Appellant could have represented himself if he wanted to make the strategic decisions.

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

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

to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

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

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson, 108 Nev. at 117, 825 P.2d at 596; see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Likewise, the decision not to call witnesses is within the discretion of trial counsel and will not be questioned unless it was a plainly unreasonable decision. Rhyne, 118 Nev. at 8, 38 P.3d at 167.

In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's

conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. A defendant is not entitled to a particular "relationship" with his attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. Id.

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

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263,

1268 (1999) (*citing* Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (*citing* Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064–65, 2068).

Claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "A petitioner for post-conviction relief cannot rely on conclusory claims for relief but must make specific factual allegations that if true would entitle him to relief. 'Bare' and 'naked' allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record." Id. "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). A habeas corpus petitioner must prove disputed factual allegations by a preponderance of the evidence. Means, 120 Nev. at 1011, 103 P.3d at 32. The burden rests on Petitioner to "allege specific facts supporting the claims in the petition." NRS 34.735(6).

A party seeking review bears the responsibility "to cogently argue, and present relevant authority" to support his assertions. Edwards v. Emperor's Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83

(1991) (defendant's failure to present legal authority resulted in no reason for the district court to consider defendant's claim); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (an arguing party must support his arguments with relevant authority and cogent argument; "issues not so presented need not be addressed"); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (issues lacking citation to relevant legal authority do not warrant review on the merits).

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

There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects tactics rather than "sheer neglect." Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge *post hoc* rationalization for counsel's decision-making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id.

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

Appellant cites McCoy v Louisiana, 584 U.S. __, 138 S. Ct. 1500 (2018), for the proposition that a defendant has the right to make fundamental choices about his defense. AOB, p. 15-16. In McCoy, counsel conceded guilt without the client's permission. Id. at __, 138 S.Ct. at 1505. "[I]t is the defendant's prerogative, not counsel's, to decide on the objective of his defense." Id. The Court went on to hold:

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

Id. __, 138 S.Ct. at 1508 (internal citations omitted, emphasis added).[2]

McCoy held that the decision to assert innocence or represent oneself "are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are." Id. McCoy holds the defendant decides the objective of his defense.

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

Appellant asserts that his desire to raise certain legal issues was a decision regarding the defense's objective rather than a strategic way of achieving his objective. AOB, p. 17. He claims his attorneys were ineffective for failing to "pursue the object of representation." AOB at 18.

[2] While McCoy indicates a defendant has the right to decide whether to testify, the case was decided in the context of certiorari review of the denial of a motion for a new trial. McCoy, 584 U.S. at __, 138 S.Ct. at 1506-07. As noted above, Appellant did not have a constitutional right to appear at a post-conviction evidentiary hearing, habeas counsel validly waived Appellant's presence and Appellant's purported testimony would not have furthered habeas counsel's strategic decisions.

American jurisprudence presumes no such thing. The Gonzalez Court held that tactical decisions did not require client approval, as the attorney has the expertise and experience to consider the larger strategic plan for the trial. Id. at 249-50, 128 S. Ct. at 1770. The defendant chooses the objective of the representation, i.e., whether to maintain his innocence or plead guilty and hope for mercy. The attorney, however, decides how to achieve that objective. The fact that Appellant continuously harped on the preliminary hearing does not mean his attorneys had to raise that issue if they did not feel it would be successful. The strategic decisions are entrusted to the attorney. Dawson, 108 Nev. at 117, 825 P.2d at 596.

III. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PURSUE REVIEW OF THE DENIAL OF A PRE-TRIAL WRIT WHEN IT WOULD HAVE DELAYED APPELLANT'S TRIAL AGAINST HIS WISHES

Appellant argues trial counsel was ineffective for not pursuing review of Justice Court's decision to grant a continuance where the prosecutor did not swear under oath as to the circumstances surrounding the witness's absence. AOB at 18-27.

To the extent that Appellant attempts to reach the underlying alleged substantive error outside the thin veneer of an ineffective assistance of counsel claim, it is waived and it is thus not necessary to litigate the correctness of the Justice Court's decision. NRS 34.810(1) reads:

The court shall dismiss a petition if the court determines that:

> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly or that the plea was entered without effective assistance of counsel.
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> . . .
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.

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

Turning to the ineffective assistance argument, Appellant complains trial counsel was ineffective for not presenting the denial of his writ of mandamus concerning this issue to the Nevada Supreme Court before trial. AOB at 18-27. Appellant alleges he wanted to appeal the denial but trial counsel told him he could

not invoke his speedy trial rights if he delayed proceedings by pursuing immediate review. AOB, p. 13. He claims trial counsel's failure to appeal the denial "deprived Harris of important control over the objectives of his defense." AOB, p. 25.

District Court denied the writ of mandamus because Justice Court had the discretion to continue the hearing for good cause under NRS 171.196. II AA 437. The Court found the avenues for seeking a continuance in Bustos v. Sheriff, Clark County, 87 Nev. 622, 491 P.2d 1279 (1971), and Hill v. Sheriff of Clark County, 85 Nev. 234, 452 P.2d 918 (1969), were two of several avenues to seek a continuance. II AA 438. The Court noted that Justice Court was required to review the totality of the circumstances. Id. (*citing* Sheriff, Clark Cty v. Terpstra, 111 Nev. 860, 863, 899 P.2d 548, 551 (1995).

District Court made a factual determination that Appellant had directed his attorney not to seek immediate review as doing so would delay his trial. I AA 9. The objective of Appellant's defense was to acquit him as quickly as possible. Mr. Ramsey, the attorney who filed the writ of mandamus, explained why he did not pursue immediate appellate review:

> I had a discussion with Mr. Harris once the writ was denied. He wasn't present for the hearing on the writ because it was placed on a civil calendar. I had a discussion with Mr. Harris about what he wanted to do. I had a discussion with the appeals team as far as what the process would be for appealing the denial of the writ. The appeals team essentially told me we can take it up on another writ of mandamus to the Supreme Court to get them to instruct the District Court to grant my initial writ of mandamus.

> As far as the timeframe, which was a concern for Mr. Harris because he was very adamant that he wanted to go to trial quickly, in discussion with Mr. Harris about what we wanted to do with this he decided, and I let him have this decision, that he didn't want to delay his Preliminary Hearing any further, that we just needed to get the Preliminary Hearing to go forward, and were he convicted at trial we would take it up on direct appeal.

I AA 95. Further, Mr. Ramsey also testified that "[t]he only reason he didn't want to do the appeals process or the other writ to the Supreme Court was because he wanted to go forward to trial because he thought he was going to win." I AA 96.

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

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

I AA 76.

Appellate counsel Ms. Bernstein testified that her understanding was that "Mr. Harris did not want to waive his right to a speedy trial, so we lost a lot of challenges that we could have raised based on that." I AA 89.

Habeas counsel argued an "antsy" client should not cause an attorney to not appeal, because "clients oftentimes want to do things procedurally that are not in their best interest. That's why they have lawyers." I AA 97. "Mr. Harris may have wanted to get to trial but it was not in his best interest to do so, and it really is up to

the attorney to proceed with the trial in a manner—or with the proceedings in a manner that is in the client's best interest." I AA 98. Interestingly, this is the opposite of what Appellant now argues—that his autonomy is threatened when his lawyer makes legal strategic decisions.

District Court accepted that trial counsel was correct in not appealing the denial of the writ of mandamus before the preliminary hearing, given Appellant's eagerness to proceed. I AA 98-99. During the hearing, however, the District Court asked for more information as to why the issue was not raised on direct appeal. I AA 29-30. The Court noted that:

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

I AA 30.

To address the court's concerns, the State offered to call the three attorneys to permit them to testify. I AA 72. Mr. Ramsey testified that when the writ of mandamus was denied, he decided not to pursue it further because Appellant was adamant about getting to trial quickly. I AA 94-95. At the Supreme Court level, he thought Appellant would either win on writ review or "set some pretty bad case law for my client." I AA 96.

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

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

I AA 10.

IV. CUMULATIVE ERROR REVIEW IS INAPPLICABLE AND RELIEF IS UNWARRANTED

Under a heading referring to "cumulative errors," Appellant does not argue the various claims in this appeal somehow interact to become greater than the sum of their parts. Rather, he takes the opportunity to include additional issues from his wish list of complaints. Regardless, this Court should decline to conduct a cumulative error review as such is inapplicable in habeas. Ultimately, relief is unwarranted if the claims are reviewed for cumulative error.

This 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) ("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 if cumulative error review is available, such a finding in the context of a Strickland claim is extraordinarily rare. See, e.g., Harris by & Through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). After all, "[s]urmounting Strickland's high bar is never an easy task," Padilla v. Kentucky, 559 U.S. 356, 371, 130 S. Ct. 1473, 1485 (2010), and there can be no cumulative error where an appellant fails to demonstrate any single violation of Strickland. See, e.g., Athey v. State, 106 Nev. 520, 526, 797 P.2d 956 (1990) ("[B]ecause we find no error . . . the doctrine does not apply here."); United States v. Sypher, 684 F.3d 622, 628 (6th Cir. 2012) ("Where, as here, no individual ruling has been shown to be erroneous, there is no 'error' to consider, and the cumulative error doctrine does not warrant reversal"); 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.") (internal quotation marks omitted).

This Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17 (2000). Appellant must prove all three elements to be successful on appeal. Id.

Moreover, a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533 (1975) (*citing* Michigan, 417 U.S. 433).

Appellant has not asserted any meritorious claims of error, and, thus, there is no error to cumulate. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("…cumulative-error analysis should evaluate only the effect of matters determined to be error, *not the cumulative effect of non-errors*") (emphasis added). The issue of guilt is not close, as his crimes were committed against a person who knew him well and who testified about his actions. The main complaint raised on habeas is that the charges against Appellant should have been dismissed when his victim failed to appear. This type of error, even if true, would not impact the actual evidence of guilt against Appellant adduced at trial. Finally, Appellant was acquitted of many of the crimes against him.

The miscellaneous complaints raised as alleged cumulative error lack merit and do not warrant relief.

A. Trial Counsel Cross-Examined the Victim at Trial

Appellant asserts trial counsel ineffectively cross-examined his victim. AOB, p. 27. However, fails to provide the trial transcript of said cross-examination. Instead, he ineffectively cites to Ms. Dotson's testimony at the preliminary hearing, when Mr. Ramsey was the attorney, to argue that trial attorney Mr. Sheets' strategy

was to impeach Ms. Dotson. The defense strategy of Mr. Sheets at trial cannot be ascertained by a citation to Mr. Ramsey's performance at the preliminary hearing.

Appellant's failure to provide this necessary transcript precludes meaningful appellate review. As such, his claims of ineffective assistance of trial counsel flowing from the cross-examination of the victim must be denied. NRAP 30(b)(3) mandates that an *appellant*'s appendix *shall* include "any … portions of the record essential to determination of issues raised in appellant's appeal." (Emphasis added). Longstanding precedent makes it clear that it is the duty of an appellant to create a reviewable record and that a silent record is presumed to support the outcome below. Prabhu v. Levine, 112 Nev. 1538, 1549, 930 P.2d 103, 111 (1996); M&R Investment Company, Inc. v. Mandarino, 103 Nev. 711, 718, 748 P.2d 488, 493 (1987); Raishbrook v. Bayley, 90 Nev. 415, 416, 528 P.2d 1331 (1974); Kockos v. Bank of Nevada, 90 Nev. 140, 143, 520 P.2d 1359, 1361 (1974).

Further, this complaint lacks any specificity regarding which parts of Ms. Dotson's trial testimony could have been impeached and by which prior inconsistent statements. Appellant merely "points out that Ms. Dotson gave conflicting versions of events during her arrest, at the preliminary hearing, and during trial." AOB, p. 27. Appellant does not demonstrate which statements made at trial were impeachable based on which statements made at the preliminary hearing. Regarding her arrest, Appellant cites no statement Ms. Dotson made when she was picked up on a material

witness warrant. As such, Appellant's claims are suitable only for summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225.

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

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

I AA 78.

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

Because Appellant offers no substantive examples of opportunities to impeach Ms. Dotson's testimony, his claim is suitable only for summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225. Even on its merits, his claim does not

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

B. Appellant Fails to Support His Body Cam Evidence Claim

The next cumulative error complaint is that trial counsel failed "to adequately cross-examine the officers regarding body cam footage of their interview with Ms. Dotson." AOB, p. 27. He claims the officers coerced Ms. Dotson into making a statement against him and his counsel was ineffective for failing to impeach the officers or show their coercion. AOB, p. 27-28.

In his pro per petition, Appellant alleged the trial court erred on this issue: "Furthermore, if Judge Eric Johnson would have let petitioner's lawyer do his job, he should have asked for a dismissal on the bodycam grounds because it show officers telling the victim in this alleged case what to say and how to say what happen." I AA 226. He claims the judge "told petitioner's lawyer to tread lightly on body cam evidence." Id. In its response, the State pointed out substantive issues not

raised on direct appeal were waived. I AA 201-02. The State also noted Appellant did not support his contention with any specific factual allegations. I AA 202.

On appeal from the denial of his habeas petition, Appellant no longer faults the trial judge regarding the bodycam evidence. Instead, he has transmuted his claim into one of ineffective assistance of counsel for inadequately cross-examining the officers about the bodycam. AOB, p. 27-28. The District Court did not consider this version of the claim below because Appellant failed to present it. As such, it may not be raised in the first instance on appeal. Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) ("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 failed to explore the issue during his evidentiary hearing. Mr. Sheets testified that he reviewed the video body cameras before developing his defense strategy. I AA 75. He planned his strategy around "some of the officers' statements on the body camera footage." Id. Counsel raised the issue of the body cam footage in both his opening and closing arguments. I AA 79.

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

the officers somehow and for unknown reasons coerced Ms. Dotson to make a statement against Appellant, either before, during, or after the officers transported her to the hospital to have her serious injuries examined. AOB, p. 27-28. This claim fails due to Appellant's failure to present a reviewable record and as naked assertions. Prabhu, 112 Nev. at 1549, 930 P.2d at 111; Mandarino, 103 Nev. at 718, 748 P.2d at 493; Hargrove, 100 Nev. at 502, 686 P.2d at 225; Kockos, 90 Nev. at 143, 520 P.2d at 1361.

Trial counsel raised the possibility that law enforcement may have coached Ms. Dotson's statement at trial. I AA 79. Counsel argued the issue at both opening and closing. Id. Without reference to the actual trial transcripts, this Court is unable to evaluate the effectiveness of trial counsel's cross-examination of the officers. This unsubstantiated claim is suitable for summary dismissal under Hargrove, 100 Nev. at 502, 686 P.2d at 225.

C. Appellant Does Not Demonstrate Prejudice From an Inability to Personally View Body Cam Footage

Appellant contends that he was unprepared for trial because he personally did not have an opportunity to view the body cam footage while in jail. AOB, p. 28. In his original petition, Appellant merely asserted counsel "failed to send [him] all of his discovery which render some of Mr. Harris post-conviction challenges." I AA 231. On appeal, he now refers to personally viewing his body cam footage while in jail. AOB, p. 28.

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

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

I AA 78.

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

The body cam footage was summarized for Appellant. 1 AA 78. If the body camera footage was played at trial, something this Court cannot determine due to Appellant's failure to provide the transcripts, Appellant could have decided whether to testify after viewing the footage in open court. Appellant's failure to provide the trial transcripts to this Court requires summary denial of this claim. Prabhu, 112 Nev. at 1549, 930 P.2d at 111; Mandarino, 103 Nev. at 718, 748 P.2d at 493; Hargrove, 100 Nev. at 502, 686 P.2d at 225; Kockos, 90 Nev. at 143, 520 P.2d at 1361. Regardless, it is undisputed that Appellant received a verbal summary of the body camera footage, which should have been sufficient for him to determine

whether he wanted to testify. And, if the footage was played at trial, Appellant could have revisited the issue of whether to testify.

Appellant asserts the lack of the body cam footage prevented *him* from putting forth a coherent and adequate defense. AOB, p. 28. He states the footage would have put *him* in a better position to insist on presenting the evidence at trial. AOB, p. 28. The attorney, not the defendant, is responsible for putting on a coherent defense and for deciding what evidence to present. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Appellant again confuses his role in this proceeding. This claim is without merit.

D. Appellate Counsel Determines What Issues to Raise

In his next two complaints, Appellant contends his direct appeal attorney should have included the various arguments in her brief. AOB, p. 28-30. Citing to his own pro per habeas petition, he asserts without other evidence that he had valid claims of insufficient evidence, violation of his speedy trial rights, and failure to challenge the Justice Court proceedings. AOB, p. 28-30. He claims prejudice because he might be barred from raising these issues in federal court and the alleged meritorious nature of the claims. AOB, p. 29-30.

There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); *citing* Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. The United States Supreme Court has held that

there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S. 387, 396-97, 105 S. Ct. 830, 835-37 (1985); see also Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). This Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke, 110 Nev. at 1368, 887 P.2d at 268.

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

Appellate counsel is not required to raise every issue Appellant felt was pertinent to the case. The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. For judges to

second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314. The Nevada Supreme Court has similarly concluded that appellate counsel may well be more effective by not raising every conceivable issue on appeal. Ford, 105 Nev. at 853, 784 P.2d at 953.

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

Appellate counsel raised the issues she felt had merit. I AA 83. Ms. Bernstein testified she made determinations of merit on the issues she raised in the direct appeal, and that in this case she included more issues than she normally did. I AA 83-84. She made a strategic decision to only bring issues she thought this Court would favorably entertain. I AA 84-85.

1. Writ of Mandamus

Appellant contends the denial of his pretrial writ of mandamus should have been appealed to the Nevada Supreme Court, both before and after trial. AOB, p. 1, 13-14, 17-18, 18-27.

Mr. Lichtenstein cross-examined Ms. Bernstein about why she did not find the issue regarding the denial of the writ of mandamus worth raising on direct appeal. I AA 85-92. Ms. Bernstein said that issues at the preliminary hearing that do not concern the facts as presented at trial were generally not considered by the Nevada Supreme Court. I AA 87. She sorts through potential issues to winnow out weaker arguments because "I don't want to dilute issues that I believe really do have merit." Id. She went on to explain:

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

I AA 88.

Mr. Lichtenstein asked if the Justice Court Continuance had been raised, could it have affected the appeal, to which Ms. Bernstein replied that she did not believe it would have changed the outcome. I AA 92. Habeas counsel came at the issue a different way, by asking would it have harmed Appellant's direct appeal chances if the issue had been presented:

> Mr. Lichtenstein: Here was something that was an issue that had not been addressed previously by the Nevada Supreme Court. What would have been the prejudice to Mr. Harris by raising that issue in direct appeal?
>
> Ms. Bernstein: My opinion, as I stated, it would have diluted what I considered to be more potentially meritorious issues that would offer him a greater deal of relief.

> Mr. Lichtenstein: So it's your opinion that it would have affected the appeal on the other issues?
>
> Ms. Bernstein: Again, I'm not going to necessarily raise every single issue that I may see in the transcripts because what I do is I select what I consider to be the strongest issues. I'm not going to have a brief—absent a murder case or a capital case, I'm not going to have a brief represent 25 different causes of action because I don't think that the Supreme Court would either appreciate that or take any one of them seriously. What I do is I narrow it down to what I believe at that time will be the causes of action or the grounds for relief that are going to most likely give him a chance of success.

I AA 89.

Regarding a potential appeal of the denial of the writ of mandamus before the preliminary hearing, the District Court felt that was a tactical decision best left to the attorney. I AA 67. The State called Mr. Ramsey, the attorney who filed the writ of mandamus, to testify at the evidentiary hearing. When asked why he failed to appeal the denial, Mr. Ramsey said he was concerned about delaying the trial in light of Appellant's desire to go to trial quickly. I AA 95. Mr. Ramsey went on to testify that "[t]he only reason he didn't want to do the appeal's process or the other writ to the Supreme Court was because he wanted to go forward to trial because he thought he was going to win." I AA 96.

Since Appellant chose not to appeal the denial of his writ of mandamus at the expense of delaying his trial, his trial attorney cannot be ineffective for failing to do so. Since appellate counsel felt the adequacy of the preliminary hearing would have been overshadowed by the fact that a jury found Appellant guilty beyond a

reasonable doubt, she was not ineffective for focusing her direct appeal on potentially more meritorious issues.

2. Sufficiency of the Evidence

Appellant asserts without citation that his appellate counsel failed to raise the issue of insufficient evidence, contrary to his wishes. AOB, p. 29. The direct appeal opening brief argued could not be convicted of kidnapping with substantial bodily harm because the bodily harm happened before any kidnapping. II AA 269-74. This Court viewed the claim as contending that there was insufficient evidence to support the substantial bodily harm enhancement to the kidnapping offense. I AA 238-39. To the extent of the substantial bodily harm enhancement, Appellant's complaint is belied by the record and thus suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225. More importantly, even if appellate counsel's performance were deficient Appellant cannot demonstrate prejudice. In the context of addressing Appellant's claim that the trial court erroneously instructed the juror on flight and consciousness of guilt, this Court found error but did not reversal "because sufficient evidence in the record supports these convictions." I AA 238. As such, Appellant cannot demonstrate prejudice because whether raised by direct appeal counsel or not, this Court has already determined that sufficient evidence supports Appellant's convictions.

/ / /

3. Speedy Trial Rights

Appellant contends his speedy trial rights were violated, but he does not address how. AOB, p. 29. He claims not including speedy trial and insufficient evidence issues "denied [him] the objective of his defense on appeal." AOB, p. 29. Appellant complains that "had the issues been presented this Court would have granted relief due to his speedy trial rights being violated the inconsistent testimony of Ms. Dotson underlying his conviction." AOB, p. 29-30. He does not explain the connection between speedy trials and inconsistent testimony.

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

As to the first factor, to trigger a speedy trial analysis, "an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." Doggett v. United States, 505 U.S. 650, 651-52, 112 S. Ct. 2686, 2690 (1992). Courts have generally found post-

accusation delays to be "presumptively prejudicial" as they approach the one-year mark. Id. at 652 n.1, 112 S. Ct. at 2691 n.1.

The Information against Appellant was filed January 17, 2018. I AA 3. Appellant's trial started on April 9, 2018, and ended on April 16, 2018. I AA 4. Ninety (90) days passed between the formal charge and the *completion* of trial. Even if the Doggett clock starts running with the filing of charges in Justice Court on August 23, 2017, only 229 days passed between charging Appellant in Justice Court and the start of his trial. Both the 90 day and the 229 day marks are far less than the one-year, "presumptively prejudicial" timeline as expressed in Doggett. 505 U.S. at 652 n.1, 112 S. Ct. at 2691 n.1. The first Barker factor does not weigh in Appellant's favor.

As to the second factor, different reasons for trial delay should be attributed different weights. Barker, 407 U.S. at 531, 92 S. Ct. at 2192. A deliberate delay to hamper the defense is weighed heavily against the State, while negligence is weighed less heavily. Id. "[A] valid reason, such as a missing witness, should serve to justify appropriate delay." Id. However, when a defendant is responsible for most of the delay, he is not entitled to relief. Middleton v. State, 114 Nev. 1089, 1110, 968 P.2d 296, 310-11 (1998). Appellant acknowledges his own counsel requested more time to prepare for trial. AOB, p. 5; I AA 198. He is not entitled to demand such a speedy trial that his own attorney cannot adequately prepare. Appellant does

not point to any continuances requested by the State. He cannot demonstrate the second factor weighs in his favor.

Regarding the third factor, the Barker Court emphasized, "failure to assert the [speedy trial] right will make it difficult for a [petitioner] to prove that he was denied a speedy trial. 407 U.S. at 531, 92 S. Ct. at 2192. Trial counsel advised his intention to file certain pretrial motions and requested a 30-day continuance. I AA 17-18. The Court informed Appellant there were no judges available and granted the continuance. I AA 18. The third prong should weigh against Appellant as his attorney requested the continuance and the District Court had no available trial dates.

The fourth factor, prejudice, should be assessed by looking to "oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the [accused's] defense will be impaired by dimming memories and loss of exculpatory evidence." Doggett, 505 U.S. at 654, 112 S. Ct. at 2692 (internal citations omitted). This final factor is not in Appellant's favor either. Appellant does not allege the short delay in trial was detrimental to his defense. He does not meet his burden of demonstrating prejudice, and this prong cannot weigh in his favor. Because he cannot show he was prejudiced by the delay, he cannot show the speedy trial claim would have succeeded on appeal. His appellate counsel was not ineffective for focusing on potentially more meritorious claims.

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

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

I AA 9-10.

These miscellaneous issues in Appellant's cumulative error section are meritless.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court AFFIRM the District Court's denial of habeas relief.

Dated this 4th day of August.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 12,935 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 4th day of August.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 4, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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