No. 86406

IN THE NEVADA SUPREME COURT

Troy White,

Petitioner-Appellant,

v.

State of Nevada, et al.

Respondents-Appellees.

Petitioner-Appellant's Appendix
Volume 9 of 10

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ALPHABETICAL INDEX

CHRONOLOGICAL INDEX

Dated September 13, 2023.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ Laura Barrera
Laura Barrera
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2023, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

Participants in the case who are registered users in the appellate electronic filing system will be served by the system and include: Alexander G. Chen, Jonathan VonBoskerck, and Aaron D. Ford.

I further certify that some of the participants in the case are not registered appellate electronic filing system users. I have mailed the foregoing document by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following person:

Troy White #1143868 High Desert State Prison P.O. Box 650 Indian Springs, NV 89070	Jaime Stilz Deputy Attorney General Office of the Attorney General 100 N. Carson St. Carson City, NV 89701

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TROY WHITE

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. TROY WHITE, Defendant.	CASE NO. C-12-286357-1 DEPT. NO. 28

REPLY TO THE STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, Defendant, TROY WHITE, by and through his counsel of record, CHRISTOPHER R. ORAM, ESQ., hereby submits his reply to the State's response to the Supplemental brief in support of Petition for Writ of Habeas Corpus.

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This Reply is made and based upon the pleadings and papers on file herein, the Points and Authorities attached hereto, and any oral arguments adduced at the time of hearing this matter.

DATED this 24th day of April, 2019.

Respectfully submitted

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STATEMENT OF THE CASE

The Statement of the Case stands as enunciated in the Supplemental Brief.

STATEMENT OF THE FACTS

From the outset, this Court must first consider the State's complaint that Mr. White has misstated the record in his Petition (State's Opposition, p. 10). The State alleges that Mr. White either intentionally or unintentionally misstated the record. The State further explains,

> The misstatement of the record may be due to White's curious decision to cite not to the record in the District Court, but to the Appellate's Appendix ("A.A.") filed alongside White's direct appeal in Nevada Supreme Court case 68632. White has cited to the A.A. throughout his Petition; in an effort to assist the District Court in finding the relevant portions of the record, the State will cite to the District Court record in its Opposition (State's Opposition, p. 10).

Mr. White openly concedes that he cited extensively to Appellant's Appendix on direct appeal. In fact, Mr. White carefully summarized the trial transcripts and cited extensively to Appellant's Appendix on direct appeal. Whereas, the State's statement of facts derived from the Presentence Investigation Report.

The State's argument is troubling at best. For more than two decades the undersigned has been filing post-conviction writs of habeas corpus, often citing to the appendix on appeal. Comically, the State has cited to the Appendix on appeal in many of their oppositions to these writs of habeas corpus. As early as 2002, the State has been utilizing appendix citations for ease of reference. See e.g. State of Nevada v. James Chappell, C131341 (capital proceeding), State's Response to Supplemental Petition filed June 19, 2002 (Exhibit A) This is also a recent practice by the State. See e.g. State of Nevada v. Edmundo Oliveras, 10C261264-2 (murder case), State's Opposition to Defendant's petition for Post-Conviction Relief filed November 16, 2015 (Exhibit B). In just two of many examples, the State has cited to the appendix in the identical fashion that Mr. White has in this case. Not only has the State never complained about this procedure, the State

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follows this procedure in numerous other cases.

Lastly, even though the State utilizes the same procedure, the State claims this is an incorrect way to cite to the record (State's Opposition p. 17). The State has cited to no rule or case law supporting the proposition that this type of citation to the record is improper. Moreover, post-conviction writs of habeas corpus invariably result in an appeal to the higher court. For example, if the State prevails, the defendant will appeal. Likewise, if the defendant prevails, the State will appeal. On appeal, the Nevada Supreme Court must surely appreciate the consistency in citations to the record between the direct appeal and an appeal from post conviction relief. Therefore, for ease of review, utilizing the same citations makes the most sense. The State's contention regarding the citations is disengenous.

ARGUMENT

I. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

This argument stands as enunciated in the Supplemental Brief.

II. MR. WHITE RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO PROPERLY INVESTIGATE BY FAILING TO FORENSICALLY ANALYZE MR. WHITE'S CELL PHONE.

Mr. White argued in his Supplemental Brief that he received ineffective assistance of counsel for failure of counsel to challenge the State's failure to obtain a warrant to forensically analyze the cell phone (Supplemental Brief, Argument IV, p. 19-20). In reviewing the file, Mr. White noticed detective Berghuis' examination report which clearly stated that the iPhone belonged to the victim and no one else had standing to contest the search and examination of the device. Mr. White cited to Riley v. California, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) and Carpenter v. United States, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018), for the proposition that the State was required to obtain a warrant. In the Supplemental Brief, it was explained, "Mr. White respectfully requests that this

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Court order the State to produce evidence establishing that only Ms. Lucas had singular standing over the forensically analyzed cell phone." (Supplemental Brief, p. 20). Rather than accept Mr. White's invitation, the State has blatantly ignored this dilemma.

The State argues that Mr. White has no standing to bring this claim. At one point, the State argues that it is irrelevant whether the victim had singular standing over the cell phone (State's Opposition, p. 14). The State further complains that it is not their burden to establish that only Ms. Lucas had standing to challenge the search of the phone (State's Opposition, p. 14). On the contrary, the State originally asserted that no one else had standing over the cell phone. The State has presented no evidence that this phone did not belong to Mr. White and solely belonged to Ms. Lucas.

Obviously, if the State had this proof readily available, they would have provided this in their Opposition. The State's Opposition casts serious doubt as to whether Ms. Lucas was the sole owner of the phone. Simultaneously with this reply, Mr. White will file a request for limited funds for an investigator. An investigation must be conducted to determine the true ownership of the cell phone. This is a necessity as the State has completely ignored the request for clarification. In analyzing Riley and Carpenter, the State again concludes, "...here, the cell phone belonged to the victim." (State's Opposition, p. 15). The State further argues that Mr. White has submitted no evidence that he has standing under the Fourth Amendment. The state is correct, Mr. White has not been able to fully investigate this matter. Mr. White fully believed that the State would provide an answer to the ownership question regarding the cell phone.

In order to have standing, it is the burden of the accused to demonstrate that the accused had ownership and control or permission from the owner to have temporary authority and control over the property or item. Rakas v. Illinois, 439 U.S. 128, 99 S. Ct. 421 (1978).

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Based on the State's refusal to provide clarification, Mr. White respectfully requests that this Court grant funding for an investigator to unearth the answer to the standing issue.

Next, Mr. White would like an opportunity to file a more detailed reply brief once the reasonable investigation has been concluded. Mr. White cannot accurately reply without the relevant investigation being conducted. Therefore, Mr. White respectfully requests this Court grant the motion for investigative funding and permit counsel an opportunity to provide a more detailed reply once the investigation has concluded.

III. MR. WHITE RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL FOR FAILURE TO OBJECT TO THE STATE'S INSINUATION OF PRIOR UNKNOWN ACTS OF DOMESTIC VIOLENCE.

This argument stands as enunciated in the Supplemental Brief.

IV. MR. WHITE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON COUNSEL'S FAILURE TO ENSURE THE POLICE OBTAINED A WARRANT TO FORENSICALLY ANALYZE THE PHONE ATTRIBUTED TO ECHO LUCAS IN VIOLATION OF THE SIXTH, FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This argument stands as enunciated in the Supplemental Brief.

V. MR. WHITE RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL FOR FAILURE TO OBJECT AND RAISE ON APPEAL IMPROPER PROSECUTORIAL ARGUMENT.

This argument stands as enunciated in the Supplemental Brief.

VI. MR. WHITE RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL FOR FAILURE TO OBJECT AND RAISE ON APPEAL THE DISTRICT COURT'S GIVING OF INSTRUCTION NUMBERS 18 AND 28 IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This argument stands as enunciated in the Supplemental Brief.

VII. MR. WHITE IS ENTITLED TO A REVERSAL OF HIS CONVICTIONS BASED UPON CUMULATIVE ERROR.

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This argument stands as enunciated in the Supplemental Brief.

VIII. MR. WHITE IS ENTITLED TO AN EVIDENTIARY HEARING.

This argument stands as enunciated in the Supplemental Brief.

CONCLUSION

Wherefore, Mr. White respectfully requests this Court grant his Petition finding he received ineffective assistance of counsel.

Dated this 24th day of April, 2019.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 2019, I served a true and correct copy of the foregoing document entitled **REPLY TO THE STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** to the Clark County District Attorney's Office by sending a copy via electronic mail to:

CLARK COUNTY DISTRICT ATTORNEY
motions@clarkcountyda.com

BY:

/s/ Nancy Medina
An employee of Christopher R. Oram, Esq.

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EXHIBIT A

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ORIGINAL

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JAMES MONTELL CHAPPELL,
#1212860

Defendant.

Case No. C131341
Dept. No. XI

STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

DATE OF HEARING: 7-22-02
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through H. LEON SIMON, Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Supplemental Petition for Writ of Habeas Corpus (Post Conviction).

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

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STATEMENT OF THE CASE

On October 11, 1995, James Montell Chappell, hereinafter Defendant, was charged by Information with Count I- Burglary, Count II- Robbery with Use of a Deadly Weapon, and Count III- Murder (open) with Use of a Deadly Weapon. On November 8, 1995, the State filed a Notice of Intent of Seek the Death Penalty. On July 30, 1996, Defendant filed a Motion to Strike Allegations of Aggravating Factors. The District Court denied this motion. Thereafter, a jury trial commenced. On October 16, 1996, the jury returned guilty verdicts against Defendant in all three counts. The penalty phase of the trial was held in which the jury sentenced Defendant to death for Count III.

Defendant was sentenced on December 30, 1996 to the following: Count I- a maximum of one hundred twenty (120) months and a minimum of forty-eight (48) months in the Nevada Department of Prisons, Count II- a maximum of one hundred eighty (180) months and a minimum of seventy-two (72) months in the Nevada Department of Prisons with an equal and consecutive sentence for the deadly weapon enhancement to run consecutive to Count I, and Count III- death to run consecutive to Counts I and II. Defendant was given one hundred ninety two (192) days credit for time served. The Judgment of Conviction was filed on December 31, 1996.

On January 17, 1997, Defendant filed a Notice of Appeal with the Nevada Supreme Court. Defendant's appeal was denied the by the Nevada Supreme Court on December 30, 1998. The Remittitur was filed on October 26, 1999.

On October 19, 1999, Defendant filed a Petition for Writ of Habeas Corpus (Post-conviction). After post-conviction counsel was appointed, Defendant filed a Supplemental Petition for Writ of Habeas Corpus (Post-conviction).

ARGUMENT

I.

DEFENDANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING

In claim I, Defendant argues that he is entitled to an evidentiary hearing. This claim is without merit. Pursuant to NRS 34.770(1), the judge or justice, upon review of the return,

answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations that, 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). However, "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record." Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984); *citing* Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981). As evidenced by the arguments below, the State alleges that Defendant's claims for relief are without merit and belied by the record. As such, he is not entitled to an evidentiary hearing.

II.

DEFENDANT WAS PROVIDED WITH EFFECTIVE ASSISTANCE OF COUNSEL

Defendant's arguments that his Sixth and Fourteenth Amendment rights to effective assistance of counsel were violated are without merit. The Supreme Court has clearly established the appropriate test for determining whether a defendant received constitutionally defective assistance of counsel. To demonstrate ineffective assistance of counsel, a convicted defendant must show **both** that his counsel's performance was deficient, and that the deficient performance prejudiced his defense. Strickland v. Washington, 566 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). The Nevada Supreme Court has adopted this test articulated by the Supreme Court. Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995).

Counsel's performance is deficient where counsel made errors so serious that the adversarial process cannot be relied on as having produced a just result. Strickland, at 686. The proper standard for evaluating an attorney's performance is that of "reasonable effective assistance." Strickland, at 687. This evaluation is to be done in light of all the circumstances surrounding the trial. Id. The Supreme Court has created a strong presumption that defense counsel's actions are reasonably effective:

> Every effort [must be made] to eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at

> the time. . . .A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id at 689-690. "[S]trategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992). The Nevada Supreme Court has held that it is presumed counsel fully discharged his duties, and said presumption can only be overcome by strong and convincing proof to the contrary. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978)

It is not enough for a defendant to show deficient performance on the part of counsel, a defendant must also demonstrate that the deficient performance prejudiced the outcome of his case. Strickland v. Washington, 566 U.S. 668, 686, 104 S.Ct. 2052, 2065 (1984). In meeting the prejudice requirement of an ineffective assistance of counsel claim, a defendant must 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, 401, 990 P.2d 1263, 1268 (1999) *citing* Strickland, 566 U.S. 668, 687, 104 S.Ct. 2052, 2066 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. *citing* Strickland, 466 U.S. at 687-89, 694.

Defendant claims that he received ineffective assistance of counsel when his attorney: 1) failed to call witnesses during trial, 2) failed to object to the exclusion of African Americans from the jury system, 3) failed to object to improper jury instructions, 4) failed to object to overlapping aggravating factors used to apply the death penalty to Defendant, 5) failed to object to prosecutorial misconduct during closing argument and during the penalty phase, and 6) failed to object thereby precluding important issues on appeal. Applying this standard of review, the State will address each of the Defendant's claims of ineffective assistance of counsel individually.

A. Failure to Call Witnesses

Defendant asserts that his counsel was ineffective for failing to call witnesses at trial. Specifically, Defendant claims that the witnesses listed in his petition would have demonstrated that Defendant and the victim had a loving, rather than abusive, relationship. Pursuant to

Bejarano v. State, 106 Nev. 840, 842, 801 P.2d 1388, 1390 (1990), the Court need not determine whether counsel's actions were ineffective prior to evaluating whether Defendant has been prejudiced. In this case, Defendant has failed to demonstrate how his counsel's failure to call the enumerated witnesses prejudiced him. In demonstrating that prejudice exists, the defendant must show that the decision in the case would have been different absent the errors. McNelton v. State, 115 Nev. 396, 401, 990 P.2d 1263, 1268 (1999). Here, the defendant cannot demonstrate this.

Defendant claims that if the witnesses listed in his petition had testified, they would have demonstrated that defendant did not commit first degree murder because their testimony would have demonstrated that he had permission to be in the house and use the victim's belongings. The evidence indicating to the contrary is overwhelming. Further the Nevada Supreme Court found that there was ample evidence to prove the aggravating factors (robbery, burglary and sexual assault) existed. See Exhibit One p. 5-8. As such, character witnesses would not have changed the outcome of the case. Thus, Defendant's attorney was not ineffective for not calling the witnesses.

B. Failure to Object to Jury Selection

Defendant claims that he received ineffective assistance of counsel because his attorney failed to object to the Clark County jury selection system which systematically excludes African Americans. Defendant's claim is without merit.

Both the Sixth and the Fourteenth Amendments to the United States Constitution guarantee a defendant the right to a jury selected from a representative cross-section of the community. This right requires that the pools from which juries are drawn do not systematically exclude distinctive groups in the community. Taylor v. Louisiana, 419 U.S. 522, 538, 95 S.Ct. 692, 702 (1975). However, there is no requirement that the jury that is selected actually mirror the population at large. Holland v. Illinois, 493 U.S. 474, 110 S.Ct. 803 (1990).

The defendant bears the burden of establishing a prima facie violation of the fair cross-section requirement. In order to demonstrate a prima facie violation, the defendant must show 1) that the group alleged to be excluded is a distinctive group in the community, 2) that the

representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community and 3) that this under representation is due to systematic exclusion of the group in the jury selection process. Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668 (1979). This test has been adopted by the Nevada Supreme Court. See Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996).

Defendant has failed to meet this test. Defendant claims that African Americans have been excluded from jury selection in Clark County Nevada. Although African Americans are a distinctive group, Defendant has failed to prove the other two prongs required for a prima facie showing that African Americans have been systematically excluded. Defendant's claim that the number of African Americans on the jury was not reasonable and that they were systematically excluded from the jury is belied by the record. Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). The record indicates that initially there were a substantial number of African Americans on the entire panel from which the jury in Defendant's case was selected. (ROA Vol. 4 p.832). Further, several of the African American prospective jurors indicated an unwillingness to serve on the jury due to their beliefs regarding the death penalty. (ROA Vol. 4 p. 832). Additionally, the Nevada Supreme Court found that the two African Americans that were excused from the jury based on the State's preemptory challenges were not removed based on race. See Exhibit One p. 10-11. Thus, the record indicates that the representation of African Americans in the jury pool was fair and that African Americans have not been excluded unfairly.

As Defendant has failed to show that the jury selection process was unconstitutional, he cannot demonstrate that his counsel was ineffective in not objecting to it.

C. Failure to Object to Jury Instructions

Defendant alleges that he received ineffective assistance of counsel when his attorney failed to object to improper jury instructions. In supporting this claim, Defendant incorporates his argument in claim V. The State addresses claim V below at issue III (B). The State incorporates the arguments from issue III(B) below in demonstrating that Defendant's attorney was not ineffective in not objecting to the jury instructions.

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D. Failure to Object to or Strike Overlapping Aggravating Circumstances

Defendant asserts that his counsel was ineffective for failing to object to and move to strike overlapping aggravating circumstances utilized by the State to impose the death penalty. Specifically, Defendant claims that it was improper for the State to use robbery, burglary and sexual assault as aggravating factors because they were all based on the same set of operative facts. Additionally, Defendant claims that using all three charges as aggravating factors violated the Double Jeopardy clause. The Nevada Supreme Court has dismissed this argument. See Bennett v. State, 106 Nev. 135, 142, 787 P.2d 797, 801 (1990). In Bennett, the defendant argued that the State had improperly used burglary and robbery as two separate aggravating factors even though the charges arose out of the same indistinguishable course of conduct. Id. In disagreeing with the defendant, the Nevada Supreme Court reasoned that because the defendant could be prosecuted for both crimes separately and because convictions of both burglary and robbery do not violate the double jeopardy clause as they are separate and distinct offenses they could both be used separately as aggravating factors. Id. See also Wilson v. State, 99 Nev. 362, 376, 664 P.2d 328, 336 (1983) (where the court found that any enumerated felonies that are committed during the course of a murder can be aggravating factors).

Because it was not improper for the State to use robbery, burglary and sexual assault as aggravating factors, Defendant's counsel was not ineffective in not objecting to the aggravating factors.

E. Failure to Object to Alleged Prosecutorial Misconduct During Voir Dire and Closing Argument

Defendant argues that he received ineffective assistance of counsel when his trial counsel failed to object to numerous episodes of prosecutorial misconduct during the guilt and penalty phases of the trial. Defendant has failed to demonstrate that his counsel was ineffective.

In addressing the issue of prosecutorial misconduct, the Supreme Court has stated,

> [A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial.

United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044 (1985). Inappropriate prosecutorial comments, standing alone do not warrant reversal of a criminal conviction if the proceedings were otherwise fair. United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044 (1985). In order to reverse a conviction, the errors must be "of constitutional dimension and so egregious that they denied [the defendant] his fundamental right to a fair jury trial." Williams v. State, 113 Nev. 1008, 1018, 945 P.2d 438, 444 (1997), overruled on other grounds in Byford v. State, 116 Nev. Adv. Op. 23, 994 P.2d 700 (2000).

In order for a defendant to prove prosecutorial misconduct, he must show "that the remarks made by the prosecutor were 'patently prejudicial'." This standard of review is based on a defendant's right to have a fair trial, not necessarily a perfect one. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). The relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness as to make the result a denial of due process. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). The defendant must show that the statements violated a clear and unequivocal rule of law, he was denied a substantial right, and as a result, he was materially prejudiced. Libby, 109 Nev. at 911, 859 P.2d at 1054.

Defendant points to six alleged instances of prosecutorial misconduct which his attorney failed to object to. Each of these statements will be reviewed individually below.

1. Statement Regarding Rehabilitation

Defendant claims that the following statement was inappropriate.

> And this is a penalty hearing. It's a penalty hearing because a violent murder occurred on August 31st of 1995. So it's not appropriate for you to be considering rehabilitation. This isn't a rehabilitation hearing.

(ROA Vol. 11 p.2017). The State submits that this comment was not improper. In Evans v. State, 117 Nev. Adv. Op. No. 50, p.15, 28 P.3d 498, 514 (2001), the defendant argued misconduct occurred when the prosecutor offered his view that the penalty hearing was not a rehabilitation hearing but was for the purpose of retribution and deterrence. Specifically, the prosecutor said, "in my view, based upon this evidence, such a person has forfeited the right to

continue to live." Id. The Nevada Supreme Court determined that there was no error in the prosecutor's remarks and explained:

> A prosecutor in a penalty phase hearing may discuss general theories of penology, such as the merits of punishment, deterrence, and the death penalty. And statements indicative of opinion, belief, or knowledge are unobjectionable when made as a conclusion from the evidence introduced at trial.

Id. Thus, Defendant is incorrect in asserting that the prosecutor committed misconduct when he made the statement above. During closing argument in the penalty phase of the trial, the prosecutor expressed her view that the hearing was not a rehabilitation hearing. The prosecutor was merely commenting on theories of penology with regard to rehabilitation. As such, Defendant's counsel was not ineffective in failing to object.

2. Reference to Facts Not in Evidence

Next Defendant claims that the prosecutor improperly introduced facts that were not in evidence at the penalty hearing. The guilt phase and the penalty phase in a capital case are separate proceedings and what is inadmissible in one may be admissible in the other. Evans v. State, 112 Nev. 1172, 926 P.2d 265 (1996). The evidentiary rules are less stringent in a penalty phase of the trial. Id. Evidence which may not ordinarily be admissible at trial may be admitted in the penalty phase as long as the evidence does not draw its support from impalpable or highly suspect evidence. Id. In this case, the prosecutor's statements were made as a commentary on the merits of the death penalty. As such, they were proper. See Evans v. State, 117 Nev. Adv. Op. 50, 28 P.3d 498, 514 (2001). Defendant has failed to demonstrate that his counsel was ineffective in not objecting.

3. Inflammatory Statement During Closing at Penalty Hearing

Defendant claims that his attorney was ineffective for failing to object to the prosecutor's inflammatory statement during closing argument. See Defendant's Supp. Petition p. 24. The Nevada Supreme Court has expressly held that a prosecutor may comment on the loss experienced by the family of a murder victim. Lay v. State, 110 Nev. 1189, 1194, 886 P.2d 448, 451 (1994). In the instant case, the prosecutor's statement was a comment on the effect Deborah Panos' murder had on her family and was, therefore, proper. Additionally, in Evans v. State, 117

Nev. Adv. Op. 50, 28 P.2d 498, 514 (2001), the Nevada Supreme Court found that the statement by the prosecutor that Defendant was "an evil magnet" was not improperly inflammatory. Likewise, the statements made by the prosecutor during closing argument at the penalty hearing were not improperly inflammatory. Reference to the fact that the victim died, that her death impacted her children did not unduly prejudice Defendant. Thus, Defendant's attorney was not ineffective in not objecting to the statements.

4. Statement Regarding Sending a Message to the Community

Defendant also claims that his attorney was ineffective for not objecting when the prosector encouraged the jury to send a message to the community. In his rebuttal closing argument during the penalty phase, the prosecutor made the following statement.

> My partner also mentioned deterrence. There's nothing illegitimate about deterrence as a factor to be considered. You have it in this case, as the ladies and gentlemen of this jury, within your power to guarantee by the punishment you impose that Mr. Chappell never makes another woman a corpse. You can certainly deter him and you have it within your power to send a message today out into this community, which is we do not tolerate those who have a history of domestic violence, who will let it accelerate and become a murderer and you can tell the other would be James Chappells what the consequence is when you engage in that type of action.

(ROA Vol. 11 p. 2102). A prosecutor may ask a jury to make a statement to the community. Williams v. State, 113 Nev. 1008, 1019, 945 P.2d 438, 444 (1997). In Williams, the prosecutor remarked, "Do not let the system fail them again. When we failed them in the first instance it cost their lives. Should we fail in this instance it will take away the meaning and dignity of their lives." The Nevada Supreme Court found that this statement was not misconduct and explained that the prosecutor, "may ask the jury, through its verdict, to set a standard or make a statement to the community." Id. at 1020. Similar to the prosecutor in Williams, the prosecutor in this case was asking the jury to make a statement to the community and specifically to the defendant. This comment does not amount to prosecutorial misconduct and Defendant's attorney was not ineffective in not objecting.

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5. Victim Impact Testimony During Penalty Phase.

Defendant claims that his attorney was ineffective for failing to object to misconduct when the State introduced victim impact testimony during the trial phase. Defendant's claim is without merit. Defendant argues that the prosecutor improperly admitted victim impact testimony during the penalty phase when he referenced the loss of Deborah Ann Panos and her children during his closing argument.

> All evil required was a kitchen knife, Exhibit 68-A-1. Not a large knife, but deadly in its consequences for Deborah Panos. All evil required was a cowering victim. Deborah Ann Panos, 26 years of age, the mother of three little children aged seven, five, and three. Where the promise of her years once written on her brow? Where sleeps that promise now?

(ROA Vol. 9 p.1607). The Nevada Supreme Court has expressly held that a prosecutor may comment on the loss experienced by the family of a murder victim. Lay v. State, 110 Nev. 1189, 1194, 886 P.2d 448, 451 (1994). In Lay v. State, 110 Nev. 1189, 1194, 886 P.2d 448, 451 (1994), the Nevada Supreme Court found that the following statement during the prosecutor's closing argument was not reversible error:

> On the night of June 4th, 1990, society received a great loss and a life was taken from us. Richard Carter's family and friends can no longer have the opportunity to see him.

The statement made by the prosecutor in the instant case is similar to that above. A passing reference to the fact that the victim had three children hardly constitutes victim impact testimony. The State did not commit prosecutorial misconduct in making the statement above. As such, Defendant's attorney was not ineffective in not objecting.

6. Improper Quantification of Reasonable Doubt

Defendant asserts that his attorney was ineffective when he failed to object to a statement regarding reasonable doubt. Defendant has failed to show this statement prejudiced him. It is improper for the State to compare reasonable doubt with decisions to buy a house, choose a spouse, etc. Evans v. State, 28 P.498 (2001). However, the Nevada Supreme Court has found that this comparison is not prejudicial where a proper written instruction is given. Id. In Lord v. State, 107 Nev. 28, 35, 806 P.2d 548, 552 (1991), the prosecutor for the State suggested that

reasonable doubt was fulfilled where 90-95% of the pieces of the puzzle were there. The Nevada Supreme Court found that the improper quantification of reasonable doubt was not prejudicial to the defendant because the jury received the correct written instruction and because after making improper comments the prosecutor stated the correct statutory definition. Id. See also Randolph v. State, 36 P.3d 424 (2001) (The Nevada Supreme Court found that the statement "if you have a gut feeling he's guilty, he's guilty" was not prejudicial).

Defendant has failed to show that the statement regarding reasonable doubt was so egregious that Defendant was denied his fundamental rights. In this case, the jury was given instruction number thirty-six (36) which read:

> The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.
>
> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.
>
> If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

(ROA Vol. 9 p.1734). Instruction thirty-five did not contain any improper quantification of reasonable doubt; thus, Defendant was not prejudiced by the prosecutor's statement. As such, it was not improper for his attorney to fail to object.

F. Failure to Preserve Valid Issues for Appeal

Defendant also argues that he received ineffective assistance of counsel because his trial counsel failed to make contemporaneous objections during trial, thereby precluding appellate review of important issues. Defendant cites to five instances where his attorney did not object. Defendant fails to demonstrate that his attorney was ineffective.

1. Witnesses' Testimony During Penalty Hearing

Defendant claims that he received ineffective assistance of counsel when his attorney failed to object to the testimony of the victim's mother, Norma Penfield, and aunt, Carol Monson, during the penalty hearing. Defendant claims that the witnesses improperly requested the jury to give Defendant the death penalty.

The victim's mother made the following statements at the penalty phase of the hearing.

> My only wish now is that justice will punish to the fullest the person who took her life.
>
> I feel the system has let her down once. I hope to heaven they don't do it again.

(ROA Vol. 11 p.1964, 1974). The statements of the victim's mother were not inappropriate. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991). The statements in the instant case are similar to those made by the victims in the case of Witter v. State, 112 Nev. 908, 922, 921 P.2d 886, 896 (1996). The family in Witter asked the jury to show no mercy to the defendant. Id. The family also said that they wanted to do everything in their power to make sure the defendant would not receive mercy. Id. In Witter, the Nevada Supreme Court ruled that the statements of the victim's family were intended to ask the jury to return the most severe verdict it deemed appropriate not to request a specific sentence. Similarly, the statements made by the victim's mother in this case were asking the jury to return the harshest punishment they could. They were not improper. Id.

During the penalty phase, the aunt of the victim made the following statement. "We only pray now that justice will do what it needs to do and not fail her children again. By that, I mean to give James what he gave Debbie, death." (ROA Vol. 11 p. 1960). Although Ms. Monson indicated that the jury should give Defendant the death penalty, this was no more than harmless error. In this case, the jury found four aggravating factors. (ROA Vol. 11 p. 2125-2127). Where aggravating factors have been proven, this error could amount to nothing more than harmless error. See Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 827 (1967). Defendant's

attorney was not ineffective in not objecting to these statements.

2. Questions Regarding Defendant's Sentence

Next, Defendant suggests that his counsel was ineffective for failing to object when the State questioned him about punishment. The following exchange took place between Defendant and the State during cross-examination at the guilt phase of the trial.

MR. HARMON:	As you sit here this afternoon are you concerned about punishment?
DEFENDANT:	No, sir. Whatever I get I'll accept it.
MR. HARMON:	It doesn't matter to you whether you're convicted of voluntary manslaughter or murder of the second degree or murder of the first degree?
DEFENDANT:	Does it matter? Is that what you said?
MR. HARMON:	I'm asking you if it matters which you were convicted
DEFENDANT:	No, it doesn't matter, sir. Whatever I'm convicted of I'll accept it.
MR. HARMON:	And you're not concerned if it's murder of the first degree that the punishments be minimized to some extent?
DEFENDANT:	Could you please repeat that, sir.
MR. HARMON:	You said it really doesn't matter to you what you're convicted of, if it's first degree murder you will accept that. Is that what you said basically?
DEFENDANT:	Yes, whatever I'm convicted of I will accept it, sir.
MR. HARMON:	My question therefore was so there isn't some effort here on the witness stand to present yourself in such a way that you will minimize your punishments?
DEFENDANT:	No, sir.
MR. HARMON:	You don't care if you get a death sentence?
DEFENDANT:	Yes, I do care if I get the death sentence.
MR. HARMON:	So you don't want to get a death sentence?

DEFENDANT: I have three children, sir, and I want to see them and be able to do something with them sometime in my life.

MR. HARMON: So we have established that is a punishment that you want to avoid; is that true?

DEFENDANT: Yes, sir, I am pretty sure any man or woman would want to avoid the death penalty?

MR. HARMON: Are you telling us it doesn't matter beyond that if it's life with the possibility of parole or life without parole? You don't care?

DEFENDANT: I do care, but --

MR. HARMON: What do you mean you do care?

DEFENDANT: Of course I'm going to care, you know.

MR. HARMON: The bottom line is you don't want to get life without parole either, do you, Mr. Chappell?

DEFENDANT: If I get it, I will accept it sir.

MR. HARMON: Is that what you want?

DEFENDANT: No. I have three children and I want to see my three children and be able to do something with em in their life. I never had no father, sir.

MR. HARMON: So you'd certainly prefer a life with parole sentence.

DEFENDANT: I would be honored to have life with.

MR. HARMON: Honored, is that your answer?

DEFENDANT: I would be honored to be able to get out sometime in my life and be able to reconcile with my children.

MR. HARMON: So you do have an interest in how this case turns out?

DEFENDANT: Of course. Yes.

(ROA Vol. 8 p.1413-1415). The record indicates that the prosecutor was attempting to discredit Defendant's testimony by demonstrating that he had a strong personal interest in the ultimate verdict reached by the jury. The prosecutor was not addressing sentencing in order to dissuade or persuade the jury to come to a verdict, rather he was demonstrating the Defendant's own bias.

As such, this line of questioning was not improper. Defendant's attorney was not ineffective in failing to object.

3. Implication Defendant Made Up His Testimony

Defendant claims that his attorney was ineffective for not objecting to the State's cross-examination which allegedly implied Defendant made up his testimony in violation of Defendant's Fifth Amendment rights. Specifically, Defendant claims that the State's cross-examination suggested that he fabricated his testimony after hearing the DNA evidence. Defendant cites to the following testimony:

> MR. HARMON: You've had a substantial period of time to think about today, haven't you?
>
> DEFENDANT: Yes, sir.
>
> MR. HARMON: You've known for quite a while, haven't you, that at some point you would take the witness stand and give the jury your version of what occurred?
>
> DEFENDANT: Yes, sir.
>
> MR. HARMON: And once you had made that decision, whenever it was, you've given a lot of attention to what you would tell the jury?
>
> DEFENDANT: I didn't make up anything, sir.
>
> MR. HARMON: I didn't say you made up anything, Mr. Chappell. Have you thought a lot about what you would tell the jury?
>
> DEFENDANT: No.
>
> MR. HARMON: Have you thought a lot about how you would act on the witness stand?
>
> DEFENDANT: No, sir.

(ROA Vol. 8 p. 1413). The statements by the prosecutor were not a comment on Defendant's Fifth Amendment right to be present at trial. The prosecutor only asked Defendant if he had thought a great deal about his testimony. Defendant was the one who brought up the fact that his testimony was not fabricated. The exchange indicates that the prosecutor was only trying to demonstrate Defendant's bias and was not making a statement on Defendant's right to testify.

As such, Defendant's attorney was not ineffective in not objecting to this line of questioning.

4. Failure to Strike Motion for Death Penalty Based on Race

Defendant claims that his attorney was ineffective for failing to strike the motion for death penalty based on the racially biased manner in which the death penalty is applied to African Americans. Defendant's claim is naked allegation. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Defendant has failed to provide any evidence that the death penalty notice was filed against him based on his race alone. Although Defendant provides Exhibit One indicating several other cases in which the death penalty was not sought, there has been no evidence that the death penalty was sought in Defendant's case based on his race. As such, Defendant's attorney was not ineffective in not moving to strike the death penalty based on race.

5. Failure to Include Mitigating Circumstances Raised by Defendant

Defendant claims that his eighth and fourteenth amendment rights were violated when the District Court did not give a jury instruction delineating the mitigating factors he claimed were present in addition to the statutory mitigating factors. This claim is without merit. In Byford v. State, 994 P.2d 700, 715 (2000), the defendant claimed that the district court had erred in refusing to give the jury an instruction regarding specific mitigating factors. The Court found that the defendant had not properly preserved the issue for appeal. Id. Further, the Court explained that even if the District Court erred in not giving the instruction, it did not violate the eighth and fourteenth amendments pursuant to a Supreme Court decision in Buchanan v. Angelone, 522 U.S. 269, 275, 118 S.Ct. 757, 761 (1998). The Nevada Supreme Court further explained that the defendant had been given the opportunity to argue the additional mitigating factors during the penalty hearing. Id. As in Byford, Defendant's constitutional rights were not violated when the special jury instruction was not given. Further, instruction number twenty-two indicated that the jury could consider any other mitigating factor. (ROA Vol. 11 p. 2153).

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III.

DEFENDANT IS BARRED FROM RAISING CLAIMS TWO, FIVE, SIX, SEVEN, EIGHT, AND NINE IN HIS PETITION AS THEY SHOULD HAVE BEEN RAISED ON APPEAL

NRS 34.810(1)(b)(2) states that the Court shall dismiss a petition for habeas corpus if the defendant's conviction was based on a trial and the grounds could have been raised in a direct appeal or a prior petition for writ of habeas corpus unless the court finds both good cause for failure to bring such issues previously and actual prejudice to the defendant. See NRS 34.810(1)(b). Good cause is "an impediment external to the defense which prevented [the petitioner] from complying with the state procedural rules." Crump v. Warden, 113 Nev. 293, 298, 934 P.2d 247, 252 (1997).

In the instant case, Defendant was convicted by a jury and subsequently raised thirteen issues in his direct appeal to the Supreme Court of Nevada. The Court disposed of each of Defendant's arguments. See Exhibit One. Because NRS 34.810 is a rule of procedural default, Defendant has the burden of demonstrating good cause for failing to raise the present grounds for post-conviction relief in his earlier petition and the burden of establishing that he will suffer actual prejudice if the grounds are not considered. Crump, 113 Nev. at 302, 934 P.2d at 252. Defendant provides no explanation for not filing these issues on direct appeal. As such, he is barred from bringing them in the instant petition. In claim five, Defendant attempts to elude this procedural bar by couching his claims that the jury instructions were constitutionally infirm in an ineffectiveness of counsel claim. Defendant should not be allowed to side step the procedural bar at NRS 34.810(1)(b)(2) in such a way. Thus, the State argues that claims two, five, six, seven, eight and nine are barred.

However, even if this Court were to address the claims which are procedurally barred, it would find no merit to their claims. The merits of these claims will be addressed below.

A. African Americans Were Not Systematically Excluded from the Jury

In claim two, Defendant asserts that his constitutional rights were violated because the Clark County jury selection system systematically excludes African Americans. Defendant's claim is without merit. As discussed above in issue II (B), Defendant has failed to establish a

prima facie showing that the jury selection violates the fair cross-section requirement. The record indicates that a number of African Americans were originally in the jury pool and were dismissed based on their beliefs regarding the death penalty.(ROA Vol. 4 p.832). As such, Defendant's rights have not been violated.

B. The Jury Instructions Were Not Faulty

Defendant is barred from raising claims that the instructions to the jury were improper. Failure to object to jury instructions or request special instructions precludes appellate review of the jury instructions. Etcheverry v. State, 107 Nev. 782, 784, 821 P.2d 350 (1991). In the instant case, Defendant failed to object to the jury instructions which he now claims were improper. As such, he is precluded from raising these issues on appeal. Defendant attempts to get around this bar by couching his objections to the jury instructions in an ineffective assistance of counsel claim. Even addressed on their merits, Defendant's attorney was not improper in not objecting to the jury instructions discussed below.

1. Instructions Regarding Premeditation and Deliberation

Defendant claims that the jury instruction on premeditation denied his due process rights because it does not distinguish between first and second degree murder. Defendant also claims that he received ineffective assistance of trial counsel and appellate counsel when his attorneys did raise this issue before the District Court and Nevada Supreme Court. Defendant asserts that the instructions are improper because they do not clarify the terms deliberation and willful only premeditation. Instructions twenty-one and twenty-two were given to the jury.

> Instruction No. 21
>
> Murder of the First Degree is murder which is (a) perpetrated by any kind of willful, deliberate and premeditated killing and/or (b) committed in the perpetration of burglary or attempted burglary and/or (c) committed in the perpetration of robbery or attempted robbery.
>
> Instruction No. 22
>
> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or after the time of the killing. Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believed from the evidence that the act constituting the

> killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

(ROA Vol. 9 p. 1719-1720). The Nevada Supreme Court has indicated that the instruction above, the Kazalyn instruction, does not fully define "willful, deliberate, and premeditated", elements of first degree murder. Byford v. State, 116 Nev. Adv. Op. 23, 994 P.2d 700, 716 (2000). However, this case was tried in October of 1996 prior to the ruling in Byford and the Nevada Supreme Court has indicated that the ruling in Byford is not retroactive. Garner v. State, 116 Nev. Adv. Op. 85, 6 P.3d 1013, 1025 (2000).

Further, in Garner v. State, 116 Nev. Adv. Op. 85, 9 P3d 1013, 1024 (2000), the Nevada Supreme Court clarified that its holding in Byford did not indicate that giving the Kazalyn instruction constituted error. The Nevada Supreme Court stated that it did not articulate any constitutional grounds for its decision in Byford. Id. There is sufficient evidence that Defendant committed first degree murder. As such, Defendant's constitutional rights were not violated when the Kazalyn instruction was given. Further Defendant's attorneys were not ineffective in not objecting or raising the issue on appeal.

2. Instruction on Malice

Defendant claims that jury instruction number twenty was improper and that his counsel was ineffective in failing to object to it. Specifically, Defendant contends that the jury instruction gives the improper presumption of implied malice. Jury instruction twenty reads:

> Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.
>
> Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

(ROA Vol. 9 p.1718). As Defendant admits, the Nevada Supreme Court has held that this exact instruction accurately informs the jury of the distinction between express and implied malice. Guy v. State, 108 Nev. 770, 777, 839 P.2d 578, 583 (1992). As such, Defendant has not demonstrated that his rights have been violated. Further, Defendant's counsel was not ineffective

in not objecting to this instruction.

3. Instruction on Character Evidence

In claim seven, Defendant argues that the failure to properly appraise the jury of the use of character evidence in a penalty hearing violated his constitutional rights. As argued above, this issue is not properly before the court as it was not raised on direct appeal. However, even based on its merits this Defendant deserves no relief. The jury was given instructions seven and eight. They read as follows:

> The jury may impose a sentence of death only if (1) the jurors unanimously find at least one aggravating circumstance has been established beyond a reasonable doubt and (2) the jurors unanimously find that there are no mitigating circumstances sufficient to outweigh the aggravating circumstances or circumstances found.
>
> The law never requires that a sentence of death be imposed; the jury however, may only consider the option of sentencing the Defendant to death where the State has established beyond a reasonable doubt that an aggravating circumstance or circumstances exist and the mitigating evidence is not sufficient to outweigh the aggravating circumstance.

(ROA Vol. 11 p.2138-2139). These two jury instructions made it clear that the jury could not sentence Defendant to death based on character evidence presented during the penalty hearing. Further, the jury found four aggravating factors and found that these factors outweighed the mitigating circumstances. (ROA Vol. 11 p.2125-2127). Thus, it is clear that the jury followed the instructions above. As such, the failure to instruct the jury that they could not consider character evidence prior to finding aggravating circumstances could be nothing more than harmless error. Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 826 (1967).

4. Instruction Regarding Sympathy

Defendant claims that the jury was improperly instructed that it could not consider sympathy in mitigation of the death penalty. Specifically, Defendant claims that this instruction undermined the jury's ability to consider mitigating evidence. Further Defendant claims that both his trial and appellate counsel were ineffective in not raising this issue.

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In this case, the jury was given instruction number twenty-eight which reads:

> Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.
>
> A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

(ROA Vol. 11 p. 2159). Defendant's claim that this instruction restricted the jury's consideration of mitigating factors has previously been rejected by the Nevada Supreme Court. Lay v. State, 110 Nev. 1189, 1194, 886 P.2d 448, 451 (1994). The Nevada Supreme Court has approved the instruction above so long as the jury is instructed to consider the mitigating circumstances placed before it. Id. In the instant case, jury instruction twenty-two listed the mitigating factors for first degree murder. (ROA Vol. 11 p.2153). In addition, instruction number thirty advised the jury:

> The Court has submitted two sets of verdicts to you. One set of verdicts reflects the four possible punishments which may be imposed. The other verdicts are special verdicts. They are to reflect your findings with respect to the presence or absence and weight to be given any aggravating circumstance and any mitigating circumstance.

(ROA Vol. 11 p.2161). It is evident from the record that the jury was instructed to consider mitigating circumstances. As such, the antisympathy jury instruction was not improper. See Lay v. State, 110 Nev. 1189, 1194, 886 P.2d 448, 451 (1994).

5. Instruction on Specific Mitigating Circumstances

Defendant claims that his Eighth and Fourteenth amendment rights were violated when the District Court did not give a jury instruction delineating the mitigating factors he claimed were present in addition to the statutory mitigating factors. As discussed above in issue II (F)(5), this claim is without merit. In Byford v. State, 994 P.2d 700, 715 (2000), the Nevada Supreme Court explained that even if the District Court erred in not giving the instruction, it did not violate the eighth and fourteenth amendments pursuant to a Supreme Court decision in Buchanan

v. Angelone, 522 U.S. 269, 275, 118 S.Ct. 757, 761 (1998). As in Byford, Defendant's constitutional rights were not violated when the special jury instruction was not given. Further, instruction number twenty-two indicated that the jury could consider any other mitigating factor. (ROA Vol. 11 p. 2153).

C. The Aggravating Circumstances Are Not Unconstitutional

In claim six, Defendant asserts that the State's use of overlapping aggravating circumstances to impose the death penalty was unconstitutional. As discussed above in issue II (D), the use of burglary, robbery and sexual assault as aggravating factors was not improper. In Bennett v. State, 106 Nev. 135, 142, 787 P.2d 797, 801 (1990), the defendant argued that the State had improperly used burglary and robbery as two separate aggravating factors even though the charges arose out of the same indistinguishable course of conduct. Id. In disagreeing with the defendant, the Nevada Supreme Court reasoned that because defendant could be prosecuted for both crimes separately and because convictions of both burglary and robbery do not violate the double jeopardy clause as they are separate and distinct offenses they could be used separately as aggravating factors. Id. See also Wilson v. State, 99 Nev. 362, 376, 664 P.2d 328, 336 (1983) (where the court found that any enumerated felonies that are committed during the course of a murder can be aggravating factors). Thus, it was not improper for the State to use robbery, burglary and sexual assault as aggravating factors.

D. The Lack of a Jury Instruction Prohibiting the Jury from Considering Character Evidence Did Not Violate Defendant's Constitutional Rights

Defendant claims that the failure to properly appraise the jury of the use of character evidence in a penalty hearing violated his constitutional rights. As discussed above in issue III (B)(3), Defendant deserves no relief. Two jury instructions, numbers seven and eight, made it clear that the jury could not sentence Defendant to death without finding aggravating factors which outweighed the mitigating factors. (ROA Vol. 11 p. 2138-2139). As such, the jury was aware that they could not sentence Defendant to death based on character evidence presented during the penalty hearing. Further, the jury found four aggravating factors. (ROA Vol. 11 p. 2125-2127). As such, the failure to instruct the jury that they could not consider character

evidence prior to finding aggravating circumstances could be nothing more than harmless error. Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 826 (1967).

E. The Application of Death Penalty was not Racially Motivated

In claim eight, Defendant asserts that the death penalty was inappropriately applied to him based on his race in violation of his constitutional rights. A defendant who seeks to assert an Equal Protection clause violation must prove that prosecuting authorities acted with discriminatory purpose in his particular case. McClesky v. Kemp, 481 U.S. 279, 292, 107 S.Ct. 1756, 1767 (1986). Defendant has provided no evidence that would support his inference that Defendant's race played a part in the prosecution's decision to seek the death penalty in his case. Instead, Defendant presents three completely unrelated cases in which the death penalty was not sought. As Defendant has provided no evidence that the State acted with discriminatory purpose in prosecuting his case, he has failed to demonstrate a violation of the equal protection clause has occurred.

F. The Administration of Capital Punishment in Nevada is Not Arbitrary

In claim nine, Defendant argues that the imposition of the death penalty in Nevada is arbitrary and therefore, unconstitutional. Both the United States Supreme Court and the Nevada Supreme Court have repeatedly upheld the constitutionality of the death penalty. Colwell v. State, 112 Nev. 807, 814, 919 P.2d 403, 408 (1996). Defendant's claim that the State of Nevada arbitrarily applies the death penalty is a naked allegation unsubstantiated by fact. See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

IV.

DEFENDANT'S APPELLATE COUNSEL WAS EFFECTIVE

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. 395, 397, 105 S.Ct. 830, 836-837 (1985); see also, Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The federal courts have held that in order to claim ineffective assistance of appellate counsel the defendant must satisfy the two-prong test of Strickland v. Washington by demonstrating that: (1) counsel's representation fell below an objective standard of

reasonableness; and (2) but for counsel's errors, there was a reasonable probability that the result of the proceedings would have been different. *See* Strickland, 466 U.S. at 687-688 & 694, 104 S.Ct. at 2065 & 2068; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

Further, there is a strong presumption that 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 Nevada Supreme Court, although not yet affirming the decision of the federal courts, has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). Finally, in order to prove that appellate counsel's alleged error was prejudicial, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. *See* Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

Counsel is not required to assert frivolous claims on appeal. The Defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). However, the Defendant does not have the 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. In reaching this conclusion, the Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most, on a few key issues." Jones, 463 U.S. at 751-752, 103 S.Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying the good arguments ... in a verbal mound made up of strong and weak contentions." Id. at 753, 3313. The Court has, therefore, held that 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 deserve the very goal of vigorous and effective advocacy." Id. at 754, 3314.

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Similar to the standards of ineffective assistance regarding trial counsel, appellate counsel has the right and discretion to employ his professional knowledge and tactics in construing a defendant's appeal. Unless the Defendant can demonstrate that counsel did not provide "reasonably effective assistance," appellate counsel's professional conduct will be upheld as effective. *See* Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; Love, 109 Nev. at 1138, 865 P.2d at 323. The Defendant has not shown that appellate counsel acted unreasonably. Furthermore, appellate counsel did raise key issues on direct appeal. Obviously, appellate counsel focused on those issues that had the greatest chance of success on appeal and thus any argument of ineffectiveness is without merit.

1. Instructions were Proper

Defendant claims that his appellate counsel was ineffective for not raising claims on direct appeal regarding improper jury instructions. These claims have been addressed above in issue III (B). As the jury instructions were proper, Defendant cannot show his appellate counsel was ineffective.

2. Overlapping Aggravators

Defendant asserts that his appellate counsel was ineffective for failing to object to and move to strike overlapping aggravating circumstances utilized by the State to impose the death penalty. As discussed above, in issue II (D) the aggravating factors presented by the State were not overlapping. As such, Defendant's appellate counsel was not ineffective.

3. Prosecutorial Misconduct

Defendant claims that his appellate counsel was ineffective for failing to raise issues regarding instances of prosecutorial misconduct. As discussed above in issue II (E), the prosecutor was did not commit misconduct. Thus, Defendant's claim is without merit.

4. Application of Death Penalty Based on Race.

This issue was addressed above in issue III (E). As it is without merit, Defendant cannot demonstrate that his appellate counsel was ineffective.

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5. Improper Victim Impact Testimony

Defendant claims that his appellate counsel was ineffective in not raising issues on appeal with regard to the testimony of the victim's mother and aunt. This issue has been addressed above in II (F)(1) and is without merit. Thus, Defendant's appellate attorney was not ineffective.

6. Improper Cross-examination of Defendant

Defendant claims that his appellate counsel was ineffective in not raising an issue with regard to the cross-examination of Defendant. This issues is addressed above in II (F) (2) and is without merit. As such, Defendant cannot demonstrate his appellate attorney was ineffective.

V.

THE NEVADA SUPREME COURT PROPERLY REVIEWED DEFENDANT'S CASE

Defendant's claim that the Nevada Supreme Court failed to review Defendant's death sentence pursuant to NRS 177.055 (2) is belied by the record. See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). NRS 177.055 (2) provides:

> 2. Whether or not the defendant or his counsel affirmatively waives the appeal, the sentence must be reviewed on the record by the supreme court, which shall consider, in a single proceeding in an appeal is taken:
>
> (a) Any errors enumerated by way of appeal;
>
> (b) Whether the evidence supports the finding of an aggravating circumstance or circumstances;
>
> (c) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and
>
> (d) Whether the sentence of death is excessive, considering both the crime and the defendant.

The Nevada Supreme Court's order affirming Defendant's conviction and sentence of death filed on December 30, 1998 demonstrates that the Court did review Defendant's death sentence as required by NRS 177.055.

The Nevada Supreme Court addressed the issues presented by Defendant on appeal. See Exhibit One p. 3-9, 10-11.Defendant claims that the fact the Nevada Supreme Court failed to provide discussion on six of Defendant's appellate claims demonstrates that it did not comply

with the requirement to address issues presented on appeal. This is belied by the record. See Hargrove v. State. In its order, the Nevada Supreme Court listed the six issues and stated, "We have reviewed each of these issues and conclude they lack merit." See Exhibit One p. 10-11.

Further, the Supreme Court's order indicates that it completed the review as required by NRS 177.055 (2) (b-d). In its order under the heading "Mandatory review of propriety of death penalty", the Nevada Supreme Court stated:

> NRS 177.055(2) requires this court to review every death penalty sentence. Pursuant to the statutory requirement, and in addition to the contentions raised by Chappell and addressed above, we have determined that the aggravating circumstances or robbery, burglary and sexual assault, found by the jury, are supported by sufficient evidence. Moreover, there is no evidence in the record indicating that Chappell's death sentence was imposed under the influence of passion prejudice or any arbitrary factor. Lastly, we have concluded that the death sentence Chappell received was not excessive considering the seriousness of his crimes and Chappell as a person.

See Exhibit One p. 10. The record indicates that the Supreme Court fully complied with the mandatory review of Defendant's death sentence. As such, Defendant's claim that his rights were violated is without merit. Furthermore, in so much as Defendant is asking the District Court to find that the Supreme Court of Nevada erred, the District Court does not have jurisdiction to do so. Nev. Const. Article 6 Section 6.

CONCLUSION

Based on the foregoing arguments, the Court should deny Defendant's Supplemental Petition for Writ of Habeas Corpus.

DATED this 18 day of June, 2002.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY H. Leon Simon
H. LEON SIMON
Deputy District Attorney
Nevada Bar #000411

RECEIPT OF COPY

RECEIPT OF A COPY of the above and foregoing STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)is hereby acknowledged this 19 day of June, 2002.

DAVID M. SCHIECK, ESQ.

BY David M. Schieck, Esq /mc
302 E. Carson Ave., #600
Las Vegas, Nevada 89101

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 29884

FILED

DEC 30 1998

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

Appeal from a judgment of conviction pursuant to a jury verdict of one count each of burglary, robbery with the use of a deadly weapon, and first-degree murder with the use of a deadly weapon, and from a sentence of death. Eighth Judicial District Court, Clark County; A. William Maupin, Judge.

Affirmed.

Morgan D. Harris, Public Defender, Michael L. Miller, Deputy Public Defender, Howard S. Brooks, Deputy Public Defender, Clark County,
for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Stewart L. Bell, District Attorney, James Tufteland, Chief Deputy District Attorney, Abbi Silver, Deputy District Attorney, Clark County,
for Respondent.

O P I N I O N

PER CURIAM:

On the morning of August 31, 1995, James Montell Chappell was mistakenly released from prison in Las Vegas where he had been serving time since June 1995 for domestic battery. Upon his release, Chappell went to the Ballerina Mobile Home Park in Las Vegas where his ex-girlfriend, Deborah Panos, lived with their three children. Chappell entered Panos' trailer by climbing through the window. Panos was home alone, and she and Chappell engaged in sexual intercourse. Sometime later that morning, Chappell repeatedly stabbed Panos with a kitchen knife, killing her. Chappell then left the

EXHIBIT" 1 "

trailer park in Panos' car and drove to a nearby housing complex.

The State filed an information on October 11, 1995, charging Chappell with one count of burglary, one count of robbery with the use of a deadly weapon, and one count of murder with the use of a deadly weapon. On November 8, 1995, the State filed a notice of intent to seek the death penalty. The notice listed four aggravating circumstances: (1) the murder was committed during the commission of or an attempt to commit any robbery; (2) the murder was committed during the commission of or an attempt to commit any burglary and/or home invasion; (3) the murder was committed during the commission of or an attempt to commit any sexual assault; and (4) the murder involved torture or depravity of mind.

Prior to trial, Chappell offered to stipulate that he (1) entered Panos' trailer home through a window, (2) engaged in sexual intercourse with Panos, (3) caused Panos' death by stabbing her with a kitchen knife, and (4) was jealous of Panos giving and receiving attention from other men. The State accepted the stipulations, and the case proceeded to trial on October 7, 1996.

Chappell took the witness stand on his own behalf and testified that he considered the trailer to be his home and that he had entered through the trailer's window because he had lost his key and did not know that Panos was at home. He testified that Panos greeted him as he entered the trailer and that they had consensual sexual intercourse. Chappell testified that he left with Panos to pick up their children from day care and discovered in the car a love letter addressed to Panos. Chappell, enraged, dragged Panos back into the trailer where he stabbed her to death. Chappell argued that his actions were the result of a jealous rage.

The jury convicted Chappell of all charges. Following a penalty hearing, the jury returned a sentence of death on the murder charge, finding two mitigating circumstances -- murder committed while Chappell was under the influence of extreme mental or emotional disturbance and "any other mitigating circumstances" -- and all four alleged aggravating circumstances. The district court sentenced Chappell to a minimum of forty-eight months and a maximum of 120 months for the burglary; a minimum of seventy-two months and a maximum of 180 months for robbery, plus an equal and consecutive sentence for the use of a deadly weapon; and death for the count of murder in the first degree with the use of a deadly weapon. The district court ordered all counts to run consecutively. Chappell timely appealed his conviction and sentence of death.

DISCUSSION

Admission of evidence of prior bad acts

Chappell contends that the district court abused its discretion by admitting evidence of prior acts of theft without holding a Petrocelli[1] hearing. During the State's case-in-chief, LaDonna Jackson testified that Chappell was known as a "regulator"[2] and that, on one occasion, he sold his children's diapers for drug money.

Ordinarily, in order for this court to review a district court's decision to admit evidence of prior bad acts, a Petrocelli hearing must have been conducted on the record. Armstrong v. State, 110 Nev. 1322, 1324, 885 P.2d 600, 600-01

[1]See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

[2]Jackson testified that a "regulator" is a person who steals items from a store and then resells those items for money or drugs.

(1994). However, where the district court fails to hold a proper hearing on the record, automatic reversal is not mandated where "(1) the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of bad acts evidence . . . ; or (2) where the results would have been the same if the trial court had not admitted the evidence." Qualls v. State, 114 Nev. ____, ____, 961 P.2d 765, 767 (1998).

The district court in the instant case did not hold a Petrocelli hearing either on or off the record. Under the circumstances, we conclude that the record is not sufficient for this court to determine whether the evidence was admissible under the test for admissibility of prior bad acts evidence. In light of the overwhelming evidence of guilt in this case, however, we conclude that had the district court not admitted the evidence, the results would have been the same. See Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985) (when deciding whether an error is harmless or prejudicial, the following considerations are relevant: "whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged"); see also Bradley v. State, 109 Nev. 1090, 1093, 864 P.2d 1272, 1274 (1993). Accordingly, we hold that the district court's failure to conduct a Petrocelli hearing before admitting this evidence amounted to harmless error, and does not, therefore, require reversal.

Issues arising out of alleged aggravating circumstances

Chappell argues that insufficient evidence exists to support the jury's finding of the four alleged aggravating circumstances. The first three aggravating circumstances depend on whether Chappell killed Panos during the commission

of or an attempt to commit robbery, burglary and/or home invasion, and sexual assault. Chappell's challenge to each of these aggravators comes down to a challenge of the sufficiency of the evidence supporting each of the "aggravating" offenses.

On appeal, the standard of review for sufficiency of the evidence is "whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992). Where there is sufficient evidence in the record to support the verdict, it will not be overturned on appeal. Id. We conclude that there is sufficient evidence to support the aggravating circumstances for robbery, burglary and sexual assault. We further conclude that the evidence does not support the aggravating circumstance of torture or depravity of mind.

Robbery

Chappell contends that the evidence shows that he took Panos' car as an afterthought and, therefore, cannot be guilty of robbery. The State argues that a rational trier of fact could find that Chappell took Panos' social security card and car through the use of actual violence or the threat of violence. Under Nevada's criminal law, robbery is defined as

> the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property . . . . A taking is by means of force or fear if force or fear is used to:
>
> (a) Obtain or retain possession of the property;
>
> (b) Prevent or overcome resistance to the taking; or
>
> (c) Facilitate escape.
>
> The degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property. A taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of

> the person from whom taken, such knowledge was prevented by the use of force or fear.

The statute does not require that the force or violence be committed with the specific intent to commit robbery.

This court has held that in robbery cases it is irrelevant when the intent to steal the property is formed. In Norman v. Sheriff, 92 Nev. 695, 697, 558 P.2d 541, 542 (1976), this court stated:

> [A]lthough the acts of violence and intimidation preceded the actual taking of the property and may have been primarily intended for another purpose, it is enough, to support the charges in the indictment, that appellants, taking advantage of the terrifying situation they created, fled with [the victim's] property.

This position was affirmed in Sheriff v. Jefferson, 98 Nev. 392, 394, 649 P.2d 1365, 1366-67 (1982), and Patterson v. Sheriff, 93 Nev. 238, 239, 562 P.2d 1134, 1135 (1977). See also State v. Myers, 640 P.2d 1245 (Kan. 1982) (holding that where aggravated robbery requires taking by force or threat of force while armed, it is sufficient that defendant shot victim and then returned three hours later to take victim's wallet, as there was a continuous chain of events and the prior force made it possible to take the property without resistance); State v. Mason, 403 So. 2d 701 (La. 1981) (holding that acts of violence need not be for the purpose of taking property and that it is sufficient that the taking of a purse was accomplished as a result of earlier acts of pushing victim onto bed and pulling her clothes).

Accordingly, we hold that there is sufficient evidence to support the conviction of robbery and the finding of robbery as an aggravating circumstance.

Burglary

Chappell argues that the State adduced insufficient evidence to prove that he committed a burglary. We disagree. NRS 205.060(1) provides that a person is guilty of burglary when he "by day or night, enters any . . . semitrailer or house trailer . . . with the intent to commit grand or petit larceny, assault or battery on any person or any felony." At trial, the State introduced evidence that Panos wanted to end her relationship with Chappell, that Chappell had threatened and abused Panos in the past, and that Panos did not communicate with Chappell while he was in jail. Moreover, there was testimony that the trailer appeared ransacked, and that Panos' social security card and car keys were found in Chappell's possession. Accordingly, we conclude that there is sufficient evidence to support the conviction of burglary and the finding by the jury of burglary as an aggravator.

Sexual assault

Chappell argues that the State failed to prove beyond a reasonable doubt that the sexual encounter between Chappell and Panos was nonconsensual. We do not agree. The jury was instructed to find sexual assault if Chappell engaged in sexual intercourse with Panos "against [her] will" or under conditions in which Chappell knew or should have known that Panos was "mentally and emotionally incapable of resisting." The evidence at trial and during the penalty hearing showed that Panos and Chappell had an abusive relationship, that Panos had ended her relationship with Chappell, that Chappell was extremely jealous of Panos' relationships with other men, and that Panos was involved with another man at the time of the killing. We conclude that a rational trier of fact could have concluded that either Panos would not have consented to

sexual intercourse under these circumstances or was mentally or emotionally incapable of resisting Chappell's advances, and that Chappell therefore committed sexual assault. Consequently, the evidence supports the jury's finding of sexual assault as an aggravating circumstance.

Torture or depravity of mind

Chappell argues that the circumstances of Panos' death do not rise to the level necessary to establish torture or depravity of mind. We agree. The depravity of mind aggravator applies in capital cases if "torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself" is shown. Robins v. State, 106 Nev. 611, 629, 798 P.2d 558, 570 (1990); NRS 200.033(8).[3] In the present case, the jury was instructed that the elements of murder by torture are that "(1) the act or acts which caused the death must involve a high degree of probability of death, and (2) the defendant must commit such act or acts with the intent to cause cruel pain and suffering for the purpose of revenge, persuasion or for any other sadistic purpose.[4] Panos died as a result of multiple stab wounds; thus, the first element is satisfied. The second element is not as easily met under the facts of this case.

The State argues that evidence of torture may be found in the following: Panos was severely beaten by

[3]NRS 200.033(8) was amended in 1995 deleting the language of "depravity of mind." 1995 Nev. Stat., ch. 467, §§ 1-3, at 1490-91. In the present case, the murder was committed before October 1, 1995, thus, the previous version of NRS 200.033(8) applies. Id.

[4]These instructions were approved by this court in Deutscher v. State, 95 Nev. 669, 677 n.5, 601 P.2d 407, 413 n.5 (1979); see NRS 200.030(1)(a) (defining first-degree murder by torture as murder "[p]erpetrated by means of . . . torture").

Chappell, there were numerous bruises and abrasions on Panos' face, Panos was stabbed in the groin area and chest, Panos was stabbed thirteen times, and four of the stabs were of such force as to have penetrated the spinal cord in Panos' neck. We conclude that there is no evidence that Chappell stabbed Panos with any intention other than to deprive her of life. No evidence exists that Chappell intended to cause Panos cruel suffering for the purposes of revenge, persuasion, or other sadistic pleasure. Nor does Chappell's act of stabbing Panos thirteen times rise to the level of torture. Accordingly, we hold that the record does not contain sufficient evidence to support the aggravating circumstance of depravity of mind and torture.

Invalidating an aggravating circumstance

Invalidating an aggravating circumstance does not automatically require this court to vacate a death sentence and remand for new proceedings before a jury. See Witter v. State, 112 Nev. 908, 929, 921 P.2d 886, 900 (1996); see also Canape v. State, 109 Nev. 864, 881-83, 859 P.2d 1023, 1034-35 (1993). Where at least one other aggravating circumstance exists, this court may either reweigh the aggravating circumstances against the mitigating evidence or conduct a harmless error analysis. Witter, 112 Nev. at 929-30, 921 P.2d at 900. In the present case, the jury designated as mitigating circumstances (1) that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, and (2) any other mitigating circumstances. We conclude that the remaining three aggravators, robbery, burglary and sexual assault, clearly outweigh the mitigating evidence presented by Chappell. We therefore conclude that Chappell's death sentence was proper.

Mandatory review of propriety of death penalty

NRS 177.055(2)[5] requires this court to review every death penalty sentence. Pursuant to the statutory requirement, and in addition to the contentions raised by Chappell and addressed above, we have determined that the aggravating circumstances of robbery, burglary and sexual assault, found by the jury, are supported by sufficient evidence. Moreover, there is no evidence in the record indicating that Chappell's death sentence was imposed under the influence of passion, prejudice or any arbitrary factor. Lastly, we have concluded that the death sentence Chappell received was not excessive considering the seriousness of his crimes and Chappell as a person.

Additional issues raised on appeal

Chappell further contends that: (1) the State's use of peremptory challenges to excuse two African-American jurors from the jury pool was discriminatory; (2) the district court erred in admitting hearsay statements; (3) the district court erred by denying Chappell's motion to strike the notice of intent to seek the death penalty; (4) the State improperly

[5] NRS 177.055(2) provides:

> 2. Whether or not the defendant or his counsel affirmatively waives the appeal, the sentence must be reviewed on the record by the supreme court, which shall consider, in a single proceeding if an appeal is taken:
> (a) Any error enumerated by way of appeal;
> (b) Whether the evidence supports the finding of an aggravating circumstance or circumstances;
> (c) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and
> (d) Whether the sentence of death is excessive, considering both the crime and the defendant.

appealed to the jury for vengeance during the penalty phase; (5) cumulative error denied Chappell a fair hearing; and (6) victim impact testimony denied Chappell a fair penalty hearing. We have reviewed each of these issues and conclude that they lack merit.

CONCLUSION

For the foregoing reasons, we affirm the judgment of conviction for robbery, burglary and first-degree murder and the sentence of death.[6] [7]

Shearing, J.

Rose, J.

Young, J.

[6]The Honorable Charles E. Springer, Chief Justice, voluntarily recused himself from participation in the decision of this appeal.

[7]The Honorable A. William Maupin, Justice, voluntarily recused himself from participation in the decision of this appeal.

EXHIBIT B

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CLERK OF THE COURT

OPPS
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
OFELIA MONJE
Deputy District Attorney
Nevada Bar #11663
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

EDMUNDO OLIVERAS,
#1331395

Defendant.

CASE NO: 10C261264-2
DEPT NO: III

STATE'S OPPOSITION TO DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF

DATE OF HEARING: January 12, 2016
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through OFELIA MONJE, Deputy District Attorney, and moves this Honorable Court for an order denying the Defendant's Petition for Post-Conviction Relief heretofore filed in the above entitled matter.

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

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On January 15, 2010, the State charged Edmundo Oliveras (hereinafter "Defendant"), along with his co-defendant, Rene Zambada-Jimenez, by way of Indictment with Count 1 –

Conspiracy to Commit Murder (Felony – NRS 199.480, 200.010, 200.030); Count 2 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165); Count 3 – Conspiracy to Commit Robbery (Felony – NRS 199.480); Count 4 – Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165); Count 5 – Conspiracy to Commit Kidnapping (Felony – NRS 199.480, 200.310); and Count 6 – First Degree Kidnapping with Use of a Deadly Weapon (Felony – NRS 200.310, 200.320, 193.165).

On October 5, 2011, a jury trial convened and lasted eight days. On October 14, 2011, the jury returned a guilty verdict for Counts 1, 2, and 4; however, the jury acquitted Defendant as to Counts 3, 5, and 6.

On January 12, 2012, the District Court sentenced Defendant to the Nevada Department of Corrections as follows: Count 1 – twenty-four months to sixty months; Count 2 – life with the possibility of parole after twenty years, plus a consecutive term of sixty months to two hundred forty months for the deadly weapon enhancement, Count 2 to run concurrent with Count 1; and as to Count 4 – forty-eight months to one hundred twenty months with a consecutive term of forty-eight months to one hundred twenty months for the deadly weapon enhancement, Count 4 to run concurrent with Counts 1 and 2. Defendant received three hundred and nine days of credit for time served. The remaining counts were dismissed. On January 27, 2012, the District Court filed the Judgment of Conviction.

On January 23, 2012, Defendant filed a Notice of Appeal. On December 13, 2013, the Nevada Supreme Court affirmed Defendant's conviction. Remittitur issued in January 7, 2014.

On December 27, 2013, Defendant filed a Motion for Appointment of Attorney. On January 21, 2014, the District Court granted Defendant's motion. On February 4, 2014, Mr. Oram confirmed as counsel for Defendant.

On April 8, 2014, Defendant filed a Petition for Writ of Habeas Corpus. On August 13, 2015, Defendant filed a Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus. The State responds as follows.

///

STATEMENT OF THE FACTS[1]

At around 6:00 p.m. on December 9, 2009, Scotty Heer ("Heer") was traveling to his home on Mt. Charleston via Highway 157, also known as Kyle Canyon Road (3AA at 416). While driving, Heer's attention was caught by a flashlight waving near the ground on the right side of the road (3 AA 417). When Heer pulled over to investigate the light, he found a man lying on his stomach (3 AA 417). Heer inquired of the man's well-being, and the man, later identified as Ulises Mendez-Rodriguez ("Ulises" or "victim"), told Heer he had been shot (3 AA 419). Ulises told Heer the person that shot him was no longer in the area (3 AA 419).

Upon a quick observation of Ulises, Heer did see a small hole in the victim's back (3 AA 420). Though Ulises was asking for Heer to call his wife, Heer called 911 instead (3 AA 421). After the police and medical personnel arrived, Ulises was attended to by paramedics, while police officers escorted Heer to a police vehicle so he could make a statement (3 AA 423-424). During the 911 calls, Ulises can be heard in the background identifying the person that shot him as Rene Zambada ("Rene"). See State's Ex. 1, a copy of the 911 call for event number 091209-2690.

Ulises was taken to the hospital, where attempts were made to save his life (3 AA 434). However, Ulises died approximately one and a half hours after arriving by ambulance. Detective Pete Kallas ("Det. Kallas") from the homicide unit was called to the crime scene (though unfortunately on the date of trial, Det. Kallas was unable to attend due to a serious illness). (4 AA 662). His partner that day was Detective Barry Jensen ("Det. Jensen"), who was already at UMC investigating another unrelated death (4 AA 662). Since Ulises was also taken to UMC, Det. Jensen picked up part of the investigation at UMC when Ulises arrived (4 AA 662). After Ulises died, Det. Jensen observed the body and personal effects (4 AA 663). Absent from personal effects were the victim's wallet and identification (4 AA 663). The only way Det. Jensen was able to determine where the victim lived was by a receipt in his pocket (4 AA 663). Det. Jensen met with Ulises' wife and during that conversation, Det. Kallas relayed to Det. Jensen that Ulises was heard on 911 naming the person that shot him as Rene

[1] Like Defendant, the citations in the instant opposition have been derived from the Defendant's appendix filed in his appeal. Edmundo Oliveras vs. the State of Nevada, Nevada Supreme Court Docket No. 60005.

Zambada (4 AA 664). Ulises' wife was aware of Rene and that Ulises was with Rene that day (4 AA 663). Det. Jensen placed an APB out for Rene Zambada's vehicle, which was eventually found at the Alpine Village Apartments, where Rene and his family lived (4 AA 663). Ulises' Jeep was also found parked at the complex (4 AA 665).

Police set up surveillance on Rene's Jeep while other officers watched the home starting at about 12:30 a.m., the morning of December 10, 2009 (4 AA 664). At about 3:00 a.m., they watched as Rene's mother-in-law left the apartment with a baby stroller (4 AA 665-66). They stopped the woman, later identified as Lidia, who had an infant with her, and spoke to her (4 AA 665). They learned Rene and his wife, Elba, were not home, and Lidia was taking the baby to Elba (App. 4 AA 666). Lidia authorized a search of the apartment, however, out of an abundance of caution, police also obtained a search warrant once the scene was cleared for the presence of other people (4 AA 665).

During the execution of the search warrant, Det. Jensen received a call from Det. Kallas at Kyle Canyon Road saying that three, red colored 12-gauge shotgun shells were found. Det. Jensen attempted to find a matching murder weapon. Lidia had indicated that Rene and Elba shared the master bedroom, so officers concentrated their search there (4 AA 667). The first thing officers noticed was a blue backpack propped up against the door. In it was the victim's wallet, insurance paperwork, receipts and identification belonging to Ulises (4 AA 667). Under the bed, officers found a 12-gauge shotgun with only one slug in it. The remaining slug was also red, thus Det. Jansen believed this gun to be the murder weapon (4 AA 667). Among other items found were pistol bullets and a disassembled .22 revolver (4 AA 667).

During the search, a man came over to the house around 3:30 a.m. (4 AA 666). The man was identified as Uriel Delgado, who was returning Lidia's van after he fixed it (4 AA 666). Since he was not a party to the murder, he was released from the scene after police took his identifying information (4 AA 668). Shortly thereafter, Det. Jensen was alerted that Rene and Elba were found at a motel near Desert Inn and Boulder Highway (4 AA 669). They were arrested and brought to the homicide office to be interviewed (4 AA 669). Defendant was

with Rene and Elba at that motel when they were apprehended and, because he had active traffic warrants, he was taken to city jail (4 AA 670).

Meanwhile, Detective Christopher Bunn interviewed Defendant at the city jail (4 AA 650). Det. Bunn speaks both English and Spanish and before the interview began, he spoke both languages to see which language Defendant was more comfortable speaking (4 AA 651). Defendant chose to the do the interview in English (4 AA 651). Defendant was given a Miranda[2] card printed in English and read it out loud (4 AA 651). When the questioning first began, Det. Bunn told Defendant he was investigating Ulises' murder, and Defendant told the detective he knew nothing about it (4 AA 652). He said he did not know who Ulises was and was never in a car with him (4 AA 652). He even denied ever going over to Rene's apartment (4 AA 653). Det. Bunn confronted Defendant with a subterfuge that traffic cameras caught him in Ulises' Jeep on the way to Mt. Charleston. At that point, Defendant admitted being in the car with Ulises and driving with him and Rene to Mt. Charleston (4 AA 653). Det. Bunn also told Defendant that they found a shotgun at Rene's house with the Defendant's fingerprints on it (4 AA 653). At that point, Defendant admitted he took the shotgun from the residence, hid it in his jacket and carried it with him to Ulises' Jeep (4 AA 653). He stated he got in the back passenger seat with the gun (4 AA 653). This was inconsistent with a later statement where Defendant told Det. Bunn that Rene had given him the shotgun to hold (4 AA 654). Defendant told Det. Bunn he kept the shotgun concealed in his jacket and in the back seat during the trip, and that he did not think Ulises, who was sitting in the front passenger seat, knew that he had brought a shotgun (4 AA 654).

Another inconsistency was revealed when Defendant told Det. Bunn that when the trio stopped at Mt. Charleston, Rene took the gun from Defendant and "did what he had to do", but later, he told Det. Bunn that he didn't even know Rene had taken the gun from the back seat, since he had gotten out of the car to urinate (4 AA 654). Defendant than stated he heard three gun shots, never looked up, and ran to the Jeep and got in the driver's seat (4 AA 654).

[2] 384 U.S. 436, 86 S. Ct. 1602 (1966).

However, Rene wanted to drive, so Rene pushed Defendant to the front passenger seat (4 AA 654).

When asked for the reason that Defendant, Rene, and Ulises went up to Mt. Charleston in the first place, Defendant first stated he did not know, but stated that "he didn't know the person they were going up to kill" (4 AA 655). Defendant also mentioned that someone had made an accusation that Ulises was threatening his family (4 AA 655). At another point in the interview, Defendant said that he knew he was in trouble (4 AA 660).

Det. Burin also listened to the 911 tapes in this case (4 AA 656). At one point, Ulises is heard saying "they" stole my car, as opposed to "he" (being Rene alone) stole my car (4 AA 656).

Earlier in the investigation, several Crime Scene Analysts ("CSAs") were involved in processing various scenes for evidence. CSA Randall McPhail arrived at about 8:30 p.m. to Kyle Canyon Road where he met homicide detectives and other Metro personnel (4 AA 489). His job on that date was to document the scene and to generate a report (4 AA 491).. CSA Dave Horn also responded and was assigned to draw the diagram of the scene and collect evidence (4 AA 491). CSA McPhail found a .25 caliber pistol, a disturbance in the dirt where the gun was found, blood, a toothpick, a hat with blood on it, a pair of glasses, and several fired shotgun shells (4 AA 497, 501 and 504). There were also footwear impressions and tire impressions (4 AA 497-498). The three shotgun shells were found in close proximity to each other (4 AA 500). All the evidence collected was found within a 9 x 16 foot area (4 AA 521). After examination, the pistol that was found did not appear to be the weapon used on the victim, as it was rusted over and non-operational (4 AA 501).

CSA William Speas was also part of the investigation, and his role was to process Rene's apartment during the execution of the search warrant (4 AA 526-527). Near the master bedroom closet, a blue backpack was found on the floor. In the backpack was paperwork addressed to Ulises, a wallet containing photos of Ulises and Ulises' identification, and Ulises' car insurance card (4 AA 536-537, 539). In the master bedroom, Speas found shotgun shells and magazines with different types of ammunition (4 AA 540). While there were various

types of ammunition, no guns were found in the home that matched the ammunition (4 AA 544). There was also a disassembled .22 revolver found (4 AA 544). In a clothes hamper, Speas found a tank top with blood on it (4 AA 545).

Ulises' autopsy was performed by Dr. Larry Sims (3 AA 433-434). Ulises had three shotgun wounds, one in the lower right chest, one in the left abdomen, and one on the inside of the right arm (3 AA 435-436). Dr. Sims posited that the wound through the chest could have been the fatal wound, as it penetrated the liver, the stomach, and the spleen, likely causing heavy internal bleeding (3 AA 437). Dr. Sims also felt the wound to the abdomen could have been fatal, as the slug penetrated the bowel (3 AA 438). All of the wounds were characteristic of injuries caused by shotgun slug bullets (3 AA 438). The final cause and manner of death was determined to be homicide by multiple shotgun wounds (3 AA 439). Dr. Sims was also able to ascertain from a toxicology screen that the victim had ingested methamphetamine about one and a half to two hours prior to death (3 AA 442). Dr. Sims was also able to tell, based on the absence of gun powder stippling, that the wound to the abdomen and chest were shot from a distance of more than three feet, closer to six feet, while the wound to the arm was shot from a distance of right around three feet, due to the presence of a type of shrapnel in the arm (3 AA 442-443).

Latent print examiner David Johnson ("Johnson") was responsible for testing the items collected for the presence of fingerprints (4 AA 561). Johnson compared the known prints of the victim Ulises, Defendant, and Rene to various prints lifted from the scene (4 AA 568). A print lifted from the back left exterior window of Ulises' Jeep matched Defendant's fingerprints (4 AA 574-575).

Some of the evidence was also sent for a DNA analysis (4 AA 629). Forensics Analyst Julie Marschner ("Marschner") examined the DNA samples collected in this case twice, once on August 4, 2010, and once on September 29, 2011 (4 AA 629). In 2010, when Marschner processed the Remington shotgun, she was able to determine the major DNA profile on the gun, but noted that the profile did not match Rene or Ulises (4 AA 626). Following the September 29, 2011 testing, after Defendant returned to the United States and did provide a

buccal swab, Marschner compared the major DNA profile found on the shotgun with the known sample from Defendant, and this time there was a DNA match, meaning that Defendant had touched the shotgun (4 AA 629).

Dina Moses, a Forensics Firearms Examiner, was given the victim Ulises' clothing and was asked to perform a distance examination based on gunpowder residue patterns on the clothing (4 AA 630). Moses purchased material similar to the fleece pullover worn by the victim, then set up the Remington shot gun at various distances and pulled the trigger (4 AA 632). She then compared the gun powder burns on the sample material to the gun powder burns on Ulises' clothes to see at which distance the patterns most closely resembled each other (4 AA 634). Because there was even gunpowder residue at all on Ulises' clothes, Moses concluded that the shooting distance would not have been great, so she tested distances at three, five, and six feet (4 AA 634). Using this technique, Moses was able to determine that the shots were fired from more than three but less than six feet away (4 AA 634).

Though they had let him go after he delivered Lidia's van, a few days later, police talked to Uriel Delgado ("Uriel") in an attempt to get more information about the day of the murder. Uriel was an acquaintance of Rene and had met him in or around October of 2009 (4 AA 455). During the time he knew Rene, Uriel had met Ulises once or twice at Rene's apartment near the corner of Charleston and Decatur in Las Vegas, Nevada (4 AA 455). Rene lived at that apartment with his wife, his child, his mother-in-law, and his brother-in-law, Defendant (4 AA 456). On the afternoon of December 9, 2009, Uriel went to Rene's apartment to do mechanic work on Rene's Jeep (4 AA 456). The payment arrangement between Rene and Uriel was that Rene was to pay Uriel about $600.00 in exchange for the work on the Jeep (4 AA 458).

When Uriel arrived, Rene and his wife were home, and another man named Tito was present (4 AA 459). About 30 minutes after Uriel arrived, Defendant arrived (4 AA 459). A short time after that, the victim arrived at the apartment (4 AA 460). Everything appeared to be normal, as Uriel did not note any change in Rene or Defendant's demeanor (4 AA 460). Uriel had always thought Rene and the victim were friends (4 AA 477). At some point, while

Uriel and Tito were still tinkering with the Jeep, Uriel noticed Rene, Defendant and Ulises all leave together and heard them talk about going to get hamburgers (4 AA 460). Because Uriel was working under the hood of Rene's Jeep at that time, he did not see who was driving or where people were sitting, but knew that the trio took the victim's newer model Jeep (4 AA 462).

While Rene, Defendant, and Ulises were gone, Uriel finished working on Rene's Jeep (4 AA 462). Because he expected to be paid the $600.00 that night, he waited around and talked to Rene's wife in the meantime (4 AA 463). Rene's wife called Rene to tell him that Uriel was done and was waiting around (4 AA 463). At about 5:30 p.m., after it was already dark, Rene and Defendant returned, without Ulises (4 AA 466). Rene brought with him some hamburgers, one of which he gave to Uriel, and the pair sat at the kitchen table and talked while eating (4 AA 467). Rene did not pay Uriel the $600.00 owed at that time (4 AA 467).

Uriel watched as Defendant came in as well, and noted Defendant went straight to the back bedrooms (4 AA 467). He then came to get clothes from the living room, and went to the back of the house again and took a shower (4 AA 468). After his shower, Defendant returned to the kitchen where everyone else was and spoke with Rene (4 AA 468). Rene told Defendant to give Rene some money (4 AA 468). At that point, Defendant gave $200.00 cash to Rene from his pocket, the pocket of the clothes he had just gotten from the living room before showering (4 AA 470). Rene gave some of that money to Uriel for work done on the Jeep and gave the rest of the money to his wife (4 AA 470). Before Uriel left, Rene asked him to come back later on that same night to do a tune-up on his mother-in-law's mini-van (4 AA 471).

At about 8:00 p.m. that same night, Rene called Uriel and told him to come and pick up the mini-van (4 AA 472). Uriel and Tito picked the mini-van up and took it back to Uriel's mother's home to work on it (4 AA 472). Uriel worked on the van overnight, and then dropped it back off at Rene's apartment the morning of December 10, 2009 (4 AA 474). When Uriel went into Rene's apartment, he was met by armed police officers (4 AA 475).

On December 28, 2009, a little less than twenty days after the murder, Det. Jensen and Det. Kallas determined that Defendant should be arrested in addition to Rene, and thus they requested an arrest warrant (4 AA 674). However, when police went to serve the warrant, they learned Defendant had returned to Puerto Rico (4 AA 674). Extradition proceeding were started, and Defendant was finally returned to Las Vegas for prosecution in 2011 (4 AA 675).

When Defendant was returned, Det. Jensen and Det. Kallas had a second interview with Defendant (4 AA 675; 5 AA 775). In this interview, they noted some inconsistencies with the prior interview conducted by Det. Bunn (5 AA 776). For instance, back on December 10, 2009, Defendant had claimed to have been no longer working at McDonalds, but this time he started the interview saying he was working at McDonalds that day (5 AA 776). Back in 2009, Defendant said he had not been drinking that day, but in the subsequent interview, he claimed to have been drunk the day of the murder (5 AA 776). In the 2009 interview, Defendant believed Ulises did not know the gun was in the car, but in the 2011 interview he now was sure Ulises saw the gun (5 AA 777).

Defendant also changed his story midway through the interview. Initially, he told police that when he and Rene returned to the complex after the shooting, he was so upset he never even went inside the house. See State's Exhibit 152. Later though, he said he went in the apartment, but left immediately (5 AA 777). Det. Jensen also referred to Defendant's cell phone records and ascertained two things: 1) Defendant never called the police that day, and 2) Defendant's cell phone pinged to a cell phone tower not far from where Ulises was found on Kyle Canyon Road at 5:36 p.m. on December 9, 2009 (5 AA 779).

Defendant testified at trial that on December 9, 2009, he came to Rene and Elba's home to visit his mother (5 AA 685). Defendant stated that he left that day with Rene and Ulises to go to cash a paycheck (5 AA 686). Defendant admitted taking a shotgun with him from Rene's house to the car they were driving in, claiming he did so because he was told by Rene to bring the gun (5 AA 686). Defendant claims he did not ask Rene why he should bring the gun (5 AA 686). Defendant said he had seen guns in the apartment and Rene talked about having

guns (5 AA 686). Defendant also said he placed the gun in the back seat of the Jeep, while Rene drove and Ulises sat in the passenger seat (5 AA 686).

Defendant testified that at some point up the road leading off the freeway to the mountains, he asked Rene to stop so that he could use the bathroom (5 AA 688). He was not too close, but not too far from the car, urinating, when he heard two or three detonations (5 AA 688). Defendant says when he heard the shots, he ran toward the car and got in the driver's seat (5 AA 688). Defendant claims Rene was next to the passenger side of the Jeep when he first saw Rene (5 AA 688). He claims Rene then came to the driver's side with the shotgun in hand, pushed Defendant to the passenger side, and started to drive (5 AA 689). Defendant said Rene placed the shotgun next to him by the gearshift (5 AA 689). Defendant testified he did not take any property from Ulises, and during the ride home, he used his cell phone to try to locate Elba (5 AA 689). Defendant claims that after the shooting, he cashed his paycheck (5 AA 711).

When the pair returned back to Rene's home in Ulises Jeep, Defendant stated he got out of the car, went into the apartment, talked to his sister and told her what Rene had done, and then went to take a shower (5 AA 689). Defendant testified he took a shower because he was going to "go out", and after the shower he got "dressed up." (5 AA 689). He claimed that he gave his sister Elba some money he owed her for his ticket to Las Vegas, told Rene he did not want to speak to him, and left (5 AA 689). Defendant stated he never went out for hamburgers, and also stated that he did cash his paycheck, on the way home after Ulises was shot (5 AA 711). Later in testimony, Defendant also retracted his statement that he was "going out" (5 AA 712).

Defendant testified that later in the night, Elba called him and told him she needed money. So, he found a ride and went to the Motel 6 where Elba and Rene were (5 AA 690). While there, Defendant stated he was arrested and taken to city jail for unpaid tickets (5 AA 690). Defendant testified that he was interviewed by detectives while there, and stated he felt pressured because they were accusing him of committing a crime (5 AA 690). He testified also he was worried about his sister because Rene was acting crazy (5 AA 691). Defendant

claims he did not know Rene was going to kill Ulises and that he was not part of a plan with Rene to do so (5 AA 691).

During cross-examination, Defendant also claimed he was treated very poorly during his interview with Det. Bunn and was denied water and phone calls to his family. He claims he was offended when Det. Bunn told him not to cry. During this discourse with State, Defendant also slipped into answering the prosecutor's questions in English (5 AA 695). Further, Defendant was asked to refer to a portion of his statement where he told Det. Bunn that he took the bus to get his last paycheck, which did not match his testimony on direct examination that Rene and Ulises took him to get his paycheck (5 AA 698). Defendant claimed he was misunderstood (5 AA 698).

Also, the State asked Defendant if he recalled in his interview telling Det. Bunn on one occasion "he didn't know the person we were going up there to kill," and on another occasion during the interview that "they were going up to the mountain to do some business" with someone he didn't know (5 AA 698). Again, Defendant claims he was misunderstood (5 AA 699). When confronted with the fact that now, on direct examination, he had said he did not know why Rene was taking him and Ulises up to Mt. Charleston, Defendant claimed he did not remember that question on direct examination (5 AA 699). Defendant claimed he hid the shotgun in his jacket so kids playing in the area would not see it, but when asked why, if he was concerned for the children, he did not put the gun back in the home, Defendant reiterated he did what Rene told him to do (5 AA 699).

Defendant was also asked to remember his interview with Det. Bunn, and how he told Det. Bunn he had kept the gun concealed in his jacket the whole ride up to Mt. Charleston and how Ulises probably did not know about the presence of the gun (5 AA 699). When asked to explain the difference between what he said in the interview and his testimony where he said the gun was in the open by his side in the back seat, he was unable to explain and stated he did not recall the statement to Det. Bunn (5 AA 700).

Defendant also testified that when they pulled the car over for him to urinate, they pulled to the right shoulder driving up into the mountains. He further testified that to get to

the driver's side of the vehicle, he had to pass the passenger side area to go around the back of the Jeep to get into the driver's side door (5 AA 702). Taking this path, Defendant would have had to have seen Ulises, who was lying by the passenger door, and in fact, Defendant told Det. Bunn in his interview that he had seen Ulises' body (5 AA 702; see also State's Exhibit 152). However, during cross-examination, Defendant now said he never say Ulises after he heard the gun shots (5 AA 702).

Defendant agreed during cross examination that his cell phone records showed many calls on December 9, 2009, spaced at intervals of just minutes each, until 5:14 p.m (5 AA 711). At 5:14 p.m., there was a 22-minute lag until the next call, placed at 5:36 pm (5 AA 711).

The State called Elba Oliveras as a rebuttal witness. She testified that Defendant did speak English quite well, and needed to do so because he has held management jobs in the past while working in Las Vegas (5 AA 717-718). She confirmed that when Defendant first came back to the United States in 2009, he in fact stayed with her, Rene, and her mother for about a month and a half (5 AA 718). Due to people not getting along, Defendant then moved to the uncle's house (5 AA 718).

On December 9, 2009, Elba recalls overhearing a conversation between Rene and Defendant just outside the front door regarding the shotgun, shortly after Ulises arrived (5 AA 721). She then watched Defendant come back inside the house, go down the hallway, close a door, and then come back up the hallway to exit the front door again (5 AA 721). She did not see a shotgun (5 AA 721-722).

Rene and Elba returned home to police swarming the apartment complex (5 AA 725-26). She saw police specifically looking into Ulises' car (5 AA 726). When Rene sees this, he orders her to drive away from the complex (5 AA 726). They go to Uriel's house and pick Uriel up (5 AA 726). Uriel drives Elba and Rene to the Motel 6 and then takes the van (5 AA 726). Up to this point, Defendant had never talked to Elba about Ulises' murder (5 AA 727).

Elba also testifies that, while at the motel, she had no telephone contact with Defendant, but rather Rene spoke with Defendant (5 AA 727). In fact, it was Defendant who called Rene

and not the other way around (5 AA 727). Early the next morning, Defendant came to the Motel 6 where Rene and Elba were (5 AA 727).

Also, the State re-called Det. Bunn and played the tape of the December 10, 2009 interview for the jury. See State's Exhibit 152. Det. Bunn noted that he did not yell, scream, threaten, nor did he tell Defendant he was going away for life (5 AA 787).

ARGUMENT

1. Defendant Received Effective Assistance of Trial and Appellate Counsel

a. Standard

Claims of ineffective assistance of counsel are analyzed under the two-pronged test articulated in Strickland v. Washington, 466 U.S. 668, 104 (1984), wherein the defendant must show: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. Id. at 687, 2064. Nevada adopted this standard in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984). "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010). The question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 131 S. Ct. 770, 778 (2011). Further, "[e]ffective 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, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

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, 103 P.3d 35 (2004). The role of a court in considering alleged 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) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

In considering whether trial counsel was effective, the court must determine whether counsel made a "sufficient inquiry into the information . . . 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 690–91, 104 S. Ct. at 2066). Then, the court will 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 690–91, 104 S. Ct. at 2066). Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S. Ct. at 2066.

This analysis does not indicate 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." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

In order to meet the second "prejudice" prong of the test, the defendant must 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). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" or "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.; see also NRS 34.735(6).

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. 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). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

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.

b. Counsel was not ineffective for failing to obtain a competency evaluation of Defendant since there was absolutely no evidence to support that competency was an issue.

Defendant has failed to make a requisite showing that trial counsel was deficient and that the alleged deficient performance prejudiced the defense. The test for determining competency is "whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational and factual understanding of the proceedings against him." Jones v. State, 107 Nev. 632, 637-38, 817 P.2d 1179, 1182 (1991); citing Melchor-Gloria v. State, 99 Nev. 174, 178-180, 660 P.2d 109, 113 (1983). In order to require a competency determination, a defendant must demonstrate a reasonable doubt that they are competent. Martin v. State, 96 Nev. 324, 325, 608 P.2d 502, 503 (1980). Such a reasonable doubt is not raised by the bare allegations of the defendant or a history of mental illness alone. Id.; Calambro v. Second Judicial Dist. Ct., 114 Nev. 961, 971-72, 964 P.2d 794, 801 (1998) (finding defendant competent although he was diagnosed

schizophrenic and reported hearing voices); Riker v. State, 111 Nev. 1316, 1325, 905 P.2d 706, 711-12 (1995) (finding defendant competent although he suffered from mental disorders). A district court will consider the interactions with a defendant and his attorney as well as the interactions between the court and the defendant in determining whether a reasonable doubt as to competency exists. Hill v. State, 114 Nev. 169, 176-77, 953 P.2d 1077, 1082-83 (1998); Melchor-Gloria, 99 Nev. at 180-81, 660 P.2d at 113. A criminal defendant is competent to stand trial if he understands the charges and proceedings and "has sufficient present ability to consult with" and assist his counsel in his defense. Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960); see NRS 178.400(2) (defining "incompetent").

Here, Defendant has failed to demonstrate a reasonable doubt that Defendant had issues with his competency. The only things that Defendant states in support of this contention are that Defendant failed to accept a very favorable negotiation offered by the State and that trial proceeded on the first setting without counsel requesting any sort of competency evaluation. Defendant's attorney also sets forth a bare, non-specific allegation that Defendant "had received mental health counseling/hospitalization in the past." See Ex. A attached to Defendant's Supplemental Brief in Support of Defendant's Writ of Habeas Corpus. Neither of these things support Defendant's allegation that trial counsel was deficient for failing to request a competency evaluation as it is clear that Defendant showed no issues related to this competency.

First, in regards to the favorable negotiation rejected by Defendant, this does not demonstrate a reasonable doubt regarding Defendant being competent. Defendant maintained his innocence throughout trial and testified as such. Defendant rolled the dice, proceeded to trial and lost. This is nothing more than remorse for not accepting the favorable offer by the State, not incompetency. A careful reading of Defendant's trial testimony does not evidence any indication that Defendant was not competent to stand trial (5AA 684-713). Defendant had no difficulty answering questions and maintaining his innocence throughout his testimony. Defendant attempted to minimize his involvement and explain the incriminating statements he provided to police. The jury trial did go forward on the first setting, but this has absolutely

nothing to do with Defendant's competency. Defendant did not demonstrate any indication whatsoever that there was a reasonable doubt as to his competency during his trial.

Similarly, Defendant's bare allegation that at some unknown point in time, he had received mental health counseling/hospitalization does not support a reasonable doubt as to Defendant's competency. Martin, 96 Nev. At 325, 608 P.2d at 503; Calambro, 114 Nev. at 971-72, 964 P.2d at 801. At the time of trial, there is absolutely no indication that Defendant had competency issues. Because Defendant has failed to make a requisite showing that counsel was deficient and that the alleged deficient performance prejudiced the defense, this Court must deny this claim.

c. Counsel was not Ineffective for Admitting Defendant's Phone Records which allowed the State to Elicit Testimony Regarding Text Messages Defendant Sent

Defendant has failed to make a requisite showing that counsel was deficient and that the alleged deficient performance prejudiced the defense. "[T]he trial lawyer alone is entrusted with decisions regarding legal tactics such as deciding what witnesses to call." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). A review of the record shows that defense counsel admitted Defendant's cell phone records, which included text messages, as part of his strategy. Defendant used this evidence to his advantage in an attempt to raise reasonable doubt.

Defense counsel asked Det. Jensen if he obtained Defendant's phone records and reviewed them as part of his investigation (4 AA 677). As a result, defense counsel was able to elicit testimony that there was absolutely no evidence in the phone records that Defendant and his co-defendant, Rene, had messaged each other at all regarding planning a crime (4 AA 677). Notably, defense counsel stated during closing argument that the purpose for admitting Defendant's cell phone records:

> What was [Defendant] doing during that drive? We know what he was doing. He was talking on the phone. We introduced the records to show you, he's been on the phone during that period of time. He's not trying to distract Ulises . . . . We know that Edmundo had money prior to this time. He didn't need money. Two days before this we've got text messages saying, I want to buy the ticket, I want my teenage son out if I'm planning to commit a murder? I submit to you that evidence is directly contrary to the State's theory in this case.

5 AA 802.

Further, throughout Defendant's testimony, counsel asked Defendant questions and used the phone records to help corroborate Defendant's testimony. Defense counsel attempted to corroborate that Defendant was making phone calls to Puerto Rico (5 AA 687). Also, while Defendant and his co-defendant, Rene, along with the victim were driving to Mt. Charleston, Defendant was on his phone and not paying attention to where Rene was driving to (5 AA 688). Counsel also attempted to establish that Defendant had money prior to the murder so Defendant did not need to rob the victim (5 AA 710, 802).

Counsel made a strategic decision to admit the cell phone records to attempt to rebut some of the evidence of Defendant's guilt. Defendant made a serious of contradictory statements to police that could have led a reasonable juror to find that Defendant was not credible. Further, Defendant's fingerprints were located on the shotgun used to kill the victim (4 AA 629). Additionally, Defendant's sister, Elba, testified and contradicted much of what Defendant testified about. She testified that contrary to Defendant's testimony, Defendant did in fact speak good English and lived in the United States previously from 1992-2004 (5 AA 717-18). Contrary to Defendant's statement that he needed to hurry up and take a shower because he was dirty from working on a vehicle, Defendant never actually worked on vehicle on the day of the murder (5 AA 720). Despite the fact that Defendant testified that him and Rene did not stop to get any food after the murder, Elba testified that Defendant and Rene brought back fast food (5 AA 723). She also contradicted Defendant's testimony about when Defendant actually gave her money (5 AA 724). Elba testified that Defendant was the one calling Rene after the murder when Elsa and Rene were at the motel, not the other way around as Defendant testified (5 AA 727). Contrary to Defendant's testimony that the victim's vehicle was near Rene's apartment, Elba testified that the vehicle was further away (5 AA 726). Further, Elba stated that she overheard Defendant and Rene having a conversation about the shotgun used to kill the victim (5 AA 721). Additionally, Elba's testimony helped to establish that Defendant took the shotgun back to the bedroom, not Rene (5 AA 723).

Defense counsel had the task of rebutting all of this damaging evidence and made strategic decisions to admit evidence that could help Defendant's case. Rhyne, 118 Nev. at 8,

38 P.3d at 167. Notably, the jury acquitted Defendant of three of the six charges he was charged with, including two of the conspiracy counts. Again, the cell phone evidence helped counsel argue that there was no evidence of a conspiracy. To the extent that Defendant argues that this allowed the State to then present other damaging text messages regarding Defendant's relationship with his wife, a review of the record indicates that defense counsel chose to run the risk that the State would present evidence of a rocky marriage in order to also admit evidence that there was no conspiracy. Apparently the decision paid off as Defendant was acquitted of Conspiracy to Commit Kidnapping and Conspiracy to Commit Kidnapping. Id.

Further, Defendant alleges that admission of this evidence was a result of a failure to properly investigate, Defendant fails to allege and prove what information would have resulted from a better investigation. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004); State v. Haberstroh, 119 Nev. 173, 185, 69 P.3d 676, 684 (2003). Defendant reaped the benefits from the admitted cell phone records and fails to articulate what a better investigation would have uncovered. Because Defendant has failed to make a requisite showing that counsel was deficient and that the alleged deficient performance prejudiced the defense, this Court must deny this claim.

d. Counsel was not Ineffective for Allegedly Admitting Defendant's Guilt

Defendant has failed to make a requisite showing that counsel was deficient and that the alleged deficient performance prejudiced the defense. A careful reading of counsel's *entire* closing argument reveals that counsel never conceded Defendant's guilt. As such, Defendant's argument is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225; NRS 34.735(6). Defendant cites to the following portion of closing argument:

> Certainly there cannot be a unanimous finding on that based upon the evidence presented here. There is a second option, a second degree murder, a general intent, as opposed to specific intent crime. Do they show – And can you get inside of the mind of [Defendant] from the evidence that has been presented and say, he had any specific acts those – to commit those specific crimes. No, you cannot. And with that, you are left with only a second degree or not guilty.

5 AA 803.

However, Defendant fails to give this statement context. Reading counsel's argument prior to and after this statement make it clear that counsel was not conceding guilt. Rather, counsel was urging the jury to conclude that the State had not met its burden and should find Defendant not-guilty.

> *The State with all its power, with all its resources, is coming in, asking you to find somebody guilty that has not been proven guilty beyond a reasonable doubt. The evidence does not support that. It does not support a finding of guilty. You are going to sit down and do equal and exact justice between the State and the Defendant. You have to make a decision, did they prove a first degree murder? No they haven't.* Certainly there cannot be a unanimous finding on that based upon the evidence presented here. There is a second option, a second degree murder, a general intent, as opposed to specific intent crime. Do they show – And can you get inside of the mind of [Defendant] from the evidence that has been presented and say, he had any specific acts those – to commit those specific crimes. No, you cannot. And with that, you are left with only a second degree or not guilty. *And the appropriate decision to do exact and equal justice between the State of Nevada and the Defendant and enter a finding of not guilty.*

Id. (Emphasis added to the portions not cited to by Defendant).

Clearly defense counsel is making the point that the State has not met its burden as to the murder charge. Counsel uses Jury Instruction No. 50 to urge the jury to do equal and exact justice which means finding Defendant not-guilty. Counsel moved through the degrees of murder arguing that the State has failed to meet its burden as to murder entirely, thus, the jury must find Defendant not-guilty. Because Defendant has failed to make a requisite showing that counsel was deficient and that the alleged deficient performance prejudiced the defense, this Court must deny this claim.

e. Counsel was not Ineffective for Allegedly Failing to Properly Investigate and Prepare for Trial

Defendant has failed to make a requisite showing that counsel was deficient and that the alleged deficient performance prejudiced the defense. Defendant has failed to establish what information would have resulted from a better investigation. Molina, 120 Nev. at 192, 87 P.3d at 538; Haberstroh, 119 Nev. at 185, 69 P.3d at 684.

Defendant alleges that trial counsel was ineffective for failing to review Defendant's second statement to police, therefore failing to properly prepare Defendant to testify. However,

even if counsel did not receive the second until October 5, 2011, Defendant did not testify until October 11, 2011. Counsel had several days to review the statement with Defendant. Further, it is clear that even if counsel did not have the statement until October 5, 2011, Defendant knew what statements he made to police as he had barely made the statement to police on March 9, 2011, only seven months prior to testifying (4 AA 675). Defendant should know his own words. As such, it is unclear exactly how much preparation Defendant needed in regards to his own words regarding his version of the alleged acts that transpired.

Further, at the September 20, 2011 status check, defense counsel informed the District Court that he had been receiving late discovery from the State and had been dealing with it the best he could. As such, if counsel felt a need to seek a continuance based on the late disclosure of Defendant's second statement, defense counsel would have.

During Defendant's testimony, he specifically testified that he had reviewed the second statement in preparation for his testimony:

> The State: The first time it was only one. Okay. What about the second time?
>
> Defendant: There was only one – No, sorry, there were two of them. Yeah, the second time there two.
>
> ***
>
> The State: That's okay. And there was actually a transcript from that statement as well, is that correct?
>
> Defendant: Right.
>
> The State: And did you review that transcript in preparing for today.
>
> Defendant: Right

5 AA 696.

Defendant specifically testified that he reviewed the transcript prior to testifying. Defendant has failed to allege and prove what information would have resulted from a better investigation. Further, Defendant fails to articulate exactly how he would have benefitted from

counsel moving for a continuance. Defendant had provided his statement to police seven months prior to testifying and counsel had five days to review the statement with Defendant. Because Defendant has failed to make a requisite showing that counsel was deficient and that the alleged deficient performance prejudiced the defense, this Court must deny this claim.

f. Defendant Inappropriately Raises an Issue Regarding the Admission of Evidence which Should Have Been Raised on Direct Appeal

Defendant raises an issue regarding alleged evidence of ammunitions and a dismantled revolver that was allegedly erroneously admitted at trial. To the extent Defendant raises the issue substantively, this issue is inappropriately raised in the instant petition.

NRS 34.810(1) reads:

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

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001). Here, Defendant could have raised this issue in his direct appeal, but failed to do so. As such, the substantive issue of whether or not his evidence was admissible has been waived as Defendant failed to raise it in his direct appeal.

To the extent Defendant raises this issue as an issue of ineffective assistance of trial counsel, Defendant has failed to make a requisite showing that counsel was deficient and that the alleged deficient performance prejudiced the defense.

NRS 48.015 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Pursuant to NRS 48.035(1), evidence, although relevant, is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice.

Defendant complains that trial counsel should have objected to the admission of the evidence that police found "ammunition magazines that were loaded with 9mm cartridges, and a magazine loaded with 7.62 x .39 caliber ammunition (for a rifle) . . . evidence that there was a santa clause towel that had a disassembled .22 revolved inside." Petition at 23. However, Defendant fails to point out in his Petition that *all* of this "highly prejudicial" evidence was actually found at Rene's apartment, not Defendant's apartment (4 AA 540). Thus, Defendant cannot show that this evidence prejudiced him as Defendant actually benefitted from him. This evidence completely supported Defendant's theory of the case that Rene was a dangerous man and had committed this crime by himself. In fact, during closing argument, defense counsel stated:

> [Defendant] agreed to be interrogated twice, and he should be believed because it's consistent. The evidence certainly is consistent that Rene shot Ulises. That is corroborated by the fact that a deadly weapon was located in Rene's bedroom with the shotgun casings and shells and ammunition, and that Rene had other guns.

5 AA 502. Further, Defendant specifically testified that Rene "always talked about weapons, that he had weapons," and that he had seen weapons in Rene's apartment (5 AA 686).

Because Defendant has failed to make a requisite showing that counsel was deficient and that the alleged deficient performance prejudiced the defense, this Court must deny this claim. As such, this Court must deny this claim.

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g. Defendant Inappropriately Raises an Issue Regarding the Testimony of the State's Expert which Should Have been Raised on Direct Appeal

Defendant raises an issue regarding the expert's testimony at trial where she stated the procedure of having another examiner double-check her findings. To the extent Defendant raises the issue substantively, this issue is inappropriately raised in the instant petition. Defendant could have raised this issue in his direct appeal, but failed to do so. NRS 34.810(1); Franklin, 110 Nev. at 752, 877 P.2d at 1059; Evans, 117 Nev. at 646-47, 29 P.3d at 523. As such, the substantive issue has been waived as Defendant failed to raise it in his direct appeal.

To the extent Defendant raises this issue as an issue of ineffective assistance of trial and appellate counsel, Defendant has failed to make a requisite showing that counsel was deficient and that the alleged deficient performance prejudiced the defense. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him," and gives the accused the opportunity to cross-examine all those who "bear testimony" against him. Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 1364 (2004); see also White v. Illinois, 502 U.S. 346, 359, 112 S. Ct. 736, 744 (1992) (Thomas, J., concurring in part and concurring in judgment) ("critical phrase within the Clause is 'witnesses against him'"). Thus, testimonial hearsay - i.e. extrajudicial statements used as the "functional equivalent" of in-court testimony - may only be admitted at trial if the declarant is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford, 541 U.S. at 53-54, 124 S. Ct. at 1365. To run afoul of the Confrontation Clause, therefore, out-of-court statements introduced at trial must not only be "testimonial" but must also be hearsay, for the Clause does not bar the use of even "testimonial statements for purposes other than establishing the truth of the matter asserted." Id. at 51-52, 60 n.9, 124 S.Ct. at 1369 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct. 2078, 2081-82 (1985)).

As a first note, the statement above is not testimonial hearsay because it does not relate to the evidence in this case at all, but a general practice. Further, even if it did relate to the evidence in this case, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527 (2009), Bullcoming v. New Mexico, 564 U.S. ___, 131 S. Ct. 2705 (2011), Vega v. State, 126 Nev.

___, 236 P.3d 632 (2010), are distinguishable, as each of those cases concerned admission of reports or testimony demonstrating an independent non-testifying expert's testimony. Further, while in those cases, the defendants were unable to cross-examine the examining experts, here, Defendant had a full opportunity to cross-examine Moses.

Because Moses was testifying to the substance of her comparison and not attempting to introduce the substance of another scientist's written report, the holding in Williams v. Illinois, ___ 566 U.S. ___, 132 S. Ct. 2221 (2012), controls the analysis. In Williams, vaginal swabs from a rape kit were submitted to an independent, private laboratory – Cellmark. 566 U.S. at ___, 132 S. Ct. at 2227. Cellmark produced a report transmitting a DNA profile that its analyst had developed from the swabs. Id. A state DNA analyst then searched the state's database and found the matching profile of defendant Williams. Id. At trial, over defendant's objection, the police analyst was permitted to testify that the DNA profile of defendant Williams on file in the state database matched the DNA profile Cellmark created. Id. Cellmark's written report itself was not introduced into evidence. Id. The State did not introduce a witness from Cellmark. Id. No one testified to having personal knowledge of Cellmark's development of the DNA profile. Id.

Four members of the Court, in a plurality opinion, reasoned that the Cellmark report did not constitute a "testimonial statement" as used in Crawford and its progeny because its "primary purpose" is not to accuse a targeted individual and such a report is not inherently inculpatory because a "DNA profile is evidence that tends to exculpate all but one of the more than 7 billion people in the world today." Id. at ___, 132 S. Ct. at 2228, 2250. Additionally, the Court's plurality opined that the DNA laboratory report is not considered "hearsay" material because it is not offered for the truth of the matter asserted, but is the underlying facts that form the basis of the expert's testimony. Id. at ___, 132 S. Ct. at 2228. As such, there is no Crawford violation by permitting an expert to form an independent conclusion based on inadmissible evidence. Id. at ___, 132 S. Ct. at 2228, 2244. The plurality opined that the underlying data/report bore no resemblance to cases in which the prosecution called in-court witnesses to summarize the substance of out-of-court conversations or an absent declarant's

hearsay. Id. at ___, 132 S. Ct. at 2239-40. Because the testifying expert confined her testimony to her own expert analysis and opinions, as the Confrontation Clause requires, the Court did not find a Sixth Amendment violation. Id. at ___, 132 S. Ct. at 2240.

Similar to Williams, where the expert discussed the data generated from Cellmark laboratory for the non-hearsay purpose of explaining the basis of her expert opinion, Moses' testimony that others had reviewed her work and come to the same conclusions was discussed for the non-hearsay purpose of explaining that the evidence could be re-tested and went through a validation process. Therefore, there is no Crawford violation under the plurality decision of Williams.

Justice Thomas provided the fifth vote in support of the Williams holding, rejecting what he called the plurality's "new primary purpose test." Id. at ___, 132 S. Ct. at 2263 (Thomas, J., concurring in the judgment). Nonetheless, Justice Thomas concurred with the plurality that Cellmark's report was not testimonial. In Thomas's view, to satisfy the additional requirement, to be testimonial, a statement must possess sufficient "indicia of solemnity." Id. at ___, 132 S. Ct. at 2259. Only "formalized testimonial materials, such as depositions, affidavits, and prior testimony, or statements resulting from formalized dialogue, such as custodial interrogation" satisfy that criterion. Id. at ___, 132 S. Ct. at 2260. The Cellmark report was "neither sworn nor a certified declaration" and "[a]lthough the report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation." Id.

The same is true of Moses' limited reference to the findings of other analysts. Not only were their reports never introduced into evidence, but they were never sworn or certified. Reference to other analyst's findings bore "no indicia of solemnity" and therefore the limited reference did not violate the Confrontation Clause. See id. at ___, 132 S. Ct. at 2261 ("The Confrontation Clause does not require that evidence be reliable, but that the reliability of a specific 'class of testimonial statements' – formalized statements bearing indicia of solemnity – be assessed through cross-examination.") (internal citations omitted). Therefore, Moses' testimony is also nontestimonial using the solemnity test from Justice Thomas's concurring

opinion. Thus, five justices would find that Moses' statements were not testimonial under the Confrontation Clause.

Therefore, any objection or motion to strike by counsel would have been futile, and Defendant has failed to show deficient performance. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Further, Defendant cannot show prejudice. In Vega, the Nevada Supreme Court did not find prejudice where the expert testified to another doctor's findings, because the non-testifying doctor's findings were "duplicative" and "inconsequential" to the testifying expert's findings. Vega, 126 Nev. at ___, 236 P.3d at 638. Such is the case here: Moses testified extensively as to her methods and findings, and her passing reference to the findings of other analysts could not have prejudiced Defendant.

Because Defendant has failed to make a requisite showing that counsel was deficient and that the alleged deficient performance prejudiced the defense, this Court must deny this claim. Raising this issue on direct appeal would not have been successful. As such, this Court must deny this claim.

h. Appellate Counsel was not Ineffective for Failing to Raise an Issue Related to the Detective's Testimony

Defendant has failed to make a requisite showing that counsel was deficient and that the alleged deficient performance prejudiced the defense. Lay witnesses may offer opinion testimony if their opinions are "[r]ationally based on the[ir] perception." NRS 50.265(1). During Det. Bunn's testimony, in regards to Defendant's first statement to police, Det. Bunn testified in responding to two questions:

> He was extremely nervous. It seemed like he was nervous. He wasn't comfortable. I think I even commented during the interview that he needed to calm down . . . . He did not make a lot of eye contact, and he would start turning away from me, which is normal when somebody tells lies.

4 AA 652. The State argued that Det. Bunn never actually called Defendant a liar, but rather, commented on his own observations when somebody, in general, is lying. Any error would have been deemed harmless given the evidence that was presented to the jury that at the time Defendant gave his first statement, he was in fact lying.

Thereafter, in response to Det. Jensen's testimony that Defendant was at the Clark County Detention Center at the time police obtained a buccal swab, counsel made an oral motion as a result of these combined statements (4 AA 672). As a result, both the State and defense counsel argued and the District Court denied Defendant's request for a mistrial (4 AA 673). In regards to Det. Bunn's testimony, the District Court appropriately reasoned:

> The statement that he made that [Det. Bunn] thought the Defendant was lying, under different circumstances it could be problematic, but I agree by your opening and acknowledging that he was there the night that this took place, that he had gone out to Mt. Charleston with [Rene], his position being, I had nothing to do with that happened out there. So, to the extent that he was telling Det. Bunn, I don't know this guy. I was never in [the] car with him, technically he is not being truthful about that. So, if he says, I don't think he was being truthful with me, I thought he was lying in those statements, even though the State says, look, he was just talking generally about when people lie, obviously it was implicit that he was talking about the Defendant. I think in that context and how this statement went, I don't think that comment was more prejudicial than probative, and in any way warrants a mistrial.

4 AA 674.

Any challenges on appeal would have led the Nevada Supreme Court to find that the District Court did not abuse its discretion in denying the motion for a mistrial and finding that the testimony was not more prejudicial than it was probative. Raising this issue on direct appeal would not have been successful. As such, this Court must deny this claim.

i. Defendant Inappropriately Raises an Issue Regarding the Unrecorded Bench Conference which Should Have been Raised on Direct Appeal

Defendant raises an issue regarding the fact that bench conferences were not recorded at trial. To the extent Defendant raises the issue substantively; this issue is inappropriately raised in the instant petition. Defendant could have raised this issue in his direct appeal, but failed to do so. NRS 34.810(1); Franklin, 110 Nev. at 752, 877 P.2d at 1059; Evans, 117 Nev. at 646-47, 29 P.3d at 523. As such, the substantive issue of whether or not the District Court erred in not recording the bench conferences has been waived.

To the extent Defendant raises this issue as an issue of ineffective assistance of trial and appellate counsel, Defendant has failed to make a requisite showing that counsel was deficient and that the alleged deficient performance prejudiced the defense. Although not all of the bench conferences in this case were recorded, a reading of the record indicates that all of the

bench conferences were memorialized either contemporaneously or the attorneys made a record right after. "Meaningful appellate review is inextricably linked to the availability of an accurate record of the lower court proceedings regarding the issues on appeal; therefore, a defendant is entitled to have the most accurate record of his or her district court proceedings possible." Preciado v. State, 318 P.3d 176, 178, 130 Nev. Adv. Rep. 6 (2014); citing Daniel v. State, 119 Nev. 498, 507-08, 78 P.3d 890, 897 (2003). In Daniel, the Nevada Supreme Court determined that SCR 250(5)(a) and due process require a district court to record all sidebar proceedings in a capital case either contemporaneously with the matter's resolution, or the sidebar's contents must be placed on the record at the next break in trial. 119 Nev. at 507-08, 78 P.3d at 897. The Nevada Supreme Court extended its holding in Daniel to noncapital cases, "because regardless of the type of case, it is crucial for a district court to memorialize all bench conferences, either contemporaneously or by allowing the attorneys to make a record afterward." Preciado, 318 P.3d at 178, 130 Nev. Adv. Rep. 6.

Defendant fails to establish how trial counsel was ineffective as all of the bench conferences were memorialized either contemporaneously or the attorneys made a record right after. Further, Defendant fails to point to exactly what the prejudice was in not recording all of the bench conferences. Because Defendant has failed to make a requisite showing that counsel was deficient and that the alleged deficient performance prejudiced the defense, this Court must deny this claim. Raising this issue on direct appeal would not have been successful. As such, this Court must deny this claim.

j. Counsel was not Ineffective for Failing to Object to Jury Instructions Nos. 19, 21 and 50

Defendant has failed to make a requisite showing that counsel was deficient and that the alleged deficient performance prejudiced the defense. Notably, appellate counsel raised issues with several jury instructions. See Edmundo Oliveras vs. the State of Nevada, Nevada Supreme Court Docket No. 60005, January 9, 2014. Thus, appellate counsel raised the issues that she thought would have merit as opposed to challenging jury instructions that even

Defendant concedes have been found to be valid by the Nevada Supreme Court. Jones v. Barnes, 463 U.S. at 751-52, 103 S. Ct. at 3313.

The district court has broad discretion to settle jury instructions, and the Nevada Supreme Court reviews the district court's decision for an abuse of that discretion or judicial error. Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (citing Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)). Further, the district court only abuses its discretion with regard to jury instructions when the court's "decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Id. Because the instructions Defendant complains about are all valid statements of the law, any objection counsel would have made to the instruction would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103 (2006). Further, Defendant cannot make the requisite showing that if appellate counsel would have raised these issues on direct appeal there was a reasonable probability that counsel would have been successful.

a. Implied Malice Instruction

The malice instruction as given at Defendant's trial stated:

> Express malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.
>
> Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

5 AA 830.

The implied malice instruction was the statutory instruction set forth in NRS 200.020. See Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 483 (2000). The Nevada Supreme Court has previously addressed the malice instruction as given during Defendant's trial and found that, "the statutory language is well established in Nevada, and we conclude that the malice instructions as a whole were sufficient. The Nevada Supreme Court has characterized the statutory language 'abandoned and malignant heart' as 'archaic but essential.'" Leonard v. State, 117 Nev. 53, 79, 17 P.3d 397, 413 (2001) (quoting Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 272 (1988)). Similarly, in Leonard, the Nevada Supreme Court rejected a

challenge to the abandoned and malignant heart language based on the California case of People v. Phillips, 414 P.2d 353, 363–64 (1966). Id. at 79, 17 P.3d at 413.

As the Nevada Supreme Court has previously affirmed the language contained in the Jury Instruction No. 19, Defendant has failed to demonstrate how trial counsel and appellate counsel were ineffective for failing to raise this issue either at trial or on direct appeal. Objection to this instruction at trial would have been futile. Raising this issue on direct appeal would not have been successful. As such, this Court must deny this claim.

b. Premeditation and Deliberation Instruction

Jury Instruction No. 21 was taken verbatim from this Court's decision in Byford v. State, 116 Nev. 215, 237, 994 P.2d 700, 714 (2000). In full, Jury Instruction No. 21 states:

> Murder of the first degree is murder which is perpetrated by means of any kind of willful, deliberate, and premeditated killing. All three elements – willfulness, deliberation, and premeditation – must be proven beyond a reasonable doubt before an accused can be convicted of first-degree murder.
>
> Willfulness is the intent to kill. There need be no appreciable space of time between formation of the intent to kill and the act of killing.
>
> Deliberation is the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the actions.
>
> A deliberate determination may be arrived at in a short period of time. But in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill.
>
> Premeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing.
>
> Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

5 AA 832.

Defendant argues that the concept of "instantaneous" premeditation and deliberation relieves the State of its burden of proof because it is bereft of meaning and does not adequately allow the jury to consider the distinction between first and second degree murder. However, Defendant focuses in on the premeditation language in isolation and does not look to the deliberate determination language or the requirement that a jury find proof beyond a reasonable doubt of willfulness, premeditation and deliberation before finding a defendant guilty of first degree murder. Additionally, Defendant ignores the presence of Jury Instruction No. 22, which states:

> The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.
>
> The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

5 AA 833. The language in Jury Instruction No. 22 is also taken verbatim from Byford, 116 Nev. at 237, 994 P.2d at 714-15.

The Nevada Supreme Court has long recognized that "[j]ury instructions relating to intent must be read together, not disconnectedly, and a single instruction to the jury may not be judged in isolation, but must be viewed in context of the overall charge." Greene v. State, 113 Nev. 157, 167-68, 931 P.2d 54, 61 (1997); see also Cupp v. Naughten, 414 U.S. 141, 146, 94 S. Ct. 396, 400 (1973). When taken together, the jury instructions defining premeditation and deliberation provide adequate guidance to the jury and did not violate Defendant's due process and equal protection rights. To the extent that the premeditation instruction allows for an "instantaneous" decision to commit murder, the instructions as a whole clarify that the time of deliberation or premeditation is not as important as the defendant's ability to enter into a cold, calculated judgment and to weigh the reasons for and against the action. As such, the

jury instructions when taken as a whole did not relieve the State of its burden to prove that the killing was willful, premeditated and deliberate.

As the Nevada Supreme Court has previously affirmed the language contained in the Jury Instruction No. 21, Defendant has failed to demonstrate how trial counsel and appellate counsel were ineffective for failing to raise this issue either at trial or on direct appeal. Objection to this instruction at trial would have been futile. Raising this issue on direct appeal would not have been successful. As such, this Court must deny this claim.

c. Equal and Exact Justice

The equal and exact justice instruction stated:

> Now you will listen to the arguments of counsel who will endeavor to aide you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed by your deliberation as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

5 AA 861.

The Nevada Supreme Court has repeatedly affirmed that giving the equal and exact justice instruction challenged in this case does not violate a defendant's presumption of innocence or lower the State's burden of proof. Thomas v. State, 120 Nev. 37, 46, 83 P.3d 818, 824 (2004); Leonard v. State, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998). Consistent with both Leonard and Thomas, Defendant's jury received a separate instruction advising them that Defendant was presumed innocent until the contrary was proven. CITE.

As the Nevada Supreme Court has previously affirmed the language contained in the Jury Instruction No. 19, Defendant has failed to demonstrate how trial counsel and appellate counsel were ineffective for failing to raise this issue either at trial or on direct appeal. Objection to this instruction at trial would have been futile. Raising this issue on direct appeal would not have been successful. As such, this Court must deny this claim.

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2. THERE WAS NO CUMULATIVE ERROR

Without expressly endorsing an approach for cumulative error in the context of ineffective assistance of counsel claims, the Nevada Supreme Court has acknowledged that other courts have held that "multiple deficiencies in counsel's performance may be cumulated for purposes of the prejudice prong of the Strickland test when the individual deficiencies otherwise would not meet the prejudice prong." McConnell v. State, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009) (utilizing this approach to note that the defendant is not entitled to relief). However, the doctrine of cumulative error is strictly applied, and a finding of cumulative error is extraordinarily rare. State v. Hester, 979 P.2d 729, 733 (N.M. 1999); Derden v. McNeel, 978 F.2d 1453, 1461 (5th Cir. 1992).

In order for cumulative error analysis to apply, a defendant must first make a threshold showing that his counsel's performance was deficient and counsel's representation fell below an objective standard of reasonableness. State v. Theil, 655 N.W.2d 305, 323 (Wis. 2003); State v. Sheahan, 77 P.3d 956, 976 (Idaho 2003); State v. Savo, 108 P.3d 903, 916 (Alaska 2005); State v. Maestas, 299 P.3d 892, 990 (Utah 2012). In fact, logic dictates that cumulative error cannot exist where the defendant fails to show that any violation or deficiency existed under Strickland. McConnell, 125 Nev. at 259, 212 P.3d at 318; United States v. Franklin, 321 F.3d 1231, 1241 (9th Cir. 2003); Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007); Pearson v. State, 12 P.3d 686, 692 (Wyo. 2000); Hester, 979 P.2d at 733. Further, in order to cumulate errors, the defendant must not only show that an error occurred regarding his counsel's representation, but that at least two errors occurred. Rolle v. State, 236 P.3d 259, 276-77 (Wyo. 2010); Hooks v. Workman, 689 F.3d 1148, 1194-95 (10th Cir. 2012).

If the defendant can show that two or more errors existed in his counsel's representation, then he must next show that cumulatively, the errors prejudiced him. McConnell, 125 Nev. at 259 n.17, 212 P.3d at 318 n.17; Doyle v. State, 116 Nev. 148, 163, 995 P.2d 465, 474 (2000); State v. Novak, 124 P.3d 182, 189 (Mont. 2005); Savo, 108 P.3d at 916; People v. Walton, 167 P.3d 163, 169 (Colo. App. 2007). A defendant only shows that prejudice exists when he has shown that the cumulative effect of the errors "were sufficiently

significant to undermine [the court's] confidence in the outcome of the . . . trial." In re Jones, 917 P.2d 1175, 1193 (Cal. 1996); Collins v. Sec'y of Pennsylvania Dep't of Corr., 742 F.3d 528, 542 (3d Cir. 2014). "[M]ere allegations of error without proof of prejudice" are insufficient to demonstrate cumulative error. Novak, 124 P.3d at 189. Further, "in most cases errors, even unreasonable errors, will not have a cumulative impact sufficient to undermine confidence in the outcome of the trial, especially if the evidence against the defendant remains compelling." Theil, 665 N.W.2d at 322-23; see also State v. Maestas, 299 P.3d 892, 990 (2012) (holding that errors resulting in no harm are insufficient to demonstrate cumulative error). Further, cumulative error is not appropriate when a review of "the record as a whole demonstrates that a defendant received a fair trial." State v. Martin, 686 P.2d 937, 943 (N.M. 1984).

Thus, in order to demonstrate cumulative error, a defendant must show: (1) his counsel made multiple errors that were objectively unreasonable, and (2) the cumulative effect of these errors prejudiced the defendant to the extent that the court's confidence in the outcome of the case is undermined. Notably, the Nevada Supreme Court found sufficient evidence to support Defendant's conviction. See Edmundo Oliveras vs. the State of Nevada, Nevada Supreme Court Docket No. 60005, January 9, 2014. Here, Defendant has failed to meet his burden to show the two requisite factors. A review of the record as a whole demonstrates that Defendant received a fair trial. As such, there was no cumulative error.

3. DEFENDANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING

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

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

The Nevada Supreme Court has held that if a petition can be resolved without

expanding the record, then no evidentiary hearing is necessary. Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002); Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

Here, an evidentiary hearing is unwarranted because the petition may be resolved without expanding the record. Mann, 118 Nev. at 356, 46 P.3d at1231; Marshall, 110 Nev. at 1331, 885 P.2d at 605. As explained above, Defendant's claims fail to sufficiently allege ineffective assistance of counsel and are bare/belied by the record, and therefore no evidentiary hearing is warranted in order to deny such claims. Hargrove, 100 Nev. at 503, 686 P.2d at 225. Accordingly, Defendant's request for an evidentiary hearing must be denied.

CONCLUSION

Based on the foregoing, Defendant's Post-Conviction Petition for Writ of Habeas Corpus and Memorandum; Brief in Support of Petition for Writ of Habeas Corpus should be DENIED.

DATED this 16 day of November, 2015.

Respectfully submitted,

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

BY
OFELIA MONJE
Deputy District Attorney
Nevada Bar #11663

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CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was e-mailed this 16th day of November, 2015, to:

CHRISTOPHER ORAM, ESQ.
Counsel for Defendant OLIVERAS
E-mail: crorambusiness@aol.com

BY _____
T. DRIVER
Secretary for the District Attorney's Office

OM/om/MVU

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Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. TROY RICHARD WHITE, Defendant.	CASE#: C-12-286357-1 DEPT. XXVIII

BEFORE THE HONORABLE RONALD J. ISRAEL, DISTRICT COURT JUDGE
(Appearing via Bluejeans)

WEDNESDAY, SEPTEMBER 2, 2020

RECORDER'S TRANSCRIPT OF HEARING
PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

For the Plaintiff:	ELIZABETH A. MERCER, ESQ. Chief Deputy District Attorney (via Bluejeans)
For the Defendant:	CHRISTOPHER R. ORAM, ESQ. (via Bluejeans)

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

Las Vegas, Nevada, Wednesday, September 2, 2020

[Case called at 2:20 p.m.]

MR. ORAM: Good afternoon, Your Honor. Christopher Oram on behalf of Mr. White. He's present, in custody.

MS. MERCER: Good afternoon, Your Honor. Liz Mercer for the State.

THE COURT: White, 286357. This is on for the petition of habeas. I've read everything twice now. It was continued. I obviously read it the first time. Now I reread it.

Mr. Oram, anything to add?

MR. ORAM: Very briefly, Your Honor, because I know you're very thorough in the way you've looked at this. But I would really like to just take a few minutes and just specify as to Argument IV, why I think we should be entitled to an evidentiary hearing. What --

THE COURT: I was going to ask you that.

MR. ORAM: Okay.

THE COURT: Go ahead.

MR. ORAM: Because what I wanted, and I'm very concerned about, is I raise an issue in issue IV about essentially the suppression of the tech messages from the phone. And in it, I specifically cite to and I attached the detectives' and the forensic analysis done of the phone. So just so the record is clear, the phone was found near Echo's body and the State continuously refers to that phone as her phone. In Discovery,

Detective Berghuis wrote that, and I am quoting from page, just a second. I am quoting from page 19 of my brief. The Detective writes in the report: authorization to search the electronic storage device in reference to this case is granted by, per Detective T. Sandborn, the listed device belonging to the victim of the homicide and no one else has standing to contest the search and examination.

So what I do, Your Honor, is I look through the file. I can't find anything substantiating the State's position. So in my brief, I believe, right at the top of -- or the bottom of page 19, top of 20, I say to the State and to the Court, I see a fourth amendment -- potential fourth amendment violation here, but perhaps the State has these documents and I'm wrong. In other words, they're going to produce these cell phone records, show me that I'm completely wrong. And I actually say perhaps that's the case, then this issue is invalid. You know the State comes back, Your Honor, and they don't touch that comment. They don't talk about it, they won't refer to it, they won't say a word about it. That caused me real concern so I asked you for the appointment of an investigator, you graciously did it. What we found out, Your Honor, is that the cell phone records, they don't exist any longer because it's so old. But I asked the Court to consider the fact that Mr. White, obviously without talking about privileged communication, obviously I was moving in that direction. So I would ask for at least an opportunity for an evidentiary hearing because the State is saying, oh no, oh no, there's no proof, you can't meet your burden. It's only her cell phone. But they won't produce a single thing proving that.

I also note that Echo was not working at the time, that my

client, according to what I can see in the trial transcripts, was paying all the bills, paying the mortgage, paying everything. And so I think he's at least entitled to a limited evidentiary hearing, it won't take long, Your Honor. And at that time, maybe we can rebut this and then the Court could ask the State, where is your evidence that this really -- he has no standing. And so with that, Your Honor, that is what I would ask. I would respectfully ask for a limited evidentiary hearing.

THE COURT: All right. Before I let them respond, I'm not quite sure. First of all, you started off with the cell phone and there are two cell phones that's been discussed. So let's make it clear, this is the cell phone found near Ms. Lucas' body, correct?

MR. ORAM: Yes. And that was the most damaging evidence. Not in the case, but some of the most damaging evidence utilized by the State came from that and that's the text messages. And these text messages were from -- one phone from Mr. White to this other phone which we would allege he has standing in and they obtained the text messages from a forensic analysis from that phone that was found near Echo's body. And so we believe that there should have been a motion under *Riley* to suppress that. And that would have perhaps changed the outcome, probably changed the outcome of this case. In other words, it could have reduced easily this case from a second-degree murder to a manslaughter. And so that is really the sort point that I'm trying to make to the Court. Does that answer the Court's question?

THE COURT: Well, I guess you're arguing somehow that this is Mr. White's phone. Is that what --

MR. ORAM: Correct.

THE COURT: -- you're arguing?

MR. ORAM: Yes, that's correct. That he has standing in it. In other words, that maybe there -- it's both of --

THE COURT: What would he be--

MR. ORAM: -- those. I don't want --

THE COURT: What would his standing be at -- well, I read all this, and unless it's his phone, I don't see where there is standing. And he's not -- I don't, haven't seen anything where he's claiming it was his phone. We know he had another phone, probably that'll come up, but where is it, what -- I, well, I'll tell you, unless it's his phone, I don't see under fourteenth, everything, where it's fourth, fourteenth, et cetera, it's not his phone. I don't see any standing.

MR. ORAM: Your Honor, and that's why I said initially in the brief, I agree with the State that if just what you said is right, in other words, if there is proof of that, then I would concede. We asked for the investigator because the State wouldn't provide it so we went out to prove it was his phone. Unfortunately, those records are purged or they no longer exist because of the age of the case. So I'm not able to say to you, as an officer of the court, here I have this document, look it, you can see. I can't do that. But if I have an evidentiary hearing, at least I'd be given an opportunity to put on the investigator and Mr. White could testify, if he so chose.

THE COURT: Assuming, and I guess this is all down to this forensic, what is it that would be on the phone, in your mind, that would

conclusively prove one way or the other, other than the fact that she apparently possessed the phone at the time of her death?

MR. ORAM: I'm sorry, Your Honor, I misunderstood.

THE COURT: Well, so one of your requests is to forensically look at the phone. What, in your mind, could possibly be on the phone to alter the fact that it was -- she certainly possessed it at the time of her death?

MR. ORAM: Your Honor, hopefully I've made that clear, and I will right now. With regard to his phone, Troy White's phone, that was taken from him. When he was arrested, there was a phone, he told them where it was. And there are allegations that I made that that should have been forensically analyzed to determine if in there Mr. White had made a threatening text towards the gentleman who survived, whether that had actually occurred. So that was one argument I had made --

THE COURT: I understand.

MR. ORAM: -- separate from that. Separate from that, I had argued that the phone found near Echo, the female alleged victim, or she's a victim in this case, that that phone, that possessed a wealth of information for the State that they utilized to show essentially the mens rea trying to argue, well they argue first degree murder and that there was a buildup. And they tried to, you know, discount things that are elements of second degree murder and manslaughter, which is obviously their job to say look at his intent in the cell phone text messages. He's getting angrier. Look at how mean these are. Therefore, this is murder of the first degree. They didn't get a first degree murder conviction.

But a point that I'm trying to make is that if Counsel had filed a motion to suppress that, to suppress her phone, his phone, the one found next to her, and if at that time the records would not have been purged and the State was claiming we have proof, from what I can tell from that report, and it's her phone. And so what I'm trying to say is if he had -- if Counsel had suppressed that phone or moved to suppress it, they would not have been able to use that evidence and I would have thought that that would have reduced this case. It would have taken away a lot of the elements of intent that they were arguing in motive. And I think it would have been arguable, could reduce it to a manslaughter.

THE COURT: All right. Anything else? Well, let me ask -- you asked for an evidentiary hearing again. I assume regarding the trial attorney and appellate counsel, what is it you think that -- this isn't, and we see it all the time, you know, my attorney told me not to take a plea. So we need to have trial counsel, same thing could be on the appeals. What is it in this case that would suggest that an evidentiary hearing in order to bring those individuals in, is needed?

MR. ORAM: Well the thing that I'm most -- that I am most concerned about is trying to establish, to the best of my ability, any ownership and standing in that phone. Additionally, I would then ask counsel very briefly, trial counsel and appellate counsel, you know, did you raise this issue, why was this issue not raised. I don't think it would take a long time, Your Honor. In other words, this is an extensive set of issues that we have here. But it would be a limited evidentiary.

THE COURT: I understand. Anything else you want to add?

MR. ORAM: No, I'll submit it, Your Honor.

THE COURT: All right. State.

MS. MERCER: Your Honor, in regards to the arguments Mr. Oram was just making, the basis for the knowledge that it was Echo White's phone was the download that was performed of her phone. It is clear from the content of that phone that it was solely Echo White's phone. There are communications between her and her friends, her and her mother, et cetera. So, no, he would have no standing to suppress the contents of that phone.

But more importantly, Your Honor, Mr. Oram is second guessing trial strategy of Mr. Coffee. And I just want to highlight for the Court that had it not been for the contents of that phone, Mr. Coffee's argument for voluntary manslaughter would have been significantly weakened. It was obviously a strategic decision on his part to allow those text messages into evidence to avoid having to put his client on the stand. Those text messages were the only thing or the primary basis, I would say, for an argument that voluntary manslaughter instructions were warranted. Mr. Coffee used it to argue to the jury that Mr. White had been unraveling and that he just lost control of his emotions and acted in the heat of passion. And without the extensive record regarding those text messages and other items found on the phone, he would not have been able to do so.

I do not believe that Mr. Oram's entitled into an evidentiary hearing because A) there's -- he would have no standing to challenge the admissibility of those text messages and because at this point he's solely

second guessing Defense Counsel's trial strategy.

THE COURT: Anything else?

MS. MERCER: No, Your Honor, and if you -- if the Court wanted to look at the record regarding the contents of the text messages, there was a record made on the sixth day of trial at pages 80 to 87 and 90 to 168. And it was pretty extensive.

Does the Court have any other questions for the State? The reply or the return to the writ was pretty extensive so I don't really feel like I need to address anything in there unless the Court has specific questions.

THE COURT: Yeah, there is a lot in here. I'm just looking over because I wrote down some notes.

Mr. Oram, I did have questions, and this may be because, and we didn't discuss this. You brought up a different issue. On Mr. White's phone, you wanted to have that forensically looked at and my first question is, let's assume that there are no, there's nothing on the phone, which we, I think I can certainly acknowledge that the record is clear that he, I believe, didn't turn himself in until the next day and phones can be, well you can erase. If you have an Apple, you can totally wipe it clean, et cetera, et cetera.

So I guess my question is, even assuming it's not wiped clean, but there are no text messages, again, the text messages can be erased on the phone and what, assuming that there aren't any, what valuation would that have had at trial when the State, I assume they wouldn't have any problem arguing that he had his phone, that he could have easily

erased all this. And so what relevance, well, no, not relevant, how would it, and now I need to look at the quotes from the cases, how would that have been -- how would that omitted issue would have reasonable probability of changing the outcome of the case? It certainly, to me, that particular issue whether or not there are, I mean, assuming, I certainly assume if those texts are on the phone, that wouldn't have helped. And if they're not, how does that, given the entirety of the testimony, how does that change, under *Strickland*, the second prong?

MR. ORAM: Your Honor, I would have agreed with your assessment until a couple of years ago when I had a case where Metro wanted to look at a phone and I was shocked at how, it was an iPhone, and I was shocked at first of all how fast they were able to get all the data. I think Ms. Mercer probably has dealt with this in the past. But they within, I think, I remember within 12 minutes they had taken all the data off. What I distinctly remember is that the alleged victim in that case had deleted many of the messages which were important to me. And so I cross-examined her because they were able to get all the deleted messages. When I say that, I don't have the technological knowledge to make statements like that, but in that trial which I could quote to you the name of the case, I was able to use what she had tried to delete against her saying, look it, you tried to delete those messages for, and I thought that proved something in my case. But I bet Ms. Mercer would not argue that you can just completely delete an iPhone.

I think the way technology is now, they're so sophisticated that they can pull up a lot of the stuff that defendants think they can delete and

that they can rid of. So, again, I don't want to dispute what I don't really have the technological advancement and knowledge to do, but I have seen something a little different than that and so I would think the second prong would be this, that if they did -- were able to get the information off the phone and there was an abundance and it didn't have threatening nature that the gentleman who was shot and survived, claimed. He had also claimed that he was working and then admitted on cross-examination he wasn't. And so I used that in the brief, show that maybe it could be used for impeachment purposes.

THE COURT: Okay, anything else on your reply you want to make?

MR. ORAM: No.

THE COURT: Because I want to ask the State the same question. Let's assume those texts, and I'm not sure you -- let's assume those texts aren't there on the phone, how does that change, it wasn't introduced that there were no texts. Your argument, I guess, is that there were no texts on that phone. What would it show? Because the other phone shows, and my understanding is, the other phone shows texts from Mr. White's phone. Correct?

MR. ORAM: The other phone shows texts from Mr. White's phone to his wife, Echo, yes.

THE COURT: Right. Okay. You get the last word. It's your motion. Anything else?

MR. ORAM: Your Honor, I think we're entitled to an evidentiary hearing. It would be very brief and that's what I would request.

We just need an hour or two of your time.

THE COURT: In the interest of making -- giving the defendant every chance, I'm going to give you an evidentiary hearing of the trial counsel and I guess you want to call appellate counsel also? I'm not ordering a forensic expert certainly at this point because I'm still or I think it's clear to me that the evidence that if there was nothing on the phone would only go to show that it was erased. Because we know nobody's disputing there were text messages from Mr. White's phone that were on -- what's her name, Ms.? The deceased --

MS. MERCER: Echo Lucas, Your Honor.

THE COURT: Yes, the deceased's phone. That's not in dispute. So I just don't get what looking at the phone in any regards would or could change under *Strickland*. And I'm specifically talking about the second prong. Even if you were to, you know, say, again, well it's not on his phone. It has to be -- it has to be, and I'm looking for the quote, reasonable probability that but for the counsel's, in other words, not using it, that the outcome would have been different.

And other than being a minor issue, the facts that were presented, i.e., the actual texts that were on her phone, are evidence. But, again, we're not talking about his conduct. We're talking about his argument regarding manslaughter, et cetera. And clearly she received texts.

I don't see where and how the evidentiary hearing on these other issues, which I said I will allow, changes the argument that Mr. White had some right to privacy of the decedent's, the deceased's

phone. And so I'm denying that part of the writ. I don't see how the testimony of trial counsel in that regard, it was clearly, as I said, possessed. Whether or not he paid does not make it his phone and a right to privacy, or a right under the fourth or the fourteenth amendment. This was, as I said, clearly her phone and therefore that portion is denied. We'll get to the other issues. I'll allow an evidentiary hearing on those.

What do we need? Thirty days?

MS. MERCER: I believe Mr. Oram's microphone is still muted and he's trying to talk.

MR. ORAM: I'm sorry, Your Honor. I believe that we should probably go out 60 days just because of COVID.

THE COURT: All right. That's fine. Sixty days. I wanted to put one other thing on. The -- Mr. Oram, on behalf of Mr. White, is arguing that somehow the text messages that were or are not still on the phone, the testimony was both voicemail and text messages. And so the witness, and yes he was impeached on his work, et cetera, but he testified regarding threatening voicemails. Assuming, again, that these text messages aren't present, and that's what I -- that's all I can imagine that Mr. White is hoping because if they're there, that makes it worse. But that's my understanding of Mr. Oram's argument.

In any event, which goes to, if you will, as an additional point regarding the fact that no reasonable jury could -- here it is, I actually found it: there's no reasonable probability that would undermine the confidence of the outcome.

So that's part of it. Okay. Sixty days.

THE CLERK: Okay, it's for a one-hour hearing?

THE COURT: Yes, evidentiary hearing.

THE CLERK: And does it -- the defendant needs to be transported.

THE COURT: Yes.

THE CLERK: Do we need to do a special setting for that or do you just want me to put it on calendar?

THE COURT: Well, here's the issue. Mr. Oram, do you want to have the defendant in lower level so you can communicate with him during this hearing?

MR. ORAM: It would be fine if we do it just the way we're doing it today. Does that make sense, Your Honor? In other words, where the --

THE COURT: It does to me. Some counsel have asked, I will take a break so he can communicate privately with you if he has additional questions or whatever.

MR. ORAM: Okay.

THE COURT: But some counsel have asked that they actually be together.

MR. ORAM: This is fine, Your Honor.

THE COURT: Okay. All right. Sixty days.

THE CLERK: Okay. Sixty days, would you like it on a Thursday or Friday? Or do you want it on a -- after a criminal calendar?

THE COURT: You know, generally --

MS. MERCER: Your Honor, if Mr. Oram's planning on calling

Mr. Coffee, there's, I think, several homicide calendars on Fridays so that might be difficult.

THE COURT: We can certainly do it on a Thursday.

THE CLERK: Okay. Thursday, the 5th, is good.

THE COURT: All right.

MR. ORAM: Is that November?

THE CLERK: Yes.

MR. ORAM: At what time?

THE COURT: Might as well -- 10:00.

THE CLERK: 10 a.m. November 5th, 10 a.m. for the hearing. And the State, are you going to do an order to transport?

MS. MERCER: Yes, we will.

THE COURT: And he will have to be in lower level. We'll have to check because --

THE CLERK: I think we can do a bluejeans. Oh, you're right.

THE COURT: No, because somebody else is potential -- well, yeah, somebody else is potentially in where you are today at that time. So we'll have to be in lower level assuming they're not doing -- we're going to have to check on when we can do it.

MS. MERCER: Okay.

THE COURT: So we will advise you.

MR. ORAM: Okay.

THE CLERK: Okay, so the hearing is not on the 5th. We'll just -- the JEA will notify you.

MS. MERCER: Thank you, Your Honor.

MR. ORAM: Thank you, Your Honor.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: All right. Have a good day.

[Hearing concluded at 2:50 p.m.]

* * * * * * *

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

Judy Chappell

Judy Chappell
Court Recorder/Transcriber

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DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. TROY RICHARD WHITE, Defendant.	CASE#: C-12-286357-1 DEPT. XXVIII

BEFORE THE HONORABLE RONALD J. ISRAEL, DISTRICT COURT JUDGE

(Appearing via Bluejeans)

THURSDAY, MARCH 4, 2021

RECORDER'S TRANSCRIPT OF HEARING
PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

For the Plaintiff:	ELIZABETH A. MERCER, ESQ. Chief Deputy District Attorney (Appearing via Bluejeans)
For the Defendant:	CHRISTOPHER R. ORAM, ESQ. (Appearing via Bluejeans)

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

Las Vegas, Nevada, Thursday, March 4, 2021

[Case called at 1:38 p.m.]

THE COURT: Counsel, state your appearance for the record.

MR. ORAM: Your Honor, Christopher Oram on behalf of Mr. White. Mr. White is present, in custody.

MS. MERCER: And Liz Mercer for the State, Your Honor.

THE COURT: [Coughs] Excuse me, sorry. I re-read everything so I could remember all of whatever everything that was going on for today. This was -- I gave a fairly extensive decision on most of the issues and we're here on the issue of the decision of whether or whether not to investigate the phone.

So defense.

MR. ORAM: May I proceed, Your Honor?

THE COURT: Yes.

MR. ORAM: Your Honor, we ask that Mr. Coffee be sworn in. He's --

THE COURT: Go ahead, Kathy.

SCOTT COFFEE

[appearing via Bluejeans and having been called as a witness and being first duly affirmed, testified as follows:]

THE CLERK: Please state your name and spell it for the record.

THE WITNESS: Scott Coffee. S-C-O-T-T C-O-F-F-E-E.

MR. ORAM: May I proceed?

THE COURT: Yes, Go ahead.

DIRECT EXAMINATION

BY MR. ORAM:

Q Mr. Coffee, how are you employed?

A I am a Chief Deputy Public Defender with the Clark County Public Defender's Office.

Q How long have you been employed with the Clark County Public Defender's Office?

A I have my 25th anniversary in November.

Q Mr. Coffee, are you part of the homicide unit in the Clark County Public Defender's Office?

A I am.

Q How long have you been in that position?

A About 20 years.

Q Mr. Coffee, approximately how many murder trials would you estimate you have tried?

A God, I don't know. Somewhere between 20 and 30 actual trials. And I know my resolutions, I've resolved about a hundred murder trials as lead counsel.

Q Mr. Coffee, did you represent Troy White in his homicide trial?

A I did.

Q And I want to get right to the point, there was a time where the defendant was arrested in Arizona. Do you recall that?

A Yes.

Q And when he was arrested, the police seized a phone attributed to him. You recall that?

A I'm sorry, you cut out there for a second.

Q When the police arrested him, they located a phone attributed to Mr. White. Do you recall that?

A Yes.

Q And I want to switch gears for a second. Two people were shot in this case, one person lived. You remember the person who lived was Joe Averman.

A Yes.

Q Now when Mr. Averman testified, do you recall that he claimed that he received threatening emails and text messages from Troy White?

A That sounds vaguely familiar.

Q Okay. And I want also ask you if you remember that at some point Mr. Averman's testifying that he was employed and you actually cross-examined him and proved that he was not employed. Do you recall that?

A That sounds accurate.

Q So at some point, did you consider having a forensic analysis conducted on Troy White's phone to disapprove Joe Averman's testimony that he had received threatening mail and text messages from Mr. White?

A To be honest, I did not.

Q Okay. And would you agree, Mr. Coffee, that let's say the phone had been forensically analyzed and there were no such messages from Troy White to Joe Averman. Would you agree that would have placed Mr. Averman's credibility at issue?

A Why -- yeah, I think Mr. Averman already had some credibility

issues. It might or might not. I don't know what happened to the phone and I don't know the timeframe. And that's always one of the problems that we've got with analyzing the phone, right? What's been deleted, what's not been deleted, those sorts of things.

Q So fair to say that you did not have it analyzed, correct?

A That's fair. Or fair to say, I think, probably more accurate, if the State actually seized custody of that phone, I believe that they did based on everything that I'm hearing, I did not seek to have the State run more forensic testing on the phone. I think that would be accurate.

Q Well, Mr. Coffee, if -- if the phone did not have threatening text messages and emails to Mr. Averman, wouldn't that have caused Mr. Averman to have at least discredit to his credibility.

A Again, I think one of the things that discredited Mr. Averman's credibility, but, sure it's something else you can throw in the pile.

Q It sounds like you had concern about the analysis. I didn't mean to cut you off. What is your concern?

A So a lot of times in situations like this, there wasn't much question about who the shooter was. There wasn't a lot of question about what the motivation was. The State had put together their case. We had forensic analysis from Echo's phone. Echo was Troy's white -- Troy White's wife. With those things in mind, there's always a concern you find more bad stuff than good stuff when you dig into a phone.

Q And are you saying there was something that concerns you that you would worry the State may attain something damaging?

A That always concerns me. That despite -- despite what is

there, you know, the odds are, and again I haven't analyzed the phone so I suppose somebody would need to look at the phone, but the obvious thing is it proves that Mr. Averman was telling the truth. Mr. Averman's credibility was already suspect given what we had. Given that he had lied about work and given that he'd moved in with friend's best wife [sic]. There were a variety of things. Mr. Averman, in my opinion, did not come across as the most likable witness or likable person in this particular case. And it just seemed to me the risk outweighed the benefits of doing additional forensic testing.

Q Okay, I recognize that you were concerned about risks. Mr. Coffee, couldn't you have requested permission to obtain the phone and have your own expert analyze it so that, for example, Ms. Mercer would not have had the results of that analysis?

A No, not really. I mean, could I ask for it? I suppose so. And the minute that I asked for it, my guess is that Mr. Mercer is smart enough, having dealt with her for 20 years, give or take, to analyze the thing herself. If I'm looking for something, she's going to be looking for something. So the problem is I trigger an investigation irrespective of what I do.

Q And this is something you had thought through. Is that right?

A Something I considered, at least, yeah. As soon as we start, you know, no stone unturned. Some of the times as soon as you start turning over stones, things get bad.

Q So you don't rule out, since you haven't seen the results, that perhaps the results may have been favorable.

A They could be. They could be. And I did not have that phone forensically analyzed and I didn't ask the State to. So it's possible there could be something favorable on the phone.

Q And so as he sits here today, he's convicted, there wouldn't be harm with today's hearing if we were able to analyze it. In other words, if I was given permission to analyze it, he couldn't be harmed by it, could he?

A I don't suspect so unless you got, you know, a trial on other grounds and there was additional evidence there. But at this point, I don't know if there's any harm in looking.

Q I can inform you, Mr. Coffee, you may not be aware, but all the issues have been denied but this one. So the Court has not given him another trial. So if I was able to get one now, it's not as though the prosecution could bring more charges or -- because he has no trial, so there would be no harm. Is that fair?

A I think that's fair. In fact, I think it'd violate due process if they tried to add additional charges now.

Q Thank you very much, Mr. Coffee. That concludes direct examination.

THE COURT: Cross.

MS. MERCER: Just briefly, Your Honor.

CROSS-EXAMINATION

BY MS. MERCER:

Q Mr. Coffee, has it been your experience that on prior occasions when you've requested that the State permit you to examine a cell phone that's not yet been examined that the State will request its own

examination before turning it over to you?

A Yes.

Q And is that what you suspected would have happened in this scenario had you requested Mr. White's phone be looked at?

A Yeah, in my experience, the State zealously guards the evidence that they've guarded -- that they've gathered. And with that in mind, they're not going to turn things over to me unless they do testing themselves.

Q And during the course of the trial, your strategy was to focus on establishing that this was a voluntary manslaughter as opposed to a first-degree murder. Correct?

A Correct.

Q Throughout the trial, you were able to admit several items of evidence that you obtained as a result of forensic analysis on Echo's phone. Correct?

A Yes, and then we either tendered it or we got to it on cross- examination, but yeah, there was a lot of things in Echo's phone that we tried to use to our advantage.

Q And those included text messages between Mr. White and Echo Lucas, correct?

A Correct.

Q As well as voicemail messages left?

A I believe so.

Q And you were able to do a decent job highlighting the issues that you needed to highlight in order to be able to argue that it was a

voluntary manslaughter with the contents of Echo's phone alone, correct?

A Well he ended up with a second-degree murder so, you know, whether or not we did a great job on voluntary manslaughter, I suppose the proof's in the pudding. He ended up with a second-degree murder as opposed to voluntary manslaughter so I suppose you can always question that. I also don't think I'm in a position to comment on the job that I was able to do or not do. The results are what the results are.

Q I think my question more so was were you able to get the evidence in that you needed to get in to argue voluntary manslaughter?

A We were able to argue voluntary manslaughter based on the evidence we had, yes.

Q And knowing what you saw in Echo's phone and what you saw through Facebook records, et cetera, did you have concerns that there would be more incriminating evidence on the phone than there would be evidence that would be helpful to your case?

A There was a risk involved with having the phone analyzed. And, you know, the incrimination [indiscernible], we didn't test -- we did not contest identity. So, you know, the incrimination part I suppose you could argue that both ways. But there was certainly concern there'd be a lot more that we would have to explain if we started debating whether or not he had threatened Joe Averman because that wasn't the focus of the case.

Q Okay.

A If that answers the question.

Q And as you indicated previously, you were able to do a fairly

decent job attacking Mr. Averman's credibility, correct?

A Again, I wouldn't -- that's for the Judge to decide whether we did decent or not. We did what we could to attack his credibility. We were able to.

Q Okay.

MS. MERCER: Court's indulgence, Your Honor. I don't believe I have any additional questions, Your Honor.

Oh wait, I'm sorry. I do have one more question.

BY MS. MERCER:

Q Mr. Oram had asked you on direct examination whether or not there's any harm in having that phone examined now because the State can't add charges. Do you recall that question?

A Yes.

Q If the phone were to be examined and for some reason this conviction were vacated, it could still potentially produce evidence that would be helpful to the State in a retrial. Correct?

A It could.

MS. MERCER: No further questions.

THE COURT: Any --

MR. ORAM: Nothing further --

THE COURT: -- redirect?

MR. ORAM: -- argument, Your Honor.

THE COURT: Okay. Any other witnesses?

MR. ORAM: No.

THE COURT: Okay. Argument.

CLOSING ARGUMENT BY THE DEFENSE

BY MR. ORAM:

Your Honor, I hear what the State is saying. State and Mr. Coffee are saying that, oh, well, if the phone was analyzed, it could hurt Mr. White. But Mr. Coffee admits now and he says that how can it hurt any. All it could do is potentially produce exculpatory evidence. All I'm asking is that we analyze this phone. State can do it.

In the past, Your Honor, I had a case, a high-profile case, and the State was able to analyze the phone, to 12 minutes. In other words, they have equipment that they can just crunch it out, everything, all the stuff on it. I would ask that the State just be ordered to print it out, provide it to me and then we would be able to see if there's something that was very helpful to the defense, if there were threats or emails to Joe Averman. And then I would be able to further argue.

I'm sort of in a difficult predicament. Because I am aware, Your Honor, that if you were to say to me, what is on the phone. I don't know. What can be helpful on the phone. The only thing I could tell the Court that if threats and emails were not there, it would have attacked or given ammunition to attack Mr. Averman and his credibility further. And it would demonstrate, along the lines of a manslaughter, that the threat was not against Joe Averman. It was a real dispute between Mr. White and his wife who had left him and started this affair with Mr. Averman, moved Mr. Averman into the family home. Troy White was paying the mortgage, paying all the bills. He was upset. It was directed at his wife and not at Mr. Averman. So I think it could have value. And it seems like a very

limited request if State could do it in a few minutes. They could send it over to me and we could set this for a status check, see if I have anything I could possibly argue.

And with that, if the Court doesn't have more questions, I'll submit it.

THE COURT: I don't think I do right now. State.

CLOSING ARGUMENT BY THE STATE

BY MS. MERCER:

Your Honor, the State would submit to the Court that it would be, that there's no reason to have that phone examined. Mr. Averman's credibility was not the -- the main crux of the case. In this particular case, there were extensive text messages and voicemails and Facebook messages and things of that nature that were admitted into evidence that showed that this was not just a heat of passage that he developed the morning of the shooting. This was something that he thought about over the course of several weeks leading up to this homicide. So whether or not there was an indication that there were no messages in their between Mr. Averman and the defendant would not change the outcome of the case.

Furthermore, there's no reason to believe that those messages wouldn't have been deleted at this point. The defendant would have surely been aware of whether or not those messages occurred and I would imagine would have told Mr. Coffee, hey, I never sent those messages so you should look at my phone. So the fact that Mr. Coffee never asked to have the phone examined tends, to me, to

indicate that the messages probably did occur.

But either way, I don't believe the defense has met its burden or that the petitioner's met his burden of proving that counsel was ineffective as to the issue of having the defendant's cell phone examined. I think that it was a strategic decision that Mr. Coffee made and there was good reason that he made that decision.

THE COURT: Defense, reply.

MR. ORAM: Submitted, Your Honor.

THE COURT: Okay. Thank you.

I understand your, I guess, question or your request to, which as you said may not be overly burdensome, to investigate the phone. But I don't see that as being the issue that would expand the record needlessly. If in fact the decision which is the issue here today and which is the subject of the petition, the writ, whether or not Mr. Coffee was ineffective or not looking at or subpoenaing, et cetera, or having the phone looked at.

The issues that are numerous, in fact, certainly, as I believe I stated in the first time we had this, a bare and naked allegation that there might be something in the phone that was owned and possessed by the defendant. Certainly he is the person most knowledgeable as to what was there or wasn't there. And then we get into the issues, well, if you examine it and it's deleted, wiped, whatever the case might be, or parts are wiped, et cetera. All that does is bring up, potentially I guess, both inculpatory and exculpatory I guess you could argue either way. But the issue we have, and I think it's been made very clear by Mr. Coffee's

testimony is, and under the case law, he considered having the phone evaluated and he felt it was more of a risk than a reward. He did impeach the victim on two different issues bringing up his credibility. And it seemed to be that, maybe he didn't quite say it this way, that he thought it was reasonably effective in impeaching the victim's testimony. But he was concerned about finding more bad than good. That was, I believe, a quote, but certainly a paraphrase. I'm not that good at writing as quick. Then I believe he said what's been deleted, what hasn't, something else to throw into the pile, meaning the mix at the time of the trial. And the fact that he made a knowing and intelligent decision, weighing the outcome and deciding that it was, as I said, he was, let's see, considered the risk outweighed benefits of analysis.

In looking at the case law regarding ineffective assistance under *Strickland*, we look at the two prongs. Reasonable investigation and it certainly appears that he made a reasonable investigation given his weighing of the pros and cons in doing so. But more importantly, well as importantly, was the defendant prejudiced by not bringing or not investigation the phone. And the standard is a reasonable probability that the result would have been different. And I don't find, based on the testimony today and the testimony that was presented that there is a reasonable probability that the result would have been different.

Mr. Coffee, along with defense counsel, only presents a, if you will, a toss of the coin. We don't what's on it, but we want it looked at. Mr. Coffee felt that it was more likely to be detrimental. And therefore I don't see any way that there's a reasonable probability that the trial

results would have been different. And under *Strickland*, a reasonable investigation or make a reasonable decision that makes particular investigations unnecessary, that's apparently 104 Supreme Court at 2066, from Mr. Oram, his brief. And he clearly did so. You can't, and the Supreme Court on numerous cases has said, defense counsel isn't responsible for doing everything. They're responsible for making a reasonable view, if you will, of the case and presenting that evidence. And it certainly appears Mr. Coffee did that and decided, after careful thought, not to take a highly riskable, that's a bad, highly, well take a high risk in, I invented that word, in making his decision.

Therefore, I'm denying that issue and I've already laid out, at length, my other ruling so now the State needs to look at both transcripts from the last hearing and this one and prepare the order.

MS. MERCER: Okay, Your Honor. Thank --

THE COURT: Thank you.

MS. MERCER: -- you.

MR. ORAM: Thank you, Your Honor.

MS. MERCER: Thank you, Judge.

THE COURT: Thank you.

[Hearing concluded at 2:04 p.m.]

* * * * * * *

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

Judy Chappell
Court Recorder/Transcriber

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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

TROY WHITE,
#1383512

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: C-12-286357-1

DEPT NO: XXVIII

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATE OF HEARING: MARCH 4, 2021
TIME OF HEARING: 1:30 P.M.

THIS CAUSE having come on for hearing before the Honorable RONALD J. ISRAEL, District Judge, on the 4th day of March, 2021, the Petitioner being present, represented by CHRISTOPHER R. ORAM, ESQ., the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through ELIZABETH A. MERCER, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, the testimony of Scott Coffee, Esq., and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

STATEMENT OF THE CASE

On December 12, 2017, Petitioner Troy White (hereinafter "Petitioner") was charged by way of Information with the following counts: Count 1, BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony - NRS 205.060); Count 2, MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165); Count 3, ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165); Count 4, CARRYING A CONCEALED FIREARM OR OTHER DEADLY WEAPON (Category C Felony - NRS 202.350(1)(d)(3)); and Counts 5, 6, 7, 8, and 9, CHILD ABUSE, NEGLECT, OR ENDANGERMENT (Category B Felony - NRS 200.508(1)).

On February 4, 2013, Petitioner filed a pre-trial Petition for Writ of Habeas Corpus, to which the State filed a Return on March 19, 2013. On March 27, 2013, the district court granted Petitioner's Petition as to Count 1 only and denied the Petition as to Count 2 through 9. The State filed a Notice of Appeal that same day.

On August 8, 2014, the Supreme Court filed an Order affirming the district court's dismissal of Count 1, holding that a person cannot burglarize his own home. On March 24, 2015, the State filed an Amended Information with the following charges: Count 1, MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165); Count 2, ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165); Count 3, CARRYING A CONCEALED FIREARM OR OTHER DEADLY WEAPON (Category C Felony - NRS 202.350(1)(d)(3)); and Counts 4, 5, 6, 7, and 8, CHILD ABUSE, NEGLECT, OR ENDANGERMENT (Category B Felony - NRS 200.508(1)).

Jury trial began on April 6, 2015 and concluded on April 17, 2015. The State also filed a Second Amended Information on April 6, 2015, charging the same counts as listed in the Amended Information. On April 17, 2015, the jury returned a verdict as follows: as to Count 1, Guilty of Second Degree Murder with Use of a Deadly Weapon; as to Count 2, Guilty of

Attempt Murder with Use of a Deadly Weapon; as to Count 3, Guilty of Carrying a Concealed Firearm or Other Deadly Weapon; and as to Counts 4, 5, 6, 7, and 8, Guilty of Child Abuse, Neglect, or Endangerment.

Petitioner was sentenced on July 20, 2015 as follows: as to COUNT 1, to LIFE with the eligibility for parole after serving a MINIMUM of TEN (10) YEARS, plus a CONSECUTIVE term of ONE HUNDRED NINETY-TWO (192) MONTHS with a MINIMUM parole eligibility of SEVENTY-SIX (76) MONTHS for the Use of a Deadly Weapon; as to COUNT 2, to a MAXIMUM of ONE HUNDRED NINETY-TWO (192) MONTHS with a MINIMUM parole eligibility of SEVENTY-SIX (76) MONTHS, plus a CONSECUTIVE term of ONE HUNDRED NINETY-TWO (192) MONTHS with a MINIMUM parole eligibility of SEVENTY-SIX (76) MONTHS for the Use of a Deadly Weapon; CONSECUTIVE to COUNT 1; as to COUNT 3, to a MAXIMUM of FORTY-EIGHT (48) MONTHS with a MINIMUM Parole Eligibility of NINETEEN (19) MONTHS, CONCURRENT WITH COUNTS 1 & 2; as to COUNT 4, to a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONSECUTIVE TO COUNTS 1 & 2; as to COUNT 5, to a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT with ALL OTHER COUNTS; as to COUNT 6, to a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT with ALL OTHER COUNTS; as to COUNT 7, to a MAXIMUM of SIXTY (60) MONTHS with a 11 MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT with ALL OTHER COUNTS; as to COUNT 8, to a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT with ALL OTHER COUNTS; with ONE THOUSAND EIGHTY-EIGHT DAYS (1,088) DAYS credit for time served. The AGGREGATE TOTAL sentence was LIFE with a MINIMUM OF THIRTY-FOUR (34) YEARS. The Judgment of Conviction was filed July 24, 2015, but an Amended Judgment of Conviction was filed February 5, 2016, removing the aggregate sentence total language.

On August 12, 2015, Petitioner filed a Notice of Appeal. On April 26, 2017, the Nevada Supreme Court issued its Order affirming Petitioner's Judgment of Conviction. Remittitur issued on May 25, 2017.

On April 24, 2018, Petitioner filed a post-conviction Petition for Writ of Habeas Corpus. On December 20, 2018, Petitioner filed a Supplemental Brief in Support of his Petition for Writ of Habeas Corpus and Motion for Authorization to Obtain Expert and for Payment of Fees Incurred Herein. The State filed its Response to Petitioner's Supplemental Petition and Opposition to the Motion for Authorization to Obtain Expert and for Payment of Fees Incurred on March 26, 2019. On April 24, 2019, Petitioner filed his Reply and Motion for Authorization to Obtain Investigator and Payment of Frees Incurred Herein. The State filed its Opposition on May 2, 2019. The district court granted the Motion for an Investigator on June 12, 2019. The Order was filed on June 21, 2019.

On September 2, 2020, this Court denied the Motion in part as to the cell phone, and ordered a limited evidentiary on the remaining issues—specifically whether counsel was ineffective for failing to investigate the cell phone. On March 4, 2020, this Court held an evidentiary hearing where Petitioner's prior counsel, Scott Coffee Esq., testified regarding his investigation of Petitioner's cell phone. Following the evidentiary hearing, this Court denied the instant Petition.

STATEMENT OF THE FACTS

At sentencing, the district court relied on the following factual synopsis set forth in White's Supplemental Pre-Sentencing Report:

> On July 27, 2012, Las Vegas Metropolitan Police Department officers were dispatched to local residence regarding a shooting. Upon arrival, officers observed a female, later identified as victim #1 (VC2226830) lying on the floor in a bedroom in the residence. Victim #1 was unconscious and had an apparent gunshot wound to her chest. A male, later identified as victim #2 (VC2226831), was lying on the floor outside the doorway to the bedroom and he also had apparent gunshot wounds. Five children, later identified as nine year old minor victim #3 (VC2226832), five year old minor victim #4 (VC2226833), eight year old minor victim #5 (VC2226834), six month old minor victim

#6 (VC2226835), and two year old minor victim #7 (VC2226836), were also present in the house.

Medical personnel responded and transported victim #1 and victim #2 to a local trauma hospital. Officers later learned that victim #1 arrived at the hospital and after attempts to revive her, she was pronounced dead. Victim #2 underwent surgery to treat his injuries.

During their investigation, officers learned that victim #1 was married to a male, later identified as the defendant, Troy Richard White, for approximately eight years. They have three children in common, identified as minor victim #5, minor victim #6, and minor victim #7, and she has two additional children, identified as minor victim #3 and minor victim #4, with another male.

In June 2012, victim #1 and Mr. White separated and Mr. White moved out of the family home. However, when Mr. White exercised his visitation on the weekends, he would stay in the home and victim #1 would stay elsewhere.

Towards the end of June 2012, Mr. White became aware that victim #1 was dating victim #2. Victim #1 and victim #2 talked about finding their own place, but Mr. White insisted that victim #1 stay in the home and advised her that it was okay for victim #2 to stay there as well.

On the date of the offense, Mr. White went to the residence and told victim #1 that he needed to speak with her in a back room. Victim #1 agreed and went into a bedroom with Mr. White. After approximately five minutes, victim #2 heard victim #1 yell at Mr. White to stop and thought she was in trouble. Victim #2 opened the bedroom door and saw Mr. White shove victim #1 and then shoot her once in the chest or stomach. Mr. White then turned, shot victim #2, and victim #2 fell to the ground. One bullet struck victim #2 in the arm and another bullet struck him in the left abdomen. One of the bullets that struck victim #2 traveled through his body, penetrated the back wall to the room, and exited the residence. At the time victim #2 was shot, he was standing within feet of the crib which contained six month old minor victim #6.

After shooting victim #2, Mr. White stood over him and showed him the gun. Mr. White told victim #2 that he was going to jail and he was going to kill him. Mr. White also asked victim #2, "How does it feel now?" As victim #2 lay on the floor, Mr. White kept coming into the

> residence to threaten him. Mr. White finally left the residence and victim #2 heard a car leave.
>
> Once Mr. White fled the scene, minor victim #3 ran to a neighbor's house to call for police.
>
> Later that date, Mr. White turned himself in at the Yavapai County Sheriff's Department in Arizona. Upon being questioned, Mr. White reported that he was wanted in the Las Vegas area for shooting someone. He stated he fled in the vehicle that was now parked in the sheriff's department lot. Mr. White further stated the gun he used to shoot people in the Las Vegas area was inside the vehicle in the spare tire compartment area.
>
> On August 10, 2012, Mr. White was extradition back from Arizona and booked accordingly at the Clark County Detention Center.

Supplemental PSI, filed August 3, 2015, at 4-5.

AUTHORITY

Petitioner raised five (5) grounds for relief in his post-conviction Petition for Writ of Habeas Corpus alleging ineffective assistance on the part of trial and/or appellate counsel. For the reasons set forth below, all of Petitioner's claims of ineffective assistance of counsel are without merit. As the individual claims are without merit, there is no error to cumulate. Therefore, Petitioner has not established cumulative error. For the following reasons, Petitioner's post-conviction Petition for Writ of Habeas Corpus, his request for an evidentiary hearing, and his motion to obtain a cell phone expert and fees for a forensic analysis of that phone are denied.

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

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of

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

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

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

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel

do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

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

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

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

ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

I. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO FORENSICALLY ANALYZE PETITIONER'S CELL PHONE

Petitioner's first claim of ineffective assistance of trial counsel alleges that "counsel made no effort to ensure that the phone was forensically analyzed to disprove allegations made by the State and Mr. Averman." Petition at 13. As set forth by Petitioner, "[t]he State's witnesses were making claims that Mr. White had delivered threatening voice mails and text messages to Mr. Averman . . . [i]t was incumbent upon defense counsel to obtain a forensic analysis of the phone to properly determine whether the State's witnesses were accurate or whether they could have been easily impeached." Id. Petitioner also alleges Mr. Averman's testimony "may" have been easily defeated had trial counsel obtained a forensic analysis of Petitioner's cell phone. Id.

Petitioner's claim here fails for multiple reasons. Pursuant to NRS 34.735(6) and Hargrove, 100 Nev. at 502, 686 P.2d at 225, a petitioner must support his allegations with specific facts that entitle him to relief; further, pursuant to Molina, 120 Nev. at 192, 87 P.3d at 538, allegations that counsel was ineffective for failure to investigate must show how a better investigation would have rendered a more favorable outcome probable. Petitioner offers no facts indicating that such a forensic analysis *would* have provided witness impeachment evidence, only the bare and naked assertion that such an analysis *could* have provided impeachment evidence. Petition at 15. The cell phone in question was Petitioner's personal cell phone; he better than anyone would have been able to assert that such messages were not sent by him to Mr. Averman. Yet, despite personal knowledge of whether the messages sent from Petitioner's phone came from Petitioner himself, Petitioner has set forth no affidavit or declaration in support of his allegations that an analysis of the phone would have shown that another party sent the messages in question, nor any indication of what such an analysis would have uncovered. Petitioner's bare allegations also do not establish that a forensic analysis

would have rendered a more favorable trial outcome probable, as he cannot establish that a forensic analysis would have uncovered evidence that would have impeached Mr. Averman's testimony. Even if a forensic analysis would have uncovered evidence favorable to Petitioner, there would not be a reasonable probability that the results of the trial would have been different, as there were multiple eyewitnesses to the murder of Echo Lucas. Thus, pursuant to Hargrove and Molina, Petitioner's bare, naked assertions cannot satisfy his burden of showing a reasonable probability that the outcome of the trial would have been more favorable had counsel obtained a forensic examination of Petitioner's phone.

Furthermore, at the limited evidentiary hearing on this issue, Petitioner's former counsel, Scott Coffee, Esq., testified as follows:

> Q [MS. MERCER]: Mr. Coffee, has it been your experience that on prior occasions when you've requested that the State permit you to examine a cell phone that's not yet been examined that the State will request its own examination before turning it over to you?
> A [MR. COFFEE]: Yes.
> Q: And is that what you suspected would have happened in this scenario had you requested Mr. White's phone be looked at?
> A: Yeah, in my experience, the State zealously guards the evidence that they've guarded -- that they've gathered. And with that in mind, they're not going to turn things over to me unless they do testing themselves.
> Q: And during the course of the trial, your strategy was to focus on establishing that this was a voluntary manslaughter as opposed to a first-degree murder. Correct?
> A: Correct.
> Q: Throughout the trial, you were able to admit several items of evidence that you obtained as a result of forensic analysis on Echo's phone. Correct?
> A: Yes, and then we either tendered it or we got to it on cross- examination, but yeah, there was a lot of things in Echo's phone that we tried to use to our advantage.
> Q: And those included text messages between Mr. White and Echo Lucas, correct?
> A: Correct.
> Q: As well as voicemail messages left?
> A: I believe so.
> ...

> Q: And knowing what you saw in Echo's phone and what you saw through Facebook records, et cetera, did you have concerns that there would be more incriminating evidence on the phone than there would be evidence that would be helpful to your case?
> A There was a risk involved with having the phone analyzed. And, you know, the incrimination [indiscernible], we didn't test -- we did not contest identity. So, you know, the incrimination part I suppose you could argue that both ways. But there was certainly concern there'd be a lot more that we would have to explain if we started debating whether or not he had threatened Joe Averman because that wasn't the focus of the case.
> ...
> Q: Mr. Oram had asked you on direct examination whether or not there's any harm in having that phone examined now because the State can't add charges. Do you recall that question?
> A: Yes.
> Q: If the phone were to be examined and for some reason this conviction were vacated, it could still potentially produce evidence that would be helpful to the State in a retrial. Correct?
> A: It could.

Evidentiary Hearing Transcript, March 4, 2021, at 7-10.

Mr. Coffee's testimony demonstrated that he made a strategic decision to not have the phone evaluated because it was more of a risk to Petitioner than a reward. At trial, Mr. Coffee impeached the victim regarding his credibility on two (2) different issues. But overall, Mr. Coffee was more concerned that having the phone evaluated would cause more harm than good. Under Strickland, Mr. Coffee was no ineffective because he made a reasonable strategic decision that the investigation of the cell phone would be more harmful than beneficial. Mr. Coffee used careful thought and deliberation to not take a great risk and have the cell phone evaluated because of the potential harm it could cause Petitioner. Therefore, Petitioner cannot demonstrate that counsel was ineffective for failing to have the cell phone evaluated.

For the reasons set forth above, Petitioner has failed to show pursuant to Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068 that his counsel's representation fell below an objective standard of reasonableness, nor that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Petitioner's claim of ineffective assistance of counsel on this matter is denied.

II. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO ALLEGED ALLEGATIONS OF PRIOR BAD ACTS

Petitioner's second claim of ineffective assistance of trial counsel alleges that the State made an "insinuation" of "extraordinarily prejudicial innuendo" at trial, that trial counsel was ineffective for failing to object to such innuendo, and that appellate counsel was ineffective for failing to raise this issue on appeal. Petition at 16, 19. For the reasons set forth below, this claim is denied.

Petitioner's claim of ineffective assistance on counsel on this count is replete with legal and factual non-sequiturs. First, Petitioner has, whether intentionally or unintentionally, misstated the record in his Petition.[1] In Section III of his Petition, Petitioner sets forth the following: "Echo Lucas' mother testified at trial. During her testimony, the State asked the following question, and she gave the following answer ... Requesting that the mother speculate as to what 'things' Mr. White may have done to her, signaled to the jury that there was (sic) issues of domestic violence." Petition at 16. While Echo Lucas's mother, Amber Gaines, did indeed testify at trial, the State did not ask her the questions that Petitioner quotes in his Petition. Those questions were asked of State's witness Timothy Henderson, a minister with The Potter's House Church, where the victim and Petitioner worshipped together. Trial Transcript, Day 6, at 39. Petitioner refers multiple times to "her" testimony, incorrectly attributing the relevant exchange to Ms. Gaines and not to Mr. Henderson (presumably Reverend Henderson). Petition at 16-19. This is relevant to understand the context of these questions, as the victim's minister's intimate knowledge of a marital relationship would be different than that of the victim's mother.

Second, Petitioner appears to argue that the following vague question was bad act evidence or an insinuation thereof:

> Q: You don't know what things the defendant might have done to her, or what she might have done to him?

[1] The misstatement of the record may be due to Petitioner's curious decision to cite not to the record in the District Court, but to the Appellate's Appendix ("A.A.") filed alongside Petitioner's direct appeal in Nevada Supreme Court case 68632. Petitioner has cited to the A.A. throughout his Petition.

A: No, I'm not aware.

Petition at 16. Petitioner then admits that the question, or "insinuation," is not bad act evidence: "the insinuation is more powerful than an *actual* presentation of a bad act." Id. This begs the question, how could insinuating that a defendant committed a bad act possibly be worse than actually presenting a specific bad act? Petitioner provides no legal authority for this assertion, and as such this argument should be summarily rejected. Jones v. State, 113 Nev. 454, 468, 937 P.2d 55, 64 (1997) (holding that Jones' unsupported contention should be summarily rejected on appeal). Another question posed by the State is also alleged to be an "insinuation" of a bad act:

> Q: At the beginning of 2012 did you learn that he may not be such a wonderful husband to Echo?
> A: Absolutely, yes.

Id at 16, n. 8. A plain reading of the transcript shows that these questions were elicited to show that Mr. Henderson, the minister of The Potter's House Church, lacked intimate knowledge of Petitioner and the victim's relationship, and not to establish a prior bad act. The question asked immediately prior to the first question Petitioner quoted in his Petition is as follows:

> Q: Just so we're clear, you have no idea the things that might have upset either Echo or the defendant in the course of their relationship that caused it to ultimately end in early 2012; correct?
> A: No, I'm not aware of that. No.

Trial Transcript, Day 6, at 39. The question asked immediately prior to the second question was meant to demonstrate that while Petitioner may have been a good father to his children, he was not a good husband to his wife:

> Q: You were asked where the defendant was a wonderful dad. Do you remember that question?
> A: Yes.
> Q: And your answer was yes?
> A: Yes.

Trial Transcript, Day 6, at 74. Even without examining these questions in context, the questions are so facially vague that a reasonable juror would not have understood them as a reference to a prior act of domestic violence. In the first question, Rev. Henderson was unaware of what "things" Petitioner may have done to Ms. Lucas or vice versa, thus there can be no inference of any specific bad act committed by Petitioner. In the second question, Rev. Henderson merely agreed that even with his limited knowledge of their marital affairs, Petitioner was "not [] such a wonderful husband" to Ms. Lucas. This could have referred to any number of things that would make Petitioner a bad husband and not to specific acts of domestic violence.

There is no evidence of any prior bad act in the preceding questions. Instead, Petitioner alleges that the jury could only have inferred that the State was referring to prior bad acts because it mentioned Petitioner's history at sentencing, well after the trial had concluded and outside the presence of the jury. Such an argument is a factual non-sequitur; the jury could not have inferred that the State was referring to acts of domestic violence if the only evidence of such was introduced months after the jury had already entered its guilty verdicts.

Despite his assertion that the questions solicited of Rev. Henderson insinuated bad acts, as indicated by his extensive legal citations regarding bad acts, he also argues—absent any legal authority—that vague insinuations of bad acts are "more powerful than bad acts." Petition at 16. The questions posed of Rev. Henderson referenced no specific bad acts whatsoever committed by Petitioner. It is thus impossible to analyze such questions under a bad act framework, which requires the court determine whether evidence is relevant to the crime charged, proven by clear and convincing evidence, and that the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice. Tinch v. Nevada, 113 Nev. 1170, 946 P.2d 1061 (1997). Objecting to these questions on a "bad act" basis would thus have been futile, as there was no legal basis for such an objection; pursuant to Ennis, 122 Nev. at 706, 137 P.3d at 1103, counsel cannot be ineffective for failing to make futile objections or arguments.

/ / /

Further, Petitioner has not shown a reasonable probability that the result of the trial would have been different had the State not posed such questions or if trial counsel had objected to them, as there were multiple eyewitnesses to the murder of Echo Lucas and substantial evidence showing that Petitioner was guilty of that murder. Thus, Petitioner cannot satisfy his burden of showing a reasonable probability that the outcome of the trial would have been more favorable had trial counsel objected to these alleged bad acts.

Petitioner's sole argument that appellate counsel was ineffective on this issue was that appellate counsel did not raise such on direct appeal. Petition at 19. As set forth above, there was no legal or factual basis for such an argument on appeal; appellate counsel cannot be ineffective for failing to raise futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

For the reasons set forth above, Petitioner has failed to show pursuant to Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068 that his trial counsel or appellate counsel's representation fell below an objective standard of reasonableness, nor that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Petitioner's claim of ineffective assistance of counsel on this matter is therefore denied.

III. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO SUPPRESS THE EVIDENCE OBTAINED FROM THE VICTIM'S CELL PHONE

Petitioner asserts trial counsel was ineffective for failing to "ensure the police obtained a warrant to forensically analyze the phone attributed to Echo Lucas in violation of the Sixth, Fourth, and Fourteenth Amendments to the United States Constitution." Petition at 19. The meaning of this assertion is unclear; Petitioner identifies no legal support for the proposition that defense counsel has a duty to prospectively instruct police to obtain a warrant prior to conducting a search under the Fourth Amendment, nor a duty to prospectively prevent police from performing a search until a warrant is obtained. Further, while Petitioner asserts that the search in question was conducted in violation of the Fourth, Sixth, and Fourteenth Amendment, he does not specify whose constitutional rights were violated from this allegedly improper search; his own, or those of Ms. Lucas. Ordinarily, if trial counsel wishes to prevent

the introduction of evidence that was obtained in violation of a defendant's constitutional rights, counsel will move to suppress such evidence after its collection and prior to trial. See State v. Lloyd, 129 Nev. 739, 741, 312 P.3d 467, 468 (2013). The Court will proceed under the assumption that Petitioner is arguing trial counsel was ineffective for failing to suppress the information from Ms. Lucas's cell phone that was allegedly obtained in violation of Petitioner's Fourth, Sixth, and Fourteenth Amendment rights.

First, Petitioner has no standing to bring this claim. By sending messages from his phone to Ms. Lucas's phone, Petitioner had no legitimate expectation in the privacy of his messages once they were displayed and stored on Ms. Lucas's phone. See Smith v. Maryland, 442 U.S. 735, 743-44, 99 S. Ct 2577, 2581 (1979) ("[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."). Thus, whether Ms. Lucas had singular standing over the cell phone is ultimately irrelevant; as Petitioner has no legitimate expectation of privacy in the text messages voluntarily sent to and stored on Ms. Lucas's cell phone, he has no standing to contest its search.

Even if Petitioner has standing to raise this claim, Petitioner's argument here rests on two (2) unsupported arguments: one, that someone other than Ms. Lucas had standing to assert a violation of her right to be protected from unreasonable search and seizure via the investigation of her cell phone; and two, that it is the State's burden to establish that only Ms. Lucas had the standing to challenge a search of her phone. Petition at 20. The former has no factual support, while the latter has no legal support.

While Petitioner argues that Riley v. California, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) and Carpenter v. United States, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018) support his aforementioned assertions, such cases are easily distinguishable. In Riley, the defendant's personal cell phone was searched after he was taken into custody; here, the cell phone belonged to the victim. 134 S. Ct. at 2481. Thus, unlike in Riley where the defendant had standing to assert a Fourth Amendment violation, Petitioner has submitted no evidence that he has standing to assert a Fourth Amendment violation as it pertains to a search of Ms. Lucas's cell phone. Carpenter on the other hand is wholly inapplicable to the instant case, as it was decided

three (3) years after Petitioner's trial and is not retroactive. Even if Carpenter was retroactive, the case is easily distinguishable. Carpenter held that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through cell-site location information (CSLI), and that the Government must generally obtain a search warrant supported by probable cause before acquiring CSLI from a wireless carrier. 138 S. Ct. at 2217. In this case, the State did not introduce evidence of Petitioner's location as captured by CSLI; instead, the State introduced the substance of the texts sent by Petitioner to Ms. Lucas's phone. Neither Riley nor Carpenter stand for the proposition that the State must produce evidence to establish that a deceased victim was the only individual with standing to contest a search of her cell phone, and Petitioner has provided no other law in support of such argument. As this contention is unsupported by legal citation, it may be summarily dismissed pursuant to Jones, 113 Nev. at 468, 937 P.2d at 64.

As trial counsel did not object to this issue, all but plain error is waived. Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997). "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. 332, 338, 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 v. State, 131 Nev. Adv. Op. 6, 343 P.3d 590, 593 (2015). Petitioner cannot demonstrate plain error here for the reasons listed above; he has no standing to contest the search of Ms. Lucas's cell phone because he voluntarily sent messages to it, thus eliminating his legitimate expectation of privacy in those messages. And even if this court finds he had a legitimate expectation of privacy in those messages, he has not shown that he has standing to challenge a search of Ms. Lucas's phone. Further, Petitioner has produced no legal support for the assertion that the State must demonstrate that no person other than a decedent victim may have

standing to contest a search of a decedent's cell phone. Petitioner's substantial rights have thus not been violated and the failure of trial counsel to contest the search of Ms. Lucas's cell phone is not plain error.

Thus, Petitioner has not shown a reasonable probability that the result of the trial would have been different had counsel moved for suppression of the information gained from Ms. Lucas's cell phone, as there were multiple eyewitnesses to the murder of Ms. Lucas and substantial evidence showing that Petitioner was guilty of that murder. Thus, Petitioner cannot satisfy his burden of showing a reasonable probability that the outcome of the trial would have been more favorable had trial counsel objected to the introduction of Petitioner's text messages.

For the reasons set forth above, Petitioner has failed to show pursuant to Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068 that his trial counsel's representation fell below an objective standard of reasonableness, nor that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Petitioner's claim of ineffective assistance of counsel on this matter is therefore denied.

IV. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO ARGUMENT BY PROSECUTOR AS TO HEAT OF PASSION AND MANSLAUGHTER

Petitioner argues that the prosecutor "patently mischaracterized the standard of proof necessary to find the defendant guilty of manslaughter." Petition at 21. Petitioner then immediately contradicts this assertion by stating "[a]dmittedly, the jury was properly instructed" as to the standard of proof on manslaughter. Id. Despite Petitioner's concession that the jury was properly instructed as to the relevant standard of proof, Petitioner argues that the State's closing argument somehow nullified the jury instructions, that trial counsel was ineffective for failing to object to that closing argument, and that appellate counsel was ineffective as well for failing to raise this issue on appeal. Petition at 21. Petitioner's claims are without merit and are denied.

Petitioner makes multiple arguments against his own claim. "Undoubtedly, the State will argue that Mr. White has not correctly cited to the record. The State will argue that these statements were taken out of context." Petition at 22. Again, Petitioner has not correctly cited to the record, as all of his citations refer to the Appellate's Appendix attached to his direct appeal in Nevada Supreme Court case 68632. Petitioner's blatant refusal to cite to the appropriate record in this case renders the instant claim appropriate for summary dismissal, as his contentions are not properly supported. Jones, 113 Nev. at 468, 937 P.2d 64. Further, by admitting to this Court that his unsupported claim takes the State out of context, Petitioner concedes that his claim is obviously frivolous, unnecessary, unwarranted, and a waste of judicial resources. In further support of this conclusion, Petitioner has already admitted that the jury *was* properly instructed on the proper standard of proof. However, Petitioner cites to "A.A. Vol. 10 p.1939" to show the "heat of passion" instruction that was given to the jury, the instruction at page 1939 of the A.A. is *not* what Petitioner cited in his Petition. Petitioner asserts that the jury was properly instructed on the heat of passion defense as follows:

> A killing committed in the heat of passion, caused by a provocation sufficient to make the passion irresistible, is [V]oluntary [M]anslaughter even if there is an intent to kill, so long as the circumstances in which the killer was place (sic) and the facts that confronted him were [such] as also would [have] aroused the irresistible passion of the ordinarily reasonable man if likewise situated.

Petition at 21. Page 1939 of the Appellate's Appendix, however, reads as follows:

> The heat of passion which will reduce a Murder to Voluntary Manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the circumstances in which he was placed and that facts that confronted him were such as also would have aroused the irresistible passion of the ordinarily reasonable man, if likewise situated. The basic inquiry is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average

> disposition to act rashly and without deliberation and reflection and from such passion rather than from judgment.

Appellate's Appendix, NV. S. Ct. Case 68632; Jury Instructions, filed April 17, 2015, at 17.

The Court believes Petitioner wished to cite to Jury Instructions, filed April 17, 2015, at 16, which shows the actual heat of passion instruction given to the jury, minus Petitioner's numerous clerical errors. Regardless of the improper citation, the Court is confused by Petitioner's decision to bring a claim of ineffective assistance of counsel for failing to object to argument based on a paraphrasing of a jury instruction that Petitioner agrees was proper.

Nevertheless, even if Petitioner's Petition could be construed to allege that the State committed any specific wrongdoing in its argument—which it did not—the State's closing argument did not direct the jury to disregard the written jury instructions regarding the standard of proof necessary to find the Petitioner guilty of manslaughter. Indeed, Petitioner has cited to no such language in the State's closing because it does not exist. Instead, Petitioner merely asserts—without support—that "the prosecutor repeatedly informed the jury that the State's burden of proof was much less than the law required." Petition at 23.

Rather than instructing the jury to disregard the jury instructions, the State's closing argument illustrated how Petitioner did not possess a provocation sufficient to manifest a passion so "irresistible" that he could not control himself in the killing of Ms. Lucas. As noted above, this is merely a paraphrase of the "heat of passion" defense as cited by Petitioner. Indeed, unlike the prototypical example of a man finding another man in bed with his wife and being so overcome with passion that he kills without thought or judgment, here Petitioner had been separated from Ms. Lucas for months, and he knew that the victim and her boyfriend had been seeing each other for some time prior to the killing. See Supplemental PSI filed August 3, 2015, at 4-5. Further, Petitioner did not suddenly walk into a bedroom and find the decedent victim and another man in the embrace of passion; instead, Mr. Averman walked into a room where Petitioner and the victim were arguing, then Petitioner opened fire, killing Ms. Lucas and wounding Mr. Averman. Id. The State's argument that Petitioner did not possess "irresistible" passion that overcame his judgment in the killing of Ms. Lucas is

nothing more than a paraphrasing of a proper jury instruction and in no way suggested a different burden of proof.

As the State's argument was proper and the jury was correctly instructed on the burdens of proof associated with manslaughter and the heat of passion defense, any objection to such at trial would have been futile. Counsel cannot be ineffective for failing to make futile objections or arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Further, as such argument would have been futile, appellate counsel was not ineffective for failing to raise such argument on appeal. While Petitioner argues that raising this issue on appeal "would have mandated reversal," Petitioner sets forth no argument that removing the allegedly improper language from the State's closing would create a reasonable probability that the result of either the instant trial or any trial subsequent to remand would have been or would be different. Petition at 23.

For the reasons set forth above, Petitioner has failed to show pursuant to Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068 that his counsel's representation fell below an objective standard of reasonableness, nor that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Petitioner's claim of ineffective assistance of counsel on this matter is therefore denied.

V. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE REASONABLE DOUBT AND EQUAL AND EXACT JUSTICE INSTRUCTIONS

Petitioner argues that trial counsel and appellate counsel were ineffective for failing to challenge the following jury instruction on reasonable doubt:

> INSTRUCTION NO. 27
> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt, to be reasonable, must be actual, not mere possibility or speculation.

Jury Instructions, filed April 17, 2015, at 31; Petition at 23-24. Petitioner also argues counsel was ineffective for failing to challenge Instruction Number 38 on "Equal and Exact Justice," which reads as follows:

> INSTRUCTION NO. 38.
> Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed, and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

Jury Instructions, filed April 15, 2015, at 42; Petition at 24-25.

The Nevada Supreme Court has already found Instruction Number 27 permissible in Elvik v. State, 114 Nev. 883, 985 P.2d 784 (1998) and Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998). As to the second challenged instruction, Petitioner also asserts that Instruction Number 38 improperly minimized the State's burden of proof and was thus improper pursuant to Sullivan v. Louisiana, 508 U.S. 275, 281 (1993), yet provides no legal analysis in support of this assertion. Further, Petitioner has failed to cite to controlling case law directly adverse to his arguments regarding the propriety of the "equal and exact" jury instruction:

> Appellant contends that the district court denied him the presumption of innocence by instructing the jury to do "equal and exact justice between the Defendant and the State of Nevada." *This instruction does not concern the presumption of innocence or burden of proof.* A separate instruction informed the jury that the defendant is presumed innocent until the contrary is proven and that the state has the burden of proving beyond a reasonable doubt every material element of the crime and that the defendant is the person who committed the offense. Appellant was not denied the presumption of innocence.

Leonard v. State, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998).

As set forth above, there are controlling Nevada cases directly adverse to Petitioner's arguments that the challenged jury instructions were improper; thus, any objection to them at trial would have been futile, as would be any argument that they were improper on direct

appeal. Trial counsel cannot be ineffective for failing to make futile objections or arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Further, as such argument would have been futile, appellate counsel was not ineffective for failing to raise such argument on appeal. Petitioner sets forth no argument that an alternate, acceptable jury instruction would create a reasonable probability that the result of his trial would have been different. Petition at 23-25.

For the reasons set forth above, Petitioner has failed to show pursuant to Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068 that his counsel's representation fell below an objective standard of reasonableness, nor that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Petitioner's claim of ineffective assistance of counsel on this matter is therefore denied.

VI. PETITIONER HAS NOT ESTABLISHED CUMULATIVE ERROR

Petitioner asserts that all of the alleged errors contained in his Petition warrant a finding of cumulative error. Petition at 25. However, in the instant Petition, Petitioner has alleged multiple ineffective assistance of counsel claims, and multiple claims of ineffective assistance of counsel do not establish cumulative error.

The Nevada Supreme Court has held that under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive an appellant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994) (citing Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986); *see also* Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)).

However, the doctrine of cumulative error should not be applied to ineffective assistance of counsel claims, and the Nevada Supreme Court has stated its hesitance to do so. In McConnell v. State, when the defendant argued that his claims of ineffective assistance of counsel amounted to cumulative error, the Nevada Supreme Court plainly said about the application of the cumulative error standard to ineffective assistance claims, even after acknowledging that some courts have applied that doctrine saying, "[w]e are not convinced that this is the correct standard." McConnell v. State, 125 Nev. 243, at 259, 212 P.3d 307, at 318.

Ineffective assistance of counsel claims are a rare breed of claims in that harm is an element of the alleged error. That is to say, there can be no harmless ineffective assistance of counsel error because prejudice (or harm) is a required element of proving the ineffective assistance in the first place. Deficient performance, in and of itself, is not an error without accompanying prejudice. And if prejudice exists, a reversal of the verdict is automatic.

Since there can be no harmless ineffective assistance of counsel, it stands to reason that there cannot be cumulative error as to defendant's claims of the ineffective assistance variety. Nor should cumulative error apply on post-conviction review. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denial, 549 U.S. 1134, 1275 S. Ct. 980 (2007) ("a habeas Petitioner cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test.").

Here, Petitioner explicitly claims cumulative error based on ineffective assistance of counsel, and requests that the Court overturn his conviction. Petition at 25. However, Petitioner was unable to demonstrate prejudice on any of his ineffective assistance of counsel claims. Thus, since none of his ineffective assistance of counsel claims are prejudicial or demonstrate error, there cannot be a finding for cumulative error. Lee v. Lockhart, 754 F.2d 277, at 279 (cited by McConnell, at FN 17).

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

Dated this 13th day of April, 2021

Ronald J. Israel

C-12-286357-1

458 601 410F 483F
Ronald J. Israel
District Court Judge

SC

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

BY /s/ *Taleen Pandukht*
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734

BS/jg/DVU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

State of Nevada	CASE NO: C-12-286357-1
vs	DEPT. NO. Department 28
Troy White	

AUTOMATED CERTIFICATE OF SERVICE

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

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DISTRICT COURT
CLARK COUNTY, NEVADA

TROY WHITE,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: C-12-286357-1

Dept No: XXVIII

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that on April 13, 2021, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on April 15, 2021.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 15 day of April 2021, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:

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/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

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DISTRICT COURT
CLARK COUNTY, NEVADA

TROY WHITE,
#1383512

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: C-12-286357-1

DEPT NO: XXVIII

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATE OF HEARING: MARCH 4, 2021
TIME OF HEARING: 1:30 P.M.

THIS CAUSE having come on for hearing before the Honorable RONALD J. ISRAEL, District Judge, on the 4th day of March, 2021, the Petitioner being present, represented by CHRISTOPHER R. ORAM, ESQ., the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through ELIZABETH A. MERCER, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, the testimony of Scott Coffee, Esq., and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

STATEMENT OF THE CASE

On December 12, 2017, Petitioner Troy White (hereinafter "Petitioner") was charged by way of Information with the following counts: Count 1, BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony - NRS 205.060); Count 2, MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165); Count 3, ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165); Count 4, CARRYING A CONCEALED FIREARM OR OTHER DEADLY WEAPON (Category C Felony - NRS 202.350(1)(d)(3)); and Counts 5, 6, 7, 8, and 9, CHILD ABUSE, NEGLECT, OR ENDANGERMENT (Category B Felony - NRS 200.508(1)).

On February 4, 2013, Petitioner filed a pre-trial Petition for Writ of Habeas Corpus, to which the State filed a Return on March 19, 2013. On March 27, 2013, the district court granted Petitioner's Petition as to Count 1 only and denied the Petition as to Count 2 through 9. The State filed a Notice of Appeal that same day.

On August 8, 2014, the Supreme Court filed an Order affirming the district court's dismissal of Count 1, holding that a person cannot burglarize his own home. On March 24, 2015, the State filed an Amended Information with the following charges: Count 1, MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165); Count 2, ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165); Count 3, CARRYING A CONCEALED FIREARM OR OTHER DEADLY WEAPON (Category C Felony - NRS 202.350(1)(d)(3)); and Counts 4, 5, 6, 7, and 8, CHILD ABUSE, NEGLECT, OR ENDANGERMENT (Category B Felony - NRS 200.508(1)).

Jury trial began on April 6, 2015 and concluded on April 17, 2015. The State also filed a Second Amended Information on April 6, 2015, charging the same counts as listed in the Amended Information. On April 17, 2015, the jury returned a verdict as follows: as to Count 1, Guilty of Second Degree Murder with Use of a Deadly Weapon; as to Count 2, Guilty of

Attempt Murder with Use of a Deadly Weapon; as to Count 3, Guilty of Carrying a Concealed Firearm or Other Deadly Weapon; and as to Counts 4, 5, 6, 7, and 8, Guilty of Child Abuse, Neglect, or Endangerment.

Petitioner was sentenced on July 20, 2015 as follows: as to COUNT 1, to LIFE with the eligibility for parole after serving a MINIMUM of TEN (10) YEARS, plus a CONSECUTIVE term of ONE HUNDRED NINETY-TWO (192) MONTHS with a MINIMUM parole eligibility of SEVENTY-SIX (76) MONTHS for the Use of a Deadly Weapon; as to COUNT 2, to a MAXIMUM of ONE HUNDRED NINETY-TWO (192) MONTHS with a MINIMUM parole eligibility of SEVENTY-SIX (76) MONTHS, plus a CONSECUTIVE term of ONE HUNDRED NINETY-TWO (192) MONTHS with a MINIMUM parole eligibility of SEVENTY-SIX (76) MONTHS for the Use of a Deadly Weapon; CONSECUTIVE to COUNT 1; as to COUNT 3, to a MAXIMUM of FORTY-EIGHT (48) MONTHS with a MINIMUM Parole Eligibility of NINETEEN (19) MONTHS, CONCURRENT WITH COUNTS 1 & 2; as to COUNT 4, to a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONSECUTIVE TO COUNTS 1 & 2; as to COUNT 5, to a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT with ALL OTHER COUNTS; as to COUNT 6, to a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT with ALL OTHER COUNTS; as to COUNT 7, to a MAXIMUM of SIXTY (60) MONTHS with a 11 MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT with ALL OTHER COUNTS; as to COUNT 8, to a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT with ALL OTHER COUNTS; with ONE THOUSAND EIGHTY-EIGHT DAYS (1,088) DAYS credit for time served. The AGGREGATE TOTAL sentence was LIFE with a MINIMUM OF THIRTY-FOUR (34) YEARS. The Judgment of Conviction was filed July 24, 2015, but an Amended Judgment of Conviction was filed February 5, 2016, removing the aggregate sentence total language.

On August 12, 2015, Petitioner filed a Notice of Appeal. On April 26, 2017, the Nevada Supreme Court issued its Order affirming Petitioner's Judgment of Conviction. Remittitur issued on May 25, 2017.

On April 24, 2018, Petitioner filed a post-conviction Petition for Writ of Habeas Corpus. On December 20, 2018, Petitioner filed a Supplemental Brief in Support of his Petition for Writ of Habeas Corpus and Motion for Authorization to Obtain Expert and for Payment of Fees Incurred Herein. The State filed its Response to Petitioner's Supplemental Petition and Opposition to the Motion for Authorization to Obtain Expert and for Payment of Fees Incurred on March 26, 2019. On April 24, 2019, Petitioner filed his Reply and Motion for Authorization to Obtain Investigator and Payment of Frees Incurred Herein. The State filed its Opposition on May 2, 2019. The district court granted the Motion for an Investigator on June 12, 2019. The Order was filed on June 21, 2019.

On September 2, 2020, this Court denied the Motion in part as to the cell phone, and ordered a limited evidentiary on the remaining issues—specifically whether counsel was ineffective for failing to investigate the cell phone. On March 4, 2020, this Court held an evidentiary hearing where Petitioner's prior counsel, Scott Coffee Esq., testified regarding his investigation of Petitioner's cell phone. Following the evidentiary hearing, this Court denied the instant Petition.

STATEMENT OF THE FACTS

At sentencing, the district court relied on the following factual synopsis set forth in White's Supplemental Pre-Sentencing Report:

> On July 27, 2012, Las Vegas Metropolitan Police Department officers were dispatched to local residence regarding a shooting. Upon arrival, officers observed a female, later identified as victim #1 (VC2226830) lying on the floor in a bedroom in the residence. Victim #1 was unconscious and had an apparent gunshot wound to her chest. A male, later identified as victim #2 (VC2226831), was lying on the floor outside the doorway to the bedroom and he also had apparent gunshot wounds. Five children, later identified as nine year old minor victim #3 (VC2226832), five year old minor victim #4 (VC2226833), eight year old minor victim #5 (VC2226834), six month old minor victim

#6 (VC2226835), and two year old minor victim #7 (VC2226836), were also present in the house.

Medical personnel responded and transported victim #1 and victim #2 to a local trauma hospital. Officers later learned that victim #1 arrived at the hospital and after attempts to revive her, she was pronounced dead. Victim #2 underwent surgery to treat his injuries.

During their investigation, officers learned that victim #1 was married to a male, later identified as the defendant, Troy Richard White, for approximately eight years. They have three children in common, identified as minor victim #5, minor victim #6, and minor victim #7, and she has two additional children, identified as minor victim #3 and minor victim #4, with another male.

In June 2012, victim #1 and Mr. White separated and Mr. White moved out of the family home. However, when Mr. White exercised his visitation on the weekends, he would stay in the home and victim #1 would stay elsewhere.

Towards the end of June 2012, Mr. White became aware that victim #1 was dating victim #2. Victim #1 and victim #2 talked about finding their own place, but Mr. White insisted that victim #1 stay in the home and advised her that it was okay for victim #2 to stay there as well.

On the date of the offense, Mr. White went to the residence and told victim #1 that he needed to speak with her in a back room. Victim #1 agreed and went into a bedroom with Mr. White. After approximately five minutes, victim #2 heard victim #1 yell at Mr. White to stop and thought she was in trouble. Victim #2 opened the bedroom door and saw Mr. White shove victim #1 and then shoot her once in the chest or stomach. Mr. White then turned, shot victim #2, and victim #2 fell to the ground. One bullet struck victim #2 in the arm and another bullet struck him in the left abdomen. One of the bullets that struck victim #2 traveled through his body, penetrated the back wall to the room, and exited the residence. At the time victim #2 was shot, he was standing within feet of the crib which contained six month old minor victim #6.

After shooting victim #2, Mr. White stood over him and showed him the gun. Mr. White told victim #2 that he was going to jail and he was going to kill him. Mr. White also asked victim #2, "How does it feel now?" As victim #2 lay on the floor, Mr. White kept coming into the

> residence to threaten him. Mr. White finally left the residence and victim #2 heard a car leave.
>
> Once Mr. White fled the scene, minor victim #3 ran to a neighbor's house to call for police.
>
> Later that date, Mr. White turned himself in at the Yavapai County Sheriff's Department in Arizona. Upon being questioned, Mr. White reported that he was wanted in the Las Vegas area for shooting someone. He stated he fled in the vehicle that was now parked in the sheriff's department lot. Mr. White further stated the gun he used to shoot people in the Las Vegas area was inside the vehicle in the spare tire compartment area.
>
> On August 10, 2012, Mr. White was extradition back from Arizona and booked accordingly at the Clark County Detention Center.

Supplemental PSI, filed August 3, 2015, at 4-5.

AUTHORITY

Petitioner raised five (5) grounds for relief in his post-conviction Petition for Writ of Habeas Corpus alleging ineffective assistance on the part of trial and/or appellate counsel. For the reasons set forth below, all of Petitioner's claims of ineffective assistance of counsel are without merit. As the individual claims are without merit, there is no error to cumulate. Therefore, Petitioner has not established cumulative error. For the following reasons, Petitioner's post-conviction Petition for Writ of Habeas Corpus, his request for an evidentiary hearing, and his motion to obtain a cell phone expert and fees for a forensic analysis of that phone are denied.

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

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of

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

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

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

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel

do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

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

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

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

ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

I. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO FORENSICALLY ANALYZE PETITIONER'S CELL PHONE

Petitioner's first claim of ineffective assistance of trial counsel alleges that "counsel made no effort to ensure that the phone was forensically analyzed to disprove allegations made by the State and Mr. Averman." Petition at 13. As set forth by Petitioner, "[t]he State's witnesses were making claims that Mr. White had delivered threatening voice mails and text messages to Mr. Averman . . . [i]t was incumbent upon defense counsel to obtain a forensic analysis of the phone to properly determine whether the State's witnesses were accurate or whether they could have been easily impeached." Id. Petitioner also alleges Mr. Averman's testimony "may" have been easily defeated had trial counsel obtained a forensic analysis of Petitioner's cell phone. Id.

Petitioner's claim here fails for multiple reasons. Pursuant to NRS 34.735(6) and Hargrove, 100 Nev. at 502, 686 P.2d at 225, a petitioner must support his allegations with specific facts that entitle him to relief; further, pursuant to Molina, 120 Nev. at 192, 87 P.3d at 538, allegations that counsel was ineffective for failure to investigate must show how a better investigation would have rendered a more favorable outcome probable. Petitioner offers no facts indicating that such a forensic analysis *would* have provided witness impeachment evidence, only the bare and naked assertion that such an analysis *could* have provided impeachment evidence. Petition at 15. The cell phone in question was Petitioner's personal cell phone; he better than anyone would have been able to assert that such messages were not sent by him to Mr. Averman. Yet, despite personal knowledge of whether the messages sent from Petitioner's phone came from Petitioner himself, Petitioner has set forth no affidavit or declaration in support of his allegations that an analysis of the phone would have shown that another party sent the messages in question, nor any indication of what such an analysis would have uncovered. Petitioner's bare allegations also do not establish that a forensic analysis

would have rendered a more favorable trial outcome probable, as he cannot establish that a forensic analysis would have uncovered evidence that would have impeached Mr. Averman's testimony. Even if a forensic analysis would have uncovered evidence favorable to Petitioner, there would not be a reasonable probability that the results of the trial would have been different, as there were multiple eyewitnesses to the murder of Echo Lucas. Thus, pursuant to Hargrove and Molina, Petitioner's bare, naked assertions cannot satisfy his burden of showing a reasonable probability that the outcome of the trial would have been more favorable had counsel obtained a forensic examination of Petitioner's phone.

Furthermore, at the limited evidentiary hearing on this issue, Petitioner's former counsel, Scott Coffee, Esq., testified as follows:

> Q [MS. MERCER]: Mr. Coffee, has it been your experience that on prior occasions when you've requested that the State permit you to examine a cell phone that's not yet been examined that the State will request its own examination before turning it over to you?
> A [MR. COFFEE]: Yes.
> Q: And is that what you suspected would have happened in this scenario had you requested Mr. White's phone be looked at?
> A: Yeah, in my experience, the State zealously guards the evidence that they've guarded -- that they've gathered. And with that in mind, they're not going to turn things over to me unless they do testing themselves.
> Q: And during the course of the trial, your strategy was to focus on establishing that this was a voluntary manslaughter as opposed to a first-degree murder. Correct?
> A: Correct.
> Q: Throughout the trial, you were able to admit several items of evidence that you obtained as a result of forensic analysis on Echo's phone. Correct?
> A: Yes, and then we either tendered it or we got to it on cross- examination, but yeah, there was a lot of things in Echo's phone that we tried to use to our advantage.
> Q: And those included text messages between Mr. White and Echo Lucas, correct?
> A: Correct.
> Q: As well as voicemail messages left?
> A: I believe so.
> ...

> Q: And knowing what you saw in Echo's phone and what you saw through Facebook records, et cetera, did you have concerns that there would be more incriminating evidence on the phone than there would be evidence that would be helpful to your case?
> A There was a risk involved with having the phone analyzed. And, you know, the incrimination [indiscernible], we didn't test -- we did not contest identity. So, you know, the incrimination part I suppose you could argue that both ways. But there was certainly concern there'd be a lot more that we would have to explain if we started debating whether or not he had threatened Joe Averman because that wasn't the focus of the case.
> ...
> Q: Mr. Oram had asked you on direct examination whether or not there's any harm in having that phone examined now because the State can't add charges. Do you recall that question?
> A: Yes.
> Q: If the phone were to be examined and for some reason this conviction were vacated, it could still potentially produce evidence that would be helpful to the State in a retrial. Correct?
> A: It could.

Evidentiary Hearing Transcript, March 4, 2021, at 7-10.

Mr. Coffee's testimony demonstrated that he made a strategic decision to not have the phone evaluated because it was more of a risk to Petitioner than a reward. At trial, Mr. Coffee impeached the victim regarding his credibility on two (2) different issues. But overall, Mr. Coffee was more concerned that having the phone evaluated would cause more harm than good. Under Strickland, Mr. Coffee was no ineffective because he made a reasonable strategic decision that the investigation of the cell phone would be more harmful than beneficial. Mr. Coffee used careful thought and deliberation to not take a great risk and have the cell phone evaluated because of the potential harm it could cause Petitioner. Therefore, Petitioner cannot demonstrate that counsel was ineffective for failing to have the cell phone evaluated.

For the reasons set forth above, Petitioner has failed to show pursuant to Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068 that his counsel's representation fell below an objective standard of reasonableness, nor that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Petitioner's claim of ineffective assistance of counsel on this matter is denied.

II. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO ALLEGED ALLEGATIONS OF PRIOR BAD ACTS

Petitioner's second claim of ineffective assistance of trial counsel alleges that the State made an "insinuation" of "extraordinarily prejudicial innuendo" at trial, that trial counsel was ineffective for failing to object to such innuendo, and that appellate counsel was ineffective for failing to raise this issue on appeal. Petition at 16, 19. For the reasons set forth below, this claim is denied.

Petitioner's claim of ineffective assistance on counsel on this count is replete with legal and factual non-sequiturs. First, Petitioner has, whether intentionally or unintentionally, misstated the record in his Petition.[1] In Section III of his Petition, Petitioner sets forth the following: "Echo Lucas' mother testified at trial. During her testimony, the State asked the following question, and she gave the following answer ... Requesting that the mother speculate as to what 'things' Mr. White may have done to her, signaled to the jury that there was (sic) issues of domestic violence." Petition at 16. While Echo Lucas's mother, Amber Gaines, did indeed testify at trial, the State did not ask her the questions that Petitioner quotes in his Petition. Those questions were asked of State's witness Timothy Henderson, a minister with The Potter's House Church, where the victim and Petitioner worshipped together. Trial Transcript, Day 6, at 39. Petitioner refers multiple times to "her" testimony, incorrectly attributing the relevant exchange to Ms. Gaines and not to Mr. Henderson (presumably Reverend Henderson). Petition at 16-19. This is relevant to understand the context of these questions, as the victim's minister's intimate knowledge of a marital relationship would be different than that of the victim's mother.

Second, Petitioner appears to argue that the following vague question was bad act evidence or an insinuation thereof:

> Q: You don't know what things the defendant might have done to her, or what she might have done to him?

[1] The misstatement of the record may be due to Petitioner's curious decision to cite not to the record in the District Court, but to the Appellate's Appendix ("A.A.") filed alongside Petitioner's direct appeal in Nevada Supreme Court case 68632. Petitioner has cited to the A.A. throughout his Petition.

A: No, I'm not aware.

Petition at 16. Petitioner then admits that the question, or "insinuation," is not bad act evidence: "the insinuation is more powerful than an *actual* presentation of a bad act." Id. This begs the question, how could insinuating that a defendant committed a bad act possibly be worse than actually presenting a specific bad act? Petitioner provides no legal authority for this assertion, and as such this argument should be summarily rejected. Jones v. State, 113 Nev. 454, 468, 937 P.2d 55, 64 (1997) (holding that Jones' unsupported contention should be summarily rejected on appeal). Another question posed by the State is also alleged to be an "insinuation" of a bad act:

> Q: At the beginning of 2012 did you learn that he may not be such a wonderful husband to Echo?
> A: Absolutely, yes.

Id at 16, n. 8. A plain reading of the transcript shows that these questions were elicited to show that Mr. Henderson, the minister of The Potter's House Church, lacked intimate knowledge of Petitioner and the victim's relationship, and not to establish a prior bad act. The question asked immediately prior to the first question Petitioner quoted in his Petition is as follows:

> Q: Just so we're clear, you have no idea the things that might have upset either Echo or the defendant in the course of their relationship that caused it to ultimately end in early 2012; correct?
> A: No, I'm not aware of that. No.

Trial Transcript, Day 6, at 39. The question asked immediately prior to the second question was meant to demonstrate that while Petitioner may have been a good father to his children, he was not a good husband to his wife:

> Q: You were asked where the defendant was a wonderful dad. Do you remember that question?
> A: Yes.
> Q: And your answer was yes?
> A: Yes.

Trial Transcript, Day 6, at 74. Even without examining these questions in context, the questions are so facially vague that a reasonable juror would not have understood them as a reference to a prior act of domestic violence. In the first question, Rev. Henderson was unaware of what "things" Petitioner may have done to Ms. Lucas or vice versa, thus there can be no inference of any specific bad act committed by Petitioner. In the second question, Rev. Henderson merely agreed that even with his limited knowledge of their marital affairs, Petitioner was "not [] such a wonderful husband" to Ms. Lucas. This could have referred to any number of things that would make Petitioner a bad husband and not to specific acts of domestic violence.

There is no evidence of any prior bad act in the preceding questions. Instead, Petitioner alleges that the jury could only have inferred that the State was referring to prior bad acts because it mentioned Petitioner's history at sentencing, well after the trial had concluded and outside the presence of the jury. Such an argument is a factual non-sequitur; the jury could not have inferred that the State was referring to acts of domestic violence if the only evidence of such was introduced months after the jury had already entered its guilty verdicts.

Despite his assertion that the questions solicited of Rev. Henderson insinuated bad acts, as indicated by his extensive legal citations regarding bad acts, he also argues—absent any legal authority—that vague insinuations of bad acts are "more powerful than bad acts." Petition at 16. The questions posed of Rev. Henderson referenced no specific bad acts whatsoever committed by Petitioner. It is thus impossible to analyze such questions under a bad act framework, which requires the court determine whether evidence is relevant to the crime charged, proven by clear and convincing evidence, and that the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice. Tinch v. Nevada, 113 Nev. 1170, 946 P.2d 1061 (1997). Objecting to these questions on a "bad act" basis would thus have been futile, as there was no legal basis for such an objection; pursuant to Ennis, 122 Nev. at 706, 137 P.3d at 1103, counsel cannot be ineffective for failing to make futile objections or arguments.

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Further, Petitioner has not shown a reasonable probability that the result of the trial would have been different had the State not posed such questions or if trial counsel had objected to them, as there were multiple eyewitnesses to the murder of Echo Lucas and substantial evidence showing that Petitioner was guilty of that murder. Thus, Petitioner cannot satisfy his burden of showing a reasonable probability that the outcome of the trial would have been more favorable had trial counsel objected to these alleged bad acts.

Petitioner's sole argument that appellate counsel was ineffective on this issue was that appellate counsel did not raise such on direct appeal. Petition at 19. As set forth above, there was no legal or factual basis for such an argument on appeal; appellate counsel cannot be ineffective for failing to raise futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

For the reasons set forth above, Petitioner has failed to show pursuant to Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068 that his trial counsel or appellate counsel's representation fell below an objective standard of reasonableness, nor that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Petitioner's claim of ineffective assistance of counsel on this matter is therefore denied.

III. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO SUPPRESS THE EVIDENCE OBTAINED FROM THE VICTIM'S CELL PHONE

Petitioner asserts trial counsel was ineffective for failing to "ensure the police obtained a warrant to forensically analyze the phone attributed to Echo Lucas in violation of the Sixth, Fourth, and Fourteenth Amendments to the United States Constitution." Petition at 19. The meaning of this assertion is unclear; Petitioner identifies no legal support for the proposition that defense counsel has a duty to prospectively instruct police to obtain a warrant prior to conducting a search under the Fourth Amendment, nor a duty to prospectively prevent police from performing a search until a warrant is obtained. Further, while Petitioner asserts that the search in question was conducted in violation of the Fourth, Sixth, and Fourteenth Amendment, he does not specify whose constitutional rights were violated from this allegedly improper search; his own, or those of Ms. Lucas. Ordinarily, if trial counsel wishes to prevent

the introduction of evidence that was obtained in violation of a defendant's constitutional rights, counsel will move to suppress such evidence after its collection and prior to trial. See State v. Lloyd, 129 Nev. 739, 741, 312 P.3d 467, 468 (2013). The Court will proceed under the assumption that Petitioner is arguing trial counsel was ineffective for failing to suppress the information from Ms. Lucas's cell phone that was allegedly obtained in violation of Petitioner's Fourth, Sixth, and Fourteenth Amendment rights.

First, Petitioner has no standing to bring this claim. By sending messages from his phone to Ms. Lucas's phone, Petitioner had no legitimate expectation in the privacy of his messages once they were displayed and stored on Ms. Lucas's phone. See Smith v. Maryland, 442 U.S. 735, 743-44, 99 S. Ct 2577, 2581 (1979) ("[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."). Thus, whether Ms. Lucas had singular standing over the cell phone is ultimately irrelevant; as Petitioner has no legitimate expectation of privacy in the text messages voluntarily sent to and stored on Ms. Lucas's cell phone, he has no standing to contest its search.

Even if Petitioner has standing to raise this claim, Petitioner's argument here rests on two (2) unsupported arguments: one, that someone other than Ms. Lucas had standing to assert a violation of her right to be protected from unreasonable search and seizure via the investigation of her cell phone; and two, that it is the State's burden to establish that only Ms. Lucas had the standing to challenge a search of her phone. Petition at 20. The former has no factual support, while the latter has no legal support.

While Petitioner argues that Riley v. California, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) and Carpenter v. United States, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018) support his aforementioned assertions, such cases are easily distinguishable. In Riley, the defendant's personal cell phone was searched after he was taken into custody; here, the cell phone belonged to the victim. 134 S. Ct. at 2481. Thus, unlike in Riley where the defendant had standing to assert a Fourth Amendment violation, Petitioner has submitted no evidence that he has standing to assert a Fourth Amendment violation as it pertains to a search of Ms. Lucas's cell phone. Carpenter on the other hand is wholly inapplicable to the instant case, as it was decided

three (3) years after Petitioner's trial and is not retroactive. Even if Carpenter was retroactive, the case is easily distinguishable. Carpenter held that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through cell-site location information (CSLI), and that the Government must generally obtain a search warrant supported by probable cause before acquiring CSLI from a wireless carrier. 138 S. Ct. at 2217. In this case, the State did not introduce evidence of Petitioner's location as captured by CSLI; instead, the State introduced the substance of the texts sent by Petitioner to Ms. Lucas's phone. Neither Riley nor Carpenter stand for the proposition that the State must produce evidence to establish that a deceased victim was the only individual with standing to contest a search of her cell phone, and Petitioner has provided no other law in support of such argument. As this contention is unsupported by legal citation, it may be summarily dismissed pursuant to Jones, 113 Nev. at 468, 937 P.2d at 64.

As trial counsel did not object to this issue, all but plain error is waived. Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997). "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. 332, 338, 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 v. State, 131 Nev. Adv. Op. 6, 343 P.3d 590, 593 (2015). Petitioner cannot demonstrate plain error here for the reasons listed above; he has no standing to contest the search of Ms. Lucas's cell phone because he voluntarily sent messages to it, thus eliminating his legitimate expectation of privacy in those messages. And even if this court finds he had a legitimate expectation of privacy in those messages, he has not shown that he has standing to challenge a search of Ms. Lucas's phone. Further, Petitioner has produced no legal support for the assertion that the State must demonstrate that no person other than a decedent victim may have

standing to contest a search of a decedent's cell phone. Petitioner's substantial rights have thus not been violated and the failure of trial counsel to contest the search of Ms. Lucas's cell phone is not plain error.

Thus, Petitioner has not shown a reasonable probability that the result of the trial would have been different had counsel moved for suppression of the information gained from Ms. Lucas's cell phone, as there were multiple eyewitnesses to the murder of Ms. Lucas and substantial evidence showing that Petitioner was guilty of that murder. Thus, Petitioner cannot satisfy his burden of showing a reasonable probability that the outcome of the trial would have been more favorable had trial counsel objected to the introduction of Petitioner's text messages.

For the reasons set forth above, Petitioner has failed to show pursuant to Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068 that his trial counsel's representation fell below an objective standard of reasonableness, nor that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Petitioner's claim of ineffective assistance of counsel on this matter is therefore denied.

IV. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO ARGUMENT BY PROSECUTOR AS TO HEAT OF PASSION AND MANSLAUGHTER

Petitioner argues that the prosecutor "patently mischaracterized the standard of proof necessary to find the defendant guilty of manslaughter." Petition at 21. Petitioner then immediately contradicts this assertion by stating "[a]dmittedly, the jury was properly instructed" as to the standard of proof on manslaughter. Id. Despite Petitioner's concession that the jury was properly instructed as to the relevant standard of proof, Petitioner argues that the State's closing argument somehow nullified the jury instructions, that trial counsel was ineffective for failing to object to that closing argument, and that appellate counsel was ineffective as well for failing to raise this issue on appeal. Petition at 21. Petitioner's claims are without merit and are denied.

Petitioner makes multiple arguments against his own claim. "Undoubtedly, the State will argue that Mr. White has not correctly cited to the record. The State will argue that these statements were taken out of context." Petition at 22. Again, Petitioner has not correctly cited to the record, as all of his citations refer to the Appellate's Appendix attached to his direct appeal in Nevada Supreme Court case 68632. Petitioner's blatant refusal to cite to the appropriate record in this case renders the instant claim appropriate for summary dismissal, as his contentions are not properly supported. Jones, 113 Nev. at 468, 937 P.2d 64. Further, by admitting to this Court that his unsupported claim takes the State out of context, Petitioner concedes that his claim is obviously frivolous, unnecessary, unwarranted, and a waste of judicial resources. In further support of this conclusion, Petitioner has already admitted that the jury *was* properly instructed on the proper standard of proof. However, Petitioner cites to "A.A. Vol. 10 p.1939" to show the "heat of passion" instruction that was given to the jury, the instruction at page 1939 of the A.A. is *not* what Petitioner cited in his Petition. Petitioner asserts that the jury was properly instructed on the heat of passion defense as follows:

> A killing committed in the heat of passion, caused by a provocation sufficient to make the passion irresistible, is [V]oluntary [M]anslaughter even if there is an intent to kill, so long as the circumstances in which the killer was place (sic) and the facts that confronted him were [such] as also would [have] aroused the irresistible passion of the ordinarily reasonable man if likewise situated.

Petition at 21. Page 1939 of the Appellate's Appendix, however, reads as follows:

> The heat of passion which will reduce a Murder to Voluntary Manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the circumstances in which he was placed and that facts that confronted him were such as also would have aroused the irresistible passion of the ordinarily reasonable man, if likewise situated. The basic inquiry is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average

> disposition to act rashly and without deliberation and reflection and from such passion rather than from judgment.

Appellate's Appendix, NV. S. Ct. Case 68632; Jury Instructions, filed April 17, 2015, at 17.

The Court believes Petitioner wished to cite to Jury Instructions, filed April 17, 2015, at 16, which shows the actual heat of passion instruction given to the jury, minus Petitioner's numerous clerical errors. Regardless of the improper citation, the Court is confused by Petitioner's decision to bring a claim of ineffective assistance of counsel for failing to object to argument based on a paraphrasing of a jury instruction that Petitioner agrees was proper.

Nevertheless, even if Petitioner's Petition could be construed to allege that the State committed any specific wrongdoing in its argument—which it did not—the State's closing argument did not direct the jury to disregard the written jury instructions regarding the standard of proof necessary to find the Petitioner guilty of manslaughter. Indeed, Petitioner has cited to no such language in the State's closing because it does not exist. Instead, Petitioner merely asserts—without support—that "the prosecutor repeatedly informed the jury that the State's burden of proof was much less than the law required." Petition at 23.

Rather than instructing the jury to disregard the jury instructions, the State's closing argument illustrated how Petitioner did not possess a provocation sufficient to manifest a passion so "irresistible" that he could not control himself in the killing of Ms. Lucas. As noted above, this is merely a paraphrase of the "heat of passion" defense as cited by Petitioner. Indeed, unlike the prototypical example of a man finding another man in bed with his wife and being so overcome with passion that he kills without thought or judgment, here Petitioner had been separated from Ms. Lucas for months, and he knew that the victim and her boyfriend had been seeing each other for some time prior to the killing. See Supplemental PSI filed August 3, 2015, at 4-5. Further, Petitioner did not suddenly walk into a bedroom and find the decedent victim and another man in the embrace of passion; instead, Mr. Averman walked into a room where Petitioner and the victim were arguing, then Petitioner opened fire, killing Ms. Lucas and wounding Mr. Averman. Id. The State's argument that Petitioner did not possess "irresistible" passion that overcame his judgment in the killing of Ms. Lucas is

nothing more than a paraphrasing of a proper jury instruction and in no way suggested a different burden of proof.

As the State's argument was proper and the jury was correctly instructed on the burdens of proof associated with manslaughter and the heat of passion defense, any objection to such at trial would have been futile. Counsel cannot be ineffective for failing to make futile objections or arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Further, as such argument would have been futile, appellate counsel was not ineffective for failing to raise such argument on appeal. While Petitioner argues that raising this issue on appeal "would have mandated reversal," Petitioner sets forth no argument that removing the allegedly improper language from the State's closing would create a reasonable probability that the result of either the instant trial or any trial subsequent to remand would have been or would be different. Petition at 23.

For the reasons set forth above, Petitioner has failed to show pursuant to Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068 that his counsel's representation fell below an objective standard of reasonableness, nor that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Petitioner's claim of ineffective assistance of counsel on this matter is therefore denied.

V. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE REASONABLE DOUBT AND EQUAL AND EXACT JUSTICE INSTRUCTIONS

Petitioner argues that trial counsel and appellate counsel were ineffective for failing to challenge the following jury instruction on reasonable doubt:

> INSTRUCTION NO. 27
> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt, to be reasonable, must be actual, not mere possibility or speculation.

Jury Instructions, filed April 17, 2015, at 31; Petition at 23-24. Petitioner also argues counsel was ineffective for failing to challenge Instruction Number 38 on "Equal and Exact Justice," which reads as follows:

> INSTRUCTION NO. 38.
> Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed, and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

Jury Instructions, filed April 15, 2015, at 42; Petition at 24-25.

The Nevada Supreme Court has already found Instruction Number 27 permissible in Elvik v. State, 114 Nev. 883, 985 P.2d 784 (1998) and Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998). As to the second challenged instruction, Petitioner also asserts that Instruction Number 38 improperly minimized the State's burden of proof and was thus improper pursuant to Sullivan v. Louisiana, 508 U.S. 275, 281 (1993), yet provides no legal analysis in support of this assertion. Further, Petitioner has failed to cite to controlling case law directly adverse to his arguments regarding the propriety of the "equal and exact" jury instruction:

> Appellant contends that the district court denied him the presumption of innocence by instructing the jury to do "equal and exact justice between the Defendant and the State of Nevada." *This instruction does not concern the presumption of innocence or burden of proof.* A separate instruction informed the jury that the defendant is presumed innocent until the contrary is proven and that the state has the burden of proving beyond a reasonable doubt every material element of the crime and that the defendant is the person who committed the offense. Appellant was not denied the presumption of innocence.

Leonard v. State, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998).

As set forth above, there are controlling Nevada cases directly adverse to Petitioner's arguments that the challenged jury instructions were improper; thus, any objection to them at trial would have been futile, as would be any argument that they were improper on direct

appeal. Trial counsel cannot be ineffective for failing to make futile objections or arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Further, as such argument would have been futile, appellate counsel was not ineffective for failing to raise such argument on appeal. Petitioner sets forth no argument that an alternate, acceptable jury instruction would create a reasonable probability that the result of his trial would have been different. Petition at 23-25.

For the reasons set forth above, Petitioner has failed to show pursuant to Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068 that his counsel's representation fell below an objective standard of reasonableness, nor that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Petitioner's claim of ineffective assistance of counsel on this matter is therefore denied.

VI. PETITIONER HAS NOT ESTABLISHED CUMULATIVE ERROR

Petitioner asserts that all of the alleged errors contained in his Petition warrant a finding of cumulative error. Petition at 25. However, in the instant Petition, Petitioner has alleged multiple ineffective assistance of counsel claims, and multiple claims of ineffective assistance of counsel do not establish cumulative error.

The Nevada Supreme Court has held that under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive an appellant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994) (citing Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986); *see also* Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)).

However, the doctrine of cumulative error should not be applied to ineffective assistance of counsel claims, and the Nevada Supreme Court has stated its hesitance to do so. In McConnell v. State, when the defendant argued that his claims of ineffective assistance of counsel amounted to cumulative error, the Nevada Supreme Court plainly said about the application of the cumulative error standard to ineffective assistance claims, even after acknowledging that some courts have applied that doctrine saying, "[w]e are not convinced that this is the correct standard." McConnell v. State, 125 Nev. 243, at 259, 212 P.3d 307, at 318.

Ineffective assistance of counsel claims are a rare breed of claims in that harm is an element of the alleged error. That is to say, there can be no harmless ineffective assistance of counsel error because prejudice (or harm) is a required element of proving the ineffective assistance in the first place. Deficient performance, in and of itself, is not an error without accompanying prejudice. And if prejudice exists, a reversal of the verdict is automatic.

Since there can be no harmless ineffective assistance of counsel, it stands to reason that there cannot be cumulative error as to defendant's claims of the ineffective assistance variety. Nor should cumulative error apply on post-conviction review. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denial, 549 U.S. 1134, 1275 S. Ct. 980 (2007) ("a habeas Petitioner cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test.").

Here, Petitioner explicitly claims cumulative error based on ineffective assistance of counsel, and requests that the Court overturn his conviction. Petition at 25. However, Petitioner was unable to demonstrate prejudice on any of his ineffective assistance of counsel claims. Thus, since none of his ineffective assistance of counsel claims are prejudicial or demonstrate error, there cannot be a finding for cumulative error. Lee v. Lockhart, 754 F.2d 277, at 279 (cited by McConnell, at FN 17).

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

Dated this 13th day of April, 2021

Ronald J. Israel

C-12-286357-1

458 601 410F 483F
Ronald J. Israel
District Court Judge

SC

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BY /s/ *Taleen Pandukht*
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BS/jg/DVU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

State of Nevada	CASE NO: C-12-286357-1
vs	DEPT. NO. Department 28
Troy White	

AUTOMATED CERTIFICATE OF SERVICE

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

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