IN THE SUPREME COURT OF THE STATE OF NEVADA

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ALFRED P. CENTOFANTI III,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 58562

RESPONDENT'S ANSWERING BRIEF

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

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Appeal from Denial of Petition for a Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

STATEMENT OF THE ISSUE(S)

1. Whether Mr. Centofanti's trial (post-jury verdict), appeal, and post-conviction counsel were ineffective.
2. Whether Mr. Centofanti was denied rights to due process and a fair trial when the district court denied his claims for ineffective assistance of counsel.
3. Whether the cumulative effect of the errors violated Mr. Centofanti's rights under the State and Federal Constitution.
4. Whether the District Court erred in finding trial counsel was effective in not presenting a diminished capacity defense at trial.
5. Whether the District Court erred in finding no prejudice regarding the selection of the defense of self-defense and the self-defense canvass that occurred prior to trial.
6. Whether the District Court erred in finding no prejudice regarding trial counsel lying about Lt. Steve Franks.
7. Whether the District Court erred in finding no prejudice regarding trial counsel lying about Dr. Scott Sessions.

STATEMENT OF THE CASE

On January 10, 2001 Alfred P. Centofanti III ("Appellant") was charged by way of Indictment with Murder with Use of Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165). 1 Appellant's Appendix ("AA") 055.

Appellant's jury trial commenced on March 15, 2004, and lasted for thirteen days, concluding on April 16, 2004, with the jury finding the Appellant guilty of the charge on April 22, 2004. 6 AA 017, 003.

On June 28, 2004 Appellant filed a Motion for a New Trial. 8 AA 065. On August 10, 2004 the State filed its Opposition to the Motion for a New Trial. 8 AA 110. On August 24, 2004 Appellant filed a Reply to the State's Opposition. 8 AA 141. On August 26, 2004 the Court held a hearing on the Motion for New Trial and subsequently denied the motion. 8 AA 185, 222. On September 2, 2004 the Court entered an Order denying Appellant's Motion for New Trial. 8 AA 226.

On March 4, 2005 Appellant was sentenced to Life without the possibility of parole plus an equal and consecutive life sentence without the possibility of parole for use of a deadly weapon; with three hundred seventy-four (374) days credit for time served. 8 AA 228-29.

On March 11, 2005 a Judgment of Conviction was filed. 8 AA 228. On March 24, 2005 Appellant filed a Notice of Appeal (Case No. 44984). 8 AA 230. On October 27, 2005 Appellant filed his Opening Brief. 9 AA 4. On December 29, 2005 the State filed an Answering Brief. 9 AA 70. On December 27, 2006 the Nevada Supreme Court affirmed the judgment of conviction. 9 AA 133. On March 27, 2007 Remittitur issued. 9 AA 152.

On February 29, 2008 Appellant filed a Petition for Writ of Habeas Corpus (Post-Conviction). 10 AA 001. On April 8, 2008 the State filed its Opposition to the Petition for Writ of Habeas Corpus (Post-Conviction). 11 AA 144. On November 3, 2009 Appellant filed his Reply to Respondent's Answer to Writ of Habeas Corpus (Post-Conviction). 12 AA 001.

On April 23, 2010 Appellant's trial attorney Allen Bloom was deposed. 15 AA 1-16 AA 81. On July 30, 2010 the court held a hearing on the State's Motion to Strike Defendant's Expert/Evidentiary Hearing/Petition for Writ of Habeas Corpus. 13 AA 001. The court denied grounds 1 through 5 of the petition because

they were raised or could have been raised on direct appeal. 13 AA 162. On September 24, 2010 the court resumed the evidentiary hearing and heard closing arguments. 13 AA 169. On May 9, 2011 the court entered an Order Denying Petition for Writ of Habeas Corpus. 12 AA 119.

On May 19, 2011 Appellant filed a Motion for Reconsideration, Withdrawl and Appointment of Alternative Counsel, Stay of Proceedings and Other Relief. 14 AA 016. On May 25, 2011 the State filed its Opposition to the Motion for Reconsideration, Withdrawl and Appointment of Alternative Counsel, Stay of Proceedings and Other Relief. 14 AA 027. On June 2, 2011 Appellant filed a Supplement to his Motion for Reconsideration, Withdrawl and Appointment of Alternative Counsel, Stay of Proceedings and Other Relief. 14 AA 037. On August 5, 2011 the court entered and Order Denying Defendant's Motion for Reconsideration, Withdrawl and Appointment of Alternative Counsel, Stay of Proceedings and Other Relief. 14 AA 054.

On June 10, 2011 Appellant filed a pro per Notice of Appeal. 16 AA 84-88. On July 26, 2011 Appellant filed a Motion to Remand to address a conflict of interest claim. 16 AA 89-94. On August 2, 2011 the State filed its Opposition to Appellant's Motion to Remand. 16 AA 95-97. On November 18, 2011 the Nevada Supreme Court denied the Motion to Remand. 16 AA 99.

On February 22, 2012 Appellant filed his Opening Brief and the State's response follows.

STATEMENT OF RELEVANT FACTS

On April 23, 2010 the deposition of Allen Bloom ("Bloom") was taken. 15 AA 001. Bloom was Appellant's trial counsel. Bloom testified that expert Glen Lipson ("Lipson") did not conduct a full psychological evaluation of Appellant nor did he render a psychological opinion in order to protect Appellant from being evaluated by the State. 15 AA 041. Bloom stated that he was concerned about

Appellant's emotional condition and "his own personal psyche problems" so he wanted to avoid having him examined by the State. 15 AA 181.

Upon review, Bloom found that there were negative aspects in the psychological evaluation. 15 AA 183. Bloom stated that the Appellant would react to small problems in a "very grandiose or dramatic way." 15 AA 184. Therefore it was a strategic decision to not present the evaluation to the jury and this was discussed with Appellant. 15 AA 185.

Bloom also testified about Lt. Steve Franks ("Franks"). Bloom stated that he did not remember meeting Franks because most of the meetings were conducted by his investigator Jim Thomas ("Thomas"). 15 AA 045. Bloom stated that he made a tactical decision not to call Franks because Franks told Thomas that his wife was sick and that he would not be available to testify. 15 AA 055, 057-58. Bloom also explained that the substantive matter of Franks' testimony would not have been different from expert Fraser or Lipson's testimony. 15 AA 198.

Bloom explained that the decision to use self-defense was reached after Appellant told Bloom that's what happened. 15 AA 076. Bloom assessed the case and felt that self-defense was a viable defense. 15 AA 078. Bloom stated that from his analysis of the case he determined that self-defense was the best defense available. 15 AA 120. Bloom said that there was no evidence to support any other defense. 15 AA 122.

Bloom expected expert Dr. John Eisel ("Eisel") to testify that "the pathological evaluation was consistent with a spontaneous shooting of self-defense." 15 AA 063. Bloom called Eisel to testify because he had been a good witness in the past and Bloom decided that Eisel's testimony would bolster the cross-examination of the State's witness Dr. Sims. 15 AA 070.

Bloom stated that Appellant was adamant about testifying and they discussed the pros and cons of his testifying. 15 AA 088. Bloom said that he spent 30 to 40 hours preparing Appellant for his testimony. 15 AA 201. Bloom

also said that he argued for manslaughter in his closing. 15 AA 209. Bloom also requested a jury instruction for second-degree murder and manslaughter. 15 AA 209.

When asked about the self-defense canvass Bloom stated that he did not think that the canvass was a "big factor" because Appellant insisted on testifying and he was going to testify that he was the shooter but that he could not remember pulling the trigger. 5 AA 112. Bloom said that there was not an issue as to who was the shooter so Appellant saying he was the shooter was not an issue. 5 AA 112.

Finally, Bloom was asked about the testimony of Dr. Scott Sessions ("Sessions"). Bloom said Appellant insisted that he testify about how Sessions informed him that his wife Gina Centofanti ("Gina") had a hole in her nose as a result of drug use. 15 AA 098. Bloom explained that the issue was not whether she had a hole in her nose or not; the issue was Appellant's state mind as to whether it was there or not. 15 AA 101.

On July 30, 2010 the court held an evidentiary hearing. 13 AA 001. Lt. Steve Franks testified that he was never contacted by Bloom to testify as an expert in the case. 13 AA 015.

Appellant also testified at the evidentiary hearing and stated that he discussed the issue of self-defense with Bloom. 13 AA 115. Appellant also testified that he and Bloom discussed using a "battered spouse defense." 13 AA 120. Appellant admitted that he lied on the stand regarding the "hole" in Gina's nose from drug use. 13 AA 121-22.

Appellant also testified that he and Bloom discussed using a diminished capacity defense. 13 AA 128. Appellant stated that he told Bloom that it was self-defense. 13 AA 143.

Appellant testified that he was not sure if he had a psychological evaluation but he did admit that he met with Lipson, who was an expert in "psychology" or

"psychiatry factors." 13 AA 152-53. Appellant specifically testified: "I mean, did I meet with the guy? Yes. Did I talk to him? Yes. Did I do certain things? Yes. 13 AA 152. The court also addressed the conflict of interest as it related to Colucci. 13 AA 143.

ARGUMENT

I

APPELLANT WAS NOT ENTITLED TO POST-CONVICTION COUNSEL AND THUS WAS NOT ENTITLED TO EFFECTIVE ASSISTANCE OF COUNSEL

Appellant claims that appellate and post-conviction counsel was ineffective. Appellant's Opening Brief ("AOB") 6. Appellant, however, was not entitled to post-conviction counsel. Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546 (1991). In McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution…does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." McKague specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one does not have "[a]ny constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258. Accordingly, there is no right to effective post-conviction counsel. Id.

Nonetheless, a claim of ineffective assistance of counsel presents a mixed question of law and fact, which is subject to independent review upon appeal. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). However, judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption of effectiveness. Means v. State, 120 Nev. 1001, 103 P.3d 35 (2004); Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984). To overcome this presumption, a defendant must show both that

counsel's representation fell below an objective standard of reasonableness and but for counsel's errors there is a reasonable probability that the result of the proceedings would have been different. Id.; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). A reasonable probability is a probability sufficient to undermine confidence in the outcome." McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999). "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). This Court must look to the facts and circumstances of the case to determine if counsel rendered reasonably effective assistance not pass upon the merits of the action. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978).

Appellant specifically claims that appellate and post-conviction attorney Carmine Colucci ("Colucci") was ineffective because there was a conflict of interest. AOB 9. Appellant argues that he "never made a voluntary, knowing, or understanding waiver of his rights to conflict-free representation." AOB 17. This is simply false.

On July 30, 2010 the court entertained this issue:

> THE COURT: Did you discuss with Mr. Colucci potential conflicts of interest that he might have as having been your counsel on your direct appeal?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And you -- did you agree to waive those conflicts after having that discussion?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay, All right.

13 AA 143. Thus Appellant affirmatively assured the court that he was waiving any potential conflicts.

Now Appellant attempts to argue that this canvass did not meet the standard set forth Ryan v. Dist. Court, 123 Nev. 419, 168 P.3d 703 (2007). In Ryan a husband and wife were accused of murdering their roommate and they chose to be represented by two partners at the same law firm. Id. at 421, 705. The court canvassed the defendants and held that a defendant can waive the conflict of interest and the court will honor the waiver. Id. at 428, 710.

Appellant's argues "unlike Ryan" he did not sign a waiver letter drafted by Colucci and thus he did not waive the conflict. AOB 17. However, Appellant fails to realize that the waiver in writing referenced in Ryan pertains to dual representation. See also RPC 1.7(b)(4). Clearly, that is not the issue in this case and thus the reliance on Ryan is misplaced.

Appellant further argues that he was given a "cursory" canvass, that he was not appointed advisory counsel and that the court did not "explain the disabilities" the conflict placed on him. AOB 18. First, as stated above, Appellant was canvassed and waived the potential conflict. Second, Appellant was a barred attorney that was well-aware of the "ramifications" of Colucci's representation and therefore, an explanation from the court was not warranted. Finally, Appellant informed that court that he did indeed discuss the potential conflict with Colucci and that he understood them. Therefore, Appellant has not demonstrated that his counsel's actions fell below an objective standard of reasonableness. Strickland, 466 US. at 687-8, 294, 104 S.Ct. at 2065, 2068.

Appellant alleges his attorney represented him under an actual conflict of interest; and therefore, prejudice is presumed. AOB 21. Appellant attempts to analogize his case to Jones v. State, 110 Nev. 730, 877 P.2d 1052 (1994) but this analogy cannot be sustained because the presumption of prejudice in Jones pertained to defense counsel conceding his client's guilt. Ultimately, Appellant has not established that there is a presumption of prejudice.

Appellant argues that he was prejudiced because Colucci did not "raise at least the first five grounds" in his petition on direct appeal. AOB 22. Appellant, however, has not demonstrated actual prejudice. This argument must fail because any potential conflict did not occur until the petition was filed. At the time the direct appeal was filed there was no "potential conflict" and as such Appellant cannot claim that he was prejudiced when the "first five claims" were not raised on direct appeal. Thus, Appellant has failed to demonstrate he was prejudiced. Consequently, absent a showing of prejudice resulting from counsel's alleged conduct, Appellant is not entitled to relief.

Finally, Appellant claims that Colucci was ineffective because he received money from him without informing him of the potential conflicts. AOB 23. Again, Appellant was a barred attorney that was well-aware there could be a conflict of interest and he subsequently waived the potential conflict. Furthermore, Appellant cannot overcome the presumption that but for counsel's errors there is a reasonable probability that the result of the proceedings would have been different. Strickland 466 U.S. at 689, 104 S. Ct. at 2065 (1984). Thus, Appellant is not entitled to relief.

II
THE DISTRICT COURT DID NOT ERR WHEN IT FOUND THAT APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Appellant claims that the district court erred when it denied Appellant's ineffective assistance claims and did not provide a "reasoned conclusion of law for each alleged instance." AOB 25. Appellant further claims that the "error" warrants a new trial. Id. Appellant incorporated thirty-six (36) specific claims of ineffective assistance of counsel in the instant brief. AOB 25-41. Appellant's argument is without merit and thus a new trial is not warranted.

If the trial record "provides sufficient justification for the state-court ruling, the failure to explain that ruling more completely does not render it constitutionally

defective," under the federal constitution. Arizona v. Washington, 434 U.S. 497, 516–17, 98 S. Ct. 824, 836 (1978).

Here, the record provided sufficient justification for the court's rulings. The court in its May 9, 2011 Order stated: "[t]he Court has reviewed all other arguments presented by Defendant and similarly finds that the required prejudice has not been demonstrated." 12 AA 123. The court in its Order further explained that it examined copious amounts of evidence including but not limited to: "arguments by counsel and subsequent discovery proceedings . . . an evidentiary hearing . . . parties' briefs . . . extensive appendix and exhibits submitted by Defendant . . . and legal authorities" to reach its decision to deny the claims of ineffective assistance of counsel. Thus the record is replete with justifications for the court's decision and as such Appellant is not entitled to a new trial.

III
THERE WAS NO CUMULATIVE ERROR

Appellant claims that trial counsel committed several prejudicial errors that denied him the right to a fair trial; and as such, he is entitled to a new trial. AOB 43-44. However, Appellant has failed to make out a valid claim for any of the issues he has raised. 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 a defendant 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). The relevant factors to consider in determining "whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" Big Pond, 101 Nev. at 3, 692 P.2d at 1289; See also Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). The doctrine of cumulative error "requires that numerous errors be committed, not merely alleged." People v. Rivers, 727 P.2d 394, 401 (Colo. Ct. App. 1986); see also People v. Jones, 665

P.2d 127, 131 (Colo. Ct. App. 1982). Evidence against the defendant must therefore be "substantial enough to convict him in an otherwise fair trial" and it must be said "without reservation that the verdict would have been the same in the absence of the error." Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988). Furthermore, it is of note that a defendant "is not entitled to a perfect trial, but only a fair trial…" Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975), citing Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974).

Although this case satisfies the third prong of the Mulder test (the crime Appellant committed was indeed grave), Appellant's claim fails the first two prongs. There is no reasonable question as to Appellant's guilt – the Nevada Supreme Court and the district court noted that there was "overwhelming evidence" to support Appellant's conviction. 12 AA 120. Furthermore, Appellant has not shown that any errors occurred throughout the adjudication of this case. Therefore, Appellant's claim of cumulative error lacks merit and he is not entitled to a new trial.

IV
THE DISTRICT COURT DID NOT ERR IN FINDING TRIAL COUNSEL WAS EFFECTIVE FOR NOT PRESENTING A DIMINISHED CAPACITY DEFENSE

Appellant claims his counsel rendered ineffective assistance. Appellant's claims fail to meet the burden of proof and fail to provide more than bare allegations and thus his claims were properly denied.

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), established the standards for a court to determine when counsel's assistance is so ineffective that it violates the Sixth Amendment of the U.S. Constitution. Strickland laid out a two-pronged test to determine the merits of a defendant's claim of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's

> errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. Id. at 687, 2064.

The Nevada Supreme Court has held that "claims of ineffective assistance of counsel must be reviewed under the 'reasonably effective assistance' standard articulated by the U.S. Supreme Court in Strickland, requiring a defendant to show that counsel's assistance was 'deficient' and that the deficiency prejudiced the defense." Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

Strategy or decisions regarding the conduct of defendant's case are "virtually unchallengeable absent extraordinary circumstances." Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996), quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990). There is a "*strong presumption* that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, *supra* at 689, 2065, emphasis added.

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). In sum, the framework for analysis is as follows:

> Therefore, when a petitioner alleges ineffective assistance of counsel, he must establish the factual allegations which form the basis for his claim of ineffective assistance by a preponderance of the evidence. Next, as stated in Strickland, the petitioner must establish that those facts show counsel's performance fell below a standard of objective reasonableness, and finally the petition must establish prejudice by showing a reasonable probability that, but for counsel's deficient performance, the outcome would have been different. Means, *supra* at 1013, 33.

First, Appellant claims that the district court erred in not finding that trial counsel was ineffective for not pursuing a diminished capacity defense at trial. AOB 54-55. This claim is without merit.

The defense of "diminished capacity" would not have been a viable defense because Nevada does not recognize a diminished capacity defense. Crawford v.

State, 121 Nev. 744, 757, 121 P.3d 582, 591 (2005). Therefore, the district court did not err in denying this claim.

Second, Appellant claims that trial counsel was ineffective because he abandoned the battered spouse syndrome defense. AOB 52. Appellant claims that counsel was ineffective for deciding not to call an expert witness on battered spouse syndrome.

A petitioner making a claim that trial counsel was ineffective in failing to call or prepare expert witnesses must allege specifically what the experts could have done to make a different result reasonably probable. Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001). Furthermore, the decisions as to what defenses to develop and what witnesses to call rests solely with counsel, and these decisions are virtually unchallengeable. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163 (2002), Doleman v. State, 112 Nev. 843, 846, 921 P.2d 278 (1996).

Here, Appellant has not shown that calling experts would have made it reasonably probably the outcome of his case would have been different. Therefore, even if trial counsel was deficient in not calling an expert witness, Appellant has not established how he was prejudiced.

Finally, self-defense was not the only defense Bloom pursued. Bloom instructed the jury on second murder and manslaughter. 15 AA 209. Bloom also said that he argued for manslaughter in his closing. 15 AA 209. Consequently, Appellant's claim of ineffective assistance of counsel on this ground was properly denied.

V
THE DISTRICT COURT DID NOT ERR IN FINDING NO PREJUDICE REGARDING THE DEFENSE OF SELF-DEFENSE AND THE SELF-DEFENSE CANVASS

Appellant claims that the defense of self-defense was ineffective and prejudicial. AOB 55. This claim is meritless.

Counsel may make reasonable strategy decisions that make particular investigations unnecessary. Harrington v. Richter, 131 S.Ct. 770, 788 (2011).

There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial strategy decisions rather than "sheer neglect." Harrington, 131 S.Ct. at 778, citing Yarborough v. Gentry, 540 U.S. 1, 124 S.Ct. 1 (2003). Counsel is not required to articulate and defend specific strategies for every decision. Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. at 688, 104 S.Ct. 2052 (emphasis added). To establish ineffective assistance, a defendant claiming inadequate investigation must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Furthermore, 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" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.

Here, trial counsel consulted with Appellant over the course of the entire representation. Based upon the representations the Appellant made to his counsel, the decision was made by counsel to pursue the defense theory of self-defense. 15 AA 076. Again, reference to the rule in Rhyne is warranted. "Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not

the client, has the immediate- and ultimate- responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne, 118 Nev. at 8, 38 P.3d at 167, citing Wainwright v. Sykes, 433 U.S. 72, 93, 97 S.Ct. 2497 (1977).

Thus, Appellant's claim that he was denied the effective assistance of counsel based on the theory pursued by the defense cannot be sustained. First, it is counsel's decision as to what defense to pursue and that decision is based on the facts supplied by his client and the evidence in the case. Second, the record indicates this defense was pursued vigorously, and experts were called to testify as to self-defense and defendant's state of mind. 5 AA 002-24.

Appellant also claims that the district court erred by not finding the self-defense canvass ineffective. AOB 58. This claim also lacks merit.

While the court may have expressed concerns about the canvass it ultimately found that counsel was not ineffective because he previously objected to the canvass but was overruled. 12 AA 121. On December 26, 2001 Appellant filed his Response to the Prosecutions Request that Defendant be "Canvassed" by the Court to Approve of Presentation of Self Defense Evidence. 2 AA 001. Appellant argued that the canvass was not required and would violate his Constitutional rights to remain silent under the 5th and 14th Amendments. 2 AA 003. On December 27, 2001 the Court denied the request for canvass without prejudice. 1 AA 023.

However, on March 12, 2004, the State "requested Defendant authorize [defense counsel] to admit that [Appellant] was the shooter; they are using a self defense theory and that is one of the elements." 9 AA 190. Any objection to this request on behalf of the Appellant would have been futile. See Ennis, 137 P.3d at 1103. The opening element of the self defense statute states, "Justifiable homicide is ***the killing of a human being*** in necessary self defense . . ." NRS 200.120 (Emphasis added). The Appellant subsequently authorized this request and there

was no ineffective assistance of counsel or prejudice as a result. 9 AA 190. Thus the court was well aware of exactly what the State was requesting and, after allowing Appellant time to speak with his counsel regarding the issue, the Court admonished Appellant of the ramifications:

> MR. BLOOM: . . . It's my understanding what the State wants is a request – a statement from my client that my client understands that I am going to be presenting the issue of self-defense and that he was the shooter in this case; am I correct?
>
> MR. PETERSON: Yeah, essentially that he has authorized you to concede that he was the shooter, yes.
>
> THE COURT: Mr. Centofanti, is that true?
>
> DEFENDANT: Yes, your Honor.
>
> THE COURT: Simply stated, so that I'm clear in my mind and we understand what we're talking about, simply stated, when a defense is proffered of self-defense it in essence says "Yes, I shot the person, but I was justified, under the circumstances." Do you understand?
>
> DEFENDANT: Yes, your Honor.
>
> THE COURT: And so obviously when that is submitted to the jury there is that admission, tacit admission at least. Do you understand?
>
> DEFENDANT: Yes.
>
> THE COURT: That's the way you want to go with this, Mr. Centofanti?
>
> THE DEFENDANT: On the advice of counsel that's what I'm prepared to do.
>
> THE COURT: Do you have any questions?
>
> THE DEFENDANT: No.

9 AA 190.

Again, Appellant discussed the defense of self-defense with trial counsel. 13 AA 115. Appellant also testified at the evidentiary hearing that he told Bloom that it was self-defense. 13 AA 143. In fact, Bloom testified that Appellant insisted on testifying that he was the shooter but that he could not remember pulling the trigger. 5 AA 112.

Thus if the Appellant wished to proceed on a self defense theory, the State did not have to prove that he was the shooter as it is an **express concession**; rather, the State was only obligated to rebut the Appellant's claim and has the "burden of proving absence of justification or excuse for the homicide …." Hill v. State, 98 Nev. 295, 297, 647 P.2d 370, 371 (1982), citing St. Pierre v. State, 96 Nev. 887, 620 P.2d 1240 (1980). (Emphasis added). Thus Appellant was not prejudiced by the canvass; and therefore, Appellant's claim is without merit.

VI
THE DISTRICT COURT DID NOT ERR IN FINDING NO PREJUDICE REGARDING TRIAL COUNSEL "LYING" ABOUT LT. STEVE FRANKS

Appellant claims that the district court erred when it did not find that not calling Lt. Steve Franks as a witness was prejudicial. AOB 61. Per Rhyne, the Appellant did not have a claim that would have entitled him to relief.

The court held that it was concerned about "misleading statements made to the Court and the jury, but there is no showing of prejudice from failing to have him testify or from mentioning his anticipated testimony in the opening." 12 AA 122. The court was correct in not finding prejudice.

Again, the decision to call a witness sits squarely with defense counsel. See Rhyne, 118 Nev. at 8, 38 P.3d at 167, citing Wainwright v. Sykes, 433 U.S. 72, 93, 97 S.Ct. 2497 (1977). Appellant, however, complains that no one else could have testified to what Lt. Franks was going to testify to at trial. AOB 61. Bloom explained at his deposition that he made a tactical decision not to call Lt. Franks. 15 AA 055. Who to call as a witness is exactly the kind of tactical strategy that is virtually unchallengeable absent extraordinary circumstances. See Harrington, 131 S. Ct. at 788 (noting that Strickland permits counsel to make reasonable decisions that make particular investigations unnecessary). Bloom also explained that the substantive matter of Lt. Frank's testimony would not have been different from Fraser or Lipson's testimony. 15 AA 198. Therefore, there was no prejudice to Appellant and the claim must fail.

Appellant also claims that Bloom lied to the jury that Franks was under subpoena and that he spoke with him regarding testifying as an expert. AOB 60. This claim is inaccurate.

Bloom testified at his deposition that he did not remember meeting Franks because most of the meetings were conducted by his investigator Thomas. 15 AA 045. Even Franks testified at the evidentiary hearing that while he never spoke with Bloom about the case, he did speak with Bloom's investigator Thomas. 13 AA 15-16. Therefore, the facts do not support an allegation that Bloom lied to the court.

Furthermore, Bloom explained that he made a tactical decision not to call Franks because Franks told Thomas that his wife was sick and that he would not be available to testify. 15 AA 055, 057-58. Franks confirmed that his wife was sick with stage four colon cancer at the time of the trial. Again, the facts do not suggest that Bloom lied to the court. Thus, there was no prejudice.

VII
THE DISTRICT COURT DID NOT ERR IN FINDING NO PREJUDICE REGARDING TRIAL COUNSEL "LYING" ABOUT DR. SCOTT SESSIONS

Finally, Appellant claims that trial counsel failed to investigate and prepare for Dr. Scott Sessions and that this was "overwhelming prejudice." AOB 63. Appellant specifically claims that trial counsel's failure to investigate the plastic surgery issue undermined his testimony and his defense of self-defense. Id.

The court held that while the statements by Bloom were misleading regarding the corroboration in the medical records, the statements regarding the medical records were not made in front of the jury. 12 AA 123. The court also held that Appellant's "credibility was weak even absent this particular dispute." Id.

Appellant, however, cannot demonstrate prejudice. Bloom explained at his deposition that the issue was not whether she had a hole in her nose or not; the issue was Appellant's state mind as to whether it was there or not. 15 AA 101.

Therefore, this did not undermine the self-defense theory because the testimony went to Appellant's state of mind at the time of the murder; and thus, the content of the medical records is not the issue.

In fact the court ultimately held that "given the overwhelming evidence in this case, this Court does not find a probability that the result would have been different if not for this issue." 12 AA 123. Thus Appellant has not shown how an investigation would have served to exculpate him of the crime for which he was charged. Id. This showing is necessary and required to award Appellant relief, and he has failed to meet this burden. See Molina v. State, 120 Nev. at 192, 87 P.3d at 538. Appellant cannot demonstrate specific facts not offered by counsel, which would have affected the outcome of the trial. Thus, Appellant is not entitled to relief.

CONCLUSION

Based upon the foregoing, the State respectfully requests this Honorable Court AFFIRM the district court's denial of Appellant's Petition for Writ of Habeas Corpus (post-conviction).

Dated this 23rd of April, 2012.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more and contains 14,000 words or does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 23rd of April, 2012.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 23rd of April, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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