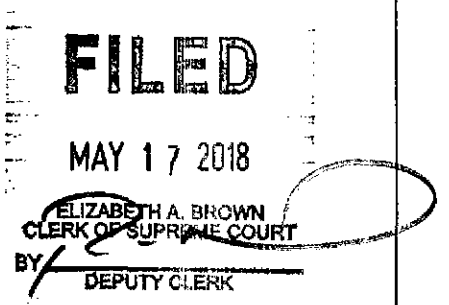
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSHUA J. BALDASSARRE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72958



ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Joshua J. Baldassarre appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on September 24, 2015, and supplemental pleadings filed on December 28, 2015, and May 5, 2016. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

Baldassarre contends the district court erred by denying his claims of ineffective assistance of counsel without first conducting an evidentiary hearing. To demonstrate ineffective assistance of counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*); *see also Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (applying *Strickland* to claims of ineffective assistance of appellate counsel). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697.

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To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). The reasonableness of counsel's actions are determined based on what counsel knew at the time of the decision. *Strickland*, 466 U.S. at 689. A petitioner claiming counsel did not conduct an adequate investigation must allege what a more thorough investigation would have uncovered. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (concluding petitioner failed to demonstrate prejudice where it was unclear what additional investigation would have uncovered).

First, Baldassarre claimed counsel should have requested a physical and/or neurological examination of the victim to ascertain the extent of her memory problems. The district court first denied the claim on the ground that counsel did file a motion to have the victim examined. Counsel however filed a pretrial motion for a *psychiatric or psychological* examination. Such a motion was not relevant to the issue presented in postconviction: whether counsel was objectively unreasonable in not filing a motion for a *physical and/or neurological* examination. *See Baldassarre v. State*, Docket No. 65159, at *6 n.5 (Order of Affirmance, March 18, 2015) (questioning the appropriateness of a psychological examination when it appeared a physical or neurological examination would have been more relevant). A psychiatric or psychological examination reveals information regarding an accuser's veracity. *See Abbott v. State*, 122 Nev. 715, 731, 138 P.3d 462, 473 (2006). Baldassarre's argument centered not on the victim's veracity—that is, her "[h]abitual regard for and observance of the truth," *Veracity, Black's Law Dictionary* (10th ed. 2014)—but rather on her ability

to perceive, recall, and communicate events in light of her having suffered a stroke.

Counsel expressed his concerns regarding the victim's cognitive ability in the pretrial motion,[1] but he failed to seek an examination by an expert who could then testify about the victim's abilities. Baldassarre contended this was objectively unreasonable. As there was no eyewitness or physical evidence in this case to corroborate the victim's allegations, it is unclear why counsel would not have sought expert testimony he seemed to indicate was necessary to Baldassarre's defense. Thus, unless we can affirm the district court's denial of this claim on the basis of its prejudice analysis, we cannot conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

The district court also denied the claim on the ground that Baldassarre failed to show prejudice. Baldassarre's ability to demonstrate prejudice was hampered by the district court's denial of his request for funds to consult with and hire an expert to conduct the physical or neurological examination. The district court cannot deny an indigent petitioner the means to obtain specific evidence and then use the petitioner's failure to obtain the evidence to deny relief. Accordingly, we cannot conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.[2] We therefore reverse the denial of this claim and remand for an evidentiary hearing.

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[1]Counsel noted the victim's "diminished mental capacity" and "difficulty recalling events," and he specifically denied he was alleging the victim was "consciously and blatantly lying."

[2]The district court may, of course, choose to bifurcate the proceedings. For example, it might conduct an initial evidentiary hearing limited to

Second, Baldassarre claimed counsel should have investigated Amber K., who may have been a percipient witness to Baldassarre's interactions with the victim at a time when the victim claimed Baldassarre sexually assaulted her. The district court first denied the claim by concluding it was a strategic reason because Amber was uncooperative with the State. While the prosecutor's statements to the trial court support that Amber was uncooperative, the finding was not relevant to the issue presented: whether counsel was ineffective for not investigating Amber. And it did not constitute a basis from which to conclude counsel's failure was a strategic decision.

The district court also denied the claim on the ground that calling Amber as a witness would have opened the door to admitting Baldassarre's jail calls in which he discussed Amber. This finding is supported by some evidence in the record; however, the mere fact that Baldassarre discussed Amber in a jail call is probative of nothing. Amber was a percipient witness who may have been able to discredit the victim in a case where guilt was based entirely on the victim's credibility. Accordingly, we cannot conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.[3] We therefore reverse the denial of this claim and remand for an evidentiary hearing.

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whether counsel was objectively unreasonable in not seeking the physical and/or neurological examination. Similarly, the district court might choose to grant counsel limited funds to consult with an examiner to determine the strength of evidence such a backward-looking examination would in fact yield before determining whether the victim must submit for an examination.

[3]For these same reasons, we conclude the district court abused its discretion in not appointing an investigator. *See Widdis v. Second Judicial*

Third, Baldassarre claimed counsel should have filed a written motion to continue trial to preserve for appeal the district court's denial of his oral motion to continue trial. Baldassarre failed to demonstrate deficiency or prejudice. He did not allege what such a motion would have said or how it would have affected the outcome of trial. Notably, in his oral motion to continue trial, counsel referred to needing more time to find a "very important" Texas witness. Baldassarre surmised in his petition that counsel was referring to Amber K., but at trial the State indicated Amber's last known location was in Yosemite. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fourth, Baldassarre claimed counsel should not have elicited testimony of Baldassarre's prior bad act, namely that he had struck the victim's mother in the face. Baldassarre failed to demonstrate deficiency or prejudice. Counsel was not objectively unreasonable where the victim volunteered the information after answering a different question and counsel immediately objected to the statement as nonresponsive. Further, Baldassarre could not demonstrate a reasonable probability of a different outcome had counsel's questioning not sparked the victim to volunteer the information. The district court sustained the objection and ordered the testimony stricken, and we presume juries follow such instructions. *See Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006). We

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Dist. Court, 114 Nev. 1224, 1229 n.2, 968 P.2d 1165, 1168 n.2 (1998) ("[T]he district court has the discretion to refuse applications for public assistance."). We reiterate: The district court cannot deny an indigent petitioner the means to obtain specific evidence and then use the petitioner's failure to obtain the evidence to deny relief.

therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fifth, Baldassarre claimed counsel should not have elicited testimony that caused the jury to recognize he had invoked his right to remain silent and to counsel. Baldassarre failed to demonstrate deficiency or prejudice. It is clear from the record that counsel's line of questioning was intended to impeach the thoroughness of the police investigation, and Baldassarre has not demonstrated it was an objectively unreasonable tactic. Further, Baldassarre has not alleged that, but for the jury hearing these facts, the outcome of trial would have been different. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Sixth, Baldassarre claimed counsel should have sought to memorialize the unrecorded bench conferences held throughout his trial. Baldassarre's bare claim failed to demonstrate deficiency or prejudice. He identified nothing from any specific bench conference that should have been memorialized and did not indicate how such memorialization would have affected the outcome at trial. We note that, at the time of Baldassarre's 2013 trial, the Nevada Supreme Court had not yet held bench conferences must be recorded or otherwise memorialized in every case. *See Preciado v. State*, 130 Nev. 40, 43, 318 P.3d 176, 178 (2014) (extending to noncapital cases the requirement that bench conferences in capital cases must be recorded or memorialized). We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.[4]

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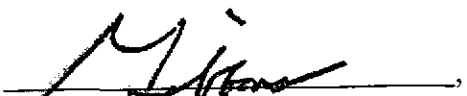
[4]To the extent Baldassarre claimed appellate counsel was ineffective for not raising the unrecorded bench conferences on appeal, his bare claim failed to allege "that the record's missing portions are so significant that

Baldassarre also contends the district court erred by denying claims raised in his pro se petition. Baldassarre's claim on appeal is largely a list of single-sentence issue statements and is entirely devoid of cogent argument and relevant facts. We therefore decline to address this claim on appeal. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Silver



_____, J.
Gibbons

TAO, J., concurring in part and dissenting in part:

I concur with much in the majority order but respectfully disagree that Baldassarre's petition has set forth everything required to warrant an evidentiary hearing, much less any other relief.

As my colleagues note, there are things about this case that seem a little odd. Baldassarre was convicted based almost exclusively upon the testimony of the victim. As a matter of law, the testimony of a single

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their absence preclude[d] this court from conducting a meaningful review of the alleged errors that the appellant identified and the prejudicial effect of any error." *Id.*

witness, even if uncorroborated, is enough evidence to sustain a conviction because it's within the jury's domain to decide whether to believe any witness and how much weight to give to any testimony. *See, e.g. Hutchins v. State*, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994). But here, the victim suffered a stroke prior to trial that left her unable to remember certain things, and her testimony was at times scattered and inconsistent. The district court denied Baldassarre's request for a psychological examination of the victim, and on direct appeal we wondered whether a neurological examination might have been appropriate to gauge the extent of her disability. *See Baldassarre v. State*, No. 65159, Order of Affirmance, n. 5 (Nev. App. Mar. 18, 2015). Even without that examination, the jury must not have believed everything the victim said because it acquitted Baldassarre of some of the charges that her testimony would have supported.

But the jury also convicted Baldassarre of other charges, meaning it found a lot of her testimony wholly credible, and we affirmed the conviction on direct appeal. In now challenging those convictions before us through a collateral petition for post-conviction habeas review, issues that could have been raised on direct appeal can no longer be raised. Our focus here is only upon the performance of Baldassarre's trial counsel. In attacking that performance as deficient under the Sixth Amendment, Baldassarre's petition must meet all of the standards that apply to such petitions. If it does not, then regardless of whatever other gaps may exist elsewhere in this case or whatever doubts my colleagues may harbor about the trial, it must be denied.

I.

Baldassarre contends that trial counsel acted in an objectively unreasonable manner when he failed to request a physical and/or neurological examination of the victim to assess whether her ability to recall past events and testify accurately might have been hampered by a stroke she suffered before trial. But in order to find that counsel's alleged failure rose to the level of a constitutional defect, Baldassarre must show "prejudice." In a case like this, I'd say this requires some proof of every step of the following chain: that if counsel had just asked for such an examination, the court would necessarily have granted it; that had it been granted and conducted, it would have revealed that the victim suffered from a medical issue that was diagnosable; that the medical issue would have been medically proven to have affected her trial testimony in some significant way; that the jury wasn't already made aware of the existence of the issue; and that the jury likely would have rendered a different verdict had it known of the medical diagnosis over and above what it could already perceive of the victim's cognitive ability on its own.

That's a pretty long chain of inferences, and unlike my colleagues I don't think Baldassarre has shown most of these things, much less all of them. To illustrate, let's just focus on a couple of the missing steps and ignore all of the others for the moment (because if Baldassarre fails on even one link of the chain, his petition must be denied). As a threshold matter, Baldassarre fails to demonstrate that the victim actually suffered from any measurable defect that a neurological examination would have particularly uncovered and identified. Indeed, his petition doesn't even bother to allege that such an examination would have uncovered anything

specific at all.[5] He just theorizes that because the victim had suffered a stroke in the past, an examination might have unearthed something that

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[5]Indeed, here's the entirety of the relevant section of Baldassarre's petition (pages 18-20):

> Prior to trial, counsel filed a motion for a pretrial psychological evaluation of S.W. The district court held a hearing and denied the motion. The district court determined counsel did not provide compelling reasons to order the psychological evaluation. The district court concluded that a psychological evaluation was not necessary to determine competency.
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> On appeal, the Court of Appeals agreed finding the district court did not abuse its discretion in denying the motion (Order of Affirmance, p. 6). The Court of Appeals also noted that a serious question existed whether the psychological evaluation requested by trial counsel was appropriate given S.W.'s condition, which included possible memory loss after a stroke, as this condition was a neurological condition and not a psychological condition (See, Alberto Maud, M.D., *Memory Loss After Stroke*, 67 The Official Journal of the Am. Acad. Of Neurology, no. 8 at E14-E15 (Oct. 24, 2006) (Order of Affirmance, p. 6).4 As the Court of Appeals correctly noted, trial counsel was aware of S.W.'s physical condition prior to trial and failed to request a physical or neurological examination of S.W.
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> In *Koerschner v. State*, 116 Nev. 111, 13 P.3d 451 (2000), this Court concluded that a court would commit error if a defendant was not permitted a psychiatric expert if: 1) The State had employed such an expert; 2) The victim is not shown by compelling reasons to be in need of protection; 3) Evidence of the crime has little or no corroboration

he could have used. To me, that's just rank speculation, and it's not enough to warrant an evidentiary hearing.

This gap collides with another. At trial, counsel knew full well of the victim's stroke and engaged in numerous attacks on her "diminished mental capacity" and her "difficulty recalling events." Baldassarre thus bears the burden of showing not only that the victim suffered from some medically diagnosable condition at the time of trial as a result of her prior stroke (which he hasn't), but, beyond that, the condition (whatever it was) wasn't already obvious to the jury based on the victim's own testimony about her stroke and defense counsel's repeated attacks on her memory during cross-examination. Not every lapse of human memory or perception is the result of a medically measurable condition; we've all seen people without diagnosed medical issues who have extremely poor memories, and, conversely, many of us have seen people measured with cognitive decline

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> beyond the testimony of the victims; and 4) There is a reasonable basis for believing the victim's mental or emotional state may have affected his or her veracity.
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> In *Abbott v. Nevada*, 122 Nev. 715, 138 P. 3d 462 (2006), the Court determined that it is within the sound discretion of the district court whether to grant or deny a defendant's request for a psychological examination [block quote from *Abbott* omitted].
>
> By analogy, trial counsel should have requested an independent physical and/or neurological evaluation of S.W. given her medical history. Therefore, Mr. Baldassarre received ineffective assistance of trial counsel for counsels failure to request a physical and/or neurological examination of S.W.

who appear to be very much on the ball. So Baldassarre must demonstrate not only that the victim suffered from something that a medical or neurological examination could have identified, but also that the examination would have told the jury more than it already could see for itself. I would conclude that he hasn't done so.

A violation of the Sixth Amendment requires more than just a guess that a medical test might have picked up something about a witness that perhaps could have made a difference. If that were all that were required to mandate an evidentiary hearing, then evidentiary hearings would be required in countless cases whenever some witness has either suffered from some previous medical condition or just couldn't remember one thing or another with perfect consistency and clarity. I don't think that's what the Sixth Amendment requires.

II.

Baldassarre also argues that trial counsel was ineffective for failing to investigate a potential eyewitness named Amber Keating. But here's the entirety of his argument as set out in his petition (pages 17, 20):

> A. Failure to Investigate Witnesses
>
> In the instant case, S.W. testified at trial that her friend Amber was present during the alleged assault which occurred at the pool. Upon information and belief, trial counsel made little if any effort to investigate the case. In fact, there appears to be no indication that any investigator ever conducted investigation on this case. Mr. Baldassarre has repeatedly and respectfully requested the opportunity to have an investigator contact Amber to determine what if anything she recalls as a potential percipient witness. In fact, the trial transcript reflects where S.W. stated that Mr.

> Baldassarre may have assaulted Amber (A. A. p. 903). . . .
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> * * *
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> What could be the harm? If Amber had nothing favorable for the defendant, the inquiry would conclude and the court would have provided Mr. Baldassarre an opportunity for meaningful post-conviction review. However, if Mr. Baldassarre's hunch is correct, and Amber has exculpatory evidence (including impeachment evidence) to provide, the harm would be failing to provide limited funding and meaningful review to an individual who may be able to provide evidence of actual innocence.

I thought it well-established that, with a claim of failure to investigate, *Strickland* requires a petitioner to make some showing of where the investigation might have led had counsel done what petitioner wants. Here, Baldassarre's briefing reveals exactly what's wrong with his claim: as he puts it, he doesn't know "what if anything [Amber Keating] recalls" or, consequently, if her testimony would have helped him at all. He merely has what he himself labels a "hunch" that there might be something there. But this is the exact thing that the Nevada Supreme Court long ago characterized as a "naked" claim for relief insufficient to warrant an evidentiary hearing: "[A]ppellant's claim that certain witnesses could establish his innocence of the bomb threat charge was not accompanied by the witness' names **or descriptions of their intended testimony**. As such, to the extent that it advanced merely 'naked' allegations, the motion did not entitle appellant to an evidentiary hearing." *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (emphasis added).

III.

An evidentiary hearing isn't a fishing expedition during which a petitioner can just see what comes up. It's supposed to be narrower and more focused than that. To warrant one, a petitioner must make specific allegations that, if true, would entitle him to relief. *See id.*; *see also Means v. State*, 120 Nev. 1001, 1016, 103 P.3d 25, 35 (2004) ("A post-conviction habeas petitioner is entitled to an evidentiary hearing only if he supports his claims with specific factual allegations that if true would entitle him to relief." (internal quotations marks omitted)). The evidentiary hearing then serves to determine whether he can prove that those allegations are, indeed, true to some fixed standard of proof when weighed against competing evidence to the contrary. *See United States v. de la Fuente*, 548 F.2d 528, 533-36 (5th Cir. 1977) (trial court did not err in refusing to hold evidentiary hearing when defendant failed to make "initial showing by affidavit or otherwise" of prima facie entitlement to relief, and motion "never seriously challenged by allegations or evidence" any of the underlying facts); *United States v. Smith*, 499 F.2d 251 (7th Cir. 1974) (no error when trial court concluded that defendant was not entitled to an evidentiary hearing because he failed to make the necessary "initial showing" that any facts were in dispute); *see generally, Nardone v. United States,* 308 U.S. 338, 341 (1939) ("[T]he burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that [there is some factual question in dispute]. Once that is established . . . the trial judge must give opportunity [for a hearing]").

Here, an evidentiary hearing would serve no purpose because even if Baldassarre can prove that all of the allegations set forth in his petition are literally true, he still wouldn't be entitled to relief. The simple

reason for this is that his allegations are incomplete on their face. Baldassarre quite literally alleges that he doesn't know what would have been uncovered had counsel investigated everything he wanted. "Hoping for the best" or "let's see where this goes" aren't usually the types of allegations that justify evidentiary hearings. Even if the district court were to hold such a hearing (which it now must do anyway in view of the majority order), it wouldn't be engaged in weighing the truth of Baldassarre's specific allegations against competing evidence to determine whether the applicable standard of proof has been met. Rather, it would simply be fishing around to see what Baldassarre's allegations truly are, where they go, and if anything interesting turns up along the way, because Baldassarre himself doesn't quite know what he can prove to be true or false. That isn't what a post-conviction petition for habeas relief is supposed to be.

IV.

For these reasons, I would simply affirm the district court's denial of Baldassarre's petition.

_____, J.
Tao

cc: Hon. Kerry Louise Earley, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk