IN THE SUPREME COURT OF THE STATE OF NEVADA

NARCUS WESLEY, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 57473

RESPONDENT'S ANSWERING BRIEF

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

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STATEMENT OF THE ISSUES

1. **Whether Appellant received effective assistance of counsel.**
2. **Whether the district court erred when it denied Appellant an evidentiary hearing on the post-conviction issues.**
3. **Whether trial and appellate counsel were ineffective for failing to address the issue of actual conflict of interest.**
4. **Whether trial counsel was ineffective for failing to properly investigate Appellant's case.**
5. **Whether trial counsel was ineffective for failing to attempt to preclude suggestive pre-trial identification.**
6. **Whether trial counsel was ineffective for failing to request psychological exam of sexual assault victim.**
7. **Whether Appellant's jury was unconstitutional because it failed to represent a cross-section of the community.**
8. **Whether it is proper for current counsel in the present appeal to adopt all issues raised by Appellant in his pro per petition for writ of habeas corpus previously filed in the district court.**
9. **Whether there was cumulative error.**

STATEMENT OF THE CASE

On April 20, 2007, the State filed an Information charging Narcus S. Wesley (hereinafter "Appellant") and Delarian Kameron Wilson (hereinafter "Wilson") with multiple counts of Conspiracy, Burglary, Robbery, Assault, Kidnapping, Sexual Assault, Coercion, and Open or Gross Lewdness, all with use of a deadly weapon. 1 Appellant's Appendix (hereinafter "AA") 16-24. Co-Defendant Wilson entered into negotiations with the

State and pleaded guilty to two counts of Robbery with Use of a Deadly Weapon and one count of Sexual Assault. 1 AA 83.

Appellant's jury trial began on April 9, 2008, and concluded on April 18, 2008. 1 AA 249; 6 AA 1199. The jury convicted Appellant of all eighteen (18) counts contained in the Second Amended Information. 6 AA 1200-01. On July 3, 2008, Appellant was adjudged guilty of all eighteen (18) counts and sentenced as follows[1]: as to Counts 1 and 18 – twelve (12) months; as to Counts 2, 3, and 11 – twenty-eight (28) to seventy-two (72) months; as to Counts 4, 6, 7, and 9 – sixty (60) to one hundred eighty (180) months plus an equal and consecutive term of sixty (60) to one hundred eighty (180) months for the use of a deadly weapon; as to Counts 5 and 8 – twenty-four (24) to seventy-two (72) months; as to Count 10 – seventy-two (72) to one hundred eighty (180) months plus an equal and consecutive term of seventy-two (72) to one hundred eighty (180) months for the use of a deadly weapon; as to Counts 12 – 15, and 17 – ten (10) years to life plus an equal and consecutive term of ten (10) years to life for the use of a deadly weapon; and as to Count 16 – twenty-four (24) to seventy-two (72) months plus an equal and consecutive term of twenty-four (24) to seventy-two (72) months for the use of a deadly weapon; all counts to run concurrently. 1 AA 127-32. Judgment of Conviction was filed on July 18, 2008, and an Amended Judgment of Conviction reflecting a correction in the sentence to Counts 12 – 15, and 17 was filed on October 8, 2008. 1 AA 122, 127. Appellant filed a Notice of Appeal from the jury verdict, the sentencing, and all pre-trial and post-trial rulings with this Court on July 25, 2008[2]. On March 11, 2010, this Court filed its Order affirming Defendant's conviction (Case No. 52127). 7 AA 1278-81. Remittitur was issued on April 8, 2010. 7 AA 1282.

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[1] The State filed a Motion to Correct Illegal Sentence as to Counts 12-15, and 17 as the court had previously given Wesley eight (8) to twenty (20) years instead of ten (10) to twenty (20) as called for under the Statute. 1 AA 132. The court corrected the sentence at a hearing on September 23, 2008. Defendant was present with counsel during said hearing. The corrected sentence is listed above.

[2] For purposes of clarification, Appellant's trial counsel were Deputy Public Defenders Jeffrey Banks (hereinafter "Mr. Banks") and Casey Landis (hereinafter "Mr. Landis"). Counsel for Appellant's direct appeal were Dan Winder (hereinafter "Mr. Winder") and Arnold Weinstock (hereinafter "Mr. Weinstock").

On September 9, 2010, Appellant filed a pro per petition for writ of habeas corpus to which the State filed an opposition. 7 AA 1238-1306. Also on September 9, 2010, Appellant filed a motion for appointment of counsel and a request for an evidentiary hearing. 7 AA 1307-10. On December 7, 2010, the district court denied the petition. 7 AA 1373. On December 28, 2010, Appellant filed a Notice of Appeal from the order denying the petition for post-conviction relief. 7 AA 1312. On January 4, 2011, a Findings of Fact, Conclusions of Law and Order was filed. On March 1, 2011, following an Order of Limited Remand for Appointment of Counsel from this Court regarding appointment of counsel for Appellant's post-conviction appeal, the district court appointed Mr. Oram. 7 AA 1375. The instant appeal from denial of Appellant's petition was filed on September 22, 2011.

STATEMENT OF THE FACTS

On February 18, 2007, Ryan Tognotti, Clint Tognotti, Aitor Eskandon, and Justin Foucault (hereinafter "Justin F."), were watching a movie at 690 Great Dane, Henderson, Nevada, when there was a knock at the door. 4 AA 818. Ryan answered the door and saw two men, a short and stocky African-American male later identified through confession to be co-defendant Wilson, and a tall and more slender African-American male later identified through Appellant's own confession to be Appellant. 5 AA 977-98. Claiming to be looking for "Grant", Wilson and Appellant became agitated when Ryan informed them that he did not know a Grant nor did a Grant live at the house. 5 AA 978. The men then lifted guns out of their waistbands, pointed them at the four men in the living room, and barged inside. 5 AA 978.

Wilson and Appellant ordered Ryan, Clint, Aitor, and Justin F. onto the floor, face down, with their arms over their heads stacking their hands on top of each other in the middle of the circle. 4 AA 889. They then asked if anyone else was in the apartment. 5 AA 979. Ryan indicated that Justin Richardson (hereinafter "Justin R.") and Danielle Browning were sleeping in Justin R.'s room down the hall. 5 AA 979. Wilson went into Justin R.'s room and yelled at them to get up and walked them at gunpoint out into the living room to join the others. 4 AA 818-19. Appellant said that he had a gun and told all six not to move. 4

AA 823, 892. Wilson demanded all of the cash, cell phones, and wallets that the six had. 4 AA 828. Upon finding only $20 between them, Wilson became upset and told them that he and Appellant needed more money or they were going to shoot them all. 5 AA 980. Since none of the victims had any more cash, Wilson asked who had money in their bank accounts. 5 AA 981. Ryan and Justin F. said they did and were subsequently ordered to hand over their ATM cards and pin numbers. 4 AA 828. Wilson took Ryan at gunpoint to get his car keys. 5 AA 981. Before Wilson and Ryan left the apartment, Wilson told all of the victims that, "If you guys fuck up, I am going to have my boy shoot you and then I am going to shoot your friend." 1 AA 60. Wilson then forced Ryan at gunpoint to drive to two separate ATMs in the area, keeping the gun pointed at Ryan's hip the entire time. 5 AA 981-82, 983. In total, Ryan withdrew $500 from Justin F.'s account and $400 from his own account. 1 AA 49.

Meanwhile, Appellant stayed with the remaining victims. 4 AA 830. He told the victims that if any of them moved, he would shoot them. 5 AA 898. At no point after Wilson left Appellant alone with the remaining victims did Appellant try to call the police or release any of the victims. 4 AA 830-31. When Ryan and Wilson returned, Wilson informed the victims that they were "90% done but that there remained 10% more to finish." 5 AA 984. Wilson then ordered Justin R. and Danielle to take off their clothing and have sex. 4 AA 832. Overcome by the stress of the situation, Justin R. was unable to sustain an erection, enraging Wilson. 4 AA 832. Wilson told the victims that if Justin R. did not perform, that he would start killing everyone. 4 AA 832, 5 AA 906. The suspects then ordered Danielle to perform fellatio on Justin R. to help him sustain an erection. 5 AA 904. When this did not work, Wilson ordered them to perform mutual oral sex on each other. 5 AA 919. At this point Wilson noted that if Justin R. could not "get it up" that either he or Appellant would do it. 4 AA 835. During this time, Appellant was standing in the background "egging" Wilson on, telling him that if Justin R. could not have sex with Danielle, he could. 5 AA 910. Since Justin R. was unable to become aroused sufficient to have sex with Danielle, Wilson ordered Ryan to get "hard", otherwise he or Appellant would have to. 4 AA 835. Wilson handed Ryan a bottle of lotion and told him to masturbate. 4 AA 835. Both Appellant and Wilson

were egging Ryan on, encouraging him to get hard so he could have sex with Danielle. 4 AA 835. Ryan too was unable to sustain an erection. 4 AA 835. Wilson asked if anyone could "get it up," to which Appellant responded, "I'm hard, I can have sex with her." 5 AA 1012.

Wilson ordered Danielle, still undressed, to the staircase. 4 AA 836. Appellant walked over and told Danielle that if Justin R. could not have sex with her, he could. 4 AA 839. Appellant moved Danielle to a nearby recliner. 4 AA 839. Appellant told her that he was hard and he wanted to have sex with her. 4 AA 839. He asked her "if she liked it." 4 AA 840. She said no. 4 AA 840. She repeatedly told Appellant that she did not want to engage in sexual relations with him. 4 AA 841. Appellant told Danielle to spread her legs and put them directly in the air. 4 AA 841. Danielle was shaking so badly that she could not keep her legs in the air. 1 AA 63. Appellant told Danielle that if she did not stop shaking he was going to shoot her. 5 AA 1013. Danielle still could not stop shaking, so Appellant held her legs up and began touching her. 1 AA 63. Appellant then put his finger inside Danielle's vagina. 4 AA 840-41. Wilson eventually told Appellant to stop because they had to go. 4 AA 842.

Appellant and Wilson grabbed all of the victim's cell phones and carried them outside. 1 AA 50. All of the cell phones, except Danielle's cell phone, were later found outside of the house. 4 AA 845. After counting to two minutes, the victims got up and locked the doors. 5 AA 927-29. Shortly thereafter the victims went to Clint's apartment where they called the police. 4 AA 846. After taking the statements from the victims, the Henderson Police Department (hereinafter "HPD") began searching for Danielle's cell phone. 6 AA 1046. Detectives also began looking into the previous residents of 690 Great Dane to see if they could find a "Grant." 6 AA 1046.

HPD Detectives Hartshorn and Weske were able to locate Grant Hieb, a former resident of 690 Great Dane, Henderson, Nevada. 5 AA 1038. Grant agreed to go to the Henderson Police Station and assist in the investigation. 5 AA 1038. Grant was able to identify Wilson as a friend who had previously robbed him. 5 AA 1039; 6 AA 1042-43. A little while later HPD received word that Danielle's cell phone had been used in the vicinity of Circus Circus. 6 AA 1046. Wilson was detained while playing cards at Circus Circus and

admitted to going to 690 Great Dane with the intention of robbing Grant of his money and marijuana. 6 AA 1047, 1066. Wilson stated that he was with his friend Narcus who played football at UNLV, which was similar to the name "Marcus" which the victims had remembered hearing. 6 AA 1074. Detectives went to UNLV to check the football roster and found that a Narcus Wesley played UNLV football and used 2372 Valley Drive in Las Vegas as his address. 6 AA 1074. Detectives contacted Nevada Power to determine whether Appellant had power at that address. 6 AA 1074. HPD Detectives were advised that there was no longer power in Appellant's name at that address, but that the power had been turned on at 4232 Gaye Lane, Las Vegas. 6 AA 1074. HPD Detectives faxed over their subpoena information to Nevada Power and headed to the Gaye Lane Address. 6 AA 1075. Upon arriving at the Gaye Lane address, the Detectives observed a 2005 Chrysler 300M registered to Appellant parked in the driveway, the same car Wilson stated his partner was driving. 6 AA 1075. The Detectives obtained a search warrant for that address. 6 AA 1075. SWAT entered the premises and served the search warrant. 6 AA 1075.

Officer Weske advised Appellant of his Miranda rights, confirmed that Appellant understood those rights, and then proceeded to interview him. 1 AA 67. Appellant stated that Wilson asked him to go get some marijuana. 6 AA 1086. Wilson also asked if Appellant knew where Wilson could get some money, but Appellant did not. 1 AA 67. Appellant then stated that once they arrived at the 690 Great Dane address Wilson told him to knock on the door and get out of the way. 1 AA 67. Appellant then claimed that he only simulated having a gun. 1 AA 67. When Wilson recognized that Grant did not live there, Wilson decided that he needed the money anyway so they continued to rob the victims. 1 AA 68. Appellant stated that he went along with Wilson for the most part, but that Wilson was the person in charge. 1 AA 68. He stated that he told Wilson he could perform when all the other guys could not because "he did not want to seem like a punk." 6 AA 1087. He admitted that he did rub the top of Danielle's vagina after asking her if it was ok, but that Danielle did not seem like she enjoyed it. 6 AA 1087. Appellant never stated that he was afraid or gave any indication that he was afraid of Wilson. 6 AA 1087. Appellant indicated that at one point, he

thought the entire robbery was funny, because it was like being in the movies. 6 AA 1087. Appellant indicated that he stayed at the house after Wilson left because he was dressed in a t-shirt, it was cold outside, and he did not know where he was, despite having six victims on the floor who could tell him the address. 6 AA 1087. Finally, Appellant identified the clothes he was wearing during the robbery. 6 AA 1087. After hearing the testimony of all six (6) victims, who identified Appellant by body-type, as well as the officers who responded to the scene and heard Appellant's confession, the jury convicted Appellant of all eighteen (18) counts. 6 AA 1114-15.

Following the Order of Affirmance issued by this Court, Appellant filed his petition for writ of habeas corpus. On December 7, 2010, finding no need for an evidentiary hearing, the district court denied the petition. This appeal follows.

ARGUMENT

I

APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

Appellant appeals the denial of his post-conviction habeas petition that raised, among other issues, multiple claims of ineffective assistance of trial counsel. However, upon review of the record and Appellant's arguments on appeal, it is clear the district court did not err in denying the petition. This Court reviews a district court's denial of a post-conviction petition for writ of habeas corpus for an abuse of discretion. See Berry v. Sheriff, Clark County, 93 Nev. 557, 571 P.2d 109 (1977). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 17 P.3d 998, 1000 (2001). Additionally, an ineffective assistance of counsel claim presents this Court with a mixed question of law and fact, and thus, it is subject to independent review. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). However, this Court must give deference to a district court's factual findings on appeal, so long as they are supported by substantial evidence and are not clearly wrong. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

In order to prevail on a claim of ineffective assistance of counsel a defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-

prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694, 104 S.Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984)(adopting the Strickland two-part test in Nevada). "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, 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).

Based on the above law, the court begins with the presumption of effectiveness and then must determine whether the Appellant 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 while 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), citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977).

"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 2065. "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), citing Strickland, 466 U.S. at 690, 104 S. Ct. at 2066; see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). This analysis does not mean that the court "should second guess reasoned choices between [defense] tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable [tactical maneuver] no matter how remote the

possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711. 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. 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." U.S. v. Cronic, 466 US 648, 657, 104 S.Ct. 2046 n.19 (1984).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the [proceeding] 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, 104 S. Ct. at 2064-65. Of particular note, a defendant must support his allegations with specific facts which, if true, would entitle him to relief. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Here, the district court's denial of Appellant's petition was not an abuse of discretion because Appellant failed to show by a preponderance of the evidence that his counsel was ineffective. Appellant did not show that his trial counsel's performance fell below an objective standard of reasonableness, and cannot meet the first prong of the Strickland test. Moreover, Appellant did not and has not shown that but for counsels' alleged errors, the result of the trial would have been any different. As such, the district court's decision to deny Appellant's petition did not exceed the bounds of law or reason and should be affirmed.

II
THE DISTRICT COURT'S DENIAL OF APPELLANT'S REQUEST FOR AN EVIDENTIARY HEARING SHOULD BE AFFIRMED

Appellant asserts that the district court erred when it denied his request for an evidentiary hearing to resolve the claims raised in his habeas petition. Appellant argues that the district court should have held an evidentiary hearing on the ineffective assistance of

counsel claims, specifically the claims regarding trial counsels' alleged concession of Appellant's guilt, and trial counsels' strategic decision to introduce co-defendant Wilson's statements. Appellant's Opening Brief (hereinafter "AOB") 7-8. However, a petitioner is only entitled to an evidentiary hearing when he raises specific factual allegations that are not belied by the record and that, if true, would entitle him to relief. Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). The Nevada Supreme Court will review the district court's decision not to conduct an evidentiary hearing for an abuse of discretion. See Johnson v. State, 118 Nev. 787, 799, 59 P.3d 450, 458 (2002). Because Appellant's claims of ineffective assistance of counsel raised in his pro per petition are belied by the record, the district court did not abuse its discretion and properly denied Appellant's request for an evidentiary hearing.

A claim is belied by the record 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. After receiving the petition, answer and supplemental pleadings filed by counsel, the district court must then determine whether an evidentiary hearing is necessary. Id. at 355, 46 P.3d at 1231. If a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994). "A defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record." Hargrove, 100 Nev. at 503, 686 P.2d at 225. A fishing expedition is insufficient to mandate an evidentiary hearing.

Because Appellant did not set forth any viable claims in his petition, he was not entitled to an evidentiary hearing, and his request for the same was properly denied by the district court. Appellant's "bare" allegations that counsel was ineffective were not sufficient to warrant an evidentiary hearing or other relief. Further, NRS 34.770 specifically provides that "[i]f 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." Moreover, in Harrington v. Richter, the United States Supreme Court upheld the denial of a post-conviction petition based upon a strong presumption in favor of counsel's objectively

reasonable strategic decisions without need for an evidentiary hearing into counsel's subjective state of mind which was not relevant. Harrington v. Richter, ___ U.S. ___, 131 S.Ct. 770, 790 (2011). "[N]either may they [courts] insist counsel confirm every aspect of the strategic basis for his or her actions. There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.' Id., citing Yarborough v. Gentry, 540 U.S. 1, 8, 124 S.Ct. 1 (2003). In the present case, Appellant failed to make out a colorable claim for ineffective assistance of counsel as he could not meet both prongs set forth in Strickland, and thus it was not necessary to expand the record in order to resolve the claims in Appellant's petition. Accordingly, the district court properly denied Appellant's petition without granting an evidentiary hearing.

A. Appellant's Trial Counsel Did Not Concede Appellant's Guilt

Appellant alleges that trial counsel admitted Appellant's guilt throughout trial without Appellant's permission. AOB 13. Appellant goes on to request a remand on this matter either for an evidentiary hearing, or to have the district court make a findings of fact and conclusions of law on the issue of why defense counsel conceded Appellant's guilt without permission. AOB 13. The case should not be remanded because Appellant's claim is belied by the record. Trial counsel did not concede Appellant's guilt. Appellant's trial counsel at most conceded only that certain crimes occurred, and not that Appellant participated or was guilty of any of those crimes. Moreover, Appellant's claim that he did not give trial counsel permission to move forward with their strategy is belied by the record because Appellant was present throughout the trial and expressed no concern as to trial counsels' strategy.

Counsels' strategy throughout the trial was to show that co-defendant Wilson was the person responsible for the crimes committed. 4 AA 801-06; 6 AA 1092-1106; 6 AA 1191-94. Appellant's counsel provided the following statements to the jury with regard to the crimes that night during his opening statement:

> **Mr. Landis**: Narcus Wesley had no control over what happened that night….As the State said, and they are correct, Danielle Browning was raped. Many of those kids were robbed. One of those kids was kidnapped. They were terrorized for an upwards of two hours. They had guns waved in their faces. I'm not disputing that. Mr. Banks is

not disputing that, and Mr. Wesley is not disputing that. That should not happen to anybody. That's shameful, it's despicable, and it's deplorable.

4 AA 803. Counsels' strategy was a tactical decision that was reasonable under the circumstances. All six victims identified Appellant by body-type and testified at trial. Officer Weske testified as to Appellant's statements, statements which meet the very definition of a confession. Specifically, Officer Weske testified on direct examination as follows:

> **Q (Ms. Luzaich)**: Then ultimately after being confronted with things, did he [Appellant] admit he touched Danielle?
>
> **A**: Yes.
>
> …
>
> **Q**: When you were asking him about what was going on while his friend was at the ATM with one of the kids in the house, did he indicate to you, ["]I didn't say nothing the whole time[."]?
>
> **A**: Yes.
>
> …
>
> **Q**: ...Did you actually find the clothes that the Defendant wore during the robbery?
>
> …
>
> **Q**: Did the Defendant indicate those were the clothes he wore during the robbery?
>
> **A**: Yes, I believe they brought him back to the room, he identified them.

6 AA 1087. Appellant's own admission of guilt regarding sexually assaulting Danielle Browning, and his own admission of guilt regarding the robbery left trial counsel with limited strategy options. Trial counsel chose to portray co-defendant Wilson as the person in control, and Appellant as the honest, trustworthy, blameless individual caught up in co-defendant Wilson's scheme. 4 AA 801-06; 6 AA 1092-1106; 6 AA 1191-94. After playing Officer Weske's interview of Wilson, and after adamantly highlighting the inconsistencies in Wilson's three different stories, Mr. Landis asked the following on cross-examination of Officer Weske:

> **Q (Mr. Landis)**: And we have already established that some of the things he [co-defendant Wilson] said were true, and some of the things he said were false?
>
> **A**: Correct.
>
> **Q**: I want to talk to you a little bit about Narcus Wesley's confession. … Narcus never talked about people who weren't at that house? …
>
> **Q**: There was no Christopher in Narcus' story?

A: No, sir.

Q: You told him the name Kameron [Wilson]?

A: Yes, sir.

Q: He said, I know of a Kameron?

A: Yes, sir.

Q: And within moments he knew what that was about?

A: Yes, sir.

Q: And he didn't try to hide that he was there?

A: No, sir.

Q: From the start, he told you in no uncertain terms that he never had a gun?

A: Yes, sir.

…

Q: He admitted to being there when the people were robbed?

A: Yes, sir.

Q: He told you that it was Kam who took the wallets?

A: I believe it was ATM cards, yes, sir.

…

Q: He told you that when they returned, it [was] Kam who said, it's 90 percent done, there is ten percent left to go?

A: Yes, sir.

Q: He told you it was Kam who ordered that they take their clothes off?

…

Q: He said that Kam ordered Justin and Danielle to have oral sex?

…

Q: He told you that Kam gave him some money?

6 AA 1106. Mr. Landis' use of the word "confession" in this line of questioning was not prejudicial; a confession is what Appellant's statements amounted to. Mr. Landis was not conceding Appellant's guilt; rather he was portraying Wilson as the "mastermind," and Appellant as the honest friend that was dragged along, thereby painting Appellant in a

favorable light for the jury. This strategy was used in defense counsels' opening statement, closing statement, and throughout trial. 4 AA 801-06; 6 AA 1092-1106; 6 AA 1191-94.

> Appellant's counsel went on in his opening statement as follows:
> **Mr. Landis**: **Narcus Wesley is not responsible for what happened that night**. Narcus Wesley did not have a gun in his possession at any time that night, and you will hear that evidence. I assure you when this case is over, you will realize the truth, and **the truth is Delarian Wilson is the one who is responsible** for what happened. **Delarian Wilson is the monster**…Narcus Wesley didn't want to rob these people. Narcus Wesley did not rob these people.

4 AA 803-805 (emphasis added). These statements show that counsel was not conceding Appellant's guilt. Rather, counsel was foisting the blame for what happened upon Wilson. Trial counsel never admitted that Appellant was guilty of any crime, only that the crimes had occurred. Counsel continued their tactical strategy in the closing statement by offering the following to the jury:

> **Mr. Banks**: I agree, Mr. Landis agrees, that the State **has the overwhelming case of guilt against Delarian Wilson.** And the prosecution is banking on you to transfer your outrage at Delarian Wilson onto Narcus….What Narcus did was vile. It was disgusting. It was horrific. And Danielle didn't deserve that. She didn't deserve that….But what he [Appellant] did was on the heels of a death threat, and it done under duress….Hold Narcus accountable only for what he did, but more importantly do not hold him accountable for that [which] he did not do.

6 AA 1191-1194 (emphasis added). Appellant admitted to sexually assaulting Danielle Browning, and the jury knew of this admission because of Officer Weske's testimony. Trial counsel did not concede Appellant's guilt; Appellant conceded his own guilt when he confessed to Officer Weske. Trial counsel worked with the options they had, chose their strategy, and implemented that strategy throughout the trial. Appellant's claim that he was given "no notice that his attorneys would acquiesce to the State's theory concluding that [Appellant's] conduct was 'horrific and vile,'" is belied by the record and taken out of context. Appellant sat through the entire trial, and observed the implementation of counsels' tactical strategy, yet failed to express any concern.

Appellant heavily relies on this Court's ruling in Jones v. State. An attorney cannot deprive his client of the right to have the issue of guilt or innocence presented to the jury as an adversarial issue upon which the state bears the burden of proof without committing ineffective assistance of counsel. Jones v. State, 110 Nev. 730, 737, 877 P.2d 1052, 1056

(1994). A lawyer may make a tactical determination of how to run a trial, but the due process clause does not permit the attorney to enter a guilty plea or admit facts that amount to a guilty plea without the client's consent. Id. In Jones, defense counsel conceded that he thought the evidence showed beyond a reasonable doubt that his client killed the victim but that he was guilty only of second-degree murder as he was incapable of forming the requisite intent and premeditation for first-degree murder. 110 Nev. at 736, 877 P.2d at 1056 (1994). Notably, Jones testified that he did not kill the victim and when canvassed on the subject following the guilt phase, indicated to the trial court that he did not consent to his counsel's argument that he was not guilty of second-degree murder. Id.

Appellant's case is clearly distinguishable from Jones. Trial counsel never admitted that Appellant was guilty of any crime, only that the crimes had occurred. 4 AA 802-3. Furthermore, he placed the blame for those crimes squarely on the shoulders of co-defendant Wilson. 4 AA 802-3. Co-defendant Wilson's guilt was demonstrated again through his guilty plea canvas and plea and through his statements to police. At no point did Appellant's trial counsel commit the egregious errors of Jones' trial counsel sufficient to warrant a reversal of his conviction. Moreover, in Jones, the Court emphasized that the "decision is limited to the situation present[ed] [t]here, where counsel undermined his client's testimonial disavowal of guilty during *the guilt phase of the trial*." Id. at 739, 877 P.2d at 1057. In the instant case, Appellant made no testimonial disavowal for which trial counsel could undermine. Appellant pleaded not guilty, and trial counsel never undermined his plea.

Since defense counsel was not admitting Appellant's guilt, Appellant did not need to give his permission for statements admitting that the victim's were injured. While the client may make decisions regarding the ultimate objectives of representation, the 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). Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. Id. 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. Id.

Defense counsel admitted on the record that they were using Wilson's statements to help their defense that Wilson was responsible for the crimes and not Appellant. 6 AA 1099. Counsel went on to state that "In each case [Wilson] talks about somebody else forcing him to do it, somebody else having the gun, and somebody else doing the robberies, the sexual contact, and he assumes our client's position. . . he lies three different times." 6 AA 1101. This position was not patently unreasonable considering Appellant's own admissions to the police that he digitally penetrated Danielle's vagina. 6 AA 1087. Based upon Appellant's confession and the consistency of the victim's story of events, defense counsel did the best they could in developing a believable defense theory.

Furthermore, Appellant has not demonstrated any prejudice with regards to his trial counsel's actions. Prejudice is very rarely presumed. See Cronic, 466 U.S. 648, 104, S.Ct. 2039. The burden is on Appellant to demonstrate prejudice sufficient to warrant overturning his conviction. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. Appellant does not plead facts to show that his counsel admitting that the crimes occurred, considering there was going to be six witnesses testifying consistently about the events that happened, prejudiced the verdict. Rowland v. State, 118 Nev. 31, 39 P.3d 114 (2002). Nor does Appellant demonstrate how counsel's "errors" seriously affected the integrity or public reputation of the judicial proceedings. Id. Appellant's bare and naked allegations that trial counsel was ineffective are belied by the record, and the district court's decision to deny Appellant's request for an evidentiary hearing was not an abuse of discretion. As such, the district court's decision should be affirmed.

B. Appellant's Trial Counsel Was Not Ineffective for Strategically Introducing Co-Defendant Wilson's Statements

Appellant argues that trial counsels' admission of co-defendant Wilson's statements resulted in a "complete breakdown of the adversarial process," and that this Court should reverse his convictions, or remand the matter for an evidentiary hearing. AOB 20.

First, Appellant is not entitled to an evidentiary hearing on this matter because this claim is barred by the law of the case doctrine. When an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue

will not be revisited. Hogan v. Warden, 109 Nev. 952, 959, 860 P.2d 710, 715 (1993); see also Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001); McNelton, 115 Nev. 396, 990 P.2d 1263; Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996) The law of a first appeal is the law of the case in all later appeals in which the facts are substantially the same; this doctrine "cannot be avoided by more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Hogan, 109 Nev. at 952, 860 P.2d at 710 (citing Hall, 91 Nev. 314, 535 P.2d 797); see also McNelton, 115 Nev. 396, 990 P.2d 1263. Here, to the extent Appellant's claim addresses the district court's admission of co-defendant Wilson's statement, this portion of the claim was already raised on direct appeal and the issue was decided on the merits by this Court. Specifically, this Court held that Appellant's claims that the district court erred by admitting co-defendant Wilson's hearsay statements and guilty plea "are without merit." 7 AA 1278. The Court further noted that "Wilson's confession and guilty plea were admitted by the defense over the State's objection. See Ford v. State, 122 Nev. 796, 805, 138 P.3d 500, 506 (2006) (confrontation rights may be waived through counsel)." 7 AA 1278. Accordingly, Appellant cannot now argue that he is entitled to an evidentiary hearing on the district court's admission of co-defendant Wilson's statements as it is barred by the law of the case doctrine.

Next, the Confrontation Clause in the Sixth Amendment of the United State's Constitution guarantees the right of a criminal defendant to be confronted with the witnesses against him. The United States Supreme Court in Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968) held that since there is a substantial risk that a jury will use a facially incriminating confession of a non-testifying defendant as evidence of the guilt of his co-defendant, the admission of the confession in a joint trial violates the confrontation clause. Id. at 126, 88 S.Ct. at 1622. Appellant's reliance on Bruton to support his claim that co-defendant Wilson's statements were improperly admitted is misplaced. While it is true that the admission of a co-defendant's confession in a joint trial has been found to violate a criminal defendant's right of cross-examination, this was not a joint trial. Moreover, in

Ducksworth v. State, 114 Nev. 951, 966 P.2d 165 (1998), this Court explained that a defendant can only establish prejudice, when faced with the co-defendant's statement, when the evidence of guilt is largely circumstantial. Here, the case against Appellant was not circumstantial, but was supported by all six (6) victims' testimony and by Appellant's own admissions. Not only are the issues regarding the Confrontation Clause and the admission of co-defendant Wilson's statements barred by the law of the case doctrine, but they are misplaced in Appellant's instant petition.

Finally, trial counsel did not acquiesce to the State's theory and the admission of co-defendant Wilson's statements was a strategic, tactical decision that in no way resulted in a breakdown of the adversarial process. Trial counsel admitted co-defendant Wilson's statements to further their theory of the case. There is no indication in the record that trial counsel admitted these statements in an attempt to build credibility with the jury, nor is there any indication in the record that trial counsel admitted these statements in an attempt to not insult the jury's intelligence. Appellant's trial counsel was not ineffective, and their actions are distinguishable from counsel's actions in United States vs. Swanson, 943 F.2d 1070, 1076 (9th Cir. 1991). In Swanson, counsel told the jury that no reasonable doubt existed as to his client's identity as the perpetrator of the only crime charged in the indictment.. Notably, the court in Swanson recognized "that in some cases a trial attorney may find it advantageous to his client's interests to concede certain elements of an offense or his guilt of one of several charges." Id. Appellant's case is one where it was advantageous to Appellant's interests to concede certain elements of an offense because Appellant's own admission of the sexual assault and the robbery was entered into evidence through the State's direct examination of Officer Weske. 6 AA 1087. In the instant case, trial counsels' tactics, including the admission of co-defendant Wilson's statements, did not lessen the State's burden of persuading the jury that Appellant was guilty of all eighteen (18) counts contained in the Information.

Trial counsel offered Wilson's taped statements to police into evidence which were subsequently played to the jury. 6 AA 1102. During the playing of the tapes, defense

counsel continued to ask questions highlighting the inconsistencies in Wilson's statements. 6 AA 1102-03. After highlighting the inconsistencies between Wilson's statements to police, the testimony of the victims in this case, and Wilson's subsequent guilty plea, trial counsel offered Wilson's guilty plea agreement into evidence. 6 AA 1105. It is clear from the record that statements made by Wilson were offered at the insistence of defense counsel for the purpose of painting Wilson as the perpetrator of the crimes. 4 AA 801-06; 6 AA 1092-1106; 6 AA 1191-94. Counsel stated on the record that they did not enter into the decision to admit Wilson's plea and plea canvass lightly. 6 AA 1099. Mr. Landis stated that this was a reasonable decision that they made after talking to each other (Mr. Landis and Mr. Banks) and after talking to their client. 6 AA 1099. Appellant was present during this conversation between the parties and the court and did not manifest any disagreement. 6 AA 1099. It is clear from the record that the decision to admit Wilson's statements was the result of strategic planning on the part of the defense. The evidence was proffered by the defense in an attempt to show that co-defendant Wilson was the person responsible for the crimes committed.

Furthermore, strategy decisions by counsel are "tactical" decisions and will be "virtually unchallengeable absent extraordinary circumstances." Doleman v. State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996). Appellant's claim that the decision to seek the admission of co-defendant Wilson's guilty plea was never discussed with him, nor did he consent to the presentation of the evidence to the jury is belied by the record. The State requested that the Defense submit on the record that their decision to enter co-defendant Wilson's statements to the police and guilty plea agreement was a strategic decision and that they were in fact waiving Confrontation Clause violation claims. 6 AA 1099. Trial counsel stated that they were making this "reasonable decision" after speaking to each other and to their client and that they were not flying "off the cuff." 6 AA 1099. Appellant was present in court when this conversation was taking place. Claiming now that he did not consent to this tactical decision and that the strategy was never discussed with him is false and is belied by the record.

For the foregoing reasons, the district court properly denied Appellant's petition and his request for an evidentiary hearing on the claims in his petition. Notably, during Appellant's sentencing hearing, the district court stated that it felt that trial counsel did an excellent job defending Appellant's case. 7 AA 1353. Appellant has failed to show by a preponderance of the evidence that either trial counsels' strategic decisions throughout trial fell below an objective standard of reasonableness, or that any different strategic decisions would have resulted in a reasonable probability of a different result at trial. As such, the district court's denial should be affirmed.

III
APPELLANT'S TRIAL AND APPELLATE COUNSEL WERE NOT INEFFECTIVE FOR FAILING TO ADDRESS AN ACTUAL CONFLICT OF INTEREST

Appellant's bare claim that his trial counsel was conflicted when they represented Appellant because the Office of the Public Defender also represented Appellant's father on a wholly unrelated matter does not establish an actual conflict. Compare with Clark v. State, 108 Nev. 324, 831 P.2d 1374 (1992). If there is an actual conflict of interest that results in an adverse effect in a lawyer's performance a presumption of prejudice to Defendant is created. Id. However, "[c]onflict of interest and divided loyalty situations can take many forms, and whether an actual conflict exists must be evaluated on the specific facts of each case. In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties." Id. (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir.1991)).

Here, there is no actual conflict of interest. Appellant argues that there was an actual conflict of interest because testimony about a rifle owned by Appellant's father was inadvertently derived during Officer Weske's testimony, and because the Office of the Public Defender represented Appellant's father in the case against him for being an ex-felon in possession of a firearm. AOB 20-21; 6 AA 1077. The case against Appellant's father had been dismissed prior to Appellant's trial. 6 AA 1080. Appellant further states that defense counsel recognized the issue prior to trial, and that defense counsel should have filed a motion to withdraw based upon the conflict of interest. AOB 21. The claim that defense

counsel recognized the issue prior to trial is belied by the record. Specifically, the following colloquy took place during trial outside the presence of the jury:

> **The Court**: It's [testimony about the rifle in Appellant's father's home] even less innocuous than that. It's just a rifle found in the course of, that's it, period.
>
> **Mr. Banks**: Judge, **if this issue had come up pretrial**, and we knew we were going to have to contend with this rifle evidence in this trial, I think it's safe to say that the Defense at that point if the evidence was coming in would have declared a conflict and moved to withdraw from the case on the grounds that with that evidence coming in before a jury we can't adequately represent Narcus and challenge that effectively. I think that's where we are now that that has come in, and at this point I submit to the Court I think we have a conflict in light of this evidence, perhaps our office withdrawing and somebody to represent Mr. Wesley be appointed. Perhaps dismissal of the charges are appropriate, in light of what has transpired today.
>
> **The Court**: There is not going to be a mistrial. You are not going to get off of this case. There is no conflict, and we're proceeding.

6 AA 1081 (emphasis added). Trial counsel did not recognize the issue prior to trial. Furthermore, trial counsel adamantly argued for withdrawal, and went so far as to request a mistrial in the case. These actions show that counsel was not ineffective in handling the alleged conflict of interest. More importantly, an actual conflict of interest did not exist. Appellant's counsel never had to argue that the rifle belonged to Appellant's father and there was no point where counsel had divided loyalties to Appellant and to Appellant's father. The district court issued a curative instruction to the jury and specifically stated that "[n]o one has ever asserted that the Defendant in this case owned or exercised any control whatsoever over that rifle." 6 AA 1081. Additionally, at the close of Officer Weske's testimony, the court asked if in the course of "this entire investigation did you ever recover any handguns," to which Officer Weske responded "No, sir." 6 AA 1111. There were no guns admitted into evidence and there were no rifles involved in the crimes committed. Trial counsel never mentioned the rifle again, and did not even represent Appellant's father at the time of Appellant's trial because the case against Appellant's father had been dismissed. Trial counsel was not ineffective in handling this issue, and there was no actual conflict of interest. As such, the district court's denial of Appellant's petition as to this issue should be affirmed.

Moreover, as there was no actual conflict of interest, appellate counsel was not ineffective for failing to raise this issue on appeal. This Court 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). In Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983), the Supreme Court recognized that part of professional diligence and competence involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751-52, 103 S. Ct. at 3313. 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. The Court also 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 disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314.

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. 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. See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992).

This Court begins with the strong presumption that appellate counsel performed reasonably and then determines whether Appellant has demonstrated that counsel was ineffective and here, Appellant makes absolutely no showing that appellate counsel was ineffective. Appellant's bare allegation that he was denied his Sixth and Fourteenth Amendment right to effective assistance of counsel on direct appeal by Mr. Winder's failure to address a non-existent conflict of interest wholly fails to demonstrate (1) how appellate counsel's performance fell below an objective standard of reasonableness, or (2) how failing to address the alleged conflict of interest affected the success on appeal. Appellant has failed

to demonstrate how appellate counsel's performance fell below an objective standard of reasonableness, and this claim should be denied.

IV
APPELLANT'S TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PROPERLY INVESTIGATE

Appellant complains his counsel was ineffective for failing to properly investigate his case. Specifically, Appellant argues that defense counsel failed to present a series of witnesses regarding Appellant's good character, and that defense counsel failed to impeach Danielle with a police report that contradicted her trial testimony. AOB 23-24. Appellant's bare allegations do not warrant either a reversal, or a remand for an evidentiary hearing.

Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney, and it is he, not the client, who 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. 1, 8, 38 P.3d 163, 167. Who to call as a witness is exactly the kind of tactical strategy that is virtually unchallengeable absent extraordinary circumstances. See Doleman, 112 Nev. at 848, 921 P.2d at 280-81, citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066; see also Harrington, 131 S. Ct. at 788 (noting that Strickland permits counsel to make reasonable decisions that make particular investigations unnecessary). Moreover, an attorney need not pursue investigations that would be fruitless. Harrington, 131 S. Ct. at 789. Here, trial counsel had the ultimate responsibility of deciding which witnesses, if any, to call and what defenses to develop. Appellant has not shown that counsels' performance was deficient, nor has Appellant shown a reasonable probability that but for trial counsels' alleged errors, Appellant would have been acquitted.

A defendant who alleges a failure to investigate must demonstrate how a better investigation would have benefited his case and changed the outcome of the proceedings. Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004). Such a defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. United States v. Porter, 924 F.2d 395, 397 (1st Cir. 1991) quoting United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989). A defendant's bare allegations

do not warrant relief. Hargrove, 100 Nev. 498, 686 P.2d 222. Furthermore, it is well established that a claim of ineffective assistance of counsel alleging a failure to properly investigate will fail where the evidence or testimony sought does not exonerate or exculpate the defendant. Ford, 105 Nev. 850, 784 P.2d 951. A defendant's mere dissatisfaction with the outcome of his case is insufficient to establish that counsel was ineffective. Id. at 853, 784 P.2d at 954.

Here, Appellant fails to specify what a more detailed investigation would have revealed that would have made a more favorable outcome reasonably probable. Appellant fails to specify who would have testified on his behalf and what they would have said regarding his "good character." Appellant merely alludes to a police report that may contradict Danielle's testimony, but does not state with specificity what portions of her testimony would have been contradicted. Appellant has not alleged with specificity what an investigation would have revealed or whether the evidence sought was exculpatory. Appellant's bare allegations do not warrant relief and Appellant's dissatisfaction with the outcome of the case, in retrospect, is insufficient to establish ineffective assistance of counsel. The district court did not abuse its discretion when it denied Appellant's petition and the denial of Appellant's petition as to this issue should be affirmed.

V

APPELLANT'S TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ATTEMPT TO PRECLUDE PRE-TRIAL IDENTIFICATION

Appellant claims that trial counsel was ineffective for failing to file a pre-trial motion to preclude the photographic identification of Appellant by co-defendant Wilson's statements. AOB 26. Appellant must prove that trial counsel's failure to attempt to preclude the pre-trial identification constituted deficient performance and that such deficient performance prejudiced him. A defendant may attack an identification as denying due process if the identification procedures were unnecessarily suggestive and conducive to irreparable mistaken identification. Stovall v. Denno, 338 U.S. 293, 87 S.Ct. 1967 (1967); Manson v. Brathwaite, 432 U.S. 98, 98 S.Ct. 2243 (1977); Jones v. State, 95 Nev. 613, 600 P.2d 247 (1979). However, even if the court finds that an identification technique was

unnecessarily suggestive, the court will still allow the identification if it is reliable. Gehrke v. State, 96 Nev. 581, 613 P.2d 1028 (1980).

Appellant's assertion that the identification was unnecessarily suggestive and therefore in violation of his due process rights is without merit. The test to determine if an identification is in violation of the due process clause is "whether the confrontation conducted…was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was deprived due process of law." Banks v. State, 95 Nev. 90, 94 590 P.2d 1152 (1978)(citing Stovall v. Denno, 388 U.S. 293, 301-302, 87 S. Ct. 1967, 1973 (1972)). The determination of whether an identification is unnecessarily suggestive requires a review of the totality of the circumstances. Id.; see also Gehrke, 96 Nev. 581, 613 P.2d 1028; Jones, 95 Nev. 613, 600 P.2d 247.

In the instant case, some of the victims told officers they thought they heard the name "Marcus" while the crimes were being committed. 6 AA 1074. Officer Weske testified that during his interview with Wilson, Wilson gave Officer Weske the name "Narcus," gave no last name, and indicated that Wilson knew Appellant because they played football together at UNLV. 6 AA 1074. After obtaining this information, Officer Weske went to UNLV, discovered that Appellant indeed played football for UNLV, and retrieved an address and a DMV photo of Appellant. Thereafter, Officer Weske showed co-defendant Wilson the DMV photograph of Appellant, and it was only then that Wilson identified Appellant as the individual in the photograph. 6 AA 1075. Under a totality of the circumstances analysis, the identification of Appellant by Wilson was not unnecessarily suggestive because Officer Weske only showed Wilson Appellant's DMV photograph after having substantial evidence indicating that Appellant was in fact Wilson's co-defendant. As such, trial counsel's failure to attempt to preclude the identification was neither deficient, nor prejudicial, and the district court's denial of this claim should be affirmed.

VI
APPELLANT'S COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBTAIN A PSYCHOLOGICAL EXAMINATION OF DANIELLE BROWNING

Appellant alleges that his counsel was ineffective for not obtaining a psychological examination of sexual assault victim, Danielle Browning. AOB 26. However, Appellant fails to make a prima facie case showing that a compelling need existed for a psychological exam of Danielle. A defendant is entitled to a psychological examination of a sexual assault victim only if (1) the State notices the defendant that it intends to examine the victim by its own experts and (2) the defendant makes a prima facie showing of a compelling need for a psychological examination. Abbott v. State, 122 Nev. 715, 723, 138 P.3d 462, 468 (2006). To determine whether a compelling need exists, the district court must consider: (1) whether little or no corroboration of the offense exists beyond the victim's testimony, and (2) whether there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity. Id.

In this case, the State neither called nor benefited from the testimony of any witness who provided opinion testimony as to the veracity or credibility of Danielle's statements. Since Danielle's behavioral and psychological characteristics were not at issue, Appellant was not entitled to an independent psychological evaluation. Furthermore, no reasonable basis existed to believe Danielle's mental or emotional state affected her veracity. Appellant's bare claims do not support a finding for a compelling need to subject the victims to an independent psychological evaluation.

It is well understood in Nevada that counsel cannot be deemed ineffective for failing to make a futile motion. Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006). Since the examination would not have been granted in this case, counsel was not ineffective for failing to request one. Id. at 705, 137 P.3d at 1103. Given the utter lack of a compelling basis to seek such an examination, any effort by counsel to seek such a psychological examination in this case would have been futile. Accordingly, the district court did not err in not finding trial counsel ineffective in this respect, given the sheer futility of such an endeavor. Thus, the district court's denial of this claim should be affirmed.

VII
APPELLANT'S JURY WAS CONSTITUTIONAL

Appellant claims that his jury was unconstitutionally selected because there was "only" one African American male on the jury and because all of his jurors were over the age of thirty-five. AOB 27-28. Appellant's claim fails on multiple levels, and the district court's denial of the claim should be affirmed.

Appellant failed to raise this issue in his direct appeal. 7 AA 1204-1226. This Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings…. [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). The Court noted in Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) "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." Because Appellant failed to raise this claim on direct appeal, it was considered waived in Appellant's pro per petition, and as such the district court did not abuse its discretion in denying this claim. However, Appellant states that he raises this issue to make sure it is properly preserved for federal review, and as such the State will address the substance of the claim.

The Sixth and Fourteenth Amendment afford Defendant the right to a jury venire that is selected from a fair cross section of the community. Williams v. State, 121 Nev. 934, 939-40, 125 P.3d 627, 631 (2006). However, it does not guarantee that a jury or venire will in fact represent a perfect cross section of the community. Id. The venires from which juries are drawn must not systematically exclude distinctive groups in the community. Id. When challenging the make up of a jury venire, it is the venire that is analyzed, not the jury that is sworn in. Id. Thus, as long as the "selection process is designed to select jurors from a fair

cross section of the community, then random variations that produce venires without a specific class of persons or with an abundance of that class are permissible." Id.

To establish a prima facie violation of the fair-cross-section requirements, 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. Id. (quoting Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996)). Appellant fails to establish any of the above requirements in his petition. Appellant makes multiple bare allegations of exclusion regarding three different groups – African Americans, the young, and males – all based on the make up of Appellant's jury that was sworn in, not of the venire. There is nothing in the record to indicate that Appellant's jury was not constitutionally selected. As such, the district court's denial of this claim should be affirmed.

VIII
NEVADA RULES OF APPELLATE PROCEDURE PROHIBIT ADOPTION BY REFERENCE OF ALL ISSUES RAISED BY APPELLANT'S PRO PER PETITION FILED IN THE COURT BELOW

Appellant's counsel attempts to adopt "all issues raised by the Defendant in his pro per petition for writ of habeas corpus that are not briefed above." AOB 28. The State would submit that this is improper and as such, the claim must be denied. The Nevada Rules of Appellate Procedure (hereinafter "NRAP") provide that opening and answering briefs shall not exceed 30 pages without permission of the Court. NRAP 32(a)(7); see also Hernandez v. State, 117 Nev. 463, 467, 24 P.3d 767, 770 (2001). Additionally, Appellant has the ultimate responsibility to provide this court with "portions of the record essential to determination of issues raised in appellant's appeal." NRAP 30(b)(3); see also Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980); Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975).

Moreover, NRAP 28(e) provides that "[e]very assertion in briefs regarding matters in the record shall be supported by a reference to the page and volume number, if any, of appendix

where the matter relied on is to be found." The rules also prohibit a brief to this court from incorporating by reference briefs or memoranda filed in district court. Thomas v. State, 120 Nev. 37, 43, 83 P.3d 818, 822, fn. 3 (2004).

It appears interesting that counsel has substantively argued some of the issues raised in Appellant's pro per petition, but has elected to not raise others in an attempt to avoid the page limitation imposed by the Rules of Appellate Procedure. Counsel's tactics are improper and the incorporation by reference of "all issues raised by the [Appellant] in his pro per petition" that were not fully briefed in the present petition is prohibited by the NRAP. As such, this claim must be denied.

IX
THERE WAS NO CUMULATIVE ERROR

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." Sipsas v. State, 102 Nev. 119, 125, 716 P.2d 231, 235 (1986); see also Big Pond v. State, 101 Nev. 1, 2, 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." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854 (2000); Big Pond, 101 Nev. at 3, 692 P.2d at 1289. The doctrine of cumulative error "requires that numerous errors be committed, not merely alleged." People v. Rivers, 727 P.2d 394, 401 (Colo.App. 1986). 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 (1998).

Insofar as Appellant has failed to establish any error which would have entitled him to relief, there is and can be no cumulative error worthy of reversal. Notably, a defendant "is not entitled to a perfect trial, but only a fair trial…" Ennis, 91 Nev. at 533, 539 P.2d at 115, citing Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974). Here, Appellant received a

fair trial and effective representation of counsel. All the errors alleged in Appellant's petition are without merit. Therefore, Appellant is not entitled to relief.

CONCLUSION

For the forgoing reasons, the State respectfully requests that this Honorable Court affirm the District Court's denial of Appellant's Petition for Writ of Habeas Corpus.

Dated this 23rd day of November, 2011.

Respectfully submitted,

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BY */s/ Steven S. Owens*
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CERTIFICATE OF COMPLIANCE

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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 day of November, 2011.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 23, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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