IN THE SUPREME COURT OF THE STATE OF NEVADA

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| JEMAR MATTHEWS,<br>Appellant,<br>v.<br>THE STATE OF NEVADA,<br>Respondent. | Case No. 62241 | Electronically Filed<br>Sep 10 2013 04:28 p.m.<br>Tracie K. Lindeman<br>Clerk of Supreme Court |

# RESPONDENT'S ANSWERING BRIEF

**Appeal From Deniel of Timely Petition for Writ of Habeas Corpus**
**Eighth Judicial District Court, Clark County**


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# RESPONDENT'S ANSWERING BRIEF

**Appeal from Denial of Timely Petition for Writ of Habeas Corpus**
**Eighth Judicial District Court, Clark County**

## STATEMENT OF THE ISSUES

1. Whether trial counsel was ineffective for failing to move to sever Matthews from a joint trial with his co-defendant, Pierre Joshlin.
2. Whether there was sufficient evidence to convict Matthews of the crimes charged.

## STATEMENT OF THE CASE

On December 7, 2006, Jemar Matthews (hereinafter "Matthews") was charged by way of Information with Count 1 – Conspiracy to Commit Murder (Felony – NRS 199.480; 200.010; 200.030); Count 2 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010; 200.030; 193.165); Counts 3, 4, and 5 – Attempt Murder With Use of a Deadly Weapon (Felony – NRS 200.020; 200.030; 193.330; 193.165); Count 6 – Possession of Short Barreled Rifle (Felony – NRS 202.275); Count 7 – Conspiracy to Commit Robbery (Felony – NRS 199.480;

200.380); Counts 8 and 9 – Robbery With Use of a Deadly Weapon (Felony – NRS 200.380; 193.165); Counts 10 and 11 – Assault With a Deadly Weapon (Felony – NRS 200.471). 7 AA 1572.

On December, 11, 2006, Matthews entered a plea of not guilty, and the case was set for jury trial. 7 AA 1469. The jury trial commenced May 7, 2007, and concluded on May 11, 2007. 7 AA 1463-5. On May 11, 2007, a jury found Matthews guilty on all counts. 7 AA 1484.

On May 21, 2007, Matthews filed a Motion for New Trial. 7 AA 1573. The State filed its Opposition on June 1, 2007. 7 AA 1573. Matthews filed a Reply on July 9, 2007. 7 AA 1573. The District Court denied the Motion on July 9, 2007. 7 AA 1497; 1573. The Order denying Matthews' motion was filed September 17, 2007. 7 AA 1497; 1573.

On July 9, 2007, Matthews was sentenced as follows: Count 1 – a minimum of twenty-six (26) months and a maximum of one hundred twenty (120) months; Count 2 – Life with the possibility of parole after twenty (20) years, plus an equal and consecutive term for use of a deadly weapon; Count 3 – a minimum of forty-eight (48) months and a maximum of two hundred forty (240) months, plus an equal and consecutive minimum of forty-eight (48) months and a maximum of two hundred forty (240) months for use of a deadly weapon; Count 4 – a minimum of forty-eight (48) months and a maximum of two hundred forty (240) months, plus

an equal and consecutive minimum of forty-eight (48) months and a maximum of two hundred forty (240) months for use of a deadly weapon; Count 5 – a minimum of forty-eight (48) months and a maximum of two hundred forty (240) months, plus an equal and consecutive minimum of forty-eight (48) months and a maximum of two hundred forty (240) months for use of a deadly weapon; Count 6 – a minimum of twelve (12) months and a maximum of forty-eight (48) months; Count 7 – a minimum of twelve (12) months and a maximum of seventy-two (72) months; Count 8 – a minimum of forty (40) months and a maximum of one hundred eighty (180) months, plus an equal and consecutive minimum of forty (40) months and a maximum of one hundred eighty (180) months for use of a deadly weapon; Count 9 – a minimum of forty (40) months and a maximum of one hundred eighty (180) months, plus an equal and consecutive forty (40) months and a maximum of one hundred eighty (180) months for use of a deadly weapon; Count 10 – a minimum of sixteen (16) months and a maximum of seventy-two (72) months; Count 11 – a minimum of sixteen (16) months and a maximum of seventy-two (72) months; all counts to run concurrent with each other with three hundred (300) days credit for time served. 7 AA 1486. The Judgment of Conviction was filed July 17, 2007. 7 AA 1492.

On August 17, 2007, Matthews filed a Notice of Appeal to the Nevada Supreme Court. 7 AA 1448. On June 30, 2009, the Nevada Supreme Court

affirmed Matthews' convictions. 7 AA 1448. The Order of Affirmance was filed on June 30, 2009. 7 AA 1497. Remittitur issued on December 15, 2009. 7 AA 1574.

On December 14, 2010, Matthews filed a Petition for Writ of Habeas Corpus (Post-Conviction). 6 AA 1420. On July 9, 2012, Matthews filed Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction). 6 AA 1433. On July 10, 2012, Matthews filed an Amended Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction). 7 AA 1446. On September 10, 2012, the State filed its Response to Matthews' Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus. 7 AA 1512. On September 24, 2012, Matthews filed a Reply to the State's Response. 7 AA 1518.

The District Court held an evidentiary hearing on Matthews' Petition for Writ of Habeas Corpus on October 12, 2012. 7 AA 1533. At the conclusion of the hearing, the court orally denied Matthews' Petition. 7 AA 1533. On November 13, 2012, the Findings of Fact and Conclusions of Law and Order were filed to reflect the denial. 7 AA 1571.

On November 20, 2012, Matthews filed a Notice of Appeal to the Nevada Supreme Court. 7 AA 1578. On August 14, 2013, Matthews filed its Opening Brief. The State responds as follows.

## STATEMENT OF THE FACTS

On September 30, 2006, Mercy Williams ("Mercy"), and her two cousins, Myniece Cook and Michel'le Tolefree, went to their grandmother's house for a Saturday dinner. 3 AA 491-2. As they were getting ready to leave, Michel'le said she wanted to stop and visit a friend who lived in the same neighborhood as their grandmother. 3 AA 493. This friend was Maurice Hickman. 3 AA 493. The three girls arrived at Maurice's house, and stood outside talking. 3 AA 493. Suddenly, four gunmen came around the corner, walked up to the girls, and began shooting in an ambush-style attack. 3 AA 495. The four gunmen fired approximately 40 bullets at them. 4 AA 926.

Fearing for their lives, Michel'le and Maurice ran in the same direction across the street, while Myniece and Mercy ran together in a different direction. 3 AA 496. As Myniece and Mercy were running, Myniece grabbed Mercy's arm but soon felt Mercy's arm get very heavy. 3 AA 496-7. Mercy then fell to the ground. 3 AA 496. Myniece did not know exactly what was happening at that moment, but believed Mercy might have been shot. 3 AA 496. Myniece dropped to the ground to play dead. 3 AA 496. Myniece was hit in the wrist during the blaze. 3 AA 498.

Once Myniece did not hear any more gunshots, she got up, ran to the side of the house, and looked around. 3 AA 497. Myniece then heard Maurice's mom opening the door. 3 AA 497. Myniece ran to the door as Maurice's mom called the

police. 3 AA 499. Myniece described all four gunmen as being Black and wearing black clothing. 3 AA 498. Michel'le later gave the same description of the gunmen as well. 3 AA 518. Myniece then returned back to where Mercy was lying. 3 AA 499. Myniece found Mercy dead from a single shot to the head. 5 AA 1224.

After opening fire at the group of girls, the gunmen ran around the corner of the street. 3 AA 497; 506. They encountered Geishe Orduno and Melvin Bolden, an unsuspecting older couple who were returning home after a night out. 3 AA 537; 539. As Geishe and Melvin pulled into their driveway, they sat in their Lincoln Continental. 3 AA 539. The four gunmen approached them and demanded their car at gunpoint. 3 AA 539-40. As Geishe and Melvin quickly got out of their car, the four gunmen got in and sped off. 3 AA 540; 542; 545. According to Geishe, the four gunmen were young Black males wearing black clothing. 3 AA 541; 544. Geishe said the gunman who got into the driver's seat was wearing red gloves. 3 AA 542-4. At the same time, Officer Cupp and Officer Walter were operating an unmarked police unit in the area. 3 AA 585. Both of the officers heard several shots fired, so they proceeded in that direction. 3 AA 587. The officers observed a silver Lincoln Town Car with several Black males and a female creating some sort of disturbance around the vehicle. 3 AA 595; 4 AA 751. A male and the female appeared to be arguing, but the officers could not understand they

were saying. 3 AA 596; 4 AA 753. According to the officers, three or four Black males got into the Lincoln Town Car and sped away. 3 AA 596-7; 4 AA 752.

The officers believed the suspects in the vehicle might have been involved in the shots that had been fired, so they followed the vehicle. 3 AA 597. The vehicle accelerated, ran a stop sign, and then ran a red light. 3 AA 598. The officers then activated their lights and siren. 3 AA 598-9. The Town Car drove on the sidewalk, swerved back onto the roadway, and then slowed as the drivers' door opened. 3 AA 602; 755. Both officers saw the driver, later identified as Matthews, wearing a dark long sleeve shirt, red gloves and blue jeans. 3 AA 603; 4 AA 756. The officers saw Matthews holding an object in his right hand which they believed was a gun. 3 AA 602; 4 AA 756. At that point, the Town Car hit the curb and Matthews jumped out. 3 AA 603; 4 AA 757. The officers noticed that Matthews was holding some sort of short rifle in his hands. 3 AA 602; 604.

Officer Cupp made the decision to swerve his unmarked police vehicle into Matthews, which caused Matthews to fall over onto the hood before falling down on the passenger side of the vehicle. 3 AA 604-5; 4 AA 757. Matthews then got up and started to run. 4 AA 758. At this point, Matthews was no longer in possession of the short barrel rife. 4 AA 758. Officer Walter got out and chased Matthews on foot. 3 AA 605. Matthews was soon thereafter taken into custody. 3 AA 698. Gunshot residue was found on a red glove Matthews was seen wearing. 4 AA 906.

The glove was located near a fence Matthews jumped over during the foot pursuit. 5 AA 987.

Officer Cupp observed two other suspects exit the passenger side of the vehicle. 4 AA 758. One of the suspects was later identified as Pierre Joshlin ("Joshlin"). 4 AA 766. Joshlin was wearing a black long sleeve t-shirt, dark pants and carrying a handgun in his right hand as he ran. 4 AA 758. Officer Cupp drew his weapon as he was running after Joshlin and shouted for Joshlin to stop. 4 AA 759. Joshlin partially turned around and pointed the gun back over his shoulder at Officer Cupp. 4 AA 759. Officer Cupp believed Joshlin was going to shoot at him, so he fired three rounds at Joshlin. 4 AA 759. None of the rounds hit Joshlin. 4 AA 836. Joshlin continued to run and was eventually located hiding in a large green dumpster. 4 AA 764. A search of the dumpster revealed an unregistered Glock .45 caliber semi auto handgun and a pair of black gloves. 5 AA 963.

Officer Cupp positively identified Joshlin as the suspect that had run from him and pointed the gun at him. 4 AA 766. Officer Walter positively identified Matthews as the suspect that had been in possession of the short barrel rifle that ran from him. 3 AA 622-3. The rifle was a Ruger model 10/22 with a barrel length of 10 ¾" and an overall length of 20". 5 AA 1113. The Ruger also had an extended length magazine attached to it. 5 AA 1125. The two other guns recovered were a

.45 caliber Glock and a .45 caliber Colt. 5 AA 985. Ballistic tests on all three guns matched the casings found at the scene of the shooting. 5 AA 1142; 1144-5.

## ARGUMENT

### I. MATTHEWS RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Matthews alleges that trial counsel was ineffective on two grounds: first, for failing to investigate, and second, for failing to seek severance from a joint trial with his co-defendant, Pierre Joshlin.

#### A. Legal Standard

In order to assert a claim for 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). Under this test, the 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. Id.; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting 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).

In determining whether trial counsel has met this standard, the court begins with a strong presumption of effectiveness and then must determine whether or not the defendant has demonstrated by "strong and convincing proof" that counsel was ineffective. Homick v. State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996), citing Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981); Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991). The role of a court in considering an allegation 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). The court should not "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. Instead, 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.

Even if a defendant can demonstrate that his trial counsel performance fell below an objective standard of reasonableness, he must still demonstrate prejudice

and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), citing Strickland, 466 U.S. at 687, 104 U.S. at 2064. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., citing Strickland, 466 U.S. at 687-89, 694, 104 S.Ct. 2052. This Court may consider both prongs in any order and need not consider them both when a defendant's showing on either prong is insufficient. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

Finally, "[a] claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review [*de novo*]." Evans v. State, 117 Nev. 609, 622, 28 P.2d 498, 508 (2001); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996); Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). "However, the district court's purely factual findings regarding a claim of ineffective assistance of counsel are entitled to deference on subsequent review by this court." Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994) (a district court's factual findings will be given deference by this court on appeal, so long as they are supported by substantial evidence and are not clearly wrong).

### B. Matthews' Argument Must Be Limited to Claims Raised in the Post-Conviction Record Below.

This Court will not consider claims for relief that were not raised in the original post-conviction petition for habeas corpus or considered by the district court below. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004). Claims not raised in the district court are not properly raised for the first time on appeal, and this Court will generally not consider them. McNelton v. State, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999); Hill v. State, 114 Nev. 169, 178, 953 P.2d 1077, 1084 (1998); Zampanti v. Sheriff, 86 Nev. 651, 653, 473 P.2d 386, 387 (1970); McGill v. Chief of Police, 85 Nev. 307, 309, 454 P.2d 28, 29 (1969). "However, we have indicated that such claims may be considered in limited circumstances when the petitioner demonstrates both good cause and prejudice, and the claim involves questions of law that do not require factual determinations outside the record." Bejarano v. State, 122 Nev. 1066, 1071, 146 P.3d 265, 269-70 (2006); Rippo v. State, 122 Nev. 1086, 1091, 146 P.3d 279, 282-83 (2006).

In this instant appeal, Matthews claims that his trial counsel was ineffective for failing to adequately investigate his case. However, Matthews has failed to preserve this issue for appeal. Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997). The sole issue raised in both Matthews' Petition for Writ of Habeas Corpus and his Supplemental Points and Authorities was the effectiveness of

counsel in failing to file a motion to sever. In neither motion did Matthews raise the issue of the effectiveness of investigation by trial counsel, nor was the issue ever raised at the October 12, 2012, hearing on Matthews' Petition. As a result, the Findings of Fact, Conclusions of Law and Order contain no mention of a claim regarding the failure to investigate by trial counsel. See, generally, 7 AA 1572.

To the extent Matthews now attempts to introduce an additional claim of inadequate investigation under the umbrella heading of "ineffective assistance of counsel," that claim is beyond the scope of his original petition and thus improper. Matthews presents no evidence to support a finding of good cause and prejudice to overcome his failure to assert this claim in the first instance. Thus, it is precluded from consideration here and should not be recognized by this Court. McKenna v. State, 114 Nev. 1044, 968 P.2d 739 (1998) (holding that this Court will not consider an argument on appeal that was not first argued before, and therefore considered by the district court on the merits). Moreover, even if this Court were to address this claim for the first time on appeal, the claim has no factual substance and consists merely of legal citations. It is therefore a conclusory claim undeserving of review. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

### C. Trial Counsel Was Not Ineffective for Failing to Move to Sever Matthews' Case from his Co-Defendant's Case

NRS 173.135 allows for two or more defendants to be charged under the same Indictment or Information if they participated in the same criminal conduct. Persons who have been jointly indicted should be tried jointly, absent compelling reasons to the contrary. Jones v. State, 111 Nev. 848, 853, 899 P.2d 544 (1995). Joint trials for co-defendants tend to be favored because of judicial economy. Id. at 854. Indeed, joint trials of persons charged with committing the same offense expedites the administration of justice, relieves trial docket congestion, conserves judicial time, lessens the burden on citizens called to sacrifice time and money while serving as jurors, and avoids the necessity of calling witnesses more than one time. Id. at 853-54; see also United States v. Brady, 579 F.2d 1121 (9th Cir. 1978), cert. denied, 439 U.S. 1074, 99 S. Ct. 849 (1979).

A trial judge may sever a joint trial if "it appears that a defendant...is prejudiced by a joinder of… defendants…for trial together." NRS 174.165(1); Chartier v. State, 124 Nev. 760, 191 P.3d 1182 (2008). In determining whether any action is warranted pursuant to NRS 174.165(1), a district court must look at the facts of each case. Chartier, 124 Nev. at 765, 191 P.3d at 1185. Demonstrating spill-over prejudice alone is not sufficient to demonstrate substantial prejudice. See Lisle v. State, 113 Nev. 679, 689-90, P.2d 459, 466 (1997), overruled on other grounds by Middleton v. State, 114 Nev. 1089, 1117 n. 9, 968 P.2d 296, 315 n. 9 (1998). In

looking at the facts, the district court should grant a severance " 'only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.' " Chartier, 124 Nev. at 765, 191 P.3d at 1185 (quoting Marshall v. State, 118 Nev. 642, 647, 56 P.3d 376, 379 (2002)).

Notably, "[t]he decision to sever is within the discretion of the district court, and an appellant has the 'heavy burden' of showing that the court abused its discretion." Floyd v. State, 118 Nev. 156, 164, 42 P.3d 249, 255 (2002) (quoting Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990)), overruled on other grounds by Grey v. State, 124 Nev. 110, 117–18, 178 P.3d 154, 160 (2008).

**a. Counsel's Performance Was Not Deficient**

Matthews claims that trial counsel was ineffective for failing to sever his case from that of his co-defendant, Pierre Joshlin. This claim is without merit for three reasons. First, claims of ineffective assistance of counsel must be supported with specific factual allegations which, if true, would entitle a defendant to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied or repelled by the record. Id. "A habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective assistance claim by a preponderance of evidence." Means v. State, 120 Nev. 1001, 1002, 103 P.3d 25, 33 (2004).

Matthews claims the evidence was so much stronger against his co-defendant than himself, and thus once Matthews was linked to Joshlin, "in the minds of the jurors, Matthews was doomed." However, Matthews incorrectly assesses the weight of the evidence against him. This Court held in its Order of Affirmance:

> "…[t]here was significant evidence indicating that Matthews participated in the shooting, robbery, and police chase (a pursuing officer identified Matthews as the driver in possession of the rifle, the bullet that killed the victim came from the same type of rifle in Matthews' possession, the red glove found near where the police apprehended Matthews tested positive for gunshot residue, and Matthews closely resembled the description of the shooting and robbery suspects)." 7 AA 1500.

Matthews' bare assertion that the evidence against him was "weak" is belied by the record and as such, fails to support his claim of ineffective assistance by a preponderance of evidence.

Second, there was never any legal basis for requesting a severance, and therefore counsel cannot be deemed deficient for failing to do so. A court will only grant a severance if joinder compromises a specific trial right, or prevents the jury from making a reliable judgment about a defendant's guilt or innocence. Chartier, 124 Nev. at 765, 191 P.3d at 1185. Matthews has not demonstrated that a *particular trial right* of his was compromised when counsel failed to file a motion to sever. Matthews simply asserts that the prejudice he suffered in the joint trial was "obvious." App. Brief pp. 14. This bare assertion does not meet the requirement for granting a severance.

Insomuch as Matthews argues the jury did not make a reliable judgment as to his guilt due to discrepancy in the evidence between himself and Joshlin, this claim is belied by the record as previously addressed. The weight of the evidence against Matthews was significant, and based on the evidence presented at trial, the jury made a reliable judgment as to Matthews' guilt. Furthermore, a mere disparity in the quantity of evidence between Matthews and Joshlin does not, by itself, prevent a jury from making a reliable judgment as to Matthews' guilt. Additionally, at the October 12, 2012, hearing on Matthews' Petition, trial counsel Dayvid Figler, Esq., testified that "there existed no legal basis for severance of Matthews' trial." 7 AA 1542. Mr. Figler explained that the motion to sever was only going to be necessary if Bruton violations occurred during trial. 7 AA 1543. While the bench brief filed by trial counsel alludes to the possibility of severance, Mr. Figler explained that a severance was only necessary *if* the State attempted to offer evidence in violation of Bruton v. United States, 391 U.S. 123 (1968). 7 AA 1542. Counsel filed the bench brief only to put the court on notice of the issue with Bruton violations, nothing more. 7 AA 1542-3. And, because a Bruton violation never occurred, trial counsel had no need to file a motion to sever. 7 AA 1548. At the conclusion of the hearing, the District Court found that any pre-trial severance motion, if raised, would have been futile. 7 AA 1576-7. The Findings of Fact, Conclusions of Law and Order reflect that Matthews failed to establish adequate grounds for severance.

Finding of Fact #8 states "[Matthews] did not establish that severance of his trial from his co-defendant was warranted." 7 AA 1574. Importantly, this determination by the District Court is entitled to deference by this Court on appeal. See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994) (a district court's factual findings will be given deference by this court on appeal, so long as they are supported by substantial evidence and are not clearly wrong).

As such, there was never any legal basis before or during trial to request a motion to sever, and Matthews fails to allege a legal basis now. This Court does not require trial counsel to "make every conceivable motion no matter how remote the possibilities are of success." Donovan v State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Therefore, trial counsel cannot be deemed ineffective for failing to file a futile motion. See Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

Third, trial counsel's decision not to seek severance was a strategic decision. "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. The decision to not file a motion to sever was strategic because trial counsel believed it could use the

discrepancy in evidence to its advantage. 7 AA 1544. Mr. Figler testified that because the evidence was stronger against Joshlin, he believed highlighting the weaker evidence against Matthews to the jury would prove beneficial. 7 AA 1544. This decision was made by trial counsel after reviewing the relevant discovery, and evaluating the strengths and weaknesses of Matthews' case. 7 AA 1544. Thus, the decision to not seek severance was strategic, made after a thorough investigation, and should not be second-guessed by this Court on appeal.

"Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970). Under the facts of this case, trial counsel acted within the range of competence demanded of a defense attorney. There was no legal basis to support a motion to sever, and trial counsel did not believe Matthews was prejudiced by the joinder. As such, counsel rendered reasonably effective assistance and Matthews' claim was properly denied.

**b. Counsel's Performance Did Not Prejudice the Defense**

Even if this Court finds counsel's performance fell below an objective standard of reasonableness, Matthews has not demonstrated there was a reasonable probability that, but for counsel's errors, the result of the trial would have been

different. Matthews claims that "if trial counsel had moved to sever the trials, only good things could have happened." App. Brief pp. 13. One of these "good things" was that "the motion could have been granted, and the danger of undue prejudice to Matthews based on joinder with Joshlin would have been avoided. Id. 13-14. As an initial matter, the motion to sever would not have been granted if brought. See argument *supra*. Furthermore, broad allegations of prejudice are not sufficient to support an ineffective assistance of counsel claim. See Hargrove, 100 Nev. at 502, 686 P.2d at 225 (1984). By simply alleging that "good things" could have happened, or that undue prejudice generally could have been avoided, Matthews does not address how failing to file a futile motion *prejudiced* the defense.

Matthews also claims that the State's linking of himself with his co-defendant during closing argument was prejudicial because the evidence against his co-defendant was "much stronger" than the evidence presented against himself. This claim is belied by the record as the facts clearly indicate the evidence implicating Matthews was significant. See Order of Affirmance. Moreover, Matthews fails to show there was a *reasonable probability* that the result would have been different had counsel filed a motion to sever. Demonstrating spill-over prejudice alone is not sufficient to demonstrate substantial prejudice. See Lisle v. State, 113 Nev. 679, 689-90, P.2d 459, 466 (1997), overruled on other grounds by Middleton v. State, 114 Nev. 1089, 1117 n. 9, 968 P.2d 296, 315 n. 9 (1998). That the evidence against

his co-defendant was even more overwhelming does not negate the significance of the evidence against Matthews, nor does it show that Matthews would not have been convicted on all counts if his trial was severed. Matthews has failed to establish that he suffered prejudice as a result of counsel's decision to not sever his case. Accordingly, Matthews' claim was properly denied.

## II. MATTHEWS' CLAIM OF INSUFFICIENT EVIDENCE IS BARRED BY LAW OF THE CASE.

Where 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. Pellegrini v. State, 117 Nev. 860, 884, 34 P.3d 519, 535 (2001). A Matthews cannot avoid the doctrine of the law of the case by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings. Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). This doctrine prevents the continued litigation of already settled issues by promoting both finality and efficiency in the appellate process. Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816, 108 S. Ct. 2166, 2177 (1988), citing 1B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice ¶ 0.404[1], p. 118 (1984).

Matthews claims he was convicted almost solely on evidence by two eyewitnesses, and cites voluminous authority on the unreliability of eyewitness testimony. It appears that Matthews is attempting to challenge the sufficiency of the evidence to convict him of the crimes charged. To this extent, Matthews' claim

is barred by the law of the case. On direct appeal, Matthews raised the issue of whether there was sufficient evidence to convict him of any of the offenses. 7 AA 1573. This Court affirmed Matthews' conviction on all counts finding there was "significant evidence indicating that Matthews participated in the shooting, robbery, and police chase." 7 A 1497; 1573. Thus, the sufficiency of the evidence has already been decided by this Court, and will not be revisited. Accordingly, Matthews' claim should be denied.

## CONCLUSION

Wherefore, the State respectfully requests that this Honorable Court AFFIRM the judgment of the district court.

Dated this 10th day of September, 2013.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more and contains no more than 14,000 words or does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 10th day of September, 2013.

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## CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 10, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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