approximately forty minutes later. RT 11/12/2008, pp. 126-27, 147, 160-61, 164-66. As Defendant's claim is belied by the record, it is denied.

35. Defendant's claim that counsel was ineffective for failing to raise the alleged Brady violation to the jury is without merit. Any consideration or findings concerning alleged Brady violations would have been rendered by the trial court and were outside the purview of the jury as fact finder. Thus, any attempt by counsel to argue to the jury that Brady violations had occurred would have raised an objection by the State and such objection would have been sustained.

36. Defendant's claim that the trial court improperly denied his motion to continue after admitting Jarmin's preliminary hearing testimony is belied by the record. No such motion to continue trial was ever made. RT 11/12/2008, pp. 100-04. The trial court cannot be held at fault for denying motions never raised. Further, even if such denial of a motion to continue occurred, this claim is barred because Defendant could have raised it on direct appeal but failed to. Therefore, Defendant's claim is denied.

37. Defendant's claim that the prosecutor committed misconduct by vouching for Jarmin's credibility is barred because Defendant could have raised it on direct appeal but failed to. Additionally, this claim is without merit as the allegedly improper comment did not constitute vouching. Finally, inasmuch as Defendant is contending counsel was ineffective for failing to object to such argument, the argument was proper and any objection would have been overruled.

38. Defendant's claim that many of his alleged prior convictions were over fifteen years old is barred because it could have been raised on appeal but was not. Further, this claim is without merit as there is no time requirement for the use of prior felony convictions under NRS 207.010.

39. Defendant's claim that the felonies he was convicted of in New Jersey are not felonies under Nevada law is barred because it could have been raised on appeal but was not. Further, this claim is without merit as Defendant's New Jersey crimes were felonies under New Jersey law, therefore, whether they constitute felonies under Nevada law is irrelevant.

40. Defendant's claim that counsel was ineffective for failing to call family members, former employers and others in mitigation as well as for not objecting to the admission of Defendant's prior felony convictions is without merit. Defendant's claim that family members, former employers and others would have been willing to testify at Defendant's sentencing is a bare allegation and does not warrant relief. Furthermore, even if such witnesses existed and were willing to testify, Defendant fails to demonstrate a reasonable probability that such would have resulted in a more favorable outcome at sentencing. Defendant's criminal record demonstrates a career criminal that consistently selects elderly and disabled victims at casinos and steals from them through distract and pickpocket methods. RT 4/7/2009, pp. 5-6. In light of such consistent criminal behavior by Defendant, any comments from family and friends would not raise a reasonable likelihood of a more favorable sentence.

41. Defendant's claim that some alleged prior convictions were erroneous because they were not for Defendant is barred because it could have been raised on appeal but was not. Furthermore, inasmuch as Defendant claims the five prior felony convictions used to sentence him to habitual criminal treatment were erroneous, this claim is belied by the record and without merit. Defendant acknowledged he was the person photographed in connection with the five prior felonies the court considered in sentencing. RT 4/7/2009, pp. 10-11. Any present claims to the contrary are belied by this earlier admission. Furthermore, the district court independently found the photographs identified Defendant in connection with the prior felony convictions. RT 4/7/2009, p. 22. Finally, inasmuch as Defendant is contending records of prior felony convictions alleged by the State but not considered by the sentencing judge were erroneous, Defendant fails to demonstrate any prejudice. Therefore, Defendant's claim is denied.

42. Defendant's claim that the New Jersey convictions were not properly certified is barred because it could have been raised on appeal but was not. Furthermore, this claim is without merit as the State produced certified copies of judgments of conviction for five different prior felony convictions as well as booking photos showing that Defendant was the

perpetrator. RT 4/7/2009, pp. 2-4. Counsel conceded that the judgments of convictions were properly certified and the district court agreed. RT 4/7/2009, pp. 17-18, 22. Any assertion by Defendant to the contrary are thus bare allegations unsupported by the record and are denied.

43. Inasmuch as Defendant is contending his sentence is cruel and unusual, consideration of this claim is barred because Defendant could have raised it on direct appeal but did not

44. Trial counsel was effective.

45. Appellate counsel was effective.

46. Cumulative error does not warrant relief.

47. An evidentiary hearing is not warranted. Many of Defendant's claims are belied by the record and therefore do not warrant an evidentiary hearing. Furthermore, Defendant has failed to demonstrate that, even if all of his claims are true, he was prejudiced thereby. Thus, an expansion of the record would not assist the merits of Defendant's claims and his request is hereby denied.

CONCLUSIONS OF LAW

1. In order to assert a claim for ineffective assistance of counsel, a defendant must prove 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, 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. Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden 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, 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)).

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2. In considering whether trial counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information that is pertinent to [the] client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996) (citing Strickland, 466 U.S. at 690-691, 104 S. Ct. at 2066). Once proof of such a reasonable inquiry by counsel has been shown, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Id. at 846, 921 P.2d at 280 (citing Strickland, 466 U.S. at 690-691, 104 S. Ct. at 2066). Finally, counsel's strategy decisions are "tactical" and will be "virtually unchallengeable absent extraordinary circumstances." Id.; Strickland, 466 U.S. at 691, 104 S. Ct. at 2066; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). Counsel cannot be found ineffective for not raising futile arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

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

4. This analysis means that the court should not "second guess reasoned choices between trial tactics" and defense counsel need not "make every conceivable motion 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.

5. Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must also demonstrate prejudice by showing a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064-65, 2068). Similarly, a defendant who contends his attorney was ineffective because he did not adequately investigate must show that the investigation was unreasonable and that a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

6. When determining whether a potential juror is biased, the relevant inquiry is whether the juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Weber v. State, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005) (quoting Leonard v. State, 117 Nev. 53, 65, 17 P.3d 397, 405 (2001)).

7. Bare assertions and claims belied by the record do not warrant post-conviction relief. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

8. NRS 174.234(3)(a) provides that the court shall prohibit the testimony of any improperly noticed expert *only if* such lack of notice was in bad faith. See also Mitchell v. State, 124 Nev. 807, 819, 192 P.3d 721, 729 (2008) (reviewing court's decision to admit improperly noticed expert for abuse of discretion and finding no bad faith nor prejudice to the defendant's substantial rights).

9. NRS 171.198(7)(b), allows the State to admit preliminary hearing testimony if a defendant was represented by counsel and cross-examined the witness at the preliminary hearing and the witness is "sick, out of the State, dead, or persistent in refusing to testify

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deposit an order of the judge to do so, or when the witness's personal attendance cannot be had in court."

10. NRS 51.035(2)(c) provides for the admission of prior statements of identification made "soon after perceiving the person" but does not prescribe a time limit between the identification and the trial.

11. Leading questions are questions which unnecessarily suggest an answer and are generally not permitted during direct examination. NRS 50.115(3)(a).

12. Hearsay is defined as an out-of-court statement offered into evidence to prove the truth of the matter asserted. NRS 51.035.

13. The threshold test for admitting expert testimony is whether such testimony would assist the jury in determining truth in "areas outside the ken of ordinary laity." Townsend v. State, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987).

14. NRS 207.010(1) provides:

> Unless the person is prosecuted pursuant to NRS 207.012 or 207.014, a person convicted in this State of:
>
> . . .
>
> (b) Any felony, who has previously been three times convicted, whether in this State or elsewhere, of any crime which under the laws of the situs of the crime or of this State would amount to a felony is a habitual criminal and shall be punished for a category A felony by imprisonment in the state prison[.]

15. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). Here the issue of guilt was not close as there was testimony and video demonstrating that Defendant stole Stathopoulos' purse at the Tropicana and used one of her credit cards forty minutes later at Sheikh Shoes. Further, although the crime had some gravity, the quantity and character of any errors by counsel were minimal and Defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975). In fact, there was no single instance of ineffective assistance in Defendant's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error

analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

16. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal or in appeals to previous petitions may not be reargued in a subsequent petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001).

17. NRS 34.810(1)(b)(2) reads:

> The court shall dismiss a petition if the court determines that:
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> . . .
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

18. 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). Federal courts have held that a claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991). 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); Heath, 941 F.2d at 1132.

19. To establish a Brady violation, a defendant must demonstrate that: (1) the prosecution suppressed evidence in its possession; (2) the evidence was favorable to the defense; and (3) the evidence was material to an issue at trial. See, e.g., Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). An accused cannot complain that exculpatory evidence has been suppressed by the prosecution when the information is known to him or could have been discovered through reasonable diligence. Rippo v. State, 113 Nev. 1239, 1258, 946 P.2d 1017, 1029 (1997).

20. The State has an obligation to preserve evidence in its possession or control. See Steese v. State, 114 Nev. 479, 491, 960 P.2d 321, 329 (1998).

21. "Vouching may occur in two ways: the prosecution may put the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony." Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997).

22. NRS 207.010(1)(b) provides for habitual criminal treatment if a defendant has three convictions for crimes that are *either* felonies under Nevada law *or* under the law of the situs of the crime.

23. An evidentiary hearing is not warranted. NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.

2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

NRS 34.770. The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, no evidentiary hearing is necessary. Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002); Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; See also Hargrove, 100 Nev. at 503, 686 P.2d at 225 ("A defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

ORDER

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

DATED this 11 day of June, 2013.

DISTRICT JUDGE

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

BY
HILARY HEAP
Deputy District Attorney
Nevada Bar #012395

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of Findings Of Fact, Conclusions Of Law And Order, for review, was made this 5th day of June, 2013, by facsimile transmission to:

MATTHEW CARLING, ESQ.
446-8065

BY: _____
C. Cintola
Employee of the District Attorney's Office

CB/HH/cc/L3

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CLERK OF THE COURT

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA

RONALD ROSS,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 07C236169
Dept No: XVII

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

PLEASE TAKE NOTICE that on June 12, 2013, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on June 17, 2013.

STEVEN D. GRIERSON, CLERK OF THE COURT

Barbara J. Gutzmer

Barbara J. Gutzmer, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 17 day of June 2013, I placed a copy of this Notice of Entry in:

The bin(s) located in the Regional Justice Center of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:

Ronald Ross # 1003485
P.O. Box 650
Indian Springs, NV 89070

Matthew D. Carling, Esq.
1100 S. Tenth Street
Las Vegas, NV 89101

Barbara J. Gutzmer

Barbara J. Gutzmer, Deputy Clerk

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CLERK OF THE COURT

ORDR

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
HILARY HEAP
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Nevada Bar #012395
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RONALD ROSS,
#1970026

Defendant.

CASE NO: C236169

DEPT NO: XVII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: FEBRUARY 22, 2013
TIME OF HEARING: 8:15 A.M.

THIS CAUSE having come on for hearing before the Honorable MICHAEL VILLANI, District Judge, on the 22ND day of FEBRUARY, 2013, the Petitioner not being present, represented by MATTHEW D. CARLING, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through HILARY HEAP, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein and the Court having taken the matter under submission until Mar 7, 2013, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT

1. On August 22, 2007, an Information was filed charging Ronald Ross ("Defendant") as follows: Counts 1, 3 and 7: Burglary (Felony – NRS 205.060); Count 2: Larceny from the Person (Felony – NRS 205.067); Count 4: Possession of Credit or Debit Card Without Cardholder's Consent (Felony – NRS 205.690); Count 5: Fraudulent Use of Credit or Debit Card (Felony – NRS 205.760); Count 6: Theft (Felony – NRS 205.0835, 205.0832); Count 8: Grand Larceny, Victim 60 Years of Age or Older (Felony – NRS 206.270, 193.1687); Counts 9 and 10: Conspiracy to Commit Larceny (Gross Misdemeanor – NRS 205.220, 205.222, 199.480). On August 23, 2007, an Amended Information was filed charging Defendant with the same offenses. On August 24, 2007, a Second Amended Information was filed charging Defendant with the same offenses. On November 12, 2008, Defendant was charged by way of Third Amended Information with the following: Counts 1 and 3: Burglary; Count 2: Larceny from the Person; Count 4: Possession of Credit or Debit Card Without Cardholder's Consent; Count 5: Fraudulent Use of Credit or Debit Card; Count 6: Theft; and Count 7: Conspiracy to Commit Larceny.

2. On November 12, 2008, Defendant's trial began. The jury returned a verdict of guilty on all counts contained in the Third Amended Information on November 13, 2008.

3. On November 17, 2008, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal, alleging seventeen prior felony convictions. The State filed an Amended Notice of Intent to Seek Punishment as a Habitual Criminal on the same day alleging eighteen prior felony convictions. A Second Amended Notice of Intent to Seek Punishment as a Habitual Criminal and a Memorandum in Support of Habitual Criminal Treatment were filed on January 5, 2009, alleging nineteen prior felony convictions.

4. On April 7, 2009, Defendant was adjudged guilty of the offenses charged in the Third Amended Information under the Large Habitual Criminal Statute and sentenced to imprisonment in the Nevada Department of Corrections as follows: Count 1: Minimum of ten (10) years, maximum of life; Count 2: Minimum of ten (10) years, maximum of life, sentence to run concurrent with count 1; Count 3: Minimum of ten (10) years, maximum of

life, sentence to run consecutive to counts 1 and 2.; Count 4: Minimum of ten (10) years, maximum of life, sentence to run consecutive to counts 1 and 2 and concurrent with count 3; Count 5: Minimum of ten (10) years, maximum of life, sentence to run consecutive to counts 1 and 2 and concurrent with count 4; Count 6: Minimum of ten (10) years, maximum of life, sentence to run consecutive to counts 1 and 2 and concurrent with count 5; Count 7: one (1) year in the Clark County Detention Center. Defendant received two hundred (200) days credit for time served. A Judgment of Conviction was filed on April 16, 2009.

5. Defendant filed a Notice of Appeal on December 5, 2008. On November 8, 2010, the Nevada Supreme Court affirmed Defendant's convictions. Remittitur issued December 3, 2010.

6. Defendant filed a pro per petition for writ of habeas corpus (post-conviction) on November 30, 2011. Defendant's First Supplemental Petition for Writ of Habeas Corpus was filed on July 18, 2012. The State's filed a Response on December 28, 2012. Defendant filed a Reply on January 22, 2013. The State filed a Response on February 5, 2013. A hearing was conducted on the Petition on February 22, 2013. The district court subsequently denied Defendant's Petition with a Minute Order on May 7, 2013.

7. Defendant's claim that counsel was ineffective for not challenging Jurors 187, 200, and 208 for cause is without merit. All three jurors unequivocally expressed they could lay aside these past experiences and that such would not affect their deliberations. Reporter's Transcript,[1] 11/12/2008, pp. 10-11, 32, 37-38, 69, 72-73. When the State raised a challenge for cause concerning another juror, the court denied the challenge because, even though the prospective juror had a pending criminal matter in Clark County, "no one got him to say he can't be fair." RT 11/12/2008, p. 76. Thus, any efforts to challenge the above listed jurors for cause would have been futile. Furthermore, Defendant cannot demonstrate prejudice as he cannot show that any of the listed prospective jurors actually served on the jury and were actually biased. The record demonstrates that Juror 187 and Juror 208 did not serve on the jury. Compare RT 11/12/2008, pp. 10-11, 37-38 with RT 11/12/2008, p. 78. It is unclear

[1] Hereinafter "RT."

whether Juror 200 served as his name is not a part of the record. However, as demonstrated above, Juror 200 unequivocally stated he could lay aside any prejudice or perceived prejudice in deciding Defendant's case. Thus, because counsel did not act below an objective standard of reasonableness and because he cannot demonstrate prejudice, this claim is denied.

8. Counsel was not ineffective in asserting Defendant's right to a speedy trial. At Defendant's arraignment on September 9, 2007, he invoked his right to a speedy trial and trial was set for October 22. RT 9/5/2007, pp. 2-3. However, this trial date was vacated because there were pending appeals in two other cases involving Defendant (C220915 and C220916),[2] one by the State and one by Defendant. RT 11/11/2007, pp. 2-3. Both Defendant's counsel and the State represented to the court that the outcome of the pending appeals could significantly affect the instant case and that, if Defendant were tried prior to the Nevada Supreme Court's decision and such decision was in his favor, the instant case would have to be retried. RT 11/11/2007, p. 3, 12/11/2007, p. 2. The State and Defendant therefore agreed that trial in the instant case should be postponed until the pending appeals were resolved. RT 11/11/2007, pp. 2-3; 12/11/2007, pp. 2-3. Defendant's stated he had "no problem" waiting for the resolution of the pending appeal but asked to be transported to prison as opposed to staying at the Clark County Detention Center while he awaited the outcome. RT 11/11/2007, pp. 3-4; 12/11/2007, pp. 2-3. When the pending appeals were resolved (See Supreme Court Case Nos. 49091 and 50153), Defendant re-asserted his right to a speedy trial and trial was set for September 2, 2008. RT 7/8/2008, p. 4-5. However, against the court's order, Defendant was not transported for the trial and it was vacated. RT 8/16/2008, p. 2. On September 16, 2008, Defendant received a new trial date of November 10, which was the earliest date that the State could transport out-of-state witnesses and the court could conduct the trial. RT 9/16/2008, p. 4-7. Trial commenced on November 12, 2008. RT 11/12/2008. Given the significant effect Defendant's pending appeals could have had on a trial in this case, it was reasonable for counsel to waive Defendant's right to a

[2] The corresponding Supreme Court Case numbers are 49091 and 50153, respectively.

speedy trial until after the appeals were determined. Furthermore, Defendant cannot demonstrate prejudice. The Nevada Supreme Court considered and denied Defendant's speedy trial claim on direct appeal, finding that Defendant had failed to demonstrate prejudice or that the delay was in bad faith. See Order of Affirmance, p. 1. Thus, if counsel had moved to dismiss Defendant's charges on this ground, such a motion would likely have been denied. Additionally, based on the same reasoning, Defendant cannot demonstrate a reasonable probability that the outcome of his case would have been different had counsel moved to dismiss his charges based on an alleged violation of his right to a speedy trial.

9. Inasmuch as Defendant now alleges the delay of his trial was prejudicial because it caused the loss of exculpatory evidence, specifically the Sheikh Shoes surveillance video, this claim is belied by the record. Sheikh Shoes store assistant manager Kevin Hancock testified that the surveillance video depicting Defendant using Georgia Stathopoulos' credit card was saved in the computer database for 1-2 weeks before being automatically erased. As the transaction took place on March 17, 2007, and Defendant was not arraigned until September 5, 2007, any surveillance video of Sheikh Shoes was unavailable prior to any delay of Defendant's trial. Therefore, because delay subsequent to September 5, 2007 did not result in the loss of such evidence, this claim is denied.

10. Inasmuch as Defendant is alleging his prosecution violated his right to a speedy trial, consideration of this claim is precluded by the law of the case. On direct appeal, the Nevada Supreme Court considered and rejected Defendant's claim that his speedy trial rights were violated. Order of Affirmance 11/8/2010, p. 1-2. Therefore, consideration of this claim is precluded and it is dismissed.

11. Counsel was not ineffective in deciding not to file a discovery motion. Defendant was already in possession of all discovery and was therefore not prejudiced by the absence of a formal motion.

12. Counsel was not ineffective for failing to preserve the Sheikh Shoes video surveillance prior to its destruction. Any surveillance of the Sheikh Shoes transaction was automatically deleted by the end of March 2007 at the latest. Defendant was not arrested in

connection with this case until June 6, 2007, and counsel was subsequently appointed. See Declaration of Arrest. Thus, any surveillance video of Sheikh Shoes was already unavailable prior to counsel's appointment and Defendant's claim is denied.

13. Defendant's claim that the State violated Brady v. Maryland, 373 U.S. 83, 83 S Ct. 1194 (1963), by not providing him with the Sheik Shoes video is not cognizable as this claim could have been raised on appeal, but was not.

14. Inasmuch as Defendant contends the State intentionally failed to preserve the Sheikh Shoes video, this claim is without merit. First, this claim is barred because Defendant could have raised it on appeal but did not. Second, although the State has an obligation to preserve evidence in its possession or control, Defendant fails to demonstrate that the State ever had possession or control of the Sheikh Shoes video. Furthermore, Defendant's claim that the State did not take steps to preserve the evidence is belied by the record. Detective Flenner testified at the preliminary hearing and at trial that he asked for a copy of the Sheikh Shoes video to be made. RT 6/19/2007, p. 95-96, 11/12/2008, p. 244. Additionally, Hancock testified that he tried to make a copy of the video but that support staff was unable to travel to the location until after the video had been automatically erased. RT 11/12/2008, pp. 200-02. Because Defendant cannot demonstrate that the Sheikh Shoes video was in the State's possession or control and because his claim that it was intentionally destroyed is belied by the record, this claim is denied.

15. Counsel was not ineffective for failing to secure the Santa Fe Station video surveillance. Defendant fails to demonstrate any prejudice. Even if counsel did not review the Santa Fe Station surveillance video prior to the first day of trial (a fact unknown to this Court), Defendant cannot demonstrate a reasonable probability of a more favorable outcome than having the charges concerning the Santa Fe Station offenses voluntarily dismissed by the State. RT 11/12/2008 p. 3. Thus, any deficiency of counsel was non-prejudicial, and Defendant's claim is hereby denied.

16. Counsel was not ineffective in not presenting the Santa Fe Station video in order to impeach the identification of Defendant from the Tropicana Hotel and Casino surveillance

video as well as the Sheik Shoes video. At Defendant's preliminary hearing, Detective Julie Holl testified that she reviewed the Santa Fe Station video and identified Defendant as the person depicted committing a larceny. RT 6/19/2007, pp. 65-66. Prior to the beginning of trial on November 12, 2008, the State filed a Third Amended Information excluding all Santa Fe Station offenses because, in reviewing the Santa Fe Station video, the prosecutor determined that Defendant was not depicted. Detective Holl did not testify at trial. Detective Flenner testified at both the preliminary hearing and at trial that he observed the Tropicana video and the Sheikh Shoes video and identified Defendant as depicted in both. RT 6/19/2007, pp. 87-105; RT 11/12/2008, pp. 236, 243, 245-47. Detective Flenner did not review or testify concerning the Santa Fe Station video. Any evidence that a non-testifying witness had misidentified Defendant in connection with another theft would have likely been excluded because it was irrelevant. The fact that Detective Holl had misidentified Defendant after observing the Santa Fe Station video did not increase or decrease the likelihood that Detective Flenner correctly identified Defendant after observing the Tropicana video and the Sheikh Shoes video and is therefore irrelevant. Furthermore, even if such evidence was admissible, counsel appropriately declined to present it because of its minimal probative value and potential prejudicial effect. Defendant was on trial for larceny of Stathopoulos' purse while she was playing slot machines at a casino by distracting her and subsequently using her stolen credit card to purchase $490 in shoes and clothing. Similarly, the larceny that occurred at Santa Fe Station involved a person who stole money from a victim while the victim was playing slot machines at a casino by distracting them. RT 6/19/2007, pp. 67-69. Therefore, even if such evidence was admissible, counsel made a reasonable decision to avoid introducing evidence that Defendant was suspected in a very similar offense occurring in another casino.

17. Defendant's claim that counsel failed to sufficiently communicate with him is belied by the record. On November 4, 2008, Defendant requested to be made co-counsel because, in discussing the case with counsel, there were disagreements concerning what witnesses to call and what defenses to develop. RT 11/4/2008, p. 3. The court recommended that counsel

and Defendant continue to discuss the case and counsel stated he would visit Defendant again before the beginning of trial to discuss the case. RT 11/4/2008, pp. 3-4. Such evidence of communication between Defendant and counsel belies Defendant's claim that there was a communication breakdown. Defendant's allegation that counsel's cross-examination of witnesses demonstrates his lack of understanding of the details of the case is also a bare allegation belied by the record. In fact, counsel engaged in lengthy and detailed cross-examinations of key witnesses Stathopoulos, Luis Valdez, Hancock and Detective Flenner. RT 11/12/2008, pp. 139-53, 180-88, 203-18, 220-23, 248-62. Therefore, Defendant's claim does not warrant relief and is hereby denied.

18. Counsel was not ineffective for not objecting to expert testimony by Detective Flenner. Detective Flenner testified, in part, concerning his experiences investigating distract and pickpocket thefts and common techniques associated with those crimes. RT 11/12/2008, pp. 236-43 Counsel did not object. On appeal, Defendant contended Detective Flenner improperly testified as an expert. The Nevada Supreme Court rejected Defendant's claim, finding that Defendant failed to demonstrate plain error. Order of Affirmance, 11/8/2010, p. 2. It was a reasoned tactical decision to not object. Defendant fails to demonstrate that Detective Flenner's testimony would have been prohibited had an objection been raised under NRS 174.234(2). Defendant does not argue in his Petition that the State's failure to notice Detective Flenner's testimony was in bad faith. Furthermore, because Detective Flenner and other detectives testified similarly concerning distract and pickpocket crimes at Defendant's preliminary hearing, Defendant was on notice concerning the testimony and fails to demonstrate that his substantial rights were violated. See RT 6/19/2007, pp. 66-70, 90-93. Therefore, any objection to Detective Flenner's testimony at trial would have been futile. Furthermore, had the district court heard Defendant's objection and overruled it, Defendant cannot show a reasonable probability that he would have successfully appealed the decision because there was no prejudice. See Order of Affirmance, 11/8/2010, p. 2. Therefore, the Nevada Supreme Court likely would have found any error harmless. Finally, even if Defendant had objected and Detective Flenner was prohibited from testifying

concerning distract and pickpocket crimes in general, Defendant fails to demonstrate a reasonable probability that the outcome of his trial would have been different. At trial, a videotape was admitted that showed Defendant and another unidentified male approach Stathopoulos with a coat draped over Defendant's arm, speak with Stathopoulos for a few minutes while Defendant's coat was over Stathopoulos' open purse, then Defendant gave his coat containing a black skinny object to the unidentified male and they left in separate directions. RT 11/12/2008, pp. 236-243. Stathopoulos identified Defendant and stated that her wallet was black and skinny and was stolen during the time that Defendant was speaking with her. RT 11/12/2008, pp. 127, 130-33. Stathopoulos' credit card was then used at Sheikh Shoes approximately forty minutes later and four people identified Defendant as the person that used the credit card to purchase $490 in merchandise. RT 11/12/2008, pp. 157-58, 162-63, 175-76, 194, 246, 246-47. In light of such evidence, Defendant cannot demonstrate a reasonable probability that the jury would have acquitted him even if evidence concerning the techniques of distract and pickpocket thefts was excluded. Therefore, Defendant's claim is denied.

19. Counsel was not ineffective for not objecting to the admission of Deja Jarmin's preliminary hearing testimony. Defendant contends counsel was ineffective in not objecting to the admission of Jarmin's preliminary hearing testimony on the grounds the State had failed to demonstrate due diligence in attempting to locate Jarmin. Any objection on this ground would have been futile. Although Defendant conceded the State had demonstrated due diligence in attempting to locate Jarmin, the court would have found such regardless. Clark County District Attorney's Office investigator Matthew Johns was sworn and testified that he had attempted to contact Jarmin at his address and called and left messages on Jarmin's phone beginning in mid-October. RT 11/12/2008, pp. 84-86. Johns contacted a woman claiming to be Jarmin's girlfriend who confirmed Jarmin's address and phone number but Johns was unable to contact Jarmin. RT 11/12/2008, p. 91. On the day of trial, Johns again contacted Jarmin's girlfriend, who told him that Jarmin had been admitted to a hospital in California on Friday for heart problems and that Jarmin's family lived in the area

near the hospital. RT 11/12/2008, p. 87. Johns then attempted to contact the hospital as well as Jarmin's family in California to confirm that Jarmin was in the hospital, but was unsuccessful. RT 11/12/2008, pp. 87-88. In light of such efforts, Defendant's claim that the State failed to exercise due diligence in attempting to locate Jarmin is a bare allegation belied by the record. Notably, while Defendant now alleges the State did not exercise due diligence in attempting to locate Jarmin, he does not explain what additional efforts the State should have made. Thus, any objection on the grounds advanced by Defendant would have been futile. Furthermore, that counsel objected to admission of Jarmin's preliminary hearing testimony on different grounds demonstrates a reasoned tactical decision to advance what counsel believed to be the strongest argument for not admitting Jarmin's preliminary hearing testimony and such decision is not so deficient to warrant reconsideration.

20. Inasmuch as Defendant alleges counsel was also ineffective for failing to object on the grounds of untimely notice of Jarmin's unavailability, such an objection would likewise have been futile. According to Jarmin's girlfriend, Jarmin had been admitted to the hospital the Friday prior to trial with heart problems, a fact Johns had learned the morning of trial. It was on this ground, not the State's inability to locate Jarmin, that the State requested Jarmin's preliminary hearing testimony be admitted. Notice of Jarmin's medical condition was provided the same day that the State learned of it and any objection to the introduction of Jarmin's testimony on this ground would have been futile.

21. Inasmuch as Defendant contends counsel was likewise ineffective for failing to renew his best evidence objection from the preliminary hearing in connection with Jarmin's testimony, such claim is without merit. First, it is unclear what objection Defendant is referring to, as counsel did not raise a best evidence objection during Jarmin's preliminary hearing testimony. See RT 6/19/2007, pp. 17-34. Furthermore, any best evidence objection would have been overruled, as the State had sufficiently demonstrated that the original Sheikh Shoes video had been destroyed without the presence of fraud by the State and could not be obtained by judicial process. Thus, any objection by counsel would have been futile. Furthermore, because such objection, or renewed objection, would have been futile,

Defendant cannot demonstrate a reasonable probability that it would have been sustained at trial, or successful on appeal, and so cannot demonstrate prejudice.

22. Counsel was not ineffective for not objecting to Hancock's prior identification of Defendant. Counsel's decision to not object to Hancock's prior identification was a reasoned tactical decision. Defendant fails to provide any authority for the proposition that a previous identification is inadmissible because of the length of time between the identification and trial. Therefore, any objection to Hancock's identification on this ground would have been futile. Second, Defendant's claim that Hancock was not cross-examined concerning his identification of Defendant is belied by the record. Defendant was cross-examined concerning the time between the incident and the photographic identification, his knowledge of the offense prior to the identification and the fact that he did not personally see Defendant in Sheik Shoes on the day of the offense. RT 11/12/2008, pp. 204-09, 211-14. Therefore, this claim is denied.

23. Counsel was not ineffective for not objecting to the verbal introduction of the receipt for the transaction made with Stathopoulos' credit card at Sheik Shoes on March 17, 2007 during Hancock's testimony. State's Exhibit 1. Counsel's decision to not object was a reasoned strategic decision. Additionally, State's Exhibit 1 had been admitted into evidence prior to Hancock's testimony. RT 11/12/2008, pp. 158-60. Thus, as the "best evidence" was already admitted, NRS 52.235 was not violated by Hancock's testimony and any objection would have been futile. Finally, Defendant cannot demonstrate prejudice. Hancock's testimony concerned the contents of the State's Exhibit 1, including: the card number for the credit card used, the date, the salesperson, the items purchased and the amount. RT 11/12/2008, pp. 197-200, 216-17. Defendant did not challenge that Stathopoulos' credit card was indeed used during the transaction State's Exhibit 1 memorialized. Given that the evidence testified to was admitted and all of the contents of the receipt were conceded to by Defendant, there is not a reasonable probability of a different outcome had counsel objected and such objection was sustained. Therefore, this claim is denied.

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24. Counsel was not ineffective for not objecting to allegedly leading questions during Hancock's direct testimony concerning State's Exhibit 1. The decision to not object was a reasoned strategic decision. Furthermore, neither of the challenged questions asked by the prosecutor unnecessarily suggested an answer. While both called for a "yes" or "no" answer, neither question suggested an answer to the witness and were therefore proper. Thus, any objection would have been futile. Finally, Defendant cannot demonstrate that, had counsel objected, there is a reasonable probability of a different outcome. Both questions concerned evidence already admitted and facts conceded to by Defendant. Therefore, had counsel objected and such objection been sustained, the prosecutor likely would have simply rephrased the question. Even if the prosecutor had abandoned the line of questioning, the result of Defendant's trial would have been the same, as State's Exhibit 1 was admitted and Defendant conceded to its contents. Therefore, Defendant fails to demonstrate prejudice and this claim is denied.

25. Counsel was not ineffective during the cross-examination of Hancock's testimony concerning identification of Defendant and for not objecting to Hancock's identification during redirect examination. Defendant's claim is a bare allegation belied by the record. Counsel cross-examined Hancock regarding his identification of Defendant. See RT 11/12/2008, pp. 204-09, 211-14. Furthermore, Defendant's claim that counsel was ineffective for failing to object to Hancock's testimony regarding Defendant's identity on redirect is without merit. Defendant does not state the grounds upon which any objection to Hancock's identification could have been made and any objection to Hancock's identification testimony would have been futile as Hancock's identification was admissible.

26. Counsel was not ineffective for not objecting to Detective Flenner testifying that he was "familiar" with Defendant and for soliciting testimony of Defendant's other bad acts. Although evidence of other bad acts is inadmissible to prove action in conformity therewith, no evidence of other acts was offered against Defendant. Detective Flenner's testimony did not imply anything more than that he was acquainted with Defendant prior to March 17, 2007. This knowledge could have originated from a multitude of avenues having nothing to

do with Defendant's prior bad acts. The jury received no testimony concerning the basis of Detective Flenner's prior knowledge of Defendant and it was instructed to not consider facts not in evidence. Jury Instruction 24. Thus, Defendant's contention that the jury inferred from Detective Flenner's testimony that Defendant had committed other bad acts is a bare allegation unsupported by the record. Furthermore, the decision to not object was a reasoned strategic decision. Finally, even if the testimony was improper under NRS 48.045(2), Defendant cannot demonstrate prejudice. Evidence of Defendant's guilt was overwhelming and included the testimony of one witness and a video of Defendant's theft and the testimony of four witnesses concerning the use of Stathopoulos' credit card. Thus, even if counsel had successfully objected to the challenged testimony, Defendant cannot demonstrate a reasonable probability that the result would have been different.

27. Defendant's claim that counsel solicited evidence of other acts is belied by the record. During cross-examination, counsel asked Detective Flenner how he was able to identify Defendant's facial features on the Tropicana surveillance video in light of the video images' poor quality. The court then asked counsel to approach and advised counsel during the bench conference that the question had the potential to elicit testimony of other acts. The question was then withdrawn and counsel was permitted to continue with cross-examination. RT 11/12/2008, pp. 253-54. Thus, no evidence of other acts was actually offered during cross-examination and Defendant's claim is denied. Furthermore, inasmuch as Defendant is contending counsel's question alone demonstrates ineffective assistance of counsel, Defendant fails to show how an unanswered question regarding the video quality of the Tropicana video prejudiced him. Therefore, this claim is denied.

28. Counsel was not ineffective for not objecting to the admission of a hearsay statement that Stathopoulos told Jarmin her stolen credit card had been used to make a purchase at Sheikh Shoes. Such testimony was not objectionable as hearsay. Testimony by Jarmin and Detective Flenner that they received information that Stathopoulos' stolen credit card had been used at Sheikh Shoes was not offered to prove that Stathopoulos' credit card was indeed stolen and used at Sheikh Shoes. Instead, such testimony was offered to put reactions

by Jarmin and Detective Flenner in context. Based on the information they received concerning the use of Stathopoulos' credit card at Sheik Shoes, Jarmin and Detective Flenner investigated the credit card receipts at Sheikh Shoes and found a receipt for items purchased with Stathopoulos' credit card. See RT 11/12/2008, pp. 161-63, 245. Because Stathopoulos' statement was not being offered to prove the truth of the matter asserted, such testimony was not hearsay and any objection would have been futile. Furthermore, counsel pursued an identity defense at trial and conceded that a theft and use of a stolen credit card had occurred. RT 11/12/2008, pp. 122, 124; 11/13/2008, pp. 29-30, 35-36, 39-41. Thus, counsel's decision to not object was a reasoned strategic decision. Finally, Defendant fails to demonstrate prejudice. There was much more probative evidence that Stathopoulos' credit card had been stolen and used at Sheikh Shoes than her out-of-court statement to Jarmin. Specifically, Stathopoulos' testified that her wallet, including her credit card, was stolen at approximately 1:00 PM on March 17, 2007, and the same card was used to purchase a significant amount of clothing and shoes approximately forty minutes later, as evidenced by the credit card receipt from Sheikh Shoes entered into evidence. RT 11/12/2008, pp. 126-27; State's Exhibit 1. Further, testimony and video demonstrated Defendant stole Stathopoulos' purse and four witnesses identified Defendant as the person that used Stathopoulos' credit card at Sheikh Shoes. RT 11/12/2008, pp. 130, 162-63, 175, 194, 243, 246-47. Therefore, Defendant cannot demonstrate a reasonable probability that the outcome of the matter would have been different had the jury not known that Stathopoulos told Jarmin her stolen credit card had been used at Sheikh Shoes. Thus, Defendant's claim is denied.

29. Counsel was not ineffective in declining to present expert testimony concerning distract and pickpocket crimes. Such was a reasoned strategic decision. Additionally, Defendant's implied assertion that counsel could have secured an expert witness to counter the testimony of Detective Flenner is a bare allegation unsupported by the record and does not warrant relief. Further, the jury did not require an expert to testify that Defendant's actions "were consistent with non-criminal activity" as such fact was not outside the ken of ordinary laity. Therefore, if such testimony was proffered, it would have likely been

excluded and counsel cannot be found ineffective for failing to proffer inadmissible evidence. Finally, Defendant fails to demonstrate prejudice. Even if the jury received expert testimony that Defendant's actions on the Tropicana surveillance video were consistent with non-criminal activity, the admission of evidence that no one else was close enough to Stathopoulos to take her purse and the fact that Defendant used Stathopoulos' credit card approximately forty minutes after her wallet was stolen would have resulted in the same conviction. Thus, Defendant cannot demonstrate a reasonable probability of a different outcome and his claim is denied.

30. Counsel was not ineffective in declining to present the testimony of a video expert to counter Detective Flenner's testimony that the Sheikh Shoes video had better resolution than the Tropicana video. Such was a reasoned strategic decision. Additionally, that counsel could have secured an expert witness to counter the testimony of Detective Flenner is a bare allegation and does not warrant relief. A copy of the Tropicana video was played at trial and Detective Flenner acknowledged on cross-examination that it had "streaks and was not very clear." See RT 11/12/2008, pp. 252-53. Detective Flenner viewed the original Sheikh Shoes video and never received a copy. RT 11/12/2008, p. 244. The original was destroyed by the time of trial. As the original Sheik Shoes video that Detective Flenner viewed had been destroyed shortly after the March 17, 2007 transaction, it is unclear how a defense expert could have testified about the comparative quality of the two videos. Further, considering that the Sheik Shoes video was an original and the Tropicana video was a copy, had an expert been called to testify, it is likely that they would have opined that originals are generally of higher quality or resolution than copies. Finally, Defendant cannot demonstrate prejudice. Even if an expert had been called and opined that casino surveillance videos are generally of higher resolution than other surveillance videos, there is not a reasonable probability that the outcome of Defendant's trial would have been different. Two eyewitnesses, including the clerk that processed the sale, testified that Defendant made a purchase at Sheikh Shoes with Stathopoulos' credit card forty minutes after it was stolen. RT 11/12/2008, pp. 155-60, 175-76. Such testimony would have been sufficient to overcome

any vague challenge to the quality of the Sheikh Shoes video. Thus, Defendant's claim does not warrant relief.

31. Counsel was not ineffective in not challenging alleged errors in Defendant's Presentence Investigation Report. First, Defendant's claim that counsel failed to investigate his prior felony convictions is a bare allegation belied by the record. On January 29, 2009, counsel requested sentencing to be continued to resolve disputes regarding Defendant's prior felonies. RT 1/29/2009, pp. 2-3. The sentencing was continued to April 7, 2009, when the State proffered booking photos for five prior felonies. RT 4/7/2009, pp. 2-4. When asked, Defendant admitted that the booking photos for the five felonies depicted him but disputed the other prior felony convictions alleged by the State. RT 4/7/2009, pp. 10-12. The district court stated it was only considering the five felony convictions with corresponding booking photos in its sentencing. RT 4/7/2009, p. 12. Counsel contended that the identity in connection with the five prior felonies was still unconfirmed and requested a continuance to establish identity through fingerprints. RT 4/7/2009, pp. 15-16. The court denied counsel's request and sentenced Defendant under the large habitual criminal statute. RT 4/7/2009, p. 22. Thus, the record supports the presumption that counsel indeed investigated Defendant's prior felony offenses. Further, in light of the fact Defendant conceded he had been previously convicted of five felonies either in Nevada or elsewhere, Defendant cannot now demonstrate prejudice. The five prior felony convictions Defendant acknowledged were the only prior felony convictions the court considered in sentencing Defendant as a large habitual criminal and were sufficient to support such a sentence. Because Defendant cannot demonstrate that, had counsel more effectively investigated prior felony convictions not considered by the court, there is a reasonable probability that the outcome of his sentencing would have been more favorable, this claim is denied.

32. Inasmuch as Defendant contends counsel was ineffective in challenging the authenticity of the prior felony convictions alleged, this claim is belied by the record. After the booking photos for five prior felony convictions were admitted and Defendant agreed that the person photographed was him, counsel still insisted that identity was not proven and

requested fingerprint analysis. RT 4/7/2009, pp. 10-11, 15-16. In fact, counsel challenged the authenticity of Defendant's prior felony convictions more forcefully than Defendant himself. Therefore, this claim is denied

33. Appellate counsel was not ineffective for declining to raise a claim that the State violated Brady. Appellate counsel raised five claims on appeal and contended that testimony of the contents of the Sheikh Shoes video in the absence of the video violated the best-evidence rule. Furthermore, prosecutors did not violate Brady. Defendant fails to demonstrate that the Sheikh Shoes video was ever in the State's possession. In fact, Detective Flenner testified he viewed the video as it existed on the security system at Sheikh Shoes and never received a copy. RT 11/12/2008, p. 244. Thus, as such evidence was not in the State's possession at any time, Defendant cannot demonstrate a Brady violation and appellate counsel appropriately declined to raise the issue. Furthermore, Defendant's claim that the State never disclosed that the security video had been destroyed is a bare allegation belied by the record. At the preliminary hearing, Detective Flenner testified the Sheikh Shoes employees did not know how to make a copy. Detective Flenner testified he did not receive a copy and was unaware of whether a copy was ever made. RT 6/19/2007, pp. 95-96. Therefore, Defendant was on notice at least as early as June 19, 2007, that the State had not secured a copy of the Sheikh Shoes video and had an equal opportunity to further investigate whether such a copy existed. Therefore, because the record demonstrates Defendant had equal access to determine whether a copy of the Sheik Shoes video existed, his claim did not have a reasonable probability of success on appeal and counsel appropriately declined to raise it.

34. Defendant's contention that counsel failed to cross-examine witnesses concerning the timing between the theft and the use of Stathopoulos' credit card is belied by the record. Counsel cross-examined both Stathopoulos and Jarmin concerning the length of time between the alleged theft and use of Stathopoulos' credit card. RT 11/12/2008, pp. 147, 152, 164-66. The witnesses consistently testified that Stathopoulos' purse and credit card were stolen at approximately 1:00 PM and Stathopoulos' credit card was used at Sheikh Shoes

approximately forty minutes later. RT 11/12/2008, pp. 126-27, 147, 160-61, 164-66. As Defendant's claim is belied by the record, it is denied.

35. Defendant's claim that counsel was ineffective for failing to raise the alleged Brady violation to the jury is without merit. Any consideration or findings concerning alleged Brady violations would have been rendered by the trial court and were outside the purview of the jury as fact finder. Thus, any attempt by counsel to argue to the jury that Brady violations had occurred would have raised an objection by the State and such objection would have been sustained.

36. Defendant's claim that the trial court improperly denied his motion to continue after admitting Jarmin's preliminary hearing testimony is belied by the record. No such motion to continue trial was ever made. RT 11/12/2008, pp. 100-04. The trial court cannot be held at fault for denying motions never raised. Further, even if such denial of a motion to continue occurred, this claim is barred because Defendant could have raised it on direct appeal but failed to. Therefore, Defendant's claim is denied.

37. Defendant's claim that the prosecutor committed misconduct by vouching for Jarmin's credibility is barred because Defendant could have raised it on direct appeal but failed to. Additionally, this claim is without merit as the allegedly improper comment did not constitute vouching. Finally, inasmuch as Defendant is contending counsel was ineffective for failing to object to such argument, the argument was proper and any objection would have been overruled.

38. Defendant's claim that many of his alleged prior convictions were over fifteen years old is barred because it could have been raised on appeal but was not. Further, this claim is without merit as there is no time requirement for the use of prior felony convictions under NRS 207.010.

39. Defendant's claim that the felonies he was convicted of in New Jersey are not felonies under Nevada law is barred because it could have been raised on appeal but was not. Further, this claim is without merit as Defendant's New Jersey crimes were felonies under New Jersey law, therefore, whether they constitute felonies under Nevada law is irrelevant.

40. Defendant's claim that counsel was ineffective for failing to call family members, former employers and others in mitigation as well as for not objecting to the admission of Defendant's prior felony convictions is without merit. Defendant's claim that family members, former employers and others would have been willing to testify at Defendant's sentencing is a bare allegation and does not warrant relief. Furthermore, even if such witnesses existed and were willing to testify, Defendant fails to demonstrate a reasonable probability that such would have resulted in a more favorable outcome at sentencing. Defendant's criminal record demonstrates a career criminal that consistently selects elderly and disabled victims at casinos and steals from them through distract and pickpocket methods. RT 4/7/2009, pp. 5-6. In light of such consistent criminal behavior by Defendant, any comments from family and friends would not raise a reasonable likelihood of a more favorable sentence.

41. Defendant's claim that some alleged prior convictions were erroneous because they were not for Defendant is barred because it could have been raised on appeal but was not. Furthermore, inasmuch as Defendant claims the five prior felony convictions used to sentence him to habitual criminal treatment were erroneous, this claim is belied by the record and without merit. Defendant acknowledged he was the person photographed in connection with the five prior felonies the court considered in sentencing. RT 4/7/2009, pp. 10-11. Any present claims to the contrary are belied by this earlier admission. Furthermore, the district court independently found the photographs identified Defendant in connection with the prior felony convictions. RT 4/7/2009, p. 22. Finally, inasmuch as Defendant is contending records of prior felony convictions alleged by the State but not considered by the sentencing judge were erroneous, Defendant fails to demonstrate any prejudice. Therefore, Defendant's claim is denied.

42. Defendant's claim that the New Jersey convictions were not properly certified is barred because it could have been raised on appeal but was not. Furthermore, this claim is without merit as the State produced certified copies of judgments of conviction for five different prior felony convictions as well as booking photos showing that Defendant was the

perpetrator. RT 4/7/2009, pp. 2-4. Counsel conceded that the judgments of convictions were properly certified and the district court agreed. RT 4/7/2009, pp. 17-18, 22. Any assertion by Defendant to the contrary are thus bare allegations unsupported by the record and are denied.

43. Inasmuch as Defendant is contending his sentence is cruel and unusual, consideration of this claim is barred because Defendant could have raised it on direct appeal but did not

44. Trial counsel was effective.

45. Appellate counsel was effective.

46. Cumulative error does not warrant relief.

47. An evidentiary hearing is not warranted. Many of Defendant's claims are belied by the record and therefore do not warrant an evidentiary hearing. Furthermore, Defendant has failed to demonstrate that, even if all of his claims are true, he was prejudiced thereby. Thus, an expansion of the record would not assist the merits of Defendant's claims and his request is hereby denied.

CONCLUSIONS OF LAW

1. In order to assert a claim for ineffective assistance of counsel, a defendant must prove 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, 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. Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden 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, 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)).

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2. In considering whether trial counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information that is pertinent to [the] client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996) (citing Strickland, 466 U.S. at 690-691, 104 S. Ct. at 2066). Once proof of such a reasonable inquiry by counsel has been shown, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Id. at 846, 921 P.2d at 280 (citing Strickland, 466 U.S. at 690-691, 104 S. Ct. at 2066). Finally, counsel's strategy decisions are "tactical" and will be "virtually unchallengeable absent extraordinary circumstances." Id.; Strickland, 466 U.S. at 691, 104 S. Ct. at 2066; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). Counsel cannot be found ineffective for not raising futile arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

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

4. This analysis means that the court should not "second guess reasoned choices between trial tactics" and defense counsel need not "make every conceivable motion 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.

5. Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must also demonstrate prejudice by showing a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064-65, 2068). Similarly, a defendant who contends his attorney was ineffective because he did not adequately investigate must show that the investigation was unreasonable and that a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

6. When determining whether a potential juror is biased, the relevant inquiry is whether the juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Weber v. State, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005) (quoting Leonard v. State, 117 Nev. 53, 65, 17 P.3d 397, 405 (2001)).

7. Bare assertions and claims belied by the record do not warrant post-conviction relief. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

8. NRS 174.234(3)(a) provides that the court shall prohibit the testimony of any improperly noticed expert *only if* such lack of notice was in bad faith. See also Mitchell v. State, 124 Nev. 807, 819, 192 P.3d 721, 729 (2008) (reviewing court's decision to admit improperly noticed expert for abuse of discretion and finding no bad faith nor prejudice to the defendant's substantial rights).

9. NRS 171.198(7)(b), allows the State to admit preliminary hearing testimony if a defendant was represented by counsel and cross-examined the witness at the preliminary hearing and the witness is "sick, out of the State, dead, or persistent in refusing to testify

///

deposit an order of the judge to do so, or when the witness's personal attendance cannot be had in court."

10. NRS 51.035(2)(c) provides for the admission of prior statements of identification made "soon after perceiving the person" but does not prescribe a time limit between the identification and the trial.

11. Leading questions are questions which unnecessarily suggest an answer and are generally not permitted during direct examination. NRS 50.115(3)(a).

12. Hearsay is defined as an out-of-court statement offered into evidence to prove the truth of the matter asserted. NRS 51.035.

13. The threshold test for admitting expert testimony is whether such testimony would assist the jury in determining truth in "areas outside the ken of ordinary laity." Townsend v. State, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987).

14. NRS 207.010(1) provides:

> Unless the person is prosecuted pursuant to NRS 207.012 or 207.014, a person convicted in this State of:
>
> . . .
>
> (b) Any felony, who has previously been three times convicted, whether in this State or elsewhere, of any crime which under the laws of the situs of the crime or of this State would amount to a felony is a habitual criminal and shall be punished for a category A felony by imprisonment in the state prison[.]

15. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). Here the issue of guilt was not close as there was testimony and video demonstrating that Defendant stole Stathopoulos' purse at the Tropicana and used one of her credit cards forty minutes later at Sheikh Shoes. Further, although the crime had some gravity, the quantity and character of any errors by counsel were minimal and Defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975). In fact, there was no single instance of ineffective assistance in Defendant's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error

analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

16. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal or in appeals to previous petitions may not be reargued in a subsequent petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001).

17. NRS 34.810(1)(b)(2) reads:

> The court shall dismiss a petition if the court determines that:
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> . . .
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

18. 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). Federal courts have held that a claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991). 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); Heath, 941 F.2d at 1132.

19. To establish a Brady violation, a defendant must demonstrate that: (1) the prosecution suppressed evidence in its possession; (2) the evidence was favorable to the defense; and (3) the evidence was material to an issue at trial. See, e.g., Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). An accused cannot complain that exculpatory evidence has been suppressed by the prosecution when the information is known to him or could have been discovered through reasonable diligence. Rippo v. State, 113 Nev. 1239, 1258, 946 P.2d 1017, 1029 (1997).

20. The State has an obligation to preserve evidence in its possession or control. See Steese v. State, 114 Nev. 479, 491, 960 P.2d 321, 329 (1998).

21. "Vouching may occur in two ways: the prosecution may put the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony." Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997).

22. NRS 207.010(1)(b) provides for habitual criminal treatment if a defendant has three convictions for crimes that are *either* felonies under Nevada law *or* under the law of the situs of the crime.

23. An evidentiary hearing is not warranted. NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.

2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

NRS 34.770. The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, no evidentiary hearing is necessary. Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002); Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; See also Hargrove, 100 Nev. at 503, 686 P.2d at 225 ("A defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

ORDER

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

DATED this 11 day of June, 2013.

DISTRICT JUDGE

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

BY
HILARY HEAP
Deputy District Attorney
Nevada Bar #012395

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of Findings Of Fact, Conclusions Of Law And Order, for review, was made this 5th day of June, 2013, by facsimile transmission to:

MATTHEW CARLING, ESQ.
446-8065

BY: _____
C. Cintola
Employee of the District Attorney's Office

CB/HH/cc/L3

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COSCC

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * *

THE STATE OF NEVADA VS	CASE NO.: 07C236169
RONALD ROSS	DEPARTMENT 17

CRIMINAL ORDER TO STATISTICALLY CLOSE CASE

Upon review of this matter and good cause appearing,

IT IS HEREBY ORDERED that the Clerk of the Court is hereby directed to statistically close this case for the following reason:

DISPOSITIONS:

- ☐ Nolle Prosequi (before trial)
- ☐ Dismissed (after diversion)
- ☐ Dismissed (before trial)
- ☐ Guilty Plea with Sentence (before trial)
- ☐ Transferred (before/during trial)
- ☐ Bench (Non-Jury) Trial
  - ☐ Dismissed (during trial)
  - ☐ Acquittal
  - ☐ Guilty Plea with Sentence (during trial)
  - ☐ Conviction
- ☐ Jury Trial
  - ☐ Dismissed (during trial)
  - ☐ Acquittal
  - ☐ Guilty Plea with Sentence (during trial)
  - ☒ Conviction
- ☐ Other Manner of Disposition

DATED this 28th day of June, 2013.

MICHAEL VILLANI
DISTRICT COURT JUDGE

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CLERK OF THE COURT

REQT
MATTHEW D. CARLING, ESQ.
Nevada Bar No.: 007302
51 East 400 North, Bldg. #1
Cedar City, UT 84721
(702) 419-7330 (Office)
(702) 446-8065 (Fax)
CedarLegal@gmail.com
Attorneys for Petitioner,
RONALD ROSS

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

RONALD ROSS,

Petitioner,

vs.

DWIGHT NEVEN, WARDEN,
HIGH DESERT STATE PRISON

Respondent.

Case No.: C236169
Dept. No.: XVII

REQUEST FOR ROUGH DRAFT TRANSCRIPTS OF DISTRICT COURT PROCEEDINGS

TO: COURT REPORTER – DEPARTMENT NO. 17

RONALD ROSS, defendant named above, requests preparation of a rough draft transcript of certain portions of the proceedings before the district court, as follows:

DATE	JUDGE	PORTION	ORIGINAL PLUS[1]
02/22/13	Villani, Michael	All	2

[1] Original Rough Draft to be filed with the District Court, two certified copies to be served on Mr. Carling, and original certificate of service to be filed with the Nevada Supreme Court. NRAP 3C(3)(E).

This notice requests a transcript of only those portions of the District Court proceedings which counsel reasonably and in good faith believes are necessary to determine whether appellate issues are present. Voir dire examination of jurors, opening statements and closing arguments of trial counsel, and the reading of jury instructions shall not be transcribed unless specifically requested above.

I recognize that I must personally serve a copy of this form on the above named court reporter and opposing counsel, and that the above named court reporter shall have twenty (20) days from the receipt of this notice to prepare and submit to the district court the transcript requested herein. I further certify that the defendant is indigent and therefore exempt from paying a deposit.

DATED this 16th day of July, 2013.

CARLING LAW OFFICE, PC

/s/ MATTHEW D. CARLING, ESQ.
Nevada Bar No.: 007302
51 East 400 North, Bldg. #1
Cedar City, UT 84721
(702) 419-7330 (Office)
(702) 446-8065 (Fax)
CedarLegal@gmail.com
Attorneys for Petitioner/Defendant,
RONALD ROSS

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2013, I served a copy of the REQUEST FOR ROUGH DRAFT TRANSCRIPTS OF DISTRICT COURT PROCEEDINGS to Dept. 11 Court Reporter by mailing a copy via first class mail, postage thereon fully prepaid, to the following:

STEVEN B. WOLFSON, ESQ.
CLARK COUNTY DISTRICT ATTORNEY
200 LEWIS AVENUE
LAS VEGAS, NEVADA 89101

COURT REPORTER
DEPT. 17
200 LEWIS AVENUE
LAS VEGAS, NEVADA 89101

RONALD ROSS (#1003485)
HDSP
P.O. BOX 650
INDIAN SPRINGS, NEVADA 89070-0650

CARLING LAW OFFICE, PC

/s/ MATTHEW D. CARLING, ESQ.
Nevada Bar No.: 007302
51 East 400 North, Bldg. #1
Cedar City, UT 84721
(702) 419-7330 (Office)
(702) 446-8065 (Fax)
CedarLegal@gmail.com
Attorneys for Petitioner/Defendant,
RONALD ROSS

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CLERK OF THE COURT

ASTA
MATTHEW D. CARLING, ESQ.
Nevada Bar No.: 007302
51 East 400 North, Bldg. #1
Cedar City, UT 84721
(702) 419-7330 (Office)
(702) 446-8065 (Fax)
CedarLegal@gmail.com
Attorneys for Petitioner,
RONALD ROSS

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

RONALD ROSS, Petitioner, vs. DWIGHT NEVEN, WARDEN, HIGH DESERT STATE PRISON, Respondent.	Case No.: C236169 Dept. No.: XVII

CASE APPEAL STATEMENT
(NRAP 3(d)(4))

1. Name of appellant filing this case appeal statement: RONALD ROSS.

2. Identify the judge issuing the decision, judgment, or order appealed from: THE HONORABLE MICHAEL VILLANI.

3. Identify each appellant and the name and address of counsel for each appellant:

   MATTHEW D. CARLING, ESQ.
   51 East 400 North, Bldg. #1
   Cedar City, Utah 84720
   (702) 419-7330 (Office)
   (702) 446-8065 (Fax)
   CedarLegal@gmail.com
   Attorneys for Petitioner/Appellant,
   RONALD ROSS

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is

unknown, indicate as much and provide the name and address of that respondent's trial counsel):

STEVEN B. WOLFSON
CLARK COUNTY DISTRICT ATTORNEY
200 Lewis Avenue
Las Vegas, NV 89155-2212
Attorneys for Plaintiff/Respondent

CATHERINE CORTEZ MASTO
ATTORNEY GENERAL OF NEVADA
Office of the Attorney General
Capitol Complex, Heroes' Memorial Building
100 North Carson Street
Carson City, Nevada 89701
Counsel for Respondent

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission): N/A

6. Indicate whether appellant was represented by appointed or retained counsel in the district court: CRAIG JORGENSON, Deputy Public Defender, was appointed to assist the Defendant in District Court. DAVID WESTBROOK, Deputy Public Defendant, was appointed to prepare the direct appeal. MATTHEW CARLING was appointed to assist the Petitioner during his post-conviction matter.

7. Indicate whether appellant is represented by appointed or retained counsel on appeal: Appellant is represented by appointed counsel in the instant appeal.

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave: Appellant did not filed a Motion to Proceed in Forma Pauperis.

9. Indicate the date the proceedings commenced in the district court (e.g., date complaint, indictment, information, or petition was filed): May 23, 2007.

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court: On May 23, 2007, Appellant was charged with twenty (20) various property, theft, burglary crimes. Appellant was convicted after jury trial. The Court sentenced the Appellant on April 7, 2009. Appellant filed a Petition for Writ of Habeas Corpus (Post-Conviction) on November 30, 2011. Petitioner, through appointed counsel, filed a Supplemental

Memorandum in Support of Petitioner for Writ of Habeas Corpus (Post-Conviction) on July 18, 2012. The District Court conducted an Evidentiary Hearing on February 22, 2013, and denied the Appellant's Petition. Appellant is appealing the Court's Findings of Fact, Conclusions of Law and Order entered on or about June 17, 2013.

11. Indicate whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding: Ross (Ronald) v. State, Nos. 50153, 52921, 53882, 58563, & 60171 (C220916). Appellant appeals directly pursuant to an Findings of Fact and Order pursuant to NRAP 4(b).

12. Indicate whether this appeal involves child custody or visitation: N/A.

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement: N/A.

Dated this 16th day of July, 2013.

CARLING LAW OFFICE, PC

/s/ MATTHEW D. CARLING, ESQ.
Nevada Bar No.: 007302
51 East 400 North, Bldg. #1
Cedar City, Utah 84720
(702) 419-7330 (Office)
(702) 446-8065 (Fax)
CedarLegal@gmail.com
Attorneys for Petitioner,
RONALD ROSS

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2013, I served a copy of the CASE APPEAL STATEMENT by mailing a copy *via* first class mail, postage thereon fully prepaid, to the following:

RONALD ROSS (#1003485)
HDSP
P.O. BOX 650
INDIAN SPRINGS, NEVADA 89070-0650

STEVEN B. WOLFSON, ESQ.
CLARK COUNTY DISTRICT ATTORNEY
200 LEWIS AVENUE
LAS VEGAS, NEVADA 89101

CARLING LAW OFFICE, PC

/s/ MATTHEW D. CARLING, ESQ.
Nevada Bar No.: 007302
51 East 400 North, Bldg. #1
Cedar City, UT 84721
(702) 419-7330 (Office)
(702) 446-8065 (Fax)
CedarLegal@gmail.com
Attorneys for Defendant,
CASTRO V. DeCASTRO

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CLERK OF THE COURT

NOASC
MATTHEW D. CARLING, ESQ.
Nevada Bar No.: 007302
51 East 400 North, Bldg. #1
Cedar City, UT 84721
(702) 419-7330 (Office)
(702) 446-8065 (Fax)
CedarLegal@gmail.com
Attorneys for Petitioner,
RONALD ROSS

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

RONALD ROSS,

Petitioner,

vs.

DWIGHT NEVEN, WARDEN,
HIGH DESERT STATE PRISON

Respondent.

Case No.: C236169
Dept. No.: XVII

NOTICE OF APPEAL

TO: THE STATE OF NEVADA

STEVEN B. WOLFSON, DISTRICT ATTORNEY, CLARK COUNTY, NEVADA and DEPARTMENT 17 OF THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

NOTICE is hereby given that RONALD ROSS, presently incarcerated at the High Desert State Prison, appeals to the Supreme Court of the State of Nevada from the

///

///

///

an Order denying his Petition for a Writ of Habeas Corpus (Post-Conviction) entered on or about June 17, 2013.

DATED this 16th day of July, 2013.

CARLING LAW OFFICE, PC

/s/ MATTHEW D. CARLING, ESQ.
Nevada Bar No.: 007302
51 Easts 400 North, Bldg. #1
Cedar City, Utah 84720
(702) 419-7330 (Office)
(702) 446-8065 (Fax)
CedarLegal@gmail.com
Attorneys for Petitioner,
RONALD ROSS

DECLARATION OF MAILING

MATTHEW D. CARLING, ESQ., hereby declares that he is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age; that on the 16th day of July, 2013, Declarant deposited in the United States mail at Cedar City, Utah, a copy of the Notice of Appeal in the above-mention case, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to the following:

RONALD ROSS (#1003485)
HDSP
P.O. BOX 650
INDIAN SPRINGS, NEVADA 89070-0650

STEVEN B. WOLFSON, ESQ.
CLARK COUNTY DISTRICT ATTORNEY
200 LEWIS AVENUE
LAS VEGAS, NEVADA 89101

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 16th day of July, 2013.

CARLING LAW OFFICE, PC

/s/ MATTHEW D. CARLING, ESQ.
Nevada Bar No.: 007302
51 East 400 North, Bldg. #1
Cedar City, UT 84721
(702) 419-7330 (Office)
(702) 446-8065 (Fax)
CedarLegal@gmail.com
Attorneys for Defendant,
RONALD ROSS

ORDR

MATTHEW D. CARLING, ESQ.
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CedarLegal@gmail.com
Attorneys for Petitioner,
RONALD ROSS

DISTRICT COURT
CLARK COUNTY, NEVADA

RONALD ROSS,

Petitioner,

vs.

DWIGHT NEVEN, WARDEN,
HIGH DESERT STATE PRISON, ET AL.,

Respondent.

Case No.: 07C236169
Dept. No.: XVII

ORDER OF APPOINTMENT

IT IS HEREBY ORDERED that MATTHEW D. CARLING, ESQ., be appointed as counsel to represent Petitioner, Ronald Ross, in the appellate proceedings, effective June 1, 2013, and that counsel be paid by the County of Clark as set forth in NRS 7.125

DATED and DONE this 23 day of July, 2013.

DISTRICT COURT JUDGE

Respectfully Submitted:

MATTHEW D. CARLING, ESQ.
Attorney for Petitioner/Appellant
RONALD ROSS

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,	)	
	)	
Plaintiff,	)	CASE NO. 07C236169
	)	
vs.	)	DEPT. XVII
	)	
RONALD ROSS,	)	
	)	
Defendant.	)	
	)	

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

FRIDAY, FEBRUARY 22, 2013

ROUGH DRAFT TRANSCRIPT OF PROCEEDINGS RE:

HEARING: PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

For the State: HILARY HEAP, ESQ.,
Deputy District Attorney

For the Defendant: MATTHEW D. CARLING, ESQ.,

RECORDED BY: MICHELLE L. RAMSEY, COURT RECORDER

LAS VEGAS, NEVADA; FRIDAY, FEBRUARY 22, 2013

[Proceeding commenced at 10:06 a.m.]

THE COURT: Mr. Carling, are you ready?

MR. CARLING: Yes, I am.

THE COURT: All right. Go ahead.

MR. CARLING: Thank you, Your Honor. When reviewing this case, it appears that most of the issues I found are right in the record. I've cited to the transcripts where I believe Mr. Jorgenson was completely deficient in his -- in his ability to represent Mr. Ross.

First of all the most glaring one is it takes 18 months to get this to trial. And on the record, it's Mr. Ross that keeps to objecting to it, not Mr. Jorgenson which obviously shows me that there's a lack of communication between the client and the attorney.

Another glaring example, the lack of pre-trial communication is the day of trial the State dismisses half the charges because of misidentification of the video. And I think Mr. Jorgenson was completely surprised by that. Mr. Ross alleges he never saw any of the videos. He never saw any of the still shots. I've obtained still shots of them and it's clearly not him, but have they had some communication prior to that, Mr. Jorgenson probably would have moved to dismiss certain charges because of misidentification.

And then on top of that, he fails to mention this to the jury because it's the same officers that are identifying Ross in one video, the legitimate video that apparently has him in there, that misidentified him in the Santa Fe video. He never brings any of that up to shed some doubt upon what's all going on here.

They're numerous objections he probably should have made. The biggest one, and I -- I have to give him the benefit of the doubt, Mr. Jorgenson the benefit of the doubt, the State never noticed Detective Flenner as an expert witness, but he gave expert witness testimony. Wasn't qualified and did that and there was no objection there.

And piggy backing on that argument had he known I suppose if he was noticed as an expert, he probably should have gotten a defense expert to talk about all of the elements they look for in these distraction type thefts. Didn't happen. I think the record is replete of no investigation. He didn't even subpoena any of he videos, didn't make proper objections. This guy just picked up a file and came to trial and got lucky that half the charges were dismissed on the day of trial because of a mistake.

I don't want to belabor them 'cause I think they're well briefed. Most of them right out of the transcript. But I think Mr. Jorgenson needs to be present to explain why he didn't do some of this stuff.

THE COURT: All right. Thank you. Ms. Heap?

MS. HEAP: Good morning, Your Honor. As you know I was not

IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD ROSS,
Appellant,
vs.
THE STATE OF NEVADA
Respondent.

Supreme Court No.: 63624
District Court Case No.: C236169

DOCKETING STATEMENT
CRIMINAL APPEALS

1. Eighth Judicial District Court, Clark County.
Judge Michael Villani, District Court Case No. C236169

2. If the Defendant was given a sentence,

(a) What is the sentence? On April 7, 2009, the Court sentenced the Appellant as follows:

Count 1—Burglary (Felony) (10 to Life pursuant to NRS 205.060);
Count 2—Larceny from the Person (Felony) (10 to Life pursuant to NRS 205.067 to run concurrent with Count 1);
Count 3— Burglary (Felony) (10 to Life pursuant to NRS 205.060 to run consecutive to Counts 1 & 2);
Count 4—Possession of Credit or Debit Card without Cardholder's Consent (Felony) (10 to Life pursuant to NRS 205.690 to run consecutive to Counts 1 & 2 and concurrent with Count 3);
Count 5—Fraudulent Use of Credit or Debit Card (Felony) (10 to Life pursuant to NRS 205.760 to run consecutive to Counts 1 & 2 and concurrent with Count 4);
Count 6—Theft (Felony) (10 to Life pursuant to NRS 205.0835, 205.0832 to run consecutive to Counts 1 & 2 and concurrent with Count 5);
Count 7— Conspiracy to Commit Larceny (Gross Misdemeanor) (One (1) year in the Clark County Detention Center pursuant to NRS 205.220, 205.222, 199.480. Petitioner received two hundred (200) days credit for time served);

(b) Has the sentenced been stayed pending appeal? No.

(c) Was the defendant admitted to bail pending appeal? No.

3. Was counsel in the district court appointed [X] or retained [ ]?

4. Attorney filing this docketing statement:

MATTHEW D. CARLING, ESQ.
51 East 400 North, Bldg. #1
Cedar City, Utah 84720
(702) 419-7330 (Office)
(702) 446-8065 (Fax)
CedarLegal@gmail.com

Client: RONALD ROSS

5. Is appellate counsel appointed [X] or retained [ ]?

If this is a joint statement by multiple appellants, add the names and addresses of other counsel on an additional sheet of accompanied by a certificate that they concur in the filing of this statement. N/A

6. Attorney(s) representing respondents:

CLARK COUNTY DISTRICT ATTORNEY
200 Lewis Avenue
Las Vegas, Nevada 89155-2212

7. **Nature of disposition below:**

[ ] Judgment after bench trial
[ ] Judgment after jury verdict
[ ] Judgment upon guilty plea
[ ] Grant of pretrial motion to dismiss
[ ] Parole/Probation revocation
[ ] Motion for new trial
[ ] grant [ ] denial
[ ] Motion to withdraw guilty plea
[ ] grant [ ] denial
[ ] Grant of pretrial habeas
[ ] Grant of motion to suppress evidence
[X] Post-conviction habeas (NRS ch. 34)
[ ] grant [X] denial
[ ] Other disposition

8. **Does the appeal raise issues concerning any of the following:**

[ ] death sentence
[X] life sentence
[ ] juvenile offender
[ ] pretrial proceedings

9. **Expedited appeals.** The court may decided to expedite the appellate process in this matter. Are you in favor of proceeding in such manner?

[X] Yes [ ] No

10. **Pending and prior proceedings in this court.** List the case name, and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal (*e.g.*, separate appeals by co-defendants, appeal after post-conviction proceeding):

Ross v. State, No. 49091
Ross v. State, No. 50153
Ross v. State, No. 52921
Ross v. State, No. 53882
Ross v. State, No. 58563
Ross v. State, No. 60171
Ross v. State, No. 63624

11. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts that are related to this appeal (e.g., habeas corpus proceedings in state or federal court, bifurcated proceedings against co-defendants):

State v. Ross, 06C219404, 8th Judicial District Court
State v. Ross, 06C219549, 8th Judicial District Court
State v. Ross, 06C220385, 8th Judicial District Court
State v. Ross, 06C220915, 8th Judicial District Court
State v. Ross, 06C220916-1, 8th Judicial District Court
State v. Ross, 07C236169, 8th Judicial District Court

12. **Nature of action.** Briefly describe the nature of the action and result below: On November 13, 2008, at trial Petitioner was convicted of Count 1—Burglary (sentenced to 10 to life), Count 2—Larceny from the Person (sentenced 10 to life, concurrent to Count 1), Count 3— Burglary (sentenced 10 to life, concurrent to Counts 1 & 2), Count 4—Possession of Credit or Debit Card without Cardholder's Consent (sentenced 10 to life, consecutive to counts 1 & 2 and concurrent with count 3), Count 5—Fraudulent Use of Credit or Debit Card (sentenced to 10 to life, consecutive to counts 1 & 2 and concurrent with count 4), Count 6—Theft (sentenced to 10 to life, consecutive to counts 1 & 2 and concurrent with count 5), Count 7—Conspiracy to Commit Larceny (sentenced to 1 year in the CCDC). The Court sentenced Petitioner on April 7, 2009. The Judgment of Conviction was filed on April 16, 2009. Petitioner filed a Notice of Appeal on December 5, 2008 (No. 52921). This Court affirmed the conviction on November 8, 2010. On December 3, 2010 Remittitur was issued. Petitioner filed a Pro per Petition for Writ of Habeas Corpus (post-conviction) on November 30, 2011. Petitioner's First Supplemental Petition for Writ of Habeas Corpus was filed on July 18, 2012. The State's filed a Response on December 28, 2012. Petitioner filed a Reply on January 22, 2013. The State filed a Response on February 5, 2013. The Court denied the Petition on May 7, 2013.

Petitioner appealed the District Court decision to deny his Petition for Writ of Habeas Corpus on July 16, 2013. This appeal follows.

13. **Issues on appeal.** State concisely the principal issues(s) in this appeal:

THE COURT ABSUSED ITS DISCRETION IN PREMATURELY DENYING DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS.

14. **Constitutional issues.** If the State is not a party and if this appeal challenges the constitutionality of a statute or municipal ordinance, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

[X] N/A [ ] Yes [ ] No

15. **Issues of first-impression or of public interest.** Does this appeal present a substantial legal issue of first-impression in this jurisdiction or one affecting an important public interest?

First impression: [ ] Yes [X] No
Public Interest: [ ] Yes [X] No

16. **Length of trial.** If this action proceeded to trial or evidentiary hearing in the district court, how many days did the trial or evidentiary hearing last?

_2_ days.

17. **Oral Argument.** Would you object to submission of this appeal for disposition without oral argument?

[ ] Yes [X] No

TIMELINESS OF NOTICE OF APPEAL

18. Date district court announced decision, sentence or order appealed from? June 11, 2013.

19. Date of entry of written judgment or order appealed from: June 11, 2013

(a) If no written judgment or order was filed in the district court, explain the basis for seeking appellate review. N/A

20. If this appeal is from an order granting or denying a petition for a writ of habeas corpus, indicate the date written notice of entry of judgment or order was served by the district court. June 17, 2013.

(a) Was service by delivery [ ] (fax) or by mail [X].

21. If the time for filing the notice of appeal was tolled by a post judgment motion,

(a) Specify the type of motion, and the date of filing of the motion:

Arrest Judgment _____ Date filed _____
New trial _____ Date filed _____
(newly discovery evidence)
New trial _____ Date filed _____
(other grounds)

(b) Date of entry of written order resolving motion _____

22. Date notice of appeal filed: July 16, 2013.

23. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(b), NRS 34.530, NRS 34.575, NRS 177.015(2), or other.

NRS 34.575

SUBSTANTIVE APPEALABILITY

24. Specify statute, rule or other authority that grants this court jurisdiction to review from:

[ ] NRS 177.015(1)(b)	[ ] NRS 34.560
[ ] NRS 177.015(1)(c)	[X] NRS 34.575(1)
[ ] NRS 177.015(2)	[ ] NRS 34.575(2)
[ ] NRS 177.015(3)	[ ] Other (specify) _____

VERIFICATION

I certify that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief.

RONALD ROSS	MATTHEW D. CARLING, ESQ.
Applicant	Counsel of Record

August 5, 2013

/s/ Matthew D. Carling, Esq.
MATTHEW D. CARLING, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 5th day of August, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General

STEVEN S. OWENS
Chief Deputy District Attorney

MATTHEW D. CARLING
Counsel for Appellant

DATED this 5th day of August, 2013.

/s/ Matthew D. Carling, Esq.

MATTHEW D. CARLING, ESQ.
Nevada Bar No. 7302
Attorney for Appellant,
RONALD ROSS

the trial counsel, so my knowledge of what happened is really limited to the brief, but I would like to point out a couple of things and I'm not going to rehash everything.

As far as the trial -- as far as taking the 18 months to get to trial, as we all know in here that's actually kind of quick to get to trial. It's not uncommon. And the Defendant actually, although he initially invoked, he did waive his right because he had some pending appeals. He agreed to continue it until after those appeals were settled. So, that seems to be why it took so long or it took 18 months to get to trial.

As far as the Santa Fe video goes, the video that was struck and the counts that were struck, first the Defendant can show prejudice in this case because those counts were dismissed. So that video wasn't presented to the jury. And it's my understanding that it was actually a different detective, Detective Holl, is the one who identified him in the Santa Fe video. That detective was not presented at trial. So it was not the same detective. Detective Flanner actually observed the Tropicana video and Sheikh Shoe video; he didn't testify as to the Santa Fe videos. So there's no prejudice there as well.

Unless Your Honor would like me to address anything else specifically, I'm sure you'd read the extensive briefs on the issue, I'll submit it.

THE COURT: Do you have anything further, Mr. Carling?

MR. CARLING: I just disagree with her argument that there's

no prejudice. I think when the State misidentifies and then counsel doesn't bring up that misidentification in the case, boy, that certainly prejudices him 'cause that could certainly cause doubt on a jury.

THE COURT: All right. Thank you. And, counsel, as I had mentioned in the other case, I'm going to prepare a written decision in this matter. You should have it the same time as I mentioned with the other case.

MS. HEAP: Sure.

THE COURT: About two weeks from today.

MR. CARLING: Very good.

MS. HEAP: Thank you, Your Honor.

THE COURT: It'd be in a minute entry and it'll be put in both of your boxes.

MR. CARLING: Okay. Thank you.

MS. HEAP: Thank you.

THE COURT: Thank you very much.

[Proceeding concluded at 10:11 a.m.]

* * * * *

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

ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellate Procedure, I acknowledge that this is a rough draft transcript, expeditiously prepared, not proofread, corrected or certified to be an accurate transcript.

Michelle Ramsey
Michelle Ramsey
Court Recorder/Transcriber

IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD ROSS,

Appellant,

vs.

STATE OF NEVADA,

Respondent.

No. C236169

APPELLANT'S APPENDIX – VOLUME V – PAGES 1000-1117

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knowledge could have originated from a multitude of avenues having nothing to do with Defendant's prior bad acts. The jury received no testimony concerning the basis of Detective Flenner's prior knowledge of Defendant and it was instructed to not consider facts not in evidence. Jury Instruction 24. Thus, Defendant's contention that the jury inferred from Detective Flenner's testimony that Defendant had committed other bad acts is a bare allegation unsupported by the record and should be denied. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. Furthermore, counsel has the "immediate and ultimate responsibility" of deciding when and if to object. See Rhyne, 118 Nev. at 8, 38 P.3d at 167. Finally, even if the testimony was improper under NRS 48.045(2), Defendant cannot demonstrate prejudice. Evidence of Defendant's guilt was overwhelming and included the testimony of one witness and a video of Defendant's theft and the testimony of four witnesses concerning the use of Stathopoulos' credit card. Thus, even if counsel had successfully objected to the challenged testimony, Defendant cannot demonstrate a reasonable probability that the result would have been different.

Defendant's claim that counsel solicited evidence of other acts is belied by the record. During cross-examination, counsel asked Detective Flenner how he was able to identify Defendant's facial features on the Tropicana surveillance video in light of the video images' poor quality. The court then asked counsel to approach and advised counsel during the bench conference that the question had the potential to elicit testimony of other acts. The question was then disregarded and counsel was permitted to continue with cross-examination. RT 11/12/2008, pp. 253-54. Thus, no evidence of other acts was actually offered during cross-examination and Defendant's claim must be denied. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. Furthermore, inasmuch as Defendant is contending counsel's question alone demonstrates ineffective assistance of counsel, Defendant fails to demonstrate how an unanswered question regarding the video quality of the Tropicana video prejudiced him. Therefore, this claim must be denied.

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8. Hearsay concerning stolen credit card

Defendant contends counsel was ineffective for eliciting testimony from Jarmin and Detective Flenner that Stathopoulos had said her stolen credit card had been used at Sheik Shoes. Such testimony was not objectionable as hearsay. Hearsay is defined as an out-of-court statement offered into evidence to prove the truth of the matter asserted. NRS 51.035. Testimony by Jarmin and Detective Flenner that they received information that Stathopoulos' stolen credit card had been used at Sheikh Shoes was not offered to prove that Stathopoulos' credit card was indeed stolen and used at Sheikh Shoes. Instead, such testimony was offered to put reactions by Jarmin and Detective Flenner in context. Based on the information they received concerning the use of Stathopoulos' credit card at Sheik Shoes, Jarmin and Detective Flenner investigated the credit card receipts at Sheikh Shoes and found a receipt for items purchased with Stathopoulos' credit card. See RT 11/12/2008, pp. 161-63, 245. Because Stathopoulos' statement was not being offered to prove the truth of the matter asserted, such testimony was not objectionable hearsay and any objection would have been futile. See Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Furthermore, counsel pursued an identity defense at trial and conceded that a theft and use of a stolen credit card had occurred. RT 11/12/2008, pp. 122, 124; 11/13/2008, pp. 29-30, 35-36, 39-41. Trial counsel has the "immediate and ultimate responsibility of deciding" what defenses to develop. Rhyne, 118 Nev. at 8, 38 P.3d at 167. As Defendant acknowledges, "this was purely an 'identification case.'" First Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), p. 27. Thus, counsel made an appropriate strategic decision to not contest that a crime had occurred and instead focus his efforts on establishing reasonable doubt as to the identity of the perpetrator. Such a reasoned strategic decision is not the proper subject of hindsight review.

Finally, Defendant fails to demonstrate prejudice. There was much more probative evidence that Stathopoulos' credit card had been stolen and used at Sheikh Shoes than her out-of-court statement to Jarmin. Specifically, Stathopoulos' testified that her wallet, including her credit card, was stolen at approximately 1:00 PM on March 17,

2007, and the same card was used to purchase a significant amount of clothing and shoes approximately forty minutes later, as evidenced by the credit card receipt from Sheikh Shoes entered into evidence. RT 11/12/2008, pp. 126-27; State's Exhibit 1. Further, testimony and video demonstrated Defendant stole Stathopoulos' purse and four witnesses identified Defendant as the person that used Stathopoulos' credit card at Sheikh Shoes. RT 11/12/2008, pp. 130, 162-63, 175, 194, 243, 246-47. Therefore, even if counsel's cross-examination of Jarmin and Detective Flenner was ineffective, Defendant cannot demonstrate a reasonable probability that the outcome of the matter would have been different had the jury not known that Stathopoulos told Jarmin her stolen credit card had been used at Sheikh Shoes. Thus, Defendant's claim must be denied.

vii. Counsel was not ineffective in deciding not to present expert testimony.

Defendant alleges counsel was ineffective for failing to call an expert in distract and pickpocket crimes and an expert in video surveillance/casino security to counter the testimony of Detective Flenner. Specifically, Defendant alleges counsel should have called an expert to testify that Defendant's actions at the Tropicana were "consistent with non-criminal activity" and did not demonstrate the modus operandi of a distract or pickpocket theft. Additionally, Defendant alleges counsel should have called an expert to counter Detective Flenner's testimony that the Sheikh Shoes video had better resolution than the Tropicana video admitted into evidence.

1. Distract/pickpocket theft expert

Counsel had the "immediate and ultimate responsibility" of deciding which witnesses, if any, to call. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Second, that counsel could have secured an expert witness to counter the testimony of Detective Flenner is a bare allegation unsupported by the record and does not warrant relief. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. Furthermore, the threshold test for admitting expert testimony is whether such testimony would assist the jury in determining truth in "areas outside the ken of ordinary laity." Townsend v. State, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987). The

jury did not require an expert to testify that Defendant's actions "were consistent with non-criminal activity" as such fact was not outside the ken of ordinary laity. Therefore, if such testimony was proffered, it would have likely been excluded and counsel cannot be found ineffective for failing to proffer inadmissible evidence. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Finally, Defendant fails to demonstrate prejudice. Even if the jury received expert testimony that Defendant's actions on the Tropicana surveillance video were consistent with non-criminal activity, the admission of evidence that no one else was close enough to Stathopoulos to take her purse and the fact that Defendant used Stathopoulos' credit card approximately forty minutes after her wallet was stolen would have resulted in the same conviction. Thus, Defendant cannot demonstrate a reasonable probability of a different outcome and his claim must be denied.

2. Video expert

Counsel had the "immediate and ultimate responsibility" of deciding which witnesses, if any, to call. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Second, that counsel could have secured an expert witness to counter the testimony of Detective Flenner is a bare allegation belied by the record and does not warrant relief. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. A copy of the Tropicana video was played at trial and Detective Flenner acknowledged on cross-examination that it had "streaks and was not very clear." See RT 11/12/2008, pp. 252-53. Detective Flenner viewed the original Sheikh Shoes video and never received a copy. RT 11/12/2008, p. 244. The original was destroyed by the time of trial. As the original Sheik Shoes video that Detective Flenner viewed had been destroyed shortly after the March 17, 2007 transaction, it is unclear how a defense expert could have testified about the comparative quality of the two videos. Further, considering that the Sheik Shoes video was an original and the Tropicana video was a copy, had an expert been called to testify, it is likely that they would have opined that originals are generally of higher quality or resolution than copies. Finally, Defendant cannot demonstrate prejudice. Even if an expert had been called and opined that casino surveillance videos are generally of higher resolution than other surveillance videos, there is not a reasonable probability that the

outcome of Defendant's trial would have been different. Two eyewitnesses, including the clerk that processed the sale, testified that Defendant made a purchase at Sheikh Shoes with Stathopoulos' credit card forty minutes after it was stolen. RT 11/12/2008, pp. 155-60, 175-76. Such testimony would have been sufficient to overcome any vague challenge to the quality of the Sheikh Shoes video. Thus, Defendant's claim does not warrant relief.

viii. Counsel was not ineffective in challenging alleged errors in the Presentence Investigation Report.

Defendant contends counsel was ineffective in failing to investigate Defendant's claims that he had five prior felonies, not eighteen as the State alleged. A defendant who contends his attorney was ineffective because he did not adequately investigate must show that the investigation was unreasonable and that a better investigation would have rendered a more favorable outcome probable. Molina, 120 Nev. at 192, 87 P.3d at 538. On January 29, 2009, counsel requested sentencing to be continued to resolve disputes regarding Defendant's prior felonies. RT 1/29/2009, pp. 2-3. The sentencing was continued to April 7, 2009, when the State proffered booking photos for five prior felonies. RT 4/7/2009, pp. 2-4. When asked, Defendant admitted that the booking photos for the five felonies depicted him but disputed the other prior felony convictions alleged by the State. RT 4/7/2009, pp. 10-12. The district court stated it was only considering the five felony convictions with corresponding booking photos in its sentencing. RT 4/7/2009, p. 12. Counsel contended that the identity in connection with the five prior felonies was still unconfirmed and requested a continuance to establish identity through fingerprints. RT 4/7/2009, pp. 15-16. The court denied counsel's request and sentenced Defendant under the large habitual criminal statute. RT 4/7/2009, p. 22.

First, Defendant's claim that counsel failed to investigate his prior felony convictions is a bare allegation unsupported by the record. In fact, Defendant acknowledges that there is no support in the record for his claim that counsel was deficient in his investigation of Defendant's prior felony convictions. First Supplemental Petition for Writ of Habeas Corpus, July 18, 2012, p. 33-34. The presumption is that counsel was effective and

Defendant is required to provide "strong and convincing proof" to rebut such a presumption. See Homick, 112 Nev. at 310, 913 P.2d at 1285. As Defendant offers no more than his bare allegation that counsel failed to investigate his prior felony convictions, this court must presume that counsel effectively investigated in preparation for Defendant's sentencing. Further, even if counsel's investigation into the matter was ineffective (a fact the State does not concede), Defendant fails to demonstrate how a better investigation would have rendered a more favorable outcome probable. NRS 207.010 provides:

> 1. Unless the person is prosecuted pursuant to NRS 207.012 or 207.014, a person convicted in this State of:
> . . .
> (b) Any felony, who has previously been three times convicted, whether in this State or elsewhere, of any crime which under the laws of the situs of the crime or of this State would amount to a felony is a habitual criminal and shall be punished for a category A felony by imprisonment in the state prison[.]

Defendant conceded that he had been previously convicted of five felonies either in Nevada or elsewhere. These were the only prior felony convictions the court considered in sentencing Defendant under NRS 207.010 and were sufficient to support such a sentence. Because Defendant cannot demonstrate that, had counsel more effectively investigated felony convictions not considered by the court, there is a reasonable probability that the outcome of his sentencing would have been more favorable, this claim must be denied.

ix. Cumulative effect does not warrant relief.

Defendant asserts a claim of cumulative error in the context of ineffective assistance of counsel. The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated; it is the State's position that they cannot.

Furthermore, even if this Court finds Defendant's cumulative error claim cognizable, it is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). Here the issue of guilt was not close as there was testimony and video

demonstrating that Defendant stole Stathopoulos' purse at the Tropicana and used one of her credit cards forty minutes later at Sheikh Shoes. Further, although the crime had some gravity, the quantity and character of any errors by counsel were minimal and Defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975). In fact, there was no single instance of ineffective assistance in Defendant's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Thus, cumulative error does not warrant relief.

II. DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS[8]

a. Defendant's right to a speedy trial was not violated.

Inasmuch as Defendant is alleging his prosecution violated his right to a speedy trial, consideration of this claim is precluded by the law of the case. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal or in appeals to previous petitions may not be reargued in a subsequent petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001). On direct appeal, the Nevada Supreme Court considered and rejected Defendant's claim that his speedy trial rights were violated. Order of Affirmance 11/8/2010, p. 1-2. Therefore, consideration of this claim is precluded and it must be dismissed. Furthermore, inasmuch as Defendant is alleging counsel was ineffective in preserving Defendant's right to a speedy trial, this contention is discussed supra and is without merit.

///

[8] Inasmuch as some of Defendant's claims are similar or the same as those raised in the First Supplemental Petition for Writ of Habeas Corpus, they are addressed above and will not be repeated here. Further, Defendant's claims are difficult to discern and the State respectfully requests an opportunity to address any claims the district court determines are articulated in Defendant's pro per Petition but are not addressed by the State in this Response.

b. Counsel was not ineffective in securing evidence or presenting a defense at trial.

Defendant next makes the following claims not addressed above: 1) Prosecutors violated Brady in not providing the Sheikh Shoes video and in not disclosing to Defendant that such video was destroyed; 2) Appellate counsel was ineffective for not raising Brady claim concerning Sheikh Shoes video; 3) Counsel failed to cross-examine witnesses concerning the timing between the theft and the use of Stathopoulos' credit card; 4) The State intentionally lost the Sheikh Shoes video; 5) Counsel failed to raise a Brady violation to jury; 6) The trial court erred in denying counsel's motion to continue after admitting Jarmin's preliminary hearing testimony. These claims are without merit.

i. Brady violations

This claim should be dismissed because it could have been brought on direct appeal but was not. NRS 34.810(1)(b)(2) reads:

> The court shall dismiss a petition if the court determines that:
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> . . .
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001). As this claim could have been brought in a

prior proceeding and Defendant fails to establish good cause or prejudice, his claim must be dismissed.

ii. Ineffective assistance of appellate counsel

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). Federal courts have held that a claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991). 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); Heath, 941 F.2d at 1132.

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). 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." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3312 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. "[F]or 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.

Appellate counsel appropriately winnowed out any Brady claims. Appellate counsel raised five claims on appeal and contended that testimony of the contents of the Sheikh Shoes video in the absence of the video violated the best-evidence rule. Furthermore, prosecutors did not violate Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). To establish a Brady violation, a defendant must demonstrate that: (1) the

prosecution suppressed evidence in its possession; (2) the evidence was favorable to the defense; and (3) the evidence was material to an issue at trial. See, e.g., Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). Here, Defendant fails to demonstrate that the Sheikh Shoes video was ever in the State's possession. In fact, Detective Flenner testified he viewed the video as it existed on the security system at Sheikh Shoes and never received a copy. RT 11/12/2008, p. 244. Thus, as such evidence was not in the State's possession at any time, Defendant cannot demonstrate a Brady violation and appellate counsel appropriately declined to raise the issue.

Furthermore, Defendant's claim that the State never disclosed that the security video had been destroyed is a bare allegation belied by the record. At the preliminary hearing, Detective Flenner testified the Sheikh Shoes employees did not know how to make a copy. Detective Flenner testified he did not receive a copy and was unaware of whether a copy was ever made. RT 6/19/2007, pp. 95-96. Therefore, Defendant was on notice at least as early as June 19, 2007, that the State had not secured a copy of the Sheikh Shoes video and had an equal opportunity to further investigate whether such a copy existed. An accused cannot complain that exculpatory evidence has been suppressed by the prosecution when the information is known to him or could have been discovered through reasonable diligence. Rippo v. State, 113 Nev. 1239, 1258, 946 P.2d 1017, 1029 (1997). Therefore, because the record demonstrates Defendant had equal access to determine whether a copy of the Sheik Shoes video existed, his claim did not have a reasonable probability of success on appeal and counsel appropriately declined to raise it. See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

iii. Cross-examination regarding timing between theft and use of Stathopoulos' credit card

Defendant's contention that counsel failed to cross-examine witnesses concerning the timing between the theft and the use of Stathopoulos' credit card is belied by the record. Counsel cross-examined both Stathopoulos and Jarmin concerning the length of time between the alleged theft and use of Stathopoulos' credit card. RT

11/12/2008, pp. 147, 152, 164-66. The witnesses consistently testified that Stathopoulos' purse and credit card were stolen at approximately 1:00 PM and Stathopoulos' credit card was used at Sheikh Shoes approximately forty minutes later. RT 11/12/2008, pp. 126-27, 147, 160-61, 164-66. As Defendant's claim is belied by the record, it must be denied. See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

iv. Intentional loss of Sheikh Shoes video

Inasmuch as Defendant contends the State intentionally failed to preserve the Sheikh Shoes video, this claim must be denied. First, this claim is barred by NRS 34.810(1)(b)(2) and Franklin, 110 Nev. at 752, 877 P.2d at 1059, because Defendant could have raised it on appeal but failed to. Second, although the State has an obligation to preserve evidence in its possession or control, Defendant fails to demonstrate that the State ever had possession or control of the Sheikh Shoes video. See Steese v. State, 114 Nev. 479, 491, 960 P.2d 321, 329 (1998). Furthermore, Defendant's claim that the State did not take steps to preserve the evidence is belied by the record. Detective Flenner testified at the preliminary hearing and at trial that he asked for a copy of the Sheikh Shoes video to be made. RT 6/19/2007, p. 95-96, 11/12/2008, p. 244. Additionally, Hancock testified that he tried to make a copy of the video but that support staff was unable to travel to the location until after the video had been automatically erased. RT 11/12/2008, pp. 200-02. Because Defendant cannot demonstrate that the Sheikh Shoes video was in the State's possession or control and because his claim that it was intentionally destroyed is belied by the record, this claim must be denied. See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

v. Decision by counsel to not raise alleged Brady violation to jury

Defendant's claim that counsel was ineffective for failing to raise the alleged Brady violation to the jury is without merit. Any consideration or findings concerning alleged Brady violations would have been rendered by the trial court and were outside the purview of the jury as fact finder. Thus, any attempt by counsel to argue to the jury that Brady violations had occurred would have raised an objection by the State and such objection would have been sustained. Counsel cannot be found ineffective for failing to

make futile arguments. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, this claim must be denied.

vi. Denial of Defendant's motion to continue

Defendant's claim that the trial court improperly denied his motion to continue after admitting Jarmin's preliminary hearing testimony is belied by the record. No such motion to continue trial was ever made. RT 11/12/2008, pp. 100-04. The trial court cannot be held at fault for denying motions never raised. Further, even if such denial of a motion to continue occurred, this claim is barred by NRS 34.810(1)(b)(2) and Franklin, 110 Nev. at 752, 877 P.2d at 1059, because Defendant could have raised it on direct appeal but failed to. Therefore, Defendant's claim must be denied.

c. Counsel was not ineffective in not making certain objections.

Defendant contends the prosecutor committed misconduct by vouching for Jarmin's credibility. First, consideration of this claim is barred by NRS 34.810(1)(b)(2) and Franklin, 110 Nev. at 752, 877 P.2d at 1059, because Defendant could have raised it on direct appeal but failed to. Second, this claim is without merit. Defendant alleges the following argument by the prosecutor was improper:

> And you heard the testimony from Luis, Kevin, and Deja that the Defendant is a regular customer. They're not just relying on their memory of this guy who came in who was just one of random thousands of customers that they've probably seen and were able to pick out this guy. They remember him because they know him.

RT 11/13/2008, p. 42. Defendant alleges this was improper because Jarmin did not testify and this constituted vouching. "Vouching may occur in two ways: the prosecution may put the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony." Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997). Neither occurred here as the prosecutor merely commented on evidence before the jury, including Jarmin's preliminary hearing testimony which was read into the record at trial. Because a prosecutor is permitted to make arguments reasonably

based on the evidence before the jury, there was no vouching and Defendant's claim must be denied.[9]

d. Counsel was not ineffective at sentencing.

Defendant raises the following claims not addressed above: 1) Many of his alleged prior convictions were over fifteen years old; 2) The felonies he was convicted of in New Jersey are not felonies under Nevada law; 3) Counsel was ineffective for failing to call family members, former employers and others in mitigation as well as for not objecting to the admission of Defendant's prior felony convictions; 4) Some alleged prior convictions were erroneous because they were not for Defendant; 5) The New Jersey convictions were not properly certified. These claims are without merit.[10]

i. Length of time between current case and prior felony convictions

First, consideration of this claim is barred by NRS 34.810(1)(b)(2) and Franklin, 110 Nev. at 752, 877 P.2d at 1059, because Defendant could have raised it on direct appeal but did not. Second, this claim is without merit as NRS 207.010 does not include a requirement that prior felony convictions must be within a certain period of time to be considered. Therefore, the fact that some of Defendant's prior felony convictions were over fifteen years old is irrelevant for purposes of sentencing him under NRS 207.010 and Defendant's claim must be denied.

ii. Crimes not considered felonies under Nevada law

First, consideration of this claim is barred by NRS 34.810(1)(b)(2) and Franklin, 110 Nev. at 752, 877 P.2d at 1059, because Defendant could have raised it on direct appeal but did not. Second, this claim is without merit as NRS 207.010(1)(b) provides for habitual criminal treatment if a defendant has three convictions

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[9] Inasmuch as Defendant is contending counsel was ineffective for failing to object to such argument, the argument was proper and any objection would have been overruled. Counsel cannot be found ineffective for failing to make futile objections. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

[10] Inasmuch as Defendant is contending his sentence is cruel and unusual, consideration of this claim is barred by NRS 34.810(1)(b)(2) and Franklin, 110 Nev. at 752, 877 P.2d at 1059, because Defendant could have raised it on direct appeal but did not.

for crimes that are *either* felonies under Nevada law *or* under the law of the situs of the crime. As Defendant's New Jersey crimes were felonies under New Jersey law, whether they constitute felonies under Nevada law is irrelevant. Therefore, Defendant's claim must be denied.

iii. Counsel's alleged ineffectiveness

Defendant's claim that family members, former employers and others would have been willing to testify at Defendant's sentencing is a bare allegation and does not warrant relief. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. Furthermore, even if such witnesses existed and were willing to testify, Defendant fails to demonstrate a reasonable probability that such would have resulted in a more favorable outcome at sentencing. Defendant's criminal record demonstrates a career criminal that consistently selects elderly and disabled victims at casinos and steals from them through distract and pickpocket methods. RT 4/7/2009, pp. 5-6. In light of such consistent criminal behavior by Defendant, any comments from family and friends do not raise a reasonable likelihood of a more favorable sentence. Furthermore, inasmuch as Defendant contends counsel was ineffective in challenging the authenticity of the prior felony convictions alleged, this claim is belied by the record. After the booking photos for five prior felony convictions were admitted and Defendant agreed that the person photographed was him, counsel still insisted that identity was not proven and requested fingerprint analysis. RT 4/7/2009, pp. 10-11, 15-16. In fact, counsel challenged the authenticity of Defendant's prior felony convictions more forcefully than Defendant himself. Therefore, this claim must be denied per Hargrove, 100 Nev. at 502, 686 P.2d at 225.

iv. Allegedly erroneous prior felony convictions

Consideration of this claim is barred by NRS 34.810(1)(b)(2) and Franklin, 110 Nev. at 752, 877 P.2d at 1059, because Defendant could have raised it on direct appeal but did not. Furthermore, inasmuch as Defendant claims the five prior felony convictions used to sentence him to habitual criminal treatment were erroneous, this claim is belied by the record and without merit. As noted above, Defendant acknowledged he was the

person photographed in connection with the five prior felonies the court considered in sentencing. RT 4/7/2009, pp. 10-11. Any present claims to the contrary are belied by this earlier admission. Furthermore, the district court independently found the photographs identified Defendant in connection with the prior felony convictions. RT 4/7/2009, p. 22. Therefore, Defendant's claim must be denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225.[11]

v. Allegedly improperly certified judgment of convictions

Inasmuch as Defendant is alleging the judgments of convictions relied upon were procedurally flawed, consideration of this claim is barred by NRS 34.810(1)(b)(2) and Franklin, 110 Nev. at 752, 877 P.2d at 1059, because Defendant could have raised it on direct appeal but did not. Furthermore, this claim is without merit as the State produced certified copies of judgments of conviction for five different prior felony convictions as well as booking photos showing that Defendant was the perpetrator. RT 4/7/2009, pp. 2-4. Counsel conceded that the judgments of convictions were properly certified and the district court agreed. RT 4/7/2009, pp. 17-18, 22. Any assertion by Defendant to the contrary are thus bare allegations unsupported by the record and must be dismissed. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

e. Cumulative error does not warrant relief.

Defendant asserts a claim of cumulative error in the context of ineffective assistance of counsel. The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated; it is the State's position that they cannot.

Furthermore, even if this Court finds Defendant's cumulative error claim cognizable, it is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). Here the issue of guilt was not close as there was testimony and video

[11] Inasmuch as Defendant is contending records of prior felony convictions alleged by the State but not considered by the sentencing judge were erroneous, Defendant fails to demonstrate any prejudice.

demonstrating that Defendant stole Stathopoulos' purse at the Tropicana and used one of her credit cards forty minutes later at Sheikh Shoes. Further, although the crime had some gravity, the quantity and character of any errors by counsel were minimal and Defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975). In fact, there was no single instance of ineffective assistance in Defendant's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Thus, cumulative error does not warrant relief.

III. REQUEST FOR AN EVIDENTIARY HEARING

An evidentiary hearing is not warranted. NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

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

NRS 34.770. The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, no evidentiary hearing is necessary. Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002); Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; See also Hargrove, 100 Nev. at 503, 686 P.2d at 225 ("A defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

Here, Defendant's Petition can be resolved without an evidentiary hearing. Many of Defendant's claims are belied by the record and therefore do not warrant an evidentiary hearing. Furthermore, Defendant has failed to demonstrate that, even if all of his claims are true (a fact the State does not concede), he was prejudiced thereby. Thus, an expansion of the record would not assist the merits of Defendant's claims. An evidentiary hearing is not required and Defendant's claims should be denied per Hargrove and Strickland.

CONCLUSION

Based on the foregoing, the State respectfully requests that Defendant's Petition and Request for an Evidentiary Hearing be DENIED.

DATED this 28th day of December, 2012.

Respectfully submitted,

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

BY /s/ FRANK COUMOU
FRANK COUMOU
Chief Deputy District Attorney
Nevada Bar #004577

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of State's Response To Defendant's Petition For Writ Of Habeas Corpus And First Supplemental Petition For Writ Of Habeas Corpus, was made this 28th day of December, 2012, by facsimile transmission to:

MATTHEW D. CARLING, ESQ.

446-8065

BY: /s/ C. Cintola
C. Cintola
Employee of the District Attorney's Office

CB/FC/cc/L3

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Attorneys for Petitioner,
RONALD ROSS

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

RONALD ROSS,

Petitioner,

vs.

DWIGHT NEVEN, WARDEN,
HIGH DESERT STATE PRISON

Respondent.

Case No.: C236169
Dept. No.: XVII

***EX PARTE* APPLICATION FOR AUTHORIZATION OF FEES IN EXCESS OF THE STATUTORY AMOUNT AUTHORIZED BY NRS 7.125 AND 7.145 AND APPLICATION FOR PAYMENT OF INTERIM FEES**

COMES NOW, Matthew D. Carling, Esq., and hereby requests authorization of fees for interim billing in the above entitled matter. This Application is made and based on the following facts:

I.

FACTS

1. On May 23, 2007, Ronald Ross was charged by Criminal Complaint with twenty (20) felony counts. On November 13, 2008, a jury returned verdicts of "guilty" on seven (7) counts.

2. Undersigned counsel was appointed on January 5, 2012, to represent the Petitioner in post-conviction proceedings. On July 18, 2012, counsel filed a Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). The State filed it's Response on December 28, 2012. Counsel filed a Reply on January 22, 2013. This matter is currently scheduled for argument on February 7, 2013.

3. Undersigned counsel has expended considerable time in reviewing the district court file, researching the relevant law, and on January 22, 2013, submitted the Petitioner's Reply. All briefing appears to have been submitted to this Court.

4. The Sixth Amendment of the United States Constitution guarantees that an accused person shall "have the Assistance of Counsel for his defense." The United States Supreme Court has clearly defined when the assistance of counsel becomes ineffective and an accused person is denied this right. Strickland v. Washington, 466 US 668 (1984). Mr. Ross is entitled to effective assistance of counsel during the present *habeas* litigation. *See also* US v. Cronic. 466 US 648 (1984).

5. Additionally, Mr. Ross has a federal constitutional right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution during this *habeas* litigation. *See* Justice Steven's concurrence and dissent to Ohio Adult Parole Authority v. Woodward, 523 US 272 (1998); *see also* Morrissey v. Brewer, 408 US 471 (1971), Gagnon v. Scarpelli, 411 US 778 (1983), Pennsylvania v. Finley, 481 US 551 (1987), and Yates v. Aiken, 484 US 211 (1988). Due process cannot be achieved in the present post-conviction matter

without the review of all documents underlying Mr. Ross' trial, the previous documents filed with the Nevada Supreme Court, all transcripts, other Motions written by Mr. Ross, and defending Mr. Ross' position at any future hearings.

6. The current amount claimed for attorney's fees during the preparation for Mr. Ross' Reply of this case totals $3,564.93. This sum represents attorney's fees and expenses which have been accrued by undersigned counsel between June 12, 2012 and January 22, 2013, during representation of Mr. Ross and is partial payment of the total attorneys fees and expenses which continue to be accrued during the ongoing representation of Petitioner, Ronald Ross.

7. This Application is made and based upon the attached Declaration of Matthew D. Carling, and a statement of services provided under separate cover.

II.

POINTS AND AUTHORITIES

Pursuant to NRS 7.125(2)(a), an attorney is entitled to compensation for representation of an indigent Defendant for a felony punishable by death or imprisonment for life with or without the possibility of parole in the amount of $20,000.00. In light of Keeney v. Tamayo-Reyes, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992), counsel is required to investigate and raise all material facts upon which the constitutionality of the conviction can be challenged in this proceeding, or risk a determination of waiver at later stages of review.

The severity of the crime, as well as the severity of the possible punishment, and the length of time the case has been in litigation and the number of procedures that have been previously litigated upon Mr. Ross' behalf have all required and continue to require extensive review, research and preparation for the presently pending post conviction litigation.

Thus, the undersigned counsel respectfully requests this Honorable Court grant the instant *Ex Parte* Application for Payment of Excess Fees in a Criminal Case and also issue an order permitting interim payment in the amount of $3,564.93.

DATED this 22nd day of January, 2013.

Respectfully Submitted,

CARLING LAW OFFICE, PC

/s/ MATTHEW D. CARLING, ESQ.
Nevada Bar No.: 007302
Attorneys for Petitioner,
RONALD ROSS

DECLARATION OF MATTHEW D. CARLING IN SUPPORT OF EX PARTE APPLICATION FOR PAYMENT OF EXCESS FEES

1. I am licensed to practice law in the State of Nevada and I was appointed to represent Ronald Ross during the pending litigation of his Petition for Writ of Habeas Corpus (Post-Conviction).

2. I was appointed on January 5, 2012, to represent the Petitioner in his *habeas* proceedings.

3. Subsequent to my appointment, I have made preliminary efforts to get the litigation moving forward.

4. The Sixth Amendment of the United States Constitution guarantees that an accused person shall "have the Assistance of Counsel for his defense." The United States Supreme Court has clearly defined when the assistance of counsel becomes ineffective and an accused person is denied this right. Strickland v. Washington, 466 US 668 (1984). Mr. Ross is entitled to effective assistance of counsel during the present *habeas* litigation. *See also* US v. Cronic. 466 US 648 (1984).

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6. That the statement of services and costs rendered by your Declarant in the above entitled case, which is submitted under separate cover to this Court, is true and correct regarding the fees and costs accrued between June 12, 2012 and January 22, 2013, with regard to the litigation of Mr. Ross' post-conviction challenge to his convictions and sentence.

7. That the current amount for services rendered and costs expended are in your Declarant's opinion absolutely necessary to the adequate and effective representation of Ronald Ross during the litigation of his pending appeal to the Nevada Supreme Court.

DATED this 22nd day of January, 2013.

Respectfully Submitted,

CARLING LAW OFFICE, PC

/s/ MATTHEW D. CARLING, ESQ.
Nevada Bar No.: 007302
Attorneys for Petitioner,
RONALD ROSS

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RONALD ROSS

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

RONALD ROSS, Petitioner, vs. DWIGHT NEVEN, WARDEN, HIGH DESERT STATE PRISON Respondent.	Case No.: C236169 Dept. No.: XVII

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Respectfully Submitted,

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/s/ MATTHEW D. CARLING, ESQ.
Nevada Bar No.: 007302
Attorneys for Petitioner,
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DISTRICT COURT
CLARK COUNTY, NEVADA

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RONALD ROSS, Petitioner, vs. DWIGHT NEVEN, WARDEN, HIGH DESERT STATE PRISON Respondent.	Case No.: C236169 Dept. No.: XVII **Evidentiary Hearing Requested**

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

The Petitioner, Ronald Ross ("Ross"), by and through his attorney of record, Matthew D. Carling, Esq., hereby submits this Reply to State's Response to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

I.

ARGUMENTS

A. Trial Counsel was Ineffective in the Jury Selection.

The State argues Ross can not establish ineffective assistance of counsel with respect to jury selection because: (a) he cannot demonstrate that any of the objectionable jurors actual served on the jury panel; (b) any said juries demonstrated bias based on the personal experiences; and (c) the failure to challenge the jurors would have been futile. These arguments are in error.

First, as specifically noted by the State, the record is unclear regarding whether juror 200 actually served on the jury panel because his name is not part of the record. Clearly, the Defendant is not charged with making the record regarding who serves on the jury panel. Said duty falls on the Court. Therefore, it is appropriate to assume juror 200 did in fact serve on the panel.

Second, merely because a juror states that he does not believe his personal experience would impact his ability to render a fair and impartial decision does not eliminate counsel's duty to challenge jurors whose bias *may* come into play and the failure to do so falls below the standard of objectively reasonable conduct. *See Mungin v. State*, 932 So.2d 986, 996 (Fla. 2006); *State v. King*, 2008 UT 54, ¶ 8, 47, 190 P.3d 1283; and *Smith v. State,* 357 S.W.3d 322 (Tenn. 2011).

Finally, the futility argument is without merit. Clearly, counsel for Ross had preemptory challenges which could have been exercised. In addition, the State's conclusion that a challenge for cause would have been futile is speculation. Absent defense counsel effectively asserting such a challenge for cause, there is no way to determine whether said challenge would have been futile.

Counsel was ineffective for failing to conduct sufficient *voir dire* to determine both actual and potential bias. Counsel was ineffective for failing to properly exercise both

preemptory and cause challenges. This conduct fell below the standard of objectively reasonable conduct.

Finally, Ross suffered prejudice. A juror had a bias which should have been challenged. Said juror would have tainted the impaneled jury and altered the outcome of the proceedings.

B. Trial Counsel was ineffective for their Violation of Ross's 6th Amendment Right to Speedy Trial.

The Sixth Amendment to the United States Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." Such claims are subject to a "balancing test, in which the conduct of both the prosecution and the defendant are weighed." *Barker v. Wingo*, 407 U.S. 514, 529 (1972). "'[S]ome of the factors' that courts should weigh include '[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.'" *Brillon*, 129 S. Ct. at 1290 (*quoting Barker*, 407 U.S. at 529). "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530.

First, the length of delay was severe. It took in excess of 540 days to bring the action to trial. Second, the reasons for the delay were several. The State continually sought continuances in violation of Ross's right to a speedy trial. The Defendant clearly invoked his right to a speedy trial, to the extent it was the subject of dialogue by the Court. The delay was clearly prejudicial to Ross. Not only was he subject to incarceration for an extended period of time, but also valuable evidence which could have exonerated Ross was no longer available, including surveillance videos. It was ineffective assistance of counsel to fail to insist upon Ross's right to a speedy trial when that right was specifically invoked by Ross.

The State argues the delays were stipulated and Ross waived his right to a speedy trial. It further argues that these issues were addressed on direct appeal. In response to both, Ross did not knowingly and voluntarily waive his right to a speedy trial. Instead, counsel mutually agreed that the delay was justified based on the pending appeals. While this may have been sufficient on direct appeal to defeat the arguments made on said appeal, those arguments did not address the question at hand: Did Ross received ineffective assistance of trial counsel because of the violation of his right to a speedy trial? The Writ focuses on the conduct of counsel as it relates to whether prejudice resulted and a different outcome would have resulted had counsel conducted himself otherwise. Therefore, the argument that the issue was resolved on direct appeal is in error.

Ross suffered prejudice. The simple fact of delay of time alters memories, makes witnesses unavailable, and otherwise alters the outcome of the proceedings, including the need to substantially refresh the memories of witnesses who otherwise would testify merely from recall. This is prejudicial and affected the outcome of the proceedings.

C. Trial Counsel Ineffective Assistance based on failure to engage in pretrial discovery.

Trial counsel further failed to conduct appropriate pretrial discovery, including obtaining surveillance video from both the shoe store which would have exonerated Ross. In *Kimmelman v. Morrison*, 477 U.S. 365 (1986), the Supreme Court deemed trial counsel's lack of investigation to be deficient under *Strickland's* performance prong. I n *Kimmelman,* the Court held that counsel's failure to request discovery, again, was not based on "strategy." *Id.* at 385. Despite "applying a heavy measure of deference to his judgment," the Court found "counsel's decision unreasonable, that is, contrary to prevailing professional norms." *Id.*

The instant case is no different. Counsel's failure to conduct pretrial investigation through obtaining surveillance videos from the shoe store precluded the presentation of a defense for Ross. Specifically, the surveillance videos may well have created a reasonable doubt that Ross in fact used a credit card to make any purchases at the shoe store and may well have created a reasonable doubt concerning whether the individual depicted was in fact Ross. This failure to obtain discovery fell so far below professional norms that it unquestionably was not a matter of strategic judgment but rather a breach of professional norm. The resulting prejudice was conviction which would not have occurred had the surveillance videos been obtained. Counsel was ineffective and the convictions must be overturned.

D. Ineffective Assistance based on counsel's failure to communicate with Petitioner prior to trial.

Counsel's representation may be deficient constituting ineffective assistance of counsel for failing to communicate with the Petitioner. Adequate consultation between attorney and client is an essential element of the effective assistance of counsel. *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065. "From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Id. See also Roe v. Flores-Ortega,* 528 U.S. 470, 120 S.Ct. 1029 (2000) and *Johnson v. Parker,* Civil Action No. 1:06CV217-SA-JAD (N.D.Miss. 9-12-2008) (failure to communicate may be both a symptom and cause of ineffective assistance).

The State argues that a Defendant is not entitled to a particular "relationship" with his attorney citing *Morris v. Slappy,* 461 U.S. 1, 14, 103 S.Ct. 1610, 1617 (1983). In *Slappy*, the Court stated:

> The Court of Appeals' conclusion that the Sixth Amendment right to counsel "would be without substance if it did not include the right to a meaningful attorney-client relationship," 649 F.2d, at 720 (emphasis added), is without basis in the law. No authority was cited for this novel ingredient of the Sixth Amendment guarantee of counsel, and of course none could be. No court could possibly guarantee that a defendant will develop the kind of rapport with his attorney — privately retained or provided by the public — that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel. Accordingly, we reject the claim that the Sixth Amendment guarantees a "meaningful relationship" between an accused and his counsel.

Id. Ross does not disagree with this premise. Ross is not suggesting that he had the right to a close, personal relationship with his attorney. He was not looking for a "friendship."

However, that does not alter the reality that Ross had the right to effective assistance of counsel, which effective assistance includes reasonable access to and communication with his counsel. *Roe v. Flores-Ortega,* 528 U.S. 470, 120 S.Ct. 1029 (2000). There was a clear break down in communication between counsel and Ross. This failure precluded Ross from being able to effectively assist counsel in the preparation of his defense, *i.e.*, tell him that he wasn't the person in the surveillance videos, *etc.* Prejudice arose because Ross was unable to explain his conduct, any potential alibis, or otherwise present evidence in his defense. This resulted in prejudice.

E. Trial counsel was ineffective for failure to lodge objections during many of the pretrial and trial proceedings.

Trial counsel was ineffective for failure to lodge objections during many of the pretrial and trial proceedings. The failure to object may result in a properly laid ineffective assistance of counsel claim. *See e.g. Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984), *cert. denied*, 471 U.S. 1004 (1985). In addition, the failure to object leads to a failure to preserve error for purposes of direct appeal. The failure to preserve issues for appellate review can constitute

ineffective assistance of counsel. *See e.g. Martin v. State*, 501 So.2d 1313 (Fla. 1st DCA 1986); *Crenshaw v. State*, 490 So.2d 1054 (Fla. 1st DCA 1986).

The trial transcript is almost entirely devoid of any objections lodged by defense counsel during the testimony of the witnesses. Clearly, it is the duty of defense counsel to insure that the proceedings are fair and that the State only puts before the finder of fact admissible evidence. There is no justifiable trial tactic which affords the State admission of evidence not otherwise admissible. Further, when defense counsel permits the admission of otherwise inadmissible evidence, not only are prejudicial matters presented to the jury but in addition it results in a failure to preserve the issues for direct appeal. Ross was prejudiced by the failure to timely object. First, inadmissible evidence was presented for the jury's consideration. Second, matters which should have been preserved for appeal were not. This prejudice could well have resulted in a different result. One can only speculate regarding jury deliberations, but assuming they considered all of the evidence presented, they also considered evidence which should have been excluded. But for such evidence, the jury may not have rendered a guilty verdict on all counts.

F. The cumulative effect of all errors constitutes ineffective assistance.

Again, as mention in his Supplement, where the errors of counsel are numerous, their cumulative effect may constitute ineffective assistance of counsel. *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). Thus, "[t]he cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Id.* As discussed in both the Petition and this Supplement, there were numerous grounds of ineffective assistance of counsel. While Ross believes that each alone is sufficient to grant this Petition, collectively they are overwhelming. This Court should grant this Petition.

II.

CONCLUSION

The Petition should be granted. In a number of ways, Ross's constitutionally protected to effective assistance of counsel were violated. It is apparent that trial counsel didn't develop facts and evidence. Each of these grounds individually are alone sufficient, however cumulatively they are overwhelmingly so. Ross suffered prejudice as a result of these ineffective assistance claims. But for these constitutional violations, the outcome of the proceedings would have been different. As such, the Petition should be granted.

DATED this 22nd day of January, 2013.

CARLING LAW OFFICE, PC

/s/ MATTHEW D. CARLING, ESQ.
Nevada Bar No.: 007302
Attorneys for Petitioner,
RONALD ROSS

CERTIFICATE OF SERVICE

This is to certify that on this the 22nd day of January, 2013, I caused a true and correct copy of the foregoing document to be served electronically as follows:

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CLERK OF THE COURT

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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RONALD ROSS,
#1970026

Defendant.

CASE NO: 07C236169

DEPT NO: XVII

STATE'S RESPONSE TO NEW ISSUE RAISED IN DEFENDANT'S REPLY

DATE OF HEARING: FEBRUARY 7, 2013
TIME OF HEARING: 8:15 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through FRANK COUMOU, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to New Issue Raised in Defendant's Reply.

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The State incorporates the Statement of the Case made in its original Response.

ARGUMENT

In Defendant's Reply, he argues for the first time that counsel was ineffective in exercising peremptory challenges.[1] First, the decision to exercise a peremptory challenge is inherently strategic and rests within the sound discretion of counsel. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). As demonstrated in the State's original Response, Prospective Juror 200 did not indicate any bias toward either side and, in fact, stated that they would be impartial during deliberation. Therefore, any strategic decision to allow Prospective Juror 200 to serve on the jury should not be questioned in hindsight here. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978).

Furthermore, Defendant fails to meet his burden of proving prejudice by showing that the allegedly biased juror, Prospective Juror 200, actually served on the jury. See Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). Defendant contends it should be presumed that Prospective Juror 200 served on the jury, but fails to offer any legal support for such a presumption. Defendant's claim contradicts the clear holding in Means that counsel is presumed effective and a defendant is required to prove otherwise. Therefore, if this Court agrees that Prospective Juror 200 demonstrated bias against Defendant, it is actually proper to presume that Prospective Juror 200 was removed because effective counsel would have done so. See also Lee v. Ball, 121 Nev. 391, 394, 116 P.3d 64, 66 (2005) (finding that a presumption against a party alleging error applies when that party fails to provide an adequate record for review); Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (finding that bare allegations unsupported by the record are insufficient to support a claim of ineffective assistance of counsel).

[1] In the Supplemental Petition, Defendant alleged only that counsel was ineffective in not exercising a *strike for cause* against Prospective Juror 200. Supplemental Petition for Writ of Habeas Corpus, p. 10.

Finally, as demonstrated in the State's original Response, even if Defendant's bare allegation that Prospective Juror 200 actually served on the jury is correct, the prospective juror was not biased. Therefore, Defendant's bare allegation is also belied by the record and does not warrant relief. See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

CONCLUSION

Based on the foregoing, the State respectfully requests that Defendant's Petition be DENIED.

DATED this 5th day of February, 2013.

Respectfully submitted,

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

BY /s/ FRANK COUMOU
FRANK COUMOU
Chief Deputy District Attorney
Nevada Bar #004577

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of State's Response To New Issue Raised In Defendant's Reply, was made this 5th day of February, 2013, by facsimile transmission to:

MATTHEW D. CARLING, ESQ.
446-8065

BY: /s/ C. Cintola
C. Cintola
Employee of the District Attorney's Office

CB/FC/cc/L3

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CLERK OF THE COURT

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA

RONALD ROSS,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 07C236169
Dept No: XVII

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

PLEASE TAKE NOTICE that on June 12, 2013, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on June 17, 2013.

STEVEN D. GRIERSON, CLERK OF THE COURT

Barbara J. Gutzmer

Barbara J. Gutzmer, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 17 day of June 2013, I placed a copy of this Notice of Entry in:

The bin(s) located in the Regional Justice Center of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:

Ronald Ross # 1003485
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Indian Springs, NV 89070

Matthew D. Carling, Esq.
1100 S. Tenth Street
Las Vegas, NV 89101

Barbara J. Gutzmer

Barbara J. Gutzmer, Deputy Clerk

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06/12/2013 04:31:00 PM

CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RONALD ROSS,
#1970026

Defendant.

CASE NO: C236169

DEPT NO: XVII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: FEBRUARY 22, 2013
TIME OF HEARING: 8:15 A.M.

THIS CAUSE having come on for hearing before the Honorable MICHAEL VILLANI, District Judge, on the 22ND day of FEBRUARY, 2013, the Petitioner not being present, represented by MATTHEW D. CARLING, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through HILARY HEAP, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein and the Court having taken the matter under submission until Mar 7, 2013, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT

1. On August 22, 2007, an Information was filed charging Ronald Ross ("Defendant") as follows: Counts 1, 3 and 7: Burglary (Felony – NRS 205.060); Count 2: Larceny from the Person (Felony – NRS 205.067); Count 4: Possession of Credit or Debit Card Without Cardholder's Consent (Felony – NRS 205.690); Count 5: Fraudulent Use of Credit or Debit Card (Felony – NRS 205.760); Count 6: Theft (Felony – NRS 205.0835, 205.0832); Count 8: Grand Larceny, Victim 60 Years of Age or Older (Felony – NRS 206.270, 193.1687); Counts 9 and 10: Conspiracy to Commit Larceny (Gross Misdemeanor – NRS 205.220, 205.222, 199.480). On August 23, 2007, an Amended Information was filed charging Defendant with the same offenses. On August 24, 2007, a Second Amended Information was filed charging Defendant with the same offenses. On November 12, 2008, Defendant was charged by way of Third Amended Information with the following: Counts 1 and 3: Burglary; Count 2: Larceny from the Person; Count 4: Possession of Credit or Debit Card Without Cardholder's Consent; Count 5: Fraudulent Use of Credit or Debit Card; Count 6: Theft; and Count 7: Conspiracy to Commit Larceny.

2. On November 12, 2008, Defendant's trial began. The jury returned a verdict of guilty on all counts contained in the Third Amended Information on November 13, 2008.

3. On November 17, 2008, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal, alleging seventeen prior felony convictions. The State filed an Amended Notice of Intent to Seek Punishment as a Habitual Criminal on the same day alleging eighteen prior felony convictions. A Second Amended Notice of Intent to Seek Punishment as a Habitual Criminal and a Memorandum in Support of Habitual Criminal Treatment were filed on January 5, 2009, alleging nineteen prior felony convictions.

4. On April 7, 2009, Defendant was adjudged guilty of the offenses charged in the Third Amended Information under the Large Habitual Criminal Statute and sentenced to imprisonment in the Nevada Department of Corrections as follows: Count 1: Minimum of ten (10) years, maximum of life; Count 2: Minimum of ten (10) years, maximum of life, sentence to run concurrent with count 1; Count 3: Minimum of ten (10) years, maximum of

life, sentence to run consecutive to counts 1 and 2.; Count 4: Minimum of ten (10) years, maximum of life, sentence to run consecutive to counts 1 and 2 and concurrent with count 3; Count 5: Minimum of ten (10) years, maximum of life, sentence to run consecutive to counts 1 and 2 and concurrent with count 4; Count 6: Minimum of ten (10) years, maximum of life, sentence to run consecutive to counts 1 and 2 and concurrent with count 5; Count 7: one (1) year in the Clark County Detention Center. Defendant received two hundred (200) days credit for time served. A Judgment of Conviction was filed on April 16, 2009.

5. Defendant filed a Notice of Appeal on December 5, 2008. On November 8, 2010, the Nevada Supreme Court affirmed Defendant's convictions. Remittitur issued December 3, 2010.

6. Defendant filed a pro per petition for writ of habeas corpus (post-conviction) on November 30, 2011. Defendant's First Supplemental Petition for Writ of Habeas Corpus was filed on July 18, 2012. The State's filed a Response on December 28, 2012. Defendant filed a Reply on January 22, 2013. The State filed a Response on February 5, 2013. A hearing was conducted on the Petition on February 22, 2013. The district court subsequently denied Defendant's Petition with a Minute Order on May 7, 2013.

7. Defendant's claim that counsel was ineffective for not challenging Jurors 187, 200, and 208 for cause is without merit. All three jurors unequivocally expressed they could lay aside these past experiences and that such would not affect their deliberations. Reporter's Transcript,[1] 11/12/2008, pp. 10-11, 32, 37-38, 69, 72-73. When the State raised a challenge for cause concerning another juror, the court denied the challenge because, even though the prospective juror had a pending criminal matter in Clark County, "no one got him to say he can't be fair." RT 11/12/2008, p. 76. Thus, any efforts to challenge the above listed jurors for cause would have been futile. Furthermore, Defendant cannot demonstrate prejudice as he cannot show that any of the listed prospective jurors actually served on the jury and were actually biased. The record demonstrates that Juror 187 and Juror 208 did not serve on the jury. Compare RT 11/12/2008, pp. 10-11, 37-38 with RT 11/12/2008, p. 78. It is unclear

[1] Hereinafter "RT."

whether Juror 200 served as his name is not a part of the record. However, as demonstrated above, Juror 200 unequivocally stated he could lay aside any prejudice or perceived prejudice in deciding Defendant's case. Thus, because counsel did not act below an objective standard of reasonableness and because he cannot demonstrate prejudice, this claim is denied.

8. Counsel was not ineffective in asserting Defendant's right to a speedy trial. At Defendant's arraignment on September 9, 2007, he invoked his right to a speedy trial and trial was set for October 22. RT 9/5/2007, pp. 2-3. However, this trial date was vacated because there were pending appeals in two other cases involving Defendant (C220915 and C220916),[2] one by the State and one by Defendant. RT 11/11/2007, pp. 2-3. Both Defendant's counsel and the State represented to the court that the outcome of the pending appeals could significantly affect the instant case and that, if Defendant were tried prior to the Nevada Supreme Court's decision and such decision was in his favor, the instant case would have to be retried. RT 11/11/2007, p. 3, 12/11/2007, p. 2. The State and Defendant therefore agreed that trial in the instant case should be postponed until the pending appeals were resolved. RT 11/11/2007, pp. 2-3; 12/11/2007, pp. 2-3. Defendant's stated he had "no problem" waiting for the resolution of the pending appeal but asked to be transported to prison as opposed to staying at the Clark County Detention Center while he awaited the outcome. RT 11/11/2007, pp. 3-4; 12/11/2007, pp. 2-3. When the pending appeals were resolved (See Supreme Court Case Nos. 49091 and 50153), Defendant re-asserted his right to a speedy trial and trial was set for September 2, 2008. RT 7/8/2008, p. 4-5. However, against the court's order, Defendant was not transported for the trial and it was vacated. RT 8/16/2008, p. 2. On September 16, 2008, Defendant received a new trial date of November 10, which was the earliest date that the State could transport out-of-state witnesses and the court could conduct the trial. RT 9/16/2008, p. 4-7. Trial commenced on November 12, 2008. RT 11/12/2008. Given the significant effect Defendant's pending appeals could have had on a trial in this case, it was reasonable for counsel to waive Defendant's right to a

[2] The corresponding Supreme Court Case numbers are 49091 and 50153, respectively.

speedy trial until after the appeals were determined. Furthermore, Defendant cannot demonstrate prejudice. The Nevada Supreme Court considered and denied Defendant's speedy trial claim on direct appeal, finding that Defendant had failed to demonstrate prejudice or that the delay was in bad faith. See Order of Affirmance, p. 1. Thus, if counsel had moved to dismiss Defendant's charges on this ground, such a motion would likely have been denied. Additionally, based on the same reasoning, Defendant cannot demonstrate a reasonable probability that the outcome of his case would have been different had counsel moved to dismiss his charges based on an alleged violation of his right to a speedy trial.

9. Inasmuch as Defendant now alleges the delay of his trial was prejudicial because it caused the loss of exculpatory evidence, specifically the Sheikh Shoes surveillance video, this claim is belied by the record. Sheikh Shoes store assistant manager Kevin Hancock testified that the surveillance video depicting Defendant using Georgia Stathopoulos' credit card was saved in the computer database for 1-2 weeks before being automatically erased. As the transaction took place on March 17, 2007, and Defendant was not arraigned until September 5, 2007, any surveillance video of Sheikh Shoes was unavailable prior to any delay of Defendant's trial. Therefore, because delay subsequent to September 5, 2007 did not result in the loss of such evidence, this claim is denied.

10. Inasmuch as Defendant is alleging his prosecution violated his right to a speedy trial, consideration of this claim is precluded by the law of the case. On direct appeal, the Nevada Supreme Court considered and rejected Defendant's claim that his speedy trial rights were violated. Order of Affirmance 11/8/2010, p. 1-2. Therefore, consideration of this claim is precluded and it is dismissed.

11. Counsel was not ineffective in deciding not to file a discovery motion. Defendant was already in possession of all discovery and was therefore not prejudiced by the absence of a formal motion.

12. Counsel was not ineffective for failing to preserve the Sheikh Shoes video surveillance prior to its destruction. Any surveillance of the Sheikh Shoes transaction was automatically deleted by the end of March 2007 at the latest. Defendant was not arrested in

connection with this case until June 6, 2007, and counsel was subsequently appointed. See Declaration of Arrest. Thus, any surveillance video of Sheikh Shoes was already unavailable prior to counsel's appointment and Defendant's claim is denied.

13. Defendant's claim that the State violated Brady v. Maryland, 373 U.S. 83, 83 S Ct. 1194 (1963), by not providing him with the Sheik Shoes video is not cognizable as this claim could have been raised on appeal, but was not.

14. Inasmuch as Defendant contends the State intentionally failed to preserve the Sheikh Shoes video, this claim is without merit. First, this claim is barred because Defendant could have raised it on appeal but did not. Second, although the State has an obligation to preserve evidence in its possession or control, Defendant fails to demonstrate that the State ever had possession or control of the Sheikh Shoes video. Furthermore, Defendant's claim that the State did not take steps to preserve the evidence is belied by the record. Detective Flenner testified at the preliminary hearing and at trial that he asked for a copy of the Sheikh Shoes video to be made. RT 6/19/2007, p. 95-96, 11/12/2008, p. 244. Additionally, Hancock testified that he tried to make a copy of the video but that support staff was unable to travel to the location until after the video had been automatically erased. RT 11/12/2008, pp. 200-02. Because Defendant cannot demonstrate that the Sheikh Shoes video was in the State's possession or control and because his claim that it was intentionally destroyed is belied by the record, this claim is denied.

15. Counsel was not ineffective for failing to secure the Santa Fe Station video surveillance. Defendant fails to demonstrate any prejudice. Even if counsel did not review the Santa Fe Station surveillance video prior to the first day of trial (a fact unknown to this Court), Defendant cannot demonstrate a reasonable probability of a more favorable outcome than having the charges concerning the Santa Fe Station offenses voluntarily dismissed by the State. RT 11/12/2008 p. 3. Thus, any deficiency of counsel was non-prejudicial, and Defendant's claim is hereby denied.

16. Counsel was not ineffective in not presenting the Santa Fe Station video in order to impeach the identification of Defendant from the Tropicana Hotel and Casino surveillance

video as well as the Sheik Shoes video. At Defendant's preliminary hearing, Detective Julie Holl testified that she reviewed the Santa Fe Station video and identified Defendant as the person depicted committing a larceny. RT 6/19/2007, pp. 65-66. Prior to the beginning of trial on November 12, 2008, the State filed a Third Amended Information excluding all Santa Fe Station offenses because, in reviewing the Santa Fe Station video, the prosecutor determined that Defendant was not depicted. Detective Holl did not testify at trial. Detective Flenner testified at both the preliminary hearing and at trial that he observed the Tropicana video and the Sheikh Shoes video and identified Defendant as depicted in both. RT 6/19/2007, pp. 87-105; RT 11/12/2008, pp. 236, 243, 245-47. Detective Flenner did not review or testify concerning the Santa Fe Station video. Any evidence that a non-testifying witness had misidentified Defendant in connection with another theft would have likely been excluded because it was irrelevant. The fact that Detective Holl had misidentified Defendant after observing the Santa Fe Station video did not increase or decrease the likelihood that Detective Flenner correctly identified Defendant after observing the Tropicana video and the Sheikh Shoes video and is therefore irrelevant. Furthermore, even if such evidence was admissible, counsel appropriately declined to present it because of its minimal probative value and potential prejudicial effect. Defendant was on trial for larceny of Stathopoulos' purse while she was playing slot machines at a casino by distracting her and subsequently using her stolen credit card to purchase $490 in shoes and clothing. Similarly, the larceny that occurred at Santa Fe Station involved a person who stole money from a victim while the victim was playing slot machines at a casino by distracting them. RT 6/19/2007, pp. 67-69. Therefore, even if such evidence was admissible, counsel made a reasonable decision to avoid introducing evidence that Defendant was suspected in a very similar offense occurring in another casino.

17. Defendant's claim that counsel failed to sufficiently communicate with him is belied by the record. On November 4, 2008, Defendant requested to be made co-counsel because, in discussing the case with counsel, there were disagreements concerning what witnesses to call and what defenses to develop. RT 11/4/2008, p. 3. The court recommended that counsel

and Defendant continue to discuss the case and counsel stated he would visit Defendant again before the beginning of trial to discuss the case. RT 11/4/2008, pp. 3-4. Such evidence of communication between Defendant and counsel belies Defendant's claim that there was a communication breakdown. Defendant's allegation that counsel's cross-examination of witnesses demonstrates his lack of understanding of the details of the case is also a bare allegation belied by the record. In fact, counsel engaged in lengthy and detailed cross-examinations of key witnesses Stathopoulos, Luis Valdez, Hancock and Detective Flenner. RT 11/12/2008, pp. 139-53, 180-88, 203-18, 220-23, 248-62. Therefore, Defendant's claim does not warrant relief and is hereby denied.

18. Counsel was not ineffective for not objecting to expert testimony by Detective Flenner. Detective Flenner testified, in part, concerning his experiences investigating distract and pickpocket thefts and common techniques associated with those crimes. RT 11/12/2008, pp. 236-43 Counsel did not object. On appeal, Defendant contended Detective Flenner improperly testified as an expert. The Nevada Supreme Court rejected Defendant's claim, finding that Defendant failed to demonstrate plain error. Order of Affirmance, 11/8/2010, p. 2. It was a reasoned tactical decision to not object. Defendant fails to demonstrate that Detective Flenner's testimony would have been prohibited had an objection been raised under NRS 174.234(2). Defendant does not argue in his Petition that the State's failure to notice Detective Flenner's testimony was in bad faith. Furthermore, because Detective Flenner and other detectives testified similarly concerning distract and pickpocket crimes at Defendant's preliminary hearing, Defendant was on notice concerning the testimony and fails to demonstrate that his substantial rights were violated. See RT 6/19/2007, pp. 66-70, 90-93. Therefore, any objection to Detective Flenner's testimony at trial would have been futile. Furthermore, had the district court heard Defendant's objection and overruled it, Defendant cannot show a reasonable probability that he would have successfully appealed the decision because there was no prejudice. See Order of Affirmance, 11/8/2010, p. 2. Therefore, the Nevada Supreme Court likely would have found any error harmless. Finally, even if Defendant had objected and Detective Flenner was prohibited from testifying

concerning distract and pickpocket crimes in general, Defendant fails to demonstrate a reasonable probability that the outcome of his trial would have been different. At trial, a videotape was admitted that showed Defendant and another unidentified male approach Stathopoulos with a coat draped over Defendant's arm, speak with Stathopoulos for a few minutes while Defendant's coat was over Stathopoulos' open purse, then Defendant gave his coat containing a black skinny object to the unidentified male and they left in separate directions. RT 11/12/2008, pp. 236-243. Stathopoulos identified Defendant and stated that her wallet was black and skinny and was stolen during the time that Defendant was speaking with her. RT 11/12/2008, pp. 127, 130-33. Stathopoulos' credit card was then used at Sheikh Shoes approximately forty minutes later and four people identified Defendant as the person that used the credit card to purchase $490 in merchandise. RT 11/12/2008, pp. 157-58, 162-63, 175-76, 194, 246, 246-47. In light of such evidence, Defendant cannot demonstrate a reasonable probability that the jury would have acquitted him even if evidence concerning the techniques of distract and pickpocket thefts was excluded. Therefore, Defendant's claim is denied.

19. Counsel was not ineffective for not objecting to the admission of Deja Jarmin's preliminary hearing testimony. Defendant contends counsel was ineffective in not objecting to the admission of Jarmin's preliminary hearing testimony on the grounds the State had failed to demonstrate due diligence in attempting to locate Jarmin. Any objection on this ground would have been futile. Although Defendant conceded the State had demonstrated due diligence in attempting to locate Jarmin, the court would have found such regardless. Clark County District Attorney's Office investigator Matthew Johns was sworn and testified that he had attempted to contact Jarmin at his address and called and left messages on Jarmin's phone beginning in mid-October. RT 11/12/2008, pp. 84-86. Johns contacted a woman claiming to be Jarmin's girlfriend who confirmed Jarmin's address and phone number but Johns was unable to contact Jarmin. RT 11/12/2008, p. 91. On the day of trial, Johns again contacted Jarmin's girlfriend, who told him that Jarmin had been admitted to a hospital in California on Friday for heart problems and that Jarmin's family lived in the area

near the hospital. RT 11/12/2008, p. 87. Johns then attempted to contact the hospital as well as Jarmin's family in California to confirm that Jarmin was in the hospital, but was unsuccessful. RT 11/12/2008, pp. 87-88. In light of such efforts, Defendant's claim that the State failed to exercise due diligence in attempting to locate Jarmin is a bare allegation belied by the record. Notably, while Defendant now alleges the State did not exercise due diligence in attempting to locate Jarmin, he does not explain what additional efforts the State should have made. Thus, any objection on the grounds advanced by Defendant would have been futile. Furthermore, that counsel objected to admission of Jarmin's preliminary hearing testimony on different grounds demonstrates a reasoned tactical decision to advance what counsel believed to be the strongest argument for not admitting Jarmin's preliminary hearing testimony and such decision is not so deficient to warrant reconsideration.

20. Inasmuch as Defendant alleges counsel was also ineffective for failing to object on the grounds of untimely notice of Jarmin's unavailability, such an objection would likewise have been futile. According to Jarmin's girlfriend, Jarmin had been admitted to the hospital the Friday prior to trial with heart problems, a fact Johns had learned the morning of trial. It was on this ground, not the State's inability to locate Jarmin, that the State requested Jarmin's preliminary hearing testimony be admitted. Notice of Jarmin's medical condition was provided the same day that the State learned of it and any objection to the introduction of Jarmin's testimony on this ground would have been futile.

21. Inasmuch as Defendant contends counsel was likewise ineffective for failing to renew his best evidence objection from the preliminary hearing in connection with Jarmin's testimony, such claim is without merit. First, it is unclear what objection Defendant is referring to, as counsel did not raise a best evidence objection during Jarmin's preliminary hearing testimony. See RT 6/19/2007, pp. 17-34. Furthermore, any best evidence objection would have been overruled, as the State had sufficiently demonstrated that the original Sheikh Shoes video had been destroyed without the presence of fraud by the State and could not be obtained by judicial process. Thus, any objection by counsel would have been futile. Furthermore, because such objection, or renewed objection, would have been futile,

Defendant cannot demonstrate a reasonable probability that it would have been sustained at trial, or successful on appeal, and so cannot demonstrate prejudice.

22. Counsel was not ineffective for not objecting to Hancock's prior identification of Defendant. Counsel's decision to not object to Hancock's prior identification was a reasoned tactical decision. Defendant fails to provide any authority for the proposition that a previous identification is inadmissible because of the length of time between the identification and trial. Therefore, any objection to Hancock's identification on this ground would have been futile. Second, Defendant's claim that Hancock was not cross-examined concerning his identification of Defendant is belied by the record. Defendant was cross-examined concerning the time between the incident and the photographic identification, his knowledge of the offense prior to the identification and the fact that he did not personally see Defendant in Sheik Shoes on the day of the offense. RT 11/12/2008, pp. 204-09, 211-14. Therefore, this claim is denied.

23. Counsel was not ineffective for not objecting to the verbal introduction of the receipt for the transaction made with Stathopoulos' credit card at Sheik Shoes on March 17, 2007 during Hancock's testimony. State's Exhibit 1. Counsel's decision to not object was a reasoned strategic decision. Additionally, State's Exhibit 1 had been admitted into evidence prior to Hancock's testimony. RT 11/12/2008, pp. 158-60. Thus, as the "best evidence" was already admitted, NRS 52.235 was not violated by Hancock's testimony and any objection would have been futile. Finally, Defendant cannot demonstrate prejudice. Hancock's testimony concerned the contents of the State's Exhibit 1, including: the card number for the credit card used, the date, the salesperson, the items purchased and the amount. RT 11/12/2008, pp. 197-200, 216-17. Defendant did not challenge that Stathopoulos' credit card was indeed used during the transaction State's Exhibit 1 memorialized. Given that the evidence testified to was admitted and all of the contents of the receipt were conceded to by Defendant, there is not a reasonable probability of a different outcome had counsel objected and such objection was sustained. Therefore, this claim is denied.

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24. Counsel was not ineffective for not objecting to allegedly leading questions during Hancock's direct testimony concerning State's Exhibit 1. The decision to not object was a reasoned strategic decision. Furthermore, neither of the challenged questions asked by the prosecutor unnecessarily suggested an answer. While both called for a "yes" or "no" answer, neither question suggested an answer to the witness and were therefore proper. Thus, any objection would have been futile. Finally, Defendant cannot demonstrate that, had counsel objected, there is a reasonable probability of a different outcome. Both questions concerned evidence already admitted and facts conceded to by Defendant. Therefore, had counsel objected and such objection been sustained, the prosecutor likely would have simply rephrased the question. Even if the prosecutor had abandoned the line of questioning, the result of Defendant's trial would have been the same, as State's Exhibit 1 was admitted and Defendant conceded to its contents. Therefore, Defendant fails to demonstrate prejudice and this claim is denied.

25. Counsel was not ineffective during the cross-examination of Hancock's testimony concerning identification of Defendant and for not objecting to Hancock's identification during redirect examination. Defendant's claim is a bare allegation belied by the record. Counsel cross-examined Hancock regarding his identification of Defendant. See RT 11/12/2008, pp. 204-09, 211-14. Furthermore, Defendant's claim that counsel was ineffective for failing to object to Hancock's testimony regarding Defendant's identity on redirect is without merit. Defendant does not state the grounds upon which any objection to Hancock's identification could have been made and any objection to Hancock's identification testimony would have been futile as Hancock's identification was admissible.

26. Counsel was not ineffective for not objecting to Detective Flenner testifying that he was "familiar" with Defendant and for soliciting testimony of Defendant's other bad acts. Although evidence of other bad acts is inadmissible to prove action in conformity therewith, no evidence of other acts was offered against Defendant. Detective Flenner's testimony did not imply anything more than that he was acquainted with Defendant prior to March 17, 2007. This knowledge could have originated from a multitude of avenues having nothing to

do with Defendant's prior bad acts. The jury received no testimony concerning the basis of Detective Flenner's prior knowledge of Defendant and it was instructed to not consider facts not in evidence. Jury Instruction 24. Thus, Defendant's contention that the jury inferred from Detective Flenner's testimony that Defendant had committed other bad acts is a bare allegation unsupported by the record. Furthermore, the decision to not object was a reasoned strategic decision. Finally, even if the testimony was improper under NRS 48.045(2), Defendant cannot demonstrate prejudice. Evidence of Defendant's guilt was overwhelming and included the testimony of one witness and a video of Defendant's theft and the testimony of four witnesses concerning the use of Stathopoulos' credit card. Thus, even if counsel had successfully objected to the challenged testimony, Defendant cannot demonstrate a reasonable probability that the result would have been different.

27. Defendant's claim that counsel solicited evidence of other acts is belied by the record. During cross-examination, counsel asked Detective Flenner how he was able to identify Defendant's facial features on the Tropicana surveillance video in light of the video images' poor quality. The court then asked counsel to approach and advised counsel during the bench conference that the question had the potential to elicit testimony of other acts. The question was then withdrawn and counsel was permitted to continue with cross-examination. RT 11/12/2008, pp. 253-54. Thus, no evidence of other acts was actually offered during cross-examination and Defendant's claim is denied. Furthermore, inasmuch as Defendant is contending counsel's question alone demonstrates ineffective assistance of counsel, Defendant fails to show how an unanswered question regarding the video quality of the Tropicana video prejudiced him. Therefore, this claim is denied.

28. Counsel was not ineffective for not objecting to the admission of a hearsay statement that Stathopoulos told Jarmin her stolen credit card had been used to make a purchase at Sheikh Shoes. Such testimony was not objectionable as hearsay. Testimony by Jarmin and Detective Flenner that they received information that Stathopoulos' stolen credit card had been used at Sheikh Shoes was not offered to prove that Stathopoulos' credit card was indeed stolen and used at Sheikh Shoes. Instead, such testimony was offered to put reactions

by Jarmin and Detective Flenner in context. Based on the information they received concerning the use of Stathopoulos' credit card at Sheik Shoes, Jarmin and Detective Flenner investigated the credit card receipts at Sheikh Shoes and found a receipt for items purchased with Stathopoulos' credit card. See RT 11/12/2008, pp. 161-63, 245. Because Stathopoulos' statement was not being offered to prove the truth of the matter asserted, such testimony was not hearsay and any objection would have been futile. Furthermore, counsel pursued an identity defense at trial and conceded that a theft and use of a stolen credit card had occurred. RT 11/12/2008, pp. 122, 124; 11/13/2008, pp. 29-30, 35-36, 39-41. Thus, counsel's decision to not object was a reasoned strategic decision. Finally, Defendant fails to demonstrate prejudice. There was much more probative evidence that Stathopoulos' credit card had been stolen and used at Sheikh Shoes than her out-of-court statement to Jarmin. Specifically, Stathopoulos' testified that her wallet, including her credit card, was stolen at approximately 1:00 PM on March 17, 2007, and the same card was used to purchase a significant amount of clothing and shoes approximately forty minutes later, as evidenced by the credit card receipt from Sheikh Shoes entered into evidence. RT 11/12/2008, pp. 126-27; State's Exhibit 1. Further, testimony and video demonstrated Defendant stole Stathopoulos' purse and four witnesses identified Defendant as the person that used Stathopoulos' credit card at Sheikh Shoes. RT 11/12/2008, pp. 130, 162-63, 175, 194, 243, 246-47. Therefore, Defendant cannot demonstrate a reasonable probability that the outcome of the matter would have been different had the jury not known that Stathopoulos told Jarmin her stolen credit card had been used at Sheikh Shoes. Thus, Defendant's claim is denied.

29. Counsel was not ineffective in declining to present expert testimony concerning distract and pickpocket crimes. Such was a reasoned strategic decision. Additionally, Defendant's implied assertion that counsel could have secured an expert witness to counter the testimony of Detective Flenner is a bare allegation unsupported by the record and does not warrant relief. Further, the jury did not require an expert to testify that Defendant's actions "were consistent with non-criminal activity" as such fact was not outside the ken of ordinary laity. Therefore, if such testimony was proffered, it would have likely been

excluded and counsel cannot be found ineffective for failing to proffer inadmissible evidence. Finally, Defendant fails to demonstrate prejudice. Even if the jury received expert testimony that Defendant's actions on the Tropicana surveillance video were consistent with non-criminal activity, the admission of evidence that no one else was close enough to Stathopoulos to take her purse and the fact that Defendant used Stathopoulos' credit card approximately forty minutes after her wallet was stolen would have resulted in the same conviction. Thus, Defendant cannot demonstrate a reasonable probability of a different outcome and his claim is denied.

30. Counsel was not ineffective in declining to present the testimony of a video expert to counter Detective Flenner's testimony that the Sheikh Shoes video had better resolution than the Tropicana video. Such was a reasoned strategic decision. Additionally, that counsel could have secured an expert witness to counter the testimony of Detective Flenner is a bare allegation and does not warrant relief. A copy of the Tropicana video was played at trial and Detective Flenner acknowledged on cross-examination that it had "streaks and was not very clear." See RT 11/12/2008, pp. 252-53. Detective Flenner viewed the original Sheikh Shoes video and never received a copy. RT 11/12/2008, p. 244. The original was destroyed by the time of trial. As the original Sheik Shoes video that Detective Flenner viewed had been destroyed shortly after the March 17, 2007 transaction, it is unclear how a defense expert could have testified about the comparative quality of the two videos. Further, considering that the Sheik Shoes video was an original and the Tropicana video was a copy, had an expert been called to testify, it is likely that they would have opined that originals are generally of higher quality or resolution than copies. Finally, Defendant cannot demonstrate prejudice. Even if an expert had been called and opined that casino surveillance videos are generally of higher resolution than other surveillance videos, there is not a reasonable probability that the outcome of Defendant's trial would have been different. Two eyewitnesses, including the clerk that processed the sale, testified that Defendant made a purchase at Sheikh Shoes with Stathopoulos' credit card forty minutes after it was stolen. RT 11/12/2008, pp. 155-60, 175-76. Such testimony would have been sufficient to overcome

any vague challenge to the quality of the Sheikh Shoes video. Thus, Defendant's claim does not warrant relief.

31. Counsel was not ineffective in not challenging alleged errors in Defendant's Presentence Investigation Report. First, Defendant's claim that counsel failed to investigate his prior felony convictions is a bare allegation belied by the record. On January 29, 2009, counsel requested sentencing to be continued to resolve disputes regarding Defendant's prior felonies. RT 1/29/2009, pp. 2-3. The sentencing was continued to April 7, 2009, when the State proffered booking photos for five prior felonies. RT 4/7/2009, pp. 2-4. When asked, Defendant admitted that the booking photos for the five felonies depicted him but disputed the other prior felony convictions alleged by the State. RT 4/7/2009, pp. 10-12. The district court stated it was only considering the five felony convictions with corresponding booking photos in its sentencing. RT 4/7/2009, p. 12. Counsel contended that the identity in connection with the five prior felonies was still unconfirmed and requested a continuance to establish identity through fingerprints. RT 4/7/2009, pp. 15-16. The court denied counsel's request and sentenced Defendant under the large habitual criminal statute. RT 4/7/2009, p. 22. Thus, the record supports the presumption that counsel indeed investigated Defendant's prior felony offenses. Further, in light of the fact Defendant conceded he had been previously convicted of five felonies either in Nevada or elsewhere, Defendant cannot now demonstrate prejudice. The five prior felony convictions Defendant acknowledged were the only prior felony convictions the court considered in sentencing Defendant as a large habitual criminal and were sufficient to support such a sentence. Because Defendant cannot demonstrate that, had counsel more effectively investigated prior felony convictions not considered by the court, there is a reasonable probability that the outcome of his sentencing would have been more favorable, this claim is denied.

32. Inasmuch as Defendant contends counsel was ineffective in challenging the authenticity of the prior felony convictions alleged, this claim is belied by the record. After the booking photos for five prior felony convictions were admitted and Defendant agreed that the person photographed was him, counsel still insisted that identity was not proven and

requested fingerprint analysis. RT 4/7/2009, pp. 10-11, 15-16. In fact, counsel challenged the authenticity of Defendant's prior felony convictions more forcefully than Defendant himself. Therefore, this claim is denied

33. Appellate counsel was not ineffective for declining to raise a claim that the State violated Brady. Appellate counsel raised five claims on appeal and contended that testimony of the contents of the Sheikh Shoes video in the absence of the video violated the best-evidence rule. Furthermore, prosecutors did not violate Brady. Defendant fails to demonstrate that the Sheikh Shoes video was ever in the State's possession. In fact, Detective Flenner testified he viewed the video as it existed on the security system at Sheikh Shoes and never received a copy. RT 11/12/2008, p. 244. Thus, as such evidence was not in the State's possession at any time, Defendant cannot demonstrate a Brady violation and appellate counsel appropriately declined to raise the issue. Furthermore, Defendant's claim that the State never disclosed that the security video had been destroyed is a bare allegation belied by the record. At the preliminary hearing, Detective Flenner testified the Sheikh Shoes employees did not know how to make a copy. Detective Flenner testified he did not receive a copy and was unaware of whether a copy was ever made. RT 6/19/2007, pp. 95-96. Therefore, Defendant was on notice at least as early as June 19, 2007, that the State had not secured a copy of the Sheikh Shoes video and had an equal opportunity to further investigate whether such a copy existed. Therefore, because the record demonstrates Defendant had equal access to determine whether a copy of the Sheik Shoes video existed, his claim did not have a reasonable probability of success on appeal and counsel appropriately declined to raise it.

34. Defendant's contention that counsel failed to cross-examine witnesses concerning the timing between the theft and the use of Stathopoulos' credit card is belied by the record. Counsel cross-examined both Stathopoulos and Jarmin concerning the length of time between the alleged theft and use of Stathopoulos' credit card. RT 11/12/2008, pp. 147, 152, 164-66. The witnesses consistently testified that Stathopoulos' purse and credit card were stolen at approximately 1:00 PM and Stathopoulos' credit card was used at Sheikh Shoes