IN THE SUPREME COURT OF THE STATE OF NEVADA

DAIMON MONROE,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 65827

RESPONDENT'S ANSWERING BRIEF

Appeal From Findings of Fact, Conclusions of Law, and Order Denying Post-Conviction Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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STATEMENT OF THE ISSUES

I. THE DISTRICT COURT DID NOT ERR IN FINDING THAT GROUNDS ONE AND TWO WERE BARRED BY LAW OF THE CASE.

II. THE DISTRICT COURT DID NOT ERR IN DENYING MONROE'S PETITION WITHOUT FIRST DETERMINING THAT COUNSEL'S PRE-TRIAL INVESTIGATION WAS GENERALLY ADEQUATE

III. THE DISTRICT COURT DID NOT ERR IN DENYING MONROE'S PETITION WITHOUT CONSIDERING WHETHER COUNSEL WAS INEFFECTIVE IN FAILING TO CHALLENGE THE VALIDITY OF THE SEARCH WARRANT UNDER NRS 47.250(4)

STATEMENT OF THE CASE

On May 13, 2008, the State of Nevada filed a Second Amended Indictment charging Daimon Monroe ("Monroe") with: Count 1 – Conspiracy to Possess Stolen Property and/or Commit Burglary (Gross Misdemeanor – NRS 205.275, 199.480); and Counts 2-27 – Possession of Stolen Property (Felony – NRS 205.275). I AA 1-12. Monroe filed on May 3, 2008 a Notice of Motion to Suppress Evidence Obtained Pursuant to Search Warrants, which the State opposed in a May 9, 2008 filing. Respondent's Appendix ("RA") 1-8, 26-33. On May 7, 2008, Monroe filed a Joinder of Motions, which joined motions filed by his co-defendants; and filed a pleading styled "Motion to Suppress Evidence (as Fruit of the Poisonous Tree)." RA 9-25. On May 12, 2008, with the exception of the motion for joinder, the Court denied Monroe's motions. RA 34-37.

Monroe proceeded to trial on May 12, 2008. I AA 13. After a seven-day trial, the jury returned a verdict of guilty on all counts. IV AA 982-88. On October 1, 2008, the Court adjudicated Monroe under the Large Habitual Criminal statute and sentenced him to the following: Count 1- twelve (12) months in the Clark County Detention Center (CCDC); Counts 2-14 – Life without the possibility of parole, Counts 2-14 running concurrently to one another; Counts 15-27 – Life without the possibility of parole, Counts 15-27 running concurrently with each other, but consecutively to Counts 2-14. IV AA 998. The Court also ordered Monroe's

sentence in this case to run consecutively to his sentence in C227874 with zero (0) days credit for time served. I AA 998. The Court filed its Judgment of Conviction.

Monroe filed a timely Notice of Appeal on November 19, 2008. RA 38-39. Among other appellate claims, Monroe alleged the Court erred in denying his motions to suppress based on a traffic stop and resulting search warrants. See RA 41-47. On July 30, 2010, the Nevada Supreme Court affirmed Monroe's Count 1-10, 12-27 convictions and sentences, vacated his conviction on Count 11 due to insufficient evidence of value, and issued its Remittitur on August 30, 2010. Id. As to Monroe's Fourth Amendment claims, the Nevada Supreme Court concluded "that Monroe's arrest did not result from an unreasonable search or seizure…," and that the search warrants were supported by adequately particularized probable cause. RA 44-46.

Monroe filed this Petition for Writ of Habeas Corpus (Post-Conviction) ("Petition") on July 7, 2011. IV AA 996-V AA 1008. On July 22, 2011, Monroe filed a document labelled "Supplemental Information and Request to Reaffirm Stay," in which he continued to allege a conspiracy and made certain requests regarding property. V AA 1009-18. The State filed its Response on October 13, 2011. V AA 1019-1027.

The Petition was originally calendared for argument on January 5, 2012, however, Monroe filed a Notice of Appeal on December 15, 2011. V AA 1028-29.

The District Court denied the Petition without prejudice on January 19, 2012, because the Court believed it lacked jurisdiction after Monroe filed the Notice of Appeal, and entered an order stating same on February 14, 2012. V AA 1029.

On January 26, 2012, this Court dismissed Monroe's appeal, and Remittitur issued on February 21, 2012. V AA 1029. Although Monroe subsequently filed various motions with the District Court, he never re-filed his Petition or sought to have it re-calendared after Remittitur. V AA 1029. On March 29, 2013, the State filed a motion requesting that the Court hear the Petition on the merits. V AA 1029. The District Court subsequently re-calendared the Petition and appointed Mr. Schwarz to represent Monroe in the matter. V AA 1029. On March 18, 2014, Mr. Schwarz represented that no supplemental briefing was necessary, and submitted the matter. V AA 1029.

On May 20, 2014, the District Court filed an Order Denying Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). V AA 1028-1033.

STATEMENT OF THE FACTS

Monroe alleged four grounds for relief in his Petition. IV AA 996-1000. All four grounds for relief relate to the same argument that the search warrants executed on Monroe's home did not actually exist and the warrants actually produced were part of a vast conspiracy being investigated by the Federal Bureau of Investigation

and involving the recent homeowner's association scandal widely reported in the media. IV AA 996-1000.

The District Court found that Grounds One and Two raised in Monroe's Petition were barred from review because the issues had been previously decided by this Court on direct appeal. V AA 1032. The District Court found that Grounds Three and Four were bare and naked claims insufficient to warrant relief. V AA 1032-33. Accordingly, the District Court denied Monroe's Petition. V AA 1033.

SUMMARY OF THE ARGUMENT

Monroe's claims rest on a misunderstanding of the law of the case doctrine as well as a mischaracterization of the District Court's order denying his Petition. The District Court did not err in applying the law of the case doctrine in denying Grounds One and Two of Monroe's Petition. Furthermore, the District Court did not err in denying the claims raised in Grounds One and Two without first determining that trial counsel conducted a thorough pre-trial investigation, particularly where the issue was not raised below. Finally, the District Court did not err in denying Monroe's Petition where Monroe did not raise a claim that counsel should have challenged the validity of a search warrant based upon NRS 47.250(4) where the issue was not raised below and the statute is inapplicable in this case.

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ARGUMENT

Standard of Review

Whether a defendant received ineffective assistance of counsel presents a mixed question of law and fact subject to this Court's independent review. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). However, this Court will defer to the district court's factual findings. Id. 110 Nev. 647, 878 P.2d at 278. Thus, the appellant bears the burden to demonstrate that the district court's factual findings are not supported by substantial evidence and are clearly wrong. Barnhart v. State, 122 Nev. 301, 304, 130 P.3d 650, 652 (2006).

This Court applies the standard outlined in Strickland to determine whether a defendant received effective assistance of counsel. A defendant only has a valid claim of ineffective assistance of counsel when the petitioner proves that he was denied "reasonably effective assistance" of counsel by satisfying a two–pronged test. Strickland v. Washington, 466 U.S. at 686–687, 104 S.Ct. at 2063-64 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

Under the Strickland test, the defendant must show both that his counsel's representation fell below an objective standard of reasonableness *and* 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 687–688, 694, 104 S.Ct. at 2065,

2068. The defendant must demonstrate the underlying facts by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

Moreover, a court "need not consider both prongs of the test if the defendant makes an insufficient showing on either one." Molina v. State, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004). Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999).

Finally, claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" or "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id., 686 P.2d at 225; see also NRS 34.735(6).

I
THE DISTRICT COURT DID NOT ERR IN FINDING THAT GROUNDS ONE AND TWO WERE BARRED BY LAW OF THE CASE

The District Court interpreted Monroe's claims in Grounds One and Two as follows: "First the Defendant asserts that incriminating evidence was uncovered by the police during an illegal search unsupported by a proper search warrant. Second, the Defendant avers that trial counsel was ineffective for failing to challenge the

legality of the police search." V AA 1029. The Court found that the issues were barred by law of the case because they have been previously decided by this Court on direct appeal. V AA 1032. On direct appeal, this Court concluded "that Monroe's arrest did not result from an unreasonable search or seizure…," and that the search warrants were supported by adequately particularized probable cause. RA 44-46.

Here, Monroe claims that the law of the case doctrine cannot apply claims raised in a timely first post-conviction writ of habeas corpus. Appellant's Opening Brief ("AOB") at 6, 11. For the following reasons, Monroe's claim is unpersuasive.

Where an issue has already been decided on the merits by this Court, the Court's ruling is law of the case, and the issue will not be revisited. Pellegrini v. State, 117 Nev. 860, 884, 34 P.3d 519, 535 (2001); see also McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993). A defendant cannot avoid the law of the case doctrine by a more detailed and precisely focused argument. Hall, 91 Nev. at 316, 535 P.2d at 798-99; see also Pertgen v. State, 110 Nev. 557, 557-58, 875 P.2d 316, 362 (1994). Moreover, a defendant cannot attempt to circumvent the law of the case doctrine by recasting his arguments as claims challenging the effectiveness of counsel. See White v. United States, 371 F.3d 900, 902 (7th Cir. 2004) ("Invoking the doctrine of the law of the case, the courts… forbid a prisoner

to relitigate in a collateral proceeding an issue that was decided on his direct appeal[,]" and "[r]elitigation is forbidden (subject to exceptions built into the law of the case doctrine, of which more later) even if it is the first collateral attack."); see also United States v. Manzo, 675 F.3d 1204, 1211 n.3 (9th Cir. 2012). Monroe's petition's Grounds One and Two seek relief based on issues already resolved adversely to Monroe on appeal. RA 44-46.

Monroe relays a "history" of the way in which ineffective assistance of counsel claims are resolved in Nevada by quoting large sections of Pellegrini, emphasizing certain language. AOB at 7-11. The language that Monroe cites, however, stands only for the proposition that ineffective assistance of counsel claims must not be raised not on direct appeal, but in post-conviction proceedings. See Pellegrini, 117 Nev. at 882-83, 34 P.3d at 534; AOB at 7-8. In discussing the specific issue of waiver under NRS 34.810, the Court in Pellegrini held that "claims of ineffective assistance of counsel brought in a timely first post-conviction petition for a writ of habeas corpus are not subject to dismissal on grounds of waiver, regardless of whether the claims could have been appropriately raised on direct appeal." Pellegrini, 117 Nev. at 883, 34 P.3d at 535.

In stating that:

> Pertgen failed to make a crucial distinction: trial court error may be appropriately raised in a timely first post-conviction petition in the context of claims of ineffective assistance of counsel, but independent claims based on the

> same error are subject to the waiver bars because such claims could have been presented to the trial court or raised in a direct appeal.

Pellegrini, 117 Nev. at 883-84, 34 P.3d at 535, the Court was explaining that a claim of ineffective assistance of counsel cannot be considered waived in a timely filed first petition although it may be based on a substantive claim of error that would be waived if raised independently. The Court did not similarly address the law of the case doctrine or suggest that it would be inapplicable to issues *actually decided* on direct appeal.

Monroe, without explanation, extends the Court's logic regarding waiver to apply to law of the case and, apparently, other types of claim preclusion. Such argument is unpersuasive. AOB at 11. In deciding that waiver would not apply to ineffective assistance of counsel claims raised in timely first petitions, the Pellegrini court was clarifying that failing to raise a claim of ineffective counsel on direct appeal did not preclude a defendant from subsequently bringing such a claim in a post-conviction writ, even if based on an alleged error that was not raised previously. Whereas waiver applies to claims that a defendant *failed* to raise on direct appeal, the law of the case doctrine applies only when a defendant *has* raised an issue on direct appeal and this Court has already decided the issue.

Monroe claims that allowing the law of the case doctrine to be applied in a first post-conviction petition amounts to a denial of substantive and procedural due

process, but fails to explain why that is the case where an issue has already been litigated. AOB at 11-12. In support of this claim, Monroe only quotes authority explaining that a defendant is afforded an absolute right to procedural due process. AOB at 12 (*citing* Carey v. Phiphus, 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1054 (1978)). Furthermore, Monroe opines that issues became more defined after an evidentiary hearing, but fails to include transcripts of such hearing in his appendix or cite to the record to support such a broad claim. AOB at 12. "It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court." Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Further, the failure to support assertions of fact with specific citations to the record is fatal to the claim relying upon the alleged fact. Nevada Rules of Appellate Procedure (NRAP) Rule 3C(e)(1)(C); Thomas v. State, 120 Nev. 37, 43, 83 P.3d 818, 822 (2004) (counsel's citation to habeas corpus petition in support of claims of error in capital murder trial did not comply with appellate rule requiring that every assertion in brief be supported by reference to specific part of transcript where matter relied upon was to be found); Rodriguez v. State, 117 Nev. 800, 811-12, 32 P.3d 773, 780-81 (2001) (no prejudicial error because capital murder defendant's brief failed to offer "cogent argument supported by legal authority and references to relevant parts of the record").

Importantly, determining that a claim is barred by law of the case —i.e. that an issue cannot be considered because it has already been decided— is fundamentally different than determining that a claim has been waived —i.e. that a claim cannot now be considered because it was not previously made. Where, as here, this Court has already considered an issue on the merits and made a ruling, it is not improper to bar relitigation of the same issue, even in a timely filed first petition.

Furthermore, although this Court did not consider the specific angle of ineffective assistance of counsel regarding the claim, the ultimate underlying issue, whether the search and seizure was illegal, has already been addressed and decided by this Court. RA 44-46. Where this Court has already determined that the search warrants were not invalid and that the searches did not violate Monroe's Fourth Amendment rights, Id. at 6, it is impossible for Monroe to demonstrate ineffective assistance of counsel under Strickland. First, Monroe cannot establish that counsel's conduct was objectively unreasonable because counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Where this Court has already ruled that the searches were not conducted in violation of Monroe's rights, it is clear that any objection on such grounds would have been futile. Monroe cannot demonstrate that counsel was objectively unreasonable in failing to make a more particularized

objection where this Court has already found that the searches did not violate Monroe's rights. Furthermore, Monroe cannot establish prejudice for the same reason. This Court has already determined that the evidence collected during the searches was properly admitted; accordingly, Monroe cannot demonstrate that the result of the trial would have been different had counsel objected. Thus, because the underlying basis of the ineffective assistance of counsel claim has already been definitively decided by this Court, Monroe's claim must necessarily fail both prongs of Strickland. Application of the law of the case doctrine is therefore proper because, although it does not require the district court to painstakingly consider both prongs of Strickland independently, it produces the same result for the same reasons: counsel cannot have been ineffective where this Court has already decided the underlying issue adversely to Monroe. For the foregoing reasons, it is clear that the District Court did not abuse its discretion in applying the law of the case doctrine to the claims raised in Grounds One and Two of Monroe's petition.

II
THE DISTRICT COURT DID NOT ERR IN DENYING MONROE'S PETITION WITHOUT FIRST DETERMINING THAT COUNSEL'S PRE-TRIAL INVESTIGATION WAS GENERALLY ADEQUATE

Monroe's claim that the District Court erred in applying "equitable estoppel to claims not raised at trial or on direct appeal" is confusing and misstates the record. AOB at 13. Once again, Monroe fails to cite to the record or provide cogent argument, and therefore his claim should be denied. Maresca, 103 Nev. at 673, 748

P.2d at 6; NRAP 3C(e)(1)(C); Thomas, 120 Nev. at 43, 83 P.3d at 822; Rodriguez, 117 Nev. at 811-12, 32 P.3d at 780-81.

Nonetheless, in an abundance of caution, the State will respond. Monroe claims that the "fact that issues were not raised at trial or on appeal" cannot serve as grounds to deny a claim of ineffective assistance of counsel. Here, however, the District Court made no such ruling, and Monroe points to nothing in the record to support his contention. Instead, the District Court found that the underlying basis for the ineffective assistance of counsel claim raised in Grounds One and Two was previously decided by this Court precisely because it *was* raised on appeal. V AA 1032.

Monroe next claims that because the District Court "did not make a determination as to whether trial counsel conducted an appropriate investigation into the case before first making its ruling on trial counsel's strategic decisions," the District Court "could not legally make a decision as to whether or not trial counsel's strategic decisions were 'reasonable' under the circumstances of the case." AOB at 14. This argument is a patently false statement of the law.

First, in order to show ineffective assistance of counsel, a defendant must show *both* that his counsel's representation fell below an objective standard of reasonableness *and* 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

687–688, 694, 104 S.Ct. at 2065, 2068. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069. Thus, if a Court finds that a defendant cannot establish prejudice, it is unnecessary for the court to address whether counsel's representation fell below an objective standard of reasonableness.

Monroe's reliance on Warner v. State, 102 Nev. 635, 729 P.2d 1359 (1986) and Jackson v. Warden, 91 Nev. 430, 432-33 (1975) is misplaced. In Warner, this Court found that counsel's failure to investigate amounted to ineffective assistance where:

> At the postconviction hearing below, trial counsel, a deputy public defender, admitted that he did not consult with any other attorneys in the public defender's office about the case, even though the potential sentence was as serious as that for a murder case. Although he was encouraged to make use of the public defender's full-time investigator, he declined to do so. Trial counsel admitted that it would have been important to investigate the background of the complaining witnesses, Dee and her mother, but he failed to do so. He never attempted to interview Dee. He did not request that Dee be given a physical examination. Although Dee admitted at trial that she lies on occasion, trial counsel did not request the district court to order Dee to undergo a psychological examination to determine whether Dee was being truthful.
>
> Trial counsel did not present any witnesses in support of appellant's character, although appellant's credibility and

> the credibility of the alleged victim were central issues in the case. Appellant provided trial counsel with a list of three possible witnesses, but counsel did not contact them. Nor did trial counsel interview appellant's employer and co-workers.

Warner, 102 Nev. at 637, 729 P.2d at 1360. Under this specific set of facts, this Court determined that counsel's failure to investigate "left appellant without a defense at trial." Id., 102 Nev. at 638, 729 P.2d at 1361. Thus, where the defendant complained that counsel failed to conduct an adequate investigation before trial, and where counsel's failures amounted to leaving the defendant without any real defense, this Court found counsel was ineffective. Notably, this Court did not articulate a requirement for the District Court to first consider whether counsel conducted a generally adequate investigation in every post-conviction proceeding before considering a defendant's particular claims of ineffectiveness, as Monroe now seems to claim.

The State notes that the citation provided for Jackson does not reference the language quoted. AOB at 15. Nevertheless, in Jackson this Court did not find that counsel was ineffective, but only remanded to the District Court for an evidentiary hearing where the defendant alleged that counsel made *no* pretrial investigation before encouraging the defendant to waive his preliminary hearing and plead guilty, despite the apparent availability of a viable defense and the fact that the presentence investigation report indicated that no offense report was filed, the victim and

witnesses were unable to be located, and no one at the scene of the incident knew what had happened. Jackson, 91 Nev. at 432-33, 537 P.2d at 474. Similarly, Powell v. Ala., 287 U.S. 45, 58, 53 S.Ct. 55, 60 (1932), addressed the lack of meaningful representation where counsel was able to conduct no investigation whatsoever and was given no time to prepare before trial.

Here, Monroe never alleged in his petition that counsel failed to conduct any pre-trial investigation at all, but instead briefly in Ground Two claimed only that counsel failed to investigate the specific issue of whether the search warrant was valid. V AA 1003. He cannot now change his claim on appeal to contend that counsel was ineffective in failing to conduct any investigation in order take advantage of more favorable caselaw. McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998), cert. denied, 528 U.S. 937, 120 S.Ct. 342 (1999) ("Where a defendant fails to present an argument below and the district court has not considered its merit, we will not consider it on appeal."). Accordingly, Monroe is constrained to review of the claim raised and addressed below.

A defendant who contends that his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 191-92, 87 P.3d 533, 538 (2004). Monroe's bare claim that counsel was ineffective in failing to investigate whether the search warrant was valid was unsupported by any

explanation of how a better investigation would have affected the outcome of the trial, but instead rested on unsupported allegations of conspiracy and cover-up. V AA 1002-3.

Monroe now relies upon a recitation of the American Bar Association Defense Standards and a brief claim that counsel failed to seek to enforce Monroe's rights under NRS 47.250(4) as support for his argument that counsel was ineffective in failing to investigate. OAB at 15-17; ABA, Criminal Justice Standards, Defense Function (3d ed. 1993). However, Monroe proffered no such argument below, and it is thus not properly raised on appeal. McKenna v. State, 114 Nev. at 1054, 968 P.2d at 746. Furthermore, while true that Rompilla v. Beard, 545 U.S. 374, 387, 125 S.Ct. 2456, 2466 (2005), indicated that ABA guidelines can sometimes be useful in assisting in the determination of whether counsel's conduct was reasonable, considering the guidelines is not a mandatory analysis. This is particularly true considering that Standard 4-1.1 states:

> These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

However, Monroe cannot be successful in simply citing ABA standards without explaining specifically how counsel failed to meet them, what counsel should have

investigated, or how, if counsel had investigated, the outcome of the proceedings would have been different. Molina, 120 Nev. at 191-92, 87 P.3d at 538.

Monroe's claim that counsel failed to "seek to enforce Appellant's rights under NRS 47.250(4)," AOB at 16, was similarly not raised below, and therefore is not properly raised on appeal. McKenna v. State, 114 Nev. at 1054, 968 P.2d at 746.

It is clear that Monroe's claim on appeal is nothing more than an attempt to re-frame his claim below, and to improperly bolster an argument that counsel acted unreasonably. Yet, below, Monroe simply claimed that counsel "didn't investigate properly," without more. V AA 1003. Accordingly, the District Court did not err in denying Monroe's claim without first making a specific finding as to the adequacy of counsel's pretrial investigation.[1]

III
THE DISTRICT COURT DID NOT ERR IN DENYING MONROE'S PETITION WITHOUT CONSIDERING WHETHER COUNSEL WAS INEFFECTIVE IN FAILING TO CHALLENGE THE VALIDITY OF THE SEARCH WARRANT UNDER NRS 47.250(4)

Monroe argues that counsel failed to investigate and was ineffective in failing to challenge the photograph of the search warrant in this case. AOB at 18. Monroe further claims that counsel should have challenged the verification of the time or

[1] The State does not address Monroe's discussion arguing that the harmless error review is inapplicable to the denial of an ineffective assistance of counsel claim because the State is not claiming harmless error here. This does not mean that the State concedes the issue, but only that it is inapplicable in this case.

placement of the photograph, and that Monroe was entitled to the presumption articulated by NRS 47.520(4). This argument was never raised below. Accordingly, it is not properly raised on appeal and this Court should decline review. McKenna v. State, 114 Nev. at 1054, 968 P.2d at 746. If Monroe wished to make this specific argument below, he should have included it in his Petition or should have filed a supplement to the petition including this argument once counsel was appointed. Monroe chose not to do so, and it is inappropriate for him to raise an entirely new claim of ineffective assistance for the first time on appeal.

Furthermore, Monroe has provided no citation to the record to support his claims that his position remained before, during, and after trial that no search warrant was ever served. AOB at 5. He has provided no citation to the record to support that a photograph "appeared" that showed a search warrant on his coffee table, or that such photograph was not properly authenticated. AOB at 5. He has provided no citation to the record *whatsoever* regarding the search warrant or this claim. AOB at 4-6; 18-20. It is also unclear what Monroe now claims counsel should have done, or when he should have done it. Monroe simply alleges that counsel did not raise an ambiguous issue – apparently that the only appropriate evidence to show the warrant was properly served would have been a photograph of an officer actually handing the warrant to Monroe – but does not explain what goal doing so would have achieved, at what stage such an issue should have been raised, or in what

context. Because of the ambiguous nature of Monroe's claim, the State cannot properly respond. Monroe's failure to properly cite to the record and his failure to advance a cogent argument to which the State can respond is fatal. Maresca, 103 Nev. at 673, 748 P.2d at 6 ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."); NRAP 3C(e)(1)(C); Thomas, 120 Nev. at 43, 83 P.3d at 822; Rodriguez, 117 Nev. at 811-12, 32 P.3d at 780-81.

Although Monroe's lack of citation to the record and unclear argument provide little guidance in how the State may respond and are sufficient grounds for this Court to deny relief, the State will attempt to address the claim in an abundance of caution. Whether "an irrebuttable presumption in a criminal case is unconstitutional," is entirely irrelevant here. AOB at 19 (*citing* Cnty. Court v. Allen, 442 U.S. 140 (1979); Mullaney v. Wilbur, 421 U.S. 684 (1975); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979); Francis v. Franklin, 471 U.S. 307 (1985); McLean v. Moran, 963 F.2d 1360 (1992)). Monroe has not alleged, nor has he pointed to any place in the record where he was subjected to an irrebuttable presumption.

Instead, Monroe alleges that the photograph produced of the search warrant on Monroe's table was not the best possible evidence available to support the conclusion that the warrant was served. Yet no rule requires that the State produce

the best imaginable evidence in order to prove a fact, whether or not such evidence exists in reality. Monroe's reliance on NRS 47.250(4), which states that a presumption may apply "that the higher evidence would be adverse from inferior being produced" is misplaced. "Presumptions similar to that found in NRS 47.250(4) obtain only where it can be shown that a party actually has in his possession better and stronger evidence than that which was presented." Langford v. State, 95 Nev. 631, 637, 600 P.2d 231, 235 (1979) (referencing People v. Taylor, 136 Cal.Rptr. 640 (Cal.App. 1977)). Monroe alleges the "best" evidence possible, a photograph of an officer actually holding the warrant in the presence of Monroe, was not made available, and thus counsel was ineffective in failing to challenge the use of the photograph of the warrant on Monroe's table. AOB at 19. Monroe, however, has not alleged that the State actually possessed the "better" evidence of a photograph of an officer holding the search warrant in front of Monroe, nor is there any indication that such a photograph existed. Therefore, the presumption articulated in NRS 47.250(4) did not apply, and counsel could not have been ineffective in failing to challenge the photograph on these grounds.

First, counsel would be remiss to object to the admission of every piece of evidence or every word of testimony that did not represent the best conceivable evidence of a fact. See Ennis, 122 Nev. at 706, 137 P.3d at 1103 (finding that counsel cannot be ineffective for failing to make futile objections or arguments);

Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) (finding that 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."). Second, Monroe cannot demonstrate prejudice where counsel did not make an objection under a rule that does not apply in this case because such an objection would not have changed the outcome of the trial. Langford, 95 Nev. at, 637, 600 P.2d at 235. Accordingly, Monroe cannot demonstrate either prong of Strickland, and cannot establish that counsel was ineffective.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court affirm the Order of the District Court.

Dated this 4th day of March, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 5,354 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 4th day of March, 2015.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 4, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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