EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT

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Steven D. Grierson
Clerk of the Court

Brandi J. Wendel
Court Division Administrator

July 14, 2017

Elizabeth A. Brown
Clerk of the Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: STATE OF NEVADA vs. DOMONIC R. MALONE
S.C. CASE: 73000
D.C. CASE: 06C224572-2

Dear Ms. Brown:

In response to the e-mail dated July 14, 2017, enclosed is a certified copy of the Findings of Fact, Conclusions of Law and Order filed May 5, 2017 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

Heather Ungermann, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
RYAN J. MACDONALD
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200 Lewis Avenue
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DOMONIC RONALDO MALONE,
#1670891

Defendant.

CASE NO: 06C224572-2

DEPT NO: XVII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: MARCH 8, 2017
TIME OF HEARING: 10:00 A.M.

THIS CAUSE having come on for hearing before the Honorable MICHAEL VILLANI, District Judge, on the 8th day of March, 2017, the Petitioner being present, PROCEEDING IN PROPER PERSON, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through MARC P. DIGIACOMO, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

On August 2, 2006, DOMONIC RONALDO MALONE (hereinafter "Petitioner"), was charged by way of Information with: COUNTS 1, 4, 13 & 14 – First Degree Kidnapping (Felony – NRS 200.310, 200.320); COUNTS 2 & 5 – Battery with Substantial Bodily Harm

(Felony – NRS 200.481); COUNTS 3 & 7 – Conspiracy to Commit Kidnapping (Felony – NRS 200.310, 200.320, 199.480); COUNT 6 – Robbery (Felony – NRS 200.380); COUNTS 8 & 9 - Pandering (Felony – NRS 201.300); COUNT 10 – Conspiracy to Commit Murder (Felony – NRS 200.010, 200.030, 199.480); COUNT 11 – Conspiracy to Commit Burglary (Gross Misdemeanor – NRS 205.060, 199.480); COUNT 12 – Burglary (Felony – NRS 205.060); COUNTS 15 & 16 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165); and COUNTS 17 & 18 – Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165). On August 16, 2006, Defendant entered a plea of Not Guilty to the charges set forth in the Information.

On August 30, 2006, the State filed an Amended Information, wherein the substantive charges remained the same. On this same date, the State filed a Notice of Intent to Seek the Death Penalty.

On January 7, 2009, Petitioner filed a Pro Per Motion to Dismiss Counsel, without attaching any points or authorities in support of said motion. Finding no good cause existed to dismiss counsel, the district court denied the Motion on January 20, 2009. Upon Petitioner's insistence, the district court set a hearing for a Faretta Canvass on January 8, 2010. After canvassing Petitioner, the district court found that he had knowingly and voluntarily waived his right to counsel. The district court then granted Petitioner's request, and appointed Petitioner's former counsel as stand-by.

On November 3, 2010, the State filed a Second Amended Information removing one count of Pandering from the Amended Information.

On January 8, 2011, Petitioner filed a Pro Per Motion to Dismiss Stand-By Counsel, but failed to provide the district court with any points and authorities in support of his Motion. On January 25, 2011, the district court questioned Petitioner regarding his Motion and, finding his complaints baseless and the absence of any points and authorities improper, denied the Motion without prejudice.

On June 29, 2011, Petitioner filed a pleading entitled "Ex Parte Communication Defendant Memorandum to Court." Petitioner alleged that he had been forced against his

wishes to represent himself in the underlying case. On July 19, 2011, a hearing was held in which the district court confirmed that Petitioner filed the Ex Parte Communications and verified that the statements therein were true. Based on Petitioner's statements, the district court revoked his request to represent himself, and appointed the Special Public Defender, currently stand-by counsel, to represent Petitioner once again.

Petitioner's jury trial commenced on January 10, 2012. On January 30, 2012, the State filed a Third Amended Information, striking the first degree kidnapping charge alleged in COUNT 1. The Third Amended Information thus charged Petitioner as follows: COUNTS 1 & 4 – Battery with Substantial Bodily Harm (Felony – NRS 200.481); COUNTS 2 & 8 – Conspiracy to Commit Kidnapping (Felony – NRS 200.310, 200.320, 199.480); COUNTS 3, 11 & 12 – First Degree Kidnapping (Felony – NRS 200.310, 200.320); COUNT 5 – Robbery (Felony – NRS 200.380); COUNT 6 – Pandering (Felony – NRS 201.300); COUNT 7 – Conspiracy to Commit Burglary (Gross Misdemeanor – NRS 205.060, 199.480); COUNT 9 – Conspiracy to Commit Murder (Felony – NRS 200.010, 200.030, 199.480); COUNT 10 – Burglary (Felony – NRS 205.060); COUNTS 13 & 14 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165); and COUNTS 15 & 16 – Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165).

On February 1, 2012, the jury returned its verdict. The jury found Petitioner Guilty of: COUNT 1 – Battery with Substantial Bodily Harm; COUNT 2 – Conspiracy to Commit Kidnapping; COUNT 3 – First Degree Kidnapping; COUNT 4 – Battery *without* Substantial Bodily Harm; COUNT 7 – Conspiracy to Commit Burglary; COUNT 8 – Conspiracy to Commit Kidnapping; COUNT 9 – Conspiracy to Commit Murder; COUNT 11 – First Degree Kidnapping; COUNT 12 – First Degree Kidnapping; COUNT 13 – First Degree Murder with Use of a Deadly Weapon; COUNT 14 – First Degree Murder with Use of a Deadly Weapon; COUNT 15 – Robbery with Use of a Deadly Weapon; and COUNT 16 – Robbery with Use of a Deadly Weapon. The jury found Petitioner Not Guilty of COUNT 5 – Robbery; COUNT 6 – Pandering; and COUNT 10 – Burglary. On February 10, 2012, the jury returned with a Special Verdict as to COUNTS 13 & 14, Murder of the First Degree with Use of a Deadly

Weapon, finding that the aggravating circumstances outweighed any mitigating circumstances, and imposed a sentence of Life without the Possibility of Parole as to both counts.

On April 24, 2012, Petitioner was sentenced as to COUNT 1 – a maximum of 48 months, and a minimum of 19 months in the Nevada Department of Corrections ("NDC"); COUNT 2 – a maximum of 60 months and a minimum of 24 months, in the NDC, consecutive to COUNT 1; COUNT 3 – Life with Parole Eligibility beginning after a minimum of 5 years served in the NDC, concurrent with COUNT 2; COUNT 4 – 6 months in the Clark County Detention Center ("CCDC"), concurrent with COUNT 3; COUNT 7 – 12 months in the CCDC, consecutive to COUNT 3; COUNT 8 – maximum of 60 months and a minimum of 24 months in the NDC, concurrent with COUNT 7; COUNT 9: maximum of 120 months and a minimum of 48 months in the NDC, consecutive to COUNT 8; COUNTS 11 & 12 – Life Without the Possibility of Parole for each count in the NDC, consecutive to COUNTS 9 & 11 respectively; COUNTS 13 & 14 – Life Without the Possibility of Parole in the NDC, plus a consecutive term of Life Without the Possibility of Parole for use of a deadly weapon for each count, consecutive to COUNTS 12 & 13 respectively; COUNT 15 – a maximum of 180 months and a minimum of 48 months in the NDC, plus a consecutive term of a maximum of 180 months and a minimum of 48 months for use of a deadly weapon, concurrent with COUNT 14; COUNT 16 – a maximum of 180 months and a minimum of 48 months in the NDC, plus a consecutive term of 180 months and a minimum of 48 months for use of a deadly weapon, consecutive to COUNT 15. Petitioner received 6 consecutive terms of Life Without the Possibility of Parole. Petitioner also received 2,148 days credit for time served. The Judgment of Conviction was filed on May 8, 2012.

Petitioner filed a timely Notice of Appeal on June 5, 2012. The Supreme Court affirmed the lower court's judgment on December 18, 2013, and Remittitur was issued on January 15, 2014. On June 3, 2014, Petitioner filed a Pro Per Motion for Withdrawal of Attorney of Record. On June 24, 2014, the Court denied Petitioner's Motion as Moot, since the Special Public Defender's Motion to Withdrawal as counsel was granted.

On August 13, 2014, Petitioner filed a Post-Conviction Petition for Writ of Habeas Corpus, along with a Motion for Appointment of Attorney. On September 2, 2014, the district court granted Petitioner's request for an attorney as it was his first Petition. Betsy Allen, Esq. was appointed as counsel on September 18, 2014.

On July 21, 2015, Petitioner filed an Ex Parte Motion to Dismiss Appointed Counsel of Record and Resubmit New Appointed Counsel. The Court dismissed Petitioner's Motion on August 11, 2015.

On February 18, 2016, Petitioner filed a Pro Per Amended Supplemental Petition for Writ of Habeas Corpus. The State submitted its Response to this fugitive document on June 2, 2016. On May 27, 2016, in violation of the Court's briefing schedule, counsel filed a Supplemental Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus.

On July 18, 2016, Petitioner filed a Pro Per Motion for Withdrawal of Attorney of Record, or in the Alternative, Request for Records/Court Case Documents. On August 25, 2016, the Court granted Petitioner's Pro Per Motion for Withdrawal of Attorney of Record.

On September 2, 2016, Petitioner filed a Motion to Strike Supplemental Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus Filed by Counsel of Record (Betsy Allen). The Court granted this Motion on September 8, 2016.

On November 9, 2016, Petitioner submitted a Supplemental Memorandum of Points and Authorities in Support of Amended Supplemental Petition for Writ of Habeas Corpus ("Supplement"). On February 9, 2017, the State filed its Response to Petitioner's February 18, 2016 Amended Supplemental Petition for Writ of Habeas Corpus ("Petition") and to the Supplement.

Following argument by counsel on March 8, 2017, the Court deferred its decision on this matter, and now rules as follows:

I. INEFFECTIVE ASSISTANCE OF COUNSEL

To prevail on a claim of ineffective assistance of trial 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 the Strickland test, a 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. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "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).

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).

First, Petitioner claims that counsel was ineffective for refusing to impeach State witness Donald Herb regarding a cut on his hand. Petition at 5; Supplement at 4. The Court finds that such claim lacks merit, as the record is clear the decision to impeach Herb with the cut was one of strategy by counsel. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). It is apparent from the record that defense counsel used Herb's trial testimony of not reporting the injury at work to support the defenses theory that Herb, rather than Petitioner had been involved in the murders. See Jury Trial Transcript ("JTT") Day 15, at 104. The Court finds the decision to not further inquire as to this cut on the hand was a deliberate, tactical decision of trial counsel that should not be second-guessed. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost

unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992). The record further reflects that defense counsel did in fact impeach Herb at other points it felt necessary during cross examination.

Second, Petitioner alleges that he received ineffective assistance of appellate counsel. Petition at 6. Petitioner, however, fails to set forth specific instances of ineffectiveness in this Petition. A proper petition for post-conviction relief must set forth specific factual allegations. N.R.S. 34.735(6). See also Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding that bare or naked allegations are insufficient to entitle a defendant to post-conviction relief). Petitioner does not allege any specific instances in which counsel's performance fell below an objective standard of reasonableness, nor does he allege any specific harm resulting from counsel's performance. Therefore, the Court finds that Petitioner's second claim lacks merit.

Third, Petitioner next alleges that he received ineffective assistance of trial counsel. He claims that evidence of this ineffective assistance is available in trial transcripts. Petition at 7. Petitioner fails to set forth any specific instances of ineffective assistance, nor does he allege any specific harm. The citation to trial transcripts as proof of counsel's ineffectiveness is insufficient to overcome the statutory bar on bare and conclusory claims. Colwell v. State, 118 Nev. Adv. Op. 80, 59 P.3d 463, 467 (2002). Because no specific area of ineffectiveness was denied, the Court finds that this issue lacks merit, as a proper petition for post-conviction relief must set forth specific factual allegations. NRS. 34.735(6).

Fourth, Petitioner alleges that he received ineffective assistance of counsel due to counsel's failure to object to the State's statement about the evidence of struggle in Apartment 222 of the South Cove and an inconsistency regarding contents of a dumped out purse. Petition at 8. A review of the record shows that the statement disputed by Petitioner was contained within closing arguments. JTT, Day 15 at 30-31. Petitioner contends counsel should have objected because there is a recorded statement from Rosalyn Tate stating that police directed her to empty her purse, and that trial counsel was aware of this statement. This Court finds no evidence of such statement. Furthermore, under Strickland, even if this Court accepts the

statement of Petitioner as true, the evidence adduced at trial was sufficient to show Petitioner was present at the apartment and engaged in a struggle. Therefore, the Court finds that Petitioner's claim lacks merit and is belied by the record.

Fifth, Petitioner claims that counsel was ineffective for failing to move for dismissal based on insufficient evidence at the end of trial. Petition at 12. The Court finds that this claim is not supported by the evidence. Ample evidence was adduced at trial that would have surely resulted in a denial of any motion for a judgment of acquittal. NRS 175.381(2) provides that the court may, on a motion of a defendant, which is made after the jury returns its verdict of guilty, set aside the verdict and enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. However, while a motion for judgment of acquittal may be made, Petitioner has no obligation to do so. Here, a tactical decision was made by counsel to not make such Motion based on the evidence adduced at trial, and this Court does not see any merit to making such Motion in light of the trial record. Specifically, there was sufficient evidence as condensed by the State in their Response to sustain a conviction for all of Petitioner's charges. See Response at 17-19.

Sixth, Petitioner alleges that counsel was ineffective for failure to correct the knowing, false and misleading testimony of Sarah Matthews. Petition at 13. Petitioner's statement fails to assert any factual specificity as to what false or misleading testimony this Court must review. Bare and conclusory claims such as these are not sufficient to warrant relief in a post-conviction petition for writ of habeas corpus. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). A review of the record indicates Matthews' testimony was examined closely by defense at trial. See generally JTT Day 7, at 38-67, 74-75. Defense counsel questioned Matthews about inconsistencies in her statements given at various times since the murders. JTT Day 7, at 37-38, 43, 47, 50, 57, 58-59, 65-67, 74-75. Therefore, the Court finds that Petitioner has failed to raise a viable claim as to his argument regarding cross-examination of Sarah Matthews.

Seventh, Petitioner next claims that counsel was ineffective for failing to object to Corrina Phillips' false testimony at the preliminary hearing. Petition at 18. Petitioner does

not explain what the false testimony at the preliminary hearing was. Because Petitioner has failed to show a specific instance of failing to object at the preliminary hearing, the Court finds that Petitioner has failed to meet his burden under Strickland.

Eighth, Petitioner claims that counsel was ineffective for failing to pursue and obtain PCR testing on the head of the golf club. Petition at 20. The record indicates that STR testing, which requires using PCR amplification, was done on the biological material on the golf club. The forensic scientist who testified at trial described the techniques he used to analyze biological material on the golf club. See JTT Day 13, at 59. The STR testing revealed that, while there was some male DNA mixed in with the Christine's blood on the head of the golf club, the source of the male DNA could not be identified. Id. at 59-63. Therefore, the Court finds that Petitioner's claim that PCR testing was not done on biological material from the golf club is belied by the record. The Court further finds that Petitioner was not prejudiced by counsel's performance; the general findings of the DNA testing worked to Petitioner's advantage at trial, as defense counsel used the inconclusive result to argue there was no physical evidence tying Petitioner to the murders in question.

Ninth, Petitioner claims that the Special Public Defender representing him was ineffective because he had other interests excluding Petitioner's interest to be tried fairly. Petition at 21. Petitioner sets forth no specific conflicts or areas to demonstrate that the Special Public Defender had interests that were in contention with the best interests of Petitioner. Bare and naked claims are not sufficient to warrant relief, nor are those that are belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. The record is clear that Petitioner on multiple occasions invoked his right to self-representation and made similar claims regarding his appointed counsel. This Court heard argument regarding Petitioner's desire to represent himself and repeatedly found no conflict with his appointed attorneys. The Court notes that, prior to trial, Petitioner requested to represent himself based upon a general allegation that the Special Public Defender was conspiring with the State to his detriment. See July 27, 2011 Motion to Withdraw Counsel; see also August 9, 2011 Minutes, Motion to Withdraw Counsel.

Therefore, the Court finds no support for the claim that counsel had other interests that even approach the standards of Strickland.

Tenth, Petitioner claims that counsel was ineffective for failing to prepare jury instructions that defined the defense theory of the case. Petition at 22. The Court finds that Petitioner's argument lacks merit as it is belied by the record. The record shows that counsel did prepare and present to the Court jury instructions that supported the defense's theory of the case. Further, at trial, counsel objected and suggested changes to 15 of the proposed jury instructions. These objections and proposed changes were detailed in a 14-page memorandum to the Court and at a hearing on the matter. See Malone's Objections to the State's Proposed Trial Phase Jury Instructions; JTT Day 14, at 2-24. Defense counsel also suggested four alternate jury instructions related their theory of the case, including an instruction regarding coercion in relation to the kidnapping counts, but not in reference to the pandering counts; a corrective instruction regarding the sufficiency of circumstantial evidence; an instruction regarding the interpretation of conflicting evidence; and an instruction regarding the non-appearance or flight of Ramaan Hall to indicate that he might be considered a suspect. JTT Day 14, at 17-18. This claim is further belied by Petitioner's direct appeal, where the issue of jury instructions was raised by Petitioner on direct appeal and the Nevada Supreme Court found that counsel did prepare and present jury instructions at trial. Malone v. State, No. 61006, 2013 Nev. Unpub. LEXIS 1954 (Dec. 18, 2013).

Eleventh, Petitioner alleges that counsel was ineffective for failing to investigate statements made by Michael Paulido concerning an alleged plot by Jason McCarty, the co-defendant, and Donald Herb to frame Petitioner. Petition at 23. Petitioner has failed to set forth anything except a bare, unsupported allegation that the statement proving a conspiracy to convict him exists. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Therefore, the Court finds that Petitioner has failed to meet his obligations under Strickland.

Twelfth, Petitioner claims that counsel was ineffective for failing to present his wife's testimony about clothing he was allegedly wearing at the time of the murder, and for failing to test that clothing for the victim's DNA. Petition at 27. Petitioner fails to set forth a viable

argument as to how he was prejudiced by failing to test clothes for DNA. The record reflects sufficient evidence of the instant crime and the lack of DNA on clothing would not have exonerated Petitioner. Therefore, the Court finds that counsel's actions did not fall below the Strickland standard in deciding not to test the clothing for DNA.

Thirteenth, Petitioner alleges that counsel was ineffective for failing to investigate cell phone records of one of the victims, Victoria, and therefore was deficient in representation. Petition at 30. A defendant who contends 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, 192, 87 P.3d 533, 538 (2004). The record demonstrates that on Days 11-13, cell phone data and evidence was introduced from an AT&T engineer who was extensively cross-examined by defense counsel. Specifically, Victoria's records were introduced at trial. JTT Day 13, at 155. Therefore, the Court finds that Petitioner's claim is belied by the record.

Fourteenth, Petitioner alleges that trial counsel was ineffective for failing to hire a historical cell site date reconstruction expert, and that Petitioner was prejudiced by this failure. Petition at 39; Supplement at 9. The record reflects a frequency engineer from AT&T testified at trial regarding cell phone towers and the ability to identify what tower a cell phone is connected to at any given time. The engineer testified about the range of each cell tower and their configuration in an urban area like Las Vegas. JTT Day 11, at 11. The engineer was also cross-examined extensively by defense about the limitations of using cell towers to pinpoint someone's location. JTT Day 11, at 12-23. There is no indication at trial that the tracking of the cell phones was still in question, or that a different engineer would have produced different testimony. Both defense counsel and the State prepared maps for the jury to indicate locations based on cell phone tracking. Therefore, the Court finds that Petitioner has failed to set forth a viable claim under both prongs of Strickland.

Petitioner's fifteenth claim alleges that counsel was ineffective for failure to object to testimony of the detective who testified about the cell site data communications. Petition at 40. Petitioner further asserts the detective was a lay person who was not qualified to testify as

to technical evidence. This claim is belied by the transcript of the detective's testimony at trial. In reviewing the record, the Court finds that the two-pronged test of Strickland has not been met by Petitioner.

Sixteenth, Petitioner alleges that appellate counsel was ineffective for failure to raise the issue of fabricated cell site evidence. Petitioner alleges that the cell site data were fabricated. Such an accusation is belied by the record, which reflects an AT&T engineer authenticating documents introduced into evidence. This Court is not persuaded that such an argument was a colorable claim for appeal and will not second guess tactical decisions by 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). The professional diligence and competence required on appeal 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, 3313 (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. The Court finds no merit to the allegation of fabrication of records; the allegation is not supported by the record and would not have been successful on appeal. Therefore, counsel was not ineffective for not raising the issue on appeal.

Seventeenth, Petitioner alleges that trial counsel's failure to file a pre-trial motion in limine to dispute the State's fabricated cell data constituted ineffective assistance of counsel. The Court finds that such a claim is belied by the record and the tactical decision to not make such a Motion was the control of trial counsel. The Court finds nothing in the pleadings or during oral argument that would lend support to Petitioner's claim.

Eighteenth, Petitioner alleges that his trial counsel was ineffective for failing to strike "pro-prosecution jurors" during voir dire. Petition at 43. To support his claim, Petitioner cites only to one juror "of African descent." Id. The Court notes that no juror number was provided. If the Court assumes Petitioner's point is true, the Court fails to find any establishment of

tactical error by trial counsel for deciding to excuse another juror instead of the alleged juror at issue. Furthermore, the Nevada Supreme Court has clearly reiterated that the purpose of voir dire is not to give any party an opportunity to pick the most favorable jury possible, but rather to determine whether individual jurors will consider the facts impartially and apply the law as instructed. See Johnson v. State, 122 Nev. 1344, 148 P.3d 767 (2006) (finding the purpose of jury voir dire is to discover whether a juror will consider and decide the facts impartially and conscientiously apply the law as charged by the court). Petitioner fails to identify any cognizable allegation that his counsel acted unreasonably during voir dire or that any jurors were in fact impartial. Such bare conclusions as set forth by Petitioner do not meet the standard under Strickland. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Finally, Petitioner's reliance on Harris v. Housewright, 697 F.2d 202, 207 (8th Cir. 1982), is misplaced, as the case is of no comparison to the instant case. In Harris, the Court reversed a conviction and granted a new trial based on trial counsel's failure to challenge or strike jurors who had relationships strongly suggestive of pro-prosecutorial bias, ultimately finding such action constituted ineffective assistance. Harris, however, was a case where several jurors revealed that they had relationships with members of the sheriff's department or the police department, both of which were involved in the investigation of the crime and actually testified at trial. Id. at 207 (emphasis added). The present case does not come close to the deficiencies of the counsel in Harris. Therefore, the Court finds no merit to Petitioner's claim of ineffective assistance during voir dire.

II. DUE PROCESS VIOLATIONS

Petitioner sets forth various violations of Due Process. This Court notes that Due Process claims raised in the Petition are waived due to Petitioner's failure to raise them on direct appeal. NRS 34.724(2)(a) states that a petition for writ of habeas corpus "[i]s not a substitute for and does not affect any remedies which are incident to the proceedings in the trial court or the remedy of direct review of the sentence or conviction." "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).

This Court further notes in reviewing Petitioner's direct appeal that only the following issues were raised on direct appeal: (1) the District Court erred in reappointing Petitioner's counsel, violating his right to self-representation; (2) the District Court erred in failing to instruct the jury that robbery is a specific intent offense; and (3) the District Court erred in giving a presumption of innocence instruction based on NRS 175.191 because this instruction did not define the material elements of the offenses. Petitioner for the first time raises the following Due Process claims: (1) the State knowingly and deliberately misled the jury by offering false statements; (2) District Court Judge Glass abused her discretion by summarily denying Petitioner's pre-trial petition; (3) the Court abused its discretion for denying a Motion for new trial; (4) the State proffered false testimony from witness Sarah Matthews; (5) the State presented to the Court knowingly perjured testimony by witness Corrina Phillips; (6) the State unlawfully arrested Petitioner; (7) insufficient evidence existed to support First Degree Kidnapping; (8) the State failed to test exculpatory clothing for DNA; (9) the State's failure to investigate Magee's phone records and cell tower records resulted in an unfair trial; (10) the State failed to conduct competent DNA analysis; (11) the District Court abused its discretion regarding jury instructions 4, 8, 13, 19, 24, 26, 36, 38, 40, 47, and 49; (12) Petitioner's Confrontation Right was violated when he was unable to examine or cross examine co-defendant McCarty; (13) the State intentionally misled the jury in regards to comments regarding cell phone use; and (14) the State introduced false testimony of Sarah Matthews.

The Court finds that Petitioner is not alleging ineffective assistance of counsel on all of these fourteen claims, and therefore such argument is not properly brought in a petition for writ of habeas corpus. NRS 34.810; Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059.

Petitioner does raise a Due Process argument that was raised on direct appeal. Petitioner now challenges the Court's denial of his proposed jury instructions 9 and 45. However, Petitioner's challenge to these jury instructions is barred by the doctrine of 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 may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Therefore, because the Nevada Supreme Court has issued its opinion on the instant issue and upheld Petitioner's conviction, along with this Court's exclusion of the requested jury instructions, Petitioner's argument lacks merit. This Court's decision was affirmed by the Nevada Supreme Court. See Malone v. State, No. 61006, 2013 Nev. Unpub. LEXIS 1954 (Dec. 18, 2013). Petitioner is therefore barred from bringing the same claim again.

ORDER

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

DATED this 28 day of April, 2017.

DISTRICT JUDGE JB

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

BY
RYAN J. MACDONALD
Deputy District Attorney
Nevada Bar #012615

CERTIFICATE OF SERVICE

I certify that on the 27th day of April, 2017, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

DOMONIC RONALDO MALONE #69418
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NV 89018

BY 
R. JOHNSON
Secretary for the District Attorney's Office

NA/RJM/rj/M-1

Clerk of the Courts
Steven D. Grierson

200 Lewis Avenue
Las Vegas, NV 89155-1160
(702) 671-4554

July 14, 2017

Case No.: 06C224572-2

CERTIFICATION OF COPY

Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full, and correct copy of the hereinafter stated original document(s):

Findings of Fact, Conclusions of Law and Order filed 05/05/2017

UNITED STATES OF AMERICA
DISTRICT COURT
OF THE
EIGHTH
JUDICIAL
DISTRICT
COUNTY OF CLARK
STATE OF NEVADA

now on file and of

In witness whereof, I have hereunto set my hand and affixed the seal of the Eighth Judicial District Court at my office, Las Vegas, Nevada, at 10:11 AM on July 14, 2017.

STEVEN D. GRIERSON, CLERK OF THE COURT