In Proper Person
P.O. Box 650 H.D.S.P.
Indian Springs, Nevada 89018



EIGHTH DISTRICT COURT

CLARK COUNTY NEVADA

DVONTAE RICHARD,

DEFENDANT,

-V-

THE STATE OF NEVADA,

PLAINTIFF,

Case No. A-19-797693-W

Dept.No. XXVIII

Docket

NOTICE OF APPEAL

Notice is hereby given that the PETITIONER, DVONTAE RICHARD, by and through himself in proper person, does now appeal to the Supreme Court of the State of Nevada, the decision of the District Court DENIAL OF WRITT OF HABEAS CORPUS

Dated this date, NOVEMBER 26 2019.

Respectfully Submitted,

In Proper Person

## CERTIFICATE OF SERVICE BY MAILING

I, D'VONTAE RICHARD, hereby certify, pursuant to NRCP 5(b), that on this 26 day of NOVEMBER, 2019, I mailed a true and correct copy of the foregoing, "DENIAL OF WRITT OF HABEAS CORPUS.

by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

SUPREME COURT OF
NEVADA. 201 S. CARSON ST
SUITE # 201 CARSON CITY,
NEVADA. 89701

DATED: this 26 day of NOVEMBER, 2019.

D'VONTAE RICHARD 1089115
# 1089115
/In Propria Persona
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding DENIAL OF WRITT OF HABEAS CORPUS
(Title of Document)

filed in District Court Case number A-19-797693-W.

☑ Does not contain the social security number of any person.

**-OR-**

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

**-or-**

B. For the administration of a public program or for an application for a federal or state grant.

Signature Date

D'VONTAE RICHARD.
Print Name

Title

DVONTAE RICHARD #1084115
H.D.S.P.
P.O. BOX. 650
INDIAN SPRINGS NV. 89070

LAS VEGAS NV 890
27 NOV 2019 PM 4 L

SUPREME COURT OF NEVADA
OFFICE OF THE CLERK.
201. S. CARSON ST, SUITE #20.
CARSON CITY, NEVADA 89701

HIGH DESERT STATE PRISON
NOV 26 2019
UNIT 7 C/D

ASTA

**IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK**

DVONTAE RICHARD,

Plaintiff(s),

vs.

WARDEN OF HIGH DESERT STATE PRISON,

Defendant(s),

Case No: A-19-797693-W

Dept No: XXVIII

# CASE APPEAL STATEMENT

1. Appellant(s): Dvontae Richard

2. Judge: Ronald J. Israel

3. Appellant(s): Dvontae Richard

Counsel:

Dvontae Richard #1089115
P.O. Box 650
Indian Springs, NV 89070

4. Respondent (s): Warden of High Desert State Prison

Counsel:

Steven B. Wolfson, District Attorney
200 Lewis Ave.
Las Vegas, NV 89155-2212

5. Appellant(s)'s Attorney Licensed in Nevada: N/A
Permission Granted: N/A

Respondent(s)'s Attorney Licensed in Nevada: Yes
Permission Granted: N/A

6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

7. Appellant Represented by Appointed Counsel On Appeal: N/A

8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A
***Expires 1 year from date filed*
Appellant Filed Application to Proceed in Forma Pauperis: No
Date Application(s) filed: N/A

9. Date Commenced in District Court: June 27, 2019

10. Brief Description of the Nature of the Action: Civil Writ

Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus

11. Previous Appeal: No

Supreme Court Docket Number(s): N/A

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 16 day of December 2019.

Steven D. Grierson, Clerk of the Court

*/s/ Heather Ungermann*
Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Dvontae Richard

EIGHTH JUDICIAL DISTRICT COURT

# CASE SUMMARY

## CASE NO. A-19-797693-W

| | | | |
|---|---|---|---|
| **Dvontae Richard, Plaintiff(s)** | § | Location: | **Department 28** |
| **vs.** | § | Judicial Officer: | **Israel, Ronald J.** |
| **Warden of High Desert Prison, Defendant(s)** | § | Filed on: | **06/27/2019** |
| | § | Cross-Reference Case Number: | **A797693** |

### CASE INFORMATION

**Related Cases**
C-15-308258-1 (Writ Related Case)

**Statistical Closures**
10/02/2019 Summary Judgment

Case Type: **Writ of Habeas Corpus**

Case Status: **10/02/2019 Closed**

### DATE — CASE ASSIGNMENT

**Current Case Assignment**

| | |
|---|---|
| Case Number | A-19-797693-W |
| Court | Department 28 |
| Date Assigned | 06/27/2019 |
| Judicial Officer | Israel, Ronald J. |

### PARTY INFORMATION

| | | *Lead Attorneys* |
|---|---|---|
| **Plaintiff** | **Richard, Dvontae** | **Pro Se** |
| **Defendant** | **Warden of High Desert Prison** | **Wolfson, Steven B**<br>*Retained*<br>702-455-5320(W) |

### DATE — EVENTS & ORDERS OF THE COURT — INDEX

## EVENTS

06/27/2019 Inmate Filed - Petition for Writ of Habeas Corpus
Party: Plaintiff Richard, Dvontae
*Post Conviction*

07/05/2019 Order for Petition for Writ of Habeas Corpus
*Order for Petition for Writ of Habeas Corpus*

08/20/2019 Response
*STATE S RESPONSE TO DEFENDANT S PETITION FOR WRIT OF HABEAS CORPUS*

10/02/2019 Order to Statistically Close Case
*Civil Order To Statistically Close Case*

10/07/2019 Recorders Transcript of Hearing
*Recorder's Transcript of Hearing Petition for Writ of Habeas Corpus 10/2/19*

10/11/2019 Order
Filed By: Defendant Warden of High Desert Prison
*Order for Transcripts*

| | |
|---|---|
| 11/05/2019 | Findings of Fact, Conclusions of Law and Order |
| 11/06/2019 | Notice of Entry<br>*Notice of Entry of Findings of Fact, Conclusions of Law and Order* |
| 12/02/2019 | Notice of Appeal |
| 12/16/2019 | Case Appeal Statement<br>Filed By: Plaintiff Richard, Dvontae<br>*Case Appeal Statement* |

## HEARINGS

| | |
|---|---|
| 10/02/2019 | **Petition for Writ of Habeas Corpus** (9:00 AM) (Judicial Officer: Israel, Ronald J.)<br>Denied;<br>Journal Entry Details:<br>*Petitioner RICHARD not present, in the Nevada Department of Correction (NDC). Court noted this was a Pro Se Petition with extensive briefing. Court stated the Petitioners challenges and noted the grounds 1 through 5 should have been raised on direct appeal as these were clearly appeal issues. Court noted regarding the ineffective assistance under Strickland, the Petitioner showed nothing but allegations; The Petitioner raised the issue, failure to communicate not being adequate, however, during the trial the Counsel and Deft. communicated on a regular basis; Further there was no information that there was ineffective assistance. Court noted the facts should have been brought up in appeal. At the request of the State, Court will allow the State to obtain a transcript of this hearing to prepare the order. Later recalled. Court stated findings regarding the Petitioners issue of accumulative error and noted it is an appeal issue and the petition did not explain what the issue was and what error. Court directed the State to prepare a detailed order.;* |

# DISTRICT COURT CIVIL COVER SHEET

A-19-797693-W
Dept. XXVIII

County, Nevada

Case No. .....
*(Assigned by Clerk's Office)*

## I. Party Information *(provide both home and mailing addresses if different)*

| Plaintiff(s) (name/address/phone): | Defendant(s) (name/address/phone): |
|---|---|
| Dvontae Richard | Warden of High Desert State Prison |
| | |
| | |
| | |
| Attorney (name/address/phone): | Attorney (name/address/phone): |
| | |
| | |
| | |

## II. Nature of Controversy *(please select the one most applicable filing type below)*

### Civil Case Filing Types

| Real Property | Torts | |
|---|---|---|
| **Landlord/Tenant** | **Negligence** | **Other Torts** |
| ☐ Unlawful Detainer | ☐ Auto | ☐ Product Liability |
| ☐ Other Landlord/Tenant | ☐ Premises Liability | ☐ Intentional Misconduct |
| **Title to Property** | ☐ Other Negligence | ☐ Employment Tort |
| ☐ Judicial Foreclosure | **Malpractice** | ☐ Insurance Tort |
| ☐ Other Title to Property | ☐ Medical/Dental | ☐ Other Tort |
| **Other Real Property** | ☐ Legal | |
| ☐ Condemnation/Eminent Domain | ☐ Accounting | |
| ☐ Other Real Property | ☐ Other Malpractice | |

| Probate | Construction Defect & Contract | Judicial Review/Appeal |
|---|---|---|
| **Probate** *(select case type and estate value)* | **Construction Defect** | **Judicial Review** |
| ☐ Summary Administration | ☐ Chapter 40 | ☐ Foreclosure Mediation Case |
| ☐ General Administration | ☐ Other Construction Defect | ☐ Petition to Seal Records |
| ☐ Special Administration | **Contract Case** | ☐ Mental Competency |
| ☐ Set Aside | ☐ Uniform Commercial Code | **Nevada State Agency Appeal** |
| ☐ Trust/Conservatorship | ☐ Building and Construction | ☐ Department of Motor Vehicle |
| ☐ Other Probate | ☐ Insurance Carrier | ☐ Worker's Compensation |
| **Estate Value** | ☐ Commercial Instrument | ☐ Other Nevada State Agency |
| ☐ Over $200,000 | ☐ Collection of Accounts | **Appeal Other** |
| ☐ Between $100,000 and $200,000 | ☐ Employment Contract | ☐ Appeal from Lower Court |
| ☐ Under $100,000 or Unknown | ☐ Other Contract | ☐ Other Judicial Review/Appeal |
| ☐ Under $2,500 | | |

| Civil Writ | | Other Civil Filing |
|---|---|---|
| **Civil Writ** | | **Other Civil Filing** |
| ■ Writ of Habeas Corpus | ☐ Writ of Prohibition | ☐ Compromise of Minor's Claim |
| ☐ Writ of Mandamus | ☐ Other Civil Writ | ☐ Foreign Judgment |
| ☐ Writ of Quo Warrant | | ☐ Other Civil Matters |

***Business Court filings should be filed using the Business Court civil coversheet.***

June 27, 2019
Date

Prepared by Clerk
Signature of initiating party or representative

***See other side for family-related case filings.***

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
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-

DVONTAE RICHARD, aka
Dvontae Dshawn Richard #2806958

Defendant.

CASE NO: A-19-797693-W

DEPT NO: XXVIII

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

DATE OF HEARING: OCTOBER 2, 2019
TIME OF HEARING: 9:00 AM

THIS CAUSE having come on for hearing before the Honorable Ronald Israel, District Judge, on the 2nd day of October, 2019, the Petitioner not being present, PROCEEDING IN PROPER PERSON, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through BERNARD ZADROWSKI, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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|---|---|
| ☐ Voluntary Dismissal | ☑ Summary Judgment |
| ☐ Involuntary Dismissal | ☐ Stipulated Judgment |
| ☐ Stipulated Dismissal | ☐ Default Judgment |
| ☐ Motion to Dismiss by Deft(s) | ☐ Judgment of Arbitration |

11/5/19

**FINDINGS OF FACT, CONCLUSIONS OF LAW**

**STATEMENT OF THE CASE**

On July 27, 2015, Petitioner Dvontae Richard ("Petitioner") was charged by way of Information with Count 1, CONSPIRACY TO COMMIT ROBBERY (Category B Felony - NRS 200.380, 199.480 - NOC 50147); Count 2, BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony - NRS 205.060 - NOC 50426); Count 3, GRAND LARCENY OF FIREARM (Category B Felony - NRS 205.226 - NOC 50526); Count 4, GRAND LARCENY (Category C Felony - NRS 205.220.1, 205.222.2 - NOC 56004); Count 5, ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - NOC 50138); Count 6, FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.310, 200.320, 193.165 - NOC 50055); Count 7, CONSPIRACY TO COMMIT ROBBERY (Category B Felony - NRS 200.380, 199.480 - NOC 50147); Count 8, ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony- NRS 200.380, 193.330, 193.165 - NOC 50145); Count 9, BATTERY WITH INTENT TO COMMIT A CRIME (Category B Felony - NRS 200.400.2 - NOC 50151); and Count 10, OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony- NRS 202.360 - NOC 51460). Petitioner was also arraigned on July 27, 2015, and invoked his right to a speedy trial.

Petitioner's jury trial started February 22, 2016. On February 26, 2016, the jury returned a verdict of Guilty on the following counts: Count 1, CONSPIRACY TO COMMIT ROBBERY; Count 2, BURGLARY WHILE IN POSSESSION OF A FIREARM; Count 3, GRAND LARCENY OF FIREARM; Count 4, GRAND LARCENY; Count 5, ROBBERY WITH USE OF A DEADLY WEAPON; Count 7, CONSPIRACY TO COMMIT ROBBERY; Count 8, ATTEMPT ROBBERY; and Count 9, BATTERY WITH INTENT TO COMMIT A CRIME. The jury returned a verdict of Not Guilty on Count 6, FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON.

Petitioner was adjudicated guilty and sentenced on May 25, 2016. Petitioner's Judgment of Conviction was filed May 27, 2016. The Amended Judgment of Conviction was

filed June 7, 2016, correcting a clerical error, and reflecting that Petitioner's Sentence was rendered as follows: COUNT 1 - a MAXIMUM of SEVENTY-TWO (72) MONTHS with a MINIMUM Parole Eligibility of TWELVE (12) MONTHS; COUNT 2 - a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM Parole Eligibility of THIRTY-SIX (36) MONTHS, CONSECUTIVE to COUNT 1; COUNT 3 - a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONSECUTIVE to COUNT 2; COUNT 4 - a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT with COUNT 3; COUNT 5 - a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM Parole Eligibility of SEVENTY-TWO (72) MONTHS plus a CONSECUTIVE term of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM parole eligibility of FORTY-EIGHT (48) MONTHS for the Use of a Deadly Weapon, CONSECUTIVE to COUNTS 1, 2 and 3; COUNT 7 - a MAXIMUM of SEVENTY-TWO (72) MONTHS with a MINIMUM Parole Eligibility of TWENTY-EIGHT (28) MONTHS, CONCURRENT with ALL OTHER COUNTS; COUNT 8 - a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM Parole Eligibility of FORTY-EIGHT (48) MONTHS, CONCURRENT with ALL OTHER COUNTS; COUNT 9 - a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM Parole Eligibility of FORTY-EIGHT (48) MONTHS, CONCURRENT with ALL OTHER COUNTS; and COUNT 10-a MAXIMUM of SEVENTY-TWO (72) MONTHS with a MINIMUM Parole Eligibility of TWENTY-EIGHT (28) MONTHS, CONCURRENT with ALL OTHER COUNTS; with THREE HUNDRED SIXTY-SEVEN (367) DAYS credit for time served. The AGGREGATE TOTAL sentence is SIXTY-ONE (61) YEARS MAXIMUM with a MINIMUM PAROLE ELIGIBILITY OF SIXTEEN (16) YEARS. THEREAFTER, a clerical error having been discovered, the Amended Judgment of Conviction reflects the following correction: COUNT 5 - CONSECUTIVE to COUNTS 1, 2 and 3 not COUNTS 1, 3 and 3.

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Petitioner filed his Notice of Appeal on June 1, 2016. Petitioner's Amended Judgment of Conviction was affirmed and remittitur issued September 17, 2018.

Petitioner filed the instant Petition for Writ of Habeas Corpus on July 5, 2019. On August 20, 2019, the State filed its Response. On October 2, 2019, this Court denied Petitioner's Petition. This Court's written Order follows.

## STATEMENT OF FACTS

The district court judge relied on the following facts set forth in the Second Supplemental Pre-Sentence Investigation Report ("Second Supplemental PSI") file May 17, 2016, which reflected that the subject offenses occurred substantially as follows:

> On May 20, 2015, the victim used an exterior ATM machine at a local Bank of America to withdraw his money. He retrieved his money and returned to the driver's seat of his vehicle and began counting and organizing his money. He looked into his rearview mirror and saw two suspects crouched down approaching his door. He described one suspect as wearing a blue medical mask carrying a black and gray semi-auto handgun and the second male as possibly wearing a black bandana over his face armed with a black semi-auto handgun.
>
> The victim reported that both suspects approached him from the driver's side window and pointed handguns at him. They told him to roll down his window and the victim complied with their orders. One of the suspects opened the victim's car door and said, "Give it up." The victim knew he was being robbed and gave the suspects his wallet (valued at $300), miscellaneous ID, and $52.00 in cash. The suspects instructed the victim to get out of his car and the victim complied. The suspects also ordered the victim to stand still near the back of his vehicle as the suspects entered his vehicle and stole his Iphone 6 (valued at $700) and his Black Glock 26 Handgun, 9mm (valued at $600).
>
> After the suspects stole the victims cell phone and weapon they made him get back in his vehicle and instructed him to wait for ten minutes before leaving. As soon as the suspects ran across Desert Inn the victim called the police from a nearby Mini-Mart. Officers with the Las Vegas Metropolitan Police Department responded (event #150520-0350) and were unsuccessful in their attempts to locate the suspects. They made contact with the victim who stated because their

faces were partially covered hid did not believe he could identify the suspects. The victim's stolen gun was listed as stolen locally and nationally.

The victim was interviewed at a later date by the detective assigned to investigate the incident. The victim indicated that he actually felt he "might" be able to identify at least one of the suspects if he saw him again. The bank's video did not capture the incident; however, it did show the victim using the ATM's machines twice around the time of the crime. It also appeared to show at least one possible suspect running out of the parking lot after the crime. The video corroborated the victim's story.

On May 24, 2015, victims 1 & 2 were at a local Terrible Herbst having their vehicle washed and detailed. Victim #3 was cleaning the car and victim #1 was standing nearby talking on his phone. Victim #2, a Concealed Carry Weapon (CCW) holder, was standing nearby and noticed two unknown males approaching victim #1. One of the suspects had a towel over his head and the other had a hoodie on with the hood up. Victim #2 saw the male with the hoodie go directly toward victim #1 and attempted to pull the victim #1's gold chain. Victim #1 struggled with the subject, who was later identified as Dvontae Richard, the defendant and victim #2 pulled out his gun. The second unknown subject pulled a .40 caliber handgun and a gunfight ensued. Four people were shot.

Victim #2 fired approximately 15 rounds striking Richard in the right calf once. Richard's unknown accomplice fired numerous rounds and struck victim #3 in the right foot and struck victim #1 in the pelvis area and fingers, and victim #2 in the right ankle. Richard and the unknown suspect fled north and the gun was dropped and later recovered in a planter near the parking lot. Numerous 911 calls were made and the police responded (event #150524-2660). Richard was located outside a building, in a patio area suffering from a gunshot wound and there was a blood trail from the crime scene to Richard. The victims and Richard were transported to the University Medical Center Trauma for their wounds. There were numerous shell casings and the suspect's gun was retrieved from the parking lot next to a tree where the suspect had thrown it.

Detectives responded to the UMC Trauma and made contact with victim #2. Victim #2 reported he was with his cousin; victim #1 at the car wash when he noticed the two suspects walking through the parking lot. He thought they looked suspicious as one of them was

wearing a hoodie in warm weather and the other one had a towel on the top of his head. Victim #1 was on the phone and not paying attention as the two suspects approached him. He distanced himself from his cousin slightly as the suspects approached and reported that one of the suspects tried to pull the chain from victim #1's neck. Victim #1 wrestled with the suspect and victim #2 pulled out his Glock Firearm and as he was drawing down on the first suspect he noticed the second suspect pulled out a black semi-auto firearm and pointed it in his direction. Victim #2 reported there was an exchange of gunfire and he believed he shot his entire magazine, fifteen rounds. Victim #2 believed he shot the suspect who snatched the chain and was unsure where else his round went. Victim #2 was shot one time on the right ankle.

Victim #1 reported he was talking on the phone when an unknown male came up to him and tried to take his chain off his neck. He struggled with the suspect and as he was struggling with the suspect he saw a second suspect with a black handgun. When victim #1 heard the gunshots he tried to crawl away and believes he was grazed across his abdomen by a bullet and that the same round possibly hit is finger. Victim #1 reported he lost his gold ring during the struggle.

The detective made contact with Dvontae Richard who reported that he was walking to the store when he saw someone he thought had robbed him a couple of weeks ago of his necklace. He went up to this person and tried to grab what he thought was his necklace. He stated that when he did that he was shot. He also added that he now thought he went up to the wrong person and that this was not the person who took his necklace and that the necklace he tried to take wasn't his. Richard also denied knowing the name of the person that he was with. The second suspect had not been located at the time.

Victim #1 saw Richard being wheeled into the emergency room and stated he was the person who had snatched his chain.

On May 25, 2015, officers made contact with Richard at the hospital. Richard confessed to his role in the incident at the car wash (event #150524-2660) and admitted he had the Glock 26 in question. He referred to the gun as his and indicted that he had it loaded with ten bullets. The detective interviewing Richard was not aware that Glock had been stolen only four days prior and later discovered that the gun was directly linked to that robbery.

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On June 3, 2015, a photo line-up was conducted with the victim who was robbed in front of the bank. The victim was unable to identify Richard as the man who had robbed him.

Later that same day the detective made contact with Richard. The detective provided Richard some limited information about the robbery of the weapon. The detective told Richard that robbery had occurred two weeks earlier in a bank parking lot. The detective intentionally avoided telling Richard the victim's physical description, the vehicle's description or what was stolen during the robbery. Richard initially acted like he couldn't remember being involved in such a robbery. The detective explained that there was a good reason to believe he was the suspect and would likely be charged for the robbery and the question was whether or not Richard was the primary aggressor during the robbery or if he was just present during the crime. As the detective was preparing to leave Richard asked if they could start over and confessed to his role in the victims' robbery.

Without naming his co-defendant, Richard reported he and his partner were driving down Desert Inn when they saw the victim parked in front of the ATM machine and knew there would be an opportunity to get some money. He explained that everything had gone badly for him and he had one child and another on the way and he had just broken up with his girlfriend. He described the victim and what the victim was driving. He and his partner parked across the street, approached the victim who was inside his car and his partner pointed a black semi-auto handgun at the victim and made the victim get out of his car. His partner demanded money but allegedly the victim had none and once the victim was out of the car his partner reached in and stole a Glock 26. He and his partner ran across the street and he stated that he participated in the robbery because he needed money and his only job was to watch his partner's back during the crime. Richard stated he didn't have a gun himself and overall he placed the majority of the blame on his un-named partner. He further stated that he did not get any proceeds from the crime. Richard did not want to provide information on the second suspect at the time as he planned to use the information to try and negotiate a deal to get less time for his crimes. Richard stated he did not have an attorney and he contacted the Public Defender's office and was told no one was assigned to his case.

Second Supplemental PSI at 7-9.

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## ARGUMENT

The Court finds that Petitioner's claims of substantive error in Grounds One through Five of his Petition are waived. The Court further finds that Petitioner's claims of ineffective assistance of trial counsel in Ground Six are waived and/or without legal or factual merit. The Court also finds that Petitioner's claims of cumulative error are similarly without legal or factual merit. For the reasons set forth below, Petitioner's Petition for Writ of Habeas Corpus is denied.

### I. GROUNDS ONE THROUGH FIVE ARE WAIVED

Petitioner makes five separate claims in Grounds One through Five of his Petition, to wit: one, that Petitioner's due process rights were violated because the Information was "flawed"; two, that Petitioner's due process rights were violated because Petitioner's two pending cases were consolidated into a single case; three, that the district court lacked subject matter over the subject case; four, a duplicative claim of structural error for the consolidation of multiple counts into a single case; and five, a duplicative claim that the Information was "flawed." Petition at 1-13. The Court finds that each of these substantive claims could have been raised on direct appeal. The Court therefore finds that these claims are waived and are summarily dismissed pursuant to NRS 34.810(1).

NRS 34.810(1) reads:

> The court shall dismiss a petition if the court determines that:
>
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.
> (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.*
> . . .
> unless the court finds *both* cause for the failure to present the grounds and actual prejudice to the petitioner.

(Emphasis added).

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).

Petitioner filed a Notice of Appeal on June 1, 2016. On September 17, 2018, the Nevada Supreme Court issued remittitur, affirming Petitioner's amended judgment of conviction. The Court notes that none of Petitioner's claims in Grounds One through Five allege ineffective assistance of counsel, nor any other claim that could be properly considered for the first time in the instant Petition. The Court further notes that nowhere in the instant Petition does Petitioner even allege, must less establish, good cause to present his substantive claims before the court. The Court finds that since Petitioner has failed to establish good cause for failing to bring these claims on direct appeal, these claims are waived in the instant Petition and are dismissed pursuant to NRS 34.810(1), Franklin, and Evans.

## II. TRIAL COUNSEL WAS NOT INEFFECTIVE

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

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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, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. 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; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here 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.

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). 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). 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).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the

possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "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); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). 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.

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) (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).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, claims of ineffective assistance of counsel 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" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims

in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (Emphasis added).

Unsupported arguments and baseless assertions are suitable for summary dismissal. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."); State v. Haberstroh, 119 Nev. 173, 187, 69 P.3d 676, 685-86 (2003) ("[c]ontentions unsupported by specific argument or authority should be summarily rejected on appeal.") (internal citations omitted); Jones v. State, 113 Nev. 454, 468, 937 P.2d 55, 64 (1997) (holding that Jones' unsupported contention should be summarily rejected on appeal).

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, 87 P.3d 533 (2004). Such a defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. United States v. Porter, 924 F.2d 395, 397 (1st Cir. 1991), quoting United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989). "Where counsel and the client in a criminal case clearly understand the evidence and the permutations of proof and outcome, counsel is not required to unnecessarily exhaust all available public or private resources." Molina, 120 Nev. at 192, 87 P.3d at 538. Further, it is well established that a claim of ineffective assistance of counsel alleging a failure to properly investigate will fail where the evidence or testimony sought does not exonerate or exculpate the defendant. See Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989).

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 his 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 such a reasonable inquiry has been made by counsel, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280, citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Finally, counsel's strategy decision

is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

"Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970). With respect to prejudice, a petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Harrington v. Richter, 562 U.S. 86, 104, 131 S. Ct. 770, 788 (2011). It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Although courts may not indulge post hoc rationalization for counsel's decision-making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. The mere possibility of success based on a defense "'for which there exists little or no evidentiary support is not enough to establish constitutionally inadequate counsel.'" Kerr v. Thumer, 639 F.3d 315, 319 (7th Cir. 2010), quoting Long v. Krenke, 138 F.3d 1160, 1164 (7th Cir. 1988).

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. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very

goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314. Appellate lawyers are not ineffective when they refuse to follow a "kitchen sink" approach to the issues on appeals. Howard v. Gramley, 225 F.3d 784, 791 (7th Cir. 2000). To the contrary, one of the most important parts of appellate advocacy is the selection of the proper claims to urge on appeal. Schaff v. Snyder, 190 F.3d 513, 526–27 (7th Cir. 1999). Throwing in every conceivable point is distracting to appellate judges, consumes space that should be devoted to developing the arguments with some promise, inevitably clutters the brief with issues that have no chance because of doctrines like harmless error or the standard of review of jury verdicts, and is overall bad appellate advocacy. Howard at 791. An attorney's decision not to raise meritless issues on appeal is not ineffective assistance of counsel. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal. Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir.1992); Heath v. Jones, 941 F.2d 1126, 1132 (11th Cir.1991). In making this determination, a court must review the merits of the omitted claim. Heath, 941 F.2d at 1132.

Appellate counsel may not simply raise issues on appeal that have no support in the record; unsupported arguments and baseless assertions are suitable for summary dismissal. 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 28(e). Further, claims of ineffective assistance of counsel 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, 100 Nev. at 502, 686 P.2d at 225. "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.

**a. Counsel Was Not Ineffective For The Alleged Failure To Investigate**

Petitioner claims trial counsel was ineffective for failing to investigate Petitioner's "Version Of The Case," in which he alleges a "Mr. Ruiz" would "Go Around Looting Each Automatic Teller Machine." Petition at 14.

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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, 120 Nev. 185, 87 P.3d 533. Such a defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. Porter, 924 F.2d at 397. It is well established that a claim of ineffective assistance of counsel alleging a failure to properly investigate will fail where the evidence or testimony sought does not exonerate or exculpate the defendant. See Ford, 105 Nev. 850, 784 P.2d 951. The Court finds that Petitioner neither alleges with specificity what the investigation into Mr. Ruiz's involvement with the instant offenses would have revealed, nor how it would have changed the outcome of the case.

Petitioner alleges elsewhere in his Petition that the Information in this case was "flawed" because Petitioner could not be charged with Conspiracy if he was the only named defendant. This was due to Petitioner's refusal to name his co-conspirator. Had counsel investigated and found that Luis Ruiz—*the victim in this case*—was Petitioner's co-defendant, Petitioner cannot show that he would not have been convicted of any fewer crimes at trial. The Court therefore finds that Petitioner fails to allege, much less establish, that naming his co-conspirator would have exonerated Petitioner of his involvement in the underlying offenses.

The Court notes that Petitioner also presupposes that trial counsel failed to investigate Mr. Ruiz's involvement in the conspiracy. However, it is likely that counsel would have chosen not to investigate Mr. Ruiz as a strategy decision to avoid convictions for conspiracy-related charges at trial due to lack of identifying a co-conspirator. The Court finds that counsel's strategy decision not to investigate into the identity of a co-conspirator would have been a "tactical" decision and is "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

Finally, even if victim Mr. Ruiz had been investigated and identified as a co-conspirator, Petitioner cannot show that this information would have made a more favorable outcome at trial more probable. The Court notes that Petitioner admitted to his involvement in

the underlying crimes, and multiple eyewitnesses identified Petitioner as the perpetrator of the instant offenses. Thus, even if the jury knew of Petitioner's co-conspirator's identity, Petitioner cannot show that the jury would have somehow ignored the overwhelming evidence against Petitioner at trial. Thus, the Court finds that Petitioner has failed to show that counsel was ineffective for the alleged failure to investigate pursuant to Molina and Porter, and his claims of ineffective assistance of counsel are therefore be denied.

**b. Counsel Was Not Ineffective For The Alleged Failure To Suppress Petitioner's Statements**

Petitioner's claim that counsel was ineffective for failing to suppress his statements made to arresting officers fails on its face:

> Mr. Richards,'s Attorney Failed to Challenge Mr. Richard's, *Voluntary Statements* Under The Miranda-Vs.-Arizona, Doctrine.

Petition at 14 (emphasis added).

The Court notes that Petitioner sets forth no law whatsoever providing for a basis to suppress *voluntary* statements to officers; indeed, as the Nevada Supreme Court has already determined that Petitioner's confessions to investigating officers were voluntary, the trial court did not err in denying Petitioner's motion to suppress those statements:

> We conclude that substantial evidence supports the district court's determination that Richard received a proper *Miranda* warning and that his statement to Weirauch was voluntary. Therefore, the district court did not err in denying the motion to suppress Richard's statement to Weirauch.

Order Affirming Judgment of Conviction at 14-15, filed September 21, 2018.

To the extent that Petitioner's claim here could be considered a substantive claim that the court erred in denying his Motion to Suppress, as this issue has already been raised on direct appeal and denied, the Court finds it must be summarily dismissed pursuant to NRS 34.810(1):

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> The court shall dismiss a petition if the court determines that:
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> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.
> (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.*
> . . .
> unless the court finds *both* cause for the failure to present the grounds and actual prejudice to the petitioner.

Petitioner has failed to argue, let alone establish, good cause to bring this substantive claim in the instant Petition; such a claim is therefore waived in the instant Petition and must be dismissed pursuant to NRS 34.810(1), Franklin, and Evans. The Court further notes that even if this claim were proper as an ineffective assistance of counsel claim, such a claim would fail for several reasons. First, the allegation that trial counsel failed to file a motion to suppress Petitioner's statements is belied by the record; not only did trial counsel file the same, that motion was denied in the trial court, that issue was raised again on direct appeal, and the denial of that motion was affirmed. Thus, this allegation is belied by the record and is insufficient to warrant relief pursuant to Hargrove, 100 Nev. at 502, 686 P.2d at 225 ("Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record). Further, even if trial counsel hadn't filed a motion to suppress, Petitioner cannot show that he would have been prejudiced by the failure to file such a motion, as the record shows such a motion was meritless and futile; counsel cannot be ineffective for failing to make futile objections or arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Finally, as the issue of whether Petitioner's statement was voluntary has already been decided on appeal, Petitioner is barred from raising it in the instant habeas proceedings by the law of the case doctrine. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton, 115 Nev. at 414-15, 990 P.2d at 1275). Furthermore, this court cannot overrule the Nevada Supreme Court. NEV. CONST. Art.

VI § 6. "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.

The Court finds that for the numerous reasons set forth above, Petitioner's claim that counsel was ineffective for failing to file a motion to suppress Petitioner's *voluntary* statements is belied by the record, barred by the law of the case, without merit, and waived. Petitioner's claim of ineffective assistance of counsel is therefore denied.

**c. Counsel Was Not Ineffective For The Alleged Failure To Communicate**

Petitioner advances a single sentence setting forth of his claim that trial counsel was ineffective for failing to communicate with Petitioner, to wit:

> Mr. Richard,'s Attorney At Some Point Broke The Lines Of Communication, Which did Result In A "Breakdown-in-Communciations", That Breakdown Affected Mr. Richard's Right. To Put Together A Defense.

Petition at 14.

A proper petition for post-conviction relief must set forth specific factual allegations. NRS 34.735; Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. So, to the extent that Petitioner raises a claim of failure to communicate or "Breakdown-In-Communications" in his Petition, the Court finds that such a bare, naked claim is too vague and unclear to meet the specificity requirements of NRS 34.735 and Hargrove. Additionally, unsupported arguments and baseless assertions are suitable for summary dismissal. 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."); Haberstroh, 119 Nev. at 187, 69 P.3d at 685-86 ("[c]ontentions unsupported by specific argument or authority should be summarily rejected on appeal.") (internal citations omitted); Jones, 113 Nev. at 468, 937 P.2d at 64 (holding that Jones' unsupported contention should be summarily rejected on appeal).

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The Court notes that even if Petitioner had made a proper, supported claim that counsel had failed to properly communicate with him, a defendant is not entitled to a particular "relationship" with his attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). The Court notes that there is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. See id. The Court finds that Petitioner has failed to establish that trial counsel was ineffective in any way. Thus, as counsel was reasonably effective, Petitioner was not entitled to any specific amount of communication pursuant to Morris. The Court further finds that Petitioner has failed to establish that trial counsel's communication was objectively unreasonable, nor that Petitioner was in any way prejudiced by this alleged lack of communication. Petitioner's claim of ineffective assistance of counsel is therefore denied.

**d. Counsel Was Not Ineffective For The Alleged Failure To Object To The "Flawed" Complaint, Nor For The Alleged Failure To Object To The Consolidated Trial, Nor For The Alleged Failure To File A Motion For A New Trial**

Petitioner claims that trial counsel was ineffective for failing to object to the Complaint/Information as it was "fatally flawed," for failing to object to the "jointed" trial, failing to file a motion for a new trial, and for handling the trial against Petitioner's wishes (presumably opposite what Petitioner believed to be the most strategic means). Petition at 15. The Court note that this claim is unaccompanied by any legal or factual support.

The Court finds that these claims should be dismissed for three reasons. First, the Court finds that these allegations of ineffective assistance of counsel should be summarily dismissed, as they lack any factual or legal support. A proper petition for post-conviction relief must set forth specific factual allegations. NRS 34.735; Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. The Court finds that to the extent that Petitioner raises a claim of ineffective assistance of counsel for the reasons set forth above, such a bare, naked claim is too vague and unclear to meet the specificity requirements of NRS 34.735 and Hargrove. Additionally, unsupported arguments and baseless assertions are suitable for summary dismissal. 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."); Haberstroh, 119 Nev. at 187, 69 P.3d at 685-86 ("[c]ontentions unsupported by specific argument or authority should be summarily rejected on appeal.") (internal citations omitted); Jones, 113 Nev. at 468, 937 P.2d at 64 (holding that Jones' unsupported contention should be summarily rejected on appeal).

Second, the Court finds that Petitioner's claims are wholly without legal merit, and would have been futile for trial counsel to raise; counsel cannot be ineffective for failing to make futile objections or arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

As to the claim that the Complaint/Information was "fatally flawed," Petitioner claims that he cannot be charged with any Conspiracy crimes because he was the only named defendant, stating "The Law is Clear" that the State cannot alleged a conspiracy with an unnamed co-conspirator. Petition at 7, 15. Petitioner's claim is incorrect. The State does not have to name all co-conspirators, as all that must be proven at trial is that a defendant conspired with another to commit a crime:

> Because the State is not required to prove the identity of unknown conspiracy members, we conclude that the State's use of the language "unnamed coconspirator" in the second amended criminal information did not render the document defective. As a result, Washington has failed to demonstrate substantial prejudice, and reversal is therefore not warranted on this basis.
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> The United States Supreme Court has stated that "at least two persons are required to constitute a conspiracy, but *the identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown.*"

Washington v. State, 132 Nev. 655, 376 P.3d 802, 805-810 (2016) citing Rogers v. United States, 340 U.S. 367, 375, 71 S.Ct. 438, 95 L.Ed. 344 (1951) (emphasis added).

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Thus, as the State can bring conspiracy charges against a defendant without naming co-conspirators. The Court finds that a motion to challenge the Complaint/Information on this basis would have been futile; and counsel cannot be ineffective for failing to make futile objections or arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

As to the allegation that counsel should have objected to a "jointed" trial, Petitioner sets forth no factual or legal basis for this allegation. Petitioner vaguely alleges in Ground Two of his Petition that the State "Knowingly Erroneously Mischarge Richard With Two Separate Conspiracies By His Lonesome In Two Cases Conjoined To One Is A Violation Of Mr. Richard's Fundamental Const. Rights To An Impartial Jury." Petition at 9. The Court notes there was no joinder or consolidation of cases in the instant case. Since trial counsel could not have opposed a consolidation that never occurred, the Court finds that counsel was not ineffective for failing to oppose the same. The Court also finds that to the extent that Petitioner's claim could be construed as an argument that trial counsel was ineffective for failing to file a motion to sever his charges, Petitioner fails to establish how a motion to sever would have been meritorious. When initial joinder of charges is permissible under NRS 173.115, the trial court should sever the offenses if the joinder is unfairly prejudicial, i.e., required by justice. Middleton v. State, 114 Nev. 1089, 1107, 968 P.2d 296, 309 (1998). Joinder of offenses in an original Information may be prejudicial if it causes a defendant to "become embarrassed or confounded in presenting separate defenses." Id.

Here, the Court finds that Petitioner fails to set forth any basis that he was unfairly prejudiced by the initial joinder of charges in this case, or that he would have been confounded in presenting separate offenses pursuant to Middleton. Thus, any motion to sever based on Petitioner's baseless claims in the instant Petition would have been futile. The Court finds that counsel cannot be ineffective for failing to make futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Similarly, the Court finds that Petitioner cannot establish that he was prejudiced by the failure to file a motion for a new trial. Ordinarily, to merit a new trial, a defendant must allege the existence of newly-discovered evidence, or evidence that could not have been discovered

through reasonable diligence either before or during trial. Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991). Here, Petitioner alleges simply that "Richard's Attorney Failed To Put In A Motion For A New Trial." Petition at 14. Petitioner fails to establish any factual or legal basis for a new trial, nor does he identify the existence of newly-discovered evidence that would entitle him to a new trial pursuant to Sanborn. Petitioner thus fails to establish that a motion for new trial would not have been futile; counsel cannot be ineffective for failing to make futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Petitioner's claims of ineffective assistance of counsel are thus without merit and are therefore denied.

## III. CLAIMS OF CUMULATIVE ERROR ARE NOT AVAILABLE IN HABEAS

Petitioner claims that cumulative errors warrant granting habeas relief. Petition at 16-17. The Court finds that Petitioner's claim is without merit as set forth below.

A proper petition for post-conviction relief must set forth specific factual allegations. NRS 34.735; Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. So, to the extent that Petitioner raises a claim of "cumulative error" in his Petition, such a claim is too vague and unclear to meet the specificity requirements of NRS 34.735 and Hargrove.

To the extent that Petitioner's cognizable claims are ineffective assistance of counsel claims pursuant to Strickland, the Nevada Supreme Court has not endorsed application of its direct appeal cumulative error standard to the post-conviction Strickland context. McConnell, 125 Nev. at 259, 212 P.3d at 318. Nor does cumulative error apply on post-conviction review. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006) ("a habeas petitioner cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test.")

Nevertheless, even if cumulative error review was available on post-conviction review, such a finding in the context of a Strickland claim is extraordinarily rare. See, e.g., Harris by & Through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). After all, "[s]urmounting Strickland's high bar is never an easy task," Padilla v. Kentucky, 559 U.S. 356, 371, 130 S. Ct. 1473, 1484, 176 L. Ed. 2d 284 (2010), and there can be no cumulative error where the defendant fails to demonstrate *any* single violation of Strickland. See, e.g., Athey v. State, 106

Nev. 520, 526, 797 P.2d 956 (1990) ("[B]ecause we find no error . . . the doctrine does not apply here."); United States v. Sypher, 684 F.3d 622, 628 (6th Cir. 2012) ("Where, as here, no individual ruling has been shown to be erroneous, there is no 'error' to consider, and the cumulative error doctrine does not warrant reversal"); Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007) ("where individual allegations of error are not of constitutional stature or are not errors, there is nothing to cumulate.") (internal quotation marks omitted). The Court finds that Petitioner has not demonstrated that any individual claim warrants relief, and as such, there is nothing to cumulate. Therefore, Petitioner's cumulative error claim is denied.

**ORDER**

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

DATED this 31 day of October, 2019.

DISTRICT JUDGE
RONALD J. ISRAEL

A-19-797693-W

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

BY Taleen Pandukht
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar # 005734

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CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 5th day of Nov, 2019, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

DVONTAE RICHARD, BAC #1089115
H.D.S.P.
P.O. BOX 650
INDIAN SPRINGS, NV, 89070

BY _____
Secretary for the District Attorney's Office

Electronically Filed
11/6/2019 9:43 AM
Steven D. Grierson
CLERK OF THE COURT

NEO

# DISTRICT COURT
# CLARK COUNTY, NEVADA

DVONTAE RICHARD,

Petitioner,

vs.

WARDEN OF HIGH DESERT PRISON,

Respondent,

Case No: A-19-797693-W

Dept No: XXVIII

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

**PLEASE TAKE NOTICE** that on November 5, 2019, 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 November 6, 2019.

STEVEN D. GRIERSON, CLERK OF THE COURT

*/s/ Debra Donaldson*
Debra Donaldson, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 6 day of November 2019, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Dvontae Richard # 1089115
P.O. Box 650
Indian Springs, NV 89070

*/s/ Debra Donaldson*
Debra Donaldson, Deputy Clerk

FCL
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DVONTAE RICHARD, aka
Dvontae Dshawn Richard #2806958

Defendant.

CASE NO: A-19-797693-W

DEPT NO: XXVIII

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

DATE OF HEARING: OCTOBER 2, 2019
TIME OF HEARING: 9:00 AM

THIS CAUSE having come on for hearing before the Honorable Ronald Israel, District Judge, on the 2nd day of October, 2019, the Petitioner not being present, PROCEEDING IN PROPER PERSON, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through BERNARD ZADROWSKI, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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| ☐ Voluntary Dismissal | ☑ Summary Judgment |
| ☐ Involuntary Dismissal | ☐ Stipulated Judgment |
| ☐ Stipulated Dismissal | ☐ Default Judgment |
| ☐ Motion to Dismiss by Deft(s) | ☐ Judgment of Arbitration |

11/5/19

**FINDINGS OF FACT, CONCLUSIONS OF LAW**

**STATEMENT OF THE CASE**

On July 27, 2015, Petitioner Dvontae Richard ("Petitioner") was charged by way of Information with Count 1, CONSPIRACY TO COMMIT ROBBERY (Category B Felony - NRS 200.380, 199.480 - NOC 50147); Count 2, BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony - NRS 205.060 - NOC 50426); Count 3, GRAND LARCENY OF FIREARM (Category B Felony - NRS 205.226 - NOC 50526); Count 4, GRAND LARCENY (Category C Felony - NRS 205.220.1, 205.222.2 - NOC 56004); Count 5, ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - NOC 50138); Count 6, FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.310, 200.320, 193.165 - NOC 50055); Count 7, CONSPIRACY TO COMMIT ROBBERY (Category B Felony - NRS 200.380, 199.480 - NOC 50147); Count 8, ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony- NRS 200.380, 193.330, 193.165 - NOC 50145); Count 9, BATTERY WITH INTENT TO COMMIT A CRIME (Category B Felony - NRS 200.400.2 - NOC 50151); and Count 10, OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony- NRS 202.360 - NOC 51460). Petitioner was also arraigned on July 27, 2015, and invoked his right to a speedy trial.

Petitioner's jury trial started February 22, 2016. On February 26, 2016, the jury returned a verdict of Guilty on the following counts: Count 1, CONSPIRACY TO COMMIT ROBBERY; Count 2, BURGLARY WHILE IN POSSESSION OF A FIREARM; Count 3, GRAND LARCENY OF FIREARM; Count 4, GRAND LARCENY; Count 5, ROBBERY WITH USE OF A DEADLY WEAPON; Count 7, CONSPIRACY TO COMMIT ROBBERY; Count 8, ATTEMPT ROBBERY; and Count 9, BATTERY WITH INTENT TO COMMIT A CRIME. The jury returned a verdict of Not Guilty on Count 6, FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON.

Petitioner was adjudicated guilty and sentenced on May 25, 2016. Petitioner's Judgment of Conviction was filed May 27, 2016. The Amended Judgment of Conviction was

filed June 7, 2016, correcting a clerical error, and reflecting that Petitioner's Sentence was rendered as follows: COUNT 1 - a MAXIMUM of SEVENTY-TWO (72) MONTHS with a MINIMUM Parole Eligibility of TWELVE (12) MONTHS; COUNT 2 - a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM Parole Eligibility of THIRTY-SIX (36) MONTHS, CONSECUTIVE to COUNT 1; COUNT 3 - a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONSECUTIVE to COUNT 2; COUNT 4 - a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT with COUNT 3; COUNT 5 - a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM Parole Eligibility of SEVENTY-TWO (72) MONTHS plus a CONSECUTIVE term of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM parole eligibility of FORTY-EIGHT (48) MONTHS for the Use of a Deadly Weapon, CONSECUTIVE to COUNTS 1, 2 and 3; COUNT 7 - a MAXIMUM of SEVENTY-TWO (72) MONTHS with a MINIMUM Parole Eligibility of TWENTY-EIGHT (28) MONTHS, CONCURRENT with ALL OTHER COUNTS; COUNT 8 - a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM Parole Eligibility of FORTY-EIGHT (48) MONTHS, CONCURRENT with ALL OTHER COUNTS; COUNT 9 - a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM Parole Eligibility of FORTY-EIGHT (48) MONTHS, CONCURRENT with ALL OTHER COUNTS; and COUNT 10-a MAXIMUM of SEVENTY-TWO (72) MONTHS with a MINIMUM Parole Eligibility of TWENTY-EIGHT (28) MONTHS, CONCURRENT with ALL OTHER COUNTS; with THREE HUNDRED SIXTY-SEVEN (367) DAYS credit for time served. The AGGREGATE TOTAL sentence is SIXTY-ONE (61) YEARS MAXIMUM with a MINIMUM PAROLE ELIGIBILITY OF SIXTEEN (16) YEARS. THEREAFTER, a clerical error having been discovered, the Amended Judgment of Conviction reflects the following correction: COUNT 5 - CONSECUTIVE to COUNTS 1, 2 and 3 not COUNTS 1, 3 and 3.

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Petitioner filed his Notice of Appeal on June 1, 2016. Petitioner's Amended Judgment of Conviction was affirmed and remittitur issued September 17, 2018.

Petitioner filed the instant Petition for Writ of Habeas Corpus on July 5, 2019. On August 20, 2019, the State filed its Response. On October 2, 2019, this Court denied Petitioner's Petition. This Court's written Order follows.

## STATEMENT OF FACTS

The district court judge relied on the following facts set forth in the Second Supplemental Pre-Sentence Investigation Report ("Second Supplemental PSI") file May 17, 2016, which reflected that the subject offenses occurred substantially as follows:

> On May 20, 2015, the victim used an exterior ATM machine at a local Bank of America to withdraw his money. He retrieved his money and returned to the driver's seat of his vehicle and began counting and organizing his money. He looked into his rearview mirror and saw two suspects crouched down approaching his door. He described one suspect as wearing a blue medical mask carrying a black and gray semi-auto handgun and the second male as possibly wearing a black bandana over his face armed with a black semi-auto handgun.
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> The victim reported that both suspects approached him from the driver's side window and pointed handguns at him. They told him to roll down his window and the victim complied with their orders. One of the suspects opened the victim's car door and said, "Give it up." The victim knew he was being robbed and gave the suspects his wallet (valued at $300), miscellaneous ID, and $52.00 in cash. The suspects instructed the victim to get out of his car and the victim complied. The suspects also ordered the victim to stand still near the back of his vehicle as the suspects entered his vehicle and stole his Iphone 6 (valued at $700) and his Black Glock 26 Handgun, 9mm (valued at $600).
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> After the suspects stole the victims cell phone and weapon they made him get back in his vehicle and instructed him to wait for ten minutes before leaving. As soon as the suspects ran across Desert Inn the victim called the police from a nearby Mini-Mart. Officers with the Las Vegas Metropolitan Police Department responded (event #150520-0350) and were unsuccessful in their attempts to locate the suspects. They made contact with the victim who stated because their

faces were partially covered hid did not believe he could identify the suspects. The victim's stolen gun was listed as stolen locally and nationally.

The victim was interviewed at a later date by the detective assigned to investigate the incident. The victim indicated that he actually felt he "might" be able to identify at least one of the suspects if he saw him again. The bank's video did not capture the incident; however, it did show the victim using the ATM's machines twice around the time of the crime. It also appeared to show at least one possible suspect running out of the parking lot after the crime. The video corroborated the victim's story.

On May 24, 2015, victims 1 & 2 were at a local Terrible Herbst having their vehicle washed and detailed. Victim #3 was cleaning the car and victim #1 was standing nearby talking on his phone. Victim #2, a Concealed Carry Weapon (CCW) holder, was standing nearby and noticed two unknown males approaching victim #1. One of the suspects had a towel over his head and the other had a hoodie on with the hood up. Victim #2 saw the male with the hoodie go directly toward victim #1 and attempted to pull the victim #1's gold chain. Victim #1 struggled with the subject, who was later identified as Dvontae Richard, the defendant and victim #2 pulled out his gun. The second unknown subject pulled a .40 caliber handgun and a gunfight ensued. Four people were shot.

Victim #2 fired approximately 15 rounds striking Richard in the right calf once. Richard's unknown accomplice fired numerous rounds and struck victim #3 in the right foot and struck victim #1 in the pelvis area and fingers, and victim #2 in the right ankle. Richard and the unknown suspect fled north and the gun was dropped and later recovered in a planter near the parking lot. Numerous 911 calls were made and the police responded (event #150524-2660). Richard was located outside a building, in a patio area suffering from a gunshot wound and there was a blood trail from the crime scene to Richard. The victims and Richard were transported to the University Medical Center Trauma for their wounds. There were numerous shell casings and the suspect's gun was retrieved from the parking lot next to a tree where the suspect had thrown it.

Detectives responded to the UMC Trauma and made contact with victim #2. Victim #2 reported he was with his cousin; victim #1 at the car wash when he noticed the two suspects walking through the parking lot. He thought they looked suspicious as one of them was

wearing a hoodie in warm weather and the other one had a towel on the top of his head. Victim #1 was on the phone and not paying attention as the two suspects approached him. He distanced himself from his cousin slightly as the suspects approached and reported that one of the suspects tried to pull the chain from victim #1's neck. Victim #1 wrestled with the suspect and victim #2 pulled out his Glock Firearm and as he was drawing down on the first suspect he noticed the second suspect pulled out a black semi-auto firearm and pointed it in his direction. Victim #2 reported there was an exchange of gunfire and he believed he shot his entire magazine, fifteen rounds. Victim #2 believed he shot the suspect who snatched the chain and was unsure where else his round went. Victim #2 was shot one time on the right ankle.

Victim #1 reported he was talking on the phone when an unknown male came up to him and tried to take his chain off his neck. He struggled with the suspect and as he was struggling with the suspect he saw a second suspect with a black handgun. When victim #1 heard the gunshots he tried to crawl away and believes he was grazed across his abdomen by a bullet and that the same round possibly hit is finger. Victim #1 reported he lost his gold ring during the struggle.

The detective made contact with Dvontae Richard who reported that he was walking to the store when he saw someone he thought had robbed him a couple of weeks ago of his necklace. He went up to this person and tried to grab what he thought was his necklace. He stated that when he did that he was shot. He also added that he now thought he went up to the wrong person and that this was not the person who took his necklace and that the necklace he tried to take wasn't his. Richard also denied knowing the name of the person that he was with. The second suspect had not been located at the time.

Victim #1 saw Richard being wheeled into the emergency room and stated he was the person who had snatched his chain.

On May 25, 2015, officers made contact with Richard at the hospital. Richard confessed to his role in the incident at the car wash (event #150524-2660) and admitted he had the Glock 26 in question. He referred to the gun as his and indicted that he had it loaded with ten bullets. The detective interviewing Richard was not aware that Glock had been stolen only four days prior and later discovered that the gun was directly linked to that robbery.

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On June 3, 2015, a photo line-up was conducted with the victim who was robbed in front of the bank. The victim was unable to identify Richard as the man who had robbed him.

Later that same day the detective made contact with Richard. The detective provided Richard some limited information about the robbery of the weapon. The detective told Richard that robbery had occurred two weeks earlier in a bank parking lot. The detective intentionally avoided telling Richard the victim's physical description, the vehicle's description or what was stolen during the robbery. Richard initially acted like he couldn't remember being involved in such a robbery. The detective explained that there was a good reason to believe he was the suspect and would likely be charged for the robbery and the question was whether or not Richard was the primary aggressor during the robbery or if he was just present during the crime. As the detective was preparing to leave Richard asked if they could start over and confessed to his role in the victims' robbery.

Without naming his co-defendant, Richard reported he and his partner were driving down Desert Inn when they saw the victim parked in front of the ATM machine and knew there would be an opportunity to get some money. He explained that everything had gone badly for him and he had one child and another on the way and he had just broken up with his girlfriend. He described the victim and what the victim was driving. He and his partner parked across the street, approached the victim who was inside his car and his partner pointed a black semi-auto handgun at the victim and made the victim get out of his car. His partner demanded money but allegedly the victim had none and once the victim was out of the car his partner reached in and stole a Glock 26. He and his partner ran across the street and he stated that he participated in the robbery because he needed money and his only job was to watch his partner's back during the crime. Richard stated he didn't have a gun himself and overall he placed the majority of the blame on his un-named partner. He further stated that he did not get any proceeds from the crime. Richard did not want to provide information on the second suspect at the time as he planned to use the information to try and negotiate a deal to get less time for his crimes. Richard stated he did not have an attorney and he contacted the Public Defender's office and was told no one was assigned to his case.

Second Supplemental PSI at 7-9.

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## ARGUMENT

The Court finds that Petitioner's claims of substantive error in Grounds One through Five of his Petition are waived. The Court further finds that Petitioner's claims of ineffective assistance of trial counsel in Ground Six are waived and/or without legal or factual merit. The Court also finds that Petitioner's claims of cumulative error are similarly without legal or factual merit. For the reasons set forth below, Petitioner's Petition for Writ of Habeas Corpus is denied.

### I. GROUNDS ONE THROUGH FIVE ARE WAIVED

Petitioner makes five separate claims in Grounds One through Five of his Petition, to wit: one, that Petitioner's due process rights were violated because the Information was "flawed"; two, that Petitioner's due process rights were violated because Petitioner's two pending cases were consolidated into a single case; three, that the district court lacked subject matter over the subject case; four, a duplicative claim of structural error for the consolidation of multiple counts into a single case; and five, a duplicative claim that the Information was "flawed." Petition at 1-13. The Court finds that each of these substantive claims could have been raised on direct appeal. The Court therefore finds that these claims are waived and are summarily dismissed pursuant to NRS 34.810(1).

NRS 34.810(1) reads:

> The court shall dismiss a petition if the court determines that:
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> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.
> (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.*
> . . .
> unless the court finds *both* cause for the failure to present the grounds and actual prejudice to the petitioner.

(Emphasis added).

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).

Petitioner filed a Notice of Appeal on June 1, 2016. On September 17, 2018, the Nevada Supreme Court issued remittitur, affirming Petitioner's amended judgment of conviction. The Court notes that none of Petitioner's claims in Grounds One through Five allege ineffective assistance of counsel, nor any other claim that could be properly considered for the first time in the instant Petition. The Court further notes that nowhere in the instant Petition does Petitioner even allege, must less establish, good cause to present his substantive claims before the court. The Court finds that since Petitioner has failed to establish good cause for failing to bring these claims on direct appeal, these claims are waived in the instant Petition and are dismissed pursuant to NRS 34.810(1), Franklin, and Evans.

## II. TRIAL COUNSEL WAS NOT INEFFECTIVE

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

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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, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. 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; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here 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.

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). 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). 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).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the

possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "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); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). 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.

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) (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).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, claims of ineffective assistance of counsel 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" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims

in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (Emphasis added).

Unsupported arguments and baseless assertions are suitable for summary dismissal. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."); State v. Haberstroh, 119 Nev. 173, 187, 69 P.3d 676, 685-86 (2003) ("[c]ontentions unsupported by specific argument or authority should be summarily rejected on appeal.") (internal citations omitted); Jones v. State, 113 Nev. 454, 468, 937 P.2d 55, 64 (1997) (holding that Jones' unsupported contention should be summarily rejected on appeal).

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, 87 P.3d 533 (2004). Such a defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. United States v. Porter, 924 F.2d 395, 397 (1st Cir. 1991), quoting United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989). "Where counsel and the client in a criminal case clearly understand the evidence and the permutations of proof and outcome, counsel is not required to unnecessarily exhaust all available public or private resources." Molina, 120 Nev. at 192, 87 P.3d at 538. Further, it is well established that a claim of ineffective assistance of counsel alleging a failure to properly investigate will fail where the evidence or testimony sought does not exonerate or exculpate the defendant. See Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989).

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 his 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 such a reasonable inquiry has been made by counsel, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280, citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Finally, counsel's strategy decision

is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

"Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970). With respect to prejudice, a petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Harrington v. Richter, 562 U.S. 86, 104, 131 S. Ct. 770, 788 (2011). It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Although courts may not indulge post hoc rationalization for counsel's decision-making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. The mere possibility of success based on a defense "'for which there exists little or no evidentiary support is not enough to establish constitutionally inadequate counsel.'" Kerr v. Thumer, 639 F.3d 315, 319 (7th Cir. 2010), quoting Long v. Krenke, 138 F.3d 1160, 1164 (7th Cir. 1988).

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. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very

goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314. Appellate lawyers are not ineffective when they refuse to follow a "kitchen sink" approach to the issues on appeals. Howard v. Gramley, 225 F.3d 784, 791 (7th Cir. 2000). To the contrary, one of the most important parts of appellate advocacy is the selection of the proper claims to urge on appeal. Schaff v. Snyder, 190 F.3d 513, 526–27 (7th Cir. 1999). Throwing in every conceivable point is distracting to appellate judges, consumes space that should be devoted to developing the arguments with some promise, inevitably clutters the brief with issues that have no chance because of doctrines like harmless error or the standard of review of jury verdicts, and is overall bad appellate advocacy. Howard at 791. An attorney's decision not to raise meritless issues on appeal is not ineffective assistance of counsel. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal. Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir.1992); Heath v. Jones, 941 F.2d 1126, 1132 (11th Cir.1991). In making this determination, a court must review the merits of the omitted claim. Heath, 941 F.2d at 1132.

Appellate counsel may not simply raise issues on appeal that have no support in the record; unsupported arguments and baseless assertions are suitable for summary dismissal. 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 28(e). Further, claims of ineffective assistance of counsel 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, 100 Nev. at 502, 686 P.2d at 225. "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.

**a. Counsel Was Not Ineffective For The Alleged Failure To Investigate**

Petitioner claims trial counsel was ineffective for failing to investigate Petitioner's "Version Of The Case," in which he alleges a "Mr. Ruiz" would "Go Around Looting Each Automatic Teller Machine." Petition at 14.

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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, 120 Nev. 185, 87 P.3d 533. Such a defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. Porter, 924 F.2d at 397. It is well established that a claim of ineffective assistance of counsel alleging a failure to properly investigate will fail where the evidence or testimony sought does not exonerate or exculpate the defendant. See Ford, 105 Nev. 850, 784 P.2d 951. The Court finds that Petitioner neither alleges with specificity what the investigation into Mr. Ruiz's involvement with the instant offenses would have revealed, nor how it would have changed the outcome of the case.

Petitioner alleges elsewhere in his Petition that the Information in this case was "flawed" because Petitioner could not be charged with Conspiracy if he was the only named defendant. This was due to Petitioner's refusal to name his co-conspirator. Had counsel investigated and found that Luis Ruiz—*the victim in this case*—was Petitioner's co-defendant, Petitioner cannot show that he would not have been convicted of any fewer crimes at trial. The Court therefore finds that Petitioner fails to allege, much less establish, that naming his co-conspirator would have exonerated Petitioner of his involvement in the underlying offenses.

The Court notes that Petitioner also presupposes that trial counsel failed to investigate Mr. Ruiz's involvement in the conspiracy. However, it is likely that counsel would have chosen not to investigate Mr. Ruiz as a strategy decision to avoid convictions for conspiracy-related charges at trial due to lack of identifying a co-conspirator. The Court finds that counsel's strategy decision not to investigate into the identity of a co-conspirator would have been a "tactical" decision and is "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

Finally, even if victim Mr. Ruiz had been investigated and identified as a co-conspirator, Petitioner cannot show that this information would have made a more favorable outcome at trial more probable. The Court notes that Petitioner admitted to his involvement in

the underlying crimes, and multiple eyewitnesses identified Petitioner as the perpetrator of the instant offenses. Thus, even if the jury knew of Petitioner's co-conspirator's identity, Petitioner cannot show that the jury would have somehow ignored the overwhelming evidence against Petitioner at trial. Thus, the Court finds that Petitioner has failed to show that counsel was ineffective for the alleged failure to investigate pursuant to Molina and Porter, and his claims of ineffective assistance of counsel are therefore be denied.

**b. Counsel Was Not Ineffective For The Alleged Failure To Suppress Petitioner's Statements**

Petitioner's claim that counsel was ineffective for failing to suppress his statements made to arresting officers fails on its face:

> Mr. Richards,'s Attorney Failed to Challenge Mr. Richard's, *Voluntary Statements* Under The Miranda-Vs.-Arizona, Doctrine.

Petition at 14 (emphasis added).

The Court notes that Petitioner sets forth no law whatsoever providing for a basis to suppress *voluntary* statements to officers; indeed, as the Nevada Supreme Court has already determined that Petitioner's confessions to investigating officers were voluntary, the trial court did not err in denying Petitioner's motion to suppress those statements:

> We conclude that substantial evidence supports the district court's determination that Richard received a proper *Miranda* warning and that his statement to Weirauch was voluntary. Therefore, the district court did not err in denying the motion to suppress Richard's statement to Weirauch.

Order Affirming Judgment of Conviction at 14-15, filed September 21, 2018.

To the extent that Petitioner's claim here could be considered a substantive claim that the court erred in denying his Motion to Suppress, as this issue has already been raised on direct appeal and denied, the Court finds it must be summarily dismissed pursuant to NRS 34.810(1):

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> The court shall dismiss a petition if the court determines that:
>
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.
> (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.*
> . . .
> unless the court finds *both* cause for the failure to present the grounds and actual prejudice to the petitioner.

Petitioner has failed to argue, let alone establish, good cause to bring this substantive claim in the instant Petition; such a claim is therefore waived in the instant Petition and must be dismissed pursuant to NRS 34.810(1), Franklin, and Evans. The Court further notes that even if this claim were proper as an ineffective assistance of counsel claim, such a claim would fail for several reasons. First, the allegation that trial counsel failed to file a motion to suppress Petitioner's statements is belied by the record; not only did trial counsel file the same, that motion was denied in the trial court, that issue was raised again on direct appeal, and the denial of that motion was affirmed. Thus, this allegation is belied by the record and is insufficient to warrant relief pursuant to Hargrove, 100 Nev. at 502, 686 P.2d at 225 ("Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record). Further, even if trial counsel hadn't filed a motion to suppress, Petitioner cannot show that he would have been prejudiced by the failure to file such a motion, as the record shows such a motion was meritless and futile; counsel cannot be ineffective for failing to make futile objections or arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Finally, as the issue of whether Petitioner's statement was voluntary has already been decided on appeal, Petitioner is barred from raising it in the instant habeas proceedings by the law of the case doctrine. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton, 115 Nev. at 414-15, 990 P.2d at 1275). Furthermore, this court cannot overrule the Nevada Supreme Court. NEV. CONST. Art.

VI § 6. "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.

The Court finds that for the numerous reasons set forth above, Petitioner's claim that counsel was ineffective for failing to file a motion to suppress Petitioner's *voluntary* statements is belied by the record, barred by the law of the case, without merit, and waived. Petitioner's claim of ineffective assistance of counsel is therefore denied.

**c. Counsel Was Not Ineffective For The Alleged Failure To Communicate**

Petitioner advances a single sentence setting forth of his claim that trial counsel was ineffective for failing to communicate with Petitioner, to wit:

> Mr. Richard,'s Attorney At Some Point Broke The Lines Of Communication, Which did Result In A "Breakdown-in-Communciations", That Breakdown Affected Mr. Richard's Right. To Put Together A Defense.

Petition at 14.

A proper petition for post-conviction relief must set forth specific factual allegations. NRS 34.735; Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. So, to the extent that Petitioner raises a claim of failure to communicate or "Breakdown-In-Communications" in his Petition, the Court finds that such a bare, naked claim is too vague and unclear to meet the specificity requirements of NRS 34.735 and Hargrove. Additionally, unsupported arguments and baseless assertions are suitable for summary dismissal. 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."); Haberstroh, 119 Nev. at 187, 69 P.3d at 685-86 ("[c]ontentions unsupported by specific argument or authority should be summarily rejected on appeal.") (internal citations omitted); Jones, 113 Nev. at 468, 937 P.2d at 64 (holding that Jones' unsupported contention should be summarily rejected on appeal).

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The Court notes that even if Petitioner had made a proper, supported claim that counsel had failed to properly communicate with him, a defendant is not entitled to a particular "relationship" with his attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). The Court notes that there is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. See id. The Court finds that Petitioner has failed to establish that trial counsel was ineffective in any way. Thus, as counsel was reasonably effective, Petitioner was not entitled to any specific amount of communication pursuant to Morris. The Court further finds that Petitioner has failed to establish that trial counsel's communication was objectively unreasonable, nor that Petitioner was in any way prejudiced by this alleged lack of communication. Petitioner's claim of ineffective assistance of counsel is therefore denied.

**d. Counsel Was Not Ineffective For The Alleged Failure To Object To The "Flawed" Complaint, Nor For The Alleged Failure To Object To The Consolidated Trial, Nor For The Alleged Failure To File A Motion For A New Trial**

Petitioner claims that trial counsel was ineffective for failing to object to the Complaint/Information as it was "fatally flawed," for failing to object to the "jointed" trial, failing to file a motion for a new trial, and for handling the trial against Petitioner's wishes (presumably opposite what Petitioner believed to be the most strategic means). Petition at 15. The Court note that this claim is unaccompanied by any legal or factual support.

The Court finds that these claims should be dismissed for three reasons. First, the Court finds that these allegations of ineffective assistance of counsel should be summarily dismissed, as they lack any factual or legal support. A proper petition for post-conviction relief must set forth specific factual allegations. NRS 34.735; Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. The Court finds that to the extent that Petitioner raises a claim of ineffective assistance of counsel for the reasons set forth above, such a bare, naked claim is too vague and unclear to meet the specificity requirements of NRS 34.735 and Hargrove. Additionally, unsupported arguments and baseless assertions are suitable for summary dismissal. 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."); Haberstroh, 119 Nev. at 187, 69 P.3d at 685-86 ("[c]ontentions unsupported by specific argument or authority should be summarily rejected on appeal.") (internal citations omitted); Jones, 113 Nev. at 468, 937 P.2d at 64 (holding that Jones' unsupported contention should be summarily rejected on appeal).

Second, the Court finds that Petitioner's claims are wholly without legal merit, and would have been futile for trial counsel to raise; counsel cannot be ineffective for failing to make futile objections or arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

As to the claim that the Complaint/Information was "fatally flawed," Petitioner claims that he cannot be charged with any Conspiracy crimes because he was the only named defendant, stating "The Law is Clear" that the State cannot alleged a conspiracy with an unnamed co-conspirator. Petition at 7, 15. Petitioner's claim is incorrect. The State does not have to name all co-conspirators, as all that must be proven at trial is that a defendant conspired with another to commit a crime:

> Because the State is not required to prove the identity of unknown conspiracy members, we conclude that the State's use of the language "unnamed coconspirator" in the second amended criminal information did not render the document defective. As a result, Washington has failed to demonstrate substantial prejudice, and reversal is therefore not warranted on this basis.
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> ***
>
> The United States Supreme Court has stated that "at least two persons are required to constitute a conspiracy, but *the identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown.*"

Washington v. State, 132 Nev. 655, 376 P.3d 802, 805-810 (2016) citing Rogers v. United States, 340 U.S. 367, 375, 71 S.Ct. 438, 95 L.Ed. 344 (1951) (emphasis added).

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Thus, as the State can bring conspiracy charges against a defendant without naming co-conspirators. The Court finds that a motion to challenge the Complaint/Information on this basis would have been futile; and counsel cannot be ineffective for failing to make futile objections or arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

As to the allegation that counsel should have objected to a "jointed" trial, Petitioner sets forth no factual or legal basis for this allegation. Petitioner vaguely alleges in Ground Two of his Petition that the State "Knowingly Erroneously Mischarge Richard With Two Separate Conspiracies By His Lonesome In Two Cases Conjoined To One Is A Violation Of Mr. Richard's Fundamental Const. Rights To An Impartial Jury." Petition at 9. The Court notes there was no joinder or consolidation of cases in the instant case. Since trial counsel could not have opposed a consolidation that never occurred, the Court finds that counsel was not ineffective for failing to oppose the same. The Court also finds that to the extent that Petitioner's claim could be construed as an argument that trial counsel was ineffective for failing to file a motion to sever his charges, Petitioner fails to establish how a motion to sever would have been meritorious. When initial joinder of charges is permissible under NRS 173.115, the trial court should sever the offenses if the joinder is unfairly prejudicial, i.e., required by justice. Middleton v. State, 114 Nev. 1089, 1107, 968 P.2d 296, 309 (1998). Joinder of offenses in an original Information may be prejudicial if it causes a defendant to "become embarrassed or confounded in presenting separate defenses." Id.

Here, the Court finds that Petitioner fails to set forth any basis that he was unfairly prejudiced by the initial joinder of charges in this case, or that he would have been confounded in presenting separate offenses pursuant to Middleton. Thus, any motion to sever based on Petitioner's baseless claims in the instant Petition would have been futile. The Court finds that counsel cannot be ineffective for failing to make futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Similarly, the Court finds that Petitioner cannot establish that he was prejudiced by the failure to file a motion for a new trial. Ordinarily, to merit a new trial, a defendant must allege the existence of newly-discovered evidence, or evidence that could not have been discovered

through reasonable diligence either before or during trial. Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991). Here, Petitioner alleges simply that "Richard's Attorney Failed To Put In A Motion For A New Trial." Petition at 14. Petitioner fails to establish any factual or legal basis for a new trial, nor does he identify the existence of newly-discovered evidence that would entitle him to a new trial pursuant to Sanborn. Petitioner thus fails to establish that a motion for new trial would not have been futile; counsel cannot be ineffective for failing to make futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Petitioner's claims of ineffective assistance of counsel are thus without merit and are therefore denied.

## III. CLAIMS OF CUMULATIVE ERROR ARE NOT AVAILABLE IN HABEAS

Petitioner claims that cumulative errors warrant granting habeas relief. Petition at 16-17. The Court finds that Petitioner's claim is without merit as set forth below.

A proper petition for post-conviction relief must set forth specific factual allegations. NRS 34.735; Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. So, to the extent that Petitioner raises a claim of "cumulative error" in his Petition, such a claim is too vague and unclear to meet the specificity requirements of NRS 34.735 and Hargrove.

To the extent that Petitioner's cognizable claims are ineffective assistance of counsel claims pursuant to Strickland, the Nevada Supreme Court has not endorsed application of its direct appeal cumulative error standard to the post-conviction Strickland context. McConnell, 125 Nev. at 259, 212 P.3d at 318. Nor does cumulative error apply on post-conviction review. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006) ("a habeas petitioner cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test.")

Nevertheless, even if cumulative error review was available on post-conviction review, such a finding in the context of a Strickland claim is extraordinarily rare. See, e.g., Harris by & Through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). After all, "[s]urmounting Strickland's high bar is never an easy task," Padilla v. Kentucky, 559 U.S. 356, 371, 130 S. Ct. 1473, 1484, 176 L. Ed. 2d 284 (2010), and there can be no cumulative error where the defendant fails to demonstrate *any* single violation of Strickland. See, e.g., Athey v. State, 106

Nev. 520, 526, 797 P.2d 956 (1990) ("[B]ecause we find no error . . . the doctrine does not apply here."); United States v. Sypher, 684 F.3d 622, 628 (6th Cir. 2012) ("Where, as here, no individual ruling has been shown to be erroneous, there is no 'error' to consider, and the cumulative error doctrine does not warrant reversal"); Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007) ("where individual allegations of error are not of constitutional stature or are not errors, there is nothing to cumulate.") (internal quotation marks omitted). The Court finds that Petitioner has not demonstrated that any individual claim warrants relief, and as such, there is nothing to cumulate. Therefore, Petitioner's cumulative error claim is denied.

**ORDER**

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

DATED this 31 day of October, 2019.

DISTRICT JUDGE
RONALD J. ISRAEL

A-19-797693-W

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

BY Taleen Pandukht
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar # 005734

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CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 5th day of Nov, 2019, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

DVONTAE RICHARD, BAC #1089115
H.D.S.P.
P.O. BOX 650
INDIAN SPRINGS, NV, 89070

BY _____
Secretary for the District Attorney's Office

A-19-797693-W Dvontae Richard, Plaintiff(s)
vs.
Warden of High Desert Prison, Defendant(s)

October 02, 2019 09:00 AM Petition for Writ of Habeas Corpus

HEARD BY: Israel, Ronald J. COURTROOM: RJC Courtroom 15C

COURT CLERK: Thomas, Kathy

RECORDER: Chappell, Judy

REPORTER:

PARTIES PRESENT:

**Bernard B. Zadrowski** **Attorney for Defendant**

## JOURNAL ENTRIES

Petitioner RICHARD not present, in the Nevada Department of Correction (NDC). Court noted this was a Pro Se Petition with extensive briefing. Court stated the Petitioners challenges and noted the grounds 1 through 5 should have been raised on direct appeal as these were clearly appeal issues. Court noted regarding the ineffective assistance under Strickland, the Petitioner showed nothing but allegations; The Petitioner raised the issue, failure to communicate not being adequate, however, during the trial the Counsel and Deft. communicated on a regular basis; Further there was no information that there was ineffective assistance. Court noted the facts should have been brought up in appeal. At the request of the State, Court will allow the State to obtain a transcript of this hearing to prepare the order.

Later recalled. Court stated findings regarding the Petitioners issue of accumulative error and noted it is an appeal issue and the petition did not explain what the issue was and what error. Court directed the State to prepare a detailed order.

# Certification of Copy

**State of Nevada**
**County of Clark** } **SS:**

I, 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):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; DISTRICT COURT MINUTES;

DVONTAE RICHARD,

Plaintiff(s),

vs.

WARDEN OF HIGH DESERT STATE PRISON,

Defendant(s),

Case No: A-19-797693-W

Dept No: XXVIII

now on file and of record in this office.

**IN WITNESS THEREOF,** I have hereunto Set my hand and Affixed the seal of the Court at my office, Las Vegas, Nevada This 16 day of December 2019.

Steven D. Grierson, Clerk of the Court

Heather Ungermann, Deputy Clerk