IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

DVONTAE DSHAWN RICHARD,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: A-19-797693-W

Docket No: 80235

RECORD ON APPEAL

ATTORNEY FOR APPELLANT
DVONTAE RICHARD #1089115,
PROPER PERSON
P.O. BOX 650
INDIAN SPRINGS, NV 89070

ATTORNEY FOR RESPONDENT
STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

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

I N D E X

A-19-797693-W
Dept. XXVIII

FILED
JUN 27 2019
CLERK OF COURT

Case No. C-[redacted]
Dept. No.

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

DVONTAE DSHAWN RICHARD,
Petitioner,

v.

WARDEN OF HIGH DESERT STATE PRISON
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)

FEDERALIZE

"ACTUAL INNOCENCE"

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you are not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: HIGH DESERT STATE PRISON (IN THE STATE OF NEVADA)

2. Name and location of court which entered the judgment of conviction under attack: THE 8TH JUD. DIST. COURT. IN & OF CLARK COUNTY, NV.

3. Date of judgment of conviction:

4. Case number: C-15-308258-1

5. (a) Length of sentence: 16-81 YEARS

-1-

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(b) If sentence is death, state any date upon which execution is scheduled:....

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes ..... No ..✓...

If "yes," list crime, case number and sentence being served at this time: N/A

.....

.....

7. Nature of offense involved in conviction being challenged: ROBBERY

.....

8. What was your plea? (check one)

(a) Not guilty ..✓...

(b) Guilty .....

(c) Guilty but mentally ill .....

(d) Nolo contendere .....

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: N/A

.....

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

(a) Jury ..✓...

(b) Judge without a jury .....

11. Did you testify at the trial? Yes ..... No .....

12. Did you appeal from the judgment of conviction? Yes ..✓... No .....

13. If you did appeal, answer the following:

(a) Name of court: 8TH Judicial Distr. Court

(b) Case number or citation: C-15-308258-1

(c) Result: Appeal Was Affirmed.

(d) Date of result: .....

(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: N/A

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ..... No ✓

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of court: N/A

(2) Nature of proceeding: N/A

(3) Grounds raised: N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No ✓

(5) Result: N/A

(6) Date of result: N/A

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: N/A

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: N/A

(2) Nature of proceeding: N/A

(3) Grounds raised: N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No ✓

(5) Result: N/A

(6) Date of result: N/A

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: N/A

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes ..... No ✓

Citation or date of decision: N/A → This Is First Petition

(2) Second petition, application or motion? Yes ..... No ✓

Citation or date of decision: N/A

(3) Third or subsequent petitions, applications or motions? Yes ..... No ✓

Citation or date of decision: N/A

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: No

(b) The proceedings in which these grounds were raised: N/A

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) NO - This Petition Is Being Filed In A Timely Manner.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ..... No ✓

If yes, state what court and the case number: N/A

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ..... No ✓

If yes, specify where and when it is to be served, if you know: N/A

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

— CAVEAT —

Petitioner Richard, Urges The Court To Understand That This Petition Is Being Executed By Richard, Without The Case-File - Discovery. After Petitioner Does Receive His Case-File, Then It's Possible That Petitioner May Need To Amend This Petition, And Issues Herein.

THIS CASE CONSISTS OF A FATALLY FLAWED COMPLAINT, IN WHICH CAUSES STRUCTURAL ERROR, RESULTING IN A FUNDAMENTAL MISCARRIAGE OF JUSTICE.

IN THIS CASE MR. RICHARD, ADDRESSES THE FOLLOWING U.S. CONSTITUTIONAL VIOLATIONS, ISSUES CONSISTING OF REVERSIBLE ERRORS IN ABUNDANCE!

- POINTS AND AUTHORITIES -

PART (I): LEGAL GROUNDS = (GROUND 1 = FATALLY FLAWED COMPLAINT - U.S. CONST. 5TH, 14TH AMEND.). FEDERALIZE
- LEGAL GROUND 2 = MISJOINDER OF OFFENSES. FEDERALIZE
- LEGAL GROUND 3 = LACK OF SUBJECT MATTER JURISDICTION
- LEGAL GROUND 4 = STRUCTURAL ERROR. FEDERALIZE
- LEGAL GROUND 5 = RIGHT TO FAIR TRIAL. FEDERALIZE

PART (II) - LEGAL GROUND 6 = RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. FEDERALIZE

PART (III) - LEGAL GROUND 7 = CUMULATIVE ERRORS.

PART (IV) - AFFIDAVIT

PART (V) - EXHIBITS

PART (I)

(I). - U.S. Const. 5th Am. - Due Process Of Law.

(a) Ground ONE: The Complaint Against Richard, Is & Was Fatally Flawed, Amounting To Structural Error, And Violation Of Richard's 5th & 14th Amend Due Process Of Law. **FEDERALIZE**

Supporting FACTS (Tell your story briefly without citing cases or law) (a) The Complaint Against Richard, Is Fatally Flawed In Many Ways Because In Count 2 Of The Complaint Which Is Conspiracy To Commit Robbery NRS199.480 Is An Invalid Charge. See EXHIBIT "A"

How?

Because In Essence A Conspiracy Charge Requires There To Be, "Two Or More"... Yet The Complaint Against Richard, List Several Conspiracy Charges, Which Would Need To Entail Several different Conspiratorial Plots. The States' Complaint Don't Meet Statutory Law Requisites Because The Complaint Only Names One Defendant In This Case! So It Now Therefore Invalidates The Charges In The Entire Complaint. In Which Ultimately Invalidates The Conviction. Mr. Richard's Conviction Must Be Overturned On This Issue Alone! The Law is clear! And Mr. Richard Is "Actually Innocent Of Conspiracy To Commit Any Thing Because Richard Is The Only One Involved That Is Charged With This Case. It Fails To State A Material Element:

(b) = The Fatally Flawed Complaint Against Richard Charges Richard Alon With Separate Conspiracies In One Case! (Counts 1, 2, 7).

By Trying Richard Under A Joint Combination Of Counts Which Stemmed From 2 Completely Separate Cases, And Chain Of Events, And Separate Investigations Also, Two Separate Body Of Evidence, It Erodes All Constitutional Tenets Of Due Process Of Law, And, The Right To A Fair Trial As Well As Equal Protection Of Laws.

How Is This Joinder A U.S. Const. Violation?

Reason Is Because One Crime Has Absolutely Nothing To do With The Other. The Crimes Are Separate Cases, Which Occurred On Different Dates, The Crimes Contain different Witnesses, Evid. And different Victims. And So, It Completely Detheorizes The States Theory Of The Case And Ultimately Spills Over And Misleads The Jury Within The Jury Instructions, There Prejudicing Mr. Richard's Case At Richard's One, Only Trial. But In All Actuality It Was Supposed To Be Two Separate Trials.

Each Crime Has Its Own Set Of Elements. Each Crime Has Its Own Corpus Delicti. And So, For The State To Erroneously Charge Richard In This Case Caused "Structural Error", And A "Miscarriage Of Justice", Now! Richard Demands Total Exoneration

• So, Question of Law Is: How Can Richard, Be Charged With (2) Separate Conspiracies In One Case When Richard, Is The Only Named Defendant?

• Is It A Violation Of NRS 199.480, If A Sole Defendant is Charged Without Any Co-Conspirators?

(c).- Richard Believes That Its Due Process Error Based On Prosecutorial Misconduct. And The Prosecutors Overzealousness.

(d).- Richard Believes That Its Abuse Of Discretion On The Judges Behalf For Allowing The Fatally Flained Complaint Into Trial.

(e).- Richard Believes His Trial Counsel Was Ineffective For Not Challenging The Complaints. (See, Part II Of This Petition.) Infra

Ground TWO: THE PROSECUTION ERRED BY COMBINING TWO SEPARATE CASES INTO ONE AGAINST RICHARD. IT VIOLATED HIS DUE PROCESS OF LAW.- U.S. CONST. 5TH & 14TH AMEND. - FEDERALIZE

Supporting FACTS (Tell your story briefly without citing cases or law.): IN THIS CASE MR. RICHARD, STARTED OUT FACING TWO SEPARATE AND DISTINCTIVE CASES. AT THE HEART OF EACH OF THESE CASES IS A CONSPIRACY CHARGE. MR. RICHARD KNOWS THAT ONE PERSON CAN'T BE ALONE LEGALLY CHARGED WITH A CONSPIRACY! AND SO, FOR THE PROSECUTION TO 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. IT WAS NEVER EXPLAINED TO THE JURY HOW THE CONSPIRACY CHARGES ON ONE CASE didn't RELATE AT ALL TO THE OTHER CASE, BECAUSE IT APPEARS THAT RICHARD IS CHARGED UNDER A CONSPIRACY OCCURRING ON MAY 20TH, 2015 AND ANOTHER OCCURRING ON MAY 24TH, 2015. THERE IS NO COMMON MODUS OPERANDI, ALLEGED! THIS IS PLAIN ERROR.

BY COMBINING THE CHARGES IT DEPRIVED RICHARD THE OPPORTUNITY TO HAVE HIS CASE CONSIDERED FAIRLY AND DECIDED UPON A UNANIMOUS THEORY. AND IT DEPRIVED RICHARD OF A FAIR & PROPER NOTICE TO DEFEND HIMSELF IN TRIAL.

- 9

GROUND : THREE

MR. RICHARD, NOW URGES THAT THE 8TH JUDICIAL DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION. OVER THIS CASE! WHICH VIOLATES U.S. CONST. 5TH & 6TH & 14TH AM.

(a) MR. RICHARD, CLAIMS THAT THE 8TH JUD. DIST. CT. NEVER HAD PROPER JURISDICTION BECAUSE THE NEVADA REVISED STATUTES DON'T CONTAIN THE NECESSARY ENACTMENT CLAUSE. UNDER THE NEVADA CONST. ARTICLE 4 § 23 LEGISLATURE CREATES THE LAWS. AND THE ENACTING CLAUSE OF EVERY LAW SHALL BE AS FOLLOWS: "THE PEOPLE OF THE STATE OF NEVADA REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS", AND NO LAW SHALL BE ENACTED EXCEPT BY BILL. CHASE -VS- ROGERS, 10 NEV. 250 (1875). THE ENACTMENT CLAUSE IS MANDATORY. A JOINT RESOLUTION ADOPTED BY BOTH HOUSES CANNOT BECOME A VALID LAW IF IT DOES NOT CONTAIN THE ENACTING CLAUSE..... AGO 85 (7-25-1951). (SEE, EXHIBIT "B" REGARDING THIS ISSUE, MR. RICHARD, DEMANDS IMMEDIATE RELEASE FROM CUSTODY.

(b). MR. RICHARD, NOW URGES THAT MR. PERCIVAL WAS INEFFECTIVE DUE TO HIS FAILURE TO RAISE THIS ISSUE OF A FATALLY FLAWED COMPLAINT. AND THE NRS STATUTES MISSING THE MANDATED ENACTMENT CLAUSE. AN ATTORNEY HAS A DUTY TO INVESTIGATE NOT JUST THE CASE ITSELF, BUT ALSO THE STATUTES A DEFENDANT IS CHARGED UNDER.

GROUND FOUR

MR. RICHARD, NOW CLAIMS IT WAS STRUCTURAL ERROR ON HOW HE WAS DENIED THE RIGHT TO FAIR TRIAL UNDER EQUAL PROTECTION OF LAWS. - U.S. CONST. 5TH, 6TH, 14TH AMEND. - FEDERALIZE.

RICHARD NOW ASSERTS HERE THAT A DIFFERENT RESULT WOULD'VE OCCURRED, HAD RICHARD'S RIGHTS TO A FAIR TRIAL BEEN HONORED. HAD IT NOT BEEN FOR THE STRUCTURAL ERROR OF THE TWO CASES BEING COMBINED TO ONE THEN RICHARD WOULDN'T HAVE BEEN FORCED TO CHOOSE ONE CONSTITUTIONAL RIGHT OVER ANOTHER. SUCH AS: THE RIGHT TO REMAIN SILENT -VS- THE RIGHT TO TESTIFY! BECAUSE IN ONE CASE MR. RICHARD did BELIEVE THAT HIS ACTIONS AMOUNTED TO SELF-DEFENSE AND THAT HE SHOULD TESTIFY TO THAT.

THEREFORE,

MR. RICHARD, NOW DEMANDS THAT HIS CONVICTION BE VACATED. AND THE COURT ① ORDERS RICHARD'S IMMEDIATE RELEASE! ② THE COURT ORDERS RICHARD A NEW TRIAL! ③ THE COURT ORDERS RICHARD, AN EVIDENTIARY HEARING! EITHER WAY THE CONVICTION CANNOT STAND!

Ground Five - U.S. Const. 5th, 6th, 14th Amend. - Guarantees A Person The Right To A Fair Trial. Mr. Richard Claims That Due To The Many Constitutional Violations That He did Not Receive A Fair Trial.

Supporting FACTS (Tell your story briefly without citing cases or law.): (a).- Richard Asserts That His Right To A Fair Trial / Right To An Impartial Jury Was Violated Through And Through. Because For Instance: (1). Since The Complaint Against Richard Was Fatally Flawed it Completely Invalidated The Court Of Proper Jurisdiction In This Case. Reason Why Is Because, if The Court Starts Out Under An Invalid Complaint Then it forces The Court Into Automatically Making Erroneous Rulings. And To Take One To Trial On An Invalid Complaint Forces The Court To Misinstruct The Jury. And The Jury Erroneously Convicts A Defendant, Then The Court Erroneously Sentences The Defendant. Therefore The Sentence Is Illegal The Only Cure Is To Release Mr. Richard, Now!

(b).- The Fatally Flawed Complaint Erroneously Lists (2) Counts Of Conspiracy In Which A Necessary Element To A Conspiracy Is The Agreement Of Two Or More. - By The Charging document Listing A Conspiracy And Not Specifying Who Mr. Richard's Co-Conspirators Were, And By Richard Being Charged Alone It deprives Mr. Richard Of His Due Notice Of Charges. - And The Case Must Be Reversed!

(c).- By Combining The Charges Of Two Separate, distinctive Cases, Then It Prejudiced The Jury To Hear The Conjoined And Confungled Evidence. It Prejudiced The Jury On Finding Guilt Beyond A Reasonable Doubt Pertaining To Each Element, Of Each Count, Charged. Which Violated Due Process Of Law.

-12

(c) - Continued.
The Due Process Of Law Standards, Require A defendant To Be Convicted OFF Each Element Constituting The Crime. Combining The Charges did Taint The Jury Instructions Which Violated Richard's Right To Fair Trial!

(d). - The 14th Amendment To The U.S. Const. Equal Protection Of Laws, clause Does Guarantee That Each Defendant Has The Right To A Fair Trial. So, Herein Mr. Richard, Now Urges To Totally Incorporate All Issues Herein.

(e). - Mr. Richard, Now Is Without The Benefit Of His Case -File And discovery. But Richard, Now Preserves The Evidentiary claims Herein. Urging That Evidence Was Lost - Destroyed - Spoilation - Contaminated.

PART (II)
LEGAL GROUND SIX
(II).- U.S. CONST. 6TH AM.- RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. FEDERALIZE

UNDER U.S. CONST. 6TH AMEND. - A CRIMINAL DEFENDANT HAS THE RIGHT TO COUNSEL, IN ANY & ALL PROSECUTIONS, PURSUANT TO: GIDEON -VS- WAINWRIGHT, 372 U.S. 335 (1963) AND, STRICKLAND -VS.- WASHINGTON, 466 U.S. 668. HERE MR. RICHARD, CLAIMS THAT HIS ATTORNEY didn't do HIS JOB WHICH IS TO ADVOCATE FOR MR. RICHARD'S U.S. CONST RIGHTS. BUT IN FACT MR. PERCIVAL, Didn't:

(A).- INVESTIGATE MR. RICHARD'S, VERSION OF THE CASE, WHEN MR. RICHARD TOLD HIS ATTY THE STORY OF THE CASE. IN THE VERSION MR. RICHARD, DESCRIBED LUIS RUIZ'S SCAM, SCANDAL OF HOW MR. RUIZ, Would GO AROUND LOOTING EACH AUTOMATIC TELLER MACHINE. AND WITHIN THE STORY WAS THE PROPOSED DEFENSE THAT MR. RICHARD, URGED HIS ATTORNEY TO PURSUE.

(B).- MR. RICHARD,'S ATTORNEY FAILED TO CHALLENGE MR. RICHARD'S, VOLUNTARY STATEMENTS UNDER THE MIRANDA -VS.- ARIZONA, DOCTRINE. WHICH MR. RICHARD, REQUEST REVIEW OF THE VIOLATION OF HIS U.S. CONST. 5TH AMEND. RIGHT TO REMAIN SILENT.

(C).- MR. RICHARD,'S ATTORNEY AT SOME POINT BROKE THE LINES OF COMMUNICATION, WHICH did RESULT IN A "BREAKDOWN" IN COMMUNICATIONS", THAT BREAKDOWN AFFECTED MR. RICHARD'S RIGHT. TO PUT TOGETHER A DEFENSE.

(1). ① Mr. Richard's Attorney Failed To Object To The Complaint Being Fatally Flawed. ② Mr. Richard's, Attorney Knew That If The Complaint is Fatally Flawed Then It Weaves Structural Error Into The Fabric Of The Case. It Diverts Justice Being Served. It Taints The Jury Instructions, And That Results In A Tainted Conviction. ③ Mr. Richard's Attorney Failed To Object To The Jointed Trial Itself. ④ Richard's Attorney Failed To Put In A Motion For A New Trial. ⑤ Richard's Attorney Handled Mr. Richard's Trial & Appeal Against Richard's Wishes. And Since Mr. Richard's, Attorney Performance fell Below The Reasonable Standard [redacted] Outlined In Strickland-Vs-Washington 104. S. Ct. Therefore Richard's Conviction Must Be Vacated. And Richard, Exonerated Under The Actual Innocence Doctrine.

15

PART. III

GROUND SEVEN

MR. RICHARD, URGES THAT IT IS "CUMULATIVE ERROR" FOR THE OCCURRANCES THAT HAPPENED IN THIS CASE. THE CUMULATION OF ERRORS AMOUNTS TO:

(A). STRUCTURAL ERROR, IN WHICH CAUSED AN ILLEGAL CONVICTION AMOUNTING IN A "FUNDAMENTAL MISCARRIAGE OF JUSTICE". BECAUSE MR. RICHARD, IS ACTUALLY INNOCENT. - PURSUANT TO: THE VIOLATION OF DUE PROCESS OF LAW! (BY CHARGING RICHARD (ALONE DEFENDANT) WITH SEVERAL CONSPIRACIES IN ONE CASE.)
IN, BARREN -VS- STATE, 99 NEV. 661, IT IS AGAINST THE CONSTITUTION TO TAKE A DEFENDANT TO TRIAL WITHOUT PROPER SPECIFIC NOTICE OF CHARGES. AND IN MR. RICHARD, CASE THE STATE CHARGED RICHARD WITH A CONSPIRACY WITHOUT NAMING ANY CO-CONSPIRATOR AND THAT ALONE CAUSES THE COMPLAINT TO BE FALSE!

- CASELAW OF INVALID COMPLAINTS THAT SHOW THE CONVICTION IS ILLEGAL, AND MUST BE VACATED!

- BARREN -VS- STATE, 99 NEV. 661
- U.S. -V- UMAGAT, 998 F.2d 770
- U.S. -V- GARRETT, 797 F.2d 656
- U.S. -V- DUCKETT, 550 F.2d 1027
- BERGER -V- U.S. 55 S.CT. 629
- NORTON -V- 8TH JUD. DIST. CT. 2012 NEV. UNPUBL. LEXIS 1326
- SIMPSON -V- 8TH JUD. DISTR. CT. 88 NEV. 654
- U.S. -V- DU BO, 186 F. 3d 1177

Conclusion

In This Instant Case Mr. Richard, Has Illustrated, Elaborated On How Here The Problems Of Errors Listed Below, Do Exist And Pervade The Proceedings In This Case. Such As:

- The Fatally Flawed Complaint
- The Misjoinder Of Offenses
- The Lack Of Subject Matter Jurisdiction
- Structural Error
- The Abridgement Of The Right To A Fair Trial
- The Ineffective Assistance Of Counsel
- The Cumulative Errors Overall.

And All Of These Issues In & Of Themselves Are Reversible, So Together These Issues Here Should And Do Require Mr. Richard's Conviction To Be Vacated!

AFFIDAVIT

I, DVONTAE D. RICHARD, DO DECLARE UNDER THE PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE. DATED THIS 18 DAY OF June 2019.

* [signature]

* 06-18-2019
DATE

EXHIBIT

A

CONSPIRACY

199.480. Penalties.

1. Except as otherwise provided in subsection 2, whenever two or more persons conspire to commit murder, robbery, sexual assault, kidnapping in the first or second degree, arson in the first or second degree, involuntary servitude in violation of NRS 200.463 or 200.464, a violation of any provision of NRS 200.465, trafficking in persons in violation of NRS 200.467 or 200.468, sex trafficking in violation of NRS 201.300 or a violation of NRS 205.463, each person is guilty of a category B felony and shall be punished:

(a) If the conspiracy was to commit robbery, sexual assault, kidnapping in the first or second degree, arson in the first or second degree, involuntary servitude in violation of NRS 200.463 or 200.464, a violation of any provision of NRS 200.465, trafficking in persons in violation of NRS 200.467 or 200.468, sex trafficking in violation of NRS 201.300 or a violation of NRS 205.463, by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years; or

(b) If the conspiracy was to commit murder, by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years,

and may be further punished by a fine of not more than $5,000.

2. If the conspiracy subjects the conspirators to criminal liability under NRS 207.400, they shall be punished in the manner provided in NRS 207.400.

3. Whenever two or more persons conspire:

(a) To commit any crime other than those set forth in subsections 1 and 2, and no punishment is otherwise prescribed by law;

(b) Falsely and maliciously to procure another to be arrested or proceeded against for a crime;

(c) Falsely to institute or maintain any action or proceeding;

(d) To cheat or defraud another out of any property by unlawful or fraudulent means;

(e) To prevent another from exercising any lawful trade or calling, or from doing any other lawful act, by force, threats or intimidation, or by interfering or threatening to interfere with any tools, implements or property belonging to or used by another, or with the use or employment thereof;

EXHIBIT "B"

NOTES TO DECISIONS

The words "general law" as used in this section mean a general law passed by the Legislature. Hardgrave v. State ex rel. State Hwy. Dep't, 80 Nev. 74, 389 P.2d 249, 1964 Nev. LEXIS 124 (1964).

The state under the doctrine of sovereign immunity is immune from liability for its negligent construction of roads. Hardgrave v. State ex rel. State Hwy. Dep't, 80 Nev. 74, 389 P.2d 249, 1964 Nev. LEXIS 124 (1964).

Cited in: Hill v. Thomas, 70 Nev. 389, 270 P.2d 179, 1954 Nev. LEXIS 64 (1954); State ex rel. Brennan v. Bowman, 89 Nev. 330, 512 P.2d 1321, 1973 Nev. LEXIS 515 (1973).

23. Enacting clause; law to be enacted by bill.

The enacting clause of every law shall be as follows: "The people of the State of Nevada represented in Senate and Assembly, do enact as follows," and no law shall be enacted except by bill.

NOTES TO DECISIONS

This constitutional provision is mandatory and an act not in the proper form is void and unenforceable. State ex rel. Chase v. Rogers, 10 Nev. 250, 1875 Nev. LEXIS 24 (1875).

This section is an imperative mandate of the people in their sovereign capacity to the Legislature, requiring that all laws to be binding upon them shall, upon their face, express the authority by which they were enacted, and an act which does not show such authority upon its face is not a law. State ex rel. Chase v. Rogers, 10 Nev. 250, 1875 Nev. LEXIS 24 (1875).

Each of the words are necessary in the enacting clause. The words "represented in senate and assembly," expressive of the authority which passed the law, are as necessary as the words "the people" or any other words of the enacting clause. State ex rel. Chase v. Rogers, 10 Nev. 250, 1875 Nev. LEXIS 24 (1875).

OPINIONS OF ATTORNEY GENERAL

The enacting clause is mandatory. A joint resolution adopted by both houses cannot become a valid law if it does not contain the enacting clause required by this section. AGO 65 (7-25-1951).

24. Lotteries.

1. Except as otherwise provided in subsection 2, no lottery may be authorized by this State, nor may lottery tickets be sold.

2. The State and the political subdivisions thereof shall not operate a lottery. The legislature may authorize persons engaged in charitable activities or activities not for profit to operate a lottery in the form of a raffle or drawing on their own behalf. All proceeds of the lottery, less expenses directly related to the operation of the lottery, must be used only to benefit charitable or nonprofit activities in this state. A charitable or nonprofit organization shall not employ or otherwise engage any person to organize or operate its lottery for compensation. The legislature may provide by law for the regulation of such lotteries.

Amendments. The 1990 amendment to this section was proposed and passed in Statutes of Nevada 1987, p. 2468; agreed to and passed in Statutes of Nevada 1989, p. 2249; and ratified at the 1990 general election.

NOTES TO DECISIONS

A lottery is a game of hazard in which small sums are ventured for the chance of obtaining greater. State ex rel. Murphy v. Overton, 16 Nev. 136, 1881 Nev. LEXIS 23 (1881).

A ticket which purports to entitle the holder to whatever prize may be drawn by its corresponding number in a prize scheme is a lottery ticket. State ex rel. Murphy v. Overton, 16 Nev. 136, 1881 Nev. LEXIS 23 (1881).

When the element of chance enters into the distribution of prizes it is a lottery regardless of the name by which it is called; courts will not inquire into the name but will determine the character of the scheme by the nature of the transaction or business in which the parties are engaged. State ex rel. Murphy v. Overton, 16 Nev. 136, 1881 Nev. LEXIS 23 (1881).

Neither the charitable character nor the name given to the scheme can legitimize a lottery. The act authorizing the Nevada Benevolent Association to give public entertainments or gift concerts and to sell tickets of admission entitling the holder to participate in a distribution of awards by raffle or other scheme of like character, for the purpose of providing means to erect an insane asylum, provided for a lottery and therefore was unconstitutional; the character of the scheme was in no way changed by the charitable purpose of the act, nor by calling the drawings "entertainments or gift concerts." Ex parte Blanchard, 9 Nev. 101, 1874 Nev. LEXIS 1 (1874).

Public and private lotteries are prohibited. The argument that the words "by this state" were inserted in this provision for the purpose of preventing the Legislature from authorizing public lotteries as a means of raising revenues, and that this provision was not intended to prevent the Legislature from authorizing private lotteries, is wholly untenable. This language applies to all lotteries, whether public or

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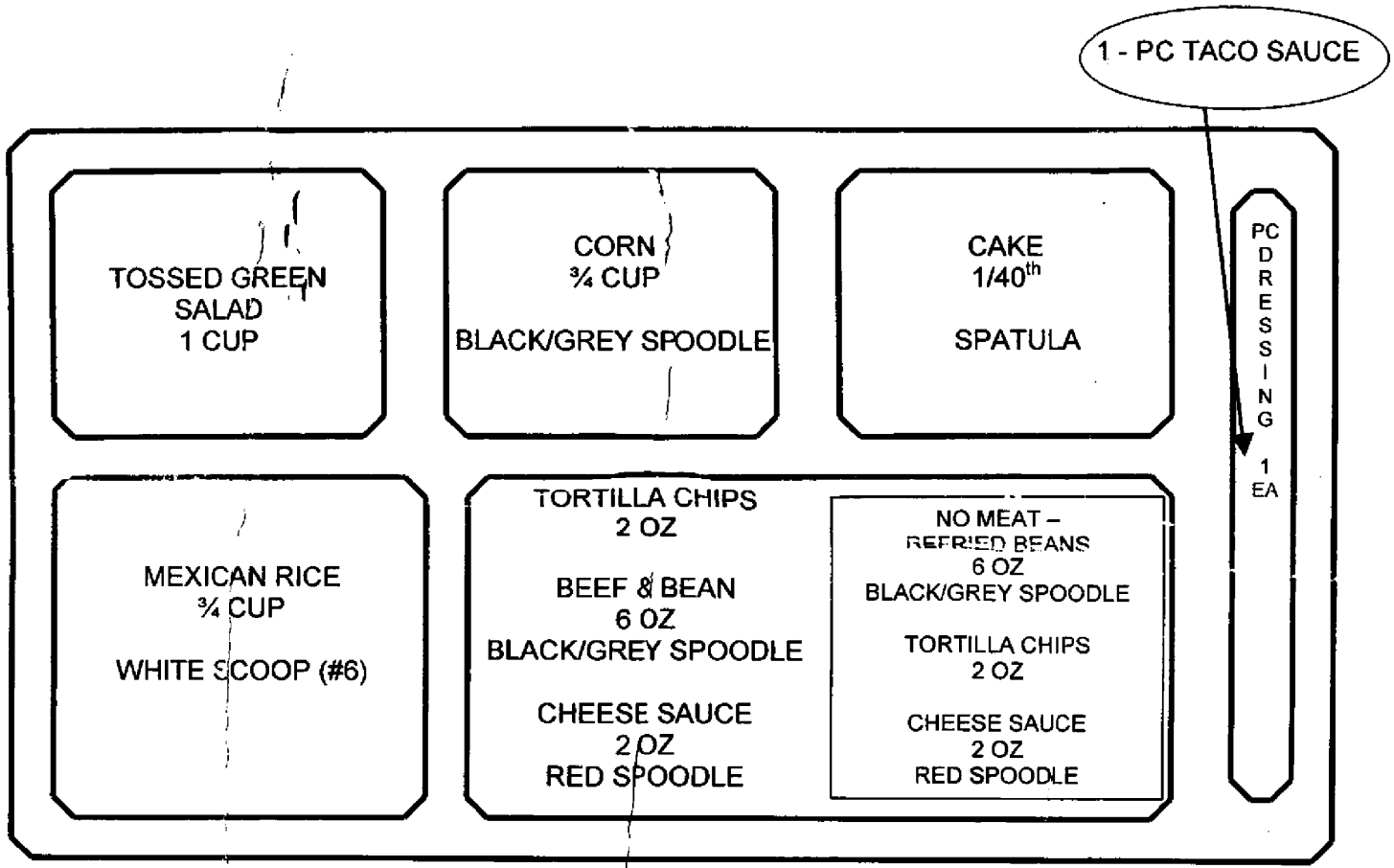

Approved: Duane Wilson, FSM III _____ _____ _____

Print Name **Signature** **Date**

Divontae Richard #1089115
H.D.S.P
P.O. Box 650
Indian Springs NV 89070.

STEVEN D. GRIERSON.
CLERK OF THE COURT
200 LEWIS AVE 3rd FLOOR
LAS VEGAS NV, 89118-1160

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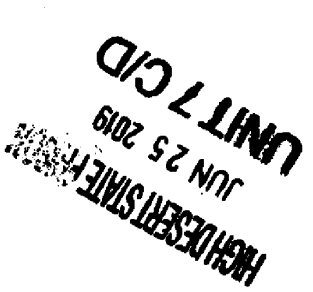

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DISTRICT COURT

CLARK COUNTY, NEVADA

Dvontae Richard,

Petitioner,

vs.

Warden of High Desert Prison,

Respondent,

Case No: A-19-797693-W
Department 28
(C15-308258-1)

ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS

FILE WITH MASTER CALENDAR

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on June 27, 2019. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's Calendar on the 2nd day of October, 2019, at the hour of 9:00 o'clock for further proceedings.

Ronald J. Israel 7-3-19

District Court Judge

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RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
CHARLES THOMAN
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Nevada Bar #12649
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
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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

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS

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

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through CHARLES THOMAN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in State's Response to Defendant's Petition for Writ Of Habeas Corpus.

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

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. The State's Response 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.

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.

ARGUMENT

Petitioner's claims of substantive error in Grounds One through Five of his Petition are waived. Petitioner's claims of ineffective assistance of trial counsel in Ground Six are waived and/or without legal or factual merit. 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 should be 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. Each of these substantive claims could have been raised on direct appeal, they are waived and should be 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. 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. Nowhere in the instant Petition does Petitioner even allege, must less establish, good cause to present his substantive claims before the court. As 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 must be 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).

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).

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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 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.

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. Here, 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. Petitioner fails to allege, much less establish, that naming his co-conspirator would have exonerated Petitioner of his involvement in the underlying offenses.

Petitioner also presupposes that trial counsel failed to investigate Mr. Ruiz's involvement in the conspiracy; 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. 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. 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, 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 here should therefore be denied.

b. Counsel Was Not Ineffective For The Alleged Failure To Suppress Defendant'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).

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, it must be summarily dismissed pursuant to NRS 34.810(1):

> 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. To the extent that this claim is proper as an ineffective assistance of counsel claim, such a claim fails 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.

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 should therefore be denied.

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

Petitioner advances a single sentence bereft of legal or factual support 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-

> Communications", 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, 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).

Even assuming 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). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. See id. As set forth throughout Section II of the instant Response *supra* and *infra*, 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. 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 here should therefore be denied.

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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—without any legal or factual support whatsoever—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.

First, 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. 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, 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 is wrong. 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.
>
> ***
>
> 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).

Thus, as the State can bring conspiracy charges against a defendant without naming co-conspirators, any motion to challenge the Complaint/Information on this basis would have been futile; 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. It is unclear what Petitioner's argument is here. First, there was no joinder or consolidation of cases in the instant case; thus, as trial counsel could not have opposed a consolidation that never occurred, counsel cannot be ineffective for failing to oppose the same. Second, 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, 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; counsel cannot be ineffective for failing to make futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Similarly, 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 wholly without merit and should therefore be denied.

III. CLAIMS OF CUMULATIVE ERROR ARE NOT AVAILABLE IN HABEAS

Petitioner claims that cumulative errors warrant granting habeas relief. Petition at 16-17. 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 should 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). Here, Petitioner has not demonstrated that any individual claim warrants relief, and as such, there is nothing to cumulate. Therefore, Petitioner's cumulative error claim should be denied.

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CONCLUSION

For the reasons set forth above, this court should deny Petitioner's Petition for Writ of Habeas Corpus.

DATED this 20th day of August, 2019.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #1565

BY /s/ CHARLES THOMAN
CHARLES THOMAN
Chief Deputy District Attorney
Nevada Bar #12649

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 20th day of August, 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 /s/ J. MOSLEY
Secretary for the District Attorney's Office

OSCC

DISTRICT COURT

CLARK COUNTY, NEVADA

****

Dvontae Richard, Plaintiff(s), vs. Warden of High Desert Prison, et al., Defendant(s).	Case No.: A-19-797693-W Department 28

CIVIL ORDER TO STATISTICALLY CLOSE CASE

Upon review of this matter and good cause appearing,
IT IS HEREBY ORDERED that the Clerk of the Court is hereby directed to statistically close this case for the following reason:

DISPOSITIONS:

- ☐ Default Judgment
- ☐ Judgment on Arbitration
- ☐ Stipulated Judgment
- ☐ Involuntary Dismissal
- ☐ Motion to Dismiss by Defendant(s)
- ☐ Stipulated Dismissal
- ☒ Summary Judgment

(State to prepare FFCL and Order)

- ☐ Voluntary Dismissal
- ☐ Transferred (before trial)
- ☐ Non-Jury – Disposed After Trial Starts
- ☐ Non-Jury – Judgment Reached
- ☐ Jury – Disposed After Trial Starts
- ☐ Jury – Verdict Reached
- ☐ Other Manner of Disposition

DATED this 2nd day of October, 2019.

Ronald J. Israel

RONALD J. ISRAEL
DISTRICT COURT JUDGE

RONALD J. ISRAEL
DISTRICT JUDGE
DEPT XXVIII
LAS VEGAS, NV 89155

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

DVONTAE RICHARD, Plaintiff, vs. WARDEN OF HIGH DESERT PRISON, Defendant.	CASE#: A-19-797693-W DEPT. XXVIII

BEFORE THE HONORABLE RONALD J. ISRAEL, DISTRICT COURT JUDGE

WEDNESDAY, OCTOBER 2, 2019

RECORDER'S TRANSCRIPT OF HEARING
PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

For the Plaintiff: PRO SE

For the Defendant: BERNARD ZADROWSKI, ESQ.

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

Las Vegas, Nevada, Monday, October 2, 2019

[Case called at 11:14 a.m.]

THE COURT: 797693. This is a Pro Se petition for Writ of Habeas. I – the defendant provided extensive briefing in regards to his challenges. I'll go through them.

Shouldn't it be – somebody needs to – is it the AG or no?

MR. ZADROWSKI: For what?

THE COURT: To – for the order.

MR. ZADROWSKI: Oh.

THE COURT: Or let me see who –

MR. ZADROWSKI: Well we responded, it looks like.

THE COURT: Oh, okay, yeah, you did. All right. Then you're the one that's going to be taking down the notes.

As to Grounds 1 through 5, and I don't think I need to restate them. They're clearly in his petition. Those grounds should have been raised on direct appeal. They're clearly appellate issues from his trial that could have been raised.

As to the other issue regarding ineffective assistance, the petitioner claims ineffective assistance under *Strickland* but he doesn't show anything other than bare allegations as to ineffective assistance. He argues regarding the co-conspirator should be named which is not required in the statute and therefore there can't be any ineffective assistance since that's not a proper allegation.

He also argues failure to suppress evidence, but these issues were raised on direct appeal and therefore are both moot as far as the writ and regarding ineffective assistance.

He raises the failure to communicate but he makes a bare allegation that the communications that were done were not adequate. However, this – there was a, and I can't remember how long the trial was, where clearly the petitioner and counsel communicated on a regular basis. So I'm not even sure, and he certainly has not presented anything that would even raise the issue of ineffective assistance. The Court is well aware that he's not entitled to counsel that he likes as long as counsel is effective and does his job which there was no information, I won't even say evidence, information introduced that he did not provide effective assistance regarding the investigation he – and/or the issue regarding conspiracy.

Petitioner set, and I'm quoting now from the State: the petitioner set forth no law whatsoever regarding the basis to suppress the statements.

There was – this was brought up at the time of trial and argued and denied. So somehow that the trial counsel failed to file a motion to suppress is clearly opposite of what is in the record. And so that is not founded in fact.

In addition, he does argue that additional facts should have been brought up in the appeal but case law is clear that not every issue either should or is appropriate to bring up in that it clouds effective issues that were brought up or reasonable issues to be brought up. So there's

no grounds under that.

Hopefully, I covered everything. I have lots of notes. So prepare an order and I will review it consistent with my notes and hopefully I covered everything.

Thank you.

MR. ZADROWSKI: Your Honor, can I get a transcript just to be clear that my notes are, you know –

THE COURT: Absolutely.

MR. ZADROWSKI: Thank you.

[Hearing concluded at 11:21 a.m.]

[Hearing recalled at 11:45 a.m.]

THE COURT: A797693, Dvontae Richard. I just wanted to add, because I didn't cover, and as I said, it was a very extensive brief. His last, the petitioner's last issue – what, did I lose it again?

THE CLERK: Accumulative [sic] error.

THE COURT: What's that?

THE CLERK: The accumulative [sic] error.

THE COURT: Thank you. Yes, the cumulative error. Although, that wasn't – well, it was certainly brought up, the – on page, well, I won't find it in his brief. It was brought up. He addresses his, the fact that he believes it was cumulative error, which first of all I think is an appeal issue. Second of all, he doesn't explain what the cumulative error was or what errors were cumulative in nature. And third, it doesn't

appear that the issues he even brings up were error.

So I need to – put that in there too. Thank you.

[Hearing concluded at 11:47 a.m.]

* * * * * * *

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

Judy Chappell
Court Recorder/Transcriber

ORDR
STEVEN B. WOLFSON
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Nevada Bar #001565
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DVONTAE RICHARD,
#2806958

Defendant.

CASE NO: A-19-797693-W

DEPT NO: XXVIII

ORDER FOR TRANSCRIPT

Upon the ex-parte application of the State of Nevada, represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through, TALEEN PANDUKHT, Chief Deputy District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that a transcript of the Petition for Writ of Habeas Corpus heard on the 2nd day of October, 2019, be prepared by Judy Chappell, Court Recorder for the above-entitled Court.

DATED this 8 day of October, 2019.

Ronald J. Israel

DISTRICT JUDGE
RONALD J. ISRAEL

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

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

jg/CAU

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10/7/19

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

11/20/19

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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:
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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

Electronically Filed
11/5/2019 6:47 AM
Steven D. Grierson
CLERK OF THE COURT

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

11/20/19

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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

FILED
DEC - 2 2019
CLERK OF COURT

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

RECEIVED
DEC 02 2019
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

RECEIVED
APPEALS
DEC 13 2019
CLERK OF THE COURT

A-19-797693-W
NOAS
Notice of Appeal
4882002

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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

DUONTAE RICHARD #1089115

HDSP

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

1598679+0688

HIGH DESERT STATE PRISON

NOV 26 2019

UNIT 7 C/D

108

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

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**October 02, 2019**

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

October 02, 2019 **9:00 AM** **Petition for Writ of Habeas Corpus**

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

COURT CLERK: Kathy Thomas

RECORDER: Judy Chappell

REPORTER:

PARTIES PRESENT: Zadrowski, Bernard B. Attorney

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 and Transmittal of Record

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

Pursuant to the Supreme Court order dated January 10, 2020, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 111.

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 21 day of January 2020.

Steven D. Grierson, Clerk of the Court

Heather Ungermann, Deputy Clerk