NOASC
MONIQUE MCNEILL, ESQ.
Nevada State Bar No. 009862
P.O. Box 2451
Las Vegas, Nevada 89125
Tel: (702) 497-9734
Email: monique.mcneill@yahoo.com

DISTRICT COURT

CLARK COUNTY, NEVADA

KENYA SPLOND,

Petitioner,

-vs-

JAMES DZURENDA,
STATE OF NEVADA

Respondents.

CASE NO: A-19-793961-W

DEPT NO: 28

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Defendant, KENYA SPLOND, appeals to the Supreme Court of Nevada from the judgment entered against said Petitioner, denying his Petition for Writ of Habeas Corpus on May 12, 2021.

DATED this 24th day of May, 2021.

By: */s/ Monique McNeill*
MONIQUE A. MCNEILL, ESQ.
Nevada Bar No. 009862
P.O. Box 2451
Las Vegas, Nevada 89125
Phone: (702) 497-9734
Email: monique.mcneill@yahoo.com

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED by the undersigned that on 24h day of May, 2021, I served a true and correct copy of the foregoing **Notice of Appeal** on the parties listed on the attached service list via one or more of the methods of service described below as indicated next to the name of the served individual or entity by a checked box:

VIA U.S. MAIL: by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada.

VIA FACSIMILE: by transmitting to a facsimile machine maintained by the attorney or the party who has filed a written consent for such manner of service.

BY PERSONAL SERVICE: by personally hand-delivering or causing to be hand delivered by such designated individual whose particular duties include delivery of such on behalf of the firm, addressed to the individual(s) listed, signed by such individual or his/her representative accepting on his/her behalf. A receipt of copy signed and dated by such an individual confirming delivery of the document will be maintained with the document and is attached.

BY E-MAIL: by transmitting a copy of the document in the format to be used for attachments to the electronic-mail address designated by the attorney or the party who has filed a written consent for such manner of service.

DATED this 24th day of May, 2021.

By: */s/ Monique McNeill*
MONIQUE A. MCNEILL, ESQ.
Nevada Bar No. 009862
P.O. Box 2451
Las Vegas, Nevada 89125
Phone: (702) 497-9734
Email: monique.mcneill@yahoo.com

SERVICE LIST

ATTORNEYS OF RECORD	PARTIES REPRESENTED	METHOD OF SERVICE
CLARK COUNTY DISTRICT ATTORNEY'S OFFICE 200 E. Lewis Ave Las Vegas, NV 89101 pdmotions@clarkcountyda.com	State of Nevada	☐ Personal service ☒ Email service ☐ Fax service ☐ Mail service

ASTA
MONIQUE MCNEILL, ESQ.
Nevada State Bar No. 009862
P.O. Box 2451
Las Vegas, Nevada 89125
Tel: (702) 497-9734
Email: monique.mcneill@yahoo.com

DISTRICT COURT

CLARK COUNTY, NEVADA

KENYA SPLOND,

Petitioner,

-vs-

JAMES DZURENDA,
STATE OF NEVADA

Respondents.

CASE NO: A-19-793961-W

DEPT NO: 28

CASE APPEAL STATEMENT

1. **Name of appellant filing this case appeal statement:** Kenya Splond.

2. **Identify the judge issuing the decision, judgment, or order appealed from:** Ronald Israel, Eighth Judicial District Court, Dept. 28;

3. **Identify all parties to the proceedings in the district court (the use of et al. to denote parties is prohibited):** The State of Nevada, Respondent, Kenya Splond, Petitioner;

4. **Identify all parties involved in this appeal (the use of et al. to denote parties is prohibited):** The State of Nevada, Respondent, Kenya Splond, Petitioner;

5. **Set forth the name, law firm, address and telephone number of all counsel on appeal and identify the party or parties whom they represent:** Counsel for Respondent,

Clark County District Attorney's Office, Regional Justice Center, 200 Lewis Ave., 3rd Floor, Las Vegas, NV 89101, (702) 671-2500; Counsel for Petitioner, Monique McNeill, P.O. Box 2451, Las Vegas, Nevada 89125.

6. **Indicate whether appellant was represented by appointed or retained counsel in the district court:** appointed;

7. **Indicate whether appellant is represented by appointed or retained counsel on appeal:** appointed;

8. **Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:** Appellant has appointed counsel as he is indigent.

9. **Indicate the date the proceedings commenced in the District Court (e.g., date complaint, indictment, information, or petition was filed):** A Petition for Writ of Habeas Corpus was filed on April 29, 2019.

10. **A brief description of the nature of the action and result in the District Court, including the type of judgment or order being appealed and the relief granted by the District Court:** This is an appeal in a of a denial of a post-conviction petition for writ of habeas corpus.

11. **Whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding:** Yes; Splond v. State, 72545.

/ / /

/ / /

12. **Whether the appeal involves child custody or visitation:** No;

DATED this 24th day of May, 2021.

By: */s/ Monique McNeill*
MONIQUE A. MCNEILL, ESQ.
Nevada Bar No. 009862
P.O. Box 2451
Las Vegas, Nevada 89125
Phone: (702) 497-9734
Email: monique.mcneill@yahoo.com

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED by the undersigned that on 24th day of May, 2021, I served a true and correct copy of the foregoing **Notice of Appeal** on the parties listed on the attached service list via one or more of the methods of service described below as indicated next to the name of the served individual or entity by a checked box:

VIA U.S. MAIL: by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada.

VIA FACSIMILE: by transmitting to a facsimile machine maintained by the attorney or the party who has filed a written consent for such manner of service.

BY PERSONAL SERVICE: by personally hand-delivering or causing to be hand delivered by such designated individual whose particular duties include delivery of such on behalf of the firm, addressed to the individual(s) listed, signed by such individual or his/her representative accepting on his/her behalf. A receipt of copy signed and dated by such an individual confirming delivery of the document will be maintained with the document and is attached.

BY E-MAIL: by transmitting a copy of the document in the format to be used for attachments to the electronic-mail address designated by the attorney or the party who has filed a written consent for such manner of service.

DATED this 24th day of May, 2021.

By: */s/ Monique McNeill*
MONIQUE A. MCNEILL, ESQ.
Nevada Bar No. 009862
P.O. Box 2451
Las Vegas, Nevada 89125
Phone: (702) 497-9734
Email: monique.mcneill@yahoo.com

SERVICE LIST

ATTORNEYS OF RECORD	PARTIES REPRESENTED	METHOD OF SERVICE
CLARK COUNTY DISTRICT ATTORNEY'S OFFICE 200 E. Lewis Ave Las Vegas, NV 89101 pdmotions@clarkcountyda.com	State of Nevada	☐ Personal service ☒ Email service ☐ Fax service ☐ Mail service

REQT
MONIQUE MCNEILL, ESQ.
Nevada State Bar No. 009862
P.O. Box 2451
Las Vegas, Nevada 89125
Tel: (702) 497-9734
Email: monique.mcneill@yahoo.com

DISTRICT COURT

CLARK COUNTY, NEVADA

KENYA SPLOND, Petitioner, -vs- JAMES DZURENDA, STATE OF NEVADA Respondents.	)	CASE NO: A-19-793961-W DEPT NO: 28

REQUEST FOR TRANSCRIPT OF PROCEEDINGS

TO: Judy Chappell,

Kenya Splond, Petitioner named above, requests preparation of transcript of certain portions of the proceedings before the district court, as follows:

Specific individual dates of proceedings for which transcripts are being requested (a range of dates is not acceptable):

- Hearing on March 3, 2021
- Evidentiary Hearing on April 15, 2021

Specific portions of the transcript being requested (e.g., suppression hearing, trial, closing argument, etc.): Hearing on Petition; Evidentiary Hearing.

This notice requests a transcript of only those portions of the district court proceedings that counsel reasonably and in good faith believes are necessary to determine whether appellate issues

are present. Voir dire examination of jurors, opening statements and closing arguments of trial counsel, and the reading of jury instructions shall not be transcribed unless specifically requested above.

DATED this 24th day of May, 2021.

By: */s/ Monique McNeill*
MONIQUE A. MCNEILL, ESQ.
Nevada Bar No. 009862
P.O. Box 2451
Las Vegas, Nevada 89125
Phone: (702) 497-9734
Email: monique.mcneill@yahoo.com

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2021, I personally served, via email, a copy of the foregoing **Request for Transcripts** to:

Judy Chappell at chappellj@clarkcountycourts.us

By: /s/ Monique McNeill

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. A-19-793961-W

Kenya Splond, Plaintiff(s)	§	Location:	**Department 28**
vs.	§	Judicial Officer:	**Israel, Ronald J.**
James Dzurenda, Defendant(s)	§	Filed on:	**04/29/2019**
	§	Cross-Reference Case Number:	**A793961**

CASE INFORMATION

Related Cases
C-14-296374-1 (Writ Related Case)

Statistical Closures
04/15/2021 Summary Judgment

Case Type: **Writ of Habeas Corpus**

Case Status: **04/15/2021 Closed**

DATE — CASE ASSIGNMENT

Current Case Assignment

Case Number	A-19-793961-W
Court	Department 28
Date Assigned	04/29/2019
Judicial Officer	Israel, Ronald J.

PARTY INFORMATION

Plaintiff	**Splond, Kenya**	**McNeill, Monique A.** *Retained* 702-497-9734(W)
Defendant	**Dzurenda, James**	**Wolfson, Steven B** *Retained* 702-671-2700(W)

DATE — EVENTS & ORDERS OF THE COURT — INDEX

EVENTS

04/29/2019 Inmate Filed - Petition for Writ of Habeas Corpus
Party: Plaintiff Splond, Kenya
Petition for Writ of Habeas Corpus

05/08/2019 Order for Petition for Writ of Habeas Corpus
Order for Petition for Writ of Habeas Corpus

07/18/2019 Motion
Filed By: Plaintiff Splond, Kenya
Plaintiff's- Motion and Order for Transportation of Inmate for Court Appearance or, in the Alternative, for Appearance by Telephone or Video Conference

07/18/2019 Notice of Motion
Filed By: Plaintiff Splond, Kenya
Paintiff's - Notice of Motion

08/26/2019 Addendum
Filed By: Plaintiff Splond, Kenya
Addendum Petition for Writ of Habeas Corpus

10/01/2019	Petition for Writ of Habeas Corpus *Petition for Writ of Habeas Corpus "Federalize"*
10/10/2019	Order for Petition for Writ of Habeas Corpus *Order for Petition for Writ of Habeas Corpus*
11/12/2019	Notice of Motion Filed By: Plaintiff Splond, Kenya *Notice of Motion*
11/12/2019	Notice of Motion Filed By: Plaintiff Splond, Kenya *Notice of Motion to Transport Petitioner to Court*
11/12/2019	Motion Filed By: Plaintiff Splond, Kenya *Motion to Transport*
11/12/2019	Notice of Motion Filed By: Plaintiff Splond, Kenya *Notice of Motion for Evidentiary Hearing*
11/12/2019	Motion for Appointment of Attorney Filed By: Plaintiff Splond, Kenya *Motion for the Appointment of Counsel*
11/12/2019	Petition for Writ of Habeas Corpus Filed by: Plaintiff Splond, Kenya *Petition for Writ of Habeas Corpus*
11/13/2019	Clerk's Notice of Hearing *Notice of Hearing*
11/25/2019	Response *State's Response to Defendant's Petition for Writ of Habeas Corpus, Motion for Appointment of Counsel, and Request for Evidentiary Hearing*
03/17/2020	Ex Parte Application Party: Plaintiff Splond, Kenya *Ex Parte Application to Appoint Expert/Investigator*
06/05/2020	Stipulation and Order *Stipulation And Order*
06/05/2020	Ex Parte Order Filed By: Plaintiff Splond, Kenya *Ex Parte Order to Appoint Investigator*
10/12/2020	Supplement Filed by: Plaintiff Splond, Kenya *SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)*

10/12/2020 Exhibits
Filed By: Plaintiff Splond, Kenya
Exhibits In Support of Supplemental Petition

01/12/2021 Response
State's Response to Petitioner's Supplemental Memorandum of Points and Authorities in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction)

01/25/2021 Reply in Support
Filed By: Plaintiff Splond, Kenya
Petitioner's Reply in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction)

02/02/2021 Order for Production of Inmate
Order For Production Of Inmate Kenya Splond, BAC #1173052 - March 3, 2021

03/11/2021 Supplement
Filed by: Plaintiff Splond, Kenya
Second Supplemental Memorandum of Points and Authorities in Support of Defendant'sPetition for Writ of Habeas Corpus (Post Conviction)

05/12/2021 Findings of Fact, Conclusions of Law and Order
Findings Of Fact, Conclusions Of Law And Order

05/19/2021 Notice of Entry of Findings of Fact, Conclusions of Law
Filed By: Defendant Dzurenda, James
Notice of Entry of Findings of Fact, Conclusions of Law and Order

05/24/2021 Notice of Appeal (Criminal)
Party: Plaintiff Splond, Kenya
Notice of Appeal

05/24/2021 Case Appeal Statement
Filed By: Plaintiff Splond, Kenya
Case Appeal Statement

05/24/2021 Request
Request for Transcripts

HEARINGS

08/07/2019 **Petition for Writ of Habeas Corpus** (9:00 AM) (Judicial Officer: Israel, Ronald J.)
Off Calendar;
Journal Entry Details:
Defendant not present. COURT NOTED there is no proof of service and ORDERED, matter OFF CALENDAR. NDC CLERK'S NOTE: A copy of this minute order has been mailed to: Kevin Splond, #1173052 High Desert State Prison 22010 Cold Creek Road PO Box 650 Indian Springs, Nevada 89070 ;

12/16/2019 **Petition for Writ of Habeas Corpus** (9:00 AM) (Judicial Officer: Israel, Ronald J.)
12/16/2019, 02/01/2021, 04/15/2021
Off Calendar;
Hearing Set;
Denied;
Off Calendar;
Hearing Set;

Denied;
Journal Entry Details:
Deft. SPLOND not present, in custody in the Nevada Department of Corrections (NDC). Correction Officer noted the Deft. was not transported. Ms. McNeill noted the State did not do the order to transport and further noted they could proceed today. Ms. McNeill submitted on the briefs. Court noted the matter was well briefed. State submitted. Court noted upon review of all the pleadings, Court will allow a limited Evidentiary Hearing regarding prior counsel, Mr. Kocka and conveying the offer. Court further stated findings regarding all the remaining issues. Court noted issues 1 through 6, the appeal was waived. Court noted the Nevada Supreme Court favors joining cases for judicial effectiveness and referred to NRS 174.155 regarding consolidation. Court further found cited case Strickland prongs was not met and stated further findings addressing; ineffective counsel, photo lineup, identification, experts, instructions for the jury, and the State to prove beyond a reasonable doubt. COURT ORDERED, Limited Evidentiary Hearing SET regarding the conveying offer issue and all remaining issues DENIED. State to prepare an order to transport. The Judicial Executive Assistant (JEA) may schedule a special setting following Court. Otherwise Clerk set the hearing in the ordinary calendar. NDC 03/03/2021 11:00 AM EVIDENTIARY HEARING (LIMITED ISSUE)...PETITION FOR WRIT OF HABEAS CORPUS;
Off Calendar;

Hearing Set;
Denied;

12/16/2019 **Motion** (9:00 AM) (Judicial Officer: Israel, Ronald J.)
Plaintiff s Notice of Motion Re: Petition for Writ of Habeas Corpus
Off Calendar; Plaintiff s Notice of Motion Re: Petition for Writ of Habeas Corpus

12/16/2019 **Motion** (9:00 AM) (Judicial Officer: Israel, Ronald J.)
Plaintiff's Notice of Motion to Transport Petitioner to Court
Off Calendar; Plaintiff's Notice of Motion to Transport Petitioner to Court

12/16/2019 **Motion** (9:00 AM) (Judicial Officer: Israel, Ronald J.)
Plaintiff's Notice of Motion for Evidentiary Hearing
Off Calendar; Plaintiff's Notice of Motion for Evidentiary Hearing

12/16/2019 **Motion for Appointment of Attorney** (9:00 AM) (Judicial Officer: Israel, Ronald J.)
Plaintiff's Motion for the Appointment of Counsel
Granted; Plaintiff's Motion for the Appointment of Counsel

12/16/2019 **All Pending Motions** (9:00 AM) (Judicial Officer: Israel, Ronald J.)
All Pending Motions (12/16/19)
Matter Heard; All Pending Motions (12/16/19)
Journal Entry Details:
PLAINTIFF'S MOTION FOR THE APPOINTMENT OF COUNSEL: Court noted the claims are not difficult, however, the issues that could be presented could be substantial and therefore, COURT ORDERED, Motion GRANTED and Matter SET for Confirmation of Counsel. PETITION FOR WRIT OF HABEAS CORPUS...PLAINTIFF'S NOTICE OF MOTION RE: PETITION FOR WRIT OF HABEAS CORPUS...PLAINTIFF'S NOTICE OF MOTION FOR EVIDENTIARY HEARING...PLAINTIFF'S NOTICE OF MOTION TO TRANSPORT PETITIONER TO COURT: COURT ORDERED, Matters OFF CALENDAR and Matter SET for a status check to set a briefing schedule and reset Petitions. 12/30/19 9:00 AM CONFIRMATION OF COUNSEL...STATUS CHECK: SET BRIEFING SCHEDULE AND RESET PETITION FOR WRIT CLERK'S NOTE: Court Clerk emailed Mr. Christiansen regarding appointment of counsel. kt 12/17/19.;

12/30/2019 **Confirmation of Counsel** (9:00 AM) (Judicial Officer: Thompson, Charles)
Confirmation of Counsel
Counsel Confirmed;

12/30/2019 **Status Check** (9:00 AM) (Judicial Officer: Israel, Ronald J.)
12/30/2019, 02/12/2020
Status Check: Set Briefing Schedule & Reset Petition for Writ
Matter Continued;

Briefing Schedule Set; Status Check: Set Briefing Schedule & Reset Petition for Writ
Journal Entry Details:
Ms. McNeill not present. State requested matter be continued for Counsel to be present. Court noted this matter was on calendar to set a briefing scheduled. At the request of the State, Court trailed matter. Later recalled: Ms. McNeill not present. State noted upon reaching out to Ms. McNeill, who would not be able to be present, Ms. McNeill requested 120 days to file her brief. COURT ORDERED, Briefing Schedule, SET: Plaintiff's brief due by 06/10/2020, Defendant's/State's Opposition by 09/09/2020, Plaintiff's reply by 10/07/2020 and hearing set. 11/04/2020 9:00 AM PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION);
Matter Continued;
Briefing Schedule Set; Status Check: Set Briefing Schedule & Reset Petition for Writ

12/30/2019 **All Pending Motions** (9:00 AM) (Judicial Officer: Thompson, Charles)
Matter Heard;
Journal Entry Details:
CONFIRMATION OF COUNSEL...STATUS CHECK: SET BRIEFING SCHEDULE & RESET PETITION FOR WRIT Ms. Mcneill advised she would be able to accept appointment and CONFIRMED as counsel. Ms. Mcneill advised she was waiting on the file and requested matter be continued. COURT SO ORDERED. NDC CONTINUED TO: 02/12/2020 9:00 AM;

03/03/2021 *CANCELED* **Hearing** (1:30 PM) (Judicial Officer: Israel, Ronald J.)
Vacated
Hearing 1:30 PM

04/15/2021 **Hearing** (1:30 PM) (Judicial Officer: Israel, Ronald J.)
Hearing Re: Petition for Writ of Habeas Corpus (limited to convey of offer issue)
At Request of the State - NOT PREPARED; TO BE RESET./sj
Matter Heard; Hearing Re: Petition for Writ of Habeas Corpus (limited to convey of offer issue)

04/15/2021 **All Pending Motions** (1:30 PM) (Judicial Officer: Israel, Ronald J.)
All Pending Motions (04/15/2021)
Matter Heard; All Pending Motiions (04/15/2021)
Journal Entry Details:
HEARING RE: PETITION FOR WRIT OF HABEAS CORPUS (LIMITED TO CONVEY OF OFFER ISSUE)...PETITION FOR WRIT OF HABEAS CORPUS Deft/ Petitioner SPLOND present, in custody in the Nevada Department of Corrections (NDC). Also present for the State Julia Barker #14823. All parties present by video. Colloquy regarding Defense Counsel filing a 2nd Supplemental memorandum filed after Court's decision. Ms. McNeill noted the supplemental was only for today's issue. State noted the 2nd supplemental went beyond and would only refer to pages 18-20. Court noted Court would allow the 2nd supplement only for what is on today, the issue of conveying an offer. Upon Court's inquiry, Deft/Petitioner agreed to waive his right of attorney client privilege. Hearing: Ms. McNeill INVOKED the EXCLUSIONARY RULE. Testimony from Mr. Frank Kocka, Kenya Splond and Lisa Wallace. Defense rested. State rested. Argument by Ms. McNeill and the State. Court stated findings noting Mr. Kocka's testimony was credible and Mr. Splenda noted in testimony that Mr. Kocka was a good attorney. Court referred to the testimony given by all witnesses. Court noted the Defendant had the burden of proof and his testimony did not seem creditable. Court added the Deft. never questioned or inquired if there was an offer and Mr. Kocka stated many times on the record he was waiting for a better offer. Court finds under Strickland and Fry cases of authority, they had not shown an offer was not conveyed or explained to the Deft. The Strickland prongs were not met and therefore this remaining part of the Petition is DENIED. Court directed the State to prepare the order.;

DISTRICT COURT CIVIL COVER SHEET

A-19-793961-W
Dept: XXVIII

County, Nevada

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

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

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
Kenny Splond	James Dzurenda
P.O. Box 650	
Las Vegas, NV 89070	
Attorney (name/address/phone):	Attorney (name/address/phone):

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

Civil Case Filing Types

Real Property

Landlord/Tenant
- ☐ Unlawful Detainer
- ☐ Other Landlord/Tenant

Title to Property
- ☐ Judicial Foreclosure
- ☐ Other Title to Property

Other Real Property
- ☐ Condemnation/Eminent Domain
- ☐ Other Real Property

Torts

Negligence
- ☐ Auto
- ☐ Premises Liability
- ☐ Other Negligence

Malpractice
- ☐ Medical/Dental
- ☐ Legal
- ☐ Accounting
- ☐ Other Malpractice

Other Torts
- ☐ Product Liability
- ☐ Intentional Misconduct
- ☐ Employment Tort
- ☐ Insurance Tort
- ☐ Other Tort

Probate

Probate *(select case type and estate value)*
- ☐ Summary Administration
- ☐ General Administration
- ☐ Special Administration
- ☐ Set Aside
- ☐ Trust/Conservatorship
- ☐ Other Probate

Estate Value
- ☐ Over $200,000
- ☐ Between $100,000 and $200,000
- ☐ Under $100,000 or Unknown
- ☐ Under $2,500

Construction Defect & Contract

Construction Defect
- ☐ Chapter 40
- ☐ Other Construction Defect

Contract Case
- ☐ Uniform Commercial Code
- ☐ Building and Construction
- ☐ Insurance Carrier
- ☐ Commercial Instrument
- ☐ Collection of Accounts
- ☐ Employment Contract
- ☐ Other Contract

Judicial Review/Appeal

Judicial Review
- ☐ Foreclosure Mediation Case
- ☐ Petition to Seal Records
- ☐ Mental Competency

Nevada State Agency Appeal
- ☐ Department of Motor Vehicle
- ☐ Worker's Compensation
- ☐ Other Nevada State Agency

Appeal Other
- ☐ Appeal from Lower Court
- ☐ Other Judicial Review/Appeal

Civil Writ

Civil Writ
- ■ Writ of Habeas Corpus
- ☐ Writ of Mandamus
- ☐ Writ of Quo Warrant
- ☐ Writ of Prohibition
- ☐ Other Civil Writ

Other Civil Filing

Other Civil Filing
- ☐ Compromise of Minor's Claim
- ☐ Foreign Judgment
- ☐ Other Civil Matters

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

4/29/2019
Date

Prepared by Clerk #27
Signature of initiating party or representative

See other side for family-related case filings.

FFCO
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-

KENYA SPLOND,
#1138461

Defendant.

CASE NO: A-19-793961-W
(C-14-296374-1)

DEPT NO: XXVIII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: APRIL 15, 2021
TIME OF HEARING: 1:30 PM

THIS CAUSE having come on for hearing before the Honorable RONALD ISRAEL, District Judge, on the 15 day of April, 2021, the Petitioner being present, represented by MONIQUE MCNEILL, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through BINU PALAL, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On April 8, 2015, Kenya Splond (hereinafter "Petitioner"), was charged by way of an Amended Indictment with Count 1 – Conspiracy to Commit Robbery (Category B Felony -

NRS 200.380, 199.480 - 50147); Count 2 – Burglary While in Possession of a Firearm (Category B Felony - NRS 205.060 - 50426); Count 3 – Robbery With Use of a Deadly Weapon (Category B Felony - NRS 200.380, 193.165 - 50138) Count 4 – Possession of Stolen Property (Category B Felony - NRS 205.275(2)(c) - 56060), Count 5 – Burglary While in Possession of a Firearm (Category B Felony - NRS 205.060 - 50426); Count 6 – Robbery With Use of a Deadly Weapon (Category B Felony - NRS 200.380, 193.165 - 50138); Count 7 – Burglary While in Possession of a Firearm (Category B Felony - NRS 205.060 - 50426); and Count 8 – Robbery With Use of a Deadly Weapon (Category B Felony - NRS 200.380, 193.165 - 50138).

On April 20, 2015, Petitioner's defense counsel, Frank Kocka, withdrew as attorney of record, and Augustus Claus confirmed as trial counsel for Petitioner.

On March 15, 2016, Petitioner filed a Motion to Preserve and Produce Evidence. On March 16, 2016, the district court granted the motion in part. On March 18, 2016, Petitioner filed a Motion to Suppress Evidence Obtained as Result of Illegal Stop. The district court denied that motion on March 21, 2016.

The jury trial commenced on March 21, 2016, and concluded on March 24, 2016. On March 24, 2016, the jury found Petitioner guilty on all counts.

On July 20, 2016, the date set for sentencing, Petitioner requested a continuance to correct errors in Petitioner's Presentence Investigation Report (hereinafter "PSI).

On February 2, 2017, after six (6) more continuances, Petitioner was sentenced as follows: Count 1 – twelve (12) to sixty (60) months; Count 2 – twenty-eight (28) to one hundred fifty-six (156) months, concurrent with Count 1; Count 3 – twenty-eight (28) to one hundred fifty-six (156) months, plus a consecutive term of twenty-eight (28) to one hundred fifty-six (156) months for the Use of a Deadly Weapon, to run concurrent with Count 2; Count 4 – twenty-four (24) to sixty (60) months, concurrent with Counts 1, 2, and 3; Count 5 – twenty-eight (28) to one hundred fifty-six (156) months, consecutive to Counts 1, 2, 3, and 4; Count 6 – twenty-eight (28) to one hundred fifty-six (156) months, plus a consecutive term of twenty-eight (28) to one hundred fifty-six (156) months for the use of a deadly weapon,

concurrent with Count 5; Count 7 – twenty-eight (28) to one hundred fifty-six (156) months, consecutive to other counts; Count 8 – twenty-eight (28) to one hundred fifty-six (156) months plus a consecutive term of twenty-eight (28) to one hundred fifty-six (156) months for the use of a deadly weapon, concurrent with Count 7. The aggregate total sentence equaled one hundred sixty-eight months (168) to nine hundred thirty-six (936) months. Petitioner received nine hundred thirty-five (935) days credit for time served.

On February 13, 2017, Petitioner's Judgment of Conviction was filed. The Nevada Court of Appeals affirmed Petitioner's Judgment of Conviction on December 17, 2018. Remittitur issued on January 15, 2019.

Petitioner filed the instant Petition for Writ of Habeas Corpus (hereinafter "Petition") on April 29, 2019. Petitioner filed a Motion for Appointment of Counsel, and Request for Evidentiary Hearing on November 12, 2019. On November 25, 2019, the State filed a Response to Defendant's Petition, Motion for Appointment of Counsel, and Request for Evidentiary Hearing.

On December 16, 2019, the district court granted Petitioner's Motion for Appointment of Counsel, noting that "the claims are not difficult, however, the issues that could be presented could be substantial." The Court then ordered Petitioner's Petition and Request for Evidentiary hearing off calendar and set the matter for confirmation of counsel. On December 30, 2019, counsel confirmed, and a briefing schedule was set.

On October 12, 2020, Petitioner filed a Supplemental Memorandum of Points and Authorities in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) ("Supp. Petition"). On January 12, 2021, the State filed a Response to Petitioner's Supp. Petition. On January 25, 2021, Petitioner filed a Reply to the State's Response to Petitioner's Supp. Petition.

On February 20, 2021, this Court concluded that a limited evidentiary hearing regarding whether prior counsel, Mr. Kocka, conveyed the offer to negotiate. On April 15, 2021, this Court conducted an evidentiary hearing and heard testimony from Petitioner and Mr. Kocka. Following testimony and argument, this Court concluded as follows.

STATEMENT OF FACTS

JANUARY 22, 2014, CRICKET WIRELESS

Samuel Echeverria (hereinafter "Echeverria"), who was working at Cricket Wireless, testified that on January 22, 2014, a black male adult came into the store with a black hoodie, a black baseball cap, black shirt, black shoes, and regular blue jeans. The man, later identified as Petitioner, presented himself as a customer. Petitioner came up to the register and asked for a specific battery for his girlfriend. Echeverria walked up to the front of the store to see if the battery was in stock and walked behind the desk to grab the keys to unlock the holsters.

Everyone had left the store, except for Petitioner and Echeverria. When Echeverria started ringing Petitioner up for the battery, he looked up and Petitioner pulled out a black gun and said, "[g]ive me all the money before I blow your brains out." Echeverria described the gun as a black revolver. In a photo lineup, Echeverria identified Appellant with 100 percent certainty. The robbery was also caught on surveillance video and played for the jury. Echeverria immediately called the police after Petitioner left the store.

Although Echeverria was not able to identify Petitioner in court, he testified that he identified him approximately a month after the robbery as the person in the number two position in the photo lineup. While testifying, Echeverria maintained that he was 100 percent certain then that the person who robbed him was in the number two spot in the photo lineup.

Alisa Williams (hereinafter "Williams") testified that on January 22, 2014, after getting out of work, she saw a black male adult come out of the Cricket Wireless Store and jump into the back seat of a silver car. She also saw a light-skinned black female adult with white shades on driving the car. She remembered the male had a hat on his head and a scar on his face, more specifically his jaw. When testifying, she said the second photo in the photo lineup looked like it might be him, but she was not sure it was him when she testified, and was not sure it was him back when she was initially shown the photo lineup.

JANUARY 28, 2014, METRO PCS

On January 28, 2014, Graciela Angles (hereinafter "Angles") was working at Metro PCS on 6663 Smoke Ranch. Around 2:00 PM Petitioner robbed the store, taking money and a

phone. He looked at phones and asked Angles about phone plans. Petitioner asked about a Galaxy S4, so Angles went and grabbed it. Petitioner then asked about the Omega, so Angles took the Galaxy S4 back and brought out the Omega. Petitioner then pulled out the gun and asked Angles to step back and give him the money. In fear, Angles grabbed all the money out of the cash drawer while Petitioner was pointing the gun at her, and Petitioner took the cash and the Omega and left. Angles immediately called 911.

About a month later, a police officer with Metro showed Angles a photo lineup. She circled picture number two, wrote her name under it, and said she was 100 percent sure that was the person who robbed her. She also identified Petitioner in court and further testified she still was 100 percent sure that was who robbed her. Video surveillance of the robbery was shown to the jury. She was the only employee in the store at the time of the robbery.

FEBRUARY 2, 2014, STAR MART

Brittany Slathar (hereinafter "Slathar") was working at Star Mart as a cashier on February 2, 2014, around 2:45 AM. She saw Petitioner come in and go to the gum section. She then got up and walked to the counter. Petitioner picked up some Wrigley Spearmint gum. No one else was in the store. Slathar asked Petitioner if he needed anything else and that is when he said two packs of Newport 100s. As Slathar was ringing the cigarettes up, Petitioner pulled out a gun and told Slathar to give him all the money in the cash register. Slathar told Petitioner that she was in the middle of a transaction and she could not open her register. Petitioner kept saying, "Give me the money. Give me the money. I'm gonna kill you. You're gonna die." He called her a "dumb white bitch" and told her she was stupid.

Slathar never opened the register because she thought she would have to pay back the money he stole. Petitioner left, but told Slathar he would be back, and that she was lucky. Petitioner grabbed the cigarettes and gum and left. Slathar immediately called Metro and Officer Jeremy Landers took her to the location where a suspect had been apprehended and gave her a Show Up Witness Instruction Sheet. Slather identified Petitioner with 100 percent certainty. Slathar read the statement she wrote down for police into the record. She read, "[t]he male in front of the police car was the man who robbed me at the—robbed me at gunpoint. He

was wearing blue jeans, red T-shirt, and black tennis shoes. When he came in the store he was wearing blue jeans, a black hooded sweatshirt and a light beanie with dark brown spots. She testified it was a camouflage beanie. She also identified Petitioner in court.

Slather said Petitioner had a small black revolver with no clip. When Petitioner came into the store, Slather recognized him as a previous customer that had been in the store before. The robbery was also caught on video surveillance.

Officer Joshua Rowberry (hereinafter "Officer Rowberry") testified that on February 2, 2014, he received a call involving a robbery around 2:57 a.m. at 5001 North Rainbow. The information Officer Rowberry received was that the suspect had left the store and he was traveling northbound on Rainbow. Moments later, Officer Rowberry saw a car north on Rainbow. He testified it was the only vehicle in the area, it was in close proximity to the robbery, and it was headed northbound away from where the robbery had just occurred. He stopped the vehicle because it was leaving the area of the robbery and because there was damage to the rear of the vehicle as if it was just involved in an accident.

As he followed the vehicle, it turned into a residential neighborhood, wherein Officer Rowberry activated his lights and sirens. The car stopped, he exited his vehicle, and approached the car on the driver's side rear passenger door. He could not see through the windows due to the dark tint. Kelly Chapman (hereinafter "Chapman") was the driver of the vehicle. After she rolled down the window, Officer Rowberry noticed there was an adult black male laying in the back seat, covered up by a blanket and breathing heavily.

Officer Rowberry gave Petitioner instructions to show his hands, which he did not do. Officer Rowberry initiated code red on his radio, signaling to other officers he needed backup. Once the other officers arrived, Officer Rowberry instructed Chapman and Petitioner to step out of the car. Officer Rowberry was able to see inside the car when Petitioner and Chapman got out, and he saw two packs of Newport cigarettes and a pack of spearmint Wrigley's gum, which were the items taken from the store.

Officer Rowberry also found a black sweatshirt and camouflage beanie. A revolver was inside a pocket of the sweatshirt. Out of the six (6) possible rounds, there were four (4) rounds

in the revolver. Petitioner's shirt also had some black dots on it and small cotton fibers from the sweatshirt.

Jeffrey Habberman (hereinafter "Habberman") testified that he was the owner of a 38-caliber Colt revolver that was stolen when someone broke into his home and stole the entire gun safe. He testified that he did not know the Petitioner sitting at counsel table, he did not know a Kenny Splond, he never gave Petitioner permission to go into his house, never gave him permission to borrow his revolver, and he never gave permission to any of his friends or relatives to ever use his gun. Habberman identified Exhibit #28 as a picture of his gun.

ANALYSIS

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). 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 v. State, 100 Nev. 498, 503, 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).

A claim of ineffective assistance of appellate counsel must also satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

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.

Additionally, 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 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.

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).

I. PETITIONER'S PRO PER PETITION IS DENIED

Petitioner raised the following claims in his pro per Petition: (1) that his car was stopped illegally in violation of his Fourth Amendment rights; (2) that his right to a speedy trial was violated; (3) that the State withheld discovery; (4) that he is actually innocent because the

theory of constructive possession is an illegal falsehood; (5) that his criminal complaint was flawed because it did not include the necessary elements for conspiracy; (6) that the district court erred when consolidating his cases; (7) numerous claims of ineffective assistance of counsel alleged against Frank Kocka and Augustus Claus; (8) that the district court erred in admitting inadmissible prior bad act evidence; (9) that his PSI was incorrect; and (10) cumulative error. For the foregoing reasons, all of Petitioner's claims are denied.

A. PETITIONER'S CLAIM THAT HIS FOURTH AMENDMENT RIGHTS WERE VIOLATED DURING AN ILLEGAL TRAFFIC STOP IS BARRED BY THE LAW OF THE CASE

"The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. NEV. CONST. Art. VI § 6. See Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005) (recognizing the doctrine's applicability in the criminal context); see also York v. State, 342 S.W. 528, 553 (Tex. Crim. Appl. 2011). Accordingly, by simply continuing to file motions with the same arguments, his motion is barred by the doctrines of the law of the case and res judicata. Id.; Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

Petitioner contends that law enforcement illegally stopped the car he was a passenger in. Petition at 6. Petitioner explains that while he was stopped because of an allegedly damaged rear end, the officer never wrote a citation for that damage, which means he did not actually have probable cause to stop the car. Id. Because there was no probable cause, all evidence seized—specifically the gun and cigarettes—is fruit of the poisonous tree and should not have been admitted at trial. Id.

Petitioner has already raised this claim on direct appeal. The Nevada Court of Appeals rejected this claim on direct appeal. Therefore, it cannot be re-litigated here. Specifically, the Court of Appeals explained:

> Next, we consider whether the district court failed to suppress evidence stemming from an improper traffic stop. 'This court reviews findings of fact for clear error, but the legal consequences of those facts involve questions of law that we review de no vo.' State v. Beckman, 129 Nev. 481, 486, 305 P.3d 912, 916 (2013). Where an officer has probable cause to believe that a driver has committed a traffic infraction, a traffic stop does not violate the Fourth Amendment. State v. Rincon, 122 Nev. 1170, 1173, 147 P.3d 233, 235 (2006); Gama v. State, 112 Nev 833, 836, 920 P.2d 1010, 1012-13 (1996) distinguished on other ground by Backman, 129 Nev. 481, 305 P.3d 912.
>
> Here, the police officer stopped Splond's vehicle after observing that the back of the vehicle was smashed and had parts hanging down as if it had been in an accident. The officer testified that driving a damaged vehicle is a citable offense. Therefore, we conclude the officer had probable cause to stop Splond, and that the district court did not err in denying Splond's motion to suppress or in admitting the evidence obtained from the officer's traffic stop.

Nevada Court of Appeals Order of Affirmance at 5. Thus, the evidence obtained as a result of the traffic stop has been deemed admissible against Petitioner. Accordingly, this claim is denied.

B. PETITIONER'S CLAIM THAT HIS RIGHT TO A SPEEDY TRIAL WAS VIOLATED IS WAIVED FOR FAILURE TO RAISE IT ON DIRECT APPEAL

Petitioner alleges that his speedy trial rights were violated because he invoked his right to a trial within sixty (60) days pursuant to NRS 178.495. Petition at 7. First, Petitioner seems to confuse his constitutional right to a speedy trial with the statutory right to a speedy trial which can be waived. NRS 178.495. Regardless, either claim is waived as he failed to raise the issue on direct appeal and because Petitioner waived his statutory right to a speedy trial on April 30, 2014. Court Minutes, April 30, 2014.

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C. PETITIONER'S CLAIM THAT THE STATE WITHHELD DISCOVERY IS WAIVED FOR FAILURE TO RAISE IT ON DIRECT APPEAL

Claims other than ineffective assistance of counsel or challenges to the validity of a guilty plea are waived if not first raised on direct appeal unless a petitioner can show good cause and prejudice for failing to make the argument. Franklin, 110 Nev. 752, 877 P.2d 1059. Here, Petitioner alleges that the State withheld the following discovery: statements from Jeffry Haberman, Brittany Slather, Sam Echerverria, and Graciela Angeles, pictures and exhibits, and Kellie Chapman's criminal history. Petition at 8. Petitioner further claims that this deprived him of his right to effective cross-examination of the witnesses and that the district court should hold an evidentiary hearing to determine if this deprived him of his right to a fair trial. Petition at 9. This claim should have been raised on direct appeal and the failure to do so waives Petitioner's ability to raise this claim here.

D. PETITIONER'S CLAIM OF ACTUAL INNOCENCE AND ATTACKING THE VALIDITY OF THE THEORY OF CONSTRUCTIVE POSSESSION ARE WAIVED FOR FAILURE TO RAISE IT ON DIRECT APPEAL

Claims other than ineffective assistance of counsel or challenges to the validity of a guilty plea are waived if not first raised on direct appeal unless a petitioner can show good cause and prejudice for failing to make the argument. Franklin, 110 Nev. 752, 877 P.2d 1059. Here, Petitioner appears to argue that constructive possession is a legal falsehood and that he should not have been charged with possession of stolen property, namely the gun, because Kellie Chapman was the driver of the car the weapon was found in and whoever is driving the car is presumed to be in possession of anything found in the car. Petition at 9-10. Petitioner also alleges that he is actually innocent because the gun used in the crime did not test positive for his DNA or fingerprints. Id. Again, these claims should have been raised on direct appeal. Therefore, Petitioner waived his right to raise this claim in a post-conviction petition for writ of habeas corpus.

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E. PETITIONER'S CLAIM THAT THE CRIMINAL COMPLAINT IS FLAWED IS WAIVED FOR FAILURE TO RAISE IT ON DIRECT APPEAL

Claims other than ineffective assistance of counsel or challenges to the validity of a guilty plea are waived if not first raised on direct appeal unless a petitioner can show good cause and prejudice for failing to make the argument. Franklin, 110 Nev. 752, 877 P.2d 1059. Petitioner claims that he is entitled to relief because the Indictment used to charge him did not include the elements of conspiracy. Petition at 11. According to Petitioner, because he conspired with Kellie Chapman on two (2) separate occasions, he should have been charged separately for each conspiracy. Petition at 11. Not only is this not the law, Petitioner waived this claim when he failed to raise it on direct appeal. Therefore, this claim is waived.

F. PETITIONER'S CLAIM THAT THE DISTRICT COURT SHOULD NOT HAVE CONSOLIDATED HIS CASES IS WAIVED FOR FAILURE TO RAISE IT ON DIRECT APPEAL

Claims other than ineffective assistance of counsel or challenges to the validity of a guilty plea are waived if not first raised on direct appeal unless a petitioner can show good cause and prejudice for failing to make the argument. Franklin, 110 Nev. 752, 877 P.2d 1059. Petitioner alleges that the district court erred in granting the State's Motion to Consolidate Petitioner's cases. Petition at 12. Petitioner should have raised this claim on direct appeal and his failure to do so waives his ability to argue this claim here.

G. PETITIONER HAS NOT ESTABLISHED INEFFECTIVE ASSISTANCE OF COUNSEL

1. Petitioner has not established that his prior counsel, Frank Kocka, was ineffective.

Petitioner provides a laundry list of reasons as to why Mr. Kocka was ineffective: (1) failure to investigate his case; (2) failure to convey the State's offer; (3) a breakdown in communication; (4) failure to provide Petitioner his case file; and (5) failure to file motions. Petition at 13. All of these claims are unsupported by specific facts and suitable for summary denial under Hargrove. Moreover, none of Petitioner's claims entitle him to relief because the allegations do not amount to ineffective assistance of counsel. His claims are therefore denied.

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First, Petitioner's claim that Mr. Kocka's investigation of his case was inadequate fails. A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Petitioner fails to explain what investigation Mr. Kocka failed to do or how it would have rendered a more favorable outcome. As such, Petitioner's claim is denied.

Second, Petitioner's claim that Mr. Kocka failed to convey the State's offer is belied by the record. On April 20, 2015, Mr. Kocka and the district court had the following exchange:

> THE COURT: Hey. Is this case resolved?
>
> MR. KOCKA: It is not, Your Honor. I did receive an offer on the case; the offer is not acceptable to my client. so at this point, Your Honor, I don't know if you want me to do it formally in writing or you'll accept it orally, but I'm going to have to get him over to the PD's office because he wants to go to trial.

Recorder's Transcript of Status Check: Status of Case Heard on April 20, 2015, April 20, 2015 at 2.

The Court minutes reflect that Appellant was present on April 20, 2015. Thus, he heard the response his attorney gave to the Court and did not object to his attorney's representations. Therefore, Petitioner's claim that his counsel never informed him of the offer is belied by the record. Moreover, Petitioner does not allege that had he known about the offer that he would have accepted it. In fact, Petitioner makes very clear that he would never have accepted an offer and that he believes it was his refusal to accept a plea that resulted in the delay in trial. Petition at 7. As such, Petitioner has not established prejudice for allegedly never having heard an offer he would have rejected.

Third, Petitioner's argument that Mr. Kocka was ineffective for a breakdown in communication is denied. 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. Petitioner's claim is meritless the record because he fails to explain what Mr. Kocka failed to communicate to him and did not explain exactly how the breakdown in communication prejudiced him at trial. This is likely because any communication breakdown between Mr. Kocka and Petitioner is irrelevant because Mr. Kocka did not represent Petitioner at trial.

Fourth, Petitioner's claim that Mr. Kocka did not provide him his case file is meritless. The record is clear that when Mr. Claus substituted in as counsel of record, the complete discovery file was provided to Mr. Claus. Court Minutes, April 22, 2015. As such, it does not matter whether Mr. Kocka provided Petitioner his case file because Petitioner's new attorney received it and Petitioner does not specifically allege what pieces of discovery Mr. Kocka had that he did not provide to either Petitioner or Mr. Claus.

Fifth, Petitioner's claim that Mr. Kocka was ineffective because he did not file motions is denied for lack of specificity. 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). Petitioner does not explain what motions Mr. Kocka should have filed or whether they had any merit. As such, this claim must fail. Additionally, because Mr. Kocka withdrew as Petitioner's attorney of record over one (1) year before trial, Petitioner has not showed how his failure to file motions prejudiced him at trial.

Moreover, Petitioner has not established how any of the above claims prejudiced him because Mr. Kocka was not retained to take the case to trial and withdrew as attorney of record one (1) year before Petitioner's trial. Frank Kocka was originally Petitioner's defense counsel but withdrew from representation on April 20, 2015 when it became clear that Petitioner was not interested in negotiating a resolution with the State. Court Minutes, April 20, 2015. Augustus Claus confirmed as counsel of record on April 22, 2015. Court Minutes, April 22, 2015. Mr. Claus continued to represent Petitioner throughout trial and as his Appellate counsel.

As such, Petitioner failed to show how any of Mr. Kocka's actions prejudiced him at trial and his claims are therefore denied.

2. Petitioner has not established that trial counsel, Augustus Claus, was ineffective.

Similarly, Petitioner provides a laundry list of reasons for why Mr. Claus was ineffective at trial: (1) failure to file motions; (2) failure to present a defense or subpoena records necessary for his defense; (3) failure to investigate; (4) failure to object to a fatally flawed indictment and joinder of Petitioner's two cases; (5) failure to object to Haberman's inadmissible testimony about prior bad acts; (6) failure to object to the PSI or move for a Petrocelli hearing to handle the errors in his PSI; and (7) failure to object to jury instructions. Petition at 14. Petitioner also accuses Mr. Claus of ineffectiveness as appellate counsel because he did not argue his own ineffectiveness on appeal. Id. These claims are unsupported by specific facts and suitable for summary denial under Hargrove. Moreover, none of Petitioner's claims would entitle him to relief because the allegations do not amount to ineffective assistance of counsel.

First, Petitioner's claim that counsel did not file motions is denied for lack of specificity and as belied by the record. A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina, 120 Nev. at 192, 87 P.3d at 538. Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Petitioner fails to explain what motions counsel did not file or how any of them had merit. Moreover, defense counsel filed two motions. On March 15, 2016, counsel filed a discovery motion which was granted in part on March 16, 2016. Court Minutes, March 16, 2016. On March 18, 2016, counsel confirmed that he received all discovery. Court Minutes, March 18, 2016. Next, counsel filed a motion to suppress on March 18, 2016 which was denied on March 21, 2018. Court Minutes, March 21, 2016. Therefore, Petitioner failed to show how counsel's actions prejudiced him or how filing other motions would have resulted in a more favorable outcome at trial.

Second, Petitioner's claim that counsel did not present a defense or subpoena phone records necessary for his defense is denied. 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, 118 Nev. at 8, 38 P.3d at 167. Petitioner does not explain what other investigation defense counsel should have or what favorable evidence the phone records contained that would have changed the outcome at trial. Molina, 120 Nev. at 192, 87 P.3d at 538. As such, this claim is summarily denied as a bare and naked allegation pursuant to Hargrove.

Third, Petitioner has not established that counsel failed to investigate. Petitioner does not explain what investigation counsel failed to conduct or how a different investigation would have made the outcome more favorable to Petitioner. As such, this bare and naked claim is summarily denied under Hargrove.

Fourth, Petitioner's claim that counsel was ineffective because he did not object to the Amended Indictment or consolidation of Petitioner's cases is denied. Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Petitioner was properly charged with conspiracy to commit robbery. NRS 199.480 defines conspiracy as an agreement between two or more people to commit an unlawful purpose. Here, the Amended Indictment explained that Petitioner and co-conspirator Kellie Chapman agreed to commit robbery. Specifically, the Amended Indictment stated:

> Count 1 – Conspiracy to Commit Robbery
> Defendant KENNY SPLOND, aka Kenya Splond, and Co-Conspirator KELLIE ERIN CHAPMAN did, then and there meet with each other and between themselves, and each of them with the other, willfully, unlawfully, and feloniously conspire and agree to commit robbery, and in furtherance of said conspiracy, defendants did commit the acts as set forth in Count 2 and 3, said acts being incorporated by reference as though fully set forth herein.

Amended Indictment at 1-2. Next, counsel was not representing Petitioner when the district court consolidated Petitioner's cases. Petitioner's cases were consolidated on March 18, 2015. Counsel did not confirm as counsel until April 22, 2015, over one month later.

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Therefore, counsel cannot be ineffective for failing to object to a motion that was filed and granted before he was ever the attorney of record.

Fifth, Petitioner's claim this his counsel was ineffective for failing to object to Haberman's inadmissible testimony about prior bad acts is denied. The record indicates that when Haberman testified that the weapon used during the robbery was stolen from his home, defense counsel did ask for a limiting instruction that the jury was not to consider the testimony that Haberman's home was burglarized as evidence against Petitioner. Recorder's Transcript of Jury Trial – Day 2 at 97-98. Rather, it was only to be considered for purposes of determining whether the gun was stolen. Id.

Moreover, Petitioner has not established prejudice because counsel cannot be ineffective for making futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). The State admitted evidence that Petitioner broke into Haberman's home to prove that Petitioner was guilty of Possession of Stolen Property, specifically the revolver that was used in the charged robberies with a deadly weapon. As Haberman was the owner of that firearm, his testimony was necessary to show that the gun was stolen. The State showed Haberman a picture of the gun used, asked if it was his, whether it was stolen, how it was stolen, and if he gave Petitioner permission to possess the gun. Recorder's Transcript of Jury Trial – Day 2 at 88-92. The line of questioning was not meant to show that Petitioner committed a prior uncharged act. It was meant to establish that Petitioner possessed stolen property. Both the State's closing argument, a limiting instruction, and the jury instructions made sure that the jury was not to consider whether Petitioner broke into another home and stole a weapon. Thus, Haberman testifying to the fact that his gun was stolen did not constitute inadmissible prior bad act evidence. It was proper evidence regarding the Possession of Stolen Property charge.

Sixth, counsel was not ineffective in handling the errors with the PSI. At the first scheduled sentencing date, counsel objected to sentencing Petitioner at that time because it appeared that there were errors in the PSI. Specifically, Petitioner believed that some of the criminal convictions listed belonged to his counsel and not Petitioner. Counsel then had nearly

six (6) months' worth of continuances to try and correct those errors. In that six (6) months, counsel subpoenaed records to investigate what corrections on the PSI needed to be made. Court Minutes, July 20, 2016; August 10, 2016; September 7, 2016; October 12, 2016; November 23, 2016; December 21, 2016; February 6, 2017. Defense counsel filed a Motion to Compel Production of Subpoenaed Records in an effort to clarify any potential errors in Petitioner's PSI. Defendant's Motion to Compel Production of Subpoenaed Materials. Defense counsel had a hearing on that entire issue, and it was only when it became clear that there was no additional information that the district court moved forward with sentencing over defense counsel's objection. Recorder's Transcript of Defendant's Motion to Compel Production of Subpoenaed Materials, dated January 23, 2017; Recorder's Transcript of Sentencing, dated February 2, 2017. As such, it is unclear what more defense counsel could have, let alone should have done. Finally, because this issue was addressed and dismissed on direct appeal, Petitioner has not showed prejudice because he cannot establish that different actions would have resulted in a more favorable outcome.

Seventh, Petitioner's claim that counsel was ineffective for failing to object to the jury instructions is summarily denied as a bare and naked assertion pursuant to Hargrove. The district court gave thirty (30) jury instructions and Petitioner does not point to a single one that he claims was objectionable. Moreover, because Petitioner cannot show how the jury instructions were incorrect, he has not established prejudice.

Finally, Petitioner accused Mr. Claus, who was also his appellate counsel, of ineffectiveness because he did not argue his own ineffectiveness on appeal. Ineffective assistance of counsel claims are inappropriate for direct appeal. Gibbons v. State, 97 Nev. 520, 634 P.2d 1214 (1981). Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. As such, appellate counsel cannot be ineffective for arguing his own ineffectiveness at trial because the Nevada Supreme Court would not have considered such arguments.

Petitioner also appears to argue that Mr. Claus was ineffective appellate counsel because he did not raise certain claims on appeal. Petition at 15. Here, Petitioner failed to show

how appellate counsel was ineffective because, as discussed above, he has not established that any of the claims counsel did not raise on direct appeal had merit let alone a reasonable possibility of success. Therefore, counsel was not ineffective for failing to make a losing argument and Petitioner's claim is denied.

H. PETITIONER'S CLAIM THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN ADMITTING INADMISSIBLE PRIOR BAD ACT EVIDENCE IS BARRED BY THE LAW OF THE CASE

Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini, 117 Nev. 879, 34 P.3d 532. Petitioner argues that it was error for the district court to allow evidence of a prior uncharged act through the testimony of Jeffery Haberman (hereinafter "Haberman") without holding a Petrocelli hearing. Petition at 16-19. Petitioner has already raised, and the Nevada Court of Appeals has rejected this argument on direct appeal. Specifically, the Court of Appeals concluded that the evidence of Petitioner's prior home invasion was admissible:

> First, we address whether the district court erred in admitting evidence of an uncharged burglary and/or home invasion at trial. We review the trial court's determination to admit or exclude prior bad act evidence for an abuse of discretion. See Chavez v. State, 125 Nev. 328, 345, 213 P.3d 476, 488 (2009). Because Splond failed to object to the evidence regarding the burglary and/or home invasion below, we review for plain error. See Id. at 269, 182 P.3d at 110. Under that standard, reversal is proper if the error cause "actual prejudice or a miscarriage of justice, thereby affecting his substantial right. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008).
>
> Relevant evidence is generally admissible unless the danger of unfair prejudice substantially outweighs its probative value. NRS 48.105; NRS 48.025; NRS 48.035(1). The State is entitled to present evidence necessary to prove the crime charged in the indictment. Dutton v. State, 94 Nev. 461,464, 581 P.2d 856, 858 (1978) disapproved on other grounds by Gray v. State, 100 Nev. 556, 688 P.2d 313 (1984).
>
> Here, the State only charged Splond with possession of stolen property—a firearm. On direct examination by the State, the victim testified that *on a date prior to the time* Splond was apprehended with a firearm, an unknown

> perpetrator forcefully broke into the victim's home and stole his revolver. The prosecutor then immediately asked, 'Did you ever give that man [Kenny Splond] permission to go in your house?' to which the victim answered, 'No, sir.' Clearly, the prosecutor's question, along with the victim's answer, unfairly and prejudicially insinuated that Splond committed the burglary and/or home invasion of the victim's home prior to the crimes alleged by the State in the information against Splond.
>
> Splond's attorney thereafter asked the district court for a bench conference. After the unrecorded bench conference, the district court gave a limiting instruction immediately after the victim's testimony and again at the end of trial. Because the district court gave the jury two limiting instructions as a result of the prosecutor's improper question, we conclude that the district court mitigated any prejudicial effect that may have occurred under these circumstances. See Chavez v. State, 125 Nev. 328, 345, 213 P.3d 476, 488 (2009) (noting that a limiting instruction may cure prejudice associated with bad act evidence). Thus, based on the foregoing, we conclude that the district court did not abuse its discretion in admitting the victim's testimony that he did not give Splond permission to break into his home and take his revolver on a previous date not charged by the State.

Nevada Court of Appeals Order of Affirmance at 2-3. The Court of Appeals concluded that any prejudicial effect was mitigated because the district court gave two limiting instructions as a result of the question. Id. As such, Petitioner is barred from re-litigating the same claim here.

I. PETITIONER'S ARGUMENT THAT THE DISTRICT COURT RELIED ON AN INACCURATE PSI IS BARRED BY THE LAW OF THE CASE

Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini, 117 Nev. 879, 34 P.3d 532. Petitioner claims that the district court erred in sentencing him based on an inaccurate PSI. Petition at 20-21. Petitioner has already raised this claim on direct appeal. The Nevada Court of Appeals rejected this claim on direct appeal. Therefore, it cannot be re-litigated here. Specifically, the Court of Appeals explained:

> Finally, we address whether the district court improperly relief on the presentence investigation (PSI) report in sentencing Splond. The district court has wide discretion in sentencing, and we review for an abuse of that

> discretion. See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). We will not interfere with the sentence imposed '[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.' Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).
>
> Splond fails to demonstrate that the district court relied on impalpable or highly suspect evidence. The district court acknowledged that the first PSI was incorrect and allowed Splond to correct the mistake. The district court also presided over the trial, heard all the evidence at the sentencing hearing, and rendered sentencing for each conviction within the applicable statutory guidelines. Therefore, we conclude that the district court did not abuse its discretion.

Nevada Court of Appeals Order of Affirmance at 5-6. Therefore, Petitioner is barred from re-litigating the same claim here.

J. PETITIONER FAILED TO ESTABLISH CUMULATIVE ERROR

This Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000) Appellant needs to present all three elements to be successful on appeal. Id. Moreover, a defendant "is not entitled to a perfect trial, but only a fair trial. . . ." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (*citing* Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974)

First, Appellant has not asserted any meritorious claims of error, and, thus, there is no error to cumulate. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("…cumulative-error analysis should evaluate only the effect of matters determined to be error, *not the cumulative effect of non-errors*.") (emphasis added). Second, the evidence of guilt is not close. Multiple victims identified Appellant and the robberies were caught on video surveillance. Finally, Appellant was not convicted of grave crimes. See Valdez, 124 Nev. at 1198, 196 P.3d at 482 (2008) (stating crimes of first-degree murder and attempt murder are very grave crimes).

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In this case, Appellant's convictions are not Category A felonies punishable by a life sentence; therefore, the third factor does not weigh in Appellant's favor. Therefore, Appellant's claim of cumulative error is denied.

II. PETITIONER'S SUPPLEMENTAL PETITION IS DENIED

Petitioner raises the following claims in his Supplemental Petition: (1) ineffective assistance of prior counsel, Frank Kocka; and (2) ineffective assistance of trial counsel, Augustus Claus. For the foregoing reasons, all claims are denied.

A. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL PRIOR TO TRIAL

1. Ground One: Counsel was not ineffective in failing to convey an offer of negotiation.

Petitioner claims that counsel prior to trial, Mr. Kocka, was ineffective because he did not convey an offer of negotiation to Petitioner for the two (2) years Petitioner's case was pending trial. Supp. Petition at 19. Petitioner further appears to indicate that when Mr. Claus replaced Mr. Kocka as counsel of record, he confirmed that he never received an offer. Id. As a result, Petitioner avers that if he had accepted the offer, his sentence would have been less than what he was ultimately sentenced to after trial. Supp. Petition at 20. Petitioner finally claims that he established that he would have accepted the plea negotiation because he "asked the court to intervene when counsel made a record regarding the offer." Id. Petitioner's claim is belied by the record.

As an initial matter, the record is clear that Mr. Kocka received an offer of negotiation from the State, conveyed it to Petitioner and Petitioner rejected that offer:

> THE COURT: Hey. Is this case resolved?
>
> MR. KOCKA: It is not, Your Honor. I did receive an offer on the case; **the offer is not acceptable to my client.** So at this point, Your Honor, I don't know if you want me to do it formally in writing or you'll accept it orally, **but I'm going to have to get him over to the PD's office because he wants to go to trial**.

Recorder's Transcript of Status Check: Status of Case, at 2 (April 20, 2015) (emphasis added).

The Court minutes reflect that Appellant was present on April 20, 2015. Thus, he heard the response his attorney gave to the Court and did not object to his attorney's representations. Nevertheless, this Court determined that an evidentiary hearing on this limited issue was prudent. At the evidentiary hearing, this Court heard testimony from Mr. Kocka and Petitioner. After hearing testimony and argument, this Court concluded that Mr. Kocka's testimony was credible, and that Petitioner had failed to establish that he asked Mr. Kocka if there was an outstanding offer of negotiation.

Counsel cannot be deemed ineffective for not receiving an offer of negotiation prior to April 2015. Rather, a review of the transcripts indicate that Kocka was diligently seeking an offer of negotiation from the State and that they did not extend one because Petitioner had multiple cases. See generally, Transcript of Proceedings Calendar Call (April 2, 2014); Transcript of Proceedings Status Check: Negotiations/Reset Trial (April 30, 2014); Transcript of Proceedings Status Check: Possible Negotiations (June 16, 2014); Transcript of Proceedings Status Check: Negotiations (September 8, 2014). Specifically, on June 16, 2014, Mr. Kocka explained to the district court the status of the negotiations:

> MR. KOCKA: He's present in custody.
>
> Your Honor, we have been going back and forth with Ms. Lexis of the DA's Office trying to get an offer, a global offer on the table. He has a prelim down at Department 3, and a sentencing currently set in Department 2. I know we set this a couple of times for status checks. Ms. Lexis has assured me she's going to make an offer. She's cautioned it by saying I may not like the offer, but she's going to be getting me an offer for sure.

Transcript of Proceedings Status Check: Possible Negotiations, at 2 (June 16, 2014).

On September 15, 2014, Mr. Kocka explained that he had received an offer:

> Ms. Lexis: I did convey an offer, You Honor, previously which involved both cases while the second case was still in Justice Court. I can reconvey that offer. All though I know Mr. Kocka did not like it very much, so.
> Mr. Kocka: Ms. Trippiedi has the other case, Judge. Maybe I'll talk to her and see if I can get a better deal.
> […]
> Mr. Kocka: I'm going to get the offer, Judge.

Transcript of Proceedings Status Check: Negotiations, at 3-4 (September 15, 2014).

That Mr. Kocka believed he could secure a better offer does not make him ineffective. Indeed, as the record is clear that he did receive and convey an offer to Petitioner, the record instead indicates that Mr. Kocka was effective in diligently seeking to obtain a favorable offer of negotiation. Defense counsel cannot be deemed ineffective for his failure to secure a more favorable offer. Counsel does not have control over what the State offers. See, Young v. District Court, 107 Nev. 642, 818 P.2d 844 (1991). Therefore, both Petitioner's claims that counsel did not convey or attempt to receive an offer of negotiation from the State is belied by the record.

Moreover, that Mr. Claus claimed he did not receive the offer of negotiation on the first day of trial is of no import. Mr. Claus was appointed to Petitioner's case to proceed to trial after all offers of negotiation had been revoked. Recorder's Transcript of Status Check: Status of Case, at 2 (April 20, 2015). That another more favorable offer was not extended while Mr. Claus represented Petitioner does not make either Mr. Kocka or Mr. Claus ineffective. Indeed, on the first day of trial, the State made clear that there had not been other offers extended and that any offer of negotiation was revoked when Petitioner rejected it two (2) years prior. Recorder's Transcript of Proceedings RE: Jury Trial – Day 1 at 6-9 (March 15, 2016). Again, neither Mr. Kocka nor Mr. Claus had any control over what plea negotiation the State offers or whether the State offers any plea negotiation whatsoever. See, Young, 107 Nev. 642, 818 P.2d 844.

Next, to the extent Petitioner alleges that counsel was ineffective for failing to file motions, that claim is denied. Supp. Petition at 19. As an initial matter, Petitioner does not explain in Ground One what motions Mr. Kocka should have filed and has not explained that any of those motions would have been successful or impacted Petitioner's decision to proceed to trial. This claim is further belied by the record because despite Petitioner's claim, Mr. Kocka said he would be filing motions if Petitioner's case did not resolve through a plea negotiation. Transcript of Proceedings State's Motion to Consolidate, at 4 (March 18, 2015). Therefore,

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Petitioner's claim is denied as a bare and naked allegation that is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Finally, Petitioner has not established prejudice. While Petitioner relies on Missouri v. Frye, to claim that failure to convey an offer of negotiation amounts to ineffective assistance of counsel (Supp. Petition at 18), Petitioner fails to recognize that Frye also held that before a defendant can establish said ineffectiveness, they must show "a reasonable probability they would have accepted" the offer that that "if the prosecution had the discretion to cancel it… there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented." 566 U.S. 134, 148, 132 S.Ct. 1399, 1410 (2012). Even if Petitioner had made such a request, the district court cannot force the State to convey an offer of negotiation and cannot insert itself into the plea-bargaining process. Cripps v. State, 122 Nev. 764, 137 P.3d 1187 (2006).

Regardless, as the record is clear that Petitioner rejected the offer provided by the State, any claim of prejudice or reliance on Frye is denied. Recorder's Transcript of Status Check: Status of Case, at 2 (April 20, 2015). That Petitioner now wishes he had accepted an offer of negotiation after he was convicted at trial does not render counsel ineffective. It was Petitioner's decision to reject the State's offer of negotiation. Counsel cannot be deemed ineffective merely because the Defendant's risk in disregarding counsel's advice did not pay off. See Cronic, 466 U.S. at 657 n.19, 104 S.Ct. at 2046 n.19 (noting counsel is not required to do what is impossible).

Indeed, at the evidentiary hearing Petitioner further failed to show that he established that he would have accepted the offer that the State conveyed. Specifically, Petitioner testified that he was not willing to plead guilty to any offer of negotiation that did not have an agreed upon recommended sentence. As the State never conveyed such an offer, Petitioner failed to establish that he would have pled guilty, and his claim is therefore denied.

Accordingly, Petitioner has not showed that counsel was ineffective in conveying an offer of negotiation to him prior to trial.

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2. Ground Two: Counsel was not ineffective for failing to oppose the State's Motion to Consolidate.

Petitioner argues that counsel should have opposed the State's Motion to Consolidate because Petitioner's two (2) crimes were not factually similar and would not have been cross-admissible. Supp. Petition at 21. Petitioner further claims that he can establish prejudice because there were identification issues for one (1) of the three (3) robberies and that he was likely only convicted of that third robbery because of the joint trial. Supp. Petition at 24-25. Petitioner's claims are denied.

Counsel cannot be ineffective for failing to make futile objections or arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. 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, 118 Nev. at 8, 38 P.3d at 167. Petitioner has not established that counsel could have successfully opposed the State's Motion to Consolidate because the State's Motion was legally correct.

The charges in each case were based on two (2) or more acts or transactions connected or constituting parts of a common scheme or plan as described above in the Statement of Facts. Additionally, consolidation was warranted because it promotes judicial economy, efficiency and administration, and the evidence would be cross-admissible at trial.

NRS 174.155 addresses consolidation of Informations. It states in pertinent part:

> The court may order two or more indictments or information or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

In considering whether to allow consolidation, courts have looked at the conflicting policies of economy and efficiency in judicial administration, seeking to control court calendars in avoidance of multiple trials, and any resulting prejudice to the defendant which might arise from being prosecuted at trial by presentation of evidence of other crimes flowing from a common plan or scheme. Cantano v. United States, 176 F.2d 820 (4th Cir. 1948); United States v. Fletcher, 195 F. Supp. 634 (D. Conn. 1960), aff'd, 319 F.2d 604 (4th Cir.

1963). Moreover, as the Nevada Supreme Court has repeatedly held, the decision to allow the joinder of offenses lies within the sound discretion of the trial court and such a decision will not be reversed absent an abuse of discretion. Robins v. State, 106 Nev. 611, 798 P.2d 558 (1990); Mitchell v. State, 105. 735, 782 P.2d 1340 (1989); Lovell v. State, 92 Nev. 128, 132, 546 P.2d 1301, 1303 (1976). The United States Supreme Court has noted that joint trials are preferred because "they promote efficiency and 'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'" United States v. Zafiro, 113 S.Ct. 933 (1993). Further, the United State Supreme Court held that joinder of criminal offenses is not an issue that raises constitutional concern. Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648 (1967).

Eighth Judicial District Court Rule 3.10 also promotes judicial economy. It provides:

> (a) When an indictment or information is filed against a defendant who has other criminal cases pending in the court, the new case may be assigned directly to the department wherein a case against that defendant is already pending.
> (b) Unless objected to by one of the judges concerned, criminal cases, writs or motion may be consolidated or reassigned to any department for trial, settlement or other resolution.

Cross-admissibility is an additional factor leading toward consolidation. In Robins v. State, 106 Nev. 611, 798 P.2d 558 (1990), our Supreme Court was faced with the joinder of a child abuse charge and a murder charge. It was held that "[i]f evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed." Id. at 619, 563 (*citing* Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342)

NRS 173.115 further provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are:
> (1) Based on the same act or transaction; or
> (2) Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Additionally, there must be more prejudice shown than is inherent in any joinder of counts. United States v. Bright, 630 F.2d 804 (5th Circ. 1980). It is insufficient to show that

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severance gives the defendant a better defense. He must show prejudice of such a magnitude that he is denied a fair trial. United States v. Martinez, 486 F.2d 15 (5th Cir. 1973).

In his Supp. Petition, Petitioner takes issue with the State's reliance on Tillema v. State, 112 Nev. 266, 914, P.2d 605 (1995), in its Motion to Consolidate. Supp. Petition at 22. Specifically, Petitioner claims that Tillema is factually dissimilar from Petitioner's offenses because "[t]he distinguishing feature in Tillema in allowing joinder of the cases is that the auto burglaries were similar enough to be connected, and the store burglary occurred the very same day, within hours, of the auto burglary. Here, the burglary of the cell phone stores and the burglary of the Star Mart are similar in that they are burglary/robbery cases." Supp. Petition at 23. However, in doing so, Petitioner neglects to note the other similarities in all three (3) of Petitioner's offenses.

Tillema involved the joinder of two (2) vehicular burglaries and one (1) store burglary. 112 Nev. at 268. Specifically, Tillma was charged with a vehicular burglary occurring on May 29, 1993, and a vehicular and store burglary occurring on June 16, 1993. Id. at 267-68; 914 P.2d at 606. In Tillema, the Nevada Supreme Court held that when separate crimes are connected by a continued course of conduct, joinder is appropriate. Id. Additionally, the court found that if "evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed. Id. The court held that the two (2) vehicular burglaries evidenced a common scheme or plan because both offenses involved vehicles in casino parking garages and occurred only seventeen (17) days apart. Id. As a result, the court concluded that evidence from both cases would be cross admissible to prove Tillema's felonious intent in entering the vehicles. Id. The court further concluded that evidence of the store burglary was admissible and properly joined because the arresting detective witnessed Tillema enter the store right after completing the second vehicular burglary. Id. at 269; 914 P.2d at 607.

Like Tillema, Petitioner's offenses were properly consolidated because they were factually similar and involved a common scheme or plan. Petitioner was charged with three (3) store burglaries, all of which occurred over a thirteen (13) day span. In each store burglary,

Petitioner entered the store, waited until he and the clerk were the only people in the store, and asked the clerk to get him something that was behind the counter and near the cash register. Then, Petitioner pulled out a revolver and pointed it at the clerk, threatened the victim and demanded money in the cash register. Petitioner was able to receive money in only the first two (2) store robberies because the clerk in the third robbery refused to open the register. Therefore, contrary to Petitioner's claim that the only similarity between all three (3) offenses was time, there were additional significant and notable similarities between all offenses supporting joinder. Evidence of the offenses were cross admissible for intent as they all evidenced a common scheme or plan.

Finally, Petitioner's claim of prejudice fails. While Petitioner relies on Hubbard v. State, 422 P.3d 1260, 1262 (2018), to claim that prejudice can outweigh any probative value, Hubbard dealt with admission of a prior conviction, not joinder of multiple charged offenses. Therefore, Hubbard would have been irrelevant to the district court's determination of whether Petitioner's cases should have been joined.

Regardless, there must be more prejudice shown than is inherent in any joinder of counts. Bright, 630 F.2d 804. It is insufficient to show that severance gives the defendant a better defense. He must show prejudice of such a magnitude that he is denied a fair trial. Martinez, 486 F.2d 15. Video surveillance of the first two (2) store robberies was shown to the jury and the victims of all three (3) robberies identified Petitioner with one hundred (100) percent certainty. This joinder also did not prevent counsel from cross examining witnesses on any identification or forensic issues. Given the overwhelming evidence of Petitioner's guilt, Petitioner's claim that he was prejudiced because there was more significant evidence of guilt as to one (1) robbery is denied.

Accordingly, as the district court properly consolidated Petitioner's cases, Petitioner has failed to demonstrate that counsel was ineffective for not opposing the State's Motion to Consolidate. Petitioner has not demonstrated that any opposition would have been successful, and he has not demonstrated that he was prejudiced by consolidation given the overwhelming

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evidence of Petitioner's guilt in each robbery. Therefore, Petitioner's Ground Two claim is denied.

B. PETITIONER WAS NOT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

Petitioner raises ten (10) claims of ineffective assistance of trial counsel.[1] All ten (10) claims fail.

1. Grounds One Through Six.

Petitioner reasserts the following claims that Petitioner raised in his original Petition as to his trial counsel, Mr. Claus,: (1) failing to investigate; (2) failing to present a defense and failing to subpoena phone records; (3) failing to object to the complaint; (4) failing to object to evidence at trial; (5)failing to request a Petrocelli hearing; (6) failing to object to jury instructions; and (7) failing to object to the Presentence Investigation Report. Supp. Petition at 28. These claims are denied for the grounds set forth *supra* I.G.2

2. Ground Seven: Trial counsel was not ineffective when presenting expert testimony.

Petitioner argues that trial counsel was ineffective for failing to call an eyewitness identification expert to testify as to the two (2) photo lineups used to identify Petitioner for the January 22, 2014 and January 28, 2014 robberies. Supp. Petition at 31. Specifically, Petitioner claims that while trial counsel cross examined Detective Kavon about the procedure behind compiling the lineups and if he used a procedure known as the "double blind setup," he did not call an expert to testify to the accuracy of photo lineups. Supp. Petition at 31. Had counsel done so, Petitioner claims this expert would have testified as to what the "double blind setup" is and how other not using this setup increases the likelihood of inaccurate definitions. Supp. Petition at 31-32. According to Petitioner, counsel's failure to call such an expert deprived

[1] Petitioner's heading of section II.A states "Grounds three through," but does not give the ending number. Supp. Petition at 27. However, Petitioner's section II.A.i. heading starts his ground numbering and Ground 1. Supp. Petition at 28. Accordingly, the numbering will mirror Petitioner's raised grounds as numbered in sections II.A.i-vi.

Petitioner from presenting a meaningful defense. Supp. Petition at 32. Petitioner's claim is denied.

Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Howard, 106 Nev. at 722, 800 P.2d at 180; Strickland, 466 U.S. at 691, 104 S. Ct. at 2066. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough, 540 U.S. at 124 S. Ct. at 1. In considering whether trial counsel was effective, the court must determine whether counsel made a "sufficient inquiry into the information . . . 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 this decision is made, the court will consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Id.

A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome. Molina, 120 Nev. at 192, 87 P.3d at 538; Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. Such a defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. See Love, 109 Nev. at 1138, 865 P.2d at 323. Further, it is well established that a claim of ineffective assistance of counsel alleging a failure to investigate will fail where the evidence or testimony sought does not exonerate or exculpate the defendant. See Ford, 105 Nev. at 853, 784 P.2d at 953.

Counsel is expected to conduct legal and factual investigations when developing a defense so they may make informed decisions on their client's behalf. Jackson, 91 Nev. at 433, 537 P.2d at 474 (quoting In re Saunders, 2 Cal.3d 1033, 88 Cal.Rptr. 633, 638, 472 P.2d 921, 926 (1970)). "[D]efense counsel has a duty 'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Love, 109 Nev. at 1138, 865 P.2d at 323 (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at 2066). "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." Id. There is a strong presumption that defense counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Harrington v. Richter, 562 U.S. 86, 109, 131 S.Ct. 770, 109 (2011).

Further, counsel is not required to call an expert when it is clear that they vigorously cross-examined State witnesses. Id. at 110, 131 S.Ct. at 791. The decision not to call witnesses is within the discretion of trial counsel, and will not be questioned unless it was a plainly unreasonable decision. See Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002); see also Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict. Harrington, 131 S.Ct. at 791, 131 S.Ct. at 110. "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).

Here, Petitioner has not established that counsel was ineffective for not calling an expert in photo lineups. First, Petitioner has not identified that any such expert existed or would have been available to testify to the lineups used here. While Petitioner includes a report supporting his claim as to the double-blind setup, the simple existence of a report published in 2007 does not establish that an expert was available.

Second, counsel's decision not to call an unidentified expert is a virtually unchallengeable strategic decision. Petitioner has not established that this unidentified expert would have been permitted to testify at all, let alone would have been permitted to testify to the accuracy of the photo lineup procedures used here. Petitioner appears to contend that this expert would have testified that the photo lineup procedure used by Detective Kavon for each victim was unreliable and that the double-blind setup is a more reliable form of picture identification. Supp. Petition at 31-32. However, Petitioner has not established, and does not claim, that such testimony would have been admissible. Moreover, as this double-blind set up

was not used for any of Petitioner's lineups, any testimony about that procedure or its accuracy is entirely irrelevant.

Further, there was sufficient evidence regarding the process of assembling the line up at trial. Detective Kavon testified during direct examination as to how a six-pack photo lineup is assembled:

> Metro Police Department has a database, a database of photos that are in this database. Hundreds and hundreds and thousands of photographs are in this database. These photographs are separated into categories by race, by gender, that sort of thing, by age.
>
> It's data inputted in when the photograph was taken. You know, they put in the age of the person, their name and their ID number and, you know, how tall they are and how much they weigh and that's all in the database.
>
> When we create a photo array or sometimes it's referred to as a six-pack, you go into this database and you input the information for the known person that you want included in there. In this case, I input the information for Kenny Splond. Then that pulls Kenny Splond's picture out of the database.
>
> And then you also put in criteria of what you want to match with that. You -- you put in, obviously, you wouldn't want to put in female with a male suspect. So you eliminate all the females. You eliminate Caucasian or -- or white -- white people. You eliminate all sorts of varlous things. You make sure the ages are close and the height and weights are close.
>
> And when that computer program or that database randomly generates about 200 to 300 more photographs that it thinks is similar to, in this case, Kenny Splond. From there, then the detective will take -- and in this case, I took and I pulled out photographs that, you know, the hairs were -- the hair color, it was similar, and things like that that the computer just can't do.
>
> And I chose five other photographs to go along with Kenny Splond's photograph and told the computer to compile that. The computer randomly puts those pictures into -- on one sheet of paper, so to speak, in one, two, three, four, five, six pictures. And it generates that document for you.

Recorder's Transcript of Jury Trial – Day 1 at 155-56.

Detective Kavon further testified that prior to showing anyone a photo line-up, he reads them the following instructions:

> In a moment, I'm going to show you a group of photographs. This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. The fact that the photos are

being shown to you should not cause you to believe or guess that a guilty person has been caught.

You do not have to identify anyone. It is just as important to free innocent persons from suspicion as it is to identify those that are guilty. Please keep in mind that hair styles, beards, mustaches, are easily changed. Also, photographs do not always depict the true complexion of a person. It may be lighter or darker than shown in the photo.

You should pay no attention to any markings or numbers that may appear on the photos. Also pay no attention to whether the photos are in color or black and white or any other differences in the type or the style of the photographs.

You should only study the person shown in each photograph. Please do not talk to anyone, other than police officers while viewing the photos. You must make up your own mind and not be influenced by any other witnesses, if any.

When you've completed viewing the photos, please tell me whether or not you can make an identification. If you can, tell me in your own words how sure you are of your identification. Please do not indicate to any other witnesses that you have or have not made an identification. Thank you.

Id. at 156-58.

After explaining this procedure, Detective Kavon confirmed that all three (3) victims identified Petitioner with one hundred (100) percent certainty, which was rare in his twenty-five (25) year experience as a police officer. Id. at 158-60. This evidence sufficiently established that the photo line-up was reliable.

Even so, counsel vigorously challenged the line-up procedure. On cross examination, counsel peppered Detective Kavon with questions about this double-blind set up and Detective Kavon testified that he did not and had not ever used it. Id. at 163-64. Detective Kavon did testify that he had heard about this procedure but was not aware of any police departments that were using it. Id. at 164. Counsel then continued asking Detective Kavon numerous questions about the procedure of the lineups, all of which Detective Kavon answered to the best of his ability, before returning to questions regarding the double-blind setup. Id. at 164-72. When counsel did so, he asked about the purposes of the double-blind set up and Detective Kavon stated he did not know what the policy reasons supporting the double-blind set up were. Id. at 172-73. Counsel then rephrased and engaged in the following colloquy with Detective Kavon:

Q Then let's go broader. You've testified that you know generally what a double-blind survey is; correct?
A Correct.
Q All right. And so the purpose of a double-blind survey is to stop the person who's giving the survey from advertently or inadvertently -- one of the major purposes of a double-blind survey is to keep the person who's giving the survey from inadvertently signaling the person who's taking the survey to what sort of answer they want them to give; correct?
A That seems fair, yes.
Q It's to create, as much as possible, an even result; correct?
A Okay.
Q And some police departments are using this method in their six-packs today; correct?
A I don't know that.
Q This method was not used in this six-pack; correct?
A Correct.
Q When you gave the six-pack to Mr. Echeverria, you knew who was in the number 2 slot and you knew who the suspect was that you were interested in information about; correct?
A Correct.
Q When you gave the survey to Ms. Angles, you knew who was in the number 2 spot and you knew who the suspect was that you were interested in getting information about; correct?
A The six-pack, you mean?
Q Yes.
A Yes, that's correct.
Q I'm sorry if I misspoke.

Id. at 173-74.

During closing argument, counsel argued that the photo lineup should be questioned because even Detective Kavon confirmed that there could be some outward influence when presenting those pictures. Id. at 209. Counsel then transitioned and focused his argument on the lack of forensic evidence linking Petitioner to the crimes before returning back to the concept of double-blind setups and arguing that because that setup was not used here, the identifications should be rejected and the jury should instead focus on the lack of forensic evidence. Id. at 216. That counsel's argument did not exonerate Petitioner does not render counsel deficient because there was overwhelming evidence of Petitioner's guilt. The procedure of the photo lineup does not change the fact that all three (3) victims of three (3)

different crimes, who had never met, all identified the same person: Petitioner; and that there was video surveillance evidence of Petitioner's guilt.

Finally, Petitioner does not establish that evidence or testimony about this double-blind set up would have reasonably changed the outcome at trial. Indeed, he cannot as the report Petitioner relies on and attaches as Exhibit D does not claim that the lineup procedure used here has been proven to be unreliable. Instead, a review of the study establishes that while this double blind set up produced positive results in the lab, when used in the field, it increased the rate of misidentifications. Exhibit D at 4. Therefore, it would appear that Petitioner was better served by the lineup procedure used here. Accordingly, Petitioner failed to show that any testimony by this unidentified expert would have reasonably changed the outcome at trial and his claim is denied.

C. Ground Eight: Counsel was not ineffective in not requesting certain jury instructions.

Petitioner argues that trial counsel was ineffective for failing to request two (2) instructions: (1) an instruction regarding eyewitness identification; and (2) an inverse instruction regarding Count 4 – Possession of Stolen Property. Supp. Petition at 33-34. Specifically, Petitioner claims that because Petitioner's identification was the critical defense and because there were eyewitness identification issues, counsel was ineffective for failing to request an instruction regarding the reliability of any eyewitness identification because that instruction would have gone to the heart of Petitioner's defense. Id. at 33. Similarly, Petitioner claims counsel should have requested an instruction that if the State did not prove beyond a reasonable doubt that Petitioner knew or should have known that the revolver was stolen, the jury must find Petitioner not guilty. Id. at 34. Both of Petitioner's claims are denied.

While "the defense has the right to have the jury instructed on its theory of the case ... no matter how weak or incredible that evidence may be," Margetts v. State, 107 Nev. 616, 619, 818 P.2d 392, 394 (1991), the district court may refuse instructions on the defendant's theory of the case if the proffered instructions are substantially covered by the instructions given to the jury, Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031 (1995). Indeed,

instructions cannot be worded such that they are misleading, state the law inaccurately, or duplicate other instructions. Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005).

Taking each claim in turn, Petitioner has not showed that counsel was ineffective for failing to request an instruction regarding eyewitness identification. At trial, the jury received the following instructions regarding credibility of witness testimony and the State's burden of proof:

> The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests, or feelings, his opportunity to have observed the manner to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.
>
> If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

Jury Instruction No. 8.

> The Defendant is presumed innocent unless the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every element of the crime charged and that the Defendant is the person who committed the offense or offenses.
>
> A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control of person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are ln such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt.
>
> Doubt to be reasonable must be actual, not mere possibility or speculation. If you have a reasonable doubt as to the guilt of the Defendant, the Defendant is entitled to a verdict of not guilty.

Jury Instruction No. 9.

The Nevada Supreme Court has repeatedly held that the credibility and burden of proof instructions negate the need for any specific instruction regarding eyewitness issues. United States v. Masterson, 529 F.2d 30 (9th Cir.), cert. denied, 426 U.S. 908, 96 S.Ct. 2231, 48 L.Ed.2d 833 (1976); Sparks v. State, 96 Nev. 26, 604 P.2d 802 (1980); See also United States v. Sambrano, 505 F.2d 284 (9th Cir.1974). Specifically, the Nevada Supreme Court has held that "specific eyewitness identification instructions need not be given, and are duplicitous of

the general instructions on credibility of witnesses and proof beyond a reasonable doubt." Nevius v. State, 101 Nev. 238, 248–49, 699 P.2d 1053, 1060 (1985). Given this well-established law, Petitioner has failed to demonstrate that the Court would have agreed to give the requested instruction or that it would have been error for the court to reject his instruction.

Next, Petitioner did not establish that counsel was ineffective for failing to request an inverse jury instruction regarding Count 4 – Possession of Stolen Property. At trial, the jury was instructed that:

> Any person who possesses a stolen firearm and either knows the firearm is stolen or possesses the firearm under such circumstances as should have caused a reasonable person to know the firearm is stolen is guilty of Possession of Stolen Property.

Jury Instruction No. 23.

Petitioner claims that counsel should have requested an instruction that if the State did not prove that Petitioner knew or should have known that the revolver was stolen, the jury must find him not guilty "of possession of revolver." Supp. Petition at 34. Given that Jury Instructions No. 9 and 23 covered the fact that the State had the burden to prove beyond a reasonable doubt that Petitioner knew or should have known that the revolver was stolen, Petitioner has not established that counsel was ineffective. Petitioner's proffered instruction was substantially covered in other instructions. Further, Petitioner's proffered instruction would have been misleading. Had the State failed to prove that Petitioner knew or reasonably should have known that the revolver was stolen, the jury would not have found him guilty of possession of stolen property, not "possession of firearm."

Finally, Petitioner has not established a reasonable probability that the result at trial would have been different had counsel requested these two (2) instructions. Even if there is any error regarding instructions, it may be harmless. Instructional errors are harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," and the error is not the type that would undermine certainty in the verdict. Wegner v. State, 116 Nev. 1149, 1155–56, 14 P.3d 25, 30 (2000), overruled on other grounds, Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006); see also NRS 178.598. As both requested

instructions were substantially covered by three (3) other instructions, Petitioner has not established that the Court would have agreed to provide these requested instructions or that failing to give these requested instructions deprived the jury from being instructed on a critical area of the law. Accordingly, Petitioner's Ground Eight claim is denied.

D. Ground Nine: Counsel was not ineffective in eliciting witness testimony.

Petitioner argues that counsel should have elicited testimony from Detective Kavon regarding Petitioner's knowledge as to whether the firearm was stolen. Supp. Petition at 35. Specifically, Petitioner claims counsel should have asked Detective Kavon about the fact that Nevada allows for private party firearm sales because that would have undermined the State's theory that Petitioner knew or should have known that the revolver was stolen. Id. According to Petitioner, failing to do so was per se ineffective and that Petitioner is entitled to a new trial. Id. Petitioner's claim is denied.

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. 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, 118 Nev. at 8, 38 P.3d at 167. In order to establish ineffectiveness a petitioner must allege and prove what information would have resulted from a better investigation or the substance of the missing witness' testimony. Molina, 120 Nev. at 192, 87 P.3d at 538; Haberstroh, 119 Nev. at 185, 69 P.3d at 684.

Here, Petitioner offers only naked speculation as to whether asking Detective Kavon whether he knew that private firearm sales were legal in Nevada would have changed the outcome at trial Indeed, such questioning was of no import because that would not negate Petitioner's guilt as to Count 4 – Possession of Stolen Property. Petitioner has not demonstrated how Petitioner came to own the revolver and has not provided any information that Petitioner purchased the gun privately. As such, Petitioner's claim is summarily denied as a bare and naked allegation. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Even if Petitioner could make the showing required by Molina, he still failed demonstrate ineffective assistance of counsel. He has not established deficient performance

because "the trial lawyer alone is entrusted with decisions regarding legal tactics such as deciding what witnesses to call." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). This is especially true considering the State's argument:

> How about the firearm? Jeffrey Haberman. Folks, we're not alleging that he stole the firearm. We're not charging him with stealing the firearm. We're charging him with possession of stolen property. And what evidence do you have that he's guilty of possession of stolen property?
>
> Well, first, let's take a look at the law. Any person who possesses a stolen firearm and either knows the firearm is stolen or -- or possesses the firearm under such circumstances as should have caused a reasonable person to know the firearm is stolen is guilty of possession of stolen property.
>
> Jeffrey Haberman told you, he owns that firearm. It was stolen from him. Never seen the Defendant before. Never gave anyone permission to take his gun. Yet, that man has his gun. Now, I underlined, how do we know he either knows or possesses a firearm under such circumstances he should cause a reasonable person to know the firearm is stolen?
>
> Again, under such circumstances as should have caused a reasonable person to know a firearm is stolen. Well, not only does he have the stolen firearm on him, he obviously never registered the firearm. He obviously didn't buy it from a store that checks registration or ownership of the firearm. And most importantly, how is he using this weapon? And when he's caught, how's he acting?
>
> He's using it to commit armed robberies. And when caught red-handed, he tries -- he still tries to conceal it. For the Jeffrey Haberman firearm incident, we ask you to find the Defendant guilty of possession of stolen property.

Recorder's Transcript of Jury Trial – Day 1 at 206-07.

Based on the State's evidence, whether counsel inquired of Detective Kavon's knowledge of private gun sales would not have changed the outcome at trial. Moreover, any such questions were irrelevant because Petitioner did not establish or explain that Petitioner acquired the gun through a legal private sale. Indeed, he cannot as his actions with the revolver suggest the opposite. Therefore, Petitioner's Ground Nine claim is denied.

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E. Ground Ten: Appellate counsel did not fail to argue that the State failed to prove that Petitioner was guilty of Possession of Stolen Property.

Petitioner claims that appellate counsel should have argued that there was insufficient evidence that Petitioner knew or should have known that the firearm used during all three (3) robberies was stolen. Supp. Petition at 36. According to Petitioner, because private parties are allowed to sell firearms in Nevada, there was no evidence that Petitioner knew the revolver was stolen when he purchased it or that he purchased the revolver under circumstances that would indicate that the revolver was stolen. Supp. Petition at 37. Petitioner's claim is denied.

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258–59, 524 P.2d 328, 331 (1974); see also Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). When there is substantial evidence in support, the jury's verdict will not be disturbed on appeal. Brass v. State, 128 Nev. 748, 754, 291 P.3d 145, 149–50 (2012). This does not require this Court to decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson, 443 U.S. at 319-20, 99 S.Ct. at 2789 (quoting Woodby v. INS, 385 U.S. 895, 87 S.Ct. 483, 486 (1966)). This standard thus preserves the fact finder's role and responsibility "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id. at 319, 99 S.Ct. at 2789.

When reviewing a sufficiency of the evidence claim, the relevant inquiry is not whether the court is convinced of the defendant's guilt beyond a reasonable doubt. Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). Rather, the limited inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Milton v. State, 111 Nev. 1487, 1491, 908 P.2d 684, 686–87 (1995) (quotation and citation omitted). Thus, the evidence is only insufficient when "the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury." Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (emphasis removed).

"[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)). It is further the jury's role "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson, 443 U.S. at 319, 99 S. Ct. at 2789. Moreover, in rendering its verdict, a jury is free to rely on circumstantial evidence. Wilkins, 96 Nev. at 374, 609 P.2d at 313. Indeed, "circumstantial evidence alone may support a conviction." Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

Here, Petitioner has not showed that appellate counsel was ineffective for failing to challenge the sufficiency of the evidence as to Petitioner's conviction of Count 4 – Possession of Stolen Property. Pursuant to N.R.S. 205.275:

> 1. Except as otherwise provided in NRS 501.3765, a person commits an offense involving stolen property if the person, for his or her own gain or to prevent the owner from again possessing the owner's property, buys, receives, possesses or withholds property:
>
> (a) Knowing that it is stolen property; or
>
> (b) Under such circumstances as should have caused a reasonable person to know that it is stolen property.

At trial, Jeffery Haberman testified that in October of 2013, someone broke into his home, took his entire gun safe, which included a 38-caliber Colt Revolver Petitioner used in the commission of the robberies here. Recorder's Transcript of Jury Trial – Day 1 at 88-91. Mr. Haberman further testified that he registered the revolver, reported it stolen, and that he did not know Petitioner and never gave him permission to use the revolver. Id. at 91-92. During closing argument, the State argued that while Petitioner was not charged with stealing Mr. Haberman's revolver in 2013, there was sufficient circumstantial evidence that Petitioner reasonably should have known the revolver was stolen. Petitioner did not attempt to register the revolver when he purchased it, and instead used it to commit three (3) store robberies:

> Well, not only does he have the stolen firearm on him, he obviously never registered the firearm. He obviously didn't buy it from a store that

> checks registration or ownership of the firearm. And most importantly, how is he using this weapon? And when he's caught, how's he acting?
>
> He's using it to commit armed robberies. And when caught red-handed, he tries -- he still tries to conceal it. For the Jeffrey Haberman firearm incident, we ask you to find the Defendant guilty of possession of stolen property.

Recorder's Transcript of Jury Trial – Day 1 at 206-07.

This was sufficient evidence and argument that Petitioner was guilty of Possession of Stolen Property. Petitioner did not provide any evidence that he legally purchased the revolver. Indeed, as the revolver was both registered and reported stolen, it is hard to imagine that there is any evidence contradicting the State's argument that Petitioner reasonably should have known that the revolver was stolen. Therefore, Petitioner has failed to establish that challenging his conviction as to Count 4 – Possession of Stolen Property would have been successful.

Finally, Petitioner did not establish prejudice because his twenty-four (24) to sixty (60) month sentence on Count 4 was imposed concurrently with his sentences for Counts 1, 2, and 3. As Petitioner was sentenced to twelve (12) to sixty (60) months as to Count 1, twenty-eight (28) to one hundred fifty-six (156) months and to Count 2, and twenty-eight (28) to one hundred fifty-six (156) months, plus a consecutive term of twenty-eight (28) to one hundred fifty-six (156) months for the deadly weapon enhancement as to Count 3; Petitioner's sentence in Count 4 was subsumed by his other sentences. Accordingly, Petitioner's Ground Ten claim is denied.

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ORDER

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

Dated this 12th day of May, 2021

Ronald J. Israel

A-19-793961-W

E3B EEC D39D 0230
Ronald J. Israel
District Court Judge

SC

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

BY /s/ TALEEN PANDUKHT
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the foregoing, was made this 12th day of May, 2021, by Electronic Filing to:

MONIQUE A. MCNEILL, Esquire
E-mail Address: Monique.McNeill@yahoo.com

___/s/ Janet Hayes_____
Secretary for the District Attorney's Office

14F01777A/jb/jh/GANG

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Kenya Splond, Plaintiff(s)	CASE NO: A-19-793961-W
vs.	DEPT. NO. Department 28
James Dzurenda, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 5/12/2021

Dept 28 Law Clerk Law Clerk	dept28lc@clarkcountycourts.us
Monique McNeill	McNeill@yahoo.com
Monique McNeill	monique.mcneill@yahoo.com

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Steven D. Grierson
CLERK OF THE COURT

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

KENYA SPLOND,

Petitioner,

vs.

JAMES DZURENDA,

Respondent,

Case No: A-19-793961-W

Dept No: XXVIII

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

PLEASE TAKE NOTICE that on May 12, 2021, 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 May 19, 2021.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 19 day of May 2021, 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:

Kenya Splond # 1173052
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Indian Springs, NV 89070

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/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

KENYA SPLOND,
#1138461

Defendant.

CASE NO: A-19-793961-W
(C-14-296374-1)

DEPT NO: XXVIII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: APRIL 15, 2021
TIME OF HEARING: 1:30 PM

THIS CAUSE having come on for hearing before the Honorable RONALD ISRAEL, District Judge, on the 15 day of April, 2021, the Petitioner being present, represented by MONIQUE MCNEILL, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through BINU PALAL, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On April 8, 2015, Kenya Splond (hereinafter "Petitioner"), was charged by way of an Amended Indictment with Count 1 – Conspiracy to Commit Robbery (Category B Felony -

NRS 200.380, 199.480 - 50147); Count 2 – Burglary While in Possession of a Firearm (Category B Felony - NRS 205.060 - 50426); Count 3 – Robbery With Use of a Deadly Weapon (Category B Felony - NRS 200.380, 193.165 - 50138) Count 4 – Possession of Stolen Property (Category B Felony - NRS 205.275(2)(c) - 56060), Count 5 – Burglary While in Possession of a Firearm (Category B Felony - NRS 205.060 - 50426); Count 6 – Robbery With Use of a Deadly Weapon (Category B Felony - NRS 200.380, 193.165 - 50138); Count 7 – Burglary While in Possession of a Firearm (Category B Felony - NRS 205.060 - 50426); and Count 8 – Robbery With Use of a Deadly Weapon (Category B Felony - NRS 200.380, 193.165 - 50138).

On April 20, 2015, Petitioner's defense counsel, Frank Kocka, withdrew as attorney of record, and Augustus Claus confirmed as trial counsel for Petitioner.

On March 15, 2016, Petitioner filed a Motion to Preserve and Produce Evidence. On March 16, 2016, the district court granted the motion in part. On March 18, 2016, Petitioner filed a Motion to Suppress Evidence Obtained as Result of Illegal Stop. The district court denied that motion on March 21, 2016.

The jury trial commenced on March 21, 2016, and concluded on March 24, 2016. On March 24, 2016, the jury found Petitioner guilty on all counts.

On July 20, 2016, the date set for sentencing, Petitioner requested a continuance to correct errors in Petitioner's Presentence Investigation Report (hereinafter "PSI).

On February 2, 2017, after six (6) more continuances, Petitioner was sentenced as follows: Count 1 – twelve (12) to sixty (60) months; Count 2 – twenty-eight (28) to one hundred fifty-six (156) months, concurrent with Count 1; Count 3 – twenty-eight (28) to one hundred fifty-six (156) months, plus a consecutive term of twenty-eight (28) to one hundred fifty-six (156) months for the Use of a Deadly Weapon, to run concurrent with Count 2; Count 4 – twenty-four (24) to sixty (60) months, concurrent with Counts 1, 2, and 3; Count 5 – twenty-eight (28) to one hundred fifty-six (156) months, consecutive to Counts 1, 2, 3, and 4; Count 6 – twenty-eight (28) to one hundred fifty-six (156) months, plus a consecutive term of twenty-eight (28) to one hundred fifty-six (156) months for the use of a deadly weapon,

concurrent with Count 5; Count 7 – twenty-eight (28) to one hundred fifty-six (156) months, consecutive to other counts; Count 8 – twenty-eight (28) to one hundred fifty-six (156) months plus a consecutive term of twenty-eight (28) to one hundred fifty-six (156) months for the use of a deadly weapon, concurrent with Count 7. The aggregate total sentence equaled one hundred sixty-eight months (168) to nine hundred thirty-six (936) months. Petitioner received nine hundred thirty-five (935) days credit for time served.

On February 13, 2017, Petitioner's Judgment of Conviction was filed. The Nevada Court of Appeals affirmed Petitioner's Judgment of Conviction on December 17, 2018. Remittitur issued on January 15, 2019.

Petitioner filed the instant Petition for Writ of Habeas Corpus (hereinafter "Petition") on April 29, 2019. Petitioner filed a Motion for Appointment of Counsel, and Request for Evidentiary Hearing on November 12, 2019. On November 25, 2019, the State filed a Response to Defendant's Petition, Motion for Appointment of Counsel, and Request for Evidentiary Hearing.

On December 16, 2019, the district court granted Petitioner's Motion for Appointment of Counsel, noting that "the claims are not difficult, however, the issues that could be presented could be substantial." The Court then ordered Petitioner's Petition and Request for Evidentiary hearing off calendar and set the matter for confirmation of counsel. On December 30, 2019, counsel confirmed, and a briefing schedule was set.

On October 12, 2020, Petitioner filed a Supplemental Memorandum of Points and Authorities in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) ("Supp. Petition"). On January 12, 2021, the State filed a Response to Petitioner's Supp. Petition. On January 25, 2021, Petitioner filed a Reply to the State's Response to Petitioner's Supp. Petition.

On February 20, 2021, this Court concluded that a limited evidentiary hearing regarding whether prior counsel, Mr. Kocka, conveyed the offer to negotiate. On April 15, 2021, this Court conducted an evidentiary hearing and heard testimony from Petitioner and Mr. Kocka. Following testimony and argument, this Court concluded as follows.

STATEMENT OF FACTS

JANUARY 22, 2014, CRICKET WIRELESS

Samuel Echeverria (hereinafter "Echeverria"), who was working at Cricket Wireless, testified that on January 22, 2014, a black male adult came into the store with a black hoodie, a black baseball cap, black shirt, black shoes, and regular blue jeans. The man, later identified as Petitioner, presented himself as a customer. Petitioner came up to the register and asked for a specific battery for his girlfriend. Echeverria walked up to the front of the store to see if the battery was in stock and walked behind the desk to grab the keys to unlock the holsters.

Everyone had left the store, except for Petitioner and Echeverria. When Echeverria started ringing Petitioner up for the battery, he looked up and Petitioner pulled out a black gun and said, "[g]ive me all the money before I blow your brains out." Echeverria described the gun as a black revolver. In a photo lineup, Echeverria identified Appellant with 100 percent certainty. The robbery was also caught on surveillance video and played for the jury. Echeverria immediately called the police after Petitioner left the store.

Although Echeverria was not able to identify Petitioner in court, he testified that he identified him approximately a month after the robbery as the person in the number two position in the photo lineup. While testifying, Echeverria maintained that he was 100 percent certain then that the person who robbed him was in the number two spot in the photo lineup.

Alisa Williams (hereinafter "Williams") testified that on January 22, 2014, after getting out of work, she saw a black male adult come out of the Cricket Wireless Store and jump into the back seat of a silver car. She also saw a light-skinned black female adult with white shades on driving the car. She remembered the male had a hat on his head and a scar on his face, more specifically his jaw. When testifying, she said the second photo in the photo lineup looked like it might be him, but she was not sure it was him when she testified, and was not sure it was him back when she was initially shown the photo lineup.

JANUARY 28, 2014, METRO PCS

On January 28, 2014, Graciela Angles (hereinafter "Angles") was working at Metro PCS on 6663 Smoke Ranch. Around 2:00 PM Petitioner robbed the store, taking money and a

phone. He looked at phones and asked Angles about phone plans. Petitioner asked about a Galaxy S4, so Angles went and grabbed it. Petitioner then asked about the Omega, so Angles took the Galaxy S4 back and brought out the Omega. Petitioner then pulled out the gun and asked Angles to step back and give him the money. In fear, Angles grabbed all the money out of the cash drawer while Petitioner was pointing the gun at her, and Petitioner took the cash and the Omega and left. Angles immediately called 911.

About a month later, a police officer with Metro showed Angles a photo lineup. She circled picture number two, wrote her name under it, and said she was 100 percent sure that was the person who robbed her. She also identified Petitioner in court and further testified she still was 100 percent sure that was who robbed her. Video surveillance of the robbery was shown to the jury. She was the only employee in the store at the time of the robbery.

FEBRUARY 2, 2014, STAR MART

Brittany Slathar (hereinafter "Slathar") was working at Star Mart as a cashier on February 2, 2014, around 2:45 AM. She saw Petitioner come in and go to the gum section. She then got up and walked to the counter. Petitioner picked up some Wrigley Spearmint gum. No one else was in the store. Slathar asked Petitioner if he needed anything else and that is when he said two packs of Newport 100s. As Slathar was ringing the cigarettes up, Petitioner pulled out a gun and told Slathar to give him all the money in the cash register. Slathar told Petitioner that she was in the middle of a transaction and she could not open her register. Petitioner kept saying, "Give me the money. Give me the money. I'm gonna kill you. You're gonna die." He called her a "dumb white bitch" and told her she was stupid.

Slathar never opened the register because she thought she would have to pay back the money he stole. Petitioner left, but told Slathar he would be back, and that she was lucky. Petitioner grabbed the cigarettes and gum and left. Slathar immediately called Metro and Officer Jeremy Landers took her to the location where a suspect had been apprehended and gave her a Show Up Witness Instruction Sheet. Slather identified Petitioner with 100 percent certainty. Slathar read the statement she wrote down for police into the record. She read, "[t]he male in front of the police car was the man who robbed me at the—robbed me at gunpoint. He

was wearing blue jeans, red T-shirt, and black tennis shoes. When he came in the store he was wearing blue jeans, a black hooded sweatshirt and a light beanie with dark brown spots. She testified it was a camouflage beanie. She also identified Petitioner in court.

Slather said Petitioner had a small black revolver with no clip. When Petitioner came into the store, Slather recognized him as a previous customer that had been in the store before. The robbery was also caught on video surveillance.

Officer Joshua Rowberry (hereinafter "Officer Rowberry") testified that on February 2, 2014, he received a call involving a robbery around 2:57 a.m. at 5001 North Rainbow. The information Officer Rowberry received was that the suspect had left the store and he was traveling northbound on Rainbow. Moments later, Officer Rowberry saw a car north on Rainbow. He testified it was the only vehicle in the area, it was in close proximity to the robbery, and it was headed northbound away from where the robbery had just occurred. He stopped the vehicle because it was leaving the area of the robbery and because there was damage to the rear of the vehicle as if it was just involved in an accident.

As he followed the vehicle, it turned into a residential neighborhood, wherein Officer Rowberry activated his lights and sirens. The car stopped, he exited his vehicle, and approached the car on the driver's side rear passenger door. He could not see through the windows due to the dark tint. Kelly Chapman (hereinafter "Chapman") was the driver of the vehicle. After she rolled down the window, Officer Rowberry noticed there was an adult black male laying in the back seat, covered up by a blanket and breathing heavily.

Officer Rowberry gave Petitioner instructions to show his hands, which he did not do. Officer Rowberry initiated code red on his radio, signaling to other officers he needed backup. Once the other officers arrived, Officer Rowberry instructed Chapman and Petitioner to step out of the car. Officer Rowberry was able to see inside the car when Petitioner and Chapman got out, and he saw two packs of Newport cigarettes and a pack of spearmint Wrigley's gum, which were the items taken from the store.

Officer Rowberry also found a black sweatshirt and camouflage beanie. A revolver was inside a pocket of the sweatshirt. Out of the six (6) possible rounds, there were four (4) rounds

in the revolver. Petitioner's shirt also had some black dots on it and small cotton fibers from the sweatshirt.

Jeffrey Habberman (hereinafter "Habberman") testified that he was the owner of a 38-caliber Colt revolver that was stolen when someone broke into his home and stole the entire gun safe. He testified that he did not know the Petitioner sitting at counsel table, he did not know a Kenny Splond, he never gave Petitioner permission to go into his house, never gave him permission to borrow his revolver, and he never gave permission to any of his friends or relatives to ever use his gun. Habberman identified Exhibit #28 as a picture of his gun.

ANALYSIS

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). 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 v. State, 100 Nev. 498, 503, 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).

A claim of ineffective assistance of appellate counsel must also satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

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.

Additionally, 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 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.

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).

I. PETITIONER'S PRO PER PETITION IS DENIED

Petitioner raised the following claims in his pro per Petition: (1) that his car was stopped illegally in violation of his Fourth Amendment rights; (2) that his right to a speedy trial was violated; (3) that the State withheld discovery; (4) that he is actually innocent because the

theory of constructive possession is an illegal falsehood; (5) that his criminal complaint was flawed because it did not include the necessary elements for conspiracy; (6) that the district court erred when consolidating his cases; (7) numerous claims of ineffective assistance of counsel alleged against Frank Kocka and Augustus Claus; (8) that the district court erred in admitting inadmissible prior bad act evidence; (9) that his PSI was incorrect; and (10) cumulative error. For the foregoing reasons, all of Petitioner's claims are denied.

A. PETITIONER'S CLAIM THAT HIS FOURTH AMENDMENT RIGHTS WERE VIOLATED DURING AN ILLEGAL TRAFFIC STOP IS BARRED BY THE LAW OF THE CASE

"The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. NEV. CONST. Art. VI § 6. See Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005) (recognizing the doctrine's applicability in the criminal context); see also York v. State, 342 S.W. 528, 553 (Tex. Crim. Appl. 2011). Accordingly, by simply continuing to file motions with the same arguments, his motion is barred by the doctrines of the law of the case and res judicata. Id.; Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

Petitioner contends that law enforcement illegally stopped the car he was a passenger in. Petition at 6. Petitioner explains that while he was stopped because of an allegedly damaged rear end, the officer never wrote a citation for that damage, which means he did not actually have probable cause to stop the car. Id. Because there was no probable cause, all evidence seized—specifically the gun and cigarettes—is fruit of the poisonous tree and should not have been admitted at trial. Id.

Petitioner has already raised this claim on direct appeal. The Nevada Court of Appeals rejected this claim on direct appeal. Therefore, it cannot be re-litigated here. Specifically, the Court of Appeals explained:

> Next, we consider whether the district court failed to suppress evidence stemming from an improper traffic stop. 'This court reviews findings of fact for clear error, but the legal consequences of those facts involve questions of law that we review de no vo.' State v. Beckman, 129 Nev. 481, 486, 305 P.3d 912, 916 (2013). Where an officer has probable cause to believe that a driver has committed a traffic infraction, a traffic stop does not violate the Fourth Amendment. State v. Rincon, 122 Nev. 1170, 1173, 147 P.3d 233, 235 (2006); Gama v. State, 112 Nev 833, 836, 920 P.2d 1010, 1012-13 (1996) distinguished on other ground by Backman, 129 Nev. 481, 305 P.3d 912.
>
> Here, the police officer stopped Splond's vehicle after observing that the back of the vehicle was smashed and had parts hanging down as if it had been in an accident. The officer testified that driving a damaged vehicle is a citable offense. Therefore, we conclude the officer had probable cause to stop Splond, and that the district court did not err in denying Splond's motion to suppress or in admitting the evidence obtained from the officer's traffic stop.

Nevada Court of Appeals Order of Affirmance at 5. Thus, the evidence obtained as a result of the traffic stop has been deemed admissible against Petitioner. Accordingly, this claim is denied.

B. PETITIONER'S CLAIM THAT HIS RIGHT TO A SPEEDY TRIAL WAS VIOLATED IS WAIVED FOR FAILURE TO RAISE IT ON DIRECT APPEAL

Petitioner alleges that his speedy trial rights were violated because he invoked his right to a trial within sixty (60) days pursuant to NRS 178.495. Petition at 7. First, Petitioner seems to confuse his constitutional right to a speedy trial with the statutory right to a speedy trial which can be waived. NRS 178.495. Regardless, either claim is waived as he failed to raise the issue on direct appeal and because Petitioner waived his statutory right to a speedy trial on April 30, 2014. Court Minutes, April 30, 2014.

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C. PETITIONER'S CLAIM THAT THE STATE WITHHELD DISCOVERY IS WAIVED FOR FAILURE TO RAISE IT ON DIRECT APPEAL

Claims other than ineffective assistance of counsel or challenges to the validity of a guilty plea are waived if not first raised on direct appeal unless a petitioner can show good cause and prejudice for failing to make the argument. Franklin, 110 Nev. 752, 877 P.2d 1059. Here, Petitioner alleges that the State withheld the following discovery: statements from Jeffry Haberman, Brittany Slather, Sam Echerverria, and Graciela Angeles, pictures and exhibits, and Kellie Chapman's criminal history. Petition at 8. Petitioner further claims that this deprived him of his right to effective cross-examination of the witnesses and that the district court should hold an evidentiary hearing to determine if this deprived him of his right to a fair trial. Petition at 9. This claim should have been raised on direct appeal and the failure to do so waives Petitioner's ability to raise this claim here.

D. PETITIONER'S CLAIM OF ACTUAL INNOCENCE AND ATTACKING THE VALIDITY OF THE THEORY OF CONSTRUCTIVE POSSESSION ARE WAIVED FOR FAILURE TO RAISE IT ON DIRECT APPEAL

Claims other than ineffective assistance of counsel or challenges to the validity of a guilty plea are waived if not first raised on direct appeal unless a petitioner can show good cause and prejudice for failing to make the argument. Franklin, 110 Nev. 752, 877 P.2d 1059. Here, Petitioner appears to argue that constructive possession is a legal falsehood and that he should not have been charged with possession of stolen property, namely the gun, because Kellie Chapman was the driver of the car the weapon was found in and whoever is driving the car is presumed to be in possession of anything found in the car. Petition at 9-10. Petitioner also alleges that he is actually innocent because the gun used in the crime did not test positive for his DNA or fingerprints. Id. Again, these claims should have been raised on direct appeal. Therefore, Petitioner waived his right to raise this claim in a post-conviction petition for writ of habeas corpus.

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E. PETITIONER'S CLAIM THAT THE CRIMINAL COMPLAINT IS FLAWED IS WAIVED FOR FAILURE TO RAISE IT ON DIRECT APPEAL

Claims other than ineffective assistance of counsel or challenges to the validity of a guilty plea are waived if not first raised on direct appeal unless a petitioner can show good cause and prejudice for failing to make the argument. Franklin, 110 Nev. 752, 877 P.2d 1059. Petitioner claims that he is entitled to relief because the Indictment used to charge him did not include the elements of conspiracy. Petition at 11. According to Petitioner, because he conspired with Kellie Chapman on two (2) separate occasions, he should have been charged separately for each conspiracy. Petition at 11. Not only is this not the law, Petitioner waived this claim when he failed to raise it on direct appeal. Therefore, this claim is waived.

F. PETITIONER'S CLAIM THAT THE DISTRICT COURT SHOULD NOT HAVE CONSOLIDATED HIS CASES IS WAIVED FOR FAILURE TO RAISE IT ON DIRECT APPEAL

Claims other than ineffective assistance of counsel or challenges to the validity of a guilty plea are waived if not first raised on direct appeal unless a petitioner can show good cause and prejudice for failing to make the argument. Franklin, 110 Nev. 752, 877 P.2d 1059. Petitioner alleges that the district court erred in granting the State's Motion to Consolidate Petitioner's cases. Petition at 12. Petitioner should have raised this claim on direct appeal and his failure to do so waives his ability to argue this claim here.

G. PETITIONER HAS NOT ESTABLISHED INEFFECTIVE ASSISTANCE OF COUNSEL

1. Petitioner has not established that his prior counsel, Frank Kocka, was ineffective.

Petitioner provides a laundry list of reasons as to why Mr. Kocka was ineffective: (1) failure to investigate his case; (2) failure to convey the State's offer; (3) a breakdown in communication; (4) failure to provide Petitioner his case file; and (5) failure to file motions. Petition at 13. All of these claims are unsupported by specific facts and suitable for summary denial under Hargrove. Moreover, none of Petitioner's claims entitle him to relief because the allegations do not amount to ineffective assistance of counsel. His claims are therefore denied.

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First, Petitioner's claim that Mr. Kocka's investigation of his case was inadequate fails. A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Petitioner fails to explain what investigation Mr. Kocka failed to do or how it would have rendered a more favorable outcome. As such, Petitioner's claim is denied.

Second, Petitioner's claim that Mr. Kocka failed to convey the State's offer is belied by the record. On April 20, 2015, Mr. Kocka and the district court had the following exchange:

> THE COURT: Hey. Is this case resolved?
>
> MR. KOCKA: It is not, Your Honor. I did receive an offer on the case; the offer is not acceptable to my client. so at this point, Your Honor, I don't know if you want me to do it formally in writing or you'll accept it orally, but I'm going to have to get him over to the PD's office because he wants to go to trial.

Recorder's Transcript of Status Check: Status of Case Heard on April 20, 2015, April 20, 2015 at 2.

The Court minutes reflect that Appellant was present on April 20, 2015. Thus, he heard the response his attorney gave to the Court and did not object to his attorney's representations. Therefore, Petitioner's claim that his counsel never informed him of the offer is belied by the record. Moreover, Petitioner does not allege that had he known about the offer that he would have accepted it. In fact, Petitioner makes very clear that he would never have accepted an offer and that he believes it was his refusal to accept a plea that resulted in the delay in trial. Petition at 7. As such, Petitioner has not established prejudice for allegedly never having heard an offer he would have rejected.

Third, Petitioner's argument that Mr. Kocka was ineffective for a breakdown in communication is denied. 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. Petitioner's claim is meritless the record because he fails to explain what Mr. Kocka failed to communicate to him and did not explain exactly how the breakdown in communication prejudiced him at trial. This is likely because any communication breakdown between Mr. Kocka and Petitioner is irrelevant because Mr. Kocka did not represent Petitioner at trial.

Fourth, Petitioner's claim that Mr. Kocka did not provide him his case file is meritless. The record is clear that when Mr. Claus substituted in as counsel of record, the complete discovery file was provided to Mr. Claus. Court Minutes, April 22, 2015. As such, it does not matter whether Mr. Kocka provided Petitioner his case file because Petitioner's new attorney received it and Petitioner does not specifically allege what pieces of discovery Mr. Kocka had that he did not provide to either Petitioner or Mr. Claus.

Fifth, Petitioner's claim that Mr. Kocka was ineffective because he did not file motions is denied for lack of specificity. 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). Petitioner does not explain what motions Mr. Kocka should have filed or whether they had any merit. As such, this claim must fail. Additionally, because Mr. Kocka withdrew as Petitioner's attorney of record over one (1) year before trial, Petitioner has not showed how his failure to file motions prejudiced him at trial.

Moreover, Petitioner has not established how any of the above claims prejudiced him because Mr. Kocka was not retained to take the case to trial and withdrew as attorney of record one (1) year before Petitioner's trial. Frank Kocka was originally Petitioner's defense counsel but withdrew from representation on April 20, 2015 when it became clear that Petitioner was not interested in negotiating a resolution with the State. Court Minutes, April 20, 2015. Augustus Claus confirmed as counsel of record on April 22, 2015. Court Minutes, April 22, 2015. Mr. Claus continued to represent Petitioner throughout trial and as his Appellate counsel.

As such, Petitioner failed to show how any of Mr. Kocka's actions prejudiced him at trial and his claims are therefore denied.

2. Petitioner has not established that trial counsel, Augustus Claus, was ineffective.

Similarly, Petitioner provides a laundry list of reasons for why Mr. Claus was ineffective at trial: (1) failure to file motions; (2) failure to present a defense or subpoena records necessary for his defense; (3) failure to investigate; (4) failure to object to a fatally flawed indictment and joinder of Petitioner's two cases; (5) failure to object to Haberman's inadmissible testimony about prior bad acts; (6) failure to object to the PSI or move for a Petrocelli hearing to handle the errors in his PSI; and (7) failure to object to jury instructions. Petition at 14. Petitioner also accuses Mr. Claus of ineffectiveness as appellate counsel because he did not argue his own ineffectiveness on appeal. Id. These claims are unsupported by specific facts and suitable for summary denial under Hargrove. Moreover, none of Petitioner's claims would entitle him to relief because the allegations do not amount to ineffective assistance of counsel.

First, Petitioner's claim that counsel did not file motions is denied for lack of specificity and as belied by the record. A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina, 120 Nev. at 192, 87 P.3d at 538. Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Petitioner fails to explain what motions counsel did not file or how any of them had merit. Moreover, defense counsel filed two motions. On March 15, 2016, counsel filed a discovery motion which was granted in part on March 16, 2016. Court Minutes, March 16, 2016. On March 18, 2016, counsel confirmed that he received all discovery. Court Minutes, March 18, 2016. Next, counsel filed a motion to suppress on March 18, 2016 which was denied on March 21, 2018. Court Minutes, March 21, 2016. Therefore, Petitioner failed to show how counsel's actions prejudiced him or how filing other motions would have resulted in a more favorable outcome at trial.

Second, Petitioner's claim that counsel did not present a defense or subpoena phone records necessary for his defense is denied. 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, 118 Nev. at 8, 38 P.3d at 167. Petitioner does not explain what other investigation defense counsel should have or what favorable evidence the phone records contained that would have changed the outcome at trial. Molina, 120 Nev. at 192, 87 P.3d at 538. As such, this claim is summarily denied as a bare and naked allegation pursuant to Hargrove.

Third, Petitioner has not established that counsel failed to investigate. Petitioner does not explain what investigation counsel failed to conduct or how a different investigation would have made the outcome more favorable to Petitioner. As such, this bare and naked claim is summarily denied under Hargrove.

Fourth, Petitioner's claim that counsel was ineffective because he did not object to the Amended Indictment or consolidation of Petitioner's cases is denied. Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Petitioner was properly charged with conspiracy to commit robbery. NRS 199.480 defines conspiracy as an agreement between two or more people to commit an unlawful purpose. Here, the Amended Indictment explained that Petitioner and co-conspirator Kellie Chapman agreed to commit robbery. Specifically, the Amended Indictment stated:

> Count 1 – Conspiracy to Commit Robbery
> Defendant KENNY SPLOND, aka Kenya Splond, and Co-Conspirator KELLIE ERIN CHAPMAN did, then and there meet with each other and between themselves, and each of them with the other, willfully, unlawfully, and feloniously conspire and agree to commit robbery, and in furtherance of said conspiracy, defendants did commit the acts as set forth in Count 2 and 3, said acts being incorporated by reference as though fully set forth herein.

Amended Indictment at 1-2. Next, counsel was not representing Petitioner when the district court consolidated Petitioner's cases. Petitioner's cases were consolidated on March 18, 2015. Counsel did not confirm as counsel until April 22, 2015, over one month later.

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Therefore, counsel cannot be ineffective for failing to object to a motion that was filed and granted before he was ever the attorney of record.

Fifth, Petitioner's claim this his counsel was ineffective for failing to object to Haberman's inadmissible testimony about prior bad acts is denied. The record indicates that when Haberman testified that the weapon used during the robbery was stolen from his home, defense counsel did ask for a limiting instruction that the jury was not to consider the testimony that Haberman's home was burglarized as evidence against Petitioner. Recorder's Transcript of Jury Trial – Day 2 at 97-98. Rather, it was only to be considered for purposes of determining whether the gun was stolen. Id.

Moreover, Petitioner has not established prejudice because counsel cannot be ineffective for making futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). The State admitted evidence that Petitioner broke into Haberman's home to prove that Petitioner was guilty of Possession of Stolen Property, specifically the revolver that was used in the charged robberies with a deadly weapon. As Haberman was the owner of that firearm, his testimony was necessary to show that the gun was stolen. The State showed Haberman a picture of the gun used, asked if it was his, whether it was stolen, how it was stolen, and if he gave Petitioner permission to possess the gun. Recorder's Transcript of Jury Trial – Day 2 at 88-92. The line of questioning was not meant to show that Petitioner committed a prior uncharged act. It was meant to establish that Petitioner possessed stolen property. Both the State's closing argument, a limiting instruction, and the jury instructions made sure that the jury was not to consider whether Petitioner broke into another home and stole a weapon. Thus, Haberman testifying to the fact that his gun was stolen did not constitute inadmissible prior bad act evidence. It was proper evidence regarding the Possession of Stolen Property charge.

Sixth, counsel was not ineffective in handling the errors with the PSI. At the first scheduled sentencing date, counsel objected to sentencing Petitioner at that time because it appeared that there were errors in the PSI. Specifically, Petitioner believed that some of the criminal convictions listed belonged to his counsel and not Petitioner. Counsel then had nearly

six (6) months' worth of continuances to try and correct those errors. In that six (6) months, counsel subpoenaed records to investigate what corrections on the PSI needed to be made. Court Minutes, July 20, 2016; August 10, 2016; September 7, 2016; October 12, 2016; November 23, 2016; December 21, 2016; February 6, 2017. Defense counsel filed a Motion to Compel Production of Subpoenaed Records in an effort to clarify any potential errors in Petitioner's PSI. Defendant's Motion to Compel Production of Subpoenaed Materials. Defense counsel had a hearing on that entire issue, and it was only when it became clear that there was no additional information that the district court moved forward with sentencing over defense counsel's objection. Recorder's Transcript of Defendant's Motion to Compel Production of Subpoenaed Materials, dated January 23, 2017; Recorder's Transcript of Sentencing, dated February 2, 2017. As such, it is unclear what more defense counsel could have, let alone should have done. Finally, because this issue was addressed and dismissed on direct appeal, Petitioner has not showed prejudice because he cannot establish that different actions would have resulted in a more favorable outcome.

Seventh, Petitioner's claim that counsel was ineffective for failing to object to the jury instructions is summarily denied as a bare and naked assertion pursuant to Hargrove. The district court gave thirty (30) jury instructions and Petitioner does not point to a single one that he claims was objectionable. Moreover, because Petitioner cannot show how the jury instructions were incorrect, he has not established prejudice.

Finally, Petitioner accused Mr. Claus, who was also his appellate counsel, of ineffectiveness because he did not argue his own ineffectiveness on appeal. Ineffective assistance of counsel claims are inappropriate for direct appeal. Gibbons v. State, 97 Nev. 520, 634 P.2d 1214 (1981). Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. As such, appellate counsel cannot be ineffective for arguing his own ineffectiveness at trial because the Nevada Supreme Court would not have considered such arguments.

Petitioner also appears to argue that Mr. Claus was ineffective appellate counsel because he did not raise certain claims on appeal. Petition at 15. Here, Petitioner failed to show

how appellate counsel was ineffective because, as discussed above, he has not established that any of the claims counsel did not raise on direct appeal had merit let alone a reasonable possibility of success. Therefore, counsel was not ineffective for failing to make a losing argument and Petitioner's claim is denied.

H. PETITIONER'S CLAIM THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN ADMITTING INADMISSIBLE PRIOR BAD ACT EVIDENCE IS BARRED BY THE LAW OF THE CASE

Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini, 117 Nev. 879, 34 P.3d 532. Petitioner argues that it was error for the district court to allow evidence of a prior uncharged act through the testimony of Jeffery Haberman (hereinafter "Haberman") without holding a Petrocelli hearing. Petition at 16-19. Petitioner has already raised, and the Nevada Court of Appeals has rejected this argument on direct appeal. Specifically, the Court of Appeals concluded that the evidence of Petitioner's prior home invasion was admissible:

> First, we address whether the district court erred in admitting evidence of an uncharged burglary and/or home invasion at trial. We review the trial court's determination to admit or exclude prior bad act evidence for an abuse of discretion. See Chavez v. State, 125 Nev. 328, 345, 213 P.3d 476, 488 (2009). Because Splond failed to object to the evidence regarding the burglary and/or home invasion below, we review for plain error. See Id. at 269, 182 P.3d at 110. Under that standard, reversal is proper if the error cause "actual prejudice or a miscarriage of justice, thereby affecting his substantial right. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008).
>
> Relevant evidence is generally admissible unless the danger of unfair prejudice substantially outweighs its probative value. NRS 48.105; NRS 48.025; NRS 48.035(1). The State is entitled to present evidence necessary to prove the crime charged in the indictment. Dutton v. State, 94 Nev. 461,464, 581 P.2d 856, 858 (1978) disapproved on other grounds by Gray v. State, 100 Nev. 556, 688 P.2d 313 (1984).
>
> Here, the State only charged Splond with possession of stolen property—a firearm. On direct examination by the State, the victim testified that *on a date prior to the time* Splond was apprehended with a firearm, an unknown

> perpetrator forcefully broke into the victim's home and stole his revolver. The prosecutor then immediately asked, 'Did you ever give that man [Kenny Splond] permission to go in your house?' to which the victim answered, 'No, sir.' Clearly, the prosecutor's question, along with the victim's answer, unfairly and prejudicially insinuated that Splond committed the burglary and/or home invasion of the victim's home prior to the crimes alleged by the State in the information against Splond.
>
> Splond's attorney thereafter asked the district court for a bench conference. After the unrecorded bench conference, the district court gave a limiting instruction immediately after the victim's testimony and again at the end of trial. Because the district court gave the jury two limiting instructions as a result of the prosecutor's improper question, we conclude that the district court mitigated any prejudicial effect that may have occurred under these circumstances. See Chavez v. State, 125 Nev. 328, 345, 213 P.3d 476, 488 (2009) (noting that a limiting instruction may cure prejudice associated with bad act evidence). Thus, based on the foregoing, we conclude that the district court did not abuse its discretion in admitting the victim's testimony that he did not give Splond permission to break into his home and take his revolver on a previous date not charged by the State.

Nevada Court of Appeals Order of Affirmance at 2-3. The Court of Appeals concluded that any prejudicial effect was mitigated because the district court gave two limiting instructions as a result of the question. Id. As such, Petitioner is barred from re-litigating the same claim here.

I. PETITIONER'S ARGUMENT THAT THE DISTRICT COURT RELIED ON AN INACCURATE PSI IS BARRED BY THE LAW OF THE CASE

Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini, 117 Nev. 879, 34 P.3d 532. Petitioner claims that the district court erred in sentencing him based on an inaccurate PSI. Petition at 20-21. Petitioner has already raised this claim on direct appeal. The Nevada Court of Appeals rejected this claim on direct appeal. Therefore, it cannot be re-litigated here. Specifically, the Court of Appeals explained:

> Finally, we address whether the district court improperly relief on the presentence investigation (PSI) report in sentencing Splond. The district court has wide discretion in sentencing, and we review for an abuse of that

> discretion. See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). We will not interfere with the sentence imposed '[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.' Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).
>
> Splond fails to demonstrate that the district court relied on impalpable or highly suspect evidence. The district court acknowledged that the first PSI was incorrect and allowed Splond to correct the mistake. The district court also presided over the trial, heard all the evidence at the sentencing hearing, and rendered sentencing for each conviction within the applicable statutory guidelines. Therefore, we conclude that the district court did not abuse its discretion.

Nevada Court of Appeals Order of Affirmance at 5-6. Therefore, Petitioner is barred from re-litigating the same claim here.

J. PETITIONER FAILED TO ESTABLISH CUMULATIVE ERROR

This Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000) Appellant needs to present all three elements to be successful on appeal. Id. Moreover, a defendant "is not entitled to a perfect trial, but only a fair trial. . . ." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (*citing* Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974)

First, Appellant has not asserted any meritorious claims of error, and, thus, there is no error to cumulate. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("…cumulative-error analysis should evaluate only the effect of matters determined to be error, *not the cumulative effect of non-errors*.") (emphasis added). Second, the evidence of guilt is not close. Multiple victims identified Appellant and the robberies were caught on video surveillance. Finally, Appellant was not convicted of grave crimes. See Valdez, 124 Nev. at 1198, 196 P.3d at 482 (2008) (stating crimes of first-degree murder and attempt murder are very grave crimes).

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In this case, Appellant's convictions are not Category A felonies punishable by a life sentence; therefore, the third factor does not weigh in Appellant's favor. Therefore, Appellant's claim of cumulative error is denied.

II. PETITIONER'S SUPPLEMENTAL PETITION IS DENIED

Petitioner raises the following claims in his Supplemental Petition: (1) ineffective assistance of prior counsel, Frank Kocka; and (2) ineffective assistance of trial counsel, Augustus Claus. For the foregoing reasons, all claims are denied.

A. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL PRIOR TO TRIAL

1. Ground One: Counsel was not ineffective in failing to convey an offer of negotiation.

Petitioner claims that counsel prior to trial, Mr. Kocka, was ineffective because he did not convey an offer of negotiation to Petitioner for the two (2) years Petitioner's case was pending trial. Supp. Petition at 19. Petitioner further appears to indicate that when Mr. Claus replaced Mr. Kocka as counsel of record, he confirmed that he never received an offer. Id. As a result, Petitioner avers that if he had accepted the offer, his sentence would have been less than what he was ultimately sentenced to after trial. Supp. Petition at 20. Petitioner finally claims that he established that he would have accepted the plea negotiation because he "asked the court to intervene when counsel made a record regarding the offer." Id. Petitioner's claim is belied by the record.

As an initial matter, the record is clear that Mr. Kocka received an offer of negotiation from the State, conveyed it to Petitioner and Petitioner rejected that offer:

> THE COURT: Hey. Is this case resolved?
>
> MR. KOCKA: It is not, Your Honor. I did receive an offer on the case; **the offer is not acceptable to my client.** So at this point, Your Honor, I don't know if you want me to do it formally in writing or you'll accept it orally, **but I'm going to have to get him over to the PD's office because he wants to go to trial**.

Recorder's Transcript of Status Check: Status of Case, at 2 (April 20, 2015) (emphasis added).

The Court minutes reflect that Appellant was present on April 20, 2015. Thus, he heard the response his attorney gave to the Court and did not object to his attorney's representations. Nevertheless, this Court determined that an evidentiary hearing on this limited issue was prudent. At the evidentiary hearing, this Court heard testimony from Mr. Kocka and Petitioner. After hearing testimony and argument, this Court concluded that Mr. Kocka's testimony was credible, and that Petitioner had failed to establish that he asked Mr. Kocka if there was an outstanding offer of negotiation.

Counsel cannot be deemed ineffective for not receiving an offer of negotiation prior to April 2015. Rather, a review of the transcripts indicate that Kocka was diligently seeking an offer of negotiation from the State and that they did not extend one because Petitioner had multiple cases. See generally, Transcript of Proceedings Calendar Call (April 2, 2014); Transcript of Proceedings Status Check: Negotiations/Reset Trial (April 30, 2014); Transcript of Proceedings Status Check: Possible Negotiations (June 16, 2014); Transcript of Proceedings Status Check: Negotiations (September 8, 2014). Specifically, on June 16, 2014, Mr. Kocka explained to the district court the status of the negotiations:

> MR. KOCKA: He's present in custody.
>
> Your Honor, we have been going back and forth with Ms. Lexis of the DA's Office trying to get an offer, a global offer on the table. He has a prelim down at Department 3, and a sentencing currently set in Department 2. I know we set this a couple of times for status checks. Ms. Lexis has assured me she's going to make an offer. She's cautioned it by saying I may not like the offer, but she's going to be getting me an offer for sure.

Transcript of Proceedings Status Check: Possible Negotiations, at 2 (June 16, 2014).

On September 15, 2014, Mr. Kocka explained that he had received an offer:

> Ms. Lexis: I did convey an offer, You Honor, previously which involved both cases while the second case was still in Justice Court. I can reconvey that offer. All though I know Mr. Kocka did not like it very much, so.
> Mr. Kocka: Ms. Trippiedi has the other case, Judge. Maybe I'll talk to her and see if I can get a better deal.
> […]
> Mr. Kocka: I'm going to get the offer, Judge.

Transcript of Proceedings Status Check: Negotiations, at 3-4 (September 15, 2014).

That Mr. Kocka believed he could secure a better offer does not make him ineffective. Indeed, as the record is clear that he did receive and convey an offer to Petitioner, the record instead indicates that Mr. Kocka was effective in diligently seeking to obtain a favorable offer of negotiation. Defense counsel cannot be deemed ineffective for his failure to secure a more favorable offer. Counsel does not have control over what the State offers. See, Young v. District Court, 107 Nev. 642, 818 P.2d 844 (1991). Therefore, both Petitioner's claims that counsel did not convey or attempt to receive an offer of negotiation from the State is belied by the record.

Moreover, that Mr. Claus claimed he did not receive the offer of negotiation on the first day of trial is of no import. Mr. Claus was appointed to Petitioner's case to proceed to trial after all offers of negotiation had been revoked. Recorder's Transcript of Status Check: Status of Case, at 2 (April 20, 2015). That another more favorable offer was not extended while Mr. Claus represented Petitioner does not make either Mr. Kocka or Mr. Claus ineffective. Indeed, on the first day of trial, the State made clear that there had not been other offers extended and that any offer of negotiation was revoked when Petitioner rejected it two (2) years prior. Recorder's Transcript of Proceedings RE: Jury Trial – Day 1 at 6-9 (March 15, 2016). Again, neither Mr. Kocka nor Mr. Claus had any control over what plea negotiation the State offers or whether the State offers any plea negotiation whatsoever. See, Young, 107 Nev. 642, 818 P.2d 844.

Next, to the extent Petitioner alleges that counsel was ineffective for failing to file motions, that claim is denied. Supp. Petition at 19. As an initial matter, Petitioner does not explain in Ground One what motions Mr. Kocka should have filed and has not explained that any of those motions would have been successful or impacted Petitioner's decision to proceed to trial. This claim is further belied by the record because despite Petitioner's claim, Mr. Kocka said he would be filing motions if Petitioner's case did not resolve through a plea negotiation. Transcript of Proceedings State's Motion to Consolidate, at 4 (March 18, 2015). Therefore,

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Petitioner's claim is denied as a bare and naked allegation that is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Finally, Petitioner has not established prejudice. While Petitioner relies on Missouri v. Frye, to claim that failure to convey an offer of negotiation amounts to ineffective assistance of counsel (Supp. Petition at 18), Petitioner fails to recognize that Frye also held that before a defendant can establish said ineffectiveness, they must show "a reasonable probability they would have accepted" the offer that that "if the prosecution had the discretion to cancel it… there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented." 566 U.S. 134, 148, 132 S.Ct. 1399, 1410 (2012). Even if Petitioner had made such a request, the district court cannot force the State to convey an offer of negotiation and cannot insert itself into the plea-bargaining process. Cripps v. State, 122 Nev. 764, 137 P.3d 1187 (2006).

Regardless, as the record is clear that Petitioner rejected the offer provided by the State, any claim of prejudice or reliance on Frye is denied. Recorder's Transcript of Status Check: Status of Case, at 2 (April 20, 2015). That Petitioner now wishes he had accepted an offer of negotiation after he was convicted at trial does not render counsel ineffective. It was Petitioner's decision to reject the State's offer of negotiation. Counsel cannot be deemed ineffective merely because the Defendant's risk in disregarding counsel's advice did not pay off. See Cronic, 466 U.S. at 657 n.19, 104 S.Ct. at 2046 n.19 (noting counsel is not required to do what is impossible).

Indeed, at the evidentiary hearing Petitioner further failed to show that he established that he would have accepted the offer that the State conveyed. Specifically, Petitioner testified that he was not willing to plead guilty to any offer of negotiation that did not have an agreed upon recommended sentence. As the State never conveyed such an offer, Petitioner failed to establish that he would have pled guilty, and his claim is therefore denied.

Accordingly, Petitioner has not showed that counsel was ineffective in conveying an offer of negotiation to him prior to trial.

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2. Ground Two: Counsel was not ineffective for failing to oppose the State's Motion to Consolidate.

Petitioner argues that counsel should have opposed the State's Motion to Consolidate because Petitioner's two (2) crimes were not factually similar and would not have been cross-admissible. Supp. Petition at 21. Petitioner further claims that he can establish prejudice because there were identification issues for one (1) of the three (3) robberies and that he was likely only convicted of that third robbery because of the joint trial. Supp. Petition at 24-25. Petitioner's claims are denied.

Counsel cannot be ineffective for failing to make futile objections or arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. 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, 118 Nev. at 8, 38 P.3d at 167. Petitioner has not established that counsel could have successfully opposed the State's Motion to Consolidate because the State's Motion was legally correct.

The charges in each case were based on two (2) or more acts or transactions connected or constituting parts of a common scheme or plan as described above in the Statement of Facts. Additionally, consolidation was warranted because it promotes judicial economy, efficiency and administration, and the evidence would be cross-admissible at trial.

NRS 174.155 addresses consolidation of Informations. It states in pertinent part:

> The court may order two or more indictments or information or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

In considering whether to allow consolidation, courts have looked at the conflicting policies of economy and efficiency in judicial administration, seeking to control court calendars in avoidance of multiple trials, and any resulting prejudice to the defendant which might arise from being prosecuted at trial by presentation of evidence of other crimes flowing from a common plan or scheme. Cantano v. United States, 176 F.2d 820 (4th Cir. 1948); United States v. Fletcher, 195 F. Supp. 634 (D. Conn. 1960), aff'd, 319 F.2d 604 (4th Cir.

1963). Moreover, as the Nevada Supreme Court has repeatedly held, the decision to allow the joinder of offenses lies within the sound discretion of the trial court and such a decision will not be reversed absent an abuse of discretion. Robins v. State, 106 Nev. 611, 798 P.2d 558 (1990); Mitchell v. State, 105. 735, 782 P.2d 1340 (1989); Lovell v. State, 92 Nev. 128, 132, 546 P.2d 1301, 1303 (1976). The United States Supreme Court has noted that joint trials are preferred because "they promote efficiency and 'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'" United States v. Zafiro, 113 S.Ct. 933 (1993). Further, the United State Supreme Court held that joinder of criminal offenses is not an issue that raises constitutional concern. Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648 (1967).

Eighth Judicial District Court Rule 3.10 also promotes judicial economy. It provides:

> (a) When an indictment or information is filed against a defendant who has other criminal cases pending in the court, the new case may be assigned directly to the department wherein a case against that defendant is already pending.
> (b) Unless objected to by one of the judges concerned, criminal cases, writs or motion may be consolidated or reassigned to any department for trial, settlement or other resolution.

Cross-admissibility is an additional factor leading toward consolidation. In Robins v. State, 106 Nev. 611, 798 P.2d 558 (1990), our Supreme Court was faced with the joinder of a child abuse charge and a murder charge. It was held that "[i]f evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed." Id. at 619, 563 (*citing* Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342)

NRS 173.115 further provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are:
> (1) Based on the same act or transaction; or
> (2) Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Additionally, there must be more prejudice shown than is inherent in any joinder of counts. United States v. Bright, 630 F.2d 804 (5th Circ. 1980). It is insufficient to show that

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severance gives the defendant a better defense. He must show prejudice of such a magnitude that he is denied a fair trial. United States v. Martinez, 486 F.2d 15 (5th Cir. 1973).

In his Supp. Petition, Petitioner takes issue with the State's reliance on Tillema v. State, 112 Nev. 266, 914, P.2d 605 (1995), in its Motion to Consolidate. Supp. Petition at 22. Specifically, Petitioner claims that Tillema is factually dissimilar from Petitioner's offenses because "[t]he distinguishing feature in Tillema in allowing joinder of the cases is that the auto burglaries were similar enough to be connected, and the store burglary occurred the very same day, within hours, of the auto burglary. Here, the burglary of the cell phone stores and the burglary of the Star Mart are similar in that they are burglary/robbery cases." Supp. Petition at 23. However, in doing so, Petitioner neglects to note the other similarities in all three (3) of Petitioner's offenses.

Tillema involved the joinder of two (2) vehicular burglaries and one (1) store burglary. 112 Nev. at 268. Specifically, Tillma was charged with a vehicular burglary occurring on May 29, 1993, and a vehicular and store burglary occurring on June 16, 1993. Id. at 267-68; 914 P.2d at 606. In Tillema, the Nevada Supreme Court held that when separate crimes are connected by a continued course of conduct, joinder is appropriate. Id. Additionally, the court found that if "evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed. Id. The court held that the two (2) vehicular burglaries evidenced a common scheme or plan because both offenses involved vehicles in casino parking garages and occurred only seventeen (17) days apart. Id. As a result, the court concluded that evidence from both cases would be cross admissible to prove Tillema's felonious intent in entering the vehicles. Id. The court further concluded that evidence of the store burglary was admissible and properly joined because the arresting detective witnessed Tillema enter the store right after completing the second vehicular burglary. Id. at 269; 914 P.2d at 607.

Like Tillema, Petitioner's offenses were properly consolidated because they were factually similar and involved a common scheme or plan. Petitioner was charged with three (3) store burglaries, all of which occurred over a thirteen (13) day span. In each store burglary,

Petitioner entered the store, waited until he and the clerk were the only people in the store, and asked the clerk to get him something that was behind the counter and near the cash register. Then, Petitioner pulled out a revolver and pointed it at the clerk, threatened the victim and demanded money in the cash register. Petitioner was able to receive money in only the first two (2) store robberies because the clerk in the third robbery refused to open the register. Therefore, contrary to Petitioner's claim that the only similarity between all three (3) offenses was time, there were additional significant and notable similarities between all offenses supporting joinder. Evidence of the offenses were cross admissible for intent as they all evidenced a common scheme or plan.

Finally, Petitioner's claim of prejudice fails. While Petitioner relies on Hubbard v. State, 422 P.3d 1260, 1262 (2018), to claim that prejudice can outweigh any probative value, Hubbard dealt with admission of a prior conviction, not joinder of multiple charged offenses. Therefore, Hubbard would have been irrelevant to the district court's determination of whether Petitioner's cases should have been joined.

Regardless, there must be more prejudice shown than is inherent in any joinder of counts. Bright, 630 F.2d 804. It is insufficient to show that severance gives the defendant a better defense. He must show prejudice of such a magnitude that he is denied a fair trial. Martinez, 486 F.2d 15. Video surveillance of the first two (2) store robberies was shown to the jury and the victims of all three (3) robberies identified Petitioner with one hundred (100) percent certainty. This joinder also did not prevent counsel from cross examining witnesses on any identification or forensic issues. Given the overwhelming evidence of Petitioner's guilt, Petitioner's claim that he was prejudiced because there was more significant evidence of guilt as to one (1) robbery is denied.

Accordingly, as the district court properly consolidated Petitioner's cases, Petitioner has failed to demonstrate that counsel was ineffective for not opposing the State's Motion to Consolidate. Petitioner has not demonstrated that any opposition would have been successful, and he has not demonstrated that he was prejudiced by consolidation given the overwhelming

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evidence of Petitioner's guilt in each robbery. Therefore, Petitioner's Ground Two claim is denied.

B. PETITIONER WAS NOT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

Petitioner raises ten (10) claims of ineffective assistance of trial counsel.[1] All ten (10) claims fail.

1. Grounds One Through Six.

Petitioner reasserts the following claims that Petitioner raised in his original Petition as to his trial counsel, Mr. Claus,: (1) failing to investigate; (2) failing to present a defense and failing to subpoena phone records; (3) failing to object to the complaint; (4) failing to object to evidence at trial; (5)failing to request a Petrocelli hearing; (6) failing to object to jury instructions; and (7) failing to object to the Presentence Investigation Report. Supp. Petition at 28. These claims are denied for the grounds set forth *supra* I.G.2

2. Ground Seven: Trial counsel was not ineffective when presenting expert testimony.

Petitioner argues that trial counsel was ineffective for failing to call an eyewitness identification expert to testify as to the two (2) photo lineups used to identify Petitioner for the January 22, 2014 and January 28, 2014 robberies. Supp. Petition at 31. Specifically, Petitioner claims that while trial counsel cross examined Detective Kavon about the procedure behind compiling the lineups and if he used a procedure known as the "double blind setup," he did not call an expert to testify to the accuracy of photo lineups. Supp. Petition at 31. Had counsel done so, Petitioner claims this expert would have testified as to what the "double blind setup" is and how other not using this setup increases the likelihood of inaccurate definitions. Supp. Petition at 31-32. According to Petitioner, counsel's failure to call such an expert deprived

[1] Petitioner's heading of section II.A states "Grounds three through," but does not give the ending number. Supp. Petition at 27. However, Petitioner's section II.A.i. heading starts his ground numbering and Ground 1. Supp. Petition at 28. Accordingly, the numbering will mirror Petitioner's raised grounds as numbered in sections II.A.i-vi.

Petitioner from presenting a meaningful defense. Supp. Petition at 32. Petitioner's claim is denied.

Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Howard, 106 Nev. at 722, 800 P.2d at 180; Strickland, 466 U.S. at 691, 104 S. Ct. at 2066. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough, 540 U.S. at 124 S. Ct. at 1. In considering whether trial counsel was effective, the court must determine whether counsel made a "sufficient inquiry into the information . . . 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 this decision is made, the court will consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Id.

A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome. Molina, 120 Nev. at 192, 87 P.3d at 538; Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. Such a defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. See Love, 109 Nev. at 1138, 865 P.2d at 323. Further, it is well established that a claim of ineffective assistance of counsel alleging a failure to investigate will fail where the evidence or testimony sought does not exonerate or exculpate the defendant. See Ford, 105 Nev. at 853, 784 P.2d at 953.

Counsel is expected to conduct legal and factual investigations when developing a defense so they may make informed decisions on their client's behalf. Jackson, 91 Nev. at 433, 537 P.2d at 474 (quoting In re Saunders, 2 Cal.3d 1033, 88 Cal.Rptr. 633, 638, 472 P.2d 921, 926 (1970)). "[D]efense counsel has a duty 'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Love, 109 Nev. at 1138, 865 P.2d at 323 (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at 2066). "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." Id. There is a strong presumption that defense counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Harrington v. Richter, 562 U.S. 86, 109, 131 S.Ct. 770, 109 (2011).

Further, counsel is not required to call an expert when it is clear that they vigorously cross-examined State witnesses. Id. at 110, 131 S.Ct. at 791. The decision not to call witnesses is within the discretion of trial counsel, and will not be questioned unless it was a plainly unreasonable decision. See Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002); see also Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict. Harrington, 131 S.Ct. at 791, 131 S.Ct. at 110. "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).

Here, Petitioner has not established that counsel was ineffective for not calling an expert in photo lineups. First, Petitioner has not identified that any such expert existed or would have been available to testify to the lineups used here. While Petitioner includes a report supporting his claim as to the double-blind setup, the simple existence of a report published in 2007 does not establish that an expert was available.

Second, counsel's decision not to call an unidentified expert is a virtually unchallengeable strategic decision. Petitioner has not established that this unidentified expert would have been permitted to testify at all, let alone would have been permitted to testify to the accuracy of the photo lineup procedures used here. Petitioner appears to contend that this expert would have testified that the photo lineup procedure used by Detective Kavon for each victim was unreliable and that the double-blind setup is a more reliable form of picture identification. Supp. Petition at 31-32. However, Petitioner has not established, and does not claim, that such testimony would have been admissible. Moreover, as this double-blind set up

was not used for any of Petitioner's lineups, any testimony about that procedure or its accuracy is entirely irrelevant.

Further, there was sufficient evidence regarding the process of assembling the line up at trial. Detective Kavon testified during direct examination as to how a six-pack photo lineup is assembled:

> Metro Police Department has a database, a database of photos that are in this database. Hundreds and hundreds and thousands of photographs are in this database. These photographs are separated into categories by race, by gender, that sort of thing, by age.
>
> It's data inputted in when the photograph was taken. You know, they put in the age of the person, their name and their ID number and, you know, how tall they are and how much they weigh and that's all in the database.
>
> When we create a photo array or sometimes it's referred to as a six-pack, you go into this database and you input the information for the known person that you want included in there. In this case, I input the information for Kenny Splond. Then that pulls Kenny Splond's picture out of the database.
>
> And then you also put in criteria of what you want to match with that. You -- you put in, obviously, you wouldn't want to put in female with a male suspect. So you eliminate all the females. You eliminate Caucasian or -- or white -- white people. You eliminate all sorts of varlous things. You make sure the ages are close and the height and weights are close.
>
> And when that computer program or that database randomly generates about 200 to 300 more photographs that it thinks is similar to, in this case, Kenny Splond. From there, then the detective will take -- and in this case, I took and I pulled out photographs that, you know, the hairs were -- the hair color, it was similar, and things like that that the computer just can't do.
>
> And I chose five other photographs to go along with Kenny Splond's photograph and told the computer to compile that. The computer randomly puts those pictures into -- on one sheet of paper, so to speak, in one, two, three, four, five, six pictures. And it generates that document for you.

Recorder's Transcript of Jury Trial – Day 1 at 155-56.

Detective Kavon further testified that prior to showing anyone a photo line-up, he reads them the following instructions:

> In a moment, I'm going to show you a group of photographs. This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. The fact that the photos are

being shown to you should not cause you to believe or guess that a guilty person has been caught.

You do not have to identify anyone. It is just as important to free innocent persons from suspicion as it is to identify those that are guilty. Please keep in mind that hair styles, beards, mustaches, are easily changed. Also, photographs do not always depict the true complexion of a person. It may be lighter or darker than shown in the photo.

You should pay no attention to any markings or numbers that may appear on the photos. Also pay no attention to whether the photos are in color or black and white or any other differences in the type or the style of the photographs.

You should only study the person shown in each photograph. Please do not talk to anyone, other than police officers while viewing the photos. You must make up your own mind and not be influenced by any other witnesses, if any.

When you've completed viewing the photos, please tell me whether or not you can make an identification. If you can, tell me in your own words how sure you are of your identification. Please do not indicate to any other witnesses that you have or have not made an identification. Thank you.

Id. at 156-58.

After explaining this procedure, Detective Kavon confirmed that all three (3) victims identified Petitioner with one hundred (100) percent certainty, which was rare in his twenty-five (25) year experience as a police officer. Id. at 158-60. This evidence sufficiently established that the photo line-up was reliable.

Even so, counsel vigorously challenged the line-up procedure. On cross examination, counsel peppered Detective Kavon with questions about this double-blind set up and Detective Kavon testified that he did not and had not ever used it. Id. at 163-64. Detective Kavon did testify that he had heard about this procedure but was not aware of any police departments that were using it. Id. at 164. Counsel then continued asking Detective Kavon numerous questions about the procedure of the lineups, all of which Detective Kavon answered to the best of his ability, before returning to questions regarding the double-blind setup. Id. at 164-72. When counsel did so, he asked about the purposes of the double-blind set up and Detective Kavon stated he did not know what the policy reasons supporting the double-blind set up were. Id. at 172-73. Counsel then rephrased and engaged in the following colloquy with Detective Kavon:

Q Then let's go broader. You've testified that you know generally what a double-blind survey is; correct?
A Correct.
Q All right. And so the purpose of a double-blind survey is to stop the person who's giving the survey from advertently or inadvertently -- one of the major purposes of a double-blind survey is to keep the person who's giving the survey from inadvertently signaling the person who's taking the survey to what sort of answer they want them to give; correct?
A That seems fair, yes.
Q It's to create, as much as possible, an even result; correct?
A Okay.
Q And some police departments are using this method in their six-packs today; correct?
A I don't know that.
Q This method was not used in this six-pack; correct?
A Correct.
Q When you gave the six-pack to Mr. Echeverria, you knew who was in the number 2 slot and you knew who the suspect was that you were interested in information about; correct?
A Correct.
Q When you gave the survey to Ms. Angles, you knew who was in the number 2 spot and you knew who the suspect was that you were interested in getting information about; correct?
A The six-pack, you mean?
Q Yes.
A Yes, that's correct.
Q I'm sorry if I misspoke.

Id. at 173-74.

During closing argument, counsel argued that the photo lineup should be questioned because even Detective Kavon confirmed that there could be some outward influence when presenting those pictures. Id. at 209. Counsel then transitioned and focused his argument on the lack of forensic evidence linking Petitioner to the crimes before returning back to the concept of double-blind setups and arguing that because that setup was not used here, the identifications should be rejected and the jury should instead focus on the lack of forensic evidence. Id. at 216. That counsel's argument did not exonerate Petitioner does not render counsel deficient because there was overwhelming evidence of Petitioner's guilt. The procedure of the photo lineup does not change the fact that all three (3) victims of three (3)

different crimes, who had never met, all identified the same person: Petitioner; and that there was video surveillance evidence of Petitioner's guilt.

Finally, Petitioner does not establish that evidence or testimony about this double-blind set up would have reasonably changed the outcome at trial. Indeed, he cannot as the report Petitioner relies on and attaches as Exhibit D does not claim that the lineup procedure used here has been proven to be unreliable. Instead, a review of the study establishes that while this double blind set up produced positive results in the lab, when used in the field, it increased the rate of misidentifications. Exhibit D at 4. Therefore, it would appear that Petitioner was better served by the lineup procedure used here. Accordingly, Petitioner failed to show that any testimony by this unidentified expert would have reasonably changed the outcome at trial and his claim is denied.

C. Ground Eight: Counsel was not ineffective in not requesting certain jury instructions.

Petitioner argues that trial counsel was ineffective for failing to request two (2) instructions: (1) an instruction regarding eyewitness identification; and (2) an inverse instruction regarding Count 4 – Possession of Stolen Property. Supp. Petition at 33-34. Specifically, Petitioner claims that because Petitioner's identification was the critical defense and because there were eyewitness identification issues, counsel was ineffective for failing to request an instruction regarding the reliability of any eyewitness identification because that instruction would have gone to the heart of Petitioner's defense. Id. at 33. Similarly, Petitioner claims counsel should have requested an instruction that if the State did not prove beyond a reasonable doubt that Petitioner knew or should have known that the revolver was stolen, the jury must find Petitioner not guilty. Id. at 34. Both of Petitioner's claims are denied.

While "the defense has the right to have the jury instructed on its theory of the case ... no matter how weak or incredible that evidence may be," Margetts v. State, 107 Nev. 616, 619, 818 P.2d 392, 394 (1991), the district court may refuse instructions on the defendant's theory of the case if the proffered instructions are substantially covered by the instructions given to the jury, Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031 (1995). Indeed,

instructions cannot be worded such that they are misleading, state the law inaccurately, or duplicate other instructions. Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005).

Taking each claim in turn, Petitioner has not showed that counsel was ineffective for failing to request an instruction regarding eyewitness identification. At trial, the jury received the following instructions regarding credibility of witness testimony and the State's burden of proof:

> The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests, or feelings, his opportunity to have observed the manner to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.
>
> If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

Jury Instruction No. 8.

> The Defendant is presumed innocent unless the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every element of the crime charged and that the Defendant is the person who committed the offense or offenses.
>
> A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control of person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are ln such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt.
>
> Doubt to be reasonable must be actual, not mere possibility or speculation. If you have a reasonable doubt as to the guilt of the Defendant, the Defendant is entitled to a verdict of not guilty.

Jury Instruction No. 9.

The Nevada Supreme Court has repeatedly held that the credibility and burden of proof instructions negate the need for any specific instruction regarding eyewitness issues. United States v. Masterson, 529 F.2d 30 (9th Cir.), cert. denied, 426 U.S. 908, 96 S.Ct. 2231, 48 L.Ed.2d 833 (1976); Sparks v. State, 96 Nev. 26, 604 P.2d 802 (1980); See also United States v. Sambrano, 505 F.2d 284 (9th Cir.1974). Specifically, the Nevada Supreme Court has held that "specific eyewitness identification instructions need not be given, and are duplicitous of

the general instructions on credibility of witnesses and proof beyond a reasonable doubt." Nevius v. State, 101 Nev. 238, 248–49, 699 P.2d 1053, 1060 (1985). Given this well-established law, Petitioner has failed to demonstrate that the Court would have agreed to give the requested instruction or that it would have been error for the court to reject his instruction.

Next, Petitioner did not establish that counsel was ineffective for failing to request an inverse jury instruction regarding Count 4 – Possession of Stolen Property. At trial, the jury was instructed that:

> Any person who possesses a stolen firearm and either knows the firearm is stolen or possesses the firearm under such circumstances as should have caused a reasonable person to know the firearm is stolen is guilty of Possession of Stolen Property.

Jury Instruction No. 23.

Petitioner claims that counsel should have requested an instruction that if the State did not prove that Petitioner knew or should have known that the revolver was stolen, the jury must find him not guilty "of possession of revolver." Supp. Petition at 34. Given that Jury Instructions No. 9 and 23 covered the fact that the State had the burden to prove beyond a reasonable doubt that Petitioner knew or should have known that the revolver was stolen, Petitioner has not established that counsel was ineffective. Petitioner's proffered instruction was substantially covered in other instructions. Further, Petitioner's proffered instruction would have been misleading. Had the State failed to prove that Petitioner knew or reasonably should have known that the revolver was stolen, the jury would not have found him guilty of possession of stolen property, not "possession of firearm."

Finally, Petitioner has not established a reasonable probability that the result at trial would have been different had counsel requested these two (2) instructions. Even if there is any error regarding instructions, it may be harmless. Instructional errors are harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," and the error is not the type that would undermine certainty in the verdict. Wegner v. State, 116 Nev. 1149, 1155–56, 14 P.3d 25, 30 (2000), overruled on other grounds, Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006); see also NRS 178.598. As both requested

instructions were substantially covered by three (3) other instructions, Petitioner has not established that the Court would have agreed to provide these requested instructions or that failing to give these requested instructions deprived the jury from being instructed on a critical area of the law. Accordingly, Petitioner's Ground Eight claim is denied.

D. Ground Nine: Counsel was not ineffective in eliciting witness testimony.

Petitioner argues that counsel should have elicited testimony from Detective Kavon regarding Petitioner's knowledge as to whether the firearm was stolen. Supp. Petition at 35. Specifically, Petitioner claims counsel should have asked Detective Kavon about the fact that Nevada allows for private party firearm sales because that would have undermined the State's theory that Petitioner knew or should have known that the revolver was stolen. Id. According to Petitioner, failing to do so was per se ineffective and that Petitioner is entitled to a new trial. Id. Petitioner's claim is denied.

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. 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, 118 Nev. at 8, 38 P.3d at 167. In order to establish ineffectiveness a petitioner must allege and prove what information would have resulted from a better investigation or the substance of the missing witness' testimony. Molina, 120 Nev. at 192, 87 P.3d at 538; Haberstroh, 119 Nev. at 185, 69 P.3d at 684.

Here, Petitioner offers only naked speculation as to whether asking Detective Kavon whether he knew that private firearm sales were legal in Nevada would have changed the outcome at trial Indeed, such questioning was of no import because that would not negate Petitioner's guilt as to Count 4 – Possession of Stolen Property. Petitioner has not demonstrated how Petitioner came to own the revolver and has not provided any information that Petitioner purchased the gun privately. As such, Petitioner's claim is summarily denied as a bare and naked allegation. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Even if Petitioner could make the showing required by Molina, he still failed demonstrate ineffective assistance of counsel. He has not established deficient performance

because "the trial lawyer alone is entrusted with decisions regarding legal tactics such as deciding what witnesses to call." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). This is especially true considering the State's argument:

> How about the firearm? Jeffrey Haberman. Folks, we're not alleging that he stole the firearm. We're not charging him with stealing the firearm. We're charging him with possession of stolen property. And what evidence do you have that he's guilty of possession of stolen property?
>
> Well, first, let's take a look at the law. Any person who possesses a stolen firearm and either knows the firearm is stolen or -- or possesses the firearm under such circumstances as should have caused a reasonable person to know the firearm is stolen is guilty of possession of stolen property.
>
> Jeffrey Haberman told you, he owns that firearm. It was stolen from him. Never seen the Defendant before. Never gave anyone permission to take his gun. Yet, that man has his gun. Now, I underlined, how do we know he either knows or possesses a firearm under such circumstances he should cause a reasonable person to know the firearm is stolen?
>
> Again, under such circumstances as should have caused a reasonable person to know a firearm is stolen. Well, not only does he have the stolen firearm on him, he obviously never registered the firearm. He obviously didn't buy it from a store that checks registration or ownership of the firearm. And most importantly, how is he using this weapon? And when he's caught, how's he acting?
>
> He's using it to commit armed robberies. And when caught red-handed, he tries -- he still tries to conceal it. For the Jeffrey Haberman firearm incident, we ask you to find the Defendant guilty of possession of stolen property.

Recorder's Transcript of Jury Trial – Day 1 at 206-07.

Based on the State's evidence, whether counsel inquired of Detective Kavon's knowledge of private gun sales would not have changed the outcome at trial. Moreover, any such questions were irrelevant because Petitioner did not establish or explain that Petitioner acquired the gun through a legal private sale. Indeed, he cannot as his actions with the revolver suggest the opposite. Therefore, Petitioner's Ground Nine claim is denied.

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E. Ground Ten: Appellate counsel did not fail to argue that the State failed to prove that Petitioner was guilty of Possession of Stolen Property.

Petitioner claims that appellate counsel should have argued that there was insufficient evidence that Petitioner knew or should have known that the firearm used during all three (3) robberies was stolen. Supp. Petition at 36. According to Petitioner, because private parties are allowed to sell firearms in Nevada, there was no evidence that Petitioner knew the revolver was stolen when he purchased it or that he purchased the revolver under circumstances that would indicate that the revolver was stolen. Supp. Petition at 37. Petitioner's claim is denied.

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258–59, 524 P.2d 328, 331 (1974); see also Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). When there is substantial evidence in support, the jury's verdict will not be disturbed on appeal. Brass v. State, 128 Nev. 748, 754, 291 P.3d 145, 149–50 (2012). This does not require this Court to decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson, 443 U.S. at 319-20, 99 S.Ct. at 2789 (quoting Woodby v. INS, 385 U.S. 895, 87 S.Ct. 483, 486 (1966)). This standard thus preserves the fact finder's role and responsibility "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id. at 319, 99 S.Ct. at 2789.

When reviewing a sufficiency of the evidence claim, the relevant inquiry is not whether the court is convinced of the defendant's guilt beyond a reasonable doubt. Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). Rather, the limited inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Milton v. State, 111 Nev. 1487, 1491, 908 P.2d 684, 686–87 (1995) (quotation and citation omitted). Thus, the evidence is only insufficient when "the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury." Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (emphasis removed).

"[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)). It is further the jury's role "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson, 443 U.S. at 319, 99 S. Ct. at 2789. Moreover, in rendering its verdict, a jury is free to rely on circumstantial evidence. Wilkins, 96 Nev. at 374, 609 P.2d at 313. Indeed, "circumstantial evidence alone may support a conviction." Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

Here, Petitioner has not showed that appellate counsel was ineffective for failing to challenge the sufficiency of the evidence as to Petitioner's conviction of Count 4 – Possession of Stolen Property. Pursuant to N.R.S. 205.275:

> 1. Except as otherwise provided in NRS 501.3765, a person commits an offense involving stolen property if the person, for his or her own gain or to prevent the owner from again possessing the owner's property, buys, receives, possesses or withholds property:
>
> (a) Knowing that it is stolen property; or
>
> (b) Under such circumstances as should have caused a reasonable person to know that it is stolen property.

At trial, Jeffery Haberman testified that in October of 2013, someone broke into his home, took his entire gun safe, which included a 38-caliber Colt Revolver Petitioner used in the commission of the robberies here. Recorder's Transcript of Jury Trial – Day 1 at 88-91. Mr. Haberman further testified that he registered the revolver, reported it stolen, and that he did not know Petitioner and never gave him permission to use the revolver. Id. at 91-92. During closing argument, the State argued that while Petitioner was not charged with stealing Mr. Haberman's revolver in 2013, there was sufficient circumstantial evidence that Petitioner reasonably should have known the revolver was stolen. Petitioner did not attempt to register the revolver when he purchased it, and instead used it to commit three (3) store robberies:

> Well, not only does he have the stolen firearm on him, he obviously never registered the firearm. He obviously didn't buy it from a store that

> checks registration or ownership of the firearm. And most importantly, how is he using this weapon? And when he's caught, how's he acting?
>
> He's using it to commit armed robberies. And when caught red-handed, he tries -- he still tries to conceal it. For the Jeffrey Haberman firearm incident, we ask you to find the Defendant guilty of possession of stolen property.

Recorder's Transcript of Jury Trial – Day 1 at 206-07.

This was sufficient evidence and argument that Petitioner was guilty of Possession of Stolen Property. Petitioner did not provide any evidence that he legally purchased the revolver. Indeed, as the revolver was both registered and reported stolen, it is hard to imagine that there is any evidence contradicting the State's argument that Petitioner reasonably should have known that the revolver was stolen. Therefore, Petitioner has failed to establish that challenging his conviction as to Count 4 – Possession of Stolen Property would have been successful.

Finally, Petitioner did not establish prejudice because his twenty-four (24) to sixty (60) month sentence on Count 4 was imposed concurrently with his sentences for Counts 1, 2, and 3. As Petitioner was sentenced to twelve (12) to sixty (60) months as to Count 1, twenty-eight (28) to one hundred fifty-six (156) months and to Count 2, and twenty-eight (28) to one hundred fifty-six (156) months, plus a consecutive term of twenty-eight (28) to one hundred fifty-six (156) months for the deadly weapon enhancement as to Count 3; Petitioner's sentence in Count 4 was subsumed by his other sentences. Accordingly, Petitioner's Ground Ten claim is denied.

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ORDER

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

Dated this 12th day of May, 2021

Ronald J. Israel

A-19-793961-W

E3B EEC D39D 0230
Ronald J. Israel
District Court Judge

SC

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

BY /s/ TALEEN PANDUKHT
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the foregoing, was made this 12th day of May, 2021, by Electronic Filing to:

MONIQUE A. MCNEILL, Esquire
E-mail Address: Monique.McNeill@yahoo.com

___/s/ Janet Hayes_____
Secretary for the District Attorney's Office

14F01777A/jb/jh/GANG

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Kenya Splond, Plaintiff(s)	CASE NO: A-19-793961-W
vs.	DEPT. NO. Department 28
James Dzurenda, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 5/12/2021

Dept 28 Law Clerk Law Clerk	dept28lc@clarkcountycourts.us
Monique McNeill	McNeill@yahoo.com
Monique McNeill	monique.mcneill@yahoo.com

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**August 07, 2019**

A-19-793961-W Kenya Splond, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

August 07, 2019 **9:00 AM** **Petition for Writ of Habeas Corpus**

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

COURT CLERK: Athena Trujillo

RECORDER: Judy Chappell

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- Defendant not present.

COURT NOTED there is no proof of service and ORDERED, matter OFF CALENDAR.

NDC

CLERK'S NOTE: A copy of this minute order has been mailed to:

Kevin Splond, #1173052
High Desert State Prison
22010 Cold Creek Road
PO Box 650
Indian Springs, Nevada 89070

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**December 16, 2019**

A-19-793961-W Kenya Splond, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

December 16, 2019	**9:00 AM**	**All Pending Motions**	**All Pending Motions (12/16/19)**

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

- PLAINTIFF'S MOTION FOR THE APPOINTMENT OF COUNSEL: Court noted the claims are not difficult, however, the issues that could be presented could be substantial and therefore, COURT ORDERED, Motion GRANTED and Matter SET for Confirmation of Counsel.

PETITION FOR WRIT OF HABEAS CORPUS...PLAINTIFF'S NOTICE OF MOTION RE: PETITION FOR WRIT OF HABEAS CORPUS...PLAINTIFF'S NOTICE OF MOTION FOR EVIDENTIARY HEARING...PLAINTIFF'S NOTICE OF MOTION TO TRANSPORT PETITIONER TO COURT: COURT ORDERED, Matters OFF CALENDAR and Matter SET for a status check to set a briefing schedule and reset Petitions.

12/30/19 9:00 AM CONFIRMATION OF COUNSEL...STATUS CHECK: SET BRIEFING SCHEDULE AND RESET PETITION FOR WRIT

CLERK'S NOTE: Court Clerk emailed Mr. Christiansen regarding appointment of counsel. kt 12/17/19.

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**December 30, 2019**

A-19-793961-W Kenya Splond, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

December 30, 2019 **9:00 AM** **All Pending Motions**

HEARD BY: Thompson, Charles **COURTROOM:** RJC Courtroom 15C

COURT CLERK: Kathy Thomas
Shannon Reid

RECORDER: Judy Chappell

REPORTER:

PARTIES PRESENT:

Brooks, Parker	Attorney
McNeill, Monique A.	Attorney

JOURNAL ENTRIES

- CONFIRMATION OF COUNSEL...STATUS CHECK: SET BRIEFING SCHEDULE & RESET PETITION FOR WRIT

Ms. Mcneill advised she would be able to accept appointment and CONFIRMED as counsel. Ms. Mcneill advised she was waiting on the file and requested matter be continued. COURT SO ORDERED.

NDC

CONTINUED TO: 02/12/2020 9:00 AM

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**February 12, 2020**

A-19-793961-W Kenya Splond, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

February 12, 2020	**9:00 AM**	**Status Check**	**Status Check: Set Briefing Schedule & Reset Petition for Writ**

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

COURT CLERK: Kathy Thomas

RECORDER: Judy Chappell

REPORTER:

PARTIES PRESENT: Marland, Melanie H. Attorney

JOURNAL ENTRIES

- Ms. McNeill not present. State requested matter be continued for Counsel to be present. Court noted this matter was on calendar to set a briefing scheduled. At the request of the State, Court trailed matter.

Later recalled: Ms. McNeill not present. State noted upon reaching out to Ms. McNeill, who would not be able to be present, Ms. McNeill requested 120 days to file her brief. COURT ORDERED, Briefing Schedule, SET: Plaintiff's brief due by 06/10/2020, Defendant's/State's Opposition by 09/09/2020, Plaintiff's reply by 10/07/2020 and hearing set.

11/04/2020 9:00 AM PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**February 01, 2021**

A-19-793961-W Kenya Splond, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

February 01, 2021 **11:00 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:

Iscan, Ercan E	Attorney
McNeill, Monique A.	Attorney

JOURNAL ENTRIES

- Deft. SPLOND not present, in custody in the Nevada Department of Corrections (NDC). Correction Officer noted the Deft. was not transported. Ms. McNeill noted the State did not do the order to transport and further noted they could proceed today. Ms. McNeill submitted on the briefs. Court noted the matter was well briefed. State submitted. Court noted upon review of all the pleadings, Court will allow a limited Evidentiary Hearing regarding prior counsel, Mr. Kocka and conveying the offer. Court further stated findings regarding all the remaining issues. Court noted issues 1 through 6, the appeal was waived. Court noted the Nevada Supreme Court favors joining cases for judicial effectiveness and referred to NRS 174.155 regarding consolidation. Court further found cited case Strickland prongs was not met and stated further findings addressing; ineffective counsel, photo lineup, identification, experts, instructions for the jury, and the State to prove beyond a reasonable doubt. COURT ORDERED, Limited Evidentiary Hearing SET regarding the conveying offer issue and all remaining issues DENIED. State to prepare an order to transport. The Judicial Executive Assistant (JEA) may schedule a special setting following Court. Otherwise Clerk set the hearing in the ordinary calendar.

NDC

03/03/2021 11:00 AM EVIDENTIARY HEARING (LIMITED ISSUE)...PETITION FOR WRIT OF HABEAS CORPUS

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**April 15, 2021**

A-19-793961-W Kenya Splond, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

April 15, 2021	**1:30 PM**	**All Pending Motions**	**All Pending Motiions (04/15/2021)**

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

COURT CLERK: Kathy Thomas

RECORDER: Judy Chappell

REPORTER:

PARTIES PRESENT:

McNeill, Monique A.		Attorney
Splond, Kenya		Plaintiff

JOURNAL ENTRIES

- HEARING RE: PETITION FOR WRIT OF HABEAS CORPUS (LIMITED TO CONVEY OF OFFER ISSUE)...PETITION FOR WRIT OF HABEAS CORPUS

Deft/ Petitioner SPLOND present, in custody in the Nevada Department of Corrections (NDC). Also present for the State Julia Barker #14823. All parties present by video. Colloquy regarding Defense Counsel filing a 2nd Supplemental memorandum filed after Court's decision. Ms. McNeill noted the supplemental was only for today's issue. State noted the 2nd supplemental went beyond and would only refer to pages 18-20. Court noted Court would allow the 2nd supplement only for what is on today, the issue of conveying an offer. Upon Court's inquiry, Deft/Petitioner agreed to waive his right of attorney client privilege.

Hearing: Ms. McNeill INVOKED the EXCLUSIONARY RULE. Testimony from Mr. Frank Kocka, Kenya Splond and Lisa Wallace. Defense rested. State rested. Argument by Ms. McNeill and the State. Court stated findings noting Mr. Kocka's testimony was credible and Mr. Splenda noted in testimony that Mr. Kocka was a good attorney. Court referred to the testimony given by all witnesses. Court noted the Defendant had the burden of proof and his testimony did not seem creditable. Court

added the Deft. never questioned or inquired if there was an offer and Mr. Kocka stated many times on the record he was waiting for a better offer. Court finds under Strickland and Fry cases of authority, they had not shown an offer was not conveyed or explained to the Deft. The Strickland prongs were not met and therefore this remaining part of the Petition is DENIED. Court directed the State to prepare the order.

Certification of Copy

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

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

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

KENYA SPLOND,

Plaintiff(s),

vs.

JAMES DZURENDA,

Defendant(s),

Case No: A-19-793961-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 26 day of May 2021.

Steven D. Grierson, Clerk of the Court

Amanda Hampton, Deputy Clerk