IN THE SUPREME COURT OF THE STATE OF NEVADA

KENYA SPLOND,

Appellant,

v.
STATE OF NEVADA,

Respondent.

Docket No. 82989

APPELLANT'S

APPENDIX Volume 5

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 15th day of October, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON FORD MONIQUE MCNEILL

STEVEN WOLFSON

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

Kenya Splond

By:____/S/ Monique McNeill_____

CERTIFICATE OF SERVICE

I, KENYA SPLOND, hereby certify that I am the petitioner in this matter and I am representing myself in propria persona.

On this 22 day of APRIL, 2019, I served copies of the WRIT OF HABEAS CORPUS,

in case number: C-14-296374-1 and placed said motion(s) in U.S. First Class Mail, postage pre-paid:

Address:

Sent to:

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the petitioner in the above-entitled action, and he, the defendant has read the above CERTIFICATE OF SERVICE and that the information contained therein is true and correct. 28 U.S.C. §1746, 18 U.S.C. §1621.

Executed at _____

on this _____ day of _____, _____.

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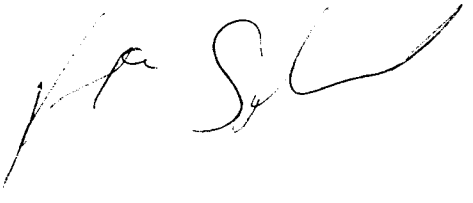
DOP#

PETITIONER -- In Proper Person



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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

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS, MOTION FOR APPOINTMENT OF COUNSEL, AND REQUEST FOR EVIDENTIARY HEARING

DATE OF HEARING: DECEMBER 16, 2019
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through TALEEN PANDUKHT, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Petition for Writ of Habeas Corpus, Motion for Appointment of Counsel, and Request for Evidentiary Hearing.

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On 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. On April 20, 2015, 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. In his Petition, Petitioner neglected to number each of his claims. The State has addressed each claim in the order in which Petitioner raised them in his Petition for Writ of Habeas Corpus. The State's response 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

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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 firearm, 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.

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ARGUMENT

I. 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:

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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 fails.

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

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).

In this case, 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.

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

As discussed previously in section II, 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.

IV. 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

As discussed in section II, 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.

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

As discussed in section II, 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 not waived.

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

As discussed in section II, 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.

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VII. PETITIONER CANNOT ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL

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, 100 Nev. at 502, 686 P.2d at 225. "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. 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. Petitioner cannot establish 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 would entitle him to relief because the allegations do not amount to ineffective assistance of counsel.

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 fails.

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:

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> 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 cannot show 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 fails. 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 fails 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 cannot show how his failure to file motions prejudiced him at trial.

Moreover, Petitioner cannot show 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.

B. Petitioner cannot establish 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. All of 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 fails for lack of specificity and is 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 fails. 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 a bare and naked claim suitable for summary denial under Hargrove.

Third, Petitioner cannot establish 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 suitable for summary denial under Hargrove.

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Fourth, Petitioner's claim that counsel was ineffective because he did not object to the Amended Indictment or consolidation of Petitioner's cases is meritless. 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. 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 meritless. 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 cannot establish 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 look into 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

cannot show 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 a bare and naked assertion suitable for summary denial under 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 cannot establish 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. 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. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). 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.

Here, Petitioner failed to show how appellate counsel was ineffective because, as discussed above, he cannot establish that any of the claims counsel did not raise on direct appeal had merit let alone a reasonable possibility of success. Therefore, counsel cannot be ineffective for failing to make a losing argument and Petitioner's claim fails.

VIII. 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

As previously discussed in section I, 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 again here.

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

As discussed in section I, 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

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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 again here.

X. 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).

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 has no merit and his conviction should be affirmed.

XI. PETITIONER IS NOT ENTITLED TO APPOINTMENT OF COUNSEL

Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution…does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." McKague specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

The Nevada Legislature has, however, given courts the discretion to appoint post-conviction counsel so long as "the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily." NRS 34.750. NRS 34.750 reads:

> A petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition *is not dismissed summarily*, the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
> (a) The issues are difficult;
> (b) The Defendant is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery.

(emphasis added). Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel.

Here, Petitioner is not entitled to appointment of counsel because the claims raised are either barred by the law of the case, waived, belied by the record, or meritless. They are not complex, Petitioner is able to comprehend the proceedings, and none of the claims raised require additional discovery.

XII. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. NRS 34.770; Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . .the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

Here, there is no need for an evidentiary hearing because all claims are either barred, waived, belied by the record, or meritless. As such, none of Petitioner's claims would entitle him to relief and there is no need to expand the record.

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CONCLUSION

Based on the above reasons, the State respectfully requests that this court DENY Petitioner's Petition for Writ of Habeas Corpus, Motion for Appointment of Counsel, and Request for Evidentiary Hearing.

DATED this 25th day of November, 2019.

Respectfully submitted,

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

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

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 25th day of November, 2019, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

KENYA SPLOND, BAC #1173052
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NEVADA 89070

BY /s/ J.H.
Secretary for the District Attorney's Office

TP/jb/jh/GANG

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

December 16, 2019 09:00 AM All Pending Motions (12/16/19)

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

COURT CLERK: Thomas, Kathy

RECORDER: Chappell, Judy

REPORTER:

PARTIES PRESENT:

Bernard B. Zadrowski **Attorney for Defendant**

JOURNAL ENTRIES

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.

SUPPL

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Tel: (702)497-9734
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Counsel for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

KENYA SPLOND,

Petitioner,

-vs-

JAMES DZURENDA,
STATE OF NEVADA

Respondents.

CASE NO: A-19-793961-W

DEPT NO: 28

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING:
TIME OF HEARING:

COMES NOW, KENYA SPLOND, by and through his attorney, MONIQUE A. MCNEILL, ESQ., and hereby submits this Supplemental Memorandum of Points and Authorities in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

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

DATED this 12th day of October, 2020.

Respectfully submitted,

/s/ Monique McNeill
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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On March 5, 2014, the State obtained a Grand Jury Indictment charging Kenya Splond ("Splond") as follows: Count 1 – Conspiracy to Commit Robbery (Felony – NRS 200.380, 199.480)); Count 2– Burglary While in Possession of a Firearm (Felony – NRS 205.060); Count 3 – Robbery with a Deadly Weapon (Felony – NRS 200.380, 193.165); and Count 4– Possession of Stolen Property (Felony – NRS 205.275(2)(c)). Appellant Appendix ("AA") 9-12.

On March 3, 2015, the State filed a Motion to Consolidate case C-14-296374-1 with case C-14-300105, in which Splond was charged with two counts of Burglary While in Possession of a Firearm, and two counts of Robbery with Use of a Deadly Weapon. AA75-80. At the time of that motion, the defense counsel did not object. AA71.

On April 8, 2015, the State filed an Amended Indictment charging Splond as follows: Count 1 – Conspiracy to Commit Robbery (Felony – NRS 200.380, 199.480)); Counts 2, 5 and 7– Burglary While in Possession of a Firearm (Felony – NRS 205.060); Counts 3,6 and 8 – Robbery with a Deadly Weapon (Felony – NRS 200.380, 193.165); and Count 4 – Possession of Stolen Property (Felony – NRS 205.275(2)(c)). Appellant Appendix ("AA") 84.

Trial commenced on March 15, 2016, but was continued due to discovery issues. AA5. Trial recommenced on March 21, 2016. AA5. The jury rendered a verdict on March 24, 2016. AA193. The jury found Splond guilty on all counts, as charged. AA193-195. After pre-sentence litigation regarding the contents of the presentence investigation ("PSI") report, the sentencing was held on February 6, 2017. AA224. The court sentenced Splond as follows: Count 1 – Twelve (12) to Sixty (60) months; Count 2 –Twenty-eight (28) to One hundred fifty-six (156) months, Count 2 to run concurrent to Count 1; Count 3 – twenty-eight (28) to one hundred fifty-six (156) months, plus a consecutive twenty-eight (28) to one hundred fifty-six (156) months for the use of the deadly weapon, to run concurrent with Count 2; Count 4 – twenty-four (24) to sixty (60) months, Count 4 to run concurrent with Counts 1, 2 and 3; Count 5 – twenty-eight (28) to one hundred fifty-six (156) months, Count

5 to run consecutive with 1, 2, 3 and 4; Count 6 – twenty-eight (28) to one hundred fifty-six (156) months, plus a consecutive twenty-eight (28) to one hundred fifty-six (156) months for the use of the deadly weapon, Count 6 to run concurrent with Count 5; Count 7 – twenty-eight (28) to one hundred fifty-six (156) months, Count 7 to run consecutive to other counts; and Count 8 – twenty-eight (28) to one hundred fifty-six (156) months, plus a consecutive twenty-eight (28) to one hundred fifty-six (156) months for the use of the deadly weapon, Count 6 to run concurrent with Count 7. AA224-225. The aggregate sentence was one hundred sixty-eight (168) months to nine hundred thirty-six (936) months. AA225. Splond had nine hundred thirty-five (935) days credit for time served. AA225.

A Judgment of Conviction was filed on February 13, 2017. AA223. On March 2, 2017, Splond filed a Notice of Appeal on March 2, 107. AA226-228. The following issues were presented:

1. District Court erred in failing to reinstate the offer that was never conveyed to the defendant.

2. District Court erred in allowing a witness to introduce uncharged bad acts and to speculate about the loaded status of a handgun.

3. District Court erred by finding that there was no illegal stop of defendant.

4. District Court relied on a flawed PSI.

5. The cumulative effects of the errors affected Splond's rights.

On December 17, 2018, the Court of Appeals affirmed Splond's conviction. (Case No. 72545). On January 24, 2019, Remittitur was issued.

On April 24, 2019, Splond filed a Pro Per Petition for Writ of Habeas Corpus. On August 26, 2019, Splond filed an Addendum to his Petition. In his petition, Splond raised the following issues:

1. The police violated his fourth amendment rights by conducting an illegal search and seizure.
2. The court State violated Splond's right to a speedy trial by conducting his trial three years after he was arrested, due to discovery issues.
3. Splond's counsel failed to convey an offer from the State, and the State did not reconvey that offer.
4. The prosecution withheld discovery.
5. Splond is actually innocent.
6. The State violated Splond's right to due process by charging him with a deficient complaint.
7. Splond's trial attorney was ineffective for failing to investigate the case, for failing to present a defense and for failing to subpoena phone records, for failing to object to the constitutionally infirm complaint, for failing to object to evidence at trial, for failing to ask for a Petrocelli hearing, for failing to object to jury instructions, and for failing to object to the PSI.
8. Splond's first attorney was ineffective for failing to communicate with him, for failing to turn over discovery, for failing to file motions.

On August 26, 2019, Splond filed an Addendum which seems to be identical to the

first petition filed.

On December 16, 2019, the Court granted Splond's Motion for Appointment of Counsel. The Court set a briefing schedule, and Splond now files the instant Supplemental Memorandum of Points and Authorities in Support of his Petition for Writ of Habeas Corpus.

STATEMENT OF FACTS

I. PRIOR COUNSEL'S REPRESENTATION LEADING UP TO TRIAL

Frank Kocka originally represented Splond in case C296374. AA242. At the initial arraignment on March 12, 2014, Splond invoked his right to a speedy trial. AA243. At the calendar call on April 2, 2014, counsel indicated that he was unable to go to trial due to already being in a jury trial. AA245. Counsel indicated that he was "trying to get together with the DA, get an offer on the table. I think we're probably going to get this one resolved. So if you want to set it for a status check in about 30 days?" The court set a status check for April 30, 2014.

On the April 30 status check date, counsel indicated that it was the "district attorney's request that we just set a new trial date in the case." AA247. The court then asked "did he waive?" meaning speedy trial. Counsel answered, "I believe he did. . ." AA 247. The court indicated that the ordinary course for trials was 2015, so the court suggested a status check. AA247. Counsel answered, "perfect. Because there's an offer that's floating around out there, we just need to finalize it." AA247. Trial was set for February 2, 2015.

On June 16, 2014, at the status check date, counsel indicated that Splond had another case set for preliminary hearing, and a sentencing set in another court. AA250. He further informed the court that the State had not yet made an offer, but has assured counsel that she would. AA250. Another status check was set for July 14, 2014. At the July 14 date, counsel was not present, so the court continued the date to July 16, 2014. AA252. On July 16, counsel was again not present. AA254.

On August 13, 2014, the court had a calendar call where counsel indicated he was not ready to go to trial. AA256. He also indicated that there was an offer outstanding that was "not that great" and he wanted a continuance and another status check date. AA256. The next status check date, counsel told the court that the State just indicted Splond on another case, and that he had not received an offer from the State, and asked for a week's continuance. AA261.

A week later, the State indicated that it had conveyed an offer to Splond's attorney. AA264. The State indicated that it had conveyed an offer, and that counsel "did not like it very much." AA264. Counsel indicated that he would try to talk to the other prosecutor to see if he could "get a better deal." AA265. Again, counsel asked for a two week continuance, and said, "I'm going to get the offer, judge." AA266.

On October 1, 2014, counsel said the case was not negotiated and asked for a trial date. That trial date was May 26, 2015. AA268. Prior to that date, the State filed a motion to consolidate Splond's two cases. AA269. At the hearing on that date, counsel indicated that he had no opposition to the motion to consolidate, and asked for a status check in 45

days. AA272. Counsel also said, "we're either going to resolve this or I'll be filing motions, Judge." AA272.

The next status check date was April 15, 2015, counsel indicated that he had been trying to get an offer from the State. He indicated he could not get either prosecutor on the case to give him an offer. AA277. At that time, counsel said that he had been hired to negotiate the case, not to do the trial. AA277. This was the first time counsel ever indicated that he had not been retained to do the trial. At all other dates, counsel acted as if he was retained to handle the entirety of the case. Counsel then stated that he was going to have to withdraw. AA278. The court stated, "they will bring an offer on Monday." AA278. The court continued the case to April 20. AA278.

Counsel indicated that he had received an offer and that the offer was not "acceptable to" his client, and therefore he asked to withdraw. AA280. The court appointed the public defender. AA281. The court then received word that the public defendant had a conflict, and on April 22, 2015, the court appointed trial counsel. AA283. Trial counsel continued the trial date, and trial eventually got set for January 11, 2016. AA296. At the calendar call date, counsel was not sure if he could proceed, and the case was set over to January 4. AA298. The new calendar call date saw a continuance due to counsel being injured. AA301. The court admonished trial counsel to be ready and set calendar call for January 13, and trial for January 25. AA303. There was some discussion between the state and defense about not being ready that quickly, so the court set the trial March 14. AA304.

On March 15, 2016, the trial commenced. The trial court inquired if an offer had ever

been made. AA323. The State said that it had made an offer to previous counsel. AA323. The offer was to plead guilty to two robberies with use of a deadly weapon, right to argue, including for consecutive time. AA323. The court asked Splond, "did you get that offer, sir, earlier?" AA323. Splond answered, "No." AA323. The court then told Splond he could have time to talk to his counsel about the offer. AA323. The State said that the offer had been revoked "I think well over a year ago." AA324. The court then said, "So there's no current offer?" to which the State answered, "There's no current offer." AA324. The Court then inquired further, and the State informed the court that the offer was made in 2014, and it was withdrawn in the beginning of 2015. AA324. At that, the court told Splond that "so they are telling me now it is withdrawn. So I guess they are not making an offer of any sort it sounds like . . " and that they would "deal with any issues there may be later. . ." AA325. Counsel then said, "And I don't think there's any disagreement, Your Honor, that no offer was ever conveyed to me, or conveyed to Mr. Splond." AA325. The State answered, "That's correct." AA325.

After some discussion about exhibits, defense counsel indicated that he did not have all of the discovery. AA334. The court continued voir dire, but after the conclusion of that court day, the defense asked for a continuance to obtain all of the discovery, and the court continued the trial, and set a status check for the resetting of the trial. AA365. Counsel filed a motion to preserve evidence, and the court heard that motion and reset the trial for March 21. AA373. Counsel indicated that he was also going to file a motion in limine, as "some things had come up" and he was going to dig into them. AA376. On March 18, the court

held another status check date, the State informed the court that it provided about 1100 pages of discovery to the defense. AA387. Defense counsel then stated that based on some items in the discovery, he filed a motion to suppress. AA387. The court heard the evidentiary hearing on that motion prior to the start of trial. AA394.

II. JURY TRIAL

Samuel Echerverria

Samuel Echeverria ("Echeverria") was working on at the Cricket Wireless store at 4343 North Rancho Drive on January 22, 2014. AA482. Around 4:35 p.m., a black man wearing a black hoodie, black baseball cap, black shirt, black shoes, and blue jeans came into the store. AA482. The man was waiting for Echeverria to finish with another customer. AA483. When the customer left, the man came up to the register and asked for a specific type of battery for his girlfriend. AA483. Echeverria said that he had to check if he had that battery, and then walked to the front of the store and then walked back to the desk with the battery. AA483. As Echeverria was ringing up the battery, he was looking down at the battery to scan it. AA483. When Echeverria looked up, he saw the man pull out a black gun, saying, "Give me all the money before I blow your brains out." AA483. Echeverria described the gun as "a black revolver, like a six shooter." AA484.

Seeing the gun, Echeverria became scared. AA484. Echeverria complied with the man's demands, and then called the police. AA484. When the man left the store, Echeverria saw the man touch the door to open it. AA494. Echeverria directed the police to where the man had touched and informed them the man was not wearing gloves. AA495.

Some time later, a detective showed Echeverria a six pack lineup. AA485. Echeverria identified someone, and indicated that he felt 100 percent certain the person he chose was the person who came into his store. AA486. When asked if he saw the person who robbed him in court, Echeverria testified that he did not. AA491-92.

Alisa Williams

On January 22, 2014, Alisa Williams ("Williams") was getting off work at A Wild Hair when she saw someone leaving the Cricket Wireless store. AA501. Williams said the man ran out of the store and jumped into the back of a car. AA502. The man was Black, and was "skinny." AA502. The car was silver, but Williams could not remember if the windows were tinted. However, in her statement to the police, Williams described the car as having tinted windows. AA511.

The person driving the car was a light-skinned Black woman, wearing white sunglasses. AA503. The man jumped into the back seat of the car. Later, police came to speak to Williams. AA503. Williams did not remember police showing her a lineup. AA503. After being shown the lineup, Williams still did not remember being shown the lineup, but did recognize her signature on a lineup form. AA504-505. Williams was not able to identify anyone in the lineup. AA505. Williams remembered that the man had scarring on his face, from a knife or a burn. AA505. She did not believe the scars were consistent with acne scars. AA505.

Brittany Slathar

On February 2, 2014, Brittany Slathar ("Slathar") was working at the Star Mart

around 2:45 in the morning. AA513. The Star Mart is located at 5001 North Rainbow. AA513. Slathar was working as a cashier on the graveyard shift. AA513. Around that time, Slathar was sitting at a table doing a crossword puzzle. AA513. A man walked in, and the door had a bell that rung. AA514. The man walked to the gum, so Slathar walked to the counter. AA514.

The man approached the register with Wrigley Spearmint gum. AA514. Slathar asked if he needed anything else, and the man responded that he wanted two packs of Newport 100 cigarettes. AA514. Slathar turned to get the cigarettes and as she was ringing them up, the man pulled out a gun. AA514. The man told her to give him all the money. AA514. Slathar said that she could not open the register. AA514. The man kept saying, "give me the money, give me the money. I'm gonna kill you. You're gonna die," and called her a "dumb white bitch." AA514. Slathar did not open the register. AA515. Slathar was in fear when she saw the gun. AA515. The man eventually left, and said he would be back. AA515.

The man grabbed the cigarettes on his way out. AA516. Slathar called the police and then locked the doors to the store. AA516. Shortly after, Slathar saw the police pull into the complex. AA516. The police then took her to another scene. AA516. The police gave her a set up instructions for a Show up. AA516. Slathar identified the man in front of the police car as the man who robbed her at gunpoint. AA517. Slathar described the gun as being a black revolver. AA520. Slathar identified Splond in court as being the man who robbed her. AA523. Slathar indicated the man had changed clothing between the robbery and the show

up, and that when he was in the store, he was wearing a black sweatshirt and a camouflage beanie. AA532. She also remembered that the man was wearing gloves inside the store. AA534.

Jeffrey Haberman

Jeffery Haberman was the owner of a .38 caliber Colt revolver. AA538. That revolver was stolen from him on October 2013. AA539. Someone broke into Haberman's house and stole his entire gun safe. AA539. Haberman came home one day and his back door was open, and someone had entered his house. AA542. His gun safe had been dragged out of his house. AA542. Haberman recognized his handgun in a photo the State showed to him. AA539. Haberman did not know Splond, nor did he ever give Splond permission to "go into his house" or "borrow his handgun." AA543. Haberman never gave anyone permission to have his handgun. AA543.

Joshua Rowberry

Joshua Rowberry ("Rowberry") was an officer with the Las Vegas Metropolitan Police Department ("LVMPD"). Rowberry was working graveyard on February 2, 2014 when he got a call about a robbery. AA569. The call was regarding 5001 North Rainbow. AA569. The call came in around 2:57 a.m., and he arrived in the area around 3:00 a.m. AA572. Rowberry had information that the suspect had gone to the north, so he proceeded to drive around Rainbow, heading north. AA572.

Rowberry did not see any pedestrians, but he did see a vehicle ahead of him traveling

north. AA573. Because the car was the only car in the area, Rowberry thought it might be related to the robbery. AA575. The vehicle had some damage to the rear. AA576. Rowberry's attention was drawn to the vehicle as it had the damage to the rear, and he did not know if it had just been involved in an accident. AA577. Rowberry decided to stop the vehicle, after he followed it briefly and it pulled into a residential neighborhood. AA578. Rowberry turned on his lights and sirens and the car stopped. AA578.

Rowberry approached the vehicle, on the driver's side, and noticed that the windows were tinted dark. AA578. Because of the tint, Rowberry could not see into the back windows. AA578. Rowberry told the driver, who he identified as Kellie Chapman, to roll down the back window. AA580. Chapman complied. AA580. Rowberry noticed a Black man lying in the back seat, covered with a blanket, breathing heavily. AA581.

Rowberry told the man to show his hands, and the man did not comply. AA581. Rowberry then called for a code red to let other officers in the area know that he needed help, and to head his way. AA582. Rowberry identified Splond as being the man in the car. AA581.

Rowberry drew his weapon and told the people in the car not to move. AA582. When other officers arrived he told the driver to step out of the car and walk backwards to officers. AA583. When she did that, officers took her into custody. AA583. The officers then told the passenger to get out of the car, which he did. AA583. With the vehicle doors open, Rowberry could see into the car, and noticed two packs of Newport cigarettes and a package of Wrigley's gum. AA584. In the back seat, officers also found a black sweater and a

camouflage beanie. AA587. When Rowberry took the sweater out of the vehicle, he found a revolver. AA588.

Jeremy Landers

Jeremy Landers ("Landers") was an officer with LVMPD who was working on February 2, 2014. AA596. Landers responded to a robbery call at the Star Mart at 5001 North Rainbow. AA597. He made spoke with Williams to get her statement. AA597. Landers learned that a suspect was in custody, and Landers drove Williams to the location of the suspect. AA598-99.

Graciela Angles

Graciela Angles ("Angles") was working at a Metro PCS store on January 28, 2014. AA604. That store was located at 6663 Smoke Ranch. AA604. Around 2:00, an Black man came into the store. AA605. The man went to look at the phones and asked her about phone plans. AA605. Angles was explaining the plans to the man, when he asked about a Galaxy S4. AA608. Angles got the phone and scanned it, and the man then asked her about a different phone. AA608. Angles scanned that other phone, and then asked the man if he was going to pay with cash or a card. AA608. The man then pulled out a gun, asked her to step back, and then told her to give him the money. AA609. Angles was in fear and she gave him the money. AA609. The man took the money and the phone and left. AA609.

About a month later, the police spoke with Angles and showed her some photographs. AA609. Angles circled photograph number 2 and wrote her name under it. AA610. Angles indicated that she was 100 percent certain the photograph was the man who robed her.

AA611. In court, Angles identified Splond as the person who robbed her. AA613. Angles did not know what kind of gun the man had. AA620.

Monte Spoor

Monte Spoor ("Spoor") worked as a Senior Crime Scene Analyst with LVMPD. AA627. On January 22, 2014, Spoor responded to a call at 4343 North Rancho Drive. AA629. Spoor processed that location for fingerprints. AA630. Spoor was able to collect prints from the interior of the north facing doors to the business. AA631. He attempted to obtain prints from the cash register but was unable to. AA635.

Shawn Fletcher

Shawn Fletcher ("Fletcher") was also a Senior Crime Scene Analyst ("CSA") for LVMPD. AA649. On January 28, 2014, Fletcher responded to 6663 Smoke Ranch to a Metro PCS store. AA652. Fletcher obtained fingerprints off a demo phone inside the store. AA654. Fletcher was not able to obtain prints from anywhere else. AA660.

Heather Goldthorpe

Heather Goldthorpe ("Goldthorpe") was a forensic scientist with the latent print unit at LVMPD. AA664. Goldthorpe was tasked with processing fingerprints collected for the instant case. AA668. Goldthorpe entered prints into the automated fingerprint identification system, and obtained a positive hit. AA668. After that hit, she went and obtained the physical prints for the match, so that she could manually compare them. AA669. Goldthorpe was able to match the prints to Samuel Echeverria. AA669. Another lift card yielded negative results. AA670.

In another lab case number, Goldthorpe was asked to compare the prints to Splond. AA670. She was not able to make that match, and could exclude him from three of the five prints. AA670. The remaining two prints were not suitable to make a comparison due to poor quality. AA670. The prints which Goldthorpe used to exclude Splond came from the Galaxy phone that Angles indicated Splond touched. AA689.

Scott Kavon

Scott Kavon ("Kavon") was a detective with LVMPD. AA705. In 2014, Kavon was assigned to investigate a series of robberies. AA706. Kavon received the cases and began to look for commonalities. AA707. He also obtained videos from each event and was able to develop a suspect. AA707. According to Kavon, the suspect in each was "very similar." AA707. Per Kavon, the suspect had a similar method of operation, and similar build. AA708. Additionally, Kavon said that each witnesses and victim described the suspect as having scarring on his cheeks. AA708. Further, the suspect used a revolver in two of the three, and in two of them witnesses described a woman driving the getaway car. AA708. When the detective looked at the Star Mart case, he found that officers had arrested Splond. AA708. Kavon decided to make photographic lineups. AA711.

Per Kavon, Echeverria identified Splond. AA717. Angles also chose Splond out of the photo lineup. AA718. Upon cross-examination, Kavon did not know what a double blind setup for a lineup was. AA721. Kavon also did not know any police departments that were using a double blind approach. AA722.

ARGUMENT

I. SPLOND WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL PRIOR TO TRIAL

A. GROUND ONE: COUNSEL FAILED TO CONVEY AN OFFER, DEPRIVING SPLOND OF EFFECTIVE ASSISTANCE OF COUNSEL AND TO DUE PROCESS OF THE LAW

The Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides that an accused has the right to effective assistance of counsel at all criminal prosecutions. *Missouri v. Frye*, 566 U.S. 134, 138 (2012) (*citing Strickland v. Washington*, 466 U.S. 668, 686 (1984). Claims of ineffective assistance of counsel in the plea bargain context are governed by the two part test set forth in *Strickland*. *See Hill v. Lockhart*, 474 U.S. 52 (1985). The United State Supreme Court held in *Missouri v. Frye*, 566 U.S. 134 (2012), that "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Id*. at 145. When defense counsel allows an offer to expire, without conveying that offer to the defendant, counsel is not rendering effective assistance of counsel. *Id.*

The defendant must show that he suffered some prejudice from not receiving an offer. *Id*. at 147. To show prejudice, the defendant must demonstrate a reasonable probability that he/she would have accepted the offer had he/she been afforded effective assistance of counsel. *Id.* It is also necessary to show that the end result would have been more favorable by a plea to a lesser charge or to a sentence of less prison time. *Id.*

In this case, Splond asserts that his counsel, prior to trial counsel, did not convey to him any offers from the State. In his pro per petition, Splond asserts that "Frank Kocka didn't relay the deal to Mr. Splond that the District Atty offered to Splond." Petition, pg. 13. Further, the record shows that subsequent counsel was also aware the Splond had never been told the offer, and when the court inquired, Splond informed the court that no one had ever told Splond what the offer was.

What the record shows is that counsel seek multiple continuances, spanning from March 2014 to April 2015. That is one year of time that Splond spent in custody with counsel informing the court that he was seeking an offer. A few times counsel indicated that HE did not like the offer. One time counsel indicated, "it's not acceptable to my client." It is not clear if counsel actually conveyed the offer or if the attorney just believed the offer was not acceptable. Another year passed before Splond actually proceeded to trial After two years in custody, with no movement on his case (prior to the trial in 2016, defense counsel filed no motions, and the case was simply continued repeatedly. Counsel withdrew because the case would not negotiate, claiming that he had been retained only to negotiate the case (although he kept setting the case for trial, and indicated he was going to "file motions").

The record does reflect that both Splond and his trial counsel affirmed that Splond never actually received the offer from his counsel, which Splond maintains in his pro per petition. The record is bereft of any clear indication that Splond actually received the offer. What the record does demonstrate is that the offer the State made was to plead to two counts of

Robbery with Use of a Deadly Weapon, full right to argue. Had Splond accepted that offer, he would have faced two (2) to fifteen (15) years, with a consecutive term of one (1) to twenty (20) years for the use of the deadly weapon. NRS 200.380, 193.165. After trial, Splond faced sentencing on three counts of robbery with use, in addition to three counts of burglary while in possession of a firearm, and a count of conspiracy to commit robbery, and a count of possession of stolen property. Under the *Frye* analysis, Splond must show that he suffered some prejudice from not receiving an offer. *Frye,* at 147. To show prejudice, the defendant must demonstrate a reasonable probability that he/she would have accepted the offer had he/she been afforded effective assistance of counsel. *Id.* It is also necessary to show that the end result would have been more favorable by a plea to a lesser charge or to a sentence of less prison time. *Id.* Splond has demonstrated that he would have accepted the offer, as he asked the court to intervene when his counsel made the record regarding the offer. The offer exposed Splond to less charges and less prison time than proceeding to trial and being convicted on all counts. Counsel was ineffective for failing to convey the offer to Splond.

B. GROUND TWO: COUNSEL FAILED TO OPPOSE THE STATE'S MOTION TO CONSOLIDATE SPLOND'S CASE, DEPRIVING SPLOND OF EFFECTIVE ASSISTANCE OF COUNSEL AND TO DUE PROCESS OF THE LAW

On March 3, 2015, the State filed a motion to consolidate case C-14-3001-5 with case C-14-296374-1. AA76. Case C-14-300105 involved the Cricket Wireless store, where Sam Echeverria worked, and the Metro PCS store where Graciela Angles was working. Case C-

14-296374 involved the allegations from the Star Mart, with Brittany Slathar listed as the named victim. The State argued that the cases should consolidated because the were factually connected and were evidence of a common scheme or plan. Counsel did not oppose that motion, and instead allowed Splond to go to trial on more charges, which tainted his right to a fair trial.

Counsel should have opposed the motion to consolidate because the cases are not part of a common scheme or plan, nor are they factually connected. The State's argument that the separate cases were part of a common scheme or plan was the fact that the incidents from case C-14-300105 were five days prior to the events of C-14-296374. Further, the State argued that the acts of one would be admissible in the other to demonstrate "felonious intent."

The mere fact that the cases occur within a close time frame is not solely dispositive. In *Farmer v. State*, 405 P.3d 114 (2017), the Nevada Supreme Court provided guidance to the courts when making an analysis under NRS 173.115 and its "common scheme or plan" language. In *Farmer*, the Nevada Supreme Court noted that, "the fact that separate offenses share some trivial elements in an insufficient ground to permit joinder as parts of a common scheme or plan." *Id.* at 121. Instead, the court should ask whether the offenses share "such a concurrence of common features as to support the inference that they were committed pursuant to a common design." *Id*. *citing State v. Lough*, 125 Wash.2d 847, 889 P.2d 487, 494 (1995). Features that are relevant to the inquiry include: degree of similarity of offenses (*Tabish v. State*, 119 Nev. 293, 303, 72 P.3d 584, 591 (2003); degree of similarity of victims

(*id.* at 303, 72 P.3d at 590; temporal proximity (*Mitchell v. State,* 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989); physical proximity (*Griego v. State*, 111 Nev. 444, 449, 893 P.2d 995, 999 (1995); number of victims (*Id.);* other context-specific features. *Farmer*, at 121. No one fact is dispositive, and "each my be assessed different weight depending on circumstances." *Id.*

The case that the State cited, *Tillema v. State*, 112 Nev. 266, 914 P.2d 605 (1996), involved two vehicular burglaries and one burglary of a commercial store. Both offenses involved vehicles in casino parking garages and occurred only seventeen days apart. The burglary of the store occurred the same day as the second auto burglary, and very close in time on that day.

Tillema was arrested for a burglary of a vehicle on May 29, 1993 and was arrested again for another burglary of a vehicle and for a burglary of a store on June 16, 1993. *Tillema,* 112 Nev. 269. The *Tillema* court reasoned that "the store burglary could clearly be viewed by the district court as 'connected together' with the second vehicle burglary because it was part of a 'continuing course of conduct.' *Id*. at 268, 914 P.2d at 607, *citing* NRS 173.115(2); *Rogers v. State,* 101 Nev. 457, 465-66, 705 P.2d 664, 670 (1985), *cert. denied*, 476 U.S. 1130, 106 S.Ct. 1999, 90 L.Ed.2d 679 (1986). The court noted that the continuing course of conduct was that on June 16th, a detective viewed Tillema's burglary of a van in a casino parking garage and then observed Tillema immediately leaving the garage and walking south to a Woolworth's store. *Id.* The detective followed Tillema and saw him in the hardware section

of the store, where Tillema remained for approximately five minutes. *Id.* The detective then saw Tillema go to a gas station a short distance away. *Id.* Tillema sold a packaged lock, with "Woolworth's" and "a price of four ninety-nine" on it, to a gas station attendant for two dollars. *Id.* The *Tillema* court state:

> We believe that Tillema's acts on June 16th demonstrate that he had an intent to steal something, anything, that he could subsequently sell. Thus, the vehicle burglary and the store burglary were certainly "connected together" due to Tillema's felonious intent and "continuing course of conduct." Moreover, we conclude that most of the evidence of the June 16th vehicle burglary would be cross-admissible in evidence at a separate trial on the store burglary to prove Tillema's felonious intent in entering the store. See NRS 48.045(2); Mitchell, 105 Nev. at 738, 782 P.2d at 1342; cf. Robins, 106 Nev. at 619, 798 P.2d at 563. Accordingly, we conclude that the vehicle burglary counts were properly joined with each other and with the store burglary count. *Id.*

The 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. However, there is nothing so special about theme to suggest that they evince a continuing course of conduct or that they are connected together.

Further, the cases are not necessarily cross admissible of evidence of intent. There is nothing about any of the cases that would even make intent an issue in the case. In each case, witnesses testified such that it was not hard for the state to establish intent. While the defense need not place intent at issue before the State may seek admission of prior act evidence (if the evidence is relevant to prove an element of the offense such as intent for the

specific intent crime of burglary), the evidence may still be inadmissible if it is not relevant or its probative value is substantially outweighed by the risk of unfair prejudice. *Hubbard v. State*, 422 P.3d 1260, 1262 (2018). In that case, the court noted that:

> where the evidence left little doubt as to the assailants' intent to commit a felony at the time of entering the home, and appellant's defense was not based on a claimed lack of intent or on mistake, but rather on a claim that he was not present and had no involvement in the crime, the evidence of his prior residential burglary conviction had little relevance or probative value as to his intent or absence of mistake when compared to the danger of unfair prejudice resulting from its propensity inference. *Id.*

The instant case is similar, in that the evidence in the State's arsenal leaves little doubt as to intent. Further, the defense did not promulgate a defense that put intent at issue. Thus, the State is incorrect in its assertion that the evidence was cross admissible. This Court would have had to balance the evidence under a probative versus prejudicial analysis. The joined was prejudicial, as will be addressed below via the prejudice prong of *Strickland.*

Splond must demonstrate deficient performance or prejudice. As far as deficient performance, an opposition to the motion to consolidate based on improper joinder would not have been futile. *See Ennis v. State,* 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims."). As argued above, an opposition was not futile, and there were valid legal grounds to oppose the motion. A reading of the caselaw provides ample grounds to distinguish caselaw cited by the State to prepare a cogent

argument against joinder.

To demonstrate prejudice, Splond must demonstrate "a substantial and injurious effect on the verdict." *Marshall v. State,* 118 Nev. 642, 647, 56 P.3d 376, 379 (2002); *see also* NRS 174.165(1) ("If it appears that a defendant or the State of Nevada is prejudiced by a joinder of ... defendants in an indictment or information, or by such joinder for trial together, the court may ... grant a severance of defendants or provide whatever other relief justice requires."). Here, the cases regarding the cellular store robberies had eyewitness identification issues to litigate. Additionally, the forensic evidence was helpful to Splond's contentions that it was not he who robbed the cellular stores. There was fertile ground for the defense to explore via cross examination. However, the evidence in the Star Mart incident was harder to defend with an eyewitness identification defense, due to the arrest of Splond shortly after the offense. However, the jury hearing the Star Mart evidence made it insurmountable for the defense to overcome the taint of the Star Mart offense and the jury likely closed its mind. Having the two cases joined "prevent[ed] the jury from making a reliable judgment about guilt or innocence.'" *See Marshall,* 118 Nev. at 647, 56 P.3d at 379 (quoting *Zafiro v. United States,* 506 U.S. 534, 539 (1993)). Counsel was ineffective for simply agreeing to the State's joinder of the cases, and it prejudiced Splond at trial.

II. SPLOND WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

To state a claim of ineffective assistance of counsel that is sufficient to invalidate a

judgment of conviction, the petition must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) counsel's errors were so severe that they rendered the verdict unreliable. *Lozada v. State,* 110 Nev. 349, 353, 871 P.2d 944, 946 (1994) *citing Strickland v. Washington,* 466 U.S. 668. 104 S.Ct. 205 (1984).

Once the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's errors, the result of the trial would probably have been different. *Strickland,* 266 U.S. at 694, 104 S.Ct. 2068; *Davis v. State,* 107 Nev. 600, 601, 602, 817 P.2d 1169, 1170 (1991). The defendant must also demonstrate errors were so egregious as to render the result of the trial unreliable or the proceedings fundamentally unfair. *State v. Love,* 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993) *citing Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064.

In *Strickland*, the United States Supreme Court established the standards for a court to determine when counsel's assistance is so ineffective that it violates the Sixth Amendment of the U.S. Constitution. 466 U.S. 668, 104 S.Ct. 2052. *Strickland* laid out a two-pronged test to determine the merits of a defendant's claim of ineffective assistance of counsel.

First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable. Unless a defendant

makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. The Nevada Supreme Court has held, "claims of ineffective assistance of counsel must be reviewed under the reasonably effective assistance standard articulated by the U.S. Supreme Court in *Strickland*, thus requiring the petitioner to show that counsel's assistance was deficient and that the deficiency prejudiced the defense." *Bennet v. State,* 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995); *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

In meeting the prejudice requirement of an ineffective assistance of counsel claim, Splond must show a reasonable probability that, but for counsel's errors, the result of the proceedings (trial, appeal, post-conviction proceedings) would have been different. Reasonable probability is probability sufficient to undermine the confidence in the outcome. *Kirksey,* 112 Nev. at 980, 923 P.2d at 1102. "Strategy or decisions regarding the conduct of a defendant's case are virtually unchallengeable, absent extraordinary circumstances." *Mazzan v. State*, 105 Nev. 745, 783 P.2d 430 (1989); *Olausen v. State,* 105 Nev. 110, 771 P.2d 583 (1989). However, counsel is still required to be effective in his or her strategic decisions. *Strickland*, *supra*.

In the instant case, Splond's proceedings were fundamentally unfair and he received ineffective assistance of counsel at trial.

A. GROUNDS THREE THROUGH

A defendant who contends that his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more

favorable outcome. Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004). Additionally, 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).

i. Grounds One Through Six: Grounds One through Six are herein reasserted as argued in the pro per pleading. Those grounds are: Trial counsel was ineffective for failing to investigate, for failing to present a defense and for failing to subpoena phone records, for failing to object to the constitutionally infirm complaint, for failing to object to evidence at trial, for failing to ask for a Petrocelli hearing, for failing to object to jury instructions, and for failing to object to the PSI.

ii. Ground Seven: Trial Counsel Failed to present expert testimony

During the trial, the evidence tying Splond to the robberies of the two cellular phone stores was eyewitness identification evidence. Trial counsel then attempted to cross examine the detective about the procedures used during the photo lineups, to then argue the procedures were flawed. However, the detective was unaware of the techniques that trial counsel was asking about during cross examination.

A review of the relevant evidence is as follows:

Cricket Wireless (Echeverria):

Echeverria testified that the man who came into the store was a black man wearing a black hoodie, a black baseball cap, black shirt, black shoes, and blue jeans. AA482. The man

"had a lot of acne" on his face. AA497. A month later, the detective approached Echeverria with a photo lineup. AA486. Echeverria selected Splond out of the photo lineup. Despite Echeverria's description that the man in the store had acne, another witness (Williams) described the man as having scarring on his face, from a knife or a burn. AA505. She did not believe the scars were consistent with acne scars. AA505.

In examining the photo lineup shown to Echeverria, the only person in the lineup that had any scarring on his face is Splond. (See Exhibit A, photo lineup).

Echeverria could not identify anyone in court at trial when asked if he saw the man who came into his store on the day in question. AA492. Echeverria was clear that the man touched the door handle without gloves when leaving. AA495. Splond's fingerprints were not found on the door.

Witness testimony was inconsistent about whether or not it was Splond, and the photo lineup was unduly suggestive, in that Splond was the only person in the lineup with any type of scarring.

Metro PCS (Angles):

Angles described the man who robbed her on the day in question as an "African American guy." AA605. In the LVMPD incident report, the description of the suspect was a Black male, around 6 feet 2 inches tall, 130-140 pounds, thin, and bald. There is no mention of any facial scarring. (See Exhibit B, incident report). Nowhere does Angles describe the man having any type of facial scarring. Even Angles' handwritten statement is devoid of any type of description about facial scarring. (See Exhibit C, voluntary statement).

Detective Kavon:

Detective Kavon testified that one of the reasons he thought the robberies were tied together was the witness descriptions that the person had facial scarring. AA708. However, nowhere does Angles describe the man as having facial scarring. Kavon also explained the process for how he put together a photo lineup. AA712. Counsel sought to question Kavon regarding the procedures used to perform lineups, including asking if LVMPD, at that time, was using a "double blind setup." AA721. When asked if LVMPD used a double-blind set up, the detective responded "not to my knowledge, no." AA721. Counsel then asked Kavon to explain to the jury what a double blind set up was. AA721. Kavon answered that he did not know. AA721. Counsel then indicated that some departments use such set up, and asked the detective to explain what the double blind procedure was. AA722. Kavon testified that he did not know of any departments using such a set up for photo lineups. AA722. The State objected to speculation, and that court sustained the objection. AA722.

Counsel then sought to question the detective about why the photo lineup instructions are given in the manner proscribed on the lineup form. AA723. The detective was unfamiliar with the theory behind why the photo lineup instructions exist in their current form. AA 724. The detective remembered very little about the surrounding circumstances behind each lineup. AA728. Counsel then went back to attempting to question the detective about double blind procedures. AA730. Counsel essentially tried to testify to what a double blind set up was, and the detective did not know anything about them, and the State successfully objected to the line of questioning. AA730. In his closing, counsel attempted

to explain the problems with photo lineups and why some departments use double blind set ups.

Counsel should have called an expert to explain to the jury the issues with photo lineups, and to explain why such lineups should be conducted in a double blind setup, what that was, and why eyewitnesses may be wrong sometimes. The National Institute of Justice published a guide in 2007 describing issues with eyewitness identifications and police lineups. *See https://nij.ojp.gov/topics/articles/police-lineups-making-eyewitness-identification-more-reliable.* (See Exhibit D). The National Institute of Justice (NIJ) is the research, development and evaluation agency of the U.S. Department of Justice. The information in the guide is based on scientific data gathered by the NIJ. Issues that exist with photo lineups include:

- **Prelineup instructions given to the witness.** This includes explaining that the suspect may or may not be present in the lineup. Research on prelineup instructions by Nancy Steblay, Ph.D., professor of psychology at Augsburg College in Minneapolis, Minnesota, revealed that a "might or might not be present" instruction reduced mistaken identification rates in lineups where the suspect was absent.
- **The physical characteristics of fillers.** Fillers who do not resemble the witness's description of the perpetrator may cause a suspect to stand out.
- **Similarities or differences between witness and suspect age, race, or ethnicity.** Research suggests that when the offender is present in a lineup, young children and the elderly perform nearly as well as young adults in identifying the perpetrator. When the lineup does not contain the offender, however, young children and the elderly commit mistaken identifications at a rate higher than young adults. Research has also indicated that people are better able to recognize faces of their own race or ethnic group than faces of another race or ethnic group.
- **Incident characteristics, such as the use of force or weapons.** The presence of a weapon during an incident can draw visual attention away from other things, such as the perpetrator's face, and thus affect an eyewitness's ability to identify the holder of the weapon. *See* exhibit D.

The article also discusses the problems with not using a double blind procedure, where the person conducting the line up does not know who the target of the lineup. The report explains that the person conducting the lineup can inadvertently direct the witness's attention to the person the officer believes is the target. *Id.*

An eyewitness identification expert would be the proper vehicle to present such evidence to the jury, such that counsel could have sufficiently presented a defense and then argued the issues to the jury in a meaningful way. To simply try to draw out from the detective who seemed to have no knowledge of such issues or procedures was not an effective method of presenting a defense. Then, to try to argue to the jury the problems with such procedures when no evidence existed before them was not effective.

A defendant is entitled to a defense, per the United States Constitution. In this case, the issues with identification were the crux of the defense to two of the allegations (Cricket Wireless and Star Mart). Counsel should have called an expert witness to present that defense to the jury. The preparation of the defense fell below a reasonable standard as it was deficient at a basic level. Therefore, Splond received ineffective assistance of counsel and is entitled to a new trial. Molina, 120 Nev. 185, 87 P.3d 533; Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

iii. Ground Eight: Trial Counsel Failed to Offer Jury Instructions on Eyewitness Evidence and an inverse instruction on the elements of possession of stolen property

The jury instructions do not contain any instructions regarding the theory of defense.

Due to the nature of the defense, as well as issues with the eyewitness identification issues, counsel should have proffered an instruction regarding eyewitness identification.

Counsel should have proffered an instruction containing language similar to the following:

> Eyewitness testimony has been received in this trial for the purpose of identifying the Defendant as the perpetrator of the crimes charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness, as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following:
> The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;
> The stress, if any, to which the witness was subjected at the time of the observation;
> The witness' ability, following the observation, to provide a description of the perpetrator of the act;
> The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;
> The witness' capacity to make an identification;
> The circumstances affecting the witness' ability to observe, such as lighting, weather conditions, obstructions, distances, duration of observation;
> Any other evidence relating to the witness' ability to make an identification.

This instruction goes right to the heart of the theory of defense proffered on two of the incidents. A defendant is entitled to a jury instruction on his theory of the case if any evidence supports the theory, however improbable it may be." *Allen v. State*, 97 Nev. 394, 397, 632 P.2d 1153, 1155 (1981); *Brooks v. State*, 103 Nev. 611, 613-14, 747 P.2d 893, 894-95 (1987) (stating that a defendant is entitled to a "position" or "theory" instruction). Because Splond was entitled to an instruction on the theory of his defense, and because counsel has a duty to present a defense, counsel should have proffered an eyewitness identification instruction.

Second, counsel should have proffered an instruction regarding the possession of the stolen firearm. Count 4 of the Indictment charged Splond with possession of a stolen firearm. The jury instructions read:

> 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. AA185.

There was no evidence offered regarding how Splond would have or should have known the firearm was stolen. Therefore counsel should have offered an inverse instruction informing the jury "if the State fails to prove beyond a reasonable doubt that the defendant knew or should have known the firearm was stolen, you must find him not guilty of possession of firearm." It is crucial to instruct the jury so that the jury fully understands its duties and the State's burden. When elements of an offense are missing, counsel must point that out to the jury and instructions are an important vehicle for ensuring fairness.

Counsel should have proffered the instruction and argued that there was nothing to suggest Splond knew that the firearm was stolen. Not offering instructions that go to the heart of the defense or that illustrate problems with the State's case is the base level of trial effectiveness. Splond received ineffective assistance of counsel and is entitled to a new trial. *Molina*, 120 Nev. 185, 87 P.3d 533; *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

v. Ground Nine: Counsel Failed to elicit testimony regarding the stolen firearm to negate the State's allegations

The only evidence introduced at trial regarding the firearm was the testimony of Jeffery Haberman. Haberman came home one day and his back door was open, and someone had entered his house. AA542. His gun safe had been dragged out of his house. AA542. Haberman recognized his handgun in a photo the State showed to him. AA539. Haberman did not know Splond, nor did he ever give Splond permission to "go into his house" or "borrow his handgun." AA543. Haberman never gave anyone permission to have his handgun. AA543.

Certainly, the State proved that the handgun was stolen. However, the State must also prove that Splond knew or should have known that the gun was stolen. There was no evidence to suggest that there were overt signs (filed off serial number, etc.) that the firearm was stolen. Counsel should have elicited testimony from the detective that Nevada allows private party gun sales. Eliciting testimony that cuts through the State's theories is precisely what trial counsel is supposed to do. Simply leaving alone a charge and eliciting no evidence, when evidence exists, to negate a charge is ineffective. Combined with the failure to offer a negatively worded jury instruction especially this failure affected Splond's right to a fair trial and to effectiveness of counsel. Therefore, this Court should give Splond a new trial.

vi. Ground Ten: Appellate Counsel Failed argue that the State had not met its burden of proof regarding the possession of the stolen firearm

To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State,* 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Both components of the inquiry must be shown, *Strickland,* 466 U.S. at 697.

Appellate counsel should have argued that the State failed to prove with sufficiency of the evidence that the Defendant knew or should have known that the firearm was stolen. When reviewing a challenge to the sufficiency of evidence supporting a criminal conviction, the appellate court will consider "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." *Stewart v. State*, 133 Nev. 142, 144, 393 P.3d 685, 687 (2017) (emphasis omitted) (internal quotations omitted). "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses." *Rose v. State*, 123 Nev. 194, 202-03, 163 P.3d 408, 414 (2007) (alteration in original) (internal quotations omitted). We will not disturb a verdict supported by substantial evidence. Stewart, 133 Nev. at 144-45, 393 P.3d at 687. "Circumstantial evidence alone may support a judgment of conviction." *Collman v. State,* 116 Nev. 687, 711,

7 P.3d 426, 441 (2000). In this case, there was not substantial evidence to support a conviction for possession of stolen property. Merely being in possession of a stolen firearm is not enough. The State must present some evidence that the defendant knew or should have known it was stolen. Private parties are allowed to sell guns in Nevada, and there was nothing so readily apparent about the gun that someone would know when purchasing it that it was stolen. There was no evidence that Splond admitted he knew it was stolen, nor was there circumstantial evidence that he bought it from someone he should have suspected was selling him a stolen gun. Further, there was no evidence he bought it for a price that suggested the gun might be stolen. The record was devoid of any evidence. Therefore, raising such a claim to the appellate court was not frivolous and appellate counsel should have made the argument. The omitted issue here would likely have been successful, as the record is devoid of evidence to sustain a conviction. Thus, appellate counsel was ineffective and this Court should grant Splond a new trial.

II. SPLOND IS ENTITLED TO AN EVIDENTIARY HEARING PURSUANT TO NRS 34.770

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. NRS 34.770 provides:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.

> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. *Marshall v. State*, 110 Nev. 1328, 885 P.2d 603 (1994); *Mann v. State*, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. *Marshall,* 110 Nev. at 1331, 885 P.2d at 605; *See also Hargrove v. State,* 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." *Mann,* 118 Nev. at 354, 46 P.3d at 1230 (2002). The district court cannot rely on affidavits submitted with a response or answer in determining whether the factual allegations are belied by the record. *Id.* at 354-56, 46 P.3d at 1230-31. Additionally, the district court cannot make credibility decisions without an evidentiary hearing. *See Id*. at 356, 46 P.3d at 1231 (rejecting suggestion that district court can resolve factual dispute without an evidentiary hearing and noting that "by observing the witnesses' demeanors during an evidentiary hearing, the district court will be better able to judge credibility").

Here, Splond has alleged numerous instances of ineffective assistance of trial counsel and of previous counsel who did not convey an offer. These are issues of both credibility

and fact and may not be determined by the district court without an evidentiary hearing. *Mann*, 118 Nev. at 354-56, 46 P.3d at 1230-31. Counsel's actions are often based upon the defendant's strategic choices and upon information supplied by the defendant. Therefore, inquiry into both trial and appellate counsel's conversations with Moore is critical in assessing counsels' actions. *Strickland,* U.S. at 691.

While the State may claim that all decisions made by counsel were strategic in nature and therefore virtually unquestionable, that is unclear from the record before the Court at this time. Splond has alleged specific factual allegations, which if true, would entitle him to relief and these allegations are not belied by the record. Therefore, Splond is entitled to an evidentiary hearing under NRS 34.770.

CONCLUSION

Based on the foregoing arguments, Splond respectfully requests that the Court reverse his conviction, grant him a new trial or, in the alternative, set an evidentiary hearing to determine all claims raised in his Petition for Writ of Habeas Corpus and the instant Supplemental Memorandum of Points and Authorities in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

DATED this 12th day of October 2020.

Respectfully submitted,

/s/ Monique McNeill
MONIQUE MCNEILL, ESQ.
Nevada Bar No. 9862

VERIFICATION

State of Nevada)
)ss.
County of Clark)

MONIQUE MCNEILL, ESQ., being first duly sworn, deposes and says:

That I am the attorney for KENYA SPLOND, the Defendant in the above entitled action; that I have read the foregoing Defendant's Supplemental Memorandum of Points and Authorities in Support of Defendant's Petition for Writ of Habeas Corpus and know the contents thereof; and that the same is true of my own knowledge except for those matters therein stated on information and belief, and as to those matters, I believe them to be true.

/s/ Monique McNeill

Monique McNeill, Esq.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED by the undersigned that on 12th day of October, 2020, I served a true and correct copy of the foregoing **SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** 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.

By: */s/ Monique McNeill*

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

KENYA SPLOND,

Petitioner,

-vs-

JAMES DZURENDA,
STATE OF NEVADA

Respondents.

CASE NO: A-19-793961-W

DEPT NO: 28

EXHIBITS IN SUPPORT OF SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, KENYA SPLOND, by and through his attorney, MONIQUE A. MCNEILL, ESQ., and hereby submits the Exhibits in support of his Supplemental Memorandum of Points and Authorities in support of his Petition for Writ of Habeas Corpus.

DATED this 12th day of October, 2020.

/s/ Monique McNeill
MONIQUE A. MCNEILL, ESQ.
Nevada Bar No. 009862

EXHIBIT A

Las Vegas Metropolitan Police Department

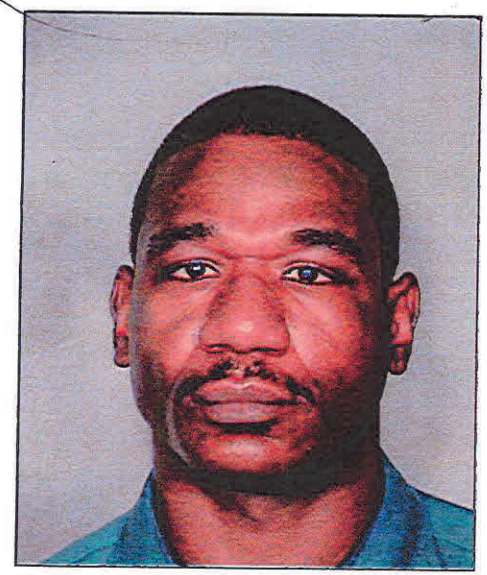
Lineup ID: 32230 22 Feb 2014

1 _____

2 _____

3 _____

4 _____



5 _____

6 _____

FOR OFFICIAL USE ONLY

001074

Splond 000067 3-17-16

EXHIBIT B

Administrative

Location **6663 Smoke Rnch LV, NV 89108** Sector /Beat **V6**
Occurred On (Date / Time) **Tuesday 01/28/2014 2:45:00 PM** Or Between (Date / Time)
Reporting Officer **06549 - Casper, M.** Reported On **01/28/2014**
Entered By **06549 - Casper, M.** Entered On **01/28/2014 3:14:18 PM**
Supervisor **04992 - Stockdale, W.** Follow Up Pro Squad **NW 21** Follow Up
Jurisdiction **Las Vegas, City of** Report Type **Officer Created - Sgt Approval** Disposition **Active**
Route To: **Robbery** Related Cases
Connecting Reports **Victim Information Guide**
Voluntary Statement

Assisting Officers:

06250 - Marquez, Alex F	**Officer**
07912 - Bruno, Bernie J	**Detective**
08253 - Dunn, Craig H	**Detective**
05221 - Fletcher, Shawn M	**ID Specialist**
07063 - Pennucci, Andrew M	**SGT**

Offenses

ROBBERY WITH A DEADLY WEAPON
Completed **Yes** Hate/Bias **None (No Bias)** Domestic Violence **No**
Entry Premises Entered Type Security Tools
Weapons **Handgun** Location Type **Specialty Store (TV, Fur, Etc.)**
Criminal Activities

Victims

Name: **METRO PCS**

Victim Type **Business** Written Statement Can ID Suspect
Victim of **200.380B - ROBBERY WITH A DEADLY WEAPON** Domestic Battery

SSN DOB Age Sex Race
Height Weight Hair Color Eye Color
Employer/School
Occupation/Grade Work Schedule
DLN DL State DL Country
Resident Tourist Departure Date
Injury Injury Weapons

Addresses
Business **6663 Smoke Rnch LV, NV 89108**

Phones
Business/Work **685-6037**

Email

Offender Relationships
Domestic Violence Information
Relationship to Suspect Primary Aggressor Determined
Intimate Relationship Drug/Alcohol Involvement
Voluntary Statement DV Information Provided
Injury Severity Medical Attention
Photos Taken

Notes:

Suspects

Name: **UNKNOWN**

Written Stmt. Alerts Non-English Language

Aliases
Moniker

Scope ID DOB Age **30-35** SSN
Race **Black** Build **Thin** Handedness **Right**
Sex **Male** Height **6' 2"** Weight **130 - 140** Hair Color **Bald** Eye Color
Employer/School Occupation/Grade
Hair Length **Bald / Shaved** Hair Style Eyes
Complexion **Medium** Facial hair Teeth
Appearance **Casual Clothes** Injury/Condition
Speech manner **Not Unusual** Speech Characteristics
DLN DL State DL Country
Resident **Unknown** Tourist Departure Place of Birth
Habitual Offender Status MO Factors
Primary Means of Attack/Weapon **Handgun** Weapon Features
Employer/School Occupation/Grade

Scars, Marks and Tattoos
Addresses

Phones

Domestic Violence Information
TPO in Effect Drug/Alcohol Involvement Voluntary Statement
Injury Severity Medical Attention DV Info provided
Photos Taken Suspect Demeanor

Notes:

Arrestees

Witnesses

Witness Name: JIMENEZ, GRACIELA

Written Statement **Yes** Can ID Suspect **Yes** Testify

SSN DOB [redacted] Age **20** Race **Hisp/Latin Amer**
Sex **Female** Height [redacted] Weight **130** Hair Color **Black** Eye Color

Addresses
Residence [redacted]0

Phones
Cellular [redacted]

Notes:

Other Entities

Properties

Type: Currency, Coins, Securities

Status **Stolen** Quantity **1** Value **300.00** Color
Description **UNITED STATES CURRENCY**
Manufacturer **UNITED STATES MINT** Model Serial No.\VIN
Vehicle Year Body Type
Lic Plate # Lic Plate State Lic Plate Exp
Insurance Company
Owner
Notes:

Detailed Property Information

Length Width Height
Horse Power Propulsion Serial #
Caliber Barrel Length
Features

Recovered Property Information

Recovered Date Recovered Value
Recovered Location Recovered Reason
Recovered By Recovered Stock #

Owner Type
Insurance Rep.

Released To
Tow Company

Type: Misc. (Cell Phones, GPS\Radar, items not listed above)

Status **Stolen** Quantity **1** Value **499.00** Color
Description **SMART CELL PHONE**
Manufacturer **GALAXY** Model **MEGAS** Serial No.\VIN
Vehicle Year Body Type
Lic Plate # Lic Plate State Lic Plate Exp
Insurance Company
Owner **V - METRO PCS**
Notes:

Detailed Property Information

Length Width Height
Horse Power Propulsion Serial #
Caliber Barrel Length
Features

Recovered Property Information

Recovered Date Recovered Value
Recovered Location Recovered Reason
Recovered By Recovered Stock #
Owner Type Released To
Insurance Rep. Tow Company

Solvability

02. WITNESS PRESENT - OTHER
05. SUSPECT CAN BE DESCRIBED
06. SUSPECT CAN BE IDENTIFIED
08. STOLEN PROPERTY IS TRACEABLE, (IDENTIFIABLE)
11. CRIMINALISTICS WORK WAS PERFORMED
09. PHYSICAL EVIDENCE IS PRESENT

Modus Operandi

MO General
Occupied? **Yes**
General Premise **Retail Business**
Surrounding Area **Middle of Block**
Specific Premise **Room**

MO Against Property
Entry Point **Door**
Entry/Attempt Method **Open for Business**
Safe Entry
Victim Location **Work/School**
Maid
Exit Point **Door**
Entry Tool
Suspect Actions **Selective In Loot**
Electronic Locks
Inspectress
Entry Location
Vehicle Entry
Additional Factors **Other**
Video Surveillance **Yes**

MO Against People
Victim-Suspect Relationship
Victim Condition
Suspect Pretended to Be
Sexual Acts
Pre-Incident Contact
Suspect Solicited/Offered
Suspect Actions
Vehicle Involvement

Narrative

The suspect came into the Metro PCS store and inquired about buying a Galaxy Mega smart cellular phone. The clerk went to the back to get a new phone and when she came back, she asked the suspect if was going to be cash or credit. The suspect then pulled out a handgun from his back right pocket, pointed it at her and told her to step back and to give him the money from the register. The clerk complied with his demands and handed the suspect approximately $300 in cash. Prior to leaving, the suspect grabbed the cell phone and ran out of the store. He was last seen running west bound in the strip mall towards the corner of Smoke Ranch and Rainbow.

ID responded and processed the scene. Video surveillance was also obtained from the store as well. Robbery Detail responded and took the scene.

Patrol Follow-Up

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EXHIBIT C

-MR-

Page 1 of 1

LAS VEGAS METROPOLITAN POLICE DEPARTMENT

VOLUNTARY STATEMENT

Event # 140128-2214

THIS PORTION TO BE COMPLETED BY OFFICER

Specific Crime	Date Occurred	Time Occurred
ROBBERY W/ DEADLY WEAPON	1/28/14	1445
Location of Occurrence	**Sector/Beat**	☒ City ☐ County
6663 SMOKE RANCH LV NV 89104	J6	

Your Name (Last / First / Middle)								Date of Birth	Social Security #
Angeles Graciela Lizeth								[redacted]	[redacted]
Race	**Sex**	**Height**	**Weight**	**Hair**	**Eyes**	**Work Schdl. (Hours)**	**(Days Off)**	**Business / School**	
Hispanic	Female	130	4'9	Black	Brown			Metro PCS	
Residence Address: (Number & Street)		**Bldg./Apt.#**	**City**		**State**	**Zip Code**		**Res. Phone:**	695-6037
[redacted]			Las Vegas		NV	[redacted]		**Bus. Phone:**	[redacted]
Bus. (Local) Address: (Number & Street)		**Bldg./Apt.#**	**City**		**State**	**Zip Code**		**Occupation**	**Depart Date (if visitor)**
6663 SMOKE RANCH		LN	LV		NV	89108		SALES	
Best *place* to contact you during the day				**Best *time* to contact you during the day**				**Can You Identify the Suspect?**	☒ Yes ☐ No
AT WORK				10-7					

DETAILS At I was at milk this black guy came in to the store asking to buy a galaxy mega I when to the back to get it and then I came out I ask him if it was going to be cash or credit and that is when he took the gun and ask me to step back and to give him the money then after that he grab the phone and walk outs

His a black male tall about 6'2 like 130 weight

I HAVE READ THIS STATEMENT AND I AFFIRM TO THE TRUTH AND ACCURACY OF THE FACTS CONTAINED HEREIN. THIS STATEMENT WAS COMPLETED AT (LOCATION) 6663 Smoke Ranch LV NV 89108

ON THE 28TH DAY OF JAN AT 1535 (AM / PM), 2014.

Witness/Officer: _____ (SIGNATURE)

Witness/Officer: A.C. MARQUEZ (PRINT ID) P# 6250

Graciela Angeles (SIGNATURE OF PERSON GIVING STATEMENT)

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LVMPD 85 (REV. 5-08)

EXHIBIT D

Police Lineups: Making Eyewitness Identification More Reliable

October 1, 2007
By: Beth Schuster

In 1981, 22-year-old Jerry Miller was arrested and charged with robbing, kidnapping, and raping a woman. Two witnesses identified Miller, in a police lineup, as the perpetrator. The victim provided a more tentative identification at trial. Miller was convicted, served 24 years in prison, and was released on parole as a registered sex offender, requiring him to wear an electronic monitoring device at all times.

Recent DNA tests, however, tell a different story: Semen taken from the victim's clothing—which could have come only from the perpetrator—did not come from Miller. In fact, when a DNA profile was created from the semen and entered into the Federal Bureau of Investigation's convicted offender database, another man was implicated in the crime.

On April 23, 2007, Miller became the 200th person in the United States to be exonerated through DNA evidence.[1]

Eyewitnesses play a vital role in the administration of justice in this country. Their testimony can provide the key to identifying, charging, and convicting a suspect in a criminal case. Indeed, in some cases, eyewitness evidence may be the only evidence

available.

Yet cases like Miller's show that eyewitness evidence is not perfect. Even the most well-intentioned witnesses can identify the wrong person or fail to identify the perpetrator of a crime. According to the American Judicature Society, misidentification by eyewitnesses was the leading cause of wrongful conviction in more than 75 percent of the first 183 DNA exonerations in the United States.[2],[3]

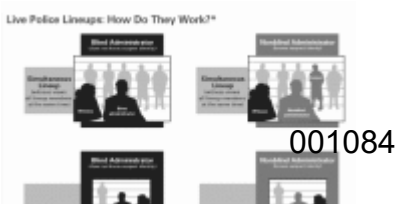
These cases have caused criminal justice professionals to take a closer look at eyewitness evidence, specifically at the effectiveness of identifying suspects from photographic and live lineups. And recent studies on lineup structure and implementation have led to even more questions and disagreement in the field, highlighting the need for more research and dialogue about what works. The National Institute of Justice (NIJ) has initiated a multisite field experiment of eyewitness evidence to examine the effectiveness and accuracy of this crucial and powerful component of the Nation's criminal justice system as it is used in police departments and courtrooms across the country.

Elements of a Lineup

At its most basic level, a police lineup involves placing a suspect among people not suspected of committing the crime (fillers) and asking the eyewitness if he or she can identify the perpetrator. This can be done using a live lineup of people or, as more commonly done in U.S. police departments, a lineup of photographs. Live lineups typically use five or six people (a suspect plus four or five fillers) and photo lineups six or more photographs.[4]

There are two common types of lineups: simultaneous and sequential. In a simultaneous lineup (used most often in police departments around the country),[5] the eyewitness views all the people or photos at the same time. In a sequential lineup, people or photographs are presented to the witness one at a time.

Typically, the law enforcement official or lineup administrator knows who the suspect is.[6] Experts suggest that lineup administrators might—whether purposefully or inadvertently—give the witness verbal or nonverbal cues as to the identity of the suspect. For instance, if an eyewitness utters the number of a filler, the lineup administrator may say to the witness,



"Take your time . . . . Make sure you look at all the photos." Such a statement may effectively lead the witness away from the filler.[7] In a "double-blind" lineup, however, neither the administrator nor the witness knows the identity of the suspect, and so the administrator cannot influence the witness in any way.[8] (See graphic, "Live Police Lineups: How Do They Work?")

Live Police Lineups: How Do They Work? (View larger image.)

Additional variables that can affect the outcome of police lineups include:

- **Prelineup instructions given to the witness.** This includes explaining that the suspect may or may not be present in the lineup. Research on prelineup instructions by Nancy Steblay, Ph.D., professor of psychology at Augsburg College in Minneapolis, Minnesota, revealed that a "might or might not be present" instruction reduced mistaken identification rates in lineups where the suspect was absent.[9]
- **The physical characteristics of fillers.** Fillers who do not resemble the witness's description of the perpetrator may cause a suspect to stand out.[10]
- **Similarities or differences between witness and suspect age, race, or ethnicity.** Research suggests that when the offender is present in a lineup, young children and the elderly perform nearly as well as young adults in identifying the perpetrator. When the lineup does not contain the offender, however, young children and the elderly commit mistaken identifications at a rate higher than young adults. Research has also indicated that people are better able to recognize faces of their own race or ethnic group than faces of another race or ethnic group.[11]
- **Incident characteristics, such as the use of force or weapons.** The presence of a weapon during an incident can draw visual attention away from other things, such as the perpetrator's face, and thus affect an eyewitness's ability to identify the holder of the weapon.[12]

Simultaneous vs. Sequential

Recent DNA exonerations have ignited heated debate among law enforcement officials, prosecutors, defense attorneys, and researchers over the best way to obtain reliable eyewitness evidence using police lineups.

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The most common lineup procedure in use by law enforcement is the simultaneous lineup.[13] Researchers like Gary Wells, Ph.D., from Iowa State University, claim, however, that during simultaneous lineups, witnesses use "relative judgment," meaning that they compare lineup photographs or members to each other, rather than to their memory of the offender. This is a problem when the perpetrator is not present in the lineup because often the witness will choose the lineup member who most closely resembles the perpetrator.[14]

During sequential lineups, on the other hand, witnesses must make a decision about each photograph or member before moving on to the next, prompting them to use "absolute judgment." In other words, witnesses compare each photograph or person only to their memory of what the offender looked like.[15]

As the body of research into simultaneous versus sequential methods continued to grow, some researchers working in the lab discovered that the double-blind sequential method—in which the administrator does not know the identity of the suspect—produced fewer false identifications than the traditional simultaneous method.[16] In 2003, the Illinois legislature put this research to the test. Lawmakers charged the Illinois State Police with conducting a yearlong examination of the double-blind sequential versus the simultaneous (commonly used) eyewitness identification procedure to determine which produced fewer false identifications.

The results, published in March 2006, surprised many. Although the double-blind sequential lineup had produced more reliable outcomes in the laboratory, this was not the case in the field. Data collected from approximately 700 photo arrays and live lineups from urban, suburban, and semi-rural Illinois police departments revealed that the double-blind sequential procedure resulted in an overall higher rate of false identifications and a lower rate of "suspect picks" than the simultaneous lineup.[17]

The stunning implications of the Illinois Pilot Program have since been marred, however, by questions about the methodology used. Wells, for instance, has noted that the study used double-blind procedures in the sequential lineups but not in the simultaneous lineups. This, he argues, left open the potential for lineup administrators to influence witnesses during the simultaneous lineups.[18] In July, a panel of social scientists expressed similar concerns about the field test's design (see sidebar, "Panel Calls Design of Illinois Study 'Flawed'").

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Also in 2003, around the same time as the Illinois Pilot Program, officials at the Hennepin County, Minnesota, Attorney's Office became convinced by the growing body of scientific laboratory evidence that the double-blind sequential procedure was essential to reduce the risk of misidentification.[19] They instituted a new photographic double-blind sequential lineup protocol in several county police departments. Over a 12-month period, the project involved 280 lineups with 206 eyewitnesses. An NIJ-funded analysis of the project found that although these field tests produced suspect identification rates similar to those in other jurisdictions that used traditional simultaneous lineups, witnesses in Hennepin County chose fillers at a lower rate. The Hennepin County data also revealed that additional viewings (or laps) of the sequential lineup reduced eyewitness accuracy.[20]

Will Double-Blind Sequential Lineups Work in the Field?

Implementation is a crucial factor when examining the reliability of the sequential lineup model versus the simultaneous model. If continued field research validates the effectiveness of the double-blind sequential model, will police departments—most of which currently use simultaneous lineups in which the administrator knows which person is the suspect—be able to smoothly and effectively implement this new procedure?

Departments involved in the Illinois study experienced challenges when implementing the double-blind sequential model. Although the model was relatively easy for them to use with photo arrays, it was more difficult in live lineups, particularly in cases with multiple perpetrators. In these cases, officers often had to place more than one suspect in a lineup because they lacked enough fillers for separate lineups. Conducting sequential lineups with more than one suspect was determined to be difficult and confusing, and therefore the use of sequential lineups in multiple-perpetrator cases was discontinued.

Finding administrators blind to the suspect's identity was also challenging, particularly during photo lineups that took place outside the police station, such as in the witnesses' homes or places of work. This created delays in investigations and inconveniences to witnesses.

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After the Illinois Pilot Program had ended, the majority of officers who had participated said they did not think that the

sequential lineup was superior; instead, they said that witnesses who can identify the offender can do so under either procedure. Officers also expressed concerns that using a blind administrator disrupts the relationship that an investigator tries to build with a witness.[21]

When Hennepin County tested the double-blind sequential model, police officers initially expressed similar concerns about using blind administrators. To deal with shortages of blind administrators, the Hennepin County investigators turned to other department staff, such as patrol officers, captains, and sergeants, to serve as blind administrators. Overall, the double-blind sequential procedure involved minimal cost to implement, and officials—both chiefs and investigators—found it easier to do so than originally anticipated.[22]

Continuing the Discussion

The current state of research on simultaneous versus sequential lineups—including the limited amount of field testing and the dispute over test designs and methodology—has generated more questions than answers. The results of the Illinois and Hennepin County studies highlight the need for more research on what works in police lineups and how police departments can easily and effectively implement them.

To continue the important discussion of eyewitness evidence and, particularly, to help identify areas for further research, NIJ and the Government Innovators Network at Harvard University's John F. Kennedy School of Government recently sponsored a discussion—a Web chat—among experts. (Hear the Web chat.)

"At the present time, [when comparing simultaneous and sequential lineup presentations,] there is no definitive sense that one form of lineup presentation is superior to the other," Roy S. Malpass, Ph.D., professor of psychology at the University of Texas at El Paso, said during the Web chat.

Malpass noted that certain practices typically used in sequential lineups—such as asking witnesses to make a separate decision on each photograph or individual—have not been examined in simultaneous lineups. Thus, it is unclear whether differences in the effectiveness of the two lineup models are due to method of presentation (simultaneous or sequential) or

the presence of these other variables.

Nancy Steblay, also a panelist on the Web chat, noted that, as with many other criminal justice procedures and protocols, there are two sources of information on eyewitness identification: the laboratory and the field. According to James Doyle, director of the Center for Modern Forensic Practice at John Jay College of Criminal Justice in New York City and the third panelist on the Web chat, both field research and lab research have limitations. Lab studies are limited by a lack of real-world, operational challenges. Field studies are limited by uncertainty about who is really the perpetrator.

According to Steblay, the field has gone past the lab and made decisions about certain elements of eyewitness identification, adapting recommended lab-based protocol to the logistics of street practice and to concerns about later courtroom challenges. It is now time for labs to follow up and see if these field decisions make a difference in eyewitness accuracy, she said.

Malpass added that because U.S. academic researchers work outside of law enforcement, law enforcement investigators, who are on the front lines, are not as familiar as they might be with research results and researchers are generally not as familiar as they might be with in-the-field police practices.

“This is the time for academics and law enforcement to come together, have a dialogue, use each other’s resources, and move on with a program of research,” he said.

Committed to fostering collaboration between researchers and practitioners, NIJ recently funded the Urban Institute to test the reliability of using simultaneous versus sequential and blind versus nonblind lineups in the field. This important research will be guided by an NIJ-sponsored study group of law enforcement officials, defense attorneys, prosecutors, victim/witness advocates, and other stakeholders from across the Nation.

During the recent NIJ-Harvard Web chat, Doyle offered guidance as the criminal justice community continues to grapple with the issue of eyewitness identification. “There are people on the one hand who would like to strangle this double-blind sequential thing and end it right here and now, and there are other people who would like to legislate it down people’s throats,” he said. “We have to try to avoid the two extremes.”

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He added, “What we have to do is recognize that we are dealing with a very unusual, complex kind of trace evidence here . . . . It’s difficult to recover, easy to contaminate, and very hard to handle.”

“All that police want from eyewitness identification is a true and accurate eyewitness identification,” said Philip J. Cline, superintendent of the Chicago Police Department, during the Web chat. “We can do better—and we welcome collaboration and guidance from researchers and lawyers, whichever side of the table they sit on.”

NCJ 219604

Sidebars

PRACTICE GUIDE, TRAINER’S MANUAL ON EYEWITNESS IDENTIFICATION

Eyewitness Evidence: A Guide for Law Enforcement, a 1999 report published by the National Institute of Justice (NIJ), offers recommendations for the collection and preservation of eyewitness evidence.

These recommendations were developed by a technical working group of law enforcement investigators, prosecutors, defense lawyers, and psychology researchers convened by NIJ to explore ways to improve the accuracy, reliability, and availability of information obtained from eyewitnesses. The recommendations included:

- Composing lineups in a way to ensure that the suspect does not stand out unduly.
- Explaining to the witness before the lineup begins that the person who committed the crime may or may not be in the lineup.
- Preserving the outcome of the lineup by documenting any identification or nonidentification by the witness.

In fall 2007, NIJ plans to convene another advisory panel of researchers and practitioners to help establish protocols for upcoming field experiments on police lineups (see main article).

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PANEL CALLS DESIGN OF ILLINOIS STUDY ‘FLAWED’

A panel of social scientists recently said that the design of the Illinois Pilot Program—which compared double-blind sequential lineup procedures to traditional nonblind simultaneous procedures—has "devastating consequences for assessing the real-world implications."

Writing in the July 2007 issue of *Law and Human Behavior*, the panel said that the design of the Illinois field study "guaranteed that most outcomes would be difficult or impossible to interpret."

The panel was convened by the Center for Modern Forensic Practice of the John Jay College of Criminal Justice and included Daniel Schacter of Harvard University and Nobel Laureate Daniel Kahneman of Princeton University. Also on the panel were Robyn Dawes of Carnegie Mellon University; Henry L. "Roddy" Roediger and Larry L. Jacoby of Washington University in St. Louis; Richard Lempert of the University of Michigan Law School; and Robert Rosenthal of the University of California, Riverside.

"The only way to sort this out [that is, which lineup methods produce the most reliable results] is by conducting further studies," the panelists said. (See main article for information on NIJ's recent funding of the Urban Institute to test simultaneous and sequential, blind and nonblind police lineups in the field.)

"The design of these studies, however, will be crucial," they added. "A well-designed field study that avoids the flaw built into the Illinois effort can be an important first step toward learning what we need to know about the best practices in identification procedures."

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About This Article

This article appeared in NIJ Journal Issue 258, October 2007.

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Notes

[note 1] Willing, R., "DNA Should Clear Man Who Served 25 Years," *USA Today*; and Ferrero, E., "In 200th DNA Exoneration Nationwide, Jerry Miller in Chicago Is Proven Innocent 25 Years After Wrongful Conviction," The Innocence Project, April 23, 2007.

[note 2] Meetings/Events of the AJS Institute of Forensic Science and Public Policy," American Judicature Society. See also: Fears, D., "Exonerations Change How Justice System Builds a Prosecution," *Washington Post,* May 3, 2007; Conway, C., "The DNA 200," *New York Times,* May 20, 2007; Duke, S.B., "Eyewitness Testimony Doesn't Make It True—A Commentary by Stephen B. Duke," Yale Law School, June 12, 2006, available at www.law.yale.edu/news/2727.htm; and Ferrero, "In 200th DNA Exoneration Nationwide, Jerry Miller in Chicago Is Proven Innocent 25 Years After Wrongful Conviction."

[note 3] See Wrongful Convictions for more information on using DNA evidence to exonerate the innocent.

[note 4]Wells, G.L., A. Memon, and S.D. Penrod, "Eyewitness Evidence: Improving Its Probative Value," *Psychological Science in the Public Interest* 7 (2) (November 2006): 45-75.

[note 5]Wells, G.L., and E. Olson, "Eyewitness Testimony," *Annual Review of Psychology* 54 (2003): 277-295.

[note 6] Wells, Memon, and Penrod, "Eyewitness Evidence: Improving Its Probative Value," 63.

[note 7] Gary L. Wells' comments on the Mecklenburg Report (see note 8).

[note 8] Mecklenburg, S.H., *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures,* submitted March 17, 2006.

[note 9] Steblay, N.M., "Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects," *Law and Human Behavior* 21 (1997): 283-297.

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[note 10] Wells, G.L., M. Small, S. Penrod, R. Malpass, S.M. Fulero, and C.A.E. Brimacombe, "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads," *Law and Human Behavior* 22 (6) (1998).

[note 11] Wells and Olson, "Eyewitness Testimony," 280.

[note 12] Ibid., 282.

[note 13] Ibid., 279.

[note 14] Wells, G.L., and E. Seelau, "Eyewitness Identification: Psychological Research and Legal Policy on Lineups," *Psychology, Public Policy and Law* 1 (1995): 765-791.

[note 15] Mecklenburg, *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures,* 5.

[note 16] Ibid., 4.

[note 17] Ibid., iv.

[note 18] Gary L. Wells' comments on the Mecklenburg Report, http://www.psychology.iastate.edu/~glwells/Illinois_Project_Wells_comments.pdf.

[note 19] Steblay, N., *Observations on the Illinois Lineup Data,* May 3, 2006, available at http://web.augsburg.edu/~steblay/ObservationsOnTheIllinoisData.pdf (accessed June 19, 2007).

[note 20] Klobuchar, A., N. Steblay, and H.L. Caligiuri, "Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project," *Cardozo Public Law, Policy, and Ethics Journal* (2006).

[note 21] Mecklenburg, *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures,* 50-61.

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[note 22] Klobuchar, Steblay, and Caligiuri, "Improving Eyewitness Identifications: Hennepin County's Blind Sequential

Lineup Pilot Project."

About the author

Cite this Article

Read More About:

Line-up Eyewitnesses Witnesses Physically handicapped DNA (Deoxyribonucleic Acid) Law enforcement Offenders Research Justice system Federal Bureau of Investigation (FBI) Young adults (18-24) Studies Criminal investigation Forensic sciences Inmates/offenders Illinois Elementary school age (5-10) Investigations

Date Created: October 1, 2007

Related Publications

NIJ Journal Issue No. 258
NIJ Journal, Oct 2007

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U.S. DEPARTMENT OF JUSTICE
OFFICE OF JUSTICE PROGRAMS

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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

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)

DATE OF HEARING: January 25, 2021
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through TALEEN PANDUKHT, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Petition for Writ of Habeas Corpus, Motion for Appointment of Counsel, and Request for Evidentiary Hearing.

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On 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"). The State's response to Petitioner's Supp. Petition follows.

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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.

ARGUMENT

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).

I. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL PRIOR TO TRIAL

A. 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

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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, this claim was first raised by Petitioner in his first Petition. The State therefore incorporates its response made in the response to Petitioner's Petition. As explained in the State's Response, 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. Therefore, Petitioner's claim that his counsel never informed him of the offer is belied by the record.

Moreover, 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.

Additionally, to the extent Petitioner alleges that counsel was ineffective for failing to file motions, that claim also fails. 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, Petitioner's claim is nothing but a bare and naked allegation that is belied by the record and suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Finally, Petitioner cannot establish 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). Petitioner claims that he has established that he can show that he would have accepted an offer of negotiation because he asked the Court to intervene. Petitioner does not point this Court to where that alleged request was made. 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 fails. 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).

Accordingly, Petitioner cannot show that counsel was ineffective in conveying an offer of negotiation to him prior to trial.

B. 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 claim fails.

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 cannot establish 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 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, Tillema 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.

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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 fails.

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

II. 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.

A. 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. The State hereby incorporates by reference its response to those claims. Response at 15-22.

B. 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.

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[1] Petitioner's numbering in section II is confusing. 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 State's numbering will mirror Petitioner's raised grounds as numbered in sections II.A.i-vi.

Petition at 31-32. According to Petitioner, counsel's failure to call such an expert deprived Petitioner from presenting a meaningful defense. Supp. Petition at 32. Petitioner's claim fails.

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 cannot establish 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 various 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 nevertheless 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 claim, let alone 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.

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 fail.

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 cannot show 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 has not established 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 cannot establish 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 does not claim, and cannot establish that there is 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 fails.

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 fails.

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). 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 v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004); State v. Haberstroh, 119 Nev. 173, 185, 69 P.3d 676, 684 (2003).

Here, Petitioner has offered this Court nothing more than 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

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nothing but a bare and naked allegation suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Even if Petitioner could make the showing required by Molina, he still cannot demonstrate ineffective assistance of counsel. He is unable to establish 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, again, Petitioner has not established or explained that

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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 fails.

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 argues 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 fails.

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. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). 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.

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 cannot show 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 has not provided any evidence that Petitioner 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 cannot show 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 fails.

III. Petitioner is not entitled to an evidentiary hearing

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

It is improper to hold an evidentiary hearing simply to make a complete record. *See* State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The

district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing."**)**. Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. 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 v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

Here, Petitioner is not entitled to an evidentiary hearing. Petitioner has failed to show that any of his claims had merit or that different actions would have reasonably changed the outcome at trial. Petitioner has not demonstrated that counsel before or during trial was ineffective in the plea-bargaining process or in presenting a defense at trial. Further, given the overwhelming evidence of Petitioner's guilt, Petitioner has not demonstrated a reasonable probability that different actions on the part of counsel would have changed the outcome at trial. As all of Petitioner's claims fail, he has likewise failed to demonstrate that the record needs to be expanded through an evidentiary hearing.

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CONCLUSION

Based on the above reasons, the State respectfully requests that this Court DENY Petitioner's Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction).

DATED this 12th day of January, 2021.

Respectfully submitted,

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

BY */s/ TALEEN PANDUKHT*
TALEEN PANDUKHT
Chief Deputy District Attorney
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CERTIFICATE OF ELECTRONIC FILING

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

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

/s/ Laura Mullinax
Secretary for the District Attorney's Office

TP/jb/lm/GU

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DISTRICT COURT

CLARK COUNTY, NEVADA

KENYA SPLOND,

Petitioner,

-vs-

JAMES DZURENDA,
STATE OF NEVADA

Respondents.

CASE NO: A-19-793961-W

DEPT NO: 28

PETITIONER'S REPLY IN SUPPORT OF DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, KENYA SPLOND, by and through his attorney, MONIQUE A. MCNEILL, ESQ., and hereby submits this Reply in Support of his Petition for Writ of Habeas Corpus (Post-Conviction). Petitioner requests that this Court set an evidentiary

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hearing to allow Petitioner to call witnesses to further establish facts which would entitle him to a new trial in this matter.

DATED this 24 th day of January 2021.

Respectfully submitted,

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POINTS AND AUTHORITIES

ARGUMENT

In its response, the State disputes the facts and legal arguments brought by the Petitioner. The focus of the allegations regarding the ineffective assistance of counsel claims require that this Court set an evidentiary hearing at which Petitioner can question witnesses.

I. SPLOND WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL PRIOR TO TRIAL

A. GROUND ONE: COUNSEL FAILED TO CONVEY AN OFFER, DEPRIVING SPLOND OF EFFECTIVE ASSISTANCE OF COUNSEL AND TO DUE PROCESS OF THE LAW

The State argues that the record is clear that counsel conveyed the offer to Splond, and the State cites to the April 20, 2015 hearing where counsel stated "I did receive an offer. . .the offer is not acceptable to my client." *Resp.* at 9, 10. The State's sole rationale that this statement must have meant counsel actually conveyed the offer lies in the reasoning that Splond did not object to that statement in open court. *Resp.* at 10.

Counsel's statement that the offer was not acceptable to this client could mean that counsel did not believe his client would accept the offer. The statement could have meant that counsel did not feel it was acceptable to his client. Further, expecting that a defendant should object on the record to statements of counsel is ludicrous. First, defendants are not counsel. They are not aware of when they may and may not speak in court. Defendants themselves are not held to the "if you do not object, you waive the issue" because they are not counsel. Defendants do not always feel they can speak up in open court, and you cannot hold Petitioner's silence as absolute proof the offer was conveyed. This is not a precedent anyone wants to set—that defendant should be yelling out objections to things their counsel says.

Counsel's statement is not proof that he conveyed the offer, or that he took the time with his client to ensure he understood the offer. Not intelligently conveying an offer, and explaining the offer is tantamount to not conveying the offer. Splond is not arguing that either counsel was ineffective for failing to secure an offer. Splond avers that his counsel did not convey an offer, and that he therefore was prejudiced by proceeding to trial and facing a

harsher penalty.

What the State seems to miss is that counsel must be effective during the negotiating process. This means more than blustering in court that counsel is "going to get the offer" and then making off hand remarks that the offer was "not acceptable" to his client. Splond does not assert that the court should have forced the State to negotiate; however, the fact Splond sought, through counsel, to make a record that no offer was made is evidence he did not receive an offer (or did not understand that he was receiving an offer). Secondly, Splond was seeking the court to intervene because if an offer had been made and not conveyed, the court should have allowed a full record to made of that fact.

Courts are to look at whether counsel conveyed an offer (*Missouri v. Frye*, 566 U.S. 134, 132 S. Ct. 1399 (2012); whether the attorney gave sound advice in conveying the offer (*Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012) and *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010)). Splond has repeatedly asserted his counsel did not convey the offer. In *Padilla, Frye*, and *Lafler*, the Supreme Court established a significant body of plea bargaining and guilty-plea jurisprudence grounded in the Sixth Amendment right to the effective assistance of counsel. The record shows only that counsel appeared on multiple court dates, did not do anything substantive on the case, made mention that he was going to "get the offer" and then that the offer was "not acceptable" to his client. The record is bereft of any real detail about whether the offer was actually conveyed, or whether the offer was explained effectively.

The United States Supreme Court has made it clear that attorneys must be effective

during the plea bargaining process, not only in conveying offers that are made, but in the advice that they give regarding the offer. In *Missouri v. Frye,* the Supreme Court held that counsel's failure to communicate the prosecution's formal plea offer violated the Sixth Amendment duty to provide reasonably competent assistance of counsel. *Id.* In a case decided the same day, the Supreme Court focused on the proper remedy when incompetent plea advice leads a defendant to reject a favorable offer. *See Lafler v. Cooper*, *supra.*

This court should set an evidentiary hearing to determine 1) if counsel actually conveyed the offer and 2) what counsel advised about the offer, if conveyed. The record does not belie the contention that Splond did not know what the offer was, and that Splond was interested in negotiating his case rather than proceed to trial. The fact that Splond's subsequent counsel asked the district court on the

The State also argues that because counsel was trying to secure a better offer, he is not ineffective. The State is incorrect in this contention. As the caselaw makes clear, the attorney must convey any offer, whether the attorney thinks the offer is a good offer or not. The attorney does not get to decide which offers to convey and which to ignore. The point of the caselaw from the highest court is clear that counsel is to keep the client informed every step of the way. Because the claim is not belied by the record, this Court should set an evidentiary hearing.

Further, the State asserts that Splond cannot prove prejudice because he cannot prove with a reasonable probability that he would have taken the offer. This Court can look to the

record where Splond's counsel brought up negotiations the first day of trial. AA323. Counsel seems to be under the impression no offer was made (which likely came from his client) and Splond himself says he never received the offer. AA323. In fact the record reflects that counsel stated, ". . .and I don't think there's any disagreement, Your Honor, that no offer was every conveyed to me or conveyed to Mr. Splond." AA325. The State responded, "That's correct." AA325. This court can take the fact that Splond sought to make a record about the offer as evidence that he would have taken the offer. Again, Splond need not prove beyond a reasonable doubt that he would have taken the offer. Just a reasonable probability that he would have. Based on the assertions Splond made in court, and in his petition, this Court can see that it is not simply "buyer's remorse" that he wishes he would have accepted the offer, but that he was seeking to negotiate his case at many points prior to trial.

B. GROUND TWO: COUNSEL FAILED TO OPPOSE THE STATE'S MOTION TO CONSOLIDATE SPLOND'S CASE, DEPRIVING SPLOND OF EFFECTIVE ASSISTANCE OF COUNSEL AND TO DUE PROCESS OF THE LAW

The State argues that because the State has deemed that their motion to consolidate would have been granted, it would have been frivolous to oppose it. Again, the State relies on *Tillema*, but fails to properly read the facts of *Tillema* that one of the incidents in that case involved an offense which was committed immediately preceding the offense that the State sought to consolidate it with. *Tillema v. State*, 112 Nev. 266, 914 P.2d 605 (1996) at 268, 914 P.2d at 607. There is no such nexus between the offense in the case at bar. Further, the

State argues that the incidents similar enough that the similarities were “notable.” There is simply nothing in these cases that is more notable than any of the dozens of robbery cases seen in this jurisdiction at any given moment. A suspect walks into a store, pretends to be a customer and then robs the store. That is not a unique set of facts. Further, despite the State’s contention that all of the victims identified Splond is completely inaccurate. Echeverria could not identify anyone in court at trial when asked if he saw the man who came into his store on the day in question. AA492.

As argued in the Supplement to the Petition, there was a colorable basis to file an objection, and the court would have had to weigh those arguments. To demonstrate prejudice, Splond must demonstrate "a substantial and injurious effect on the verdict." *Marshall v. State,* 118 Nev. 642, 647, 56 P.3d 376, 379 (2002); *see also* NRS 174.165(1) ("If it appears that a defendant or the State of Nevada is prejudiced by a joinder of insurmountable for the defense to overcome the taint of the Star Mart offense and the jury likely closed its mind. Having the two cases joined "prevent[ed] the jury from making a reliable judgment about guilt or innocence.'" *See Marshall,* 118 Nev. at 647, 56 P.3d at 379 (quoting *Zafiro v. United States,* 506 U.S. 534, 539 (1993)). Counsel was ineffective for simply agreeing to the State’s joinder of the cases, and it prejudiced Splond at trial. Counsel was ineffective for simply agreeing to the State’s joinder of the cases, and it prejudiced Splond at trial.

/ / /

II. SPLOND WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

ii. Ground Seven: Trial Counsel Failed to present expert testimony

The State argues that counsel cross-examined the detective about the lineups, and that the procedures used in the lineups were reliable. *Resp*. at 22. The State uses as evidence that the lineups were reliable the fact that the detective followed procedures and that the nanmed victims chose Splond with one hundred percent certainty as another mark that the lineups were reliable. This Court is aware of issues with photographic lineups, and the fact that three people picked the same person could just as likely suggest if the lineup was skewed to suggest Splond, then the fact that each person chose Splond would not mean anything more than the lineup was skewed.

The State characterizes counsel's cross examination as "vigorous." However, the transcript clear that the cross-examination was anything but vigorous. The cross examination was stymied by the fact that the detective did not know what a double blind set up was. The exchange was as follow:

> Q: . . . double blind set ups are now being used by some departments. Does Metro use a double-blind setup?
>
> A: Not to my knowledge, no.
>
> Q: What is a double blind setup? For the –for the –for the sake of the jury, what's a double blind setup?
>
> A: . . . as it refers to---
>
> Q: Six pack arrays.
>
> A: Six pack arrays. I don't know. We don't utilize a double – or at the time, didn't use a double-blind set up.
>
> Q: And so you don't know what a double blind—double blind array is?
>
> A: I'd never use it and I've never done it. So, no, I don't really know what that is.

Q: But you do know what it is. You have heard about it.
A: I have heard of double blind studies and such like that, in where, I'm somewhat familiar with the concept of what double-blind means, yes.
Q: Okay. So if you – and the purposes of a six pack array—and you know some departments are using this, what does it mean?
A: Number one, I don't know any departments that are using this.
MR. LEXIS: Judge, I'm gonna object to speculation. AA721-722.

The objection was sustained. AA722. Counsel then moved on, but tried to come back to the issue, by asking the officer if there had been changes made to the process to "further the efficacy of the six-pack lineup." AA723. The officer's answer was, "I'm not sure." AA723.

When counsel went on to try to question the officer regarding the importance of safeguards in conducting lineups, the testimony was as much of a failure as the questioning about the double blind:

Q: . . . And why is the written instruction given to you, the detective? Why are you not allowed to do that off the cuff?
A: Well, because I think they want consistency in what your witnesses are being told and how they're looking at the photo lineup and what – what tey should bear in mind when they do look at the photo lineups.
Q: Okay. And the concern is that you might be –well, they want a photo lineup that's the best evidence, right?
A: I would assume so, yes.
Q: And they don't want any influence on someone's statement in that six-pack lineup, correct?
A: I would assume so, yes.
Q: And they don't want any influence on someone's statement in that six-pack lineup, correct?
A: I would -I would certainly think not, no. AA724.

It is clear that counsel thought that the detective had more knowledge than he did about the concerns with photo lineups, or why certain safeguards were important.

Counsel then tried later in the questioning to return to the inquiry regarding the double blind, because it was a large part of the defense counsel was trying to proffer. That exchange is as follows:

> Q: Now, let's go back to this concept of a double blind six pack. Whether or not you know other departments that are using them, whether or not you know if Metro's using them, the concept of a double blind is to insulate the person giving the six pack from inadvertently –
> MR. LEXIS: Judge, I'm going to object. It's speculation and counsel is testifying. AA730.

The objection was not sustained, as the court was not sure what the question was.

> Q: The purpose of this double blind set up is to stop this person who's giving the six pack to the person who's receiving the six pack from inadvertently signaling them, one way or another, as to any preference or identification that might have already been made, correct?
> A: I don't know that—that's the case.
> MR. LEXIS: Objection, Your Honor. AA730.
>
> That objection was sustained. AA730.

Counsel again tried to get the detective, who had made it clear that he was not familiar with double blind lineup procedures, to go along with what counsel was merely telling him about double blind procedures. Counsel then argued in closing arguments regarding double blind procedures.

The best way to get information that is outside the knowledge of a lay person is to have an expert testify. In this case, counsel tried to get the detective to be that expert, but could not get there because the detective simply did not have the information. This was not vigorous cross-examination, this was beating a dead horse because counsel found himself flat footed in front of the jury.

The State next argues that an expert on identification issues may not have been available or the evidence may not have been admissible. Eyewitness identification issues, including issues with lineup procedures is fairly standard expert testimony. The Nevada Supreme Court has noted that "in United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir.1973), the criteria for permitting expert testimony on eyewitness identification were set forth, and include: (1) a qualified expert; (2) a proper subject; (3) conformity to a generally accepted explanatory theory; and (4) probative value compared to prejudicial effect." *Echavarria v. State*, 108 Nev. 734, 839 P.2d 589 (Nev. 1992). Further, that case specifically dealt with an eyewitness identification expert, and that court held that such as witness should have been allowed to testify. *Id.* Certainly, the type of testimony such an expert would testify to is admissible in this jurisdiction. The probative value in this case was great, as the crux of the defense proffered at trial was regarding the efficacy of the eyewitness identifications, notably issues with the lineup procedures. There was scant evidence beyond the eyewitness identifications in this case, thus the evidence would have been highly probative.

Mere cross examination could not provide the jury with information regarding issues with lineup procedures unless the witness being questioned had the prerequisite knowledge. In this case, the cross examination of the detective could not serve as a substitute for a witness with actual knowledge regarding lineup procedures, and what makes for an unduly suggestive lineup procedure. Further, despite the State's contention that the exhibit regarding double blind procedures shows that in the field the procedures were unreliable, the

exhibit does not actually assert that. There are two types of line ups: sequential and simultaneous, and it was the sequential lineups that had issues in the field. Exhibit D, at 4. An expert who could explain why lineup procedures can be problematic would have allowed the jury to understand the defense. Instead, the jury got a confusing mash of questions to which the witness did not have the information, and to which the State objected. Because of the issues with the identification in the case, an expert would have, with a reasonable probability, affected the jury's decision.

CONCLUSION

Based on the foregoing arguments, and the arguments in the Supplemental Petition, Splond respectfully requests that the Court reverse his conviction, grant him a new trial or, in the alternative, set an evidentiary hearing to determine all claims raised in his Petition for Writ of Habeas Corpus and the instant Supplemental Memorandum of Points and Authorities in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

DATED this 25th day of January, 2021.

Respectfully submitted,

/s/ Monique McNeill
MONIQUE MCNEILL, ESQ.
Nevada Bar No. 9862

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED by the undersigned that on 25th day of January, 2021 I served a true and correct copy of the foregoing **REPLY TO THE STATE'S RESPONSE TO THE SUPPLEMENTAL PETITION IN SUPPORT OF DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** 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.

By: */s/ Monique McNeill*

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

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: Thomas, Kathy

RECORDER: Chappell, Judy

REPORTER:

PARTIES PRESENT:

Ercan E Iscan	**Attorney for Defendant**
Monique A. McNeill	**Attorney for Plaintiff**

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

Electronically Filed
6/10/2021 1:22 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

KENYA SPLOND, Plaintiff, vs. JAMES DZURENDA, Defendant.	CASE#: A-19-793961-W DEPT. XXVIII

BEFORE THE HONORABLE RONALD J. ISRAEL, DISTRICT COURT JUDGE

MONDAY, FEBRUARY 1, 2021

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

APPEARANCES:

For the Plaintiff: MONIQUE MCNEILL, ESQ.
(via BlueJeans)

For the Defendant: ERCAN E. ISCAN
Chief Deputy District Attorney
(via BlueJeans)

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

Las Vegas, Nevada, Monday, February 1, 2021

[Case called at 11:01 a.m.]

THE COURT: Splond, 3 -- or, excuse me, 793961. Counsel, state your appearance.

MR. ISCAN: Good morning, [technical interference] for respondent.

MS. MCNEILL: Sorry, Judge, Monique McNeill here for Mr. Splond.

THE COURT: And is Mr. --

THE CLERK: Didn't get the State. I'm sorry.

THE COURT: -- Splond there? Is he transported?

THE CORRECTIONS OFFICER: We don't have a Splond on our calendar, Your Honor.

THE COURT: Ms. McNeill, are you going to -- is he waiving his presence, or?

MS. MCNEILL: Judge, I don't think the State did a transport order so we can proceed without him, --

THE COURT: Okay. This is --

MS. MCNEILL: -- do that without him here.

THE COURT: -- a petition writ for habeas. Do you have anything you want to add?

MS. MCNEILL: No, Your Honor, I'll just submit and I think it was very well briefed on both sides.

THE COURT: It was very well briefed and extensive and it took me well over an hour to get through. State, anything to add?

MR. ISCAN: No, Your Honor, I'll submit it.

THE COURT: Okay. Well, first of all, I'm going to grant a hearing on the one issue and that is -- and I want to make it clear, the defendant is only asking for Mr. Claus' testimony regarding whether or not he was given a offer, not the prior counsel, correct?

MS. MCNEILL: No, Your Honor, I think we need prior counsel because he's the one who received the offer and he's the one who we don't know if it was conveyed. I think it's clear Mr. Claus never received an offer.

THE COURT: All right. Well that wasn't at least in the original and I believe and even in yours, it asked for Mr. Claus. But that's fine. Let's -- we will have Mr. Kocka testify regarding his, whether or not he transmitted the, an offer and there is nothing you've just told us that Mr. Claus never received any new offers. And of course that's what the State argued. So as to all of the other issues, I'm going to go through them now.

First of all, and I have a lot of notes and cases to cite. The first arguments, and I believe it's in the original petition, the petitioner, I believe it was like 1 through 6. Yeah, 1 through 6, those arguments should have been made in the appeal --

THE CLERK: Judge -- Judge, I --

THE COURT: -- and therefore they are waived. I assume, although maybe not, but that's why defense counsel did not readdress those and so because those are waived, I don't need to address those at this time. Let me get to the other issues. This is maybe one of the more

extensive ones I've had. So the issues for the habeas, and I'm trying to get to the right section, are regarding ineffective assistance of counsel. So let's start with in order. Okay so the first one was, again, the counsel, Mr. Kocka, did not convey the offer and we will address that at a evidentiary hearing.

The, where's the next one, oh, counsel was not effective for failing to oppose the State's motion to consolidate. The two requirements are 1) that it was below a reasonable standard. And second that it would have changed the outcome. Nevada Supreme Court has said that joinder of offenses lies within the sound discretion of the trial court. And then we get to the presump -- well, I wouldn't say presumption but the fact that the Supreme Court favors joining cases for judicial efficiency. One seven -- NRS 174.155 addresses a consolidation and it's basically to expedite the resolution of cases. The defendants argued that the cross admissibility or there should not have been cross admissibility, but the -- both the facts of the case and the Supreme Court decisions belie that. They talk about or the federal circuit talks about: 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.

That's cited on the State's -- it's *United States versus Martinez*. They argue, the defendants argue that the cases that are sought to be consolidated are not similar but the facts belie that. Yes, there were different stores that were involved but the circumstances and the particular facts are similar in nature. To say, and not this case, but to say that, you know, one was a 7-11 and the other was a -- I don't know what

they call it, some other fast or quick store, whatever, doesn't make it dissimilar in nature if in fact, as we have in this case, two similar robberies.. And so defendant's argument that it shouldn't or it's not proper to join was -- is belied by the record and certainly the fact that the defense did not make that doesn't qualify as ineffective assistance.

Oh, number 7 is related regarding ineffective assistance when presenting the expert testimony. Defendants argue that a expert should have been called in order to bring in the fact or bring up the fact that this particular photo lineup was not as effective in screening out improper bias, et cetera. Even though, and this is important, even though the defense counsel at the time cross-examined the detective regarding how he conducted it and certainly made effective points that the photo lineup wasn't or could certainly be inadequate. The fact that defense counsel didn't choose to bring an expert, and this is where we get into some speculation and et cetera, an expert to testify that this version or this type of use of the photo lineup was less effective than a alternate means that there are studies, I assume that would be the point, that -- that better means of using a photo lineup are available and there's an error rate. And all of that -- and that's conditioned on it being admissible. An expert, the defendants argue, would be arguing, I guess, for alternate type of photo lineup and whether that's relevant to show if he's going to testify that this or the success or the accuracy rate of this type of photo lineup, we can only speculate. In any event, whether to have an expert that may or may not further contradict the officer's use of this type of photo lineup is speculative. He did do a cross-examination, he seemed to, in my reading

of it, make several good points and that's what cross-examination is for. A lot of times, and this is just a side light, a lot of times attorneys think that you need an expert for every -- everything. And whether or not that's effective with a jury, I would certainly question. So in any event, as far as the *Strickland* standard, it -- not choosing to have an expert in this area doesn't meet either of the prongs.

Next we go to counsel was ineffective for not requesting basically a inverse instruction. He could have -- well there's two here, he could have requested an instruction regarding eyewitness identification. He did not, I wrote -- specifically in the Nevada Supreme Court has held that specific eyewitness identifications instructions need not be given and are duplicitous and that's in Nevvus -- *Nevius*, 101 Nev 238. The instructions that were given and the cross-examination solicited question the eyewitness identifications and go to the reliability. And there were instructions that covered that. A specific instruction that the appellate counsel proposed certainly in hindsight, if it was given or if it was allowed to be given, is only something else that the attorney would argue in closing arguments that he apparently did argue that the identification wasn't correct.

Then an inverse instruction regarding Count 4, the possession of the stolen property, the defendants argue that there should have been basically an instruction that the defendant -- or that the State needs to prove beyond a reasonable doubt that the gun was stolen. And the instructions are clear that they must prove each and every element of the crime beyond a reasonable doubt. And the elements are listed to, I

guess, well not I guess, the petition clearly seeks to require the State to prove that the gun wasn't transferred voluntarily through a hand-to-hand sale and that would be basically a defense that he obtained it in a legal manner. The State argued and specifically alleged under the facts of the case the statute and there, again, clearly was a jury instruction that the State had to prove every element of the crime beyond a reasonable doubt and the jury felt that they had. To bring up that somehow they have to prove a negative, meaning the State has to prove a negative that it wasn't done in a hand-to-hand sale when that wasn't -- that was, you know, was certainly never brought up. I'm sure there's other defenses to the whether or not the revolver was stolen, but that -- they only have to prove the elements of the crime and the jury thought they did.

Then, [The Court reads document] Oh, I guess the next or certainly that's contained in, Counsel -- the defendants argue that the State had to elicit testimony that the firearm was actually, or that the defendant actually knew it was stolen. And I think I -- hopefully I covered that.

So are there any other issues that I didn't cover? Other than, as I said, we're going to do a hearing on the one issue of whether or not the offer was conveyed. Did I cover them all?

State?

MR. ISCAN: I'm looking through right now just to double check, Your Honor. I think you did.

THE COURT: And --

MS. MCNEILL: I think you --

THE COURT: -- defense?

MS. MCNEILL: -- did, Your Honor. Your --

THE COURT: I'm sorry?

MS. MCNEILL: I said I think you did, Your Honor. Your ruling on the --

THE COURT: All right. Thank you.

MS. MCNEILL: -- the jury instruction sort of --

THE COURT: All right. So --

MS. MCNEILL: -- [indiscernible] to the other.

THE COURT: -- then let's set a hearing for -- and now I already, Mr. Kocka, I believe. So 30 days?

MS. MCNEILL: That's fine, Judge. And I would request that the State do a transport order for Mr. Splond.

THE COURT: Yes, --

MR. ISCAN: We'll do that.

THE COURT: -- absolutely.

THE CLERK: Okay, so that's going to be March 3rd. And do you want that at a specific time? How long is this hearing?

THE COURT: I think --

MS. MCNEILL: It could lengthy, but I don't know if we want to take up your calendar to do it.

THE COURT: Well the problem is getting special times are also very difficult. We can try to get a special time. That gets problematic. I can have my JEA make efforts and see when we go. It probably would be -- I think they're doing Fridays, if available.

THE CLERK: Why don't we just set it for March 3rd and then have Sandy check into it --

THE COURT: Right.

THE CLERK: -- and see what we can do.

THE COURT: Yes. And she'll notify both of you if there is some other special time for a hearing. And I -- generally they'd be in lower level, right Steve?

THE MARSHAL: Yes, Judge.

THE COURT: Yeah, they'd be in lower level arraignment and of course they're using that. I'll have her -- I'll have my JEA try and if she does, she'll notify everybody and get the State to do the transport order on whatever we can. Okay? All right.

What else, Steve?

THE MARSHAL: Page 1, Freddy Arteaga.

THE COURT: Thank you.

MR. ISCAN: Sorry, what was the --

THE CLERK: The date was March 3rd, 11 o'clock --

MR. ISCAN: 11 o'clock.

THE CLERK: -- for that. Yes.

MS. MCNEILL: Thank you.

[Hearing concluded at 11:24 a.m.]

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

Judy Chappell

Judy Chappell
Court Recorder/Transcriber

SUPPL
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DISTRICT COURT

CLARK COUNTY, NEVADA

KENYA SPLOND,

Petitioner,

-vs-

JAMES DZURENDA,
STATE OF NEVADA

Respondents.

CASE NO: A-19-793961-W

DEPT NO: 28

SECOND SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING:
TIME OF HEARING:

COMES NOW, KENYA SPLOND, by and through his attorney, MONIQUE A. MCNEILL, ESQ., and hereby submits this Second Supplemental Memorandum of Points and Authorities in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

/ / /

/ / /

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

DATED this 8th day of March, 2021.

Respectfully submitted,

/s/ Monique McNeill
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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On March 5, 2014, the State obtained a Grand Jury Indictment charging Kenya Splond ("Splond") as follows: Count 1 – Conspiracy to Commit Robbery (Felony – NRS 200.380, 199.480)); Count 2– Burglary While in Possession of a Firearm (Felony – NRS 205.060); Count 3 – Robbery with a Deadly Weapon (Felony – NRS 200.380, 193.165); and Count 4– Possession of Stolen Property (Felony – NRS 205.275(2)(c)). Appellant Appendix ("AA") 9-12.

On March 3, 2015, the State filed a Motion to Consolidate case C-14-296374-1 with case C-14-300105, in which Splond was charged with two counts of Burglary While in Possession of a Firearm, and two counts of Robbery with Use of a Deadly Weapon. AA75-80. At the time of that motion, the defense counsel did not object. AA71.

On April 8, 2015, the State filed an Amended Indictment charging Splond as follows: Count 1 – Conspiracy to Commit Robbery (Felony – NRS 200.380, 199.480)); Counts 2, 5 and 7– Burglary While in Possession of a Firearm (Felony – NRS 205.060); Counts 3,6 and 8 – Robbery with a Deadly Weapon (Felony – NRS 200.380, 193.165); and Count 4 – Possession of Stolen Property (Felony – NRS 205.275(2)(c)). Appellant Appendix ("AA") 84.

Trial commenced on March 15, 2016, but was continued due to discovery issues. AA5. Trial recommenced on March 21, 2016. AA5. The jury rendered a verdict on March 24, 2016. AA193. The jury found Splond guilty on all counts, as charged. AA193-195. After pre-sentence litigation regarding the contents of the presentence investigation ("PSI") report, the sentencing was held on February 6, 2017. AA224. The court sentenced Splond as follows: Count 1 – Twelve (12) to Sixty (60) months; Count 2 –Twenty-eight (28) to One hundred fifty-six (156) months, Count 2 to run concurrent to Count 1; Count 3 – twenty-eight (28) to one hundred fifty-six (156) months, plus a consecutive twenty-eight (28) to one hundred fifty-six (156) months for the use of the deadly weapon, to run concurrent with Count 2; Count 4 – twenty-four (24) to sixty (60) months, Count 4 to run concurrent with Counts 1, 2 and 3; Count 5 – twenty-eight (28) to one hundred fifty-six (156) months, Count

5 to run consecutive with 1, 2, 3 and 4; Count 6 – twenty-eight (28) to one hundred fifty-six (156) months, plus a consecutive twenty-eight (28) to one hundred fifty-six (156) months for the use of the deadly weapon, Count 6 to run concurrent with Count 5; Count 7 – twenty-eight (28) to one hundred fifty-six (156) months, Count 7 to run consecutive to other counts; and Count 8 – twenty-eight (28) to one hundred fifty-six (156) months, plus a consecutive twenty-eight (28) to one hundred fifty-six (156) months for the use of the deadly weapon, Count 6 to run concurrent with Count 7. AA224-225. The aggregate sentence was one hundred sixty-eight (168) months to nine hundred thirty-six (936) months. AA225. Splond had nine hundred thirty-five (935) days credit for time served. AA225.

A Judgment of Conviction was filed on February 13, 2017. AA223. On March 2, 2017, Splond filed a Notice of Appeal on March 2, 107. AA226-228. The following issues were presented:

1. District Court erred in failing to reinstate the offer that was never conveyed to the defendant.

2. District Court erred in allowing a witness to introduce uncharged bad acts and to speculate about the loaded status of a handgun.

3. District Court erred by finding that there was no illegal stop of defendant.

4. District Court relied on a flawed PSI.

5. The cumulative effects of the errors affected Splond's rights.

On December 17, 2018, the Court of Appeals affirmed Splond's conviction. (Case No. 72545). On January 24, 2019, Remittitur was issued.

On April 24, 2019, Splond filed a Pro Per Petition for Writ of Habeas Corpus. On August 26, 2019, Splond filed an Addendum to his Petition. In his petition, Splond raised the following issues:

1. The police violated his fourth amendment rights by conducting an illegal search and seizure.
2. The court State violated Splond's right to a speedy trial by conducting his trial three years after he was arrested, due to discovery issues.
3. Splond's counsel failed to convey an offer from the State, and the State did not reconvey that offer.
4. The prosecution withheld discovery.
5. Splond is actually innocent.
6. The State violated Splond's right to due process by charging him with a deficient complaint.
7. Splond's trial attorney was ineffective for failing to investigate the case, for failing to present a defense and for failing to subpoena phone records, for failing to object to the constitutionally infirm complaint, for failing to object to evidence at trial, for failing to ask for a Petrocelli hearing, for failing to object to jury instructions, and for failing to object to the PSI.
8. Splond's first attorney was ineffective for failing to communicate with him, for failing to turn over discovery, for failing to file motions.

On August 26, 2019, Splond filed an Addendum which seems to be identical to the

first petition filed.

On December 16, 2019, the Court granted Splond's Motion for Appointment of Counsel. The Court set a briefing schedule, and Splond now files the instant Second Supplemental Memorandum of Points and Authorities in Support of his Petition for Writ of Habeas Corpus, and the portions of this supplement which are new are added in bold.

STATEMENT OF FACTS

I. PRIOR COUNSEL'S REPRESENTATION LEADING UP TO TRIAL

Frank Kocka originally represented Splond in case C296374. AA242. At the initial arraignment on March 12, 2014, Splond invoked his right to a speedy trial. AA243. At the calendar call on April 2, 2014, counsel indicated that he was unable to go to trial due to already being in a jury trial. AA245. Counsel indicated that he was "trying to get together with the DA, get an offer on the table. I think we're probably going to get this one resolved. So if you want to set it for a status check in about 30 days?" The court set a status check for April 30, 2014.

On the April 30 status check date, counsel indicated that it was the "district attorney's request that we just set a new trial date in the case." AA247. The court then asked "did he waive?" meaning speedy trial. Counsel answered, "I believe he did. . ." AA 247. The court indicated that the ordinary course for trials was 2015, so the court suggested a status check. AA247. Counsel answered, "perfect. Because there's an offer that's floating around out there, we just need to finalize it." AA247. Trial was set for February 2, 2015.

On June 16, 2014, at the status check date, counsel indicated that Splond had another case set for preliminary hearing, and a sentencing set in another court. AA250. He further informed the court that the State had not yet made an offer, but has assured counsel that she would. AA250. Another status check was set for July 14, 2014. At the July 14 date, counsel was not present, so the court continued the date to July 16, 2014. AA252. On July 16, counsel was again not present. AA254.

On August 13, 2014, the court had a calendar call where counsel indicated he was not ready to go to trial. AA256. He also indicated that there was an offer outstanding that was "not that great" and he wanted a continuance and another status check date. AA256. The next status check date, counsel told the court that the State just indicted Splond on another case, and that he had not received an offer from the State, and asked for a week's continuance. AA261.

A week later, the State indicated that it had conveyed an offer to Splond's attorney. AA264. The State indicated that it had conveyed an offer, and that counsel "did not like it very much." AA264. Counsel indicated that he would try to talk to the other prosecutor to see if he could "get a better deal." AA265. Again, counsel asked for a two week continuance, and said, "I'm going to get the offer, judge." AA266.

On October 1, 2014, counsel said the case was not negotiated and asked for a trial date. That trial date was May 26, 2015. AA268. Prior to that date, the State filed a motion to consolidate Splond's two cases. AA269. At the hearing on that date, counsel indicated that he had no opposition to the motion to consolidate, and asked for a status check in 45

days. AA272. Counsel also said, "we're either going to resolve this or I'll be filing motions, Judge." AA272.

The next status check date was April 15, 2015, counsel indicated that he had been trying to get an offer from the State. He indicated he could not get either prosecutor on the case to give him an offer. AA277. At that time, counsel said that he had been hired to negotiate the case, not to do the trial. AA277. This was the first time counsel ever indicated that he had not been retained to do the trial. At all other dates, counsel acted as if he was retained to handle the entirety of the case. Counsel then stated that he was going to have to withdraw. AA278. The court stated, "they will bring an offer on Monday." AA278. The court continued the case to April 20. AA278.

Counsel indicated that he had received an offer and that the offer was not "acceptable to" his client, and therefore he asked to withdraw. AA280. The court appointed the public defender. AA281. The court then received word that the public defendant had a conflict, and on April 22, 2015, the court appointed trial counsel. AA283. Trial counsel continued the trial date, and trial eventually got set for January 11, 2016. AA296. At the calendar call date, counsel was not sure if he could proceed, and the case was set over to January 4. AA298. The new calendar call date saw a continuance due to counsel being injured. AA301. The court admonished trial counsel to be ready and set calendar call for January 13, and trial for January 25. AA303. There was some discussion between the state and defense about not being ready that quickly, so the court set the trial March 14. AA304.

On March 15, 2016, the trial commenced. The trial court inquired if an offer had ever

been made. AA323. The State said that it had made an offer to previous counsel. AA323. The offer was to plead guilty to two robberies with use of a deadly weapon, right to argue, including for consecutive time. AA323. The court asked Splond, "did you get that offer, sir, earlier?" AA323. Splond answered, "No." AA323. The court then told Splond he could have time to talk to his counsel about the offer. AA323. The State said that the offer had been revoked "I think well over a year ago." AA324. The court then said, "So there's no current offer?" to which the State answered, "There's no current offer." AA324. The Court then inquired further, and the State informed the court that the offer was made in 2014, and it was withdrawn in the beginning of 2015. AA324. At that, the court told Splond that "so they are telling me now it is withdrawn. So I guess they are not making an offer of any sort it sounds like . . " and that they would "deal with any issues there may be later. . ." AA325. Counsel then said, "And I don't think there's any disagreement, Your Honor, that no offer was ever conveyed to me, or conveyed to Mr. Splond." AA325. The State answered, "That's correct." AA325.

After some discussion about exhibits, defense counsel indicated that he did not have all of the discovery. AA334. The court continued voir dire, but after the conclusion of that court day, the defense asked for a continuance to obtain all of the discovery, and the court continued the trial, and set a status check for the resetting of the trial. AA365. Counsel filed a motion to preserve evidence, and the court heard that motion and reset the trial for March 21. AA373. Counsel indicated that he was also going to file a motion in limine, as "some things had come up" and he was going to dig into them. AA376. On March 18, the court

held another status check date, the State informed the court that it provided about 1100 pages of discovery to the defense. AA387. Defense counsel then stated that based on some items in the discovery, he filed a motion to suppress. AA387. The court heard the evidentiary hearing on that motion prior to the start of trial. AA394.

II. JURY TRIAL

Samuel Echerverria

Samuel Echeverria ("Echeverria") was working on at the Cricket Wireless store at 4343 North Rancho Drive on January 22, 2014. AA482. Around 4:35 p.m., a black man wearing a black hoodie, black baseball cap, black shirt, black shoes, and blue jeans came into the store. AA482. The man was waiting for Echeverria to finish with another customer. AA483. When the customer left, the man came up to the register and asked for a specific type of battery for his girlfriend. AA483. Echeverria said that he had to check if he had that battery, and then walked to the front of the store and then walked back to the desk with the battery. AA483. As Echeverria was ringing up the battery, he was looking down at the battery to scan it. AA483. When Echeverria looked up, he saw the man pull out a black gun, saying, "Give me all the money before I blow your brains out." AA483. Echeverria described the gun as "a black revolver, like a six shooter." AA484.

Seeing the gun, Echeverria became scared. AA484. Echeverria complied with the man's demands, and then called the police. AA484. When the man left the store, Echeverria saw the man touch the door to open it. AA494. Echeverria directed the police to where the man had touched and informed them the man was not wearing gloves. AA495.

Some time later, a detective showed Echeverria a six pack lineup. AA485. Echeverria identified someone, and indicated that he felt 100 percent certain the person he chose was the person who came into his store. AA486. When asked if he saw the person who robbed him in court, Echeverria testified that he did not. AA491-92.

Alisa Williams

On January 22, 2014, Alisa Williams ("Williams") was getting off work at A Wild Hair when she saw someone leaving the Cricket Wireless store. AA501. Williams said the man ran out of the store and jumped into the back of a car. AA502. The man was Black, and was "skinny." AA502. The car was silver, but Williams could not remember if the windows were tinted. However, in her statement to the police, Williams described the car as having tinted windows. AA511.

The person driving the car was a light-skinned Black woman, wearing white sunglasses. AA503. The man jumped into the back seat of the car. Later, police came to speak to Williams. AA503. Williams did not remember police showing her a lineup. AA503. After being shown the lineup, Williams still did not remember being shown the lineup, but did recognize her signature on a lineup form. AA504-505. Williams was not able to identify anyone in the lineup. AA505. Williams remembered that the man had scarring on his face, from a knife or a burn. AA505. She did not believe the scars were consistent with acne scars. AA505.

Brittany Slathar

On February 2, 2014, Brittany Slathar ("Slathar") was working at the Star Mart

around 2:45 in the morning. AA513. The Star Mart is located at 5001 North Rainbow. AA513. Slathar was working as a cashier on the graveyard shift. AA513. Around that time, Slathar was sitting at a table doing a crossword puzzle. AA513. A man walked in, and the door had a bell that rung. AA514. The man walked to the gum, so Slathar walked to the counter. AA514.

The man approached the register with Wrigley Spearmint gum. AA514. Slathar asked if he needed anything else, and the man responded that he wanted two packs of Newport 100 cigarettes. AA514. Slathar turned to get the cigarettes and as she was ringing them up, the man pulled out a gun. AA514. The man told her to give him all the money. AA514. Slathar said that she could not open the register. AA514. The man kept saying, "give me the money, give me the money. I'm gonna kill you. You're gonna die," and called her a "dumb white bitch." AA514. Slathar did not open the register. AA515. Slathar was in fear when she saw the gun. AA515. The man eventually left, and said he would be back. AA515.

The man grabbed the cigarettes on his way out. AA516. Slathar called the police and then locked the doors to the store. AA516. Shortly after, Slathar saw the police pull into the complex. AA516. The police then took her to another scene. AA516. The police gave her a set up instructions for a Show up. AA516. Slathar identified the man in front of the police car as the man who robbed her at gunpoint. AA517. Slathar described the gun as being a black revolver. AA520. Slathar identified Splond in court as being the man who robbed her. AA523. Slathar indicated the man had changed clothing between the robbery and the show

up, and that when he was in the store, he was wearing a black sweatshirt and a camouflage beanie. AA532. She also remembered that the man was wearing gloves inside the store. AA534.

Jeffrey Haberman

Jeffery Haberman was the owner of a .38 caliber Colt revolver. AA538. That revolver was stolen from him on October 2013. AA539. Someone broke into Haberman's house and stole his entire gun safe. AA539. Haberman came home one day and his back door was open, and someone had entered his house. AA542. His gun safe had been dragged out of his house. AA542. Haberman recognized his handgun in a photo the State showed to him. AA539. Haberman did not know Splond, nor did he ever give Splond permission to "go into his house" or "borrow his handgun." AA543. Haberman never gave anyone permission to have his handgun. AA543.

Joshua Rowberry

Joshua Rowberry ("Rowberry") was an officer with the Las Vegas Metropolitan Police Department ("LVMPD"). Rowberry was working graveyard on February 2, 2014 when he got a call about a robbery. AA569. The call was regarding 5001 North Rainbow. AA569. The call came in around 2:57 a.m., and he arrived in the area around 3:00 a.m. AA572. Rowberry had information that the suspect had gone to the north, so he proceeded to drive around Rainbow, heading north. AA572.

Rowberry did not see any pedestrians, but he did see a vehicle ahead of him traveling

north. AA573. Because the car was the only car in the area, Rowberry thought it might be related to the robbery. AA575. The vehicle had some damage to the rear. AA576. Rowberry's attention was drawn to the vehicle as it had the damage to the rear, and he did not know if it had just been involved in an accident. AA577. Rowberry decided to stop the vehicle, after he followed it briefly and it pulled into a residential neighborhood. AA578. Rowberry turned on his lights and sirens and the car stopped. AA578.

Rowberry approached the vehicle, on the driver's side, and noticed that the windows were tinted dark. AA578. Because of the tint, Rowberry could not see into the back windows. AA578. Rowberry told the driver, who he identified as Kellie Chapman, to roll down the back window. AA580. Chapman complied. AA580. Rowberry noticed a Black man lying in the back seat, covered with a blanket, breathing heavily. AA581.

Rowberry told the man to show his hands, and the man did not comply. AA581. Rowberry then called for a code red to let other officers in the area know that he needed help, and to head his way. AA582. Rowberry identified Splond as being the man in the car. AA581.

Rowberry drew his weapon and told the people in the car not to move. AA582. When other officers arrived he told the driver to step out of the car and walk backwards to officers. AA583. When she did that, officers took her into custody. AA583. The officers then told the passenger to get out of the car, which he did. AA583. With the vehicle doors open, Rowberry could see into the car, and noticed two packs of Newport cigarettes and a package of Wrigley's gum. AA584. In the back seat, officers also found a black sweater and a

camouflage beanie. AA587. When Rowberry took the sweater out of the vehicle, he found a revolver. AA588.

Jeremy Landers

Jeremy Landers ("Landers") was an officer with LVMPD who was working on February 2, 2014. AA596. Landers responded to a robbery call at the Star Mart at 5001 North Rainbow. AA597. He made spoke with Williams to get her statement. AA597. Landers learned that a suspect was in custody, and Landers drove Williams to the location of the suspect. AA598-99.

Graciela Angles

Graciela Angles ("Angles") was working at a Metro PCS store on January 28, 2014. AA604. That store was located at 6663 Smoke Ranch. AA604. Around 2:00, an Black man came into the store. AA605. The man went to look at the phones and asked her about phone plans. AA605. Angles was explaining the plans to the man, when he asked about a Galaxy S4. AA608. Angles got the phone and scanned it, and the man then asked her about a different phone. AA608. Angles scanned that other phone, and then asked the man if he was going to pay with cash or a card. AA608. The man then pulled out a gun, asked her to step back, and then told her to give him the money. AA609. Angles was in fear and she gave him the money. AA609. The man took the money and the phone and left. AA609.

About a month later, the police spoke with Angles and showed her some photographs. AA609. Angles circled photograph number 2 and wrote her name under it. AA610. Angles indicated that she was 100 percent certain the photograph was the man who robed her.

AA611. In court, Angles identified Splond as the person who robbed her. AA613. Angles did not know what kind of gun the man had. AA620.

Monte Spoor

Monte Spoor ("Spoor") worked as a Senior Crime Scene Analyst with LVMPD. AA627. On January 22, 2014, Spoor responded to a call at 4343 North Rancho Drive. AA629. Spoor processed that location for fingerprints. AA630. Spoor was able to collect prints from the interior of the north facing doors to the business. AA631. He attempted to obtain prints from the cash register but was unable to. AA635.

Shawn Fletcher

Shawn Fletcher ("Fletcher") was also a Senior Crime Scene Analyst ("CSA") for LVMPD. AA649. On January 28, 2014, Fletcher responded to 6663 Smoke Ranch to a Metro PCS store. AA652. Fletcher obtained fingerprints off a demo phone inside the store. AA654. Fletcher was not able to obtain prints from anywhere else. AA660.

Heather Goldthorpe

Heather Goldthorpe ("Goldthorpe") was a forensic scientist with the latent print unit at LVMPD. AA664. Goldthorpe was tasked with processing fingerprints collected for the instant case. AA668. Goldthorpe entered prints into the automated fingerprint identification system, and obtained a positive hit. AA668. After that hit, she went and obtained the physical prints for the match, so that she could manually compare them. AA669. Goldthorpe was able to match the prints to Samuel Echeverria. AA669. Another lift card yielded negative results. AA670.

In another lab case number, Goldthorpe was asked to compare the prints to Splond. AA670. She was not able to make that match, and could exclude him from three of the five prints. AA670. The remaining two prints were not suitable to make a comparison due to poor quality. AA670. The prints which Goldthorpe used to exclude Splond came from the Galaxy phone that Angles indicated Splond touched. AA689.

Scott Kavon

Scott Kavon ("Kavon") was a detective with LVMPD. AA705. In 2014, Kavon was assigned to investigate a series of robberies. AA706. Kavon received the cases and began to look for commonalities. AA707. He also obtained videos from each event and was able to develop a suspect. AA707. According to Kavon, the suspect in each was "very similar." AA707. Per Kavon, the suspect had a similar method of operation, and similar build. AA708. Additionally, Kavon said that each witnesses and victim described the suspect as having scarring on his cheeks. AA708. Further, the suspect used a revolver in two of the three, and in two of them witnesses described a woman driving the getaway car. AA708. When the detective looked at the Star Mart case, he found that officers had arrested Splond. AA708. Kavon decided to make photographic lineups. AA711.

Per Kavon, Echeverria identified Splond. AA717. Angles also chose Splond out of the photo lineup. AA718. Upon cross-examination, Kavon did not know what a double blind setup for a lineup was. AA721. Kavon also did not know any police departments that were using a double blind approach. AA722.

ARGUMENT

I. SPLOND WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL PRIOR TO TRIAL

A. GROUND ONE: COUNSEL FAILED TO CONVEY AN OFFER, DEPRIVING SPLOND OF EFFECTIVE ASSISTANCE OF COUNSEL AND TO DUE PROCESS OF THE LAW

The Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides that an accused has the right to effective assistance of counsel at all criminal prosecutions. *Missouri v. Frye*, 566 U.S. 134, 138 (2012) (*citing Strickland v. Washington*, 466 U.S. 668, 686 (1984). Claims of ineffective assistance of counsel in the plea bargain context are governed by the two part test set forth in *Strickland*. *See Hill v. Lockhart*, 474 U.S. 52 (1985). The United State Supreme Court held in *Missouri v. Frye*, 566 U.S. 134 (2012), that "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Id*. at 145. When defense counsel allows an offer to expire, without conveying that offer to the defendant, counsel is not rendering effective assistance of counsel. *Id.*

The defendant must show that he suffered some prejudice from not receiving an offer. *Id*. at 147. To show prejudice, the defendant must demonstrate a reasonable probability that he/she would have accepted the offer had he/she been afforded effective assistance of counsel. *Id.* It is also necessary to show that the end result would have been more favorable by a plea to a lesser charge or to a sentence of less prison time. *Id.*

In this case, Splond asserts that his counsel, prior to trial counsel, did not convey to him any offers from the State. In his pro per petition, Splond asserts that "Frank Kocka didn't relay the deal to Mr. Splond that the District Atty offered to Splond." Petition, pg. 13. Further, the record shows that subsequent counsel was also aware the Splond had never been told the offer, and when the court inquired, Splond informed the court that no one had ever told Splond what the offer was.

What the record shows is that counsel seek multiple continuances, spanning from March 2014 to April 2015. That is one year of time that Splond spent in custody with counsel informing the court that he was seeking an offer. A few times counsel indicated that HE did not like the offer. One time counsel indicated, "it's not acceptable to my client." It is not clear if counsel actually conveyed the offer or if the attorney just believed the offer was not acceptable. Another year passed before Splond actually proceeded to trial After two years in custody, with no movement on his case (prior to the trial in 2016, defense counsel filed no motions, and the case was simply continued repeatedly. Counsel withdrew because the case would not negotiate, claiming that he had been retained only to negotiate the case (although he kept setting the case for trial, and indicated he was going to "file motions").

The record does reflect that both Splond and his trial counsel affirmed that Splond never actually received the offer from his counsel, which Splond maintains in his pro per petition. The record is bereft of any clear indication that Splond actually received the offer. **According to Splond's girlfriend, Lisa Wallis, she would often reach out to counsel and**

to find out if there was an offer, and got no response from the attorney. (Ms. Wallis's assertions are attached hereto in an affidavit). Ms. Wallis indicated that Splond told her counsel never conveyed an offer to him, but instead told him that he was working on a better deal. Splond had no idea what the deal was, and both Splond and Ms. Wallis were surprised when counsel withdrew.

What the record does demonstrate is that the offer the State made was to plead to two counts of Robbery with Use of a Deadly Weapon, full right to argue. Had Splond accepted that offer, he would have faced two (2) to fifteen (15) years, with a consecutive term of one (1) to twenty (20) years for the use of the deadly weapon. NRS 200.380, 193.165. After trial, Splond faced sentencing on three counts of robbery with use, in addition to three counts of burglary while in possession of a firearm, and a count of conspiracy to commit robbery, and a count of possession of stolen property. Under the *Frye* analysis, Splond must show that he suffered some prejudice from not receiving an offer. *Frye,* at 147. To show prejudice, the defendant must demonstrate a reasonable probability that he/she would have accepted the offer had he/she been afforded effective assistance of counsel. *Id.* It is also necessary to show that the end result would have been more favorable by a plea to a lesser charge or to a sentence of less prison time. *Id.* Splond has demonstrated that he would have accepted the offer, as he asked the court to intervene when his counsel made the record regarding the offer. The offer exposed Splond to less charges and less prison time than proceeding to trial and being convicted on all counts. Counsel was ineffective for failing to convey the offer to Splond.

B. GROUND TWO: COUNSEL FAILED TO OPPOSE THE STATE'S MOTION TO CONSOLIDATE SPLOND'S CASE, DEPRIVING SPLOND OF EFFECTIVE ASSISTANCE OF COUNSEL AND TO DUE PROCESS OF THE LAW

On March 3, 2015, the State filed a motion to consolidate case C-14-3001-5 with case C-14-296374-1. AA76. Case C-14-300105 involved the Cricket Wireless store, where Sam Echeverria worked, and the Metro PCS store where Graciela Angles was working. Case C-14-296374 involved the allegations from the Star Mart, with Brittany Slathar listed as the named victim. The State argued that the cases should consolidated because the were factually connected and were evidence of a common scheme or plan. Counsel did not oppose that motion, and instead allowed Splond to go to trial on more charges, which tainted his right to a fair trial.

Counsel should have opposed the motion to consolidate because the cases are not part of a common scheme or plan, nor are they factually connected. The State's argument that the separate cases were part of a common scheme or plan was the fact that the incidents from case C-14-300105 were five days prior to the events of C-14-296374. Further, the State argued that the acts of one would be admissible in the other to demonstrate "felonious intent."

The mere fact that the cases occur within a close time frame is not solely dispositive. In *Farmer v. State*, 405 P.3d 114 (2017), the Nevada Supreme Court provided guidance to the courts when making an analysis under NRS 173.115 and its "common scheme or plan" language. In *Farmer*, the Nevada Supreme Court noted that, "the fact that separate offenses

share some trivial elements in an insufficient ground to permit joinder as parts of a common scheme or plan." *Id.* at 121. Instead, the court should ask whether the offenses share "such a concurrence of common features as to support the inference that they were committed pursuant to a common design." *Id*. *citing State v. Lough*, 125 Wash.2d 847, 889 P.2d 487, 494 (1995). Features that are relevant to the inquiry include: degree of similarity of offenses (*Tabish v. State*, 119 Nev. 293, 303, 72 P.3d 584, 591 (2003); degree of similarity of victims (*id.* at 303, 72 P.3d at 590; temporal proximity (*Mitchell v. State,* 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989); physical proximity (*Griego v. State*, 111 Nev. 444, 449, 893 P.2d 995, 999 (1995); number of victims (*Id.);* other context-specific features. *Farmer*, at 121. No one fact is dispositive, and "each my be assessed different weight depending on circumstances." *Id.*

The case that the State cited, *Tillema v. State*, 112 Nev. 266, 914 P.2d 605 (1996), involved two vehicular burglaries and one burglary of a commercial store. Both offenses involved vehicles in casino parking garages and occurred only seventeen days apart. The burglary of the store occurred the same day as the second auto burglary, and very close in time on that day.

Tillema was arrested for a burglary of a vehicle on May 29, 1993 and was arrested again for another burglary of a vehicle and for a burglary of a store on June 16, 1993. *Tillema,* 112 Nev. 269. The *Tillema* court reasoned that "the store burglary could clearly be viewed by the district court as 'connected together' with the second vehicle burglary because it was part of

a 'continuing course of conduct.' *Id*. at 268, 914 P.2d at 607, *citing* NRS 173.115(2); *Rogers v. State,* 101 Nev. 457, 465-66, 705 P.2d 664, 670 (1985), *cert. denied*, 476 U.S. 1130, 106 S.Ct. 1999, 90 L.Ed.2d 679 (1986). The court noted that the continuing course of conduct was that on June 16th, a detective viewed Tillema's burglary of a van in a casino parking garage and then observed Tillema immediately leaving the garage and walking south to a Woolworth's store. *Id.* The detective followed Tillema and saw him in the hardware section of the store, where Tillema remained for approximately five minutes. *Id.* The detective then saw Tillema go to a gas station a short distance away. *Id.* Tillema sold a packaged lock, with "Woolworth's" and "a price of four ninety-nine" on it, to a gas station attendant for two dollars. *Id.* The *Tillema* court state:

> We believe that Tillema's acts on June 16th demonstrate that he had an intent to steal something, anything, that he could subsequently sell. Thus, the vehicle burglary and the store burglary were certainly "connected together" due to Tillema's felonious intent and "continuing course of conduct." Moreover, we conclude that most of the evidence of the June 16th vehicle burglary would be cross-admissible in evidence at a separate trial on the store burglary to prove Tillema's felonious intent in entering the store. See NRS 48.045(2); Mitchell, 105 Nev. at 738, 782 P.2d at 1342; cf. Robins, 106 Nev. at 619, 798 P.2d at 563. Accordingly, we conclude that the vehicle burglary counts were properly joined with each other and with the store burglary count. *Id.*

The 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. However, there is nothing so special about theme to suggest that they evince a continuing course of

conduct or that they are connected together.

Further, the cases are not necessarily cross admissible of evidence of intent. There is nothing about any of the cases that would even make intent an issue in the case. In each case, witnesses testified such that it was not hard for the state to establish intent. While the defense need not place intent at issue before the State may seek admission of prior act evidence (if the evidence is relevant to prove an element of the offense such as intent for the specific intent crime of burglary), the evidence may still be inadmissible if it is not relevant or its probative value is substantially outweighed by the risk of unfair prejudice. *Hubbard v. State*, 422 P.3d 1260, 1262 (2018). In that case, the court noted that:

> where the evidence left little doubt as to the assailants' intent to commit a felony at the time of entering the home, and appellant's defense was not based on a claimed lack of intent or on mistake, but rather on a claim that he was not present and had no involvement in the crime, the evidence of his prior residential burglary conviction had little relevance or probative value as to his intent or absence of mistake when compared to the danger of unfair prejudice resulting from its propensity inference. *Id.*

The instant case is similar, in that the evidence in the State's arsenal leaves little doubt as to intent. Further, the defense did not promulgate a defense that put intent at issue. Thus, the State is incorrect in its assertion that the evidence was cross admissible. This Court would have had to balance the evidence under a probative versus prejudicial analysis. The joined was prejudicial, as will be addressed below via the prejudice prong of *Strickland.*

> Splond must demonstrate deficient performance or prejudice. As far as

deficient performance, an opposition to the motion to consolidate based on improper joinder would not have been futile. *See Ennis v. State,* 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims."). As argued above, an opposition was not futile, and there were valid legal grounds to oppose the motion. A reading of the caselaw provides ample grounds to distinguish caselaw cited by the State to prepare a cogent argument against joinder.

To demonstrate prejudice, Splond must demonstrate "a substantial and injurious effect on the verdict." *Marshall v. State,* 118 Nev. 642, 647, 56 P.3d 376, 379 (2002); *see also* NRS 174.165(1) ("If it appears that a defendant or the State of Nevada is prejudiced by a joinder of ... defendants in an indictment or information, or by such joinder for trial together, the court may ... grant a severance of defendants or provide whatever other relief justice requires."). Here, the cases regarding the cellular store robberies had eyewitness identification issues to litigate. Additionally, the forensic evidence was helpful to Splond's contentions that it was not he who robbed the cellular stores. There was fertile ground for the defense to explore via cross examination. However, the evidence in the Star Mart incident was harder to defend with an eyewitness identification defense, due to the arrest of Splond shortly after the offense. However, the jury hearing the Star Mart evidence made it insurmountable for the defense to overcome the taint of the Star Mart offense and the jury likely closed its mind. Having the two cases joined "prevent[ed] the jury from making a

reliable judgment about guilt or innocence.'" *See Marshall,* 118 Nev. at 647, 56 P.3d at 379 (quoting *Zafiro v. United States,* 506 U.S. 534, 539 (1993)). Counsel was ineffective for simply agreeing to the State's joinder of the cases, and it prejudiced Splond at trial.

II. SPLOND WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, the petition must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) counsel's errors were so severe that they rendered the verdict unreliable. *Lozada v. State,* 110 Nev. 349, 353, 871 P.2d 944, 946 (1994) *citing Strickland v. Washington,* 466 U.S. 668. 104 S.Ct. 205 (1984).

Once the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's errors, the result of the trial would probably have been different. *Strickland,* 266 U.S. at 694, 104 S.Ct. 2068; *Davis v. State,* 107 Nev. 600, 601, 602, 817 P.2d 1169, 1170 (1991). The defendant must also demonstrate errors were so egregious as to render the result of the trial unreliable or the proceedings fundamentally unfair. *State v. Love,* 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993) *citing Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064.

In *Strickland*, the United States Supreme Court established the standards for a court to determine when counsel's assistance is so ineffective that it violates the Sixth Amendment of

the U.S. Constitution. 466 U.S. 668, 104 S.Ct. 2052. *Strickland* laid out a two-pronged test to determine the merits of a defendant's claim of ineffective assistance of counsel.

First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. The Nevada Supreme Court has held, "claims of ineffective assistance of counsel must be reviewed under the reasonably effective assistance standard articulated by the U.S. Supreme Court in *Strickland*, thus requiring the petitioner to show that counsel's assistance was deficient and that the deficiency prejudiced the defense." *Bennet v. State,* 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995); *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

In meeting the prejudice requirement of an ineffective assistance of counsel claim, Splond must show a reasonable probability that, but for counsel's errors, the result of the proceedings (trial, appeal, post-conviction proceedings) would have been different. Reasonable probability is probability sufficient to undermine the confidence in the outcome. *Kirksey,* 112 Nev. at 980, 923 P.2d at 1102. "Strategy or decisions regarding the conduct of a defendant's case are virtually unchallengeable, absent extraordinary circumstances." *Mazzan v. State*, 105 Nev. 745, 783 P.2d 430 (1989); *Olausen v. State,* 105 Nev. 110, 771 P.2d 583

(1989). However, counsel is still required to be effective in his or her strategic decisions. *Strickland*, *supra*.

In the instant case, Splond's proceedings were fundamentally unfair and he received ineffective assistance of counsel at trial.

A. GROUNDS THREE THROUGH

A defendant who contends that his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome. Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004). Additionally, 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).

i. Grounds One Through Six: Grounds One through Six are herein reasserted as argued in the pro per pleading. Those grounds are: Trial counsel was ineffective for failing to investigate, for failing to present a defense and for failing to subpoena phone records, for failing to object to the constitutionally infirm complaint, for failing to object to evidence at trial, for failing to ask for a Petrocelli hearing, for failing to object to jury instructions, and for failing to object to the PSI.

ii. Ground Seven: Trial Counsel Failed to present expert testimony

During the trial, the evidence tying Splond to the robberies of the two cellular phone stores was eyewitness identification evidence. Trial counsel then attempted to cross examine the detective about the procedures used during the photo lineups, to then argue the

procedures were flawed. However, the detective was unaware of the techniques that trial counsel was asking about during cross examination.

A review of the relevant evidence is as follows:

Cricket Wireless (Echeverria):

Echeverria testified that the man who came into the store was a black man wearing a black hoodie, a black baseball cap, black shirt, black shoes, and blue jeans. AA482. The man "had a lot of acne" on his face. AA497. A month later, the detective approached Echeverria with a photo lineup. AA486. Echeverria selected Splond out of the photo lineup. Despite Echeverria's description that the man in the store had acne, another witness (Williams) described the man as having scarring on his face, from a knife or a burn. AA505. She did not believe the scars were consistent with acne scars. AA505.

In examining the photo lineup shown to Echeverria, the only person in the lineup that had any scarring on his face is Splond. (See Exhibit A, photo lineup).

Echeverria could not identify anyone in court at trial when asked if he saw the man who came into his store on the day in question. AA492. Echeverria was clear that the man touched the door handle without gloves when leaving. AA495. Splond's fingerprints were not found on the door.

Witness testimony was inconsistent about whether or not it was Splond, and the photo lineup was unduly suggestive, in that Splond was the only person in the lineup with any type of scarring.

Metro PCS (Angles):

Angles described the man who robbed her on the day in question as an "African American guy." AA605. In the LVMPD incident report, the description of the suspect was a Black male, around 6 feet 2 inches tall, 130-140 pounds, thin, and bald. There is no mention of any facial scarring. (See Exhibit B, incident report). Nowhere does Angles describe the man having any type of facial scarring. Even Angles' handwritten statement is devoid of any type of description about facial scarring. (See Exhibit C, voluntary statement).

Detective Kavon:

Detective Kavon testified that one of the reasons he thought the robberies were tied together was the witness descriptions that the person had facial scarring. AA708. However, nowhere does Angles describe the man as having facial scarring. Kavon also explained the process for how he put together a photo lineup. AA712. Counsel sought to question Kavon regarding the procedures used to perform lineups, including asking if LVMPD, at that time, was using a "double blind setup." AA721. When asked if LVMPD used a double-blind set up, the detective responded "not to my knowledge, no." AA721. Counsel then asked Kavon to explain to the jury what a double blind set up was. AA721. Kavon answered that he did not know. AA721. Counsel then indicated that some departments use such set up, and asked the detective to explain what the double blind procedure was. AA722. Kavon testified that he did not know of any departments using such a set up for photo lineups. AA722. The State objected to speculation, and that court sustained the objection. AA722.

Counsel then sought to question the detective about why the photo lineup instructions are given in the manner proscribed on the lineup form. AA723. The detective was

unfamiliar with the theory behind why the photo lineup instructions exist in their current form. AA 724. The detective remembered very little about the surrounding circumstances behind each lineup. AA728. Counsel then went back to attempting to question the detective about double blind procedures. AA730. Counsel essentially tried to testify to what a double blind set up was, and the detective did not know anything about them, and the State successfully objected to the line of questioning. AA730. In his closing, counsel attempted to explain the problems with photo lineups and why some departments use double blind set ups.

Counsel should have called an expert to explain to the jury the issues with photo lineups, and to explain why such lineups should be conducted in a double blind setup, what that was, and why eyewitnesses may be wrong sometimes. The National Institute of Justice published a guide in 2007 describing issues with eyewitness identifications and police lineups. *See https://nij.ojp.gov/topics/articles/police-lineups-making-eyewitness-identification-more-reliable.* (See Exhibit D). The National Institute of Justice (NIJ) is the research, development and evaluation agency of the U.S. Department of Justice. The information in the guide is based on scientific data gathered by the NIJ. Issues that exist with photo lineups include:

- **Prelineup instructions given to the witness.** This includes explaining that the suspect may or may not be present in the lineup. Research on prelineup instructions by Nancy Steblay, Ph.D., professor of psychology at Augsburg College in Minneapolis, Minnesota, revealed that a "might or might not be present" instruction reduced mistaken identification rates in lineups where the suspect was absent.

- **The physical characteristics of fillers.** Fillers who do not resemble the witness's description of the perpetrator may cause a suspect to stand out.
- **Similarities or differences between witness and suspect age, race, or ethnicity.** Research suggests that when the offender is present in a lineup, young children and the elderly perform nearly as well as young adults in identifying the perpetrator. When the lineup does not contain the offender, however, young children and the elderly commit mistaken identifications at a rate higher than young adults. Research has also indicated that people are better able to recognize faces of their own race or ethnic group than faces of another race or ethnic group.
- **Incident characteristics, such as the use of force or weapons.** The presence of a weapon during an incident can draw visual attention away from other things, such as the perpetrator's face, and thus affect an eyewitness's ability to identify the holder of the weapon. *See* exhibit D.

The article also discusses the problems with not using a double blind procedure, where the person conducting the line up does not know who the target of the lineup. The report explains that the person conducting the lineup can inadvertently direct the witness's attention to the person the officer believes is the target. *Id.*

An eyewitness identification expert would be the proper vehicle to present such evidence to the jury, such that counsel could have sufficiently presented a defense and then argued the issues to the jury in a meaningful way. To simply try to draw out from the detective who seemed to have no knowledge of such issues or procedures was not an effective method of presenting a defense. Then, to try to argue to the jury the problems with such procedures when no evidence existed before them was not effective.

A defendant is entitled to a defense, per the United States Constitution. In this case, the issues with identification were the crux of the defense to two of the allegations (Cricket Wireless and Star Mart). Counsel should have called an expert witness to present that

defense to the jury. The preparation of the defense fell below a reasonable standard as it was deficient at a basic level. Therefore, Splond received ineffective assistance of counsel and is entitled to a new trial. Molina, 120 Nev. 185, 87 P.3d 533; Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

iii. Ground Eight: Trial Counsel Failed to Offer Jury Instructions on Eyewitness Evidence and an inverse instruction on the elements of possession of stolen property

The jury instructions do not contain any instructions regarding the theory of defense. Due to the nature of the defense, as well as issues with the eyewitness identification issues, counsel should have proffered an instruction regarding eyewitness identification.

Counsel should have proffered an instruction containing language similar to the following:

> Eyewitness testimony has been received in this trial for the purpose of identifying the Defendant as the perpetrator of the crimes charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness, as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following:
> The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;
> The stress, if any, to which the witness was subjected at the time of the observation;
> The witness' ability, following the observation, to provide a description of the perpetrator of the act;
> The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;
> The witness' capacity to make an identification;
> The circumstances affecting the witness' ability to observe, such as lighting, weather conditions, obstructions, distances, duration of observation;
> Any other evidence relating to the witness' ability to make an identification.

This instruction goes right to the heart of the theory of defense proffered on two of the

incidents. A defendant is entitled to a jury instruction on his theory of the case if any evidence supports the theory, however improbable it may be." *Allen v. State*, 97 Nev. 394, 397, 632 P.2d 1153, 1155 (1981); *Brooks v. State*, 103 Nev. 611, 613-14, 747 P.2d 893, 894-95 (1987) (stating that a defendant is entitled to a "position" or "theory" instruction). Because Splond was entitled to an instruction on the theory of his defense, and because counsel has a duty to present a defense, counsel should have proffered an eyewitness identification instruction.

Second, counsel should have proffered an instruction regarding the possession of the stolen firearm. Count 4 of the Indictment charged Splond with possession of a stolen firearm. The jury instructions read:

> 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. AA185.

There was no evidence offered regarding how Splond would have or should have known the firearm was stolen. Therefore counsel should have offered an inverse instruction informing the jury "if the State fails to prove beyond a reasonable doubt that the defendant knew or should have known the firearm was stolen, you must find him not guilty of possession of firearm." It is crucial to instruct the jury so that the jury fully understands its duties and the State's burden. When elements of an offense are missing, counsel must point that out to the jury and instructions are an important vehicle for ensuring fairness.

Counsel should have proffered the instruction and argued that there was nothing to suggest Splond knew that the firearm was stolen. Not offering instructions that go to the heart of the defense or that illustrate problems with the State's case is the base level of trial effectiveness. Splond received ineffective assistance of counsel and is entitled to a new trial. *Molina*, 120 Nev. 185, 87 P.3d 533; *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

v. Ground Nine: Counsel Failed to elicit testimony regarding the stolen firearm to negate the State's allegations

The only evidence introduced at trial regarding the firearm was the testimony of Jeffery Haberman. Haberman came home one day and his back door was open, and someone had entered his house. AA542. His gun safe had been dragged out of his house. AA542. Haberman recognized his handgun in a photo the State showed to him. AA539. Haberman did not know Splond, nor did he ever give Splond permission to "go into his house" or "borrow his handgun." AA543. Haberman never gave anyone permission to have his handgun. AA543.

Certainly, the State proved that the handgun was stolen. However, the State must also prove that Splond knew or should have known that the gun was stolen. There was no evidence to suggest that there were overt signs (filed off serial number, etc.) that the firearm was stolen. Counsel should have elicited testimony from the detective that Nevada allows private party gun sales. Eliciting testimony that cuts through the State's theories is precisely what trial counsel is supposed to do. Simply leaving alone a charge and eliciting no

evidence, when evidence exists, to negate a charge is ineffective. Combined with the failure to offer a negatively worded jury instruction especially this failure affected Splond's right to a fair trial and to effectiveness of counsel. Therefore, this Court should give Splond a new trial.

vi. Ground Ten: Appellate Counsel Failed argue that the State had not met its burden of proof regarding the possession of the stolen firearm

To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State,* 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Both components of the inquiry must be shown, *Strickland,* 466 U.S. at 697.

Appellate counsel should have argued that the State failed to prove with sufficiency of the evidence that the Defendant knew or should have known that the firearm was stolen. When reviewing a challenge to the sufficiency of evidence supporting a criminal conviction, the appellate court will consider "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." *Stewart v. State*, 133 Nev. 142, 144, 393

P.3d 685, 687 (2017) (emphasis omitted) (internal quotations omitted). "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses." *Rose v. State*, 123 Nev. 194, 202-03, 163 P.3d 408, 414 (2007) (alteration in original) (internal quotations omitted). We will not disturb a verdict supported by substantial evidence. Stewart, 133 Nev. at 144-45, 393 P.3d at 687. "Circumstantial evidence alone may support a judgment of conviction." *Collman v. State,* 116 Nev. 687, 711, 7 P.3d 426, 441 (2000). In this case, there was not substantial evidence to support a conviction for possession of stolen property. Merely being in possession of a stolen firearm is not enough. The State must present some evidence that the defendant knew or should have known it was stolen. Private parties are allowed to sell guns in Nevada, and there was nothing so readily apparent about the gun that someone would know when purchasing it that it was stolen. There was no evidence that Splond admitted he knew it was stolen, nor was there circumstantial evidence that he bought it from someone he should have suspected was selling him a stolen gun. Further, there was no evidence he bought it for a price that suggested the gun might be stolen. The record was devoid of any evidence. Therefore, raising such a claim to the appellate court was not frivolous and appellate counsel should have made the argument. The omitted issue here would likely have been successful, as the record is devoid of evidence to sustain a conviction. Thus, appellate counsel was ineffective and this Court should grant Splond a new trial.

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II. SPLOND IS ENTITLED TO AN EVIDENTIARY HEARING PURSUANT TO NRS 34.770

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. NRS 34.770 provides:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. *Marshall v. State*, 110 Nev. 1328, 885 P.2d 603 (1994); *Mann v. State*, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. *Marshall,* 110 Nev. at 1331, 885 P.2d at 605; *See also Hargrove v. State,* 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." *Mann,* 118 Nev. at 354, 46 P.3d at 1230 (2002). The district court cannot rely on affidavits submitted with a response or answer in determining whether the factual allegations are belied by the record. *Id.* at 354-56, 46 P.3d at 1230-31. Additionally, the district court cannot make credibility decisions

without an evidentiary hearing. *See Id*. at 356, 46 P.3d at 1231 (rejecting suggestion that district court can resolve factual dispute without an evidentiary hearing and noting that "by observing the witnesses' demeanors during an evidentiary hearing, the district court will be better able to judge credibility").

Here, Splond has alleged numerous instances of ineffective assistance of trial counsel and of previous counsel who did not convey an offer. These are issues of both credibility and fact and may not be determined by the district court without an evidentiary hearing. *Mann*, 118 Nev. at 354-56, 46 P.3d at 1230-31. Counsel's actions are often based upon the defendant's strategic choices and upon information supplied by the defendant. Therefore, inquiry into both trial and appellate counsel's conversations with Moore is critical in assessing counsels' actions. *Strickland,* U.S. at 691.

While the State may claim that all decisions made by counsel were strategic in nature and therefore virtually unquestionable, that is unclear from the record before the Court at this time. Splond has alleged specific factual allegations, which if true, would entitle him to relief and these allegations are not belied by the record. Therefore, Splond is entitled to an evidentiary hearing under NRS 34.770.

CONCLUSION

Based on the foregoing arguments, Splond respectfully requests that the Court reverse his conviction, grant him a new trial or, in the alternative, set an evidentiary hearing to determine all claims raised in his Petition for Writ of Habeas Corpus and the instant

Supplemental Memorandum of Points and Authorities in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

DATED this 9th day of March 2021.

Respectfully submitted,

/s/ Monique McNeill
MONIQUE MCNEILL, ESQ.
Nevada Bar No. 9862

VERIFICATION

State of Nevada)
)ss.
County of Clark)

MONIQUE MCNEILL, ESQ., being first duly sworn, deposes and says:

That I am the attorney for KENYA SPLOND, the Defendant in the above entitled action; that I have read the foregoing Defendant's Supplemental Memorandum of Points and Authorities in Support of Defendant's Petition for Writ of Habeas Corpus and know the contents thereof; and that the same is true of my own knowledge except for those matters therein stated on information and belief, and as to those matters, I believe them to be true.

/s/ Monique McNeill

Monique McNeill, Esq.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED by the undersigned that on 9th of March, 2021, I served a true and correct copy of the foregoing **SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** 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.

By: */s/ Monique McNeill*

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

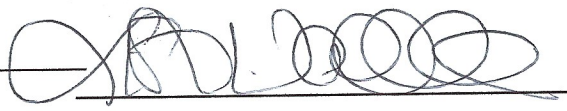
EXHIBIT A

DECLARATION

LISA WALLIS, makes the following declaration, under penalty of perjury:

1. I was friends with the Petitioner, Kenya Splond, in 2015, and helped him retain Frank Kocka as counsel.
2. I repeatedly asked counsel if there was an offer made from the State to resolve Mr. Splond's case. I was never given an answer.
3. Mr. Splond told me back in 2015-2016 that counsel kept telling him that the offer "could get better" but never what the actual offer was.
4. Counsel withdrew from the case without any explanation

EXECUTED this ___ Day of March, 2021, under penalty of perjury.



Lisa Wallis

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

KENYA SPLOND, Plaintiff, vs. JAMES DZURENDA, Defendant.	CASE#: A-19-793961-W DEPT. XXVIII

BEFORE THE HONORABLE RONALD J. ISRAEL, DISTRICT COURT JUDGE

THURSDAY, APRIL 15, 2021

RECORDER'S TRANSCRIPT OF HEARING
HEARING RE: PETITION FOR WRIT OF HABEAS CORPUS (LIMITED TO CONVEY OF OFFER ISSUE)
PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

For the Plaintiff:	MONIQUE MCNEILL, ESQ. (via BlueJeans)
For the Defendant:	JULIA A. BARKER, ESQ. Deputized Law Clerk (via BlueJeans)
	BINU G. PALAL, ESQ. Chief Deputy District Attorney (via BlueJeans)

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

001198

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Las Vegas, Nevada, Thursday, April 15, 2021

[Case called at 1:41 p.m.]

THE COURT: Good afternoon.

THE CLERK: Do you want me to call the case?

THE COURT: Go ahead.

THE CLERK: Case Number A793961, Kenya Splond versus James Dzurenda.

THE COURT: Counsel, state your appearance for the record.

MR. PALAL: Yes, Your Honor. Binu Palal, 10178, along with Julia Barker, Bar Number 14823, on behalf of the State.

MS. MCNEILL: And Monique McNeill, Bar Number 9862, on behalf of Mr. Splond who's present in custody.

THE COURT: Okay. I have to address one thing. We saw filed a second supplemental memorandum and it was after my decision on all but one issue. I certainly can't imagine how that would be timely. And it, aside from everything else, I think it exceeds the page numbers allowed. Defense, you have any comments?

MS. MCNEILL: Well, Judge, the statutes on postconviction writs allow you to supplement liberally. It didn't add anything new other than to add what the witness is going to testify to you today so that the State has that, but she can certainly -- and I'm not aware of any page limits on a postconviction writ, but she can certainly just testify to it today if the Court feels that it wants to strike the writ. But I just wanted the State to be aware of the information that the witness is going to testify to.

THE COURT: I understand. I'll listen to the State but the

supplementing is before the Court makes a decision, not after.

MS. MCNEILL: Well, Your Honor, it didn't address anything that the Court ruled on it. It only addressed what we're here, what the Court has not decided on which is the substance of this hearing.

THE COURT: All right. State.

MR. PALAL: Yes, Your Honor. From my review, the second supplemental, I do -- I agree with Ms. McNeill in a sense that it does only address, while there's a large fact section that goes beyond the issues that we are here to discus, the argument section is limited to, well the relevant argument section should be limited to pages 18 through 20 which addresses the issue that the Court has not ruled on. From my look at it, maybe I'm looking at the wrong thing, but it looks like it does delve into other issues that the Court has ruled on, but if Ms. McNeill's position is that it's only for the limited purpose of the issue of controversy today which is whether or not an offer was conveyed, I think that is not wholly inappropriate. I think if it addresses -- the extent it addresses other items, I think it's not appropriate.

THE COURT: Well okay.

MS. MCNEILL: And the new information is in bold and it only address, again it was just the purposes of the hearing today. So.

THE COURT: All right. As far the what is only on for today, I'll allow it. It's, let's see now, 30, 40 pages. I assume Ms. McNeill is correct that only the bolded part is change. But, of course, other than sitting it down side-by-side, again, I'll allow that part that's on for today.

All right. So this is on for the issue -- well, that you're all aware

of. I addressed the other issues.

So, let's see now, Mr. Splond?

MR. SPLOND: Yes.

THE COURT: Do you understand because you're raising ineffective assistance of counsel, you need to waive your right to attorney-client privilege. I'm not sure -- I didn't pull the tape from last time, but certainly, I want to make you aware of that. Are you willing to waive your right to attorney-client privilege?

MR. SPLOND: Yes.

THE COURT: All right. And your attorney has discussed those issues with you?

MR. SPLOND: Yes.

THE COURT: And explained that because generally they'll be discussion testimony regarding this issue, whether or not the offer was conveyed, but if somehow something else came up, it could address other issues. So I want to make you aware of that. And, okay, so you're willing to waive your attorney-client privilege?

MR. SPLOND: Yes.

THE COURT: Thank you.

All right. Defense.

MS. MCNEILL: Thank you, Judge. I'm not sure if we can invoke an exclusionary rule when we're doing it on BlueJeans.

THE COURT: That's a good question but the problem becomes how do we get them back once they're --

MS. MCNEILL: Right. Right. Okay, well, just we'll roll with the

punches here, --

THE COURT: Who -- who, who are you --

MS. MCNEILL: -- Judge. I would call --

THE COURT: -- who is, I see -- so Mr. Kocka who I assume, and then Lisa Wallis --

MS. MCNEILL: Correct.

THE COURT: -- is the only other one?

MS. MCNEILL: Yes. So I was going to call Mr. Kocka, then Mr. Splond, and then Ms. Wallis.

THE COURT: All right. So do you have a call back number for Ms. Wallis?

MS. MCNEILL: I do. I can -- I can always text her when we're wrapping up with Mr. Splond and then get her to log back in.

THE COURT: All right. That's fine.

MS. MCNEILL: Okay. Ms. Wallis, go ahead disconnect and then I'll let you know when you can come back in.

MS. WALLIS: Okay.

THE COURT: All right. Are you calling Mr. Kocka first?

MS. MCNEILL: Yes, Your Honor.

THE COURT: Go ahead and swear him in.

FRANK KOCKA

[having been called as a witness and being first duly affirmed, testified as follows:]

THE CLERK: Please state your name and spell it for the record.

THE WITNESS: It is Frank, F-R-A-N-K. Last name is Kocka, K-O-C-K-A. Bar Number 3095.

THE COURT: Go ahead.

MS. MCNEILL: Thank you, Judge.

DIRECT EXAMINATION OF FRANK KOCKA

BY MS. MCNEILL:

Q Good afternoon, Mr. Kocka.

A Good afternoon.

Q So you -- just to lay some background information. You were retained to represent Mr. Splond in probably about 2014, is that correct?

A It was about two thousand -- I believe it was 2014. Just a lot of background noise, I'm sorry.

Q Sorry. And do you remember what the scope of your retainer was?

A Yes, I was hired to see whether or not we could resolve the case. He was charged, at that time, with one case and to see if we can get it resolved short of going to trial.

Q Okay. And so your goal was to seek some kind of negotiation with the State.

A Correct.

Q Do you remember, and give me the background on that, when did you start seek -- asking the State for an offer?

A You know, I don't have the exact dates. After I was allowed to withdraw, I sent my file over so I don't have my original file. And, again, this is something that occurred back in 2014. So I don't have specific

dates as to when I first attempted to get an offer from them. I really could not give you an answer, accurate, one way or the other.

Q Let me do this then because we know from some of the court records, at least, some of the things you said that might help orient conversations that you had.

A Yes.

Q So in April 30th of 2014, you mentioned in court that there was offer floating around. Do you remember what that initial offer might have been?

A If you give me a minute. I've actually printed out the Register of Actions and I'll try to follow along with you. You said April 30th?

Q Right. April 30th, 2014.

A Let's see, I -- looking at the District Court Register of Actions, I don't see that there was a particular negotiation. I see on that date it was set for a status check negotiations. I don't recall if there was a negotiation at that time or not.

Q Okay. Do you remember in August -- August 13th of 2014, you mentioned on the record that the State had made an offer but it wasn't that great. Do you remember -- what do you remember about that, that it wasn't that great?

A Court -- hold on one sec, what was the date again?

Q August 13th, 2014.

A I see that there was an outstanding offer and I believe at that time there was mention of a new case coming up in the system. And I believe eventually he was indicted in a new case. So there was

some talk going around about trying to negotiate this as separately. So thus as my memory serves me, the case that I was representing along at that time, they wanted to negotiate that separate and apart from the case that was coming through the Grand Jury system. And I'm sure as myself, as most defense attorneys, would not usually think that's a good offer to separate the two of them without doing a global negotiation which I think I actually referred to later on and for the day about trying to get a global negotiation. So as best as my memory would serve that they were trying to negotiate them separately and that was not a good negotiation for the benefit of my client.

Q Okay. Makes sense. Did you have a conversation in August of 2014, around that time, with Mr. Splond, about why you thought that offer -- what they were offering and why you thought it wasn't a good idea?

A I cannot tell you specifically if I did or did not. Again, I'm going off the Register of Actions because I don't have my file. I don't want to assume, but I can tell you what my general practice is that yes --

Q Okay.

A --- if I get an offer, I would discuss it with my client and if I feel that it's not a good offer as here trying to negotiate the cases separately, I will recommend to my client they not accept the offer until we can try and get something better.

Q Okay. And, again, I know it's hard when it's this long ago and you don't have any notes, we get to the point where in April 20th of 2015, prior to you withdrawing, you mentioned that the State had made an offer

but it wasn't acceptable to your client. Do you remember that?

A Yes.

Q Okay. Do you remember what the offer was that they made?

A I do not. Again, I'm going off the Register of Actions. I do see it was, because you've indicated that there was an offer of settlement; however, as indicated in the minutes here, it was unacceptable to the client. I cannot for the life of me nor will I try to second guess what the offer was at this point without actually having it in front of me which I do not.

Q Okay. And then same question as earlier, did you convey that offer to Mr. Splond?

A As best as memory serves me, yes. Again, going by what's my normal practice, and again, we're looking at the Register of Actions that indicates -- bear with me for a second. Received an offer, it was unacceptable to the client. So at that point, again, that would be something that would indicate that -- if it was unacceptable to the client, it was referred to the client.

Q Okay. And do you, back in this time, was your usual practice to convey offers over the phone, or in person at the jail? Or?

A Back in those days, it would probably just be going to the jail. I don't think I ever -- being a private attorney, I did not have access as public defenders do, to a jail line. Even as a contract attorney at that time, they did not give us phone privileges so it would have been, from this timeframe, done in person.

Q Prior to the conversation about you conveying the offer, had

you had any conversations with Mr. Splond about what he would find to be an acceptable offer?

A I can't answer that.

Q Sorry?

A I'm sorry, I can't answer that. Again, I'd have to look back at notes and I do not have those.

Q Okay. And --

A Again, I can only testify what my practice would have been at the time and, again, if I were to have been in court making a representation that the client -- see, let me back up a little bit. One of the times here, originally you asked me a question about what I didn't think was a good negotiation and the basis for that. If I go on the record and say that my client does not feel that it's a good deal, that would in and of itself meant that the client was aware of it and he has rejected it.

Q Okay. All right. Versus earlier where you may have said that you didn't like the offer.

A Correct.

MS. MCNEILL: Okay. All right. I have nothing further.

THE COURT: Well I'll ask before the State, where are the notes or who has the notes that you turned over? Or who did you turn it over to?

THE WITNESS: Originally, I believe after I withdrew, it was supposed to go to the Public Defender, however, I believe, and again going by what I was able to reconstruct from the Register of Action, Ms. Hojjat, who is with the Public Defender's office at the time was to a do

conflict check, is thereafter set for a confirmation of counsel, and it says Coombs, so that would have been the Public Defender. I would have turned my file over to whoever the new attorney was. Going by the Register of Actions, it would have been the Public Defender's office, Your Honor.

THE COURT: Okay.

State.

MR. PALAL: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. PALAL:

Q Mr. Kocka, I want to direct your attention to a couple of dates. One Ms. McNeill's already spoken about, one she hasn't. So you've had an opportunity to review the Register of Actions and some transcripts from a couple of dates. Is that true?

A Correct.

Q Okay. Specifically I want to refer your attention to April 15th, 2015. The Register of Actions on that day says that you are not ready for trial, that you have been trying to get in touch with Ms. Botelho regarding an offer. Was Ms. Botelho the lead DA on the case at the time?

A Give me a second to catch up with you. You said August 15th, 2015?

Q Yes.

A Okay, catch up with you here. Yes. My understanding was that she was. I believe Ms. Trippiedi was also on the case with Ms. Botehlo.

Q And I guess by way of background, you had mentioned that there were -- you were initially hired to represent Mr. Splond on one case, but then a second robbery case also came through the system. Is that correct?

A That's my understanding, yes.

Q And then the cases were ultimately consolidated at some point prior to this offer being relayed. Is that correct?

A Correct. I believe at one point it was brought, as I indicated from what I've been able to see, it was brought up through the Grand Jury and there was a motion to consolidate. I was not retained on the other case that was coming up secondarily to the one that we're referencing here. So I would not have represented him on it. I believe at one point I actually made that representation to the court and indicated that I would happy -- happy to stay on the case to see if we could negotiate it, even if I wasn't retained on it. And then I believe the last time I had anything to do with the case is when the offer was made that was not agreeable and it was all indications it was going to trial and I moved to withdraw at that point.

Q Okay. And so going back to the April 15th, 2015 date, it said you had been trying to get in touch with Ms. Botelho regarding an offer however could not get anyone to respond. Do you see that?

A I do.

Q Okay. And then in the transcript, did you recall Judge Smith, who was the presiding judge at the time, actually say, demanding that the DA be in court and make sure an offer is relayed.

A That's what I'm reading off of the transcript, yes.

Q Okay. And the transcript also reflect that the sitting District Court Judge at the time even said I have Mr. Wolfson's number if this is an issue to try and get an offer.

A According to what I'm reading on the transcript, yes.

Q And as a result of that court hearing, you guys were next in court on April 20th, 2015, per the Register of Actions. Is that true?

A April 20th, correct.

Q And then this is the one that Ms. McNeill discussed with you where you state, you did receive an offer on the case. Is it fair to say that if you're telling the court you received an offer on the case, you could say today that you actually did receive an offer on the case?

A Yes.

Q And would it be any reason for you to make that misrepresentation to the court?

A No, not all.

Q Okay. And then secondarily you say the offer is not acceptable to my client. Is it also fair to say that if you represented to the court that the offer was not acceptable to your client that you would have relayed that offer to your client?

A Yes.

Q And by all indications, including the Register of Actions, Mr. Splond was actually in court during this status check. Correct?

A I'm looking at the transcript and I would have to check the minutes to see who was present, but I don't perceive Judge Smith actually

doing proceeding without the defendant being present, no.

Q And from the transcript, there's nothing in here that would suggest Mr. Splond saying, hey, I don't know what you're talking about.

A Not that I can see from reading the transcript, no.

Q And lastly with regards to this, you had mentioned earlier that you were retained specifically to negotiate the case. Is that true?

A Correct and when it says the case, that was the first case prior to the second one coming down through -- having been filed and coming up through the Grand Jury.

Q And are there different rates you might charge somebody if, hey, I'm going to represent you through trial versus I'm going to represent you through prelim, versus I want to try and get this case resolved. Do you charge differently -- or did you charge differently in 2014 and 15?

A It's always been my practice to charge differently, yes.

Q So you -- client may come to you and say, hey, I can only -- this is how much money I have, how far can -- will this take me. Or how does that actually work to determine how far your representation goes?

A The way it normally works and has always worked in my practice is the client will come to me. I'll review what the proceedings are and we'll come to an agreement as to whether or not they want me to represent them through trial or whether or not they want me to represent them through preliminary hearing, or if it's a misdemeanor trial for the misdemeanor trial. My retainer fee is different as to where the case is going to ultimately go. I would say probably 98 percent of the time, especially when they first come to me, we arrive at a negotiation in the

retainer for two separate prices. One for trial, one for not trial. This case was done for a negotiation purpose only. Trial, especially in light of the charges and the subsequent charges that came down would have required a new retainer agreement, would be substantially more than what I charge him to negotiate the case.

Q It's fair to say that the charges that Mr. Splond was facing were substantial, quite serious, and would require quite a bit of work on your end to actually take to trial.

A Absolutely.

Q So, let me ask you this. If the whole scope of your representation was negotiation, --

A Uh-huh.

Q -- would you expect that you would relay negotiations to the client, who's hired you for that purpose?

A Absolutely.

MR. PALAL: Court's indulgence.

THE WITNESS: Could I just --

BY MR. PALAL:

Q Do you have anything else to add, Mr. Kocka?

A There was and actually you had provided me with a copy of the transcript late yesterday referencing April 20th. I, unfortunately, don't have access to the actual transcripts, just the Register of Action. When you were just asking me questions about the transcript of April 20th, there's actually two answers. One that His Honor asked me about what happened to the file. And actually it's on page 2, 12 and -- lines 12 and

13. Judge Smith ordered me, after he appointed the Public Defender, to give them my files. So that file would have been given to the Public Defender in open court. Hopefully that answers His Honor's question.

And number 2, when you asked me about relaying the offer, it also says there that, and this me speaking: I would have to get them over to the PD's office because he wants to go to trial.

That did follow up on the answer that the offer is not acceptable to my client indicating he wants to go to trial, which would, again, indicate that I think given the offer, he's making a choice to reject it to go to trial.

Q So the distinction here is like the full answer in the April 20th, 2015 transcript is the judge asked, hey, is it resolved. And you say: 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 them over to the PD's office because he wants to go trial.

A That's correct.

Q And it's fair to say that you would only relay that to the Court if, in fact, you had a conversation with your client that said where he said, I want to go to trial.

A Correct.

MR. PALAL: State has no further questions with this witness.

THE COURT: Any redirect?

MS. MCNEILL: Just briefly, Judge.

…

REDIRECT EXAMINATION

BY MS. MCNEILL:

Q Mr. Kocka, do you, --

A Yes.

Q -- and again, I know it was a long time ago, after that April 20th, before that date when you conveyed the offer, do you remember if Mr. Splond had a counteroffer that he wanted you to convey?

A I'm sorry, Counsel, I don't.

Q Okay.

MS. MCNEILL: Thank you. Nothing further.

THE COURT: Anything -- recross? State?

MR. PALAL: No, Your Honor.

THE COURT: Okay.

Okay, thank you, Mr. Kocka.

MR. KOCKA: Thank you.

THE COURT: Call your next witness.

MS. MCNEILL: Okay, Judge, at this time I would call Mr. Splond.

THE COURT: Go ahead.

KENYA SPLOND

[having been called as a witness and being first duly affirmed, testified as follows:]

THE CLERK: Please state your name and spell it for the record.

THE WITNESS: Kenya Splond. K-E-N-Y-A S-P-L-O-N-D.

THE CLERK: Thank you.

THE COURT: Go ahead.

MS. MCNEILL: Thank you, Judge.

DIRECT EXAMINATION

BY MS. MCNEILL:

Q Mr. Splond, do you remember when you hired Frank Kocka back in 2014?

A Yeah, I remember when Lisa hired him, yes.

Q Okay. So Lisa Wallis, who was your girlfriend at the time, she hired him?

A Yes.

Q Okay. What did she hire him to do on your case?

A She paid him to be my lawyer and she would pay him as we went.

Q Okay. And when you say be your lawyer, what do you mean by that?

A To be my lawyer. To do duties of a lawyer, to investigate, to do anything because I pled not guilty. I wanted to go to trial at that particular time.

Q Okay. Was it your understanding that he was going to either negotiate your case or go to trial?

A I thought that we were going -- I thought that's what we was paying for was to going to trial. I didn't know that it was -- he wasn't retained to get a deal.

Q Okay. Do you remember if you had any conversations with

him about a deal? Did he ever come to you and say this is what the State is offering?

A Only time I seen Frank Kocka was in court and nine times out of ten, he didn't show up for court. Or he was late to court and when he came to court, he was always busy so he would leave right after and I never had no chances to talk to him. And when I would call his name, he was still to run out the door.

Q When was the first time that you heard what the offer was?

A I never heard of any offer. He never told me --

Q Well at some point --

A -- he never told me -- he never told me about an offer.

Q Okay. He never told you about an offer. Do you remember in court on April 20th, 2015, when Mr. Kocka said that the offer was not acceptable to you?

A He said that -- when he came to me and talked to me about that, he -- the only thing he asked me is, do you still want to go to trial? Came and talked me asking do you still want to go to trial. And I said, yes. That was it. He didn't -- he didn't -- in transcript or anything, there was never, ever, it was never stated what any deal was or did any deal ever take place. On transcript, over a year of him being my attorney, it never showed. And it --

Q Okay. Well I'm going to break that down a little bit, okay, because we have to make a record. So. You said that on that April 20th date, he did come to you and he asked you if you wanted to go trial, right?

A That's the only thing he asked me, was I -- did I still want to go to trial.

Q So he did not tell you, hey, this is what the State's offering you?

A He never, ever told me anything about a deal at any time. He never --

Q Okay.

A -- came to see -- never, nothing. The only time I seen him was in court. He never nothing -- no phone call, no visits, no nothing.

Q Now you heard the State ask Mr. Kocka that you were in court that day. You didn't jump up and say, hey, I don't know what he's talking about, right?

A Right.

Q Did you do that?

A No because I didn't -- because every time, like I said, he would come to court late or whatever he was doing, he did what he did, came in to negotiate and whether nothing happens, so ask for a different court date or whatever. That's all he did was every time he came to court. I went to court like over 30 times or however many times, and he would -- that's all he would do was pass it off to the next date, looking for a deal, looking for a deal. No, that's not what I -- no, no, no, no.

Q But what I'm asking you is in court when he said that to the Judge, did you --

A I did not -- I did not say anything because I didn't know that I should say anything or could say anything. I was like --

Q Okay.

A -- I was ignorant to this. I didn't know anything about this. I was like on some TV stuff. You hire an attorney and the attorney does his job and that's that. He never, ever came to offer me anything.

Q Were you surprised when he withdrew?

A Yes, yes.

Q Okay.

A Yes.

MS. MCNEILL: Okay, Judge, I'll pass the witness.

THE COURT: Cross.

MR. PALAL: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. PALAL:

Q Mr. Splond, when you said when Ms. McNeill was questioning you, that you had hired Mr. Kocka to take the case to trial. Is that true?

A Right. Exactly. That's what Lisa was hiring him for.

Q So Lisa hired -- did you instruct Lisa to hire him?

A No, I did not. She did it on her own.

Q So she hired him on --

A She asked --

Q -- her own --

A She asked me did I want an attorney. She asked me did I want John Momot or Frank Kocka. And I told her Frank Kocka.

Q Okay. Any particular reason why?

A Because he was on my case before this case. And I seen him

in action. I seen how he did and he's a real good attorney, he's real good at what he does. Yes. I'm not going [indiscernible] --

Q No disagreement here, sir. So he wasn't -- your position is that he wasn't hired to get a deal, he was hired to go to trial.

A That's what -- that was my understanding of why he was hired.

Q Is that because you wanted to go to trial?

A It was anything, could have been -- if he came with a deal or something like that, if he would have came and approached me and told me a deal was, then I probably would have taken a deal because I wanted to relieve myself, of course. But he never came and told me any numbers or anything about a deal.

Q Okay, sir, do you remember during the trail, before the trial started in earnest, there was a discussion about what the offer was?

A I don't remember that because I never knew what the offer was.

Q Okay. This is not when Mr. Kocka was representing you. This is when Mr. Claus was representing you. Do you remember when Mr. Claus was representing you?

A Yes, yes.

Q Okay. And so there was a trial that occurred. You remember that?

A Yes.

Q And then before the trial started, do you remember discussion about whether or not an offer was made to you?

A I told Claus that I never received an offer from him because he

had asked me the D.A. ever offer you a deal or anything. That's what he asked me. I told him no.

Q And then do you remember in court Ms. Botelho saying what the offer was prior to your trial?

A No. I don't remember. I don't remember --

Q Okay, I'm just asking -- I'm just asking if you remember. Do you remember Ms. Botelho saying that the offer was, plead guilty to two counts of robbery with use of a deadly weapon, State retaining the full right to argue?

A I don't remember that at all.

Q Okay. Well let me -- let me ask you this, sir. If you had, if you were given that offer, two counts of robbery with the use of a deadly weapon, full right to argue, including for consecutive time, would you have taken that deal?

A There was no numbers behind it. What was even --

Q Right.

A -- like a 5 to 15, 6 to -- so therefore, I can't answer that.

Q Okay. But the -- in a right to argue situation, you aren't guaranteed any time. The State could argue for the maximum amount of time allowed under statute, which under that situation, the maximum would be guilt upon representation, it'll be 60 years on the top, 24 years on the bottom. So the State could argue for as much as 24 to 60 years in prison. Your attorney would have been able to argue for a smaller amount in prison.

A Uh-huh.

Q And it would have been up to the Judge to determine how much time you would have got. Would you have pled guilty to two counts of robbery with use of a deadly weapon, State retaining the full right to argue if that offer was made to you?

A It was made to me and negotiated to something else, I -- like I said, I don't know because I, you can't, it wasn't explained to me like that. So I --

MS. MCNEILL: And, Judge, I'm going to object. I think it's a little speculative to ask what someone would have done years ago in a -- I mean, how, he can't say what he would have done then without filtering it through where he is now. So.

MR. PALAL: And --

THE COURT: I'm --

MR. PALAL: -- and, Your Honor, if I may be heard briefly.

THE COURT: Go ahead.

MR. PALAL: The -- under *Strickland*, they have to show that he would have taken the offer and would affirm to have any prejudice for the offer not being relayed. It goes straight to the heart of the issue. If the answer, which seems to be anything but an unequivocal yes, I think the defense can't make their burden here. And I think the record is actually pretty clear the answer is not an unequivocal yes.

THE COURT: Counsel, I think under *Strickland* that's correct. The State, and you can certainly comment on this, but the State can or doesn't have to make any particular offer and the issue here is you're alleging no offer was ever made. But the issue under *Strickland* is would

he have accepted the offer if it had been relayed.

MS. MCNEILL: Well, Judge, that's not actually the correct legal standard because we're looking at this under *Frye* and the standard is he has to demonstrate a reasonable probability that he would have accepted the offer had he been afforded effective assistance of counsel. And then he has to show that he suffered prejudice from not receiving the offer. So I think him saying that he would have liked to have heard an offer and that he would have been open to it, is showing a reasonable probability. We don't have to show that he absolutely would have, but that had he 1) had effective assistance of counsel in conveying the offer, that he, there's a reasonable probability he would have accepted it.

So we don't have to show an unequivocal answer that he would have accepted it. In looking at *Frye*, that's -- the standard is not, he has to give this iron-clad yes. It's a reasonable probability he would have accepted it had he had effective assistance of counsel.

THE COURT: Okay, but -- and I'll let the State, but, I mean, to get to a reasonable probability, he would have accepted it. He would have to say I would accept it.

MR. SPLOND: He never --

MS. MCNEILL: I think he could say --

MR. SPLOND -- he never told me --

MS. MCNEILL: Mr. Splond, wait. It's not your turn to talk, okay?

I don't think that a reasonable probability means an absolute yes. Otherwise, I think the standard would be he has to show that he

would have. So I think his answer -- I think it's, I'll withdraw my objection and I'll just ask him some questions on redirect, Judge.

THE COURT: Okay. I was going to say I think you're right that a reasonable probability doesn't mean he has to say that he absolutely would, but go ahead. So go ahead. She withdrew the objection.

BY MR. PALAL:

Q All right. So when you -- your position was that when you hired Mr. Kocka, you wanted him to be your trial counsel, is that true?

A All I know is he was counsel. Trial counsel because that's what I was doing it at the time.

Q Okay, but --

A He was -- I didn't know nothing about the negotiations that Lisa and Frank had. I didn't know what was going on between them. She just went and retained him and hired him. And then next thing you know, he showed up to court. So I don't know the specifics of what he was retained, because I -- she, like, she would tell you she wasn't, she didn't retain him for deal negotiation purposes only. No, I don't -- no, that's not why she retained him. She retained him to be my lawyer, just my lawyer.

Q Okay. Did you -- so it's your position that you never received an offer.

A Never received an offer.

Q And it's your position that when Mr. Kocka represented to the court that the offer was not acceptable to you, that he was being

untruthful.

A I don't know what he -- I don't, I'm not going to say that he was being untruthful. Because apparently he was being untruthful because the only he told me, the only thing he came to ask me was, are you going -- do you want to go to trial. He never came to me and said, well this is on the table, this is what they're offering, this is what's going on. He never did that. He just asked was I going to trial and that was it. Playing on -- I do believe that he was just playing on my ignorance.

Q And when he asked you, do you want to go to trial, what did you say?

A I said, yes, because that's what I was doing. That's what -- that's what was happening. He didn't come with no deal. He didn't fulfill his, you know, the bargain, like, he said that he was getting a deal. He didn't fulfill that, he didn't do that.

MR. PALAL: No further questions at this time.

THE COURT: Redirect.

MS. MCNEILL: Thank you, Judge.

REDIRECT EXAMINATION

BY MS. MCNEILL:

Q Mr. Splond, the State asked you if you would have taken the offer, and you couldn't -- you didn't really have a yes or no answer. So I'm going to ask some questions about that. When Mr. Kocka asked you, do you still want to go to trial, did you think you had any alternative to going to trial?

A No. I didn't -- I didn't think anything else but that.

Q Were you open to negotiating your case?

A Yes. Yes.

Q Do you think that you could have gotten less time if you'd taken a deal versus what you got after trial?

A Yes. Yes.

Q Would that have been a better outcome for you?

A Yes.

Q Were you hoping to get the least amount of time that you could get?

A Yes.

Q So if you had -- if your counsel had explained to you an offer, what the offer was, and if he or she thought it was better than going to trial, would you have listened to your attorney?

A Yes. Yes.

Q Had Kocka explained the offer to you back in 2015, is there a likelihood that you would have accepted that offer instead of going to trial?

A To relieve myself, yes.

MS. MCNEILL: Nothing further.

THE COURT: All right. Any recross?

MR. PALAL: Yes.

RECROSS-EXAMINATION

BY MR. PALAL:

Q So I want to -- I want to understand so we're clear on the record. It's your position that you, if an offer was relayed to you, two

robberies with use of a deadly weapon, right to argue including consecutive time, your position today is you would have accepted that offer.

A Well being that it was explained like that, I can just say, I don't know -- I don't know what the numbers are or anything behind that. You're saying that, okay, would you take a deal for this, this and this. I couldn't say yes or no because I don't know what the time behind it is. Like she --

MR. PALAL: Okay, nothing further.

THE WITNESS: -- said she asked -- she asked if he'd explained to me, but she [sic] never explained nothing to me. So therefore, I cannot tell him yes or no. Tell you yes or no right now because nothing was ever explained to me. You know what I'm saying. You're asking me this right now. Right now I've been down for 8 year now. Know what I mean. So how -- so how would the numbers add up. Would I be doing less time if I took the deal or would I be doing more time? So that's why we ended up in trial.

BY MR. PALAL:

Q Okay, so let me ask you this. So your analysis of whether or not you would have taken the deal, reasonably depends on how much time you may or may not have gotten.

A Anytime, anytime I heard anyone take a deal is -- I got a deal for 6 to 15 for whatever, robbery, whatever. Or I got 3 to 30. Or that's the only way being incarcerated, that's how I heard how deals were made. Now the way you're saying it is some totally different asking about

two robberies with the right to do this. There was no numbers behind it so I couldn't say, you know what I mean. I don't know which one going to trail or taking a deal would be better. Which one would be better? He never done talk to me about -- anything about being, okay this is what I think you should do. He never said things.

Q Okay. So he didn't make a recommendation to you whether or not you should take the deal or not.

A Right. Right, right.

Q Okay. So he conveyed it, but didn't make a recommendation?

A He never conveyed anything to me. I keep telling you guys that he -- the only thing he asked --

Q Okay, sir. I understand. I understand.

A All right.

Q So your analysis, as we sit here today, is you would have taken a deal if it meant you were doing less time than you're doing right now.

A Yes. Because I know with trial --

Q And you would -- okay, and that's a yes or no. Just a yes or no question, sir.

A Okay, yeah, we're going to say yes.

Q Okay. And then you would not have taken the deal if it would have resulted in more time than you're doing right now.

A I wouldn't -- how would I know that? How would I know that if it was more time or less time? See, this is what I don't understand what you're trying to ask me. I don't understand what you're asking me

because I don't know if it's less time or more time because I'm doing time. I went to trial and lost. But therefore -- and everyone knows if you go trial and lose, you get maxed out. And I know whatever deal that was on the table was going to relieve me in some ways, some shape, some form. So, yes, I would say yes, that I would have taken a deal, yes, if one was presented to me. Even --

Q So you would have --

A -- [indiscernible] some deal.

Q So you would have taken any deal that was presented to you --

A I'm not going to say any deal. Don't -- we're not going to cross my words. No, I'm not going to say any deal. I'm going to say a deal that was reasonable to me, if it was conveyed and offered to me. That's all I say.

Q So you would have taken a deal if you thought it was reasonable to you.

A Yes or to -- if he'd explain it to me and I think you should take this deal. That's my attorney.

MR. PALAL: Okay. Nothing further.

THE COURT: Ms. NcNeill, anything else?

MS. MCNEILL: No, Your Honor.

THE COURT: Thank you. Do you want to call --

MS. MCNEILL: Yes, Judge. I'm just texting her now to log on.

THE WITNESS: Can you hear me?

THE COURT: Yes.

THE WITNESS: Yes, I'm here.

THE COURT: We can hear you.

Go ahead.

MS. MCNEILL: Thank you, Judge. I would call Lisa Wallis at this time.

THE COURT: Kathy, go ahead.

KATHY WILLIS

[having been called as a witness and being first duly affirmed, testified as follows:]

THE CLERK: Okay. Please state your name and spell it for the record.

THE COURT: Ms. Wallis?

THE CLERK: Please state your name and spell it for the record.

THE LAW CLERK: Lost her.

THE COURT: Yeah, I think we did. It switched from video to now it's only showing audio.

THE WITNESS: Yes, I can.

THE COURT: Okay.

THE WITNESS: Hello? Can you hear me?

THE COURT: Yes.

THE WITNESS: Okay. It's Lisa Wallis. W-A-L-L-I-S.

THE COURT: Go ahead.

MS. MCNEILL: Thank you.

…

DIRECT EXAMINATION

BY MS. MCNEILL:

Q Ms. Wallis, how do you know Mr. Splond?

A I've known him, he's a boyfriend I've had for a lot of years.

Q Okay. Do you remember hiring a lawyer for him around 2014?

A Yes, I do.

Q Okay. And who did you hire?

A Mr. Frank Kocka.

Q And what did you hire Mr. Kocka for?

A To get him out of jail on.

Q Okay. So you hired him to represent Mr. Splond on his case?

A Yes.

Q Was it -- what was your understanding about what Mr. Kocka was going to do?

A When I approached him about the situation, he said shouldn't be no problem. Come down to the office. He said that it would be pretty much a fairly simple case. That [technical difficulties] get together and --

Q You cut out a little bit, Ms. Wallis. So you hired him to represent Mr. Splond on his case?

A Yes.

Q Okay. And was it your understanding that he was going to prepare the case for trial?

A Trial? No. He said nothing about trial --

Q And what was it --

A -- he said it would be, he said it would be a fairly simple case

due to the fact that he had no prior charges and that, I mean, this was the first time he's never been in trouble.

Q Okay. Did you have any conversations with him after you retained him about what was going on with the case?

A Did I have any what?

Q Conversations with him about what was going on with the case after you hired him?

A I did have conversation with him, not very long conversation with him on the case. It would be -- I would call or ask what the status was and pretty much it was just going through the courts and that he would, he would always tell me, oh, I'm trying to work a deal or get a deal and that would be it.

Q Did he ever tell you that he'd gotten a deal?

A No, not never. Said he was always trying to get one.

Q Okay. Did you -- do you remember when he withdrew?

A I never even knew he withdrew until after a new attorney had just said I'm going to represent for trial. And I was like, what? What are you talking about?

Q Okay. So Mr. Kocka never told you that he was going to withdraw.

A No, he --

Q Did you have --

A -- did not.

Q -- did you have conversations with Mr. Splond over the phone while he was in jail?

A Every day.

Q Were you ever made aware if Mr. Kocka conveyed an offer to Mr. Splond?

A I know he never did because he -- Kenya always asked me, have you ever talked, did you talk to the lawyer yet, did you talk to the lawyer. Said I tried to call, and then I said but you got court in the morning. And he's like, oh, I do. And then I would have to call to the office and see what was going on with court. And they wouldn't even know he had court and it would be -- it would be, it was just a circle.

Q So Kenya never told you that he'd been getting given an offer?

A No. He never even talked to Frank.

Q And it sounds like you were saying that Kenya would ask you to contact Frank to see if there was an offer.

A Yeah, if --

Q Did you have to --

A -- anything was going on, yeah.

Q Okay. All right.

MS. MCNEILL: I'll pass the witness, Judge.

THE COURT: Cross.

MR. PALAL: Yes.

CROSS-EXAMINATION

BY MR. PALAL:

Q Ma'am, do you remember how much you paid to retain Mr. Kocka?

A I paid him a total of 8,000.

Q And you were the person that went out and hired him?
A Yes, I am.
Q Did you ever go visit the jail with Mr. Kocka?
A With Mr. Kocka?
Q Yes.
A Not -- no, never.
Q Okay. Would you go to the court appearances?
A I went to every one of them.
Q You said you hired Mr. Kocka to get Mr. Splond out of jail, is that right?
A Yes. Yes, I did.
Q Did you give any instructions to Mr. Kocka regarding what you wanted to see Mr. Splond --
A Hold on one sec. Did I give any instructions to what?
Q Hold on. Get that in and then we'll talk.
A Right. Okay, Go ahead.
Q All right. You good?
A Yeah, I'm good.
Q All right. So did you give any instructions to Mr. Kocka what you wanted to see happen in the case?
A No, not never.
MR. PALAL: All right. State will pass the witness.
THE COURT: Any redirect?
MS. MCNEILL: No, Your Honor.
THE COURT: Any other witnesses?

MS. MCNEILL: No, Judge. We would rest.

THE COURT: State, you have any witnesses?

MR. PALAL: No, Your Honor.

THE COURT: Okay. Argument. Defense.

MS. MCNEILL: Yes, Judge. Thank you, Judge

CLOSING ARGUMENT BY THE PLAINTIFF

BY MS. MCNEILL:

I understand that Mr. Kocka testified that he did convey the offer, although he couldn't remember specifically without his notes. And just for the record, I did ask Mr. Claus who had the case for his entire file and didn't get any notes, so not sure what happened to those in the transfer of the file. But he couldn't remember specifically when or what he said about the offer, just that his practice would have been that he conveyed it. But Mr. Splond is very clear that he did not receive an offer. Ms. Wallis remembers that she would ask and that Kenya would ask her, call my lawyer to see what the offer is. And so I would submit that Mr. Splond did not, in fact, get the offer conveyed to him.

I would also submit that Mr. Splond, as a lay person, is not very savvy to the inner workings of the court and how these things work. And he made it clear that he, if someone had explained an offer to him, he would have accepted that offer because it would have mitigated the amount of time that he received after going to trial. And I think what you have is a defendant who is very unclear about kind of what happened in his own case leading up to going to trial. And there's a process to explaining an offer to a client. There's a process to making sure that they

understand the offer. And there's a process to making sure that they understand the pros and the cons of an offer. It isn't as simple as just saying here's what the offer is. There's quite a bit that goes into explaining what it means. I think it is clear that Mr. Splond did not know really anything that was going on until he finds himself sitting at a jury trial where now he's going to trial. And so I would argue that he was not given effective assistance of counsel in receiving an offer, if the offer was received and the offer being conveyed to him. You have a duty as an attorney to make sure that your client understands the offer before you reject that offer on their behalf. Because if they didn't understand, you're getting into the same territory as *Frye* and *Cooper* case law on the duties of counsel to make sure that the client knows what the offer is, make sure the client knows what you think about the offer, and then let that client decide.

It is clear that Mr. Splond had no concept of that there had been an offer made. And even today hearing it from the State, it's clear that it requires more of a conversation than simply saying the offer is plead to two counts of robbery with the use, right to argue. That's sort of meaningless to people who haven't been through the system who don't know how these things work. And so counsel has a duty to do more than just simply state here's what the offer is. So I think it's clear that Mr. Splond does not believe that an offer was conveyed to him. I -- and that he wishes that he had had the opportunity to have a meaningful conversation with his lawyer about what the offer was and what that would have meant prior to being forced to go to trial.

And so I would submit it on that.

THE COURT: Thank you.

State.

CLOSING ARGUMENT BY THE DEFENSE

BY MS. BARKER:

Thank you, Your Honor. This is Julia Barker, Deputized Law Clerk, appearing on behalf of the State.

Just addressing this issue and breaking it down based on the *Strickland* prongs, the first prong is they have to show deficient performance. And here the record is clear, and that is supported by Mr. Kocka's testimony here at the evidentiary hearing today, that he did, in fact, convey that offer. Specifically I'm looking at the transcript from April 20th, 2015, he did convey that offer. That offer was not acceptable to his client and that his client wanted to go to trial. There's no reason to doubt that what Mr. Kocka provided and the information he provided to the Court on that day was untrue or misleading. Moreover, on that same date, the Defendant didn't say anything. In fact, the only time he made any reference to not knowing when there was -- whether there was an offer was the first day in trial, when there was a jury panel outside and he was looking at being convicted of eight different very serious felony charges. And moreover so on that prong alone, Your Honor, their claim is belied by the record and they haven't been able to show deficient performance. Even the defendant said he hired Mr. Kocka because he wanted to go to trial, which leads me into the second point, the *Strickland* prong -- the second prong of *Strickland*, which is prejudice.

And prejudice is you have to show a reasonable probability sufficient to undermine the outcome. And here the question is, would he, is there reasonable probability that he would have accepted the offer. And the offer that was conveyed was two counts of robbery with use of a deadly weapon, full right to argue including consecutive time. And today at the evidentiary hearing when asked what the defendant thought of that offer, on three different times the defendant said he wanted numbers attached to that offer, which sounds like a counteroffer and that's rejection. The record's clear that he would have rejected that offer and because he would have rejected that offer, they can't show deficient performance and they can't show prejudice.

And for those reasons, this Court should deny their petition. Thank you.

THE COURT: Defense.

MS. MCNEILL: Judge, may I respond briefly?

THE COURT: Yes.

MS. MCNEILL: Thank you.

REBUTTAL ARGUMENT BY THE PLAINTIFF

BY MS. MCNEILL:

As far as deficient performance, I think what we have is this. Even if you accept that Mr. Kocka conveyed the offer, again, it's not just telling a client here's the offer. You have to make sure the client understands the offer. And even today, when Mr. Palal was telling him and he said I want numbers attached, I don't think that means a counteroffer. When I convey an offer to a client, I say to the client, here's

what the offer is. Then I explain to them the entire sentencing ranges that are available in that offer. And then I explain to my client what I believe is the likely outcome of taking that offer, based on my experience in front of that judge, based on what I know about the client's record, based on what I know about the facts of the case. I don't simply repeat this is what the offer is. I give a lengthy description of what it means from minimum sentence, maximum sentence, and then a likely possibility. I explain to them this is what I think will happen. Am I making you promises? No, but this is what I believe based on my experience. And that is what is required of a defense attorney to do when they convey an offer. And you could see from Mr. Splond today saying, well, I don't know what that means. I want numbers attached. He means what's the bottom number, what's the top number, what's the likelihood of what you're going to get here. It's more than just telling them this is the offer. And you can see from him today, he still doesn't understand what that offer means. And to me that's deficient performance. If the client cannot tell you, repeat back to you this is what the offer is and this is what that that offer means, you haven't done your job. Because how can they make a knowledgable decision about what they're going to do unless they really understand what that offer means versus going to trial. Because that's the other key is telling your client, if you go to trial, this is what I think will happen. That's how you tell them, this is what I think is the best thing to do. Sometimes the best thing is to go to trial, sometimes it's not the best thing. But why is that. What do I think that means for my client. That is how you convey an offer.

For a client to still to this day not understand what that offer meant, I think is evidence that it was deficient performance in conveying the offer. And that is what the *Frye* case law is, is clear that counsel has to explain that because then you end up on the back end with somebody who says, well, if I'd known all of those things, I might have taken that offer.

As far as him saying that he didn't saying anything in court when Mr. Kocka said that the offer was unacceptable, I don't know a lot of defendants who just randomly yell things out in court or object to things their attorney says. I mean sometimes, sure, but I don't think that the onus is on the defendant to interrupt a court proceeding especially in front of Judge Smith who is known for threatening to duct tape defendants who spoke up in court. So I don't think that the burden is on him to object. He's not a party.

As far as him saying he wanted to go to trial, he was clear as he said he wanted to go to trial because he didn't know what the alternative was. So without knowing what the alternative was, yeah, you go to trial. Defendants do usually know if there isn't a deal, you can go to trial, you can plead straight up. He didn't know what the alternative was so he said he wanted to go to trial. I think it's clear that he -- that he did not understand if an offer was conveyed to him, what it meant and what he needed to do to understand that.

He -- I think it's clear it was deficient performance. If the Court accepts that Mr. Kocka conveyed the offer, I don't think the record is belied that he conveyed that offer effectively or meaningfully putting his

client in a position to make a knowledgeable decision.

THE COURT: Thank you. Let's start at the beginning. I think Mr. Kocka was credible, even Mr. Splond agrees that he's a, I think I wrote, he's a real good attorney, as a quote. And although we're now six years post even the offer, Mr. Kocka testified his normal practice is to convey the offer. And that's at least partially confirmed in the trial -- not the trial transcript but in the transcript where he's telling the judge that his client rejected the offer. And he said, again this is my notes, hopefully it's -- defendant wants to go to trial.

As to, and I'll get back to this, but I need to say it here, as to the issue of the actual offer and the fact that the defendant, Mr. Splond, wants to know the numbers is exactly why it sounds like he didn't want the deal. And that is because the deal obviously is very open-ended and it doesn't give numbers. In fact, you could imagine and not with much, in other words, the State would have asked for the max and then defense attorney would be able to argue for the minimums. But the fact that he, even today, wanted to know the numbers, in other words, a certainty, is not what the State was offering. And, again, I said this at the beginning, unless I'm wrong, the State is never required to make any offer and whether Judge Smith wanted to resolve the case at that time or not, without a trial, doesn't enter into. That's why there are, and I say this all the time that as a judge, I don't necessarily agree with both sides or either side. That's my job when it comes to sentencing. So that doesn't, if you will, show that his lack of knowledge, it only shows that he wanted a -- some certainty. I don't blame him, which to me makes sense why he

potentially did reject it. But the State was clearly unwilling to move. They have the right to go to trial and that's what happened.

So in August, there was a second case that came in which complicated things, but as far as, let's go to Mr. Splond's testimony. He said, and this is not a quote, he wasn't retained to get a deal. He said nine out of ten times he didn't show up in court, and just from the limited reading, that appears to be false. I didn't -- certainly this part of the case, he wasn't missing court appearances nine out of ten times. And as defense counsel said, I cannot, not that it matters, I cannot imagine Judge Smith allowing that. He says he never heard of any offer at all. And that was in the -- and I don't have the number of months, but in the entirety of Mr. Kocka's representation, he apparently never told Mr. Splond anything even though he was retained whether you, under Mr. Kocka's testimony or anyone else, he was retained to get an offer. Mr. Kocka said he was not retained to try the case. And that, I think I can't avoid my own -- my knowledge that $8,000 doesn't get you a jury trial. I think certainly the Court has to recognize that. We would be talking about considerably multiple times that in order to a full jury trial. Kocka never advised him again of any offer.

And then we go to the fact that in the court appearance prior to Mr. Kocka withdrawing, he says -- he says the defendant doesn't want to accept the deal and certainly we know he didn't say anything in that regard. Ms. Wallis says she hired Mr. Kocka to represent the defendant. I'm trying to get a deal, I wrote. She did say he never told her there was a deal. I'm not sure how -- I don't know that discussing the case with her

is relevant. Again, Mr. Kocka didn't have his notes. I'm still unsure as to why or where they are. I don't believe anyone asked Mr. Kocka if he actually, as defense counsel, would suggest explain the offer. He did say it was his normal practice to do so. And so the defendant has the burden of proof in this and his testimony, again, just doesn't seem to be credible that in the multiple months he's represented, he didn't ask if there was ever an offer. It certainly seems strange, to say the least, that even if, as we did prior to COVID, the attorneys talked to the clients in the jury box, that in all those appearances, and there are multiple, that he never inquired as to whether there was any offers, even though it was represented on the record several times that Mr. Kocka said there was an offer but it wasn't acceptable. He was waiting, I believe, and I don't have the transcript in front, he was waiting for a better offer, et cetera. It just doesn't support Mr. Splond's credibility that, and the most important thing, that he was never conveyed any offer. It just -- it stretches credulity.

So given, as I said, that Mr. Splond has the burden, under *Strickland, Frye,* et cetera, he hasn't shown that the record -- that the offer was not conveyed, let alone that it wasn't explained to him and therefore the two -- either prong of *Strickland* is not met.

And therefore this part of the petition is denied. I went over all the others at our prior hearing on the other issues.

So the State needs to prepare an order based on all of that.

Thank you.

…

MS. MCNEILL: Thank you, Judge.

MS. BARKER: Thank you, Your Honor.

[Hearing concluded at 2:55 p.m.]

* * * * * * *

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

Judy Chappell

Judy Chappell
Court Recorder/Transcriber

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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