IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE MONAY-PINA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 84321

RESPONDENT'S ANSWERING BRIEF

Appeal From the District Court's Denial of a Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This is an appeal from a denial of a Petition for Writ of Habeas Corpus (Post-Conviction) involving Category B felonies. Therefore, this case is presumptively assigned to the Nevada Court of Appeals under NRAP 17(b)(3).

STATEMENT OF THE ISSUES

1. Whether the district court properly found that trial counsel was not ineffective for not hiring an investigator and allegedly not conducting a pre-trial investigation.
2. Whether the district court properly found that trial counsel was not ineffective for not filing a Motion to Sever.
3. Whether the district court properly found that trial counsel was not ineffective for not reviewing a video surveillance with Monay-Pina.
4. Whether the district court properly found no cumulative error.

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STATEMENT OF THE CASE

On March 4, 2016, Appellant Jose Fernando Monay-Pina ("Monay-Pina") was charged by way of Information with one count of Conspiracy to Commit Robbery; two counts of Burglary While in Possession of a Firearm; two counts of Robbery With Use of a Deadly Weapon; four counts of Batter With Use of a Deadly Weapon Resulting in Substantial Bodily Harm; one count of Attempt Murder With Use of a Deadly Weapon; one count of Aiming a Firearm at a Human Being; one count of Coercion With Use of a Deadly Weapon; and one count of Battery With Intent to Commit a Crime. Appellant's Appendix ("AA") Volume 1 031-37.

On March 7, 2016, Monay-Pina was arraigned, entered a plea of not guilty, and invoked his right to a speedy trial within 60 days. 1 AA 120. Trial was scheduled for May 2, 2016, with a calendar call of April 25, 2016. 1 AA 120. At calendar call, Monay-Pina waived his right to a speedy trial, requested a continuance, and the trial date was vacated and reset to September 26, 2016. 1 AA 121-22. After a few more continuances, at the February 27, 2017, calendar call, the case was reassigned to Department VII. 1 AA 123-33.

On March 13, 2017, trial commenced, and the State filed a Second Amended Information. 1 AA 136-37; 76-85. On March 15, 2017, the State filed a Third Amended Information. 1 AA 86-95. The jury returned guilty verdicts as to all counts against Monay-Pina: Count 1 – Conspiracy to Commit Robbery (Category B Felony

– NRS 200.380, 199.480); Counts 2 and 4 – Burglary While in Possession of a Firearm (Category B Felony – NRS 205.060); Counts 3 and 5 – Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165); Counts 6 and 8 – Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B Felony – NRS 200.481); Count 7 – Attempt Murder With Use of a Deadly Weapon (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165); Counts 9 and 10 – Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B Felony – NRS 200.481); Count 11 – Aiming a Firearm at a Human Being (Gross Misdemeanor – NRS 202.290); Count 12 Coercion With Use of a Deadly Weapon (Category B Felony – NRS 207.190, 193.165); and Count 13 – Battery With Intent to Commit a Crime (Category B Felony – NRS 200.400.2). 1 AA 96-99. Sentencing was set for June 15, 2017. 1 AA 100.

The parties stipulated to continue the sentencing hearing. 1 AA 102-103.

On September 7, 2017, Monay-Pina was sentenced to an aggregate term of a minimum of nine-four (94) months and a maximum of four hundred twenty (420) months in the Nevada Department of Corrections, with six hundred four (604) days credit for time served. 1 AA 104-07; 144-46. The Judgement of Conviction was filed on September 21, 2017. 1 AA 104-07.

Monay-Pina filed his Notice of Appeal on October 3, 2017. 1 AA 108-09. The Nevada Supreme Court affirmed the judgment of conviction on March 18, 2019. 3 AA 674. Remittitur issued on April 23, 2019. 3 AA 673.

On February 18, 2020, Monay-Pina filed a pro per Petition for Writ of Habeas Corpus (Post-Conviction). 3 AA 675-695. The State filed a Response on April 14, 2020. 3 AA 696-718. On April 30, 2020, the district court filed a Decision and Order denying Monay-Pina's Grounds One, Three, Five, and Nine of his Petition. 3 AA 719-28. Grounds One and Three claimed trial counsel did not advise Monay-Pina of his right to testify. 3 AA 719. Ground Five claimed trial counsel failed to move to dismiss the weapon charges. 3 AA 719. Ground Nine claimed trial counsel failed to object to the State's rebuttal argument. 3 AA 719. The district court also denied part of Monay-Pina's Ground 10, which claimed that he was entitled to two trial attorneys. 3 AA 719. The district court set an evidentiary hearing to give Monay-Pina an opportunity to present additional evidence concerning the remaining Grounds. Ground Two, counsel not hiring an investigator; Ground Four, counsel not filing to sever Monay-Pina's case from his co-defendant; Ground Six, counsel allegedly not conducting a pretrial investigation; Ground Seven, counsel's failure to challenge Monay-Pina's competency; Ground Eight, counsel's alleged failure to review video surveillance evidence with Monay-Pina; Ground Ten, counsel's alleged failure to visit Monay-Pina in jail or work with Monay-Pina to develop a

defense together; and Ground Eleven: counsel's alleged admission of Monay-Pina's guilt at trial. 3 AA 720. The district court appointed Monay-Pina counsel. 3 AA 720.

On March 29, 2021, Monay-Pina, through counsel, filed Supplemental Memorandum of Points and Authorities in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). 3 AA 742 – 4 AA 889. The State filed a Response to the Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) on June 24, 2021. 4 AA 890-906. An evidentiary hearing was held on December 21, 2021. 4 AA 907-88. On February 15, 2022, the district court filed a Decision and Order denying all remaining Grounds. 4 AA 989-95.

Monay-Pina filed a Notice of Appeal on February 28, 2022. 5 AA 1006-08. On July 1, 2022, Monay-Pina filed an Opening Brief. The State responds herein.

STATEMENT OF THE FACTS

On January 12, 2016, Richard DeCamp ("DeCamp"), was working the graveyard shift at a local 7-Eleven convenience store. 1 AA 191-92. At approximately 3:00 a.m., while DeCamp was working at the store by himself, two men, one later identified as Monay-Pina, entered the store. 1 AA 193; 223-25; 2 AA 318-19. DeCamp described the men as a "tall guy and a [] short guy" and both men wore masks and had guns. 1 AA 193. At one point, the men pointed their guns at DeCamp and ordered him to empty the cash register. 1 AA 196-97. Seeing a second cash register, the taller man, while continuing to point his gun at DeCamp, demanded

that DeCamp empty the second cash register. 1 AA 196-97. The men ordered a frightened DeCamp to lay on the floor while the men fled with the money from both cash registers. 1 AA 198. DeCamp lied on the floor for a few minutes, got up, and called 911. 1 AA 198. Approximately ten minutes later, Las Vegas Metropolitan Police Department ("Metro") responded. 1 AA 198.

Metro patrol officer, Isaiah Simmons ("Officer Simmons") and Metro Sergeant Abraham Aguirre ("Sergeant Aguirre") responded to a robbery call at a 7-Eleven. 1 AA 220-21, 237. At trial, Officer Simmons testified that upon making contact with DeCamp he was visibly shaking and frightened. 1 AA 221. Officer Simmons secured the scene, reviewed the store's surveillance video, and documented that $139.00 had been taken from the store. 1 AA 221-22. After DeCamp calmed down, Officer Simmons took a voluntary statement from him and developed a description of the suspects: "two Hispanic males . . . brandishing large firearms, dark clothing, gloves, masks . . . [and] [o]ne had a puffy jacket." 1 AA 222.

Nearby, Javier Colon ("Javier"), a former landscape worker, was living with his sister, Adriana Colon ("Adriana") and her three children. 2 AA 279-82. At the time, Javier was living in his sister's garage. 2 AA 279-82. In the early hours of January 12, 2016, Javier was asleep and suddenly awakened when two men opened the garage door and one of them screamed "Javier, get up, get up!" 2 AA 281. After the men opened the garage, one of the men rushed Javier and began beating him

using a firearm as a blunt object to repeatedly hit Javier over the head. 2 AA 284-85. During the attack, Javier noticed Monay-Pina was pointing his firearm at his family through the garage windows. 2 AA 285. Javier pleaded with the men to stop, but they ignored him. 2 AA 286. That morning, Javier planned on doing a "side job" so he had sharpened an axe and kept it near his bed. 2 AA 286. Seeing the axe and while Javier was lying on his back in the bed, Monay-Pina's Co-defendant, picked it up and swung the blade at Javier three times: hitting his leg, ribs, and attempting to hit his head. 2 AA 283-87. Luckily, prior to the blade hitting Javier's head, Javier raised his right hand and intercepted the blade which cut his hand open. 2 AA 287-88.

At trial, Javier recognized one of the men as a former landscaping colleague who he worked with in the past. 2 AA 282. Javier also identified Monay-Pina as one of the assailants because he remembered seeing Monay-Pina's eyes while Monay-Pina stood in the garage and recognized Monay-Pina's eyes in court. 2 AA 318-19, 322. Further, Javier observed Monay-Pina wore gloves. 2 AA 319-20. Javier recognized the gloves worn by Monay-Pina as the same black and red gloves that the landscaping company had given them while they worked there. 2 AA 321-22. At one point, the men noticed police lights approaching and escaped. 2 AA 289. A bloodied Javier was transported to the hospital where he received multiple stiches

and staples on his head and hand. 2 AA 291-92. Javier noticed the assailants took his camera, an MP3 player, and two collection knives. 2 AA 292.

Prior to the attack on Javier, Adriana heard Javier screaming that someone was threatening him. 2 AA 326. She made her way toward the windows facing the garage and saw two men who told her to "shut up" or they were going to "break [her] too." 2 AA 326. Adriana observed that the men had firearms and were pointing them at the windows where she was standing. 2 AA 326-27. Adriana heard the men hitting Javier "really hard." 2 AA 328. She begged them to leave, but they did not. 2 AA 327. Eventually, Adriana's daughter called the police, and they responded within minutes. 2 AA 329.

Meanwhile, at approximately 4:22 a.m., while Sergeant Aguirre was putting up crime scene tape at the 7-Eleven he heard a "high priority call" coming through the radio. 1 AA 239-40. The call described "two Hispanic males wearing dark clothing had forced their way into [a] home and were pistol whipping [a man]." 1 AA 239-40. Sergeant Aguirre made contact with Officer Simmons and told him he was going to respond to the nearby high priority call located approximately "right around the corner" from the 7-Eleven. 1 AA 239-40. On arrival Sergeant Aguirre made contact with Officer Ivan Duron ("Officer Duron") and Officer Justin Spurling ("Officer Spurling"). 1 AA 243. Sergeant Aguirre immediately noticed Officer Duron rendering aid to Javier in the garage and observed a large "amount of blood

on the bedding, walls, and floor." 1 AA 243. Sergeant Aguirre also observed an axe by the entryway to the garage. 1 AA 244. Sergeant Aguirre then received a radio call from Officer Spurling indicating he apprehended two suspects in a backyard. 1 AA 244. Sergeant Aguirre left Officer Duron behind to assist Officer Spurling. 1 AA 244.

When Officer Spurling arrived, he noticed a man screaming and crying inside a garage port. 2 AA 385-86. The man was also bleeding "pretty badly from his face." 2 AA 385-86. Officer Spurling focused on finding anyone else who might have been involved. 2 AA 387. He surveilled the area and jumped over a wall. 2 AA 387-88; 398-99. Once on the other side of the wall, Officer Spurling noticed a man, later identified as Monay-Pina, standing in the middle of a backyard. 2 AA 387-88; 398-99. After Officer Spurling and Monay-Pina made eye contact, Monay-Pina, who was wearing a stocking cap on his head, immediately ducked down. 2 AA 387-88; 398-99. Officer Spurling placed a call on his radio that he potentially located a suspect and continued to give Monay-Pina commands until he was taken into custody along with the other assailant. 2 AA 389-96. Officer Spurling testified the following items were recovered from the backyard where Monay-Pina was apprehended: a "wad of cash," Javier's wallet, a "replica firearm," and a knife and sheath. 2 AA 400-02.

Once Adam Felabom ("Felabom"), a Crime Scene Analyst with Metro, arrived on scene he examined the wad of cash and determined it totaled $138.00. 2

AA 458. Felabom also photographed, collected, and impounded a blue ski mask from the backyard. 2 AA 454-55. A DNA swab was taken from the blue ski mask. 3 AA 519. After the sample was analyzed, it was determined that the DNA found on the blue ski mask was at least 298 million times more likely to belong to Monay-Pina and one other individual compared to any other person. 3 AA 519-20.

Once Monay-Pina was arrested, Officer Simmons took DeCamp to the arrest scene where a show-up was conducted and DeCamp identified Monay-Pina and the other suspect as the ones who had robbed him at gunpoint at the 7-Eleven. 1 AA 223-25.

SUMMARY OF THE ARGUMENT

The district court properly found that Monay-Pina did not receive ineffective assistance of counsel.

First, counsel was not ineffective for not hiring an investigator or investigating the "beef" between Javier and Co-Defendant, nor investigating that Javier knew Monay-Pina more than Javier stated. None of these avenues provided any exculpatory evidence as the State presented overwhelming evidence against Monay-Pina, including DNA evidence and multiple eyewitnesses.

Second, counsel was not ineffective for not filing a Motion to Sever when counsel lacked a legal basis to file such motion. The defendants' cases were intertwined, there was ample evidence against both defendants, and the State did not

need either defendant's statement to prove their case. Additionally, counsel used this to Monay-Pina's benefit by arguing Monay-Pina's assertedly minimal involvement at trial.

Third, counsel was not ineffective for not showing Monay-Pina the 7-Eleven video surveillance. Monay-Pina knew the contents of the video and his version of events were echoed by the video. As such, Monay-Pina fails to show how his viewing of the video would have changed the outcome of the trial.

Lastly, as cumulative error claim based on ineffective assistance of counsel is not available in a habeas petition, Monay-Pina's claim should be denied on procedural grounds. However, if this Court should decide to consider the claim, all of Monay-Pina's claims lacked merit and there are no errors to cumulate. Therefore, this Court should affirm the district court's denial of Monay-Pena's habeas petition.

ARGUMENT

Standard of Review

Claims of ineffective assistance of counsel present a mixed question of law and fact that is subject to independent review. However, a district court's factual findings will be given deference by this Court on appeal, so long as they are supported by substantial evidence and are not clearly wrong. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). While this Court gives deference to the district court's factual findings if supported by substantial evidence and not clearly

erroneous, this Court reviews the district court's application of the law to those facts de novo. Id.

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. Chronic, 466 U.S. 648. 657 n.19. 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689. 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112. 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850. 853. 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case. viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. 104 S. Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable

probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064-65, 2068).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120, Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] must allege specific facts supporting the claims in the petition[.] ... Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed."

In Monay-Pina's pro per Petition, he raised the following claims:

> **Ground 1:** Counsel failed to ask Monay-Pina if he was going to testify;
> **Ground 2:** Counsel failed to hire an investigator to analyze the 7-Eleven video surveillance;
> **Ground 3:** Counsel failed to discuss with Monay-Pina his right to testify at trial and what Monay-Pina could testify to;
> **Ground 4:** Counsel failed to file a Motion to Sever;
> **Ground 5:** Counsel failed to file a pre-trial motion to dismiss the weapon charge;
> **Ground 6:** Counsel failed to conduct a pretrial investigation;
> **Ground 7:** Counsel failed to have Monay-Pina examined by a psychiatrist to ensure his competency at trial;

> **Ground 8:** Counsel failed to review the 7-Eleven video surveillance with him and failed to "subject the States case to a adversarial testing process" by not making the State prove beyond a reasonable doubt that it was him in the video surveillance;
> **Ground 9:** Counsel failed to object to the State's alleged burden shifting in rebuttal;
> **Ground 10:** Cumulative error based on counsel's failure to visit Monay-Pina in jail and work with him to develop a defense, counsel trying the case by himself, counsel failed to conduct an investigation or call any witnesses at trial;
> **Ground 11:** Counsel admitted Monay-Pina's guilt at trial despite Monay-Pina maintaining his innocence.

3 AA 675-95. The district court initially denied Grounds One, Three, Five, Nine, and part of Ten. 3 AA 731. Under Ground Ten, the district court denied Monay-Pina's claim that he was entitled to two trial attorneys. 3 AA 731. Monay-Pina was granted leave to present additional evidence in the remaining Grounds.

In his Supplemental Petition, Monay-Pina re-asserted the following claims:

> **Ground 2:** Counsel failed to hire an investigator;
> **Ground 4:** Counsel failed to file a Motion to Sever;
> **Ground 6:** Counsel failed to conduct a pretrial investigation;
> **Ground 7:** Counsel failed to have Monay-Pina examined by a psychiatrist to ensure his competency at trial;
> **Ground 8:** Counsel failed to review the 7-Eleven video surveillance with him;
> **Ground 10 (in part):** Cumulative error based on counsel's failure to visit Monay-Pina in jail and failed to work with him to develop a defense; and
> **Ground 11:** Counsel admitted Monay-Pina's guilt at trial.

4 AA 756-57. Monay-Pina now appeals only the following Grounds:

> **Ground 2:** Counsel failed to hire an investigator;
> **Ground 4:** Counsel failed to file a Motion to Sever;
> **Ground 6:** Counsel failed to conduct a pretrial investigation;

> **Ground 8:** Counsel failed to review the 7-Eleven video surveillance with him; and
> **Ground 10 (in part):** Cumulative error based on counsel's failure to visit Monay-Pina in jail and failed to work with him to develop a defense.

Appellant's Opening Brief ("AOB") 16-33. As Monay-Pina is not challenging Grounds One, Three, Five, Seven, Nine and Eleven, he has waived any argument that the district court erred in finding counsel not ineffective regarding these Grounds.

I. THE DISTRICT COURT PROPERLY FOUND THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR NOT HIRING AN INVESTIGATOR (GROUND #2) AND ALLEGEDLY NOT CONDUCTING A PRE-TRIAL INVESTIGATION (GROUND #6)

A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have changed the outcome of trial. 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 State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322,323 (1993). Further, it is well established that a claim of ineffective assistance of counsel alleging a failure to properly investigate will fail where the evidence or testimony sought does not exonerate or exculpate the defendant. See Ford v. State, 105 Nev. 850,784 P.2d 951 (1989).

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, 1 09 Nev. at 1138, 865 P.2d at 323 (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at 2066). 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.

"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. Further, 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).

Below, Monay-Pina argued counsel was ineffective for failing to hire an investigator who "would have learned that Colon did in fact know Monay-Pina beyond simply working with him a few times." 4 AA 761; See generally AOB at 19-24. Had counsel investigated Monay-Pina and Javier's prior associations, counsel would have learned that Javier harassed and slashed the co-defendant's sister's tires. 4 AA 762. Angelica is Co-Defendant's sister and Monay-Pina's girlfriend. 4 AA

762. Monay-Pina and Angelica socialized with Javier. 4 AA 762. Monay-Pina argued that this information could have been used twofold. First, to impeach Javier's testimony that he knew Monay-Pina from work. 4 AA 762. Second, this would have shown that Monay-Pina did not have a motive to attack Javier whereas his co-defendant did. 4 AA 762. The district court properly denied Monay-Pina's claim "because no sufficient facts are alleged to show how an investigation as suggested would have changed the outcome here." 4 AA 995.

The district court explained:

> trial counsel's performance was not deficient on these grounds because Mr. Monay-Pina has not established that hiring an investigator or otherwise investigating the suggested witness statements would have altered the outcome of the trial. Mr. Monay-Pina alleges that an investigation as suggested would have revealed "no motive for Monay-Pina," however, no sufficient facts or arguments are alleged to show the outcome of the trial would have been different here.

4 AA 992.

The district court correctly denied Monay-Pina's claims because none of avenues Monay-Pina asserts counsel should have investigated exonerate or exculpate him. At the evidentiary hearing, counsel testified that he discussed with Monay-Pina several matters, including hiring an investigator, whether Monay-Pina knew Javier prior to the incident, and Javier slashing Monay-Pina's girlfriend, Angelica's, tires. 4 AA 929-30, 960, 967. In his professional opinion, counsel believed this information did not benefit Monay-Pina's defense. 4 AA 930.

Accordingly, counsel strategically decided not to raise Monay-Pina and Javier's prior associations at trial. 4 AA 931.

> Q: Okay, now in -- your position as his attorney and the defense that you were going with did you think it was appropriate to get into this tire situation?
>
> A: I think it worked against his identity defense, you know, because if hey Javier Colon says I could recognize his eyes which is kind of strange because you wouldn't recognize somebody's -- you probably wouldn't recognize somebody, you know, if they hadn't met at all but to strengthen that defense you don't want to sort of beef up their relationship between the two. You know what I mean.
>
> Q: Absolutely. So it was your strategic decision to essentially not get into any of their prior associations with each other?
>
> A: Yes and I think if there was a beef it's more likely that this incident happened and it was Jose Monay-Pina. If he would say I did think because this guy slashed my girlfriend's tires it makes it more likely to have happened, you know what I mean.
>
> Q: Right and in your opinion that would have made Javier's identification of your client stronger if you were to introduce that evidence?
>
> A: Yes.

4 AA 930-31. Even if counsel would have impeached Javier with knowing Monay-Pina more than he stated, the outcome of the trial would not have changed. Such information would not overcome the facts that Monay-Pina broke into Javier's home and did not attempt to stop his co-defendant from beating Javier with a firearm and an axe. 2 AA 281, 284-85. It would not have overcome that Javier's and his family

testified that Monay-Pina pointed a gun at Javier's family to prevent them from helping Javier. 2 AA 285, 326-27.

Further, Monay-Pina's reliance on to Love to support his assertion that counsel should have hired an investigator is misplaced. 4 AA 760; AOB at 18. In Love, the defendant provided a list of alibi witnesses to his counsel and asked him to investigate them. 109 Nev. at 1138. There were no eyewitnesses to the murder, no physical evidence linking the defendant, no murder weapon was found, and there was no apparent motive for defendant to kill the victim. Id. at 1140. Because of the lack of motive and evidence tying defendant to the crime, the Nevada Supreme Court found that counsel was ineffective and prejudiced the defendant by failing to investigate his potential alibi witnesses. Id.

The instant case is distinguishable from Love because Monay-Pina cannot demonstrate how failing to hire an investigator prejudiced him to substantially affect the outcome of trial. At trial, both DeCamp and Javier identified Monay-Pina as the individual who committed the crimes. DeCamp identified the person wearing the brown puffy jacket and red gloves as the man present during the robbery, and Javier testified that he recognized Monay-Pina's eyes since he had worked with Monay-Pina in the past. 1 AA 208-09, 2 AA 318-22. Thus, this case is unlike Love, because there is a lot of evidence tying the Monay-Pina to the crimes.

Therefore, the district court properly found that Monay-Pina's claim alleged insufficient facts to support his claim of ineffective assistance of counsel.

On appeal, Monay-Pina raises new claims regarding how the investigation would have changed the outcome of the trial. Monay-Pina asserts trial counsel's mistaken identification defense was not "viable." AOB at 20. Counsel should have hired an investigator and investigated the "beef" between Javier and the co-Defendant. AOB at 19-20. Had counsel investigated this "beef," counsel "could have argued his client was merely present during the event, and that investigation could have bolstered that defense," which would have changed the outcome of the trial. AOB at 22-23. These new claims regarding viable defense[1] and "beef" between Javier and Co-Defendant should be summarily denied because they were not presented to the district court. This Court does not decide issues that were not ruled upon by a lower court. Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) ("This ground for relief was not part of appellant's original petition for post-conviction relief and was not considered in the district court's order denying that petition. Hence, it need not be considered by this court."). See also McNelton v. State, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999) (declining to address

[1] In his Petition, Monay-Pina briefly included authority for how ineffective assistance of counsel may leave a defendant without a defense, citing to Buffalo v. State, 111 Nev. 1139, 901 P.2d 647 (1995) and Warner v. State, 1032 Nev. 635, 729 P.2d 1359 (1986). However, he did not argue that he was left without a defense, nor did he analyze the authority cited. See 4 AA 757-63.

arguments not raised before the district court); Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995) (providing that a petitioner cannot raise a new claim on appeal that was not presented to the district court in postconviction proceeding); Guy v. State, 108 Nev. 770, 180, 839 P.2d 578, 584 (1992).

Nonetheless, if this Court were to consider his newly raised claims, they should be denied as they are without merit. The overwhelming evidence against Monay-Pina makes a different trial outcome highly unlikely.

Monay-Pina challenges counsel's defense by asserting that the facts of his case did not support the mistaken identification defense presented. AOB at 19. He then goes on to state the following facts proven at trial:

> Police arrested Monay-Pina very close in proximity to Colon's house, very close in time to the call to 911. Police then were able to match the clothing worn by Monay-Pina and Venegas to the clothing the in 7-11 surveillance. Further, Monay-Pina's DNA was found on items taken during the Colon incident.

AOB at 19-20. However, with such incriminating evidence against Monay-Pina, the proposed investigations would not have changed the outcome of the trial.

Likewise, even if counsel would have investigated the "beef" between Javier and Co-Defendant, the trial outcome would not have changed. Monay-Pina claims there was "negative history" between Javier and Co-Defendant. AOB at 23. Part of the negative history is Javier slashing her tires and harassing her because he had an argument with Co-Defendant. AOB 23. Monay-Pina further asserts that this

information showed Javier had bias against both defendants. AOB at 23. This information is not beneficial to Monay-Pina in the slightest. Angelica is Co-Defendant's sister and Monay-Pina's girlfriend. As such, this information provides motive for the defendants' attack on Javier. If the jury was presented with this information, it would have only strengthened the State's case.

Monay-Pina cites Buffalo v. State, 111 Nev. 1139, 901 P.2d 647 (1995) for the proposition that he was left without a defense rendering his convictions unreliable. AOB at 25-27. In Buffalo, the appellant was convicted of battery with the use of a deadly weapon, mayhem, and sexual assault. Id., 111 Nev. at 1140, 901 P.2d at 648. The facts adduced at trial was that appellant and his female co-defendant beat up the victim and one of them sexually assaulted the victim with a bottle. Id., 111 Nev. at 1141, 901 P.2d at 649. The Buffalo Court concluded that the appellant's version of events, which were not presented at trial as appellant did not testify, provided a defense of self-defense and defense of others. Id., 111 Nev. at 1141, 1144, 901 P.2d at 649, 651. Appellant claimed in his petition that the victim instigated the fight: the victim and the co-defendant "got into a fight," appellant intervened, and the fight escalated. Id., 111 Nev. at 1142, 901 P.2d at 649. Yet, appellant's counsel presented *no* defense to either the battery or mayhem charge and presented a legally incorrect defense to the sexual assault charge, which she would have known if she

spent fifteen minutes conducting legal research. Id., 111 Nev. at 1143, 901 P.2d at 650.

Appellant's counsel's billing records showed she spent less than two hours preparing for appellant's trial. Id., 111 Nev. at 1142, 901 P.2d at 649. The record also revealed that counsel only saw appellant on the day before trial and spent one hour "reviewing jury questions" and forty-five minutes in "consultation" with appellant. Id. Regarding the battery and mayhem charges, the Court noted that counsel did not even present a defense. Id., 111 Nev. at 1144, 901 P.2d at 650-51. Given appellant's version of events, the Court further noted it was difficult to comprehend why appellant was not called to testify at trial. Id., 111 Nev. at 1145, 901 P.2d at 651. The Court concluded that counsel failed to learn of appellant's version of events during her forty-five minutes with appellant. Id., 111 Nev. at 1145, 901 P.2d at 651. Counsel's actions amounted to deficient performance, so deficient that it made the trial outcome unreliable. Id., 111 Nev. at 1150, 901 P.2d at 654.

Buffalo is strikingly different from the case at hand. For starters, counsel presented a legally correct defense. Counsel acknowledged that it was not the perfect defense, but it was the best strategy at the time, given the overwhelming evidence against Monay-Pina, including forensic evidence, and the three theories of

culpability he was charged under.[2] 4 AA 943-44. Dissimilar to Buffalo, counsel in the instant case actually spoke with his client instead of spending time reviewing jury questions. At the evidentiary hearing, counsel testified that he reviewed the discovery with Monay-Pina and discussed the case. 4 AA 925. In these conversations, counsel learned Monay-Pina's versions of events, which were echoed by the 7-Eleven video surveillance. 4 AA 925-26. Monay-Pina told counsel that he wore a mask when he robbed the 7-Eleven – the mask later found with his DNA. 4 AA 925-26, 934. Because of Monay-Pina's disclosure, counsel did not advise him to testify at trial. 4 AA 927. Thus, unlike Buffalo, there was a very good reason for Monay-Pina not to testify. It was not counsel's actions that left Monay-Pina without a defense, rather it was the facts of the case. Monay-Pina was identified by DeCamp, Javier; the 7-Eleven video surveillance captured Monay-Pina robbing the store; there were pictures from the robbery and a matching description of Monay-Pina's clothing when he was apprehended; Monay-Pina was caught in possession of $138, the amount robbed from the store was $139. 1 AA 221-25; 208-09; 2 AA 458. Finally, Monay-Pina's DNA was discovered on the mask DeCamp described the robber wearing and that mask was found hidden under the shed where the defendants attacked Javier. 2 AA 397-98; 3 AA 519-20. Further, Monay-Pina was charged

[2] An offer was never extended, yet counsel still attempted to negotiate with the State. 4 AA 937.

under three theories of liability: direct liability, aider and abettor, and co-conspirator. 1 AA 86-95. Thus, a "merely present" defense would not have been successful. Nonetheless, consider the defense and included it in his closing argument. 3 AA 583-84.

None of the avenues Monay-Pina claims should have been investigated, in his Petition or Appeal, would not have produced a more favorable result at trial. Therefore, this Court should affirm the denial of Monay-Pina's ineffective assistance of counsel claim regarding Grounds Two and Six.

II. THE DISTRICT COURT PROPERLY FOUND TRIAL COUNSEL WAS NOT INEFFECTIVE FOR NOT FILING A MOTION TO SEVER (GROUND #4)

In his Petition, Monay-Pina argued that because the incident involving Javier was more damaging against his Co-Defendant, counsel should have moved to sever the defendants to assert a defense against the charges relating to Javier in which the co-defendant would have been solely implicated. 4 AA 763, 766; AOB 27. Severing the case would have allowed Monay-Pina to attack the multiple theories of liabilities for all the Counts pertaining to Javier. 4 AA 768-69. The district court found "counsel was not deficient in failing to file a motion to sever. Trial counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State, 137 P.3d 1095, 1103 (Nev. 2006)." 4 AA 993. In denying Monay-Pina's claim, the district court also rejected Monay-

Pina's reliance on Chartier v. State, 191 P.3d 1182, 1185 (2008) for the proposition that counsel's inaction prevented Monay-Pina from presenting and proving his theory of the case – he did not know what Co-Defendant was going to do and what occurred at Javier's home was not a foreseeable consequence. 4 AA 966-67; AOB 28-29. The district court explained:

> In Chartier, the Court distinguished those facts from Marshall v. State, wherein, "because the prosecution presented ample evidence against both defendants and the State's case was not dependent upon testimony from either defendant, there was 'no indication that anything in this joint trial undermined the jury's ability to render a reliable judgment'" as to the defendant's guilt. Chartier, 124 Nev. 760, 766 (2008) (quoting Marshall v. State, 118 Nev. 642, 648 (2002)). *Here, like Marshall and unlike Chartier, the State presented ample evidence against both defendants and did not rely upon testimony from either defendant.* Mr. Monay-Pina's trial counsel testified at the evidentiary hearing that he believed a motion to sever would have been futile, and *this Court does not find that a motion to sever would have necessarily been granted based on the standards for such a motion, in addition to the ample evidence presented against both defendants at trial*.

4 AA 993 (emphasis added). The district court's finding is substantially supported by the law and the facts of this case.

NRS 173.135 allows for co-defendants to be charged under the same information if they participated in the same criminal conduct. As a general rule, defendants indicted together shall be tried together, absent a compelling reason to the contrary. Rowland v. State, 118 Nev. 31 ,44 (2002). Joint trials are overwhelmingly favored in order to promote efficiency and equitable outcomes. Jones v. State, 111 Nev. 848, 853 (1995).

Courts should sever defendants only after a defendant establishes "a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence." Chartier v. State, 124 Nev. 760, 765 (2008) (quoting Marshall, 118 Nev. at 646); see also Bruton v. United States, 391 US 123 (1968); NRS 174.165. Generally speaking, severance is proper only when: (1) the codefendants' theories of defense are so antagonistic that they are "mutually exclusive" and so irreconcilable with one another that the acceptance of the one co-defendant's theory by the jury precludes acquittal of the other; and (2) there is "a serious risk that a joint trial would compromise a specific trial right ... or prevent the jury from making a reliable judgment about guilt or innocence." Chartier, 124 Nev. at 765 (internal citations omitted). Broad allegations of prejudice are not enough to mandate severance. United States v. Baker, 10 F.3d 1374. 1389 (9th Cir.1993), cert. denied, 513 U.S. 934 (1994), overruled on other grounds by United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000).

At the evidentiary hearing, trial counsel testified that because forensic evidence existed against both co-defendants and there being no co-defendant statements in the case, counsel lacked a legal basis to file a Motion to Sever. 4 AA 933-34. Counsel further noted that the two incidents were ultimately investigated as one case and, in each incident, Monay-Pina was identified by different types of

evidence. 4 AA 934-37. As such, counsel reasonably believed filing such a motion would have been futile. 4 AA 936. The district court agreed, finding said motion would not have necessarily been granted based on the motion's requirements, "in addition to the ample evidence presented against both defendants at trial." 4 AA 993.

Further, severance was not needed to "point the finger at co-defendant" as Monay-Pina argues that the evidence shows he had minimal involvement in Javier's attack. AOB at 29. Monay-Pina's minimal involvement in Javier's attack was presented to the jury. At trial, Javier testified that it was the co-defendant who attacked him with the axe. 2 AA 283-87. This is what trial counsel strategically decided to highlight to the jury and used to Monay-Pina's benefit. During closing arguments, counsel argued that Monay-Pina was not positively identified and even if he was, he was entitled to separate consideration, specifically as it related to the axe. 3 AA 584-85; 4 AA 939. At the evidentiary hearing, counsel explained how he used the fact that both co-defendants were tried together to Monay-Pina's benefit:

> Q: Okay, and when you're saying some advantage in the eyes of the jury you thought it would be more effective because Javier essentially identified Venegas as hitting him with the axe?
>
> A: Yeah so he, you know, well that's not exactly where I was going with it. But my argument was that Mr. Monay-Pina should be considered separately, you know, for what, you know, they could -- the State could prove that he did as opposed to Casimiro Venegas. Which was just a little bit different, he you know, what they were basically saying was he was there but he didn't actually pick up the axe and start chopping away with it.

> Q: Okay, so essentially that the jury would be able to weigh the two against each other in regards of level of culpability and your client would, you know, be shown some lenience comparative to Mr. Venegas?
>
> A: That was the thought, yeah.
>
> Q: And that was a strategic -- decision you made?
>
> A: Yeah.

4 AA 937-38. Counsel further testified that he considered the overwhelming evidence against Monay-Pina and the way he was charged – under three theories of criminal liability – counsel opined that a mere presence defense would have been unsuccessful. 4 AA 952. His decision was also based on witnesses' testimonies that although Monay-Pina was the person wielding the axe, they did testify that he basically held a gun and ensured no one interfered. 4 AA 952.

Furthermore, Monay-Pina has not and cannot establish that his co-defendant's identification had a substantial or injurious effect on the verdict or that the attack on Javier was an unforeseeable consequence, because the evidence against Monay-Pina was overwhelming and because the two incidents are tightly intertwined. DeCamp described the two men who robbed his 7-Eleven, and those same men were identified by him a mere mile away and less than thirty minutes later wearing the same clothes and masks. 1 AA 199-201. Monay-Pina and the co-defendant were apprehended in a backyard near Javier's home. 1 AA 244. The jury had pictures from both the 7-

Eleven robbery and the description of Monay-Pina clothes when police stopped him. 1 AA 199-200. Both matched. The following items were recovered from the backyard where Monay-Pina was apprehended: a "wad of cash" totaling $138[3], Javier's wallet, a "replica firearm," and a knife and sheath. 2 AA 400-02, 458. 1 AA 199-200. Finally, Monay-Pina's DNA was found on the mask DeCamp described the suspect wearing and hidden under the shed near where the suspects beat Javier. Id. at 79-80. Monay-Pina was identified as pointing a firearm at the victim's family through a window while his co-defendant stole the wallet and MP3 player. 4 AA 951. After Monay-Pina was arrested, DeCamp identified Monay-Pina as one of the assailants who robbed him at gunpoint at the 7-Eleven. 1 AA 223-25.

Accordingly, as Monay-Pina and Co-Defendant were indicted together and given the absence of a compelling reason not to try them together, counsel was not ineffective for not filing a Motion to Sever. Therefore, the district court properly found that counsel was not ineffective for not filing a futile motion.

III. THE DISTRICT COURT PROPERLY FOUND THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR NOT REVIEWING A VIDEO SURVEILLANCE WITH MONAY-MONAY-PINA (GROUND #8)

[3] Forensic analysist determined $139 was robbed from the 7-Eleven. 1 AA 221-22.

In his Petition, Monay-Pina stated he was "unaware if counsel had the surveillance prior to trial; but his counsel did not review the surveillance with him prior to trial." 4 AA 769.

The district court denied this claim, reasoning:

> At the evidentiary hearing, trial counsel testified that Mr. Monay-Pina's description of events were echoed by the video evidence, and as a result, he did not review the video with Petitioner. Failing to review video surveillance which comported with the client's version of events does not meet the high burden in showing a reasonable probability that the result of the trial would have changed. The Court denies Ground Eight of Mr. Monay-Pina's petition.

4 AA 994. As such, counsel did view the surveillance video prior to trial as he was able to confirm that Monay-Pina's version of events were the same as in the video. Counsel also testified that he discussed with Monay-Pina the identification defense on more than once occasion despite Monay-Pina not reviewing the video. 4 AA 927.

Now, on appeal, Monay-Pina claims counsel was ineffective for failing to review the video surveillance with him prior to trial. AOB at 31. He asserts that had counsel showed him the video, the outcome would have been different in one of two ways:

> First, as argued above regarding the failure to investigate, had counsel showed the surveillance video and discussed how that video belied a mistaken identity defense later (by matching clothing), Monay-Pina could have made the decision to not go to trial, and perhaps gotten leniency from the court. Or two, Monay-Pina would have understood that he needed another defense and counsel should have investigated beyond this nonsensical mistaken identity defense.

AOB at 31. These possible outcomes were not presented to the district court. As such, this Court should not consider them as Monay-Pina has waived them by presenting them here for the first time. See Davis, 107 Nev. 606, 817 P.2d 1173; McNelton, 115 Nev. 416, 990 P.2d 1276. Nonetheless, these new claims are without merit.

Monay-Pina's possible outcomes is not within the standard of prejudice. He must demonstrate the outcome of the *trial* would have had a more favorable result if counsel reviewed the video with him, not simply what could have been different in general. Although it is noteworthy that Monay-Pina's listed outcome includes averting trial altogether based on only *one* piece of evidence the State had against him.

In all, the district court properly denied this claim as Monay-Pina cannot meet the Strickland prongs.

IV. THE DISTRICT COURT PROPERLY FOUND NO CUMULATIVE ERROR (GROUND #10)

In Ground Ten of Monay-Pina's Petition, he asserted two additional ineffective assistance of counsel claims and then the cumulative nature of counsel's errors. "Firstly, this supplement will address the failure to visit Monay-Pina in jail, along with the failure to work with him to develop a defense, and thirdly, the cumulative nature of the errors made by counsel." 4 AA 770; AOB 32-33. As part of Monay-Pina's cumulative error claim, he asserted "[c]ounsel [did] not investigate

any of the defendant's claims, did not spend time with client to develop his defense, did not find information to impeach the State's main witness, did not review discovery with Monay-Pina[4]." 4 AA 773.

Initially, the district court partially denied Monay-Pina's cumulative error by denying his claim that he was entitled to two attorneys. 4 AA 994. After the evidentiary hearing, the district court denied the rest of Ground Ten. 4 AA 994. The district court denied Ground Ten because it found "no meritorious errors are alleged." 4 AA 995. The district court explained: "the issue of guilt here was not close due to the evidence presented against him, and the jury quickly returned its guilty verdict against Mr. Monay-Pina; further, this Court has not found error of trial counsel to accumulate. Therefore, the Court denies the remainder of Ground Ten." 4 AA 994.

The district court properly denied Monay-Pina's claims that counsel allegedly failed to visit him and counsel allegedly failed to work with him to develop a defense. 4 AA 994. Regarding the cumulative error claim, while the district court properly denied this claim as well, the district court should not have considered the claims' merits because a claim of cumulative error in the context of ineffective

[4] In Appeal, Monay-Pina, asserted as part of his cumulative error that "[c]ounsel did not spend any time preparing […]. Counsel did not file motions, counsel did not advise his client. AOB 32. As Monay-Pina did not raise these claims below, this Court should not consider them. Davis, 107 Nev. 606, 817 P.2d 1173 (1991).

assistance of counsel is not available in a habeas petition. The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated; it is the State's position that they cannot. However, even if they could be, it would be of no moment as there was no single instance of ineffective assistance in Monay-Pina 's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

Nevertheless, the district court properly found that Monay-Pina's cumulative error claim is without merit. 4 AA 995. "Relevant factors to consider in evaluating a claim of cumulative error are (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, 855 (2000). Furthermore, any errors that occurred at trial were minimal in quantity and character, and 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).

The Mulder factors weigh against Monay-Pina. The issue of guilt was not close. As laid out at the evidentiary hearing, the 7-Eleven clerk identified Monay-Pina; Monay-Pina's DNA was found on a mask that matched what the suspect in the video surveillance wore; Monay-Pina was apprehended near the 7-Eleven and in possession with almost the exact amount of money taken from the 7-Eleven; Javier's

family members identified Monay-Pina. 4 AA 950-51. Further, Monay-Pina was charged under three theories of liability in which he could be held directly liable, as an aider and abider, or as a co-conspirator. 4 AA 952. As the district court noted "the issue of guilt here was not close due to the evidence presented against him, and the jury quickly returned its guilty verdict against Mr. Monay-Pina." 4 AA 994.

While Monay-Pina alleges ineffective assistance of counsel, as discussed above, the district court found no error and counsel was not ineffective. Monay-Pina 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.").

First, 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. At the evidentiary hearing, counsel testified that he met with Monay-Pina and reviewed all discovery with him. 4 AA 925. They also discussed whether Monay-Pina knew Javier. 4 AA 929. Monay-Pina himself testified that he spoke with trial counsel at every court appearance, which were over ten court appearances. 4 AA 974.

Second, Monay-Pina's assertion that counsel could have presented a voluntary intoxication defense to negate specific intent crimes is not supported by the record. AOB at 32. As counsel testified at the evidentiary hearing, the jail records did not indicate that Monay-Pina was intoxicated. 4 AA 955-56. None of the witnesses who testified at trial, including officers, Javier, or DeCamp, ascribed any of signs of intoxication to Monay-Pina. He only has a self-serving allegation that he consumed alcohol and methamphetamine prior to the incidents. Counsel was aware that no one other than him and the co-defendant could testify that Monay-Pina had been intoxicated. 4 AA 927-28. Moreover, as counsel testified at the evidentiary hearing, because Monay-Pina had told counsel that he was one of the perpetrators in the 7-Eleven surveillance video, counsel could not ethically or legally advise Monay-Pina to testify to the alleged intoxication. 4 AA 927. Therefore, voluntary intoxication defense was not only an unsupported defense, but it was also an ethically inappropriate defense.

Contrary to Monay-Pina's claim, he did have a defense. During closing argument at trial, counsel argued that Monay-Pina did not attack Javier with the axe. 3 AA 583. Counsel repeated Javier's words:

> He testified that he did not see the face of the second attacker. The second attacker did not -- this is Mr. Colon's words -- speak, strike, or come close to him in any way. He conceded that he couldn't see the second attacker's eyebrows, but could see his eyes only. And he's testified that his eyes were brown, but there's a lot of people with brown eyes out there.

3 AA 583. Counsel also argued that none of Javier's family could identify Monay-Pina, and that Monay-Pina was entitled to separate consideration apart from his co-defendant. 3 AA 584.

Third, Monay-Pina asserts as part of his cumulative error claim that had counsel visited him, reviewed discovery with him, counsel "would have presented a viable defense such as: 1) Monay-Pina did not have the requisite intent, and 2) Monay-Pina did not directly commit the crimes at the axe scene, nor did he intentionally aid or abet or conspire with Venegas." 4 AA 773; AOB at 32. This claim is without merit for the several reasons discussed above.

As to the last Mulder factor, although the crimes charged against Monay-Pina are very serious, this factor alone does not signify cumulative error exists. Especially in the face of such overwhelming evidence against Monay-Pina.

Therefore, the district court properly found there was no cumulative error.

CONCLUSION

For all the foregoing reasons, the State respectfully requests that from the district court's denial of the Petition and Supplemental Petition for Writ of Habeas Corpus be AFFIRMED.

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/ / /

/ / /

Dated this 15th day of August, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 9,523 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 15th day of August, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 15, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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