

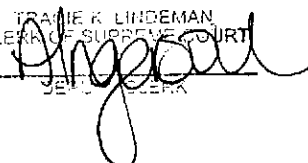
IN THE SUPREME COURT OF THE STATE OF NEVADA

JEMAR MATTHEWS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62241

FILED

JAN 16 2014

FRANIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
JULIA L. GERRA

ORDER OF AFFIRMANCE

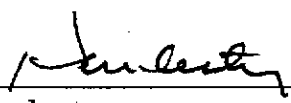
This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

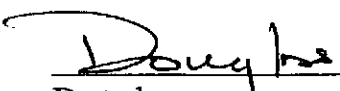
On appeal from the denial of his December 14, 2010, petition, appellant argues that the district court erred in denying his claim that trial counsel was ineffective for failing to file a motion to sever the proceedings. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). A petitioner must also demonstrate resulting prejudice by showing that the motion was meritorious, *cf. Kirksey v. State*, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996), and that there was a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland*, 466 U.S. at 687-88; *Lyons*, 100 Nev. at 432-33. Both deficiency and prejudice must be shown. *Strickland*, 466 U.S. at 697.

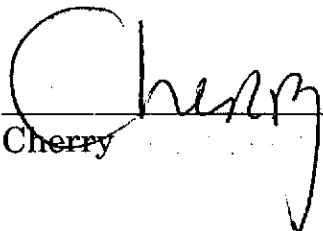
Appellant argues that counsel was ineffective for failing to file a motion to sever his case from that of his codefendant because the State's

case against the codefendant was significantly stronger than that against appellant. Appellant has failed to demonstrate deficiency or prejudice. This court has held that “a defendant is not entitled to a severance merely because the evidence admissible against a co-defendant is more damaging than that admissible against the moving party.” *Lisle v. State*, 113 Nev. 679, 690, 941 P.2d 459, 466 (1997), *limited on other grounds by Middleton v. State*, 114 Nev. 1089, 1117, n.9, 968 P.2d 296, 315 n.9 (1998). Accordingly, a motion based solely on the disparity of evidence would have lacked merit, and appellant offers no other basis for counsel to have filed the motion. Where, as here, the motion would have been futile, counsel was not ineffective in failing to file it. *Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Moreover, this court held on direct appeal not only that sufficient evidence supported appellant’s conviction but also that “significant evidence” did. *Matthews v. State*, Docket No. 50052 (Order of Affirmance, June 30, 2009). We therefore conclude that the district court did not err in denying the petition, and we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. David B. Barker, District Judge
Law Offices of Gamage & Gamage
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk