ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL RIPPO,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

Case No. 44094

RESPONDENT'S ANSWERING BRIEF

Appeal From Order Denying Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

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RESPONDENT'S ANSWERING BRIEF

Appeal from Denial of Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial Court, Clark County

STATEMENT OF THE ISSUES

1. Whether there was illegal or improper stacking of aggravators, making Defendant's sentence unconstitutional.
2. Whether Defendant received ineffective assistance of counsel.
3. Whether Defendant received ineffective assistance of appellate counsel because appellate counsel failed to raise that trial counsel allowed Defendant to waive his right to a speedy trial.
4. Whether Defendant received ineffective assistance of appellate counsel because appellate counsel failed to raise an allegation that trial counsel was deficient during the guilt phase for failing to object to the use of a photograph of the Defendant.
5. Whether Defendant received ineffective assistance of appellate counsel because appellate counsel failed to raise various allegations that trial counsel was deficient during the penalty phase.
6. Whether the instruction given at the penalty hearing adequately apprised the jury of the proper use of character evidence.
7. Whether Defendant's sentence is valid because the jury was given the statutory list of mitigating factors but was not given a special verdict form to list mitigating factors.
8. Whether Nevada's procedure for admission of victim impact testimony is Constitutional.
9. Whether Nevada's premeditation and deliberation instruction is Constitutional.
10. Whether this Court's appellate review of death penalty cases is Constitutional.
11. Whether the racial composition of Defendant's jury was Constitutional.
12. Whether Nevada's capital sentencing statute properly narrows the categories of death eligible defendants.

STATEMENT OF THE CASE

On June 5, 1992, Michael Damon Rippo, hereinafter "Defendant", was indicted by a Clark County Grand Jury for the crimes of Murder (Felony - NRS 200.010, 200.030), Robbery (Felony - NRS 200.380), Possession Stolen Vehicle (Felony - NRS 205.273), Possession of Credit Cards Without Cardholder's Consent (Felony - NRS 205.690), and Unauthorized Signing of Credit Card Transaction Document (Felony - NRS 205.750), committed at and within Clark County, on or between February 18, 1992, and February 20, 1992.

Notice of Intent to Seek the Death Penalty was filed on June 30, 1992, listing the following aggravating circumstances: 1) the murders were committed by a person under sentence of imprisonment; 2) the murders were committed by a person who was previously convicted of a felony involving the use or threat of violence to another person; 3) the murders were committed while the person was engaged in the commission of or an attempt to commit robbery; and 4) the murders involved torture, or the mutilation of the victim.

On July 6, 1992, the Honorable Gerard Bongiovanni continued the arraignment to July 20, 1992 on the grounds that Defendant had not yet received a copy of the Grand Jury transcript. (Appellant's Appendix, hereinafter AA, Volume II, page 000379). On July 20, 1992, Defendant again appeared before Judge Bongiovanni and entered pleas of not guilty to all of the charges against him. Defendant waived his right to a speedy trial and upon agreement of both the State and Defendant, trial was scheduled for February 8, 1993. The Court also ordered that discovery would be provided by the District Attorney's Office. (AA, Volume II, pages 000379-000380).

At a motion hearing on January 31, 1994, counsel for Defendant informed the Court that he had subpoenaed both of the Deputy District Attorneys prosecuting this case, John Lukens and Teresa Lowry. Mr. Dunleavy stated that the Deputy District Attorneys had conducted a search pursuant to a search warrant and that in the process of seizing items in the search, the attorneys became witnesses for the defense. Counsel

for Defendant further argued that the entire District Attorney's Office should be disqualified from the prosecution of this case. The Court ordered that the motion be submitted in writing and supported by an affidavit. (AA, Volume II, pages 000387-000388).

On March 7, 1994, an evidentiary hearing was held regarding Defendant's Motion to Disqualify the District Attorney's Office. Deputy District Attorney Chris Owens represented the State. Two days later the motion to remove Chief Deputy District Attorney Lukens and Deputy District Attorney Lowry from the case was granted. The Court, however, refused to disqualify the entire District Attorney's Office and ordered the appointment of new District Attorneys. The Court was informed that Chief Deputy District Attorneys Dan Seaton and Mel Harmon were going to replace Lukens and Lowry on March 11, 1994. (AA, Volume II, pages 000390-000393).

A status hearing was held on March 18, 1994 and was continued on the basis of the State's request to amend the indictment and new discovery provided to the defense. (AA, Volume II, pages 000393-000394). The District Court denied the State's request to amend the indictment. (AA, Volume II, page 000397). The State filed for a Writ of Mandamus, which was granted on April 27, 1995. An amended indictment was filed on January 3, 1996, including felony murder and aiding and abetting. (AA, Volume II, page 000398).

Jury selection began on January 30, 1996 (AA, Volume II, pages 000400-000402), and the trial commenced on February 2, 1996. (AA, Volume II, page 000403). A continuance was granted for Defendant to interview witnesses from February 8, 1996, to February 20, 1996. (AA, Volume II, page 000406). The trial commenced again on February 26, 1996. (AA, Volume II, page 000407).

Final arguments were made on March 5, 1996 (AA, Volume II, pages 000411-000412), and guilty verdicts were returned on March 6, 1992, of two counts of first degree murder, and one count each of robbery and unauthorized use of a credit card.

(AA, Volume II, page 000412). The penalty hearing was held from March 12, 1996 to March 14, 1996. (AA, Volume II, pages 000413-000415). The jury found the presence of all six aggravating factors and returned with a verdict of death. (AA, Volume II, page 000415).

On May 17, 1996, Defendant was sentenced to: Count I - Death; Count II - Death; Count III -Fifteen (15) years for Robbery to run consecutive to Counts I and II; and Count IV- Ten (10) years for Unauthorized Signing of Credit Card Transaction Document, to run consecutive to Counts I, II, and III; and pay restitution in the amount of $7,490.00 and an Administrative Assessment Fee. (AA, Volume II, page 000417).

A direct appeal to the Nevada Supreme Court was filed challenging the conviction and sentence and on October 1, 1997 an opinion was issued affirming the judgment of conviction and the sentence of death. *Rippo v. State*, 113 Nev. 1239, 946 P.2d 1017 (1997). A Petition for Rehearing was filed October 20, 1997, and an Order Denying Rehearing was filed February 9, 1998. A Petition for Writ of Certiorari was filed with the United States Supreme Court and was denied on October 5, 1998.

Defendant filed a Petition of Writ of Habeas Corpus (Post Conviction) on December 4, 1998. On August 8, 2002, Defendant filed a Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus. (AA, Volume I, pages 000001-000104). On October 14, 2002, the State filed an opposition. (AA, Volume I, pages 000105-000153). On February 10, 2004, Defendant filed a Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). (AA, Volume II, pages 000168-000208). On March 12, 2004, Defendant filed an ERRATA to Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). (AA, Volume I, pages 000209-000216). On April 6, 2004, the State filed a response. (AA, Volume II, page 000217-000273).

On August 20, 2004, an evidentiary hearing was held. Defendant's trial attorneys, Steve Wolfson and Phillip Dunleavy testified. At that hearing, the district

court ruled that Defendant had not received ineffective assistance of trial counsel. (AA, Volume II, pages 000278-000306).

On September 10, 2004, the evidentiary hearing continued. On that day, Defendant's appellate counsel, David Schieck testified. The district court ruled that Defendant had not received ineffective assistance of appellate counsel. (AA, Volume II, pages 000307-000368). On October 12, 2004, Defendant filed an appeal. (AA, Volume II, pages 000369-000371). An order denying the Petition for Writ of Habeas Corpus (Post-Conviction) was filed on December 1, 2004. (AA, Volume II, pages 000374-000377).

STATEMENT OF THE FACTS

For purposes of this Answering Brief, the State adopts the Statement of the Facts set forth in Appellant's Opening Brief.

ARGUMENT

I.

DEFENDANT'S SENTENCE IS VALID BECAUSE THERE WAS NO ILLEGAL OR IMPROPER STACKING OF AGGRAVATORS

Defendant alleges that "it was impermissible for the State to charge Mr. Rippo with felony capital murder because the State based the aggravating circumstances in a capital prosecution on two of those felonies upon which the State's felony murder is predicated." (Appellant's Opening Brief, page 19). The Defendant bases this on the December 2004 decision of *McConnell v. State,* 120 Nev. Adv. Op. 105, 102 P.3d 606 (2004). This argument fails for several reasons.

First, this argument is barred by the law of the case doctrine. Where an issue has already been decided on the merits by this Court, the Court's ruling is law of the case, and the issue will not be revisited. *Pellegrini v. State*, 117 Nev. 860, 34 P.3d 519 (2001); *see also*, *McNelton v. State*, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); *Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); *Valerio v. State*, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); *Hogan v. Warden*, 109 Nev. 952, 860 P.2d 710

(1993). The law of a first appeal is the law of the case in all later appeals in which the facts are substantially the same; this doctrine cannot be avoided by more detailed and precisely focused argument. *Hall, supra*; *McNelton*, *supra*; *Hogan*, *supra.*

In this case, on direct appeal, Defendant argued that the fact that he was not charged with either burglary or kidnapping prevented these crimes from being offered as aggravating circumstances. With regard to that argument, this Court said:

> "If a defendant can be prosecuted for each crime separately, each crime can be used as an aggravating circumstance. *Bennett,* 106 Nev. at 142, 787 P.2d at 801. Upon review, we conclude that Rippo could have been prosecuted separately for each of the underlying felonies, and therefore each crime was properly considered as an aggravating circumstance."

Therefore, the issue of whether aggravators were improperly stacked has already been addressed by this Court. As such, it is law of the case and this Court will not revisit the issue.

Further, the issue was not briefed in the Defendant's petition for writ of habeas corpus in the district court below. In fact, it could not have been briefed because the findings of fact, conclusions of law and order from Defendant's petition was filed on December 1, 2004. The *McConnell* decision was not reached until December 29, 2004. Therefore, the retroactivity of the *McConnell* decision is not properly before this court.[1] Because the district court did not look at the issue, this Court should not consider the issue.

Even in the event that this Court decides to look at the retroactivity issue,[2] applying the *McConnell* decision retroactively is something this Court appears to be unwilling to do. In *McConnell*, this Court stated:

> . . . in cases where the State bases a first-degree murder conviction in whole or in part on felony murder, to seek the death sentence the State **will have to prove** an aggravator other than the one based on the felony

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[1] "Before deciding retroactivity, we prefer to await the appropriate post-conviction case that presents and briefs the issue." *McConnell v. State,* 107 P.3d 1287, 1290 (2005). Here, Defendant did not brief the retroactivity issue below, therefore his is not the appropriate post-conviction petition this Court is waiting for.

[2] The Defendant recognizes this case has in no way been held to be retroactive. He states "If *McConnell* was to be applied retroactively to the instant case...the State would be left without three aggravating circumstances. (Appellant's Opening Brief, page 20).

> murder's predicate felony. **We advise the State**, therefore, that if it charges alternative theories of first-degree murder intending to seek a death sentence, jurors in the guilt phase should receive a special verdict form that allows them to indicate whether they find first-degree murder based on deliberation and premeditation, felony murder, or both. Without the return of such a form showing that the jury did not rely on felony murder to find first-degree murder, the State cannot use aggravators based on felonies which could support the felony murder.

McConnell, 606 P.3d at 624.

First, this Court's prospective language ("will have to prove" and "we advise the State") strongly indicates this Court's intent for its decision to **not** be applied retroactively. Moreover, in its published opinion denying rehearing, this Court clarified this intent by stating, "[o]ur case law makes it clear that new rules of criminal law or procedure apply to convictions which are **not final**." [Emphasis added] *McConnell*, 107 P.3d at 1290 (citing *Clem v. State*, 119 Nev. 615, 627-628, 81 P.3d 521, 530-531 (2003)).

A conviction is final when judgment has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the Supreme Court has been denied or the time for the petition has expired. *Colwell v. State*, 118 Nev. 807, 59 P.3d 463 (2002).

In the instant case, Judgment of Conviction was entered on May 31, 1996. Defendant exhausted his direct appeal on or about November 3, 1998, and his petition for writ of certiorari was denied on October 5, 1998. Defendant's conviction is, and has for over six years, been final. Thus, the "new rule" set forth in *McConnell* does not apply to this case.

Even if the decision applied to this case, it still would not afford relief as there is ample evidence of premeditation and deliberation, just as there was in *McConnell.* In charging McConnell with first-degree murder, the State alleged two theories: deliberate, premeditated murder and felony murder during the perpetration of a burglary. *McConnell,* 102 P.3d at 620. This Court noted that during his testimony, McConnell admitted that he had premeditated the murder. *Id.* Therefore, his

conviction for first-degree murder was soundly based on a theory of deliberate, premeditated murder. *Id.*

Similarly, in this case, the State alleged the same two theories with the broad language "without authority of law, with malice aforethought, willfully and feloniously kill..." There is ample evidence of premeditated murder. First, Mr. Donald Hill testified that he and the Defendant were in custody together in California in an unrelated matter. He stated that Defendant said he planned for the crime for several days, and he did so because he had been burned in a drug deal by one of the victims. He further testified that the Defendant stated he killed the other victim because she was there and he had to keep her from testifying. (21 ROA 81-82).[3]

When one of the victims went downstairs to speak to the other victim and both were out of the house, the Defendant pulled the shades in the apartment down. (21 ROA 91). Defendant made a telephone call to a friend, asking the friend to call one of the victims so that she would be distracted. (Id.) The Defendant told his girlfriend to hit one of the victims on the head while she was distracted by the telephone call. (21 ROA 91-92).

Defendant used a serrated kitchen knife to cut cords of various appliances so he could use them to tie the victims up. (21 ROA 92). Defendant placed a sock into one of the victim's mouth, pushing it back so far that the victim's own tongue went down her throat, and tied a bra around her mouth. (17 ROA 66-68). The coroner testified that both victims had died of strangulation, which takes several minutes to occur. (*See generally,* 17 ROA 66-114, Dr. Green's testimony). Therefore, as in *McConnell,* there is ample evidence that this conviction of first-degree murder was based on premeditation and deliberation.

Finally, even if the decision applied to this case and there was not ample evidence of premeditation and deliberation, Defendant would still not be afforded

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[3] Hereinafter, ROA indicates the Record on Appeal, previously on file with the Court. The first number refers to the volume, the last number refers to the page.

relief. The record reflects that the jury in Defendant's case found six aggravating factors. Even if three of the aggravators were discarded, that leaves three aggravators in tact.

First, Defendant was under a sentence of imprisonment when he committed the murders. During the penalty phase, the State called Howard Saxon, a state parole and probation officer, who verified that Defendant was on parole and under a sentence of imprisonment at the time he committed the murders.[4] *Rippo,* 113 Nev. at 1258. Therefore, this aggravator would clearly stand.

Second, Defendant was previously convicted of a felony involving the use or threat of violence to another person. Defendant's warrant of execution lists the felony as a 1982 Sexual Assault committed in the State of Nevada. Additionally, during the penalty phase, the jury heard testimony of the violent nature of this crime.[5] Even in light of *McConnell,* this aggravator would clearly stand.

Finally, the jury found that the murders committed by Defendant involved torture. This Court addressed the issue of torture in Defendant's direct appeal. It stated:

> "[T]here is evidence which would support a finding of 'murder by means of...torture' because the intentional infliction of pain is so much an integral part of these murders. Persons who taunt and torture their murder victims as part of the killing process will not be allowed to escape the murder-by-torture aggravating factor merely because the torturing is not the actual cause of death. There seems to be little doubt that when Rippo was shocking these victims with a stun gun, he was doing so for the purpose of causing them pain and terror and for no other purpose. Rippo was not shocking these women with a stun gun for the purpose of killing them but, rather, it would appear, with a purely "sadistic purpose." When we review the facts of this case and consider the entire episode as a whole—the strangulation and restraint, accompanied by the frightful, multiple blasts with a painful high voltage stun gun—we conclude that even though the stun gun shocks were not the cause of death, there is still evidence, under our

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[4] Defendant's warrant of execution states that the crime was a 1982 Sexual Assault committed in the State of Nevada.

[5] *See* 22 ROA 42-75.

> interpretation of murder perpetrated by means of torture, to support a jury finding that there was, as an inseparable ingredient of these murders, a 'continuum' or pattern of sadistic violence that justified the jury in concluding that these two murders were 'perpetrated by means of...torture.'"

Rippo, 113 Nev. at 1264.

Therefore, the torture aggravator would stand.

Even if three aggravators were to be struck, there remain three aggravating circumstances. This court recognized that the jury, during the penalty phase, found *no* mitigating circumstances. *Id.* at 1265. Weighing three aggravators against no mitigating circumstances would produce the same penalty the jury found with six aggravators. Therefore, Defendant's argument affords him no relief.

II.

DEFENDANT'S COUNSEL WAS NOT INEFFECTIVE

Defendant alleges numerous instances for which he contends "appellate counsel failed to provide reasonably effective assistance ... by failing to raise on appeal, or completely assert, all the available arguments supporting constitutional issues." Each will be addressed individually below. However, in Argument II of his Opening Brief, Defendant recites the burden of proof for a claim of ineffective assistance of counsel. The same will be addressed here.

The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. *Evitts v. Lucey*, 469 U.S. 395, 397, 105 S.Ct. 830, 836 837 (1985); *see also*, *Burke v. State,* 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). In order to demonstrate ineffective assistance of appellate counsel, the defendant must satisfy the two-prong test set forth by *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2065, 2068 (1984); *Williams v. Collins*, 16 F.3d 626, 635 (5th Cir. 1994); *Hollenback v. United States*, 987 F.2d 1272, 1275 (7th Cir. 1993); *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir. 1991); *Thomas v. State*, 120 Nev.Adv.Op. 7, 5-6, 83 P.3d 818, 823 (2004). Under this standard, the defendant must establish both that counsel's performance was

deficient and that the deficiency resulted in prejudice. *Strickland*, 466 U.S. at 687-688 and 694, 104 S.Ct. at 2065 and 2068. *Warden, Nevada State Prison v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the *Strickland* two-part test in Nevada). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" *Jackson v. Warden, Nevada State Prison*, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (*quoting McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970)). There is however a strong presumption that 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).

While the defendant has the ultimate authority to make fundamental decisions regarding his case, there is no constitutional right to "compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). In reaching this conclusion, the United States Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Id.* at 751, 752, 103 S.Ct. at 3313. 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.* 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.

Finally, in order to demonstrate that appellate counsel's alleged error was prejudicial; the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. *See Duhamel v. Collins*, 955 F.2d 962, 967 (5th Cir. 1992); *Heath*, *supra*, 941 F.2d at 1132.

Using this standard as a benchmark, it is clear that Defendant's instant claims are unfounded.

A. Counsel's Performance was not Deficient

This Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." *Burke v. State*, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). Indeed, on direct appeal in this case Defendant's counsel met this standard. Counsel filed a timely, comprehensive Opening Brief, supplemented by an equally substantive Reply, in which appellate counsel raised various meritorious claims including:

1. The trial court's failure to recuse itself and disclose a conflict of interest which allegedly tainted the proceedings.
2. The State's alleged failure to provide exculpatory information to the defense in a timely fashion.
3. Numerous instances of alleged prosecutorial misconduct.
4. Allegations that amendments of the charging document improperly prejudiced Defendant.
5. The allegation that the trial court improperly admitted evidence that a witness was threatened.
6. Allegations that the trial court improperly allowed admission of "bad acts" evidence.
7. Allegations that improper statements by the prosecution during closing argument in the guilt phase warranted reversal of Defendant's conviction.
8. A claim that cumulative error was sufficient to warrant a new trial.
9. Allegations that the use of overlapping and multiple use of the same facts as separate aggravating circumstances was reversible error.
10. Claims that improper statements by the prosecution during opening statement in the penalty phase warranted reversal.
11. Allegations that improper statements by the prosecution during closing argument in the penalty phase entitled Defendant to reversal.

12. Claims that the district court allowed improper admission of cumulative victim impact testimony.

13. Assertions that the district court utilized improper jury instructions.

14. Allegations that there was insufficient evidence to support a finding of "torture" as an aggravating circumstance.

Clearly, under the standards enunciated in both *Burke* and *Jones v. Barnes*, Defendant cannot demonstrate deficient performance simply because he now points to a number of claims he alleges appellate counsel *could* also have raised. While it is true this Court ultimately rejected Defendant's appeal (*See Rippo*, 113 Nev. 1239) merely because Defendant did not receive the favorable outcome he preferred, this result cannot be attributed to any deficiency on counsel's part. Clearly, Defendant's Opening and Reply Briefs contained what counsel considered the most meritorious of issues available for appeal and each was argued extensively and rigorously. Therefore, Defendant fails to demonstrate that counsel's performance was not reasonably effective.

B. Defendant Fails to Demonstrate Prejudice

Neither can Defendant demonstrate the alleged errors resulted in "prejudice" because none of the "omitted" issues Defendant now raises would have had a reasonable probability of success on appeal.

1. Claims of ineffective assistance of counsel are generally not appropriately raised on direct appeal

Although each of Defendant's claims is addressed and refuted in turn in the following sections, Defendant's allegations in grounds three, four, and five are based upon claims that appellate counsel was ineffective for "failing to raise or completely assert" on direct appeal numerous instances of ineffective assistance of trial counsel. However, each of these allegations fails because there was no reasonable probability that, even if appellate counsel had raised these issues, this Court would have entertained these claims on direct appeal.

This Court has generally declined to address claims of ineffective assistance of counsel on direct appeal unless there has already been an evidentiary hearing or where an evidentiary hearing would be unnecessary. *Pellegrini v. State*, *supra*; *See also, Feazell v. State*, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995); *Mazzan v. State*, 100 Nev. 74, 80, 675 P.2d 409, 413 (1984). Even when it is difficult to conceive of a reason for any of trial counsel's actions which would be consistent with effective advocacy, this Court has been hesitant to draw any final conclusions on the question of effectiveness of counsel on the basis of examination of the trial record alone. *Gibbons v. State*, 97 Nev. 520, 522, 634 P.2d 1214 (1981).

In *Gibbons*, the Court noted that trial counsel took numerous questionable actions which included, *inter alia,* waiving four of eight preemptory challenges which resulted in four jurors remaining seated who had expressed opinions concerning the defendant's guilt; failing to move for a change of venue under circumstances that appeared to call for such a motion; failing to object to the admission of the defendant's confession though there appeared to be substantial grounds for such an objection; calling the defendant to testify knowing he was taking a heavy dose of an anti-depressant drug; stating on the record, "we don't have a prayer in the world ... to fully cross examine the State's expert without our own expert" yet, after the court authorized employment and payment of a defense expert, counsel failed to employ such an expert; failing to proffer any ascertainable theory of defense; stating during the preliminary hearing that the defendant admitted shooting his father in law. *Id.* at 521-523. Yet, even in light of this record, the Court held the appropriate vehicle for the claim of ineffective assistance of counsel would be through post-conviction relief and not through appeal of judgment of conviction. *Id.* The court reasoned that it is possible that counsel could rationalize his performance at an evidentiary hearing and that if there is an evidentiary hearing there would be something more than conjecture for the Court to review. *Id.*

Therefore, because there had neither been an evidentiary hearing nor a showing that trial counsel's alleged errors were so egregious that an evidentiary hearing would have been unnecessary, each and every one of Defendant's instant claims that appellate counsel was ineffective for "failing to raise or completely assert" instances of alleged ineffective assistance of counsel on direct appeal are specious. Indeed all would have had virtually no reasonable probability of success.

While maintaining this position, each of the grounds raised by Defendant are nonetheless addressed in turn below as if this Court had set aside its long-standing rule and been inclined to entertain Defendant's claims of ineffective assistance of appellate counsel premised upon claims of ineffective assistance of trial counsel. Yet, even if Defendant's claims had survived the threshold barrier as set forth in *Gibbons*, none are successful on their merits.

III.

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR NOT RAISING THAT TRIAL COUNSEL ALLOWED DEFENDANT TO WAIVE HIS RIGHT TO A SPEEDY TRIAL

In ground three of his petition, Defendant claims appellate counsel should have raised the issue that trial counsel was ineffective for first, "insisting" that Defendant should waive his right to a speedy trial and then second, allowing some forty-six months to elapse prior to the commencement of trial. Defendant alleges that based on this delay, numerous witnesses were able to attain information about his crimes and in turn, fabricate evidence against him.

Clearly, this is not a claim that has a reasonable probability of success on appeal. Indeed, waiving the right to speedy trial in a capital murder case is a sound tactical decision on counsel's part as sixty days to prepare for trial would hardly be sufficient. This is especially true considering the substantial evidence the State maintained of Defendant's guilt. While it is true counsel sought several continuances, each instance was for a valid reason and calculated to assure Defendant received a

rigorous and effective defense. Furthermore, Defendant fails to support his contention that counsel "insisted" he waive his right to a speedy trial (and its inherent implication that Defendant wished to do otherwise) with anything other than his own self-serving allegations. *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). And, in fact, the record reflects that if any party was concerned over prejudice due to the delay, it was the State as demonstrated by its filing of a motion to expedite trial.

Moreover, Defendant similarly offers nothing more than his own speculation to bolster his contention that the delay resulted in numerous witnesses attaining information about his crimes which they subsequently used to fabricate evidence at trial. He does not point to any specific witnesses other than categorically complaining about "jailhouse snitches." Defendant does not recite any specific instances of conduct or any particular testimony that he demonstrates was fabricated. Most significantly, Defendant fails entirely to connect the witnesses' knowledge of his crimes with any cause or source other than he himself proffering the information to his fellow inmates. Clearly, Defendant's own mistake in judgment cannot be rationally translated into counsel's error. As the United States Supreme Court has articulated, "[i]nescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his." *United States v. White*, 401 U.S. 745, 752, 91 S.Ct. 1122, 1126 (1971).

Thus, counsel's strategy to waive the right to a speedy trial was sound and Defendant cannot shift accountability for what he told other inmates to counsel. As such, Defendant's claim that appellate counsel was remiss for failing to bring the claim on direct appeal is clearly without merit.

Further, at the evidentiary hearing on this matter, the district court judge stated that "you're asking defense counsel to be clairvoyant when they waived the 60-Day Rule. How are they going to anticipate there will be jailhouse snitches developed if

there is a delay?" (AA, page 000283). He goes on to say "to try to prepare a case, a defense for murder within 60 days is just rarely, if ever, done." (Id.) Therefore, appellate counsel was not ineffective for not raising this issue on appeal.

IV.

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ALLEGATION THAT TRIAL COUNSEL WAS DEFICIENT DURING THE GUILT PHASE FOR FAILING TO OBJECT TO THE USE OF A PHOTOGRAPH OF DEFENDANT

In ground IV(a), Defendant claims appellate counsel was ineffective for failing to "raise or completely assert all the available arguments" surrounding trial counsel's failure to object to the State's use of an "in custody" photograph of Defendant during the guilt phase of the trial. However, precisely because of trial counsel's decision not to object to the admission of the photograph, Defendant's claim had little chance of success on appeal.

"As a general rule, the failure to object, assign misconduct, or request an instruction, will preclude appellate consideration." *Garner v. State*, 78 Nev. 366, 373, 374 P.2d 525, 529 (1962); *Cook v. State*, 77 Nev. 83, 359 P.2d 483; *O'Briant v. State*, 72 Nev. 100, 295 P.2d 396 (1956); *Kelley v. State*, 76 Nev. 65, 348 P.2d 966 (1960); *State v. Moore*, 48 Nev. 405, 233 P. 523 (1925); *State v. Boyle*, 49 Nev. 386, 248 P. 48 (1926). However, where the errors are patently prejudicial and inevitably inflame or excite the passions of the jurors against the accused, the general rule does not apply. *Id.*; *see also Gallego v. State*, 117 Nev. 348, 23 P.3d 227, 239 (2001). The *Garner* Court further stated, "[i]f the issue of guilt or innocence is close, if the state's case is not strong, prosecutor misconduct will probably be considered prejudicial." *Lisle v. State*, 113 Nev. 540, 552, 937 P.2d 473, 480 - 481 (1997) (*quoting Garner*, 78 Nev. at 374, 374 P.2d at 530)(*cf. Lay v. State,* 110 Nev. 1189, 1194, 886 P.2d 448, 451 (1994) ("[W]here evidence of guilt is overwhelming, prosecutorial misconduct may be harmless error.").

Here, the admission of the photograph was neither plain error nor does Defendant establish prejudice and appellate counsel's decision to forego raising the claim on direct appeal was not unreasonable.

Defendant complains that the photograph was impermissible evidence of "prior bad acts." This is simply not the case. Introducing a picture of Defendant is not consistent with showing a prior criminal act, or criminal conduct, or even an act. It simply depicts how Defendant looked on a certain day and in this case, Defendant's appearance had changed considerably since the time of the murders.

NRS 48.045 provides, "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Thus, contrary to Defendant's contention that there was no relevant purpose for introduction of the photograph, clearly it was properly admitted for the purpose of identification.

Further, trial counsel was not ineffective for failing to object to admitting the photograph. Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." *Doleman v. State,* 112 Nev. 843, 846, 921 P.2d 280 (1996); *see also Howard v State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066; *State v. Meeker*, 693 P.2d 911, 917 (Ariz. 1984). Indeed, it is common trial strategy to withhold an objection when counsel does not wish to draw attention to a particular fact in evidence. Under these particular circumstances, clearly drawing attention to Defendant's more "dangerous" look and away from his clean-cut appearance in court would have served little value in ascertaining a favorable result from the jury. As such, trial counsel cannot be deemed ineffective for a reasonable tactical decision and it follows that this claim would have had little chance of success on appeal.

The district court judge stated at the evidentiary hearing that an objection to the

picture would not have been granted in his court. He said that if a picture was unduly gruesome or was not a fair representation of the Defendant, it would have been objectionable. But here, where there were no prison or jail markings on the picture, it would not be objectionable. Further, the defense would have an opportunity to show their own picture of Defendant. (AA, Volume II, page 000293). Therefore, appellate counsel was not ineffective in failing to raise this issue because it would likely have no probability of success on the merits.

Finally, the Defendant utterly fails to identify what photo he is objecting to. In fact, defense counsel admits he has not seen the actual photo[6] (Id.), nor does he have it in his possession. (AA, Volume II, page 000321). No one was able to definitively testify as to what the photo looked like, whether Defendant was in prison clothes, whether it was a head shot, whether there was a plate number in front of him, whether it had been redacted in any way. Because the Defendant has not produced the photo nor produced any reliable testimony regarding what the photo looked like, there is no cognizable issue before this Court.

V.

DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BECAUSE APPELLATE COUNSEL FAILED TO RAISE VARIOUS ALLEGATIONS THAT TRIAL COUNSEL WAS DEFICIENT DURING THE PENALTY PHASE.

In ground five, Defendant raises five distinct incidents of what he characterizes as ineffective assistance of counsel during the penalty phase. Defendant contends appellate counsel was similarly ineffective for either declining to raise the issues on appeal or completely assert all available arguments. As with Defendant's allegations in the guilt phase, and notwithstanding the *Gibbons* rule, each claim is addressed and its chances for success on appeal are refuted in turn.

A. No Objection to the Character Evidence Instruction

[6] At the evidentiary hearing on this matter, counsel for the State, Steve Owens, points out that none of the post-conviction petitions make it clear which photograph the Defendant objects to. (AA, Volume II, page 319).

In ground V(a), Defendant asserts that trial counsel was ineffective for failing to object to a jury instruction that he alleges was unconstitutional in that it "did not define and limit the use of character evidence by the jury." In turn, Defendant claims, albeit cursorily, that appellate counsel was ineffective for declining to raise the issue on appeal or "completely assert all available arguments." Similarly, in ground VI, Defendant also asserts that appellate counsel was ineffective for declining to raise what he characterizes as the unconstitutionality of the character evidence instruction. In the latter section, Defendant takes the opportunity to greatly elaborate on his claim, apparently attempting to establish that the error was so egregious, the failure to object should not have precluded appellate counsel from raising the issue on direct appeal. Because both ground V(a) and ground VI effectively raise the identical issue, both are refuted in section VI.

B. Mitigating Factors in the Jury Instructions.

In ground V(b), Defendant argues three distinct claims which he believes rise to the level of ineffective assistance of appellate counsel for "failing to raise on appeal or completely assert all the available arguments." First, Defendant claims that trial counsel should have offered a jury instruction enumerating Defendant's "specific" mitigating circumstances. Second, trial counsel should have objected to the instruction given which listed the statutory mitigating factors. Third, that trial counsel should have submitted a special verdict form listing the mitigating factors found by the jury. As with the preceding section, Defendant merely sets forth a cursory allegation that appellate counsel was ineffective for failing to raise the issue and elaborates upon this argument in ground VII. Again, the arguments set forth in both sections are refuted below in section VII.

C. Failure to Argue Specific Mitigating Circumstances or the Weighing Process Necessary before the Death Penalty May Be Considered During Closing Argument.

Defendant contends that trial counsel was ineffective because "not once during closing argument at the penalty hearing did either trial counsel submit the existence of any specific mitigating circumstances that existed on behalf of RIPPO." Again, Defendant claims appellate counsel was ineffective for failing to raise this issue on direct appeal. However, Defendant's claim is entirely belied by the record, and his contention is without merit.

During closing argument trial counsel did indeed argue mitigating circumstances including (1) that Defendant had an emotionally disturbed childhood (2) that he got lost in the juvenile system (3) that Defendant is a person who needs help which the prison system could provide and (4) that he has kept a clean record history in prison (24 ROA 118-121). 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)(*citing*, *Cooper v. Fitzharris*, 551 F.2d 1162, 1166 (9th Cir. 1977)).

In the nine mitigating factors Defendant claims in his appeal, he adds little to the mitigating circumstances counsel did in fact raise to the jury, except perhaps that Defendant was remorseful, that he was under the influence of drugs at the time of the murders and that Diana Hunt had received favorable treatment after testifying against Defendant. However, even these factors were clearly before the jury. Defendant himself exercised his right to allocution to express his remorse and the jury heard that he and one of the victims had injected morphine for recreational purposes. Defense counsel also clearly established Diana Hunt's testimony was a product of her plea agreement. Thus, trial counsel did not neglect to bring these factors to the jury's attention but chose not to specifically address them in his closing argument.

In fact, under the particular facts of this case, during his final communication with the jury, it was a sound strategy decision for trial counsel to avoid an overly

pretentious plea to save Defendant's life which could quite possibly result in offending the jurors by attempting to portray this man as a victim himself. Indeed, throughout the course of the trial, the jury had heard a plethora of evidence depicting how Defendant brutally committed the gruesome murders of two young women in the home of one of the victims. The jurors heard how Defendant planned to rob the victims, how he repeatedly used a stun gun, forced them into a closet, bound and gagged them and then ultimately strangled them to death. They heard how he then systematically cleaned up the crime scene including removing one victim's boots and pants to conceal his own blood. They heard how he told a friend that he had "choked the two bitches to death." The jury learned that on the evening of the murder, Defendant helped himself to one of the victims' car. He told a friend someone "had died" for the car. Defendant went on a shopping spree using a credit card belonging to one of the victims' boyfriend.

Thus, trial counsel was presented with an extremely delicate balancing act. That he chose to illuminate some details in his summation and leave others to be considered as part of the evidence as a whole was clearly a reasonable course. As such, the likelihood of a claim of ineffective assistance of counsel based on this issue would have scant chance of success on appeal. Therefore, appellate counsel was not remiss for failing to raise the claim to this Court in Defendant's direct appeal.

D. Failure to Object during the State's Closing Argument

Defendant alleges that appellate counsel was ineffective for failing to raise on appeal trial counsel's failure to object to a statement made by the prosecution during its closing argument. The prosecutor stated, "And I would pose the question now: Do you have the resolve, the courage, the intestinal fortitude, the sense of commitment to do your legal duty?" (Appellant's Opening Brief, page 29).

Again, it should be repeated that, "as a general rule, the failure to object … will preclude appellate consideration." *Garner v. State*, supra, 78 Nev. at 373, 374 P.2d at 529. However, where the errors are patently prejudicial and inevitably inflame or

excite the passions of the jurors against the accused, the general rule does not apply. *Id.* The *Garner* Court further stated, "[i]f the issue of guilt or innocence is close, if the state's case is not strong, prosecutor misconduct will probably be considered prejudicial." *Lisle v. State*, supra, 113 Nev. at 552, 937 P.2d at 480-81 (1997) (*cf. Jones v. State*, 113 Nev. 454, 469, 937 P.2d 55, 65 (1997) (likening the defendant to a "rabid animal" during closing argument at the penalty phase was misconduct, but the misconduct was harmless error in light of the overwhelming evidence of the defendant's guilt.)).

As Defendant correctly points out, in *Evans v. State*, 117 Nev. 609, 28 P.3d 498 (2001), this Court found that asking the jury if it had the "intestinal fortitude" to do its "legal duty" was highly improper.[7] *Id.* at 515 (*citing United States v. Young*, 470 U.S. 1, 18, 105 S.Ct. 1038 (1985) (to exhort the jury to "do its job"; that kind of pressure ... has no place in the administration of criminal justice)). However, the question is whether the prosecutor's improper remarks prejudiced the defendant by depriving him of a fair penalty hearing. *Id.* (*citing Jones v. State, supra*).

In *Evans*, the "intestinal fortitude" comment was not the only objectionable statement made during the State's closing argument. Additionally, the prosecutor also "deplored 'an era of mindless, indiscriminate violence' perpetrated by persons who 'believe they're a law unto themselves.'" He continued to argue that the defendant "is one of these persons. This is his judgment day." *Evans*, 28 P.3d at 514. In determining whether the remarks so prejudiced the defendant that he was deprived a fair penalty hearing, the court found "considered alone, perhaps they did not, but the

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[7] Although this court noted and affirmed a similar argument in *Castillo v. State,* 114 Nev. 271, 279-80, 956 P.2d 103, 109 (1998) *corrected by McKenna v. State,* 114 Nev. 1044, 1058 n. 4, 968 P.2d 739, 748 n. 4 (1998), when the prosecutor stated, "The issue is do you, as the trial jury, this afternoon have the resolve and the intestinal fortitude, the sense of commitment to do your legal and moral duty, for whatever your decision is today, and I say this based upon the violent propensities that Mr. Castillo has demonstrated on the streets..." it addressed only the prosecutor's argument on future dangerousness, not the reference to the jury's "duty."

prosecutor erred further." *Id.* at 515. Indeed, it was not until the court determined the prosecutor incorrectly informed the jurors that they did not "have to wait until a certain point in the deliberation" to consider evidence other than aggravating and mitigating circumstances to determine if the penalty of death was appropriate, did it find prejudice. *Id.* at 516.

Clearly, unlike the compounded errors in *Evans*, in this case Defendant was not so prejudiced that he was deprived of a fair penalty hearing. Indeed, even if the statement was error, "any error caused by these comments was harmless in light of the overwhelming evidence against Rippo." *Rippo*, 113 Nev. at 1255.

Further, at the evidentiary hearing on this matter, the district court judge inquired "how would defense counsel know they would have a legal ground to object without the benefit of the Supreme Court's determination?"[8] (AA, page 000303). The court further stated that objecting at closing argument is a rather dangerous situation that looks like counsel is hiding the ball. (AA, page 000304). Therefore, trial counsel was not ineffective for not objecting to this comment and certainly appellate counsel was not ineffective for not raising this on direct appeal because of its slight probability of success.

E. No Motion to Strike Two Aggravating Factors

Finally, Defendant argues that appellate counsel was ineffective for failing to raise the issue that trial counsel should have moved to strike two aggravating circumstances that were based on Defendant's 1982 conviction and sentence for the sexual assault of Laura Martin. This claim is clearly frivolous because the record reflects that trial counsel did in fact file a pre-trial motion to strike these two aggravating factors. (2 ROA 213). Furthermore, even if Defendant's claim were

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[8] There was a lengthy discussion regarding the *Evans* decision coming down in 2001, and Defendant's trial being held in 1996. Further, when Mr. Schieck testified, the court stated: "What you're saying is, that this was recognized as a legitimate argument in 2001, why wasn't it recognized five years earlier. If that's going to be our standard we'll never get anything accomplished, because every time there's a new decision or something, we can just roll it all back and say 'why didn't we think about this five years ago?' What kind of appellate issue is that?" (AA, pages 000350-000351).

based on any fact, the *Strickland* 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." *Donovan*, *supra,* 94 Nev. at 675, 584 P.2d at 711. As discussed below, there was little chance of successfully striking these two aggravating factors. Indeed, even if Defendant's claim were more properly framed in terms of claiming ineffective assistance of appellate counsel for not raising this issue on direct appeal, Defendant's contention would still fail because there was no reasonable probability the claim would survive review.

Defendant's allegation arises from Instruction No. 9, in which the jury was instructed it may consider as aggravating circumstances:

> One: The murder was committed by a person under sentence of imprisonment, to wit: Defendant was on parole for a Nevada conviction for the crime of sexual assault in 1982;
>
> Two: The murder was committed by a person who was previously convicted of a felony involving the use of threat or violence to a person of another. Defendant was convicted of sexual assault, a felony, in the state of Nevada in 1982.

Clearly appellate counsel was not remiss for declining to argue these aggravators were improper. 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. In this particular case, at the time of Defendant's appeal, it was a wise tactic to omit this claim in lieu of other issues that were raised.

First, there was clear evidence presented that Defendant was on parole for the 1982 sexual assault and from the brutal nature of the assault, it is entirely an understatement to characterize Defendant's crime as merely "involving the use of threat or violence to a person of another." Thus, there was no basis for such a motion. While Defendant argues that defense counsel should have been compelled "to utilize

any avenue of attack available against the aggravators" surely he does not suggest counsel must also pursue claims which have absolutely no basis in either law or fact.

However, Defendant appears to argue that the aggravators should have been stricken because the guilty plea that led to Defendant's conviction was not voluntarily and knowingly entered and involved a "woefully inadequate" plea canvass.[9] Yet, Defendant offers nothing more than his own bare allegation to support not only this claim, but also his claim that he "brought this to the attention of trial counsel but no effort was made to invalidate the two aggravators." Clearly, this is not a sufficient showing. "It is the appellant's responsibility to provide the materials necessary for this court's review." *Byford v. State*, 116 Nev. 215, 238, 994 P.2d 700 (2000) (*citing Jacobs v. State,* 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975)). Defendant here has failed to meet his burden.[10]

And, even if appellate counsel did err, Defendant is nonetheless unable to demonstrate prejudice.

NRS 175.554(3) provides:

> The jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

In this case, the jury found six aggravating and no mitigating circumstances sufficient to outweigh the aggravators. Therefore, even if the two contested aggravators were stricken, the result would not have been different. Defendant offers nothing more than his own speculation that "[a]s the State improperly stacked aggravating circumstances the removal of the prior conviction would have eliminated

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[9] In *State v. Freese*, 116 Nev. 1097, 13 P.3d 442 (2000), the Nevada Supreme Court held that a failure to conduct a ritualistic oral canvass does not mandate a finding of an invalid plea. Instead, the Court found that an appellate court should not invalidate a plea as long as the totality of the circumstances, as shown by the record, demonstrates that the plea was knowingly and voluntarily made and that the defendant understood the nature of the offense and the consequences of the plea. Id. at 448.

[10] Further, Defendant has already attempted to appeal his plea canvass in the sexual assault case, and such attempt was unsuccessful. 111 Nev. 1730, 916 P.2d 212 (1995), Docket #24687. *See also,* 2 ROA 424.

the two most damaging aggravators." The State disagrees. Clearly, the four remaining aggravating circumstances were at least as "damaging":

> Three: The murder was committed while the person was engaged in the commission of and/or an attempt to commit any burglary and the person charged (a) killed the person murdered; or (b) knew that life would be taken or lethal force used, or acted with reckless indifference for human life.
>
> Four: The murder was committed while the person was engaged in the commission of and/or an attempt to commit any kidnapping and the person charged (a) killed the person murdered; or (b) knew that life would be taken or lethal force used; or (c) acted with reckless indifference for human life.
>
> Five: The murder was committed while the person was engaged in the commission of or in an attempt to commit any robbery, and the person charged (a) killed the person murdered; or (b) knew that life would be taken by or lethal force used; or (c) acted with reckless indifference for human life.
>
> Six: The murder involved torture.

Thus, the record clearly belies Defendant's contention that "[t]he number of aggravators ... unduly swayed the jury. If one aggravator was enough to impose the death sentence, then surely six meant death was the only answer."

Further, at the evidentiary hearing in the matter, the district court judge stated that it was his understanding you could use the same act to satisfy two aggravating factors. He said, "If somebody throws a bomb at a fire truck while they are fighting a fire there's an aggravator of acting in a way that could endanger more than one person, two or more people, which is an aggravator. Attacking a fireman in the performance of his duties is another aggravator. You've got one act." (AA, page 000305). Based on all of the foregoing reasons, appellate counsel was clearly not ineffective for failing to raise Defendant's claim on direct appeal.

VI.

THE INSTRUCTION GIVEN AT THE PENALTY HEARING APPRAISED THE JURY OF THE PROPER USE OF CHARACTER EVIDENCE

Defendant asserts that appellate counsel was ineffective for declining to raise what he characterizes as the unconstitutionality of the character evidence instruction. Defendant attempts to establish that the error was so egregious that the failure to object should not have precluded appellate counsel from raising the issue on direct appeal. As discussed above, because both ground V(a) and ground VI effectively raise the identical issue, both are refuted in this section.

Indeed, appellate counsel did not raise this issue on direct appeal. However, its omission does not rise to the level of ineffective assistance because Defendant is unable to demonstrate that had it been raised, there was a reasonable probability of success.

First, trial counsel's failure to object precluded review on direct appeal. It is well-settled that "[t]he failure to object or to request special instruction to the jury precludes appellate consideration." *Etcheverry v. State*, 107 Nev. 782, 784-785, 821 P.2d 350, 351 (1991) (*quoting McCall v. State,* 91 Nev. 556, 557, 540 P.2d 95, 95 (1975)) (*citing State v. Fouquette,* 67 Nev. 505, 221 P.2d 404 (1950)); *see also*, *Clark v. State,* 89 Nev. 392, 513 P.2d 1224 (1973); *Cook v. State,* 77 Nev. 83, 359 P.2d 483 (1961); *State v. Switzer*, 38 Nev. 108, 110, 145 P. 925 (1914); *State v. Hall*, 54 Nev. 213, 235, 13 P.2d 624 (1932); *State v. Lewis,* 59 Nev. 262, 91 P.2d 820, 823 (1939) (If defendant had felt that a more particular instruction should have been given, he should have requested it. This he did not do, and cannot now be heard to complain of the lack of such instruction.).

Thus, in this case, appellate counsel's decision to forego raising a complaint related to trial counsel's failure to object to the instruction, and perhaps diluting the impact of the more meritorious claims that were raised, was clearly sound strategy. This is especially true in light of the fact, and contrary to Defendant's claim in ground VI, that there was nothing improper about the manner in which the jury was instructed.

During the penalty phase, the jury was instructed as follows:

Instruction No. 6
In the penalty hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense and any other evidence that bears on the defendant's character. Hearsay is admissible in a penalty hearing.

Instruction No. 7
The State has alleged that aggravating circumstances are present in this case. The defendants have alleged that certain mitigating circumstances are present in this case. It shall be your duty to determine:

A: Whether an aggravating circumstance or circumstances are found to exist; and

B: Whether a mitigating circumstance or circumstances are found to exist; and

C: Based upon these findings whether a defendant should be sentenced to life imprisonment or death. The jury may impose a sentence of death **only if:**

One: The jurors unanimously … find at least one aggravating circumstance has been established beyond a reasonable doubt; and

Two: The jurors unanimously find that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

Otherwise, the punishment imposed shall be imprisonment in the state prison with or without the possibility of parole.

A mitigating circumstance itself need not be agreed to unanimously; that is, any one juror can find a mitigating circumstance without the agreement of any of the other jurors.

The entire jury must agree unanimously, however, as to whether the aggravating circumstances outweigh the mitigating circumstances or whether the mitigating circumstances outweigh the aggravating circumstances.

Instruction No. 8
The law does not require the jury to impose the death penalty under any circumstances, even when the aggravating circumstances outweigh the mitigating circumstances; nor is the defendant required to establish any mitigating circumstances in order to be sentenced to less than death.

Instruction No. 9
You are instructed that **the following factors are circumstances by which murder of the first degree may be aggravated:**

One: The murder was committed by a person under sentence of imprisonment, to wit: Defendant was on parole for a Nevada conviction for the crime of sexual assault in 1982;

Two: The murder was committed by a person who was previously convicted of a felony involving the use of threat or violence to a person of another. Defendant was convicted of sexual assault, a felony, in the state of Nevada in 1982.

Three: The murder was committed while the person was engaged in the commission of and/or an attempt to commit any burglary and the person charged (a) killed the person murdered; or (b) knew that life would be taken or lethal force used, or acted with reckless indifference for human life.

Four: The murder was committed while the person was engaged in the commission of and/or an attempt to commit any kidnapping and the person charged (a) killed the person murdered; or (b) knew that life would be taken or lethal force used; or (c) acted with reckless indifference for human life.

Five: The murder was committed while the person was engaged in the commission of or in an attempt to commit any robbery, and the person charged (a) killed the person murdered; or (b) knew that life would be taken by or lethal force used; or (c) acted with reckless indifference for human life.

Six: The murder involved torture.

Additionally, Instructions Numbers 16 and 17 explained that mitigating circumstances need not rise to the level of a legal justification and also enumerated seven (7) circumstances which could be considered mitigating factors. Number 7 on this list was a "catch all" circumstance allowing the jury to consider *any* mitigating circumstance. Instruction 18 provided that the State has the burden to establish any aggravating factors beyond a reasonable doubt. Instruction 19 then defined reasonable doubt. It was only then that Instruction 20, which Defendant now contests, was given:

> The jury is instructed that in determining the appropriate penalty to be imposed in this case, that it may consider all evidence introduced and instructions given at both the penalty hearing phase of these proceedings, and at the trial of this matter.

(24 ROA 81-95).

Thus, the jury was indeed instructed to first consider and weigh only the aggravating and mitigating circumstances prior to determining if death was an appropriate sentence. The jurors were further instructed as to what statutorily

constitutes aggravating circumstances. Then, and only then, was the jury directed to consider "other matter" evidence.

As Defendant points out, because of the gravity of the circumstances surrounding the imposition of a penalty of death, the Nevada Supreme Court, in *Evans v. State*, *supra,* set forth specific language which it directed the district court to use when instructing a jury during a capital sentencing proceeding. In *Evans*, the court stated:

> For future capital cases, we provide the following instruction to guide the jury's consideration of evidence at the penalty hearing: In deciding on an appropriate sentence for the defendant, you will consider three types of evidence: evidence relevant to the existence of aggravating circumstances, evidence relevant to the existence of mitigating circumstances, and other evidence presented against the defendant. You must consider each type of evidence for its appropriate purposes.
>
> In determining unanimously whether any aggravating circumstance has been proven beyond a reasonable doubt, you are to consider only evidence relevant to that aggravating circumstance. You are not to consider other evidence against the defendant.
>
> In determining individually whether any mitigating circumstance exists, you are to consider only evidence relevant to that mitigating circumstance. You are not to consider other evidence presented against the defendant.
>
> In determining individually whether any mitigating circumstances outweigh any aggravating circumstances, you are to consider only evidence relevant to any mitigating and aggravating circumstances. You are not to consider other evidence presented against the defendant.
>
> If you find unanimously and beyond a reasonable doubt that at least one aggravating circumstance exists and each of you determines that any mitigating circumstances do not outweigh the aggravating, the defendant is eligible for a death sentence. At this point, you are to consider all three types of evidence, and you still have the discretion to impose a sentence less than death. You must decide on a sentence unanimously.
>
> If you do not decide unanimously that at least one aggravating circumstance has been proven beyond a reasonable doubt or if at least one of you determines that the mitigating circumstances outweigh the aggravating, the defendant is not eligible for a death sentence. Upon determining that the defendant is not eligible for death, you are to consider all three types of evidence in determining a

> sentence other than death, and you must decide on such a sentence unanimously.

Id. at 516-17.

It cannot be overlooked that the *Evans* court specifically and unequivocally intended only prospective application of the mandate. Furthermore, it is equally clear that while the language of the instructions given in this case do not mimic the instruction set forth by *Evans* precisely, the fundamental nature and directive of the instruction is indeed covered and conveyed.

Finally, Defendant fails to demonstrate, by anything other than pure speculation, that the jury did not in fact follow the court's instruction. Indeed, the record reflects that the jurors found the State had established six aggravating circumstances beyond a reasonable doubt and that these factors outweighed the mitigating circumstances.

Therefore, because there was clearly no chance for success on appeal, appellate counsel's decision to forego raising this issue was not only well within the realm of "reasonably effective" assistance but was laudable.

VII.

DEFENDANT'S SENTENCE IS VALID BECAUSE THE JURY WAS GIVEN A STATUTORY LIST OF MITIGATING CIRCUMSTANCES AND DESPITE THE FACT THE JURY WAS NOT GIVEN A SPECIAL VERDICT FORM TO LIST MITIGATING FACTORS

Defendant argues three distinct claims which he believes rise to the level of ineffective assistance of appellate counsel for "failing to raise on appeal or completely assert all the available arguments." First, Defendant claims that trial counsel should have offered a jury instruction enumerating Defendant's "specific" mitigating circumstances. Second, trial counsel should have objected to the instruction given which listed the statutory mitigating factors. Third, that trial counsel should have submitted a special verdict form listing the mitigating factors found by the jury. Again, the arguments set forth in section V(b) and section VII are refuted below.

As a threshold matter, the principle that "[t]he failure to object or to request special instruction to the jury precludes appellate consideration" *Etcheverry v. State*, supra, 107 Nev. at 784-85, 821 P.2d at 351, is similarly applicable to each of Defendant's claims in this section.

A. No offer of a jury instruction enumerating specific mitigating circumstances.

Appellate counsel was judicious in not raising on direct appeal the issue of trial counsel's declination to offer a jury instruction enumerating specific mitigating factors based upon the chances that this issue would succeed on direct appeal.

The absence of instructions on particular mitigating factors does not violate the Eighth and Fourteenth Amendments. *Buchanan v. Angelone*, 522 U.S. 269, 275, 118 S.Ct. 757, 761 (1998). In *Buchanan*, the United States Supreme Court noted that its cases established that a sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. *Id.* at 276-77, 118 S.Ct. at 761- 62 (*citing Penry v. Lynaugh,* 492 U.S. 302, 317-18, 109 S.Ct. 2934, 2946-947 (1989); *Eddings v. Oklahoma,* 455 U.S. 104, 113-14, 102 S.Ct. 869, 876-77 (1982); *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-965 (1978)). However, the State may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence. *Id.*; *see also, Johnson v. Texas,* 509 U.S. 350, 362, 113 S.Ct. 2658, 2666 (1993); *Franklin v. Lynaugh,* 487 U.S. 164, 181, 108 S.Ct. 2320, 2331 (1988). The "consistent concern" has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence. *Id.* But there is no mandate that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence. *Id.* And indeed, the line of case law addressing this issue suggests that complete jury discretion is constitutionally permissible. *See Tuilaepa v. California*, 512 U.S. 967, 971, 978-79, 114 S.Ct. 2630, 2638-239 (1994) (noting that at the selection phase, the state is not confined to

submitting specific propositional questions to the jury and may indeed allow the jury unbridled discretion); *Zant v. Stephens,* 462 U.S. 862, 875, 103 S.Ct. 2733, 2741-742 (1983), (rejecting the argument that a scheme permitting the jury to exercise "unbridled discretion" in determining whether to impose the death penalty after it has found the defendant eligible is unconstitutional).

This Court has adopted the United States Supreme Court's rationale without imposing any higher constitutional hurdle to overcome. *See, Byford v. State*, 116 Nev. 215, 238, 994 P.2d 700, 715 (2000) (in the absence of a jury instruction which includes specific mitigating circumstances, so long as the defendant is not precluded from presenting his theories of mitigation, such as during closing argument, there is no constitutional violation).

Therefore, because there was no proffered jury instruction and because there is no authority supporting Defendant's claim he is constitutionally guaranteed an instruction including the specific mitigating circumstances of his case, he fails to demonstrate he was prejudiced by appellate counsel's decision not to raise this issue on direct appeal.

At the evidentiary hearing on this matter, trial counsel stated that it was absolute strategy to not give specific mitigating factors. He stated that he didn't want to limit the jury in any way as to what a mitigating factor is, and if he gave them a list, they may think those are the only mitigating factors. He wanted to keep the area of mitigation wide open, so he felt an instruction that said *anything* could be a mitigating factor was much better. (AA, page 000302). This is exactly the type of strategy decision that cannot be questioned on a second look. Therefore, appellate counsel was not ineffective for not raising it, as it had little probability of success on the merits.

B. No objection to the instruction given

Similarly, there was no probability of success on direct appeal for the claim that trial counsel's failure to object to the jury instruction enumerating statutory mitigating circumstances equated to ineffective assistance of counsel. Thus, appellate counsel was not remiss for failing to raise the issue.

The instruction given at trial mirrored the language of NRS 200.035 which provides:

> Murder of the first degree may be mitigated by any of the following circumstances, even though the mitigating circumstance is not sufficient to constitute a defense or reduce the degree of the crime:
>
> 1. The defendant has no significant history of prior criminal activity.
> 2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
> 3. The victim was a participant in the defendant's criminal conduct or consented to the act.
> 4. The defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.
> 5. The defendant acted under duress or under the domination of another person.
> 6. The youth of the defendant at the time of the crime.
> 7. Any other mitigating circumstance.

The United States Supreme Court has held that, while the defendant is not limited to the statutory mitigating circumstances, the "catchall" instruction as set forth in NRS 200.035(7) is sufficient to protect a defendant's constitutional rights.

In *Buchanan v. Angelone*, *supra*, the Court held that the entire context in which the instructions are given must be considered in determining whether reasonable jurors would be led to believe that all evidence of petitioner's background and character could be considered in mitigation. *Id.* at 277-78, 118 S.Ct at 762; *see also*, *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 1197-198 (1990).

As in this case, the *Buchanan* Court found no constitutional violation when, even though specific mitigating circumstances were not enumerated in jury instructions, but where the jury was instructed (1) it could base its decision on "all the evidence" (2) that the jurors were informed that when they found an aggravating factor proved beyond a reasonable doubt they *may* fix the penalty at death (3) but if they found all the evidence justified a lesser sentence then they *shall* impose a life sentence and (4) there were no express constraints on how they could consider mitigating circumstances. *Id.* Moreover, in *Boyde*, the court considered the validity of an instruction listing eleven factors the jury was to consider in determining punishment and found a "catchall factor" allowing consideration of "[a]ny other circumstance" to be sufficient. *Boyde v. California*, 494 U.S. 373-74, 870, 110 S.Ct. 1190, 1194-1195 (1990).

Similarly, while maintaining the mandates of NRS 175.554, which requires the court "shall also instruct the jury as to the mitigating circumstances alleged by the defense upon which evidence has been presented," this Court has recognized the pertinent inquiry into the sufficiency of an instruction in a capital case is to be based upon what the reasonable juror would understand. *See e.g., Riley v. State*, 107 Nev. 205, 217, 808 P.2d 551, 558- 59 (1991)(The word "may" in the context of a capital sentencing instruction would be commonly understood by reasonable jurors as a permissive word that does not mandate a particular action. Thus, the jury was properly informed that the imposition of a death sentence was not compulsory, even if aggravating circumstances outweighed mitigating circumstances).

In this case, when all of the instructions are taken together, including the "catchall" that the jury could consider "any mitigating factor" it is highly improbable that the reasonable juror would simply ignore Defendant's extensive proffer of mitigating evidence during the penalty phase.

Moreover, in *Boyde, supra,* the United States Supreme Court held that the appropriate standard for determining whether jury instructions satisfy constitutional

principles was "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.,* at 380, 110 S.Ct., at 1198; *see also Johnson, supra,* 509 U.S. at 367-368, 113 S.Ct., at 2669. In this case, the record clearly reflects that the jury found the State had established six aggravating circumstances beyond a reasonable doubt. The jurors were unequivocally instructed that no mitigating circumstance could outweigh any aggravator and that there had to be unanimous agreement or else a sentence of life must be imposed. Indeed, Defendant fails to demonstrate any reasonable likelihood that the jury misapplied the contested instruction and did not consider and weigh all mitigating circumstances.

Thus, there was no basis for an objection by trial counsel and indeed, appellate counsel's strategy to forego this claim on direct appeal was a sound tactical decision.

C. No submission of a special verdict form.

Defendant's final claim on this issue is that appellate counsel failed to raise the argument on direct appeal that trial counsel was ineffective for not submitting a special verdict form listing mitigating circumstances found by the jury. However, this claim likewise fails.

Defendant fails to cite any statutory or case law authority to support his contention that trial counsel's decision not to submit a special verdict form for the purpose of listing mitigating circumstances violated his Sixth Amendment guarantee to effective assistance of counsel. Indeed, this Court has held that the trial court is not obligated to grant a defendant's request for such a special verdict form and the sentencer in a capital penalty hearing is not constitutionally or statutorily required to make such specific findings. *Servin v. State*, 59 Nev. 262, 32 P.3d 1277, 1289 (2001) (*citing,* NRS 175.554(4); *Rook v. Rice,* 783 F.2d 401, 407 (4th Cir.1986)); *see also Rogers v. State,* 101 Nev. 457, 469, 705 P.2d 664, 672 (1985) (rejecting claim that district court erred by not providing jury with form or method for setting forth findings of mitigating circumstances).

Thus, trial counsel's performance can hardly be deemed to have fallen below the "reasonably effective" standard and as such, appellate counsel's decision to forego the claim on direct appeal was similarly reasonable.

VIII.

THE CONSTITUTIONALITY OF NEVADA'S PROCEDURES FOR ADMISSION OF VICTIM IMPACT TESTIMONY IS BARRED BY LAW OF THE CASE

In ground VIII, Defendant alleges appellate counsel was ineffective for "failing to raise or assert all available arguments supporting constitutional issues raised" in his claim that Nevada's statutory scheme and case law fails to properly limit the introduction of victim impact testimony. However, this claim is barred by the doctrine of the law of the case and entirely belied by the record.

Where an issue has already been decided on the merits by this Court, the Court's ruling is law of the case, and the issue will not be revisited. *Pellegrini, supra; see also, McNelton, supra*; *Hall, supra*; *Valerio, supra; Hogan, supra.* The law of a first appeal is the law of the case in all later appeals in which the facts are substantially the same; this doctrine cannot be avoided by more detailed and precisely focused argument. *Hall, supra*; *McNelton, supra*; *Hogan, supra.*

In this case, on direct appeal, Defendant argued that the "cumulative and excess victim impact testimony should not have been allowed." This Court rejected the claim finding:

> Questions of admissibility of testimony during the penalty phase of a capital trial are largely left to the trial judge's discretion and will not be disturbed absent an abuse of discretion. *Rippo v. State, supra* 113 Nev. at 1261, 946 P.2d at 1031 (*citing Smith v. State,* 110 Nev. 1094, 1106, 881 P.2d 649, 656 (1994)). A jury considering the death penalty may consider victim-impact evidence as it relates to the victim's character and the emotional impact of the murder on the victim's family. Id. (*citing, Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991); *Homick v. State,* 108 Nev. 127, 136, 825 P.2d 600, 606 (1992); *also* NRS 175.552).

> Five witnesses testified as to the character of the victims and the impact the victims' deaths had on the witnesses' lives and the lives of their families.
>
> We conclude that each testimonial was individual in nature, and that the admission of the testimony was neither cumulative nor excessive. Thus, we conclude that the district court did not abuse its discretion in allowing all five witnesses to testify. Id.

Because this issue was raised and rejected on direct appeal, Defendant's complaint here appears to be that appellate counsel failed to "assert all available arguments" supporting this claim. However, it must be noted that Defendant merely sets forth various case law in his petition but he fails entirely to make any specific factual allegations indicating where he believes appellate counsel's argument on direct appeal fell short. As such, his bare allegations are not sufficient to entitle him to relief.

Defendant does appear to imply that appellate counsel should be faulted for failing to challenge the constitutionality of Nevada's death penalty scheme as failing to limit the introduction of victim impact testimony during the penalty phase proceedings. Clearly, this is the same issue appellate counsel did indeed raise on direct appeal only here Defendant dresses it up "in different clothing." *See*, *Evans, supra.*

However, even if the issue were validly raised in his instant petition, Defendant's claim that Nevada law fails to limit the admission of victim impact testimony lacks merit and as such, appellate counsel's strategy to limit the argument to the particular facts of Defendant's case was reasonable.

For instance, in rejecting Defendant's claim, this Court further noted:

> Three of the witnesses referred to the brutal nature of the crime. *Rippo*, *supra* 113 Nev. at 1261, 946 P.2d at 1031. The State instructed the family members not to testify about how heinous the crimes were, and the district court apparently relied, in part, on these instructions in allowing the victim-impact testimony. Thus, the testimony, insofar **as it described the nature of the victims' deaths went beyond the boundaries set forth by the State**. *Id.* at 1262, 946 P.2d at 1031 (emphasis added).

Thus, clearly Defendant's claim that Nevada's capital sentencing scheme imposes "no limits on the presentation of victim impact testimony" is wholly without merit. Therefore, even if appellate counsel had delved further into the issue, claiming unconstitutionality of the sentencing structure in its entirety, there was scant chance such a claim would have survived appellate review.

IX.

THERE IS WELL-SETTLED PRECEDENT THAT NEVADA'S PREMEDITATION AND DELIBERATION INSTRUCTION IS CONSTITUTIONAL

In ground IX, Defendant alleges the "stock jury instruction given in this case defining premeditation and deliberation necessary for first degree murder" was constitutionally violative. Defendant contends that appellate counsel was ineffective for declining to raise the issue on direct appeal. However, Defendant's claim is without merit because based on well-settled precedent, there was no reasonable probability of success.

The contested instruction stated:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing. Premeditation need not be for a day, an hour or even a minute. It may be instantaneous as successive thoughts of the mind. For if a jury believes from the evidence that the act constituting the killing had been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

As Defendant correctly points out, in *Byford*, supra, the propriety of a *Kazalyn*[11] instruction was addressed. While this Court rejected the argument as a basis for any relief for the defendant ("We conclude that the evidence in this case is clearly sufficient to establish deliberation and premeditation on Byford's part.") this Court

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[11] *Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992).

recognized that the instruction itself raised a "legitimate concern." *Byford*, supra, 116 Nev. at 233, 994 P.2d at 712. The *Byford* Court stated:

> The *Kazalyn* instruction and some of this court's prior opinions have underemphasized the element of deliberation. The neglect of "deliberate" as an independent element of the *mens rea* for first-degree murder seems to be a rather recent phenomenon. Before *Kazalyn,* it appears that "deliberate" and "premeditated" were both included in jury instructions without being individually defined but also without "deliberate" being reduced to a synonym of "premeditated." *See, e.g., State of Nevada v. Harris*, 12 Nev. 414, 416 (1877); *Scott v. State,* 92 Nev. 552, 554 n. 2, 554 P.2d 735, 737 n. 2 (1976). We did not address this issue in our *Kazalyn* decision, but later the same year, this court expressly approved the *Kazalyn* instruction, concluding that "deliberate" is simply redundant to "premeditated" and therefore requires no discrete definition. *See Powell v. State,* 108 Nev. 700, 708-10, 838 P.2d 921, 926-27 (1992), *vacated on other grounds by* 511 U.S. 79, 114 S.Ct. 1280 (1994). *Citing Powell,* this court went so far as to state that "the terms premeditated, deliberate and willful are a single phrase, meaning simply that the actor intended to commit the act and intended death as the result of the act." *Greene v. State,* 113 Nev. 157, 168, 931 P.2d 54, 61 (1997). We conclude that this line of authority should be abandoned. By defining only premeditation and failing to provide deliberation with any independent definition, the *Kazalyn* instruction blurs the distinction between first- and second-degree murder. *Id.* at 234-35, 994 P.2d at 713.

This court then proceed to set forth instructions for use by the district courts in cases where defendants are charged with first-degree murder based on willful, deliberate, and premeditated killing. *Id.* at 236, 994 P.2d at 714.

Now, Defendant appears to argue that even though at the time of his penalty hearing, *Kazalyn* and its progeny were valid authority, appellate counsel was nonetheless ineffective for failing to raise an issue that even this Court acknowledged had been inconsistently interpreted and applied. *Id.* at 235, 994 P.2d at 713. However, the *Byford* court made two specific findings which defy Defendant's claim.

First, under *Byford*, even an improper instruction will not justify reversal when the evidence of guilt is overwhelming and second, the holding is to be applied prospectively only. *Id.* at 233, 994 P.2d at 712; *see also Bridges v. State*, 116 Nev. 752, 762-63, 6 P.3d 1000, 1008 (2000); *Leonard v. State*, 117 Nev. 53, 74-76, 17 P.3d

397, 410 – 412 (2001); *Garner, supra, 116 Nev. at 789, 6 P.3d at 1025, (overruled on other grounds by Sharma v. State,* 118 Nev. 648, 56 P.3d 868 (2002)); *Evans, supra.*

Thus, because the evidence of Defendant's guilt was overwhelming (*see Rippo, supra*, 113 Nev. at 1255, 946 P.2d at 1027) even if appellate counsel had raised the issue, like the defendant in *Byford*, the claim would not have warranted relief. Moreover, because Defendant's appeal was dismissed well before the *Byford* ruling, he could not have benefited from this Court's ruling in any case. Therefore, Defendant's claim that appellate counsel was ineffective for failing to raise this issue on direct appeal is without merit and should be dismissed.

X.

THIS COURT'S APPELLATE REVIEW OF DEATH PENALTY CASES IS CONSTITUTIONAL

In ground X, Defendant alleges that appellate counsel was ineffective for failing to raise on appeal or assert all available arguments supporting his contention that "the opinion affirming RIPPO's conviction and sentence provides no indication that the mandatory review was fully and properly conducted in this case."

This claim is frivolous. There is absolutely no basis in either law or fact to support an allegation that appellate counsel was deficient for not raising on direct appeal this Court's alleged inadequate review of his direct appeal.

XI.

THE RACIAL COMPOSITION OF DEFENDANT'S JURY WAS CONSTITUTIONAL

In ground XI, Defendant claims that appellate counsel was ineffective because he failed to raise what he characterizes as the unconstitutional racial composition of the jury. Clearly, this claim lacks merit because it had virtually no chance of success on appeal.

Both the Fourteenth and the Sixth Amendments to the United States Constitution guarantee a defendant the right to a trial before a jury selected from a

representative cross-section of the community. *Evans v. State*, *supra*; *Holland v. Illinois,* 493 U.S. 474, 110 S.Ct. 803 (1990); *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692 (1975). "The fair-cross-section requirement mandates that 'the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.'" *Id.* (*quoting Taylor, supra*, at 702). However, there is "no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." *Id.* (*quoting*, *Holland, supra* at 808).

The standard for a race-based challenge to the composition of a jury pool under the Sixth Amendment was set by the United States Supreme Court in *Duren v. Missouri,* 439 U.S. 357 (1979). To show a prima facie violation of the Constitution's fair cross-section requirement in selecting a jury pool: the *defendant* must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to systematic exclusion of the group in the jury- selection process. *Id.* at 364. A "jury selection violates the Sixth Amendment or the due process and equal protection clauses of the Fourteenth Amendment *only if* it can be shown that members of the appellant's race were excluded systematically from jury duty. '(P)urposeful discrimination may not be assumed or merely asserted.'" *Bishop v. State*, 92 Nev. 510, 515, 554 P.2d 266, 270 - 270 (1976) (*quoting Swain v. Alabama*, 380 U.S. 202, 205, 85 S.Ct. 824, 827 (1965). Such discrimination must be proved. *Id.* (*citing*, *Tarrance v. Florida*, 188 U.S. 519, 23 S.Ct. 402 (1903)). The federal courts have repeatedly held that the use of voter registration lists to compile the jury pool is constitutionally acceptable. *See e.g., Taylor v. Louisiana*, 419 U.S. 522 (1975); *Watkins v. Commonwealth*, 385 S.E.2d 50, 53 (Va. 1989); *United*

States v. Lewis, 10 F.3d 1086, 1089-90 (4th Cir. 1993); *People v. Sanders*, 797 P.2d 561 (Cal. 1990)(*overruling People v. Harris*, 679 P.2d 433 (Cal. 1984)).

Defendant's claim here fails first because it must be the jury pool not the individual jury that is representative of a fair cross section of the community, the fact that Defendant's particular jury was entirely Caucasian does not support a prima facie constitutional violation. Similarly, the county-wide practice of comprising jury pools using voter registration rolls has been a long-standing constitutionally acceptable practice. Moreover, Defendant's claim that the county fails to follow up on the jury summons process hardly demonstrates "purposeful discrimination"; indeed, it is highly doubtful "individuals who move fairly frequently or are too busy trying to earn a living" would be considered a "distinctive" group for purposes of Sixth Amendment analysis and able to withstand constitutional scrutiny.

Therefore, Defendant's claim of ineffective assistance of counsel is unfounded.

XII.

NEVADA'S CAPITAL SENTENCING STATUTE PROPERLY NARROWS THE CATEGORIES OF DEATH ELIGIBLE DEFENDANTS

Defendant's final claim in ground XII is that appellate counsel was ineffective for failing to raise or completely assert the argument that Nevada's capital sentencing statute, NRS 200.033, fails to properly narrow the categories of death eligible defendants. However, as with Defendant's other claims, there was no reasonable probability this claim would have succeeded on appeal.

NRS 200.033 provides:

> The only circumstances by which murder of the first degree may be aggravated are:
>
> 1. The murder was committed by a person **under sentence of imprisonment.**
>
> 2. The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, **is or has been convicted of:**

a. **Another murder** and the provisions of subsection 12 do not otherwise apply to that other murder; or
b. **A felony involving the use or threat of violence** to the person of another and the provisions of subsection 4 do not otherwise apply to that felony. For the purposes of this subsection, a person shall be deemed to have been convicted at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

3. The murder was committed by a person who **knowingly created a great risk of death to more than one person** by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.

4. The murder was committed while the person was engaged, alone or with others, **in the commission of, or an attempt to commit or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnapping in the first degree, and the person charged**:
a. Killed or attempted to kill the person murdered; or
b. Knew or had reason to know that life would be taken or lethal force used.

5. The murder was committed **to avoid or prevent a lawful arrest or to effect an escape** from custody.

6. The murder was committed by a person, for himself or another, **to receive money or any other thing of monetary value.**

7. The murder was committed **upon a peace officer** or fireman who was killed while engaged in the performance of his official duty or because of an act performed in his official capacity, and the defendant knew or reasonably should have known that the victim was a peace officer or fireman. For the purposes of this subsection, "peace officer" means:
a. An employee of the Department of Corrections who does not exercise general control over offenders imprisoned within the institutions and facilities of the Department, but whose normal duties require him to come into contact with those offenders when carrying out the duties prescribed by the Director of the Department.
b. Any person upon whom some or all of the powers of a peace officer are conferred pursuant to NRS 289.150 to 289.360, inclusive, when carrying out those powers.

8. The murder involved **torture or the mutilation** of the victim.

9. The murder was committed upon one or more persons **at random and without apparent motive.**

10. The murder was committed upon a person **less than 14 years of age.**

11. The murder was committed upon a person because of the **actual or perceived race, color, religion, national origin, physical or mental disability or sexual orientation** of that person.

12. The defendant has, in the immediate proceeding, **been convicted of more than one offense of murder in the first or second degree**. For the purposes of this subsection, a person shall be deemed to have been convicted of a murder at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

13. The person, alone or with others, **subjected or attempted to subject the victim of the murder to nonconsensual sexual penetration** immediately before, during or immediately after the commission of the murder. For the purposes of this subsection:
    a. "Nonconsensual" means against the victim's will or under conditions in which the person knows or reasonably should know that the victim is mentally or physically incapable of resisting, consenting or understanding the nature of his conduct, including, but not limited to, conditions in which the person knows or reasonably should know that the victim is dead.
    b. "Sexual penetration" means cunnilingus, fellatio or any intrusion, however slight, of any part of the victim's body or any object manipulated or inserted by a person, alone or with others, into the genital or anal openings of the body of the victim, whether or not the victim is alive. The term includes, but is not limited to, anal intercourse and sexual intercourse in what would be its ordinary meaning.

14. The murder was committed on the property of a **public or private school**, at an activity sponsored by a public or private school or on a school bus while the bus was engaged in its official duties by a person who intended to create a great risk of death or substantial bodily harm to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person. For the purposes of this subsection, "school bus" has the meaning ascribed to it in NRS 483.160.

15. The murder was committed with the intent to commit, cause, aid, further or conceal an **act of terrorism.** For the purposes of this subsection, "act of terrorism" has the meaning ascribed to it in NRS 202.4415.

Defendant does not point to any particular portion of the statute he finds objectionable, but rather, asserts, "[t]he factors listed in NRS 200.033, individually and in combination fail to guide the sentencer's discretion and create an impermissible risk of vaguely defined, arbitrarily and capriciously selected individuals upon whom death is imposed." (Appellant's Opening Brief, pages 44-45). Defendant claims further that "[i]t is difficult, if not impossible, under the factors of NRS 200.033 for the perpetrator of a First Degree Murder not to be eligible for the death penalty at the unbridled discretion of the prosecutor." (Id.) However, even under this sweeping allegation, Defendant's claim that appellate counsel was ineffective for failing to raise this issue on direct appeal fails.

This Court has specifically held that these statutory aggravators, even "in combination," properly narrow the class of persons eligible for the death penalty. *Gallego v. State supra*, 117 Nev. at 370, 23 P.3d at 242 (2001); *See also*, *Bennett v. State*, 106 Nev. 135, 787 P.2d 797 (1990)(NRS 200.033 subdivision 4 is not constitutionally overbroad or arbitrary[12]); *Smith v. State*, 114 Nev. 33, 953 P.2d 264 (1998) (subdivision 8 is not constitutionally vague and ambiguous); *Cambro v. State*, 114 Nev. 106, 952 P.2d 946 (1998) and *Geary v. State*, 112 Nev. 1434, 930 P.2d 719 (1996) (subdivision 9 is not constitutionally vague); *Leslie v. Warden*, 59 P.3d 440 (2002)(Defense counsel was not deficient in failing to argue that "at random and without apparent motive" aggravator was not supported by evidence in penalty phase of defendant's murder trial, where Supreme Court had consistently upheld that aggravator when, as in defendant's case, killing was unnecessary to complete robbery, and defense counsel, knowing that Supreme Court was required to independently review all aggravating circumstances, may have chosen to focus on issues more likely to yield results).

[12] One of the six aggravating factors the jury in this case found to be established beyond a reasonable doubt was pursuant to subdivision 4.

Defendant relies upon two United States Supreme Court cases to bolster his contention. However, neither of these cases provides sufficient support for Defendant's claim.

In *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759 (1980), the jury imposed two sentences of death on the defendant. As to each, the jury specified that the single aggravating circumstance they had found beyond a reasonable doubt was "that the offense of murder was outrageously or wantonly vile, horrible and inhuman." *Id.* at 426, 100 S.Ct, 1759, 1764. The Court held the aggravator violated the Eighth and Fourteenth Amendments. *Id.* at 428-28, 1765. The Court reasoned there was nothing in the words "outrageously or wantonly vile, horrible or inhuman," standing alone that implied any inherent restraint on the arbitrary and capricious infliction of a death sentence. *Id.*

In *Stringer v. Black*, 503 U.S. 222, 112 S.Ct. 1130 (1992), after finding the defendant guilty of capital murder, a Mississippi jury, in the sentencing phase of the case, found that there were three statutory aggravating factors. One of these was the murder was "especially heinous, atrocious or cruel," which had not been otherwise defined in the trial court's instructions. *Id.* at 225-26, 112 S.Ct. 1130, 1134. The Court reversed the defendant's conviction. *Id.* at 227, 112 S.Ct. at 1135. Although the Court's decision was founded wholly on other grounds, it noted the unconstitutionality of the vague aggravating factor was implicit in the Court's opinion. *Id.* at 235, 112 S.Ct. at 1139.

Although Defendant does not specifically mention *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853 (1988), that Court similarly held that the language of an Oklahoma statute with an aggravating circumstance which read, "especially heinous, atrocious, or cruel" gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in *Godfrey*. *Id.* at 363-64, 108 S.Ct. 1853, 1859.

Clearly, the Nevada statute does not employ any such vague or overly broad language. On the contrary, in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976)[13], the United States Supreme Court upheld a Georgia sentencing scheme with nearly the identical language as Nevada's, even when the defendant attacked each and every aggravator individually and specifically. In upholding the sentencing statute, the Court in *Gregg* stated:

> While there is no claim that the jury in this case relied upon a vague or overbroad provision to establish the existence of a statutory aggravating circumstance, the petitioner looks to the sentencing system as a whole (as the Court did in *Furman* and we do today) and argues that it fails to reduce sufficiently the risk of arbitrary infliction of death sentences. Specifically, Gregg urges that the statutory aggravating circumstances are too broad and too vague .... *Id.* at 200, 96 S.Ct. at 2938.

Defendant here attempts to engage the same tactic as the defendant in *Gregg*. Indeed, his claim similarly fails. Clearly there is no support for his claim that the Nevada statute fails to limit the categories of death-eligible defendants to such a degree that would warrant constitutional relief. As such, his claim of effective assistance of appellate counsel must likewise fail because counsel was prudent to forego this claim in lieu of others with a far greater probability of success.

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[13] In his petition Defendant cites only to the dissenting opinion at 428 U.S. 238, 92 S.Ct. 2726 (1972).

CERTIFICATE OF COMPLIANCE

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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 17th day of June, 2005.

Respectfully submitted,

DAVID ROGER
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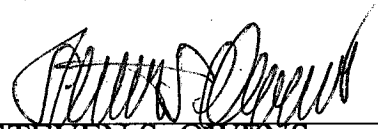
BY 
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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief to the attorney of record listed below on this 17th day of June, 2005.

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