ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

ZANE FLOYD,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

Case No. 44868

RESPONDENT'S ANSWERING BRIEF

Appeal From Order Denying Post-Conviction Relief
Eighth Judicial District Court, Clark County

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STATEMENT OF THE ISSUES

1. WHETHER APPELLANT WAS ENTITLED TO AN EVIDENTIARY HEARING ON HIS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION).

2. WHETHER APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

STATEMENT OF THE CASE

The State of Nevada accepts and adopts appellant's statement of the case.

STATEMENT OF THE FACTS

The State of Nevada accepts and adopts appellant's statement of facts.

ARGUMENT

I

APPELLANT WAS NOT ENTITLED TO AN EVIDENTIARY HEARING

In Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), the Court held that claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. "Bare" and "naked"

allegations are not sufficient, nor are those belied and repelled by the record. Id. Appellant's petition below was replete with such bare and naked allegations, or allegations completely belied by the record.

Appellant failed to support the majority of his claims with citations to the record, binding case law, or statutory interpretations that have been adopted in Nevada. He also asserted several claims that were either procedurally waived by his failure to raise them on direct appeal or claims that were controlled by the doctrine of law of the case because they were raised and ruled upon in his direct appeal. Lastly, he made arguments on settled points of law identical to other similarly situated defendants whose claims had been unequivocally denied by this court already. Furthermore, no additional facts needed to be adduced at an evidentiary hearing to address any of Appellant's claims, including ineffective assistance of counsel. Section 34.770 provides, "[t]he judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required." NRS 34.770(1).

Appellant's claims were unsupported, and some were even completely false. For example, Appellant claimed in his petition below that his trial jury was composed of all white members and that African-Americans were systematically excluded from the jury selection process. (AA, Vol. 1 at 114-16). In fact, Appellant's jury undeniably included two African-Americans who joined in convicting him and sentencing him to death. (AA, Vol. 2 at 146-149), (AA, Vol. 6 at 4-5), (AA, Vol. 1 at 6-7). Jurors No. 5, Gertrude Curl-Leatherwood, and Juror No. 12, Quennetta L. Green, were both African American as is evidenced by their jury questionnaire. Id.

While this was Appellant's most belied claim, all of the others were likewise without merit. Notably, Appellant reraises virtually all of his previously rejected claims in this appeal, except for the belied race related claim. Therefore, an evidentiary hearing was not, and is not, warranted in this case, and that claim should be denied as to all issues.

II

APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

In order to assert a claim of ineffective assistance of *trial* counsel successfully a defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694, 104 S.Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting 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).

In considering whether trial counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information that is pertinent to his client's case." Doleman v. State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996), citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Once such a reasonable inquiry has been made by counsel, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280, citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Finally, counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

Based on the above law, the court begins with the presumption of effectiveness and then must determine whether or not the defendant has demonstrated by "strong and

convincing proof" that counsel was ineffective. Homick v. State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996), citing Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981); Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991). The role of a court in considering ineffective assistance of counsel claims 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).

This analysis does not mean that the court "should second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711. In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

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

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), citing Strickland, 466 U.S. at 687. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., citing Strickland, 466 U.S. at 694.

The federal courts have held that in order to claim ineffective assistance of *appellate* counsel successfully the defendant must satisfy the two-prong test set forth by Strickland v. Washington, 466 U.S. 668, 687-688, 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).

There is 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 (2d Cir. 1990), citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. The Nevada Supreme 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). Finally, in order to prove 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, 941 F.2d at 1132.

The defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). However, the defendant does not have a constitutional right to "compel appointed counsel to press frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. In reaching this conclusion the 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. at 753, 103 S.Ct. at 3313. The Court also held that, "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.

Appellant asserts that his appellate counsel was ineffective for failing to raise the issue of ineffective assistance in Appellant's direct appeal where trial counsel failed to make contemporaneous objections during the trial and at the penalty hearing. These claims are without merit. In Gibbons v. State, 97 Nev. 520, 634 P.2d 1214 (1981), the Nevada Supreme Court held "because most claims of ineffective trail counsel involve questions of fact that can only be resolved by the district court at an evidentiary hearing 'the more appropriate vehicle for presenting a claim of ineffective assistance of counsel is through post-conviction relief.'" Id. at 523. In light of the Nevada Supreme Court's decision, appellate counsel was not ineffective for failing to raise the claim of ineffective assistance of trial counsel on direct appeal. If the Court seriously entertains the secondary ineffective appellate counsel claims, the State incorporates the relevant material below in support of appellate counsel's exercise of professional discretion and decision not to raise these issues on direct appeal. The State requests that these claims be denied.

A. Defendant Received Effective Assistance Of Trial And Appellate Counsel And Defendant Was Not Deprived Of Due Process Or A Fundamentally Fair Trial.

1. Trial counsel was not ineffective for failing to object during the State's opening statement at the penalty hearing.

During opening statements at the penalty phase of the trial, the prosecutor, in explaining to the jury the difference between aggravating circumstances and mitigating circumstances, stated that he would classify mitigating circumstances as "excuses." (AA, vol. 7 at 2013). Remarks made by a prosecutor "must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error." United States v. Young, 470 U.S. 1, 11-12, 105 S.Ct. 1038, 1044 (1985). In context, this comment was not improper. After the prosecutor made the remark that mitigating factors are simply "excuses," Appellant's counsel did not object, however, he addressed the comment at length in his opening statement to the jury during the penalty hearing. Appellant's counsel stated:

> Mitigating factors are not excuses. There is never going to be an effort or an attempt in this case to excuse Zane Floyd's behavior. They're not justifications. No effort will be made to justify Zane Floyd's behavior. And at no time throughout this penalty

> proceeding or ever is anybody ever going to ask you to forgive Zane Floyd, because the penalty hearing is not about excuses, it's not about justification, it's not about forgiveness. It's about understanding. It's about understanding the complexities of what makes us who we are.

(AA, vol. 7 at 2020). In addition to the above statements, Appellant's counsel further explained what mitigating circumstances are when he stated:

> Mitigating factors are anything, anything about an individual or about a circumstance which allows you to choose life over death. Mitigating circumstances are reasons not to select death.

(AA, vol. 7 at 2021). Appellant has failed to show how the prosecutor's remarks during opening statement worked prejudice upon him. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992), citing Strickland, 466 U.S. at 690, 104 S. Ct. at 2066); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). The prosecutor's statement in this case did not go without a response from Appellant. His attorney made a strategic decision not to object during the State's opening statement, but used the State's characterization to make his case or theory of the case stronger. Appellant's counsel was not ineffective.

If the court finds that this comment was error, it was addressed by the jury instructions defining mitigating circumstances and the jury's role in weighing them. Penalty Instruction No. 12 stated in pertinent part:

> Mitigating circumstances are those factors which do not constitute a legal justification or excuse for the commission of the offense in question, but may be considered by the jury, in fairness and mercy, as extenuating or reducing the degree of the defendant's moral culpability. The jury must consider any aspect of the defendant's character or record, and any circumstances surrounding the offense that the defendant proffers as evidence for a sentence less than death.

(RA 225).

Penalty Instruction No. 7 stated in pertinent part:

> The jurors need not find mitigating circumstances unanimously. In determining the appropriate sentence, each juror must consider and weigh any mitigating circumstance or circumstances which that juror finds.

(RA 219).

According to the United States Supreme Court, "[t]here is a presumption that jurors follow jury instructions." See Tennessee v. Street, 471 U.S. 409, 415, 105 S.Ct. 2078, 2082, 85 L.Ed.2d 425 (1985); see also Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997). Appellant has provided no evidence that the jury failed to follow its instructions. Therefore, this claim is without merit and should be denied.

Appellant asserts that his trial counsel was ineffective for failing to object to alleged personal opinion statements made by the prosecution. The prosecutor, in the opening statements made at the penalty hearing stated, "I trust that you will agree with Mr. Bell and myself that for his crimes [he] deserves what is in this case a just penalty of death." (AA, vol. 7 at 2018). Remarks made by a prosecutor "must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error." United States v. Young, 470 U.S. 1, 11-12, 105 S.Ct. 1038, 1044 (1985). This statement, when examined within the context of the sentencing hearing and trial, was not a statement of personal opinion, but was the prosecutor's conclusion to his opening remarks asserting the position the State would like the jury to take. Appellant's counsel made a similar comment when he stated "Mr. Hedger and I will be back for you and we'll be asking you to save a life." (AA, vol. 7 at 2044). These were not statements of personal opinion, but relative argumentative positions of the State and defense; and therefore, trial counsel was not ineffective for not objecting to the State's version.

Appellant argues that his counsel was ineffective for not objecting to what he believes were victim impact statements made during the trial phase. The Nevada Supreme Court has held "[e]vidence of a victim's character or trait of character is not admissible unless specifically brought into issue." Libby v. State, 109 Nev. 905, 915, 859 P.2d 1050, 1057 (1993). "However, facts establishing a victim's identity and general background are not what is generally referred to as character evidence and are admissible." Id.

The prosecutor, during his opening statement at trial, commented about Lucy Tarantino, one of the Appellant's victims, that "[s]he was in her early sixties. She was a wife, mother of three, grandmother. She was the salad lady. It was her job to get the salad

stuff ready." (AA, vol. 3 at 1359). This information is not victim impact information, but is a reference to the victim's general background. The prosecutor did not address the pain of Mrs. Tarantino's family, and did not, in detail, address any specifics regarding Mrs. Tarantino's life. The prosecutor was simply creating a picture of the victim in this case, including a glimpse of her home life, and the career that she chose. This was not a victim impact statement and therefore, defense counsel was not ineffective for not objecting to its introduction.

Appellant also argues that the prosecutor's remarks about Chuck Leos were victim impact statements and therefore improper. This argument is without merit. During his opening statement at trial, the prosecutor stated "Chuck Leos was 41, just celebrated his first anniversary to his wife, Leanne. He was the frozen food man." (AA, vol. 3 at 1357). The information that was provided to the jury was not information about holidays that Mr. Leos would no longer celebrate with his family, which the Nevada Supreme Court has held improper, but was background information that the Nevada Supreme Court has held is admissible. See Libby v. State, 109 Nev. 905, 915, 859 P.2d 1050, 1057 (1993). With this information, the prosecutor was able to establish for the jury Mr. Leos' career, and the fact that he was married. There was no mention of the loss that his wife has suffered or will suffer in the future, there was no mention of the children that the couple will no longer be able to conceive, and there was no mention of the impact that this tragedy had, or will have, on the remaining members of his family. These statements were statements about the general background of two of the victims in this case; they were glimpses of lives that no longer exist. They were not victim impact statements and therefore were not improper.

Even if the Court finds that these prosecutorial statements were inappropriate under the circumstances, no prejudice resulted to Appellant. Guilt phase Instruction No. 6 admonished the jurors that, "[s]tatements, arguments and opinions of counsel are not evidence in the case." (RA 180). "A jury is presumed to follow its instructions," and there is no evidence that it did not do so in this case. Weeks v. Angelone, 528 U.S. 225, 120 S.Ct. 727 (2000). Further, "[i]f the issue of guilt or innocence is close, if the state's case is not

strong, [erroneous prosecutorial statements] will probably be considered prejudicial." Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962). However, "if a guilty verdict was free from doubt, even aggravated prosecutorial remarks will not justify reversal." Flanagan v. State, 104 Nev. 105, 107, 754 P.2d 836, 837 (1988). There was overwhelming evidence of Appellant's guilt presented in this trial. The jurors were able to weigh the evidence, credit the statements of witnesses, and come to their own conclusions. Based on the evidence presented by the State, the jury's verdict is free from doubt and therefore, none of the cited prosecutorial statements will justify reversal.

2. Appellant was not prejudiced by the statutory scheme in Nevada addressing victim impact statements because the district court severely limited such statements.

Appellant asserts that the statutory scheme in Nevada fails to properly limit victim impact statements. To the extent that this issue was raised on direct appeal, it is law of the case. Where an issue has already been decided on the merits by the Nevada Supreme 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 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); see also 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 a more detailed and precisely focused argument. Hall supra; see also McNelton supra; Hogan supra.

On direct appeal, the Nevada Supreme Court held:

> Victim impact testimony is permitted at a capital penalty proceeding under NRS 175.552(3) and under federal due process standards, but it must be excluded if it renders the proceeding fundamentally unfair. Leonard v. State, 114 Nev. 1196, 1214, 969 P.2d 288, 300 (1998). The United States Supreme Court has stated that victim impact evidence during a capital penalty hearing is relevant to show each victim's 'uniqueness as an individual human being.' Payne v. Tennessee, 501 U.S. 808, 823, 111 S.Ct. 2597 (1991). Admissibility of testimony during the penalty phase of a capital trial is a question within the district court's discretion, and this court reviews only for abuse of discretion.

Floyd v. State, 118 Nev. 156, 174, 42 P.3d 249, 261 (2002).

The Nevada Supreme Court held that the limiting of the victim impact statements to one per victim and individuals who would testify in regard to the great risk of death aggravator was not improper.

> Floyd also complains that the district court denied his motion to allow only one victim impact witness for each murder victim and to exclude other testimony. In fact, the court granted the motion in regard to limiting victim impact witnesses to one per murder victim. The court also ruled that other people who were at the scene of the murders could testify, not as victims but in regard to the great-risk-of-death aggravator and the nature of the murders. Floyd has not shown that there was anything improper about the court's ruling.

Floyd, 118 Nev. at 175, 42 P.3d at 262. To the extent that Appellant now raises these same issues; they are barred by law of the case and should be denied.

However, if the court determines that this issue should be addressed on the merits, the following arguments would apply. In Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991), the United States Supreme Court held "[t]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." Id. at 825. Therefore, the United States Supreme Court has held that there is no *per se* bar to the introduction on victim impact statements. Id. at 827.

In the case at bar, the victim impact statements were extremely limited and were appropriate under the circumstances. The district court ruled that the victim impact statements would be limited to "one per victim." (AA, vol. 7 at 2003). In this case, there were four murders and one individual, Zachary Emenegger, who was seriously injured. Zachary Emenegger was not recalled to the stand during the penalty phase of the trial, each victim's family was given one opportunity to tell the jury how this tragedy has affected their lives, and only two of the more than twenty individuals held hostage in the store were permitted to speak. (AA, vol. 7 at 2045-2093). The statements in this case therefore were not cumulative, were not prejudicial, and were within the realm of the United States Supreme Court's ruling in Payne v. Tennessee.

Appellant has suffered no prejudice because all victim impact statements were limited to one witness per victim and only two of the more than twenty individuals who were held hostage. The State had the right under Payne v. Tennessee to introduce some victim impact evidence. This evidence was minimized by the court, was not cumulative, and therefore caused no prejudice to Appellant. Appellant has failed to show how the statutory scheme in Nevada regarding victim impact statements prejudiced *him*, especially since the statements were specifically limited here by the district court.

Appellant further argues that, "[t]rial counsel filed [sic] to limit the presentation of victim impact evidence," (Appellant's brief, p. 16), but that claim too is belied by the record. Before any victim impact testimony was presented in this case, defense counsel filed a motion with the district court seeking to bar cumulative victim impact evidence. (AA, vol. 7 at 2001); (RA 165)(Defendant's motion/cumulative victim impact). Pursuant to this motion, the district court ruled that it would limit the victim impact statements to the survivors of the dead victims at a rate of one per victim, and the eyewitness testimony or impact statements to individuals who "can give credence to the State's aggravating theory." (AA, vol. 7 at 2003). According to the United States Supreme Court, the prosecution has the right to counteract defendant's mitigating evidence with evidence that reminds the sentencer that each individual lost in a tragedy is a loss to the individual's family and to society as a whole. In Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991), the United States Supreme Court held "[t]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." Id. at 825. Due to trial counsel's motion in this case, the victim impact evidence was extremely limited. Appellant cannot now argue that his trial counsel, who was successful in severely limiting the victim impact evidence in this case, should have objected to the introduction of all victim impact testimony. Appellant's trial counsel sought and received the most limited introduction of

this evidence possible under the circumstances. Therefore, trial counsel was not ineffective and this claim should be denied.

3. The prosecutor did not improperly appeal to the passions and prejudice of the jury, did not impermissibly denigrate mitigating factors; and to the extent these arguments were raised on direct appeal, they are law of the case.

Appellant asserts that trial counsel was ineffective for not objecting to certain remarks made by prosecutors during the penalty phase opening statements that allegedly appealed to the passions and prejudice of the jury and denigrated the proper consideration of mitigating factors. Throughout the course of this case, however, Defendant's trial and appellate counsel have been diligent in their efforts to identify, curb, and cite instances of colorable prosecutorial misconduct. Notably, trial counsel was so attuned to the potential for misconduct and improper argument that a preemptive motion in limine was filed; which was, in fact, a veritable treatise on the issue consisting of nearly a hundred pages. See, (RA 57-155). Consistent with that awareness, the record certainly is not barren of trial counsel's objections to prosecutorial actions of one variety or another.[1]

Defendant's appellate counsel followed trial counsel's lead and, in the Opening Brief on direct appeal, dedicated issue headings VI and VII to alleged misconduct during closing argument and presentation of victim impact testimony. (RA 48-54). In that document, it appears that appellate counsel focused attacks on those few instances with the highest percentage of success consistent with the exercise of professional discretion. Appellate attorneys are well advised to argue with precision on a select group of merit-laden issues while winnowing out the weaker issues and arguments. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). Both trial and appellate counsel were mindful of, and effective in, preserving and presenting the strongest prosecutorial conduct issues available to Defendant. Therefore, Defendant has not demonstrated that trial or appellate counsel

[1] See, e.g., Appellant's Opening Brief, No. 36752, p. 42-46 (direct appeal); (referencing life in prison conditions prison objection)(RA 50-51), (violating individualized sentencing objection)(RA 51), (prosecutor allowing witness to exceed the scope of victim-impact)(RA 53).

committed objective error in failing to address this particular instance, or that he suffered any meaningful prejudice as a result.

Further, if the prosecutor's currently cited remarks were obvious reversible error, and any reasonable attorney would have preserved or presented the currently cited remarks consistent with Strickland,[2] the court could have taken action during the direct appeal pursuant to the doctrine of plain error. NRS 178.602; Floyd v. State, 118 Nev. 156, 172 42 P.3d 249, 261-62 (2002). Defendant ensured that this Court carefully reviewed a broad range of prosecutorial conduct both in closing argument and in the penalty phase of the trial on his direct appeal. See, Floyd, supra; (RA 48-54)(Defendant's Opening Brief, issues VI and VII). Given that prosecutorial remarks are viewed in context[3] to determine their prejudicial potential, it is a reasonable inference to presume that these portions of the transcript were heavily reviewed and no obviously prejudicial error was discovered. "In reviewing criminal cases, it is particularly important for appellate courts to relive the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal trial into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution." Johnson v. United States, 318 U.S. 189, 202, 63 S.Ct. 549, 555 (1943) (Frankfurter, J., concurring).

Defendant has been on an unsuccessful quest for *prejudicial* error since the moment of his conviction, but he has been, and should continue to be unsuccessful. However, counsel on direct appeal was able to bring prosecutorial error to the Court's attention effectively by citing the regrettable "worst massacre in the history of Las Vegas" remark. Floyd, 118 Nev. at 173. The comment was in error because the prosecutor violated the "elementary" tenet of refraining from arguing facts not in evidence. Id. The Court stated, "[a]ny inclination to . . . inflame the passions of the jury must be avoided. Such comments clearly exceed the bounds of proper prosecutorial conduct." Id. Critically, in the very next

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[2] 466 U.S. 668, 104 S.Ct. 2052 (1984).

[3] U.S. v. Young, 470 U.S. 1, 12-13 (1985).

sentence, the court continues by holding that "given the *overwhelming evidence* of Floyd's guilt, we conclude the error was harmless." Id. at 174 (emphasis added).

"If the issue . . . is close, if the state's case is not strong, [prosecutorial misconduct] will probably be considered prejudicial." See, Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962). However, "if a [penalty] verdict was free from doubt, even aggravated prosecutorial remarks will not justify reversal." See, Flanagan v. State, 104 Nev. 105, 107, 754 P.2d 836, 837 (1988). The State established its aggravating circumstances beyond a reasonable doubt and the jury was properly instructed on, and considered, no less than seventeen mitigating circumstances before returning Defendant's penalty. (RA 222, 225)(Penalty Instruction Nos. 9A, 12). "A jury is presumed to follow its instructions." Weeks v. Angelone, 528 U.S. 225, 120 S.Ct. 727 (2000). There is no evidence that the jury disregarded its instructions due to Defendant's referenced line of prosecutorial argument, and to assert as much is speculative. Given the evident severity of these crimes, and the entire evidentiary spectacle of Defendant's deeds witnessed by this jury, it is unlikely that the penalty phase was a more closely contested issue than guilt itself. Therefore, even if Defendant's quest led the court to error in this discrete portion of the State's opening penalty statement, it should deem the error harmless in the context of the entire trial and deny Defendant's claim.

B. Trial And Appellate Counsel Were Not Ineffective For Not Preserving Or Presenting Issues Related To Certain Jury Instructions

1. The anti-sympathy instruction.

Appellant claims that the district court erred when it permitted the State to include "anti-sympathy" Jury Instruction No. 37. Appellant failed to raise this issue on direct appeal when he clearly could have, thus the court should consider this argument waived. However, if the Court is inclined to consider this issue further, the claim must be rejected. Appellant was not prejudiced by the introduction of this instruction because the Nevada Supreme Court has ruled on numerous occasions that the instruction given in this case is proper and does not constitute reversible error. See Howard v. State, 102 Nev. 572, 577, 729 P.2d 1341, 1345

(1986); see also Riley v. State, 107 Nev. 205, 215, 8008 P.2d 551, 557 (1991), Lay v. State, 110 Nev. 1189, 1195, 886 P.2d 448, 451 (1994), Biondi v. State, 101 Nev. 252, 257-258, 699 P.2d 1062, 1066 (1985). The Nevada Supreme Court held in Lay v. State, "[s]o long as a jury is instructed to consider the mitigating circumstances placed before it, it is not error to instruct the jury not to be influenced by sympathy." 110 Nev. at 1195, 451-452. The jury in the case at bar was instructed by penalty instruction 9A to consider seventeen mitigating circumstances.

> The defense asserts the following circumstances as mitigation to the crime.
> 1) Mother using alcohol and drugs during early pregnancy.
> 2) Premature Birth.
> 3) Abandoned by Father.
> 4) Eight different Schools in First Nine Years.
> 5) Mother and Stepfather Heavy Drinkers Throughout Childhood.
> 6) No Significant History of Prior Criminal Activity.
> 7) No History of Violence by the Defendant.
> 8) Youth of the Defendant at the Time of the Crime.
> 9) Service in the Military.
> 10) Cooperation with Police.
> 11) Remorseful.
> 12) Insufficiently Treated for ADHD, other Emotional-Behavioral Problems including Depression.
> 13) Loved by Family and Friends.
> 14) Likely to React to a Structured Environment such as Prison.
> 15) The Murders were Committed While Defendant was Under the Influence of Extreme Mental or Emotional Disturbance.
> 16) Under the Influence of Alcohol at the Time of the Crime.
> 17) Any other Mitigating Circumstances.

(RA 222).

The jury was instructed further as to mitigation by penalty Instruction No. 12, which read:

> In determining the appropriate sentence, each juror must consider and weigh any mitigating circumstance or circumstances which that juror finds. Mitigating circumstances are those factors which do not constitute a legal justification or excuse for the commission of the offense in question, but may be considered by the jury, in fairness and mercy, as extenuating or reducing the degree of the defendant's moral culpability. The jury must consider any aspect of the defendant's character or record, and any circumstances surrounding the offense, that the defendant proffers as evidence for a sentence less than death. In balancing aggravating and mitigating circumstances, it is not the mere number of aggravating circumstances or mitigating circumstances that controls. It is within your discretion to determine what weight to give each aggravating circumstance and mitigating circumstance.
>
> It is not necessary for the defendant to present any mitigating circumstances. Even if the State establishes one or more aggravating

> circumstance beyond a reasonable doubt, and the defendant presents no evidence in mitigation, you are not required to return a sentence of death. The law never compels the imposition of the death penalty.

(RA 225).

The anti-sympathy instruction given to the jury in the case at bar so closely resembles the instruction that was upheld by the Nevada Supreme Court in Biondi, that there can be no conclusion other than the district court did not err in giving the instruction.

In Biondi, the entire anti-sympathy instruction to the jury read as follows:

> Although you are to consider only the evidence from the trial and the penalty hearing in reaching your verdict, you must bring to the consideration of evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences which you feel are justified by the evidence, keeping in mind that such inferences should not be based on speculation or guess.
> **A verdict may never be influenced by sympathy, prejudice or public opinion.** Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

Biondi, 101 Nev. at 258, 1066. (emphasis added). The full instruction that was given to the jury in the case at bar read:

> Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You must draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.
> **A verdict may never be influenced by sympathy, prejudice or public opinion.** Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

(RA 212). A notable distinction, however, is that the anti-sympathy instruction in the present case was given only during the guilt phase and was not repeated during the penalty phase. See, (RA 213-29)(penalty instructions). This belies the suggestion that jurors failed to consider mitigating evidence or that they were improperly instructed for the penalty phase. The jury was instructed as to the mitigating circumstances in the case, and was presented with a jury instruction that has been approved by the Nevada Supreme Court on numerous occasions. Therefore, there was no error and Appellant suffered no prejudice from counsel's failure to object to the instructions or failure to raise the issue on appeal.

2. Trial counsel was not ineffective for not requesting a "character evidence" instruction during the penalty phase as no such evidence was presented.

Appellant asserts that trial counsel was ineffective for failing to request an instruction that correctly defines "character" evidence for the jury. However, Appellant fails to specify what "character" evidence he challenges. Appellant simply states "there was a great deal of 'character evidence' offered by the State that was used to urge the jury to return a verdict of death." (Appellant's brief, p. 22). This assertion is vague, broad, and fails to meet the standard set out in the Nevada Rules of Appellate Procedure (NRAP) 28(e). NRAP 28(e) states in pertinent part: "Every assertion in briefs regarding matters in the record shall be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found." The merits of this argument are impossible to address specifically due to the vague and broad nature of the argument presented.

However, generally, the State did not introduce any character evidence during the penalty phase of the trial to warrant such an instruction. The State, during the penalty phase of the trial, called six (6) witnesses. Two witnesses were called by the State to establish the great-risk-of-death aggravator. Renee Sanchez, an employee at Flowerama, testified about where she was when Appellant entered the store, what she heard going on in the store, where she was hiding in the store, and the number of people that were with her. (AA, vol. 7 at 2045-2053). Shari Seech, an employee at Albertson's, testified about where she was when she learned that Appellant was in the store, who she was with while she was hiding, what steps the men hiding with her took to attempt to save their lives, a little information about each victim, and the effect the entire situation had on her. (AA, vol. 7 at 2053-2060).

Four witnesses were called by the State to present victim impact evidence. Lani Tarantino, one of Luci Tarantino's daughters, testified about her family, the kind of person her mother was, how she found out about the death of her mother, and the effect that her mother's death had on the family. (AA, vol. 7 at 2062-2067). Brenda Sargent, Troy Sargent's ex-wife, testified about her family, her ex-husband's life style, the effect this tragedy had on her children, and some methods she developed to make the healing process easier for her children. (AA, vol. 7 at 2062-2074). Leanne Leos, Chuck Leos' wife and an

Albertson's employee, testified about her relationship with her husband, the kind of person her husband was, and the effect this tragedy had on her life. (AA, vol. 7 at 2074-2079). Mona Nall, Thomas Darnell's mother, testified about her son, his numerous challenges in life due to his disability, his spirit, his character, and the effect this tragedy had on her family. (AA, vol. 7 at 2079-2093).

These were the only witnesses the State called during the penalty phase of the trial. None of the State's witnesses knew Appellant personally, nor were they able to present character evidence about Appellant. None of them addressed Appellant personally, nor said anything on the stand that would have called Appellant's character into question. Therefore, there was no need for the character evidence instruction to be given to the jury, there was no prejudice, and counsel was not ineffective in failing to request that such an instruction be given.

C. Other Objections and Issues not Raised:

1. Trial counsel was not ineffective for not objecting and for not moving to strike what Appellant claims are overlapping aggravating circumstances.

Appellant asserts that his trial counsel was ineffective for not moving to strike or objecting to the introduction of the State's three aggravating circumstances. Appellant bases this assertion on the claim that the three aggravating circumstances used by the State violated Appellant's double jeopardy and due process rights because all of the aggravators were based on the same set of operative facts. This assertion and claim are both without merit.

Trial counsel was not ineffective because the Nevada Supreme Court has previously held that multiple aggravating circumstances, based on the same set of operative facts, are not violative of defendants' double jeopardy or due process rights. See Thomas v. State, 120 Nev. 37, 83 P.3d 818 (2004); see also Sherman v. State, 114 Nev. 998, 965 P.2d 903 (1998). The argument that Appellant makes in the case at bar is identical to the argument that was made in Thomas. In Thomas, the defendant claimed his trial and appellate counsel should have challenged the aggravating circumstances involving robbery and burglary because they improperly "overlapped." Although there was limited analysis on this issue, the assumption

can be made that the reason for the challenge was the fact that robbery and burglary must have been proved using the same set of operative facts. The Nevada Supreme Court denied Thomas' claim that his trial counsel should have challenged the aggravating circumstances. Id. at 825.

In Sherman, the defendant argued that two aggravators should not have been charged because they were based on the same essential facts. Sherman contended that the aggravators "committed by a person under a sentence of imprisonment" and "committed by a person who was previously convicted of another murder" were based on the same set of facts and therefore in violation of his double jeopardy and due process rights under the Constitution. Sherman, 114 Nev. at 912, 965 P.2d at 1011-1012. The Nevada Supreme Court held that Sherman presented no compelling reason for the court to reverse the conviction. Id.

Although the sections of NRS 200.033 are different in this case than the sections that were challenged in Sherman and Thomas, the reasoning behind those cases can be analogized to the facts in the case at bar. The State's three remaining aggravating factors submitted to the jury after defense counsel's successful limiting motion were:

> (1) 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.
> (2) The murder was committed upon one or more persons at random and without apparent motive.
> (3) The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree.

(RA 221)(Penalty Instruction No. 9) The Nevada Supreme Court, during Appellant's direct appeal stated with regard to the aggravating factors:

> The first is established by the fact that Floyd repeatedly fired a shotgun while walking and running through a supermarket where a number of people were present. The second is amply supported by a record that shows that Floyd knew nothing about the people he killed or why he had killed them. . . Finally, Floyd was convicted of four murders in this case, establishing the third circumstance.

Floyd, 118 Nev. at 176, 42 P.3d at 262. The Nevada Supreme Court has held that these types of aggravators are not overlapping, and defense counsel was not ineffective for not objecting to their introduction.

It seems difficult to comprehend that Appellant is claiming ineffective assistance of counsel based on the aggravators that *were* introduced in this case because trial counsel filed a motion with the court to strike numerous aggravators that Appellant believed were duplicative or not supported by the evidence. See, (RA 156-64)(Defendant's motion to strike aggravators). Prior to the motion being filed, the State was alleging six (6) aggravating factors:

> (1) Aggravator #2 – "The murder was committed by a person who at any time before the penalty hearing is conducted has also been convicted of another felony" (which cannot include any other murder charged or the burglary which was committed when he entered the Albertson's). The felonies referred to in Aggravator #2 as applicable to the instant prosecution would consist of Counts VI through XII inclusive.
> (2) Aggravator #3 – Creating 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."
> (3) Aggravator #4 – Committing murder during the commission of a burglary (see Count I charging the Defendant with Burglary While in Possession of a Firearm together with the alternate theories of criminal liability set forth in Counts II through V inclusive).
> (4) Aggravator #8 provides "The murder involved torture or the mutilation of the victim." The aggravating circumstance may be limited to the murder set forth in Count V of Lucille Alice Tarantino for the reasons set forth in the factual scenario which follows.
> (5) Aggravator #9 – Killing "at random and without apparent motive" see factual scenario which follows.
> (6) Aggravator #12 – Being convicted upon trial or plea of more than one count of murder. It is anticipated that the Defendant will be convicted either upon trial or plea of four counts of murder.

(AA, vol. 1 at 1-2). Appellant's trial counsel successfully argued that aggravators number 1, 3, and 4 above should be dismissed. (AA, Vol. 2. at 301). Trial counsel reduced the alleged aggravators by half, thereby rendering assistance that was quite effective and beneficial to Appellant.

2. Defendant waived his malice instruction arguments by not raising them on direct appeal, but, in any event, the malice instructions are constitutional.

Appellant asserts that Jury Instruction No. 11, defining express and implied malice, was improper because it created a mandatory presumption of malice and therefore relieved the State of its burden to prove every element of murder. In addition, with respect to the implied malice instruction, Appellant contends that the "abandoned and malignant heart" language is so cryptic and archaic that they are meaningless without further definition.

Appellant failed to raise these issues on direct appeal and has provided no reasonable explanation for not doing so; therefore, these claims should be discarded. "Generally, a claim that could have been raised on direct appeal from a judgment of conviction, but was not, is considered waived for purposes of a subsequent proceeding for post-conviction relief." Bolden v. State, 99 Nev. 181, 183, 659 P.2d 886, 887 (1983), citing Roseneau v. State, 90 Nev. 161, 521 P.2d 369 (1974). More specifically, in Johnson v. Warden, the Nevada Supreme Court held that it would "consider as waived those issues raised in a post-conviction relief application which might properly have been raised on direct appeal, where no reasonable explanation is offered for petitioner's failure to present such issues." 89 Nev. 476, 477, 515 P.2d 63, 64 (1973), citing Nall v. Warden, 86 Nev. 489, 491, 471 P.2d 218, 219 (1970); Craig v. Warden, 87 Nev. 39, 482 P.2d 325 (1971).

NRS 34.810 states:

> 1. The court shall dismiss a petition if the court determines that:
> . . .
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> (1) Presented to the trial court;
> (2) Raised in a direct appeal . . .; or
> (3) Raised in any other proceeding that the petitioner has taken to secure relief from his conviction and sentence,
> unless the court finds both good cause for the failure to present the grounds and actual prejudice to the petitioner.
>
> 3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
> (a) Good cause for the petitioner's failure to present the claim. . . ; and
> (b) Actual prejudice to the petitioner.

NRS 34.810; Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001); see also Crump v. Warden, 113 Nev. 293, 298, 934 P.2d 247, 252 (1997) Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Appellant can show no prejudice because this claim was dismissed because the Nevada Supreme Court has already upheld this instruction as proper on numerous occasions. The outcome of the direct appeal would not have been different than the outcome of the trial had this issue been raised. Therefore, this issue was dismissed properly for failure to provide a reasonable explanation regarding the failure to raise this

claim on direct appeal, and a failure to show how this claim, if not addressed would prejudice Appellant.

If this court reaches the merits of Appellant's assertions, the following arguments would apply: NRS 200.010 defines murder as:

> Murder is the unlawful killing of a human being, with malice aforethought, either express or implied, or caused by a controlled substance which was sold, given, traded or otherwise made available to a person in violation of chapter 453 of NRS. The unlawful killing may be affected by any of the various means by which death may be occasioned.

Jury Instruction No. 11 stated:

> Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

(RA 185).

Jury Instruction No. 11 comes almost verbatim from NRS 200.020 defining express and implied malice.

Appellant's claims are identical to the defendant's rejected contentions in Leonard v. State, 117 Nev. 53, 17 P.3d 397 (2001). First, the defendant in Leonard claimed that the implied malice instruction created an unconstitutional presumption that improperly shifted the burden of proof. The Nevada Supreme Court has held already that the use of the word "shall" does not create a mandatory presumption that shifts the burden of proof. Id. at 78, 17 P.3d at 413, citing Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 482-83 (2000). The court in this case chose to use the word "may" instead of "shall," which makes the same finding more likely. "May" is more discretionary than "shall," and the Nevada Supreme Court has held that "shall" does not create a mandatory presumption; neither would it find that the word "may" would create such a presumption.

Second, the defendant in Leonard also claimed that the instructions were insufficient to define malice. The defendant specifically asserted that the implied malice instruction contained language "so vague and pejorative that [it] is meaningless without further definition, and it should have been eliminated in favor of less archaic terms which define the

conscious disregard for life from which malice may be implied." Id. at 78-79, 17 P.3d at 413. The Nevada Supreme Court emphasized that the statutory language is well established in Nevada, and concluded that the malice instructions as a whole were sufficient.

The Nevada Supreme Court has characterized the statutory language "abandoned and malignant heart" as "archaic but essential." Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 272 (1988). The Court held that similar instructions "accurately informed the jury of the distinction between express malice and implied malice." Guy v. State, 108 Nev. 770, 777 & n. 2, 839 P.2d 578, 582-83 & n. 2 (1992). Further, the Court has held that language in the malice aforethought instruction is constitutional that refers to "a heart fatally bent on mischief" and acts done "in contradistinction to accident or mischance." See Leonard v. State, 114 Nev. 1196, 1208, 969 P.2d 288, 296 (1998), cert. denied, 528 U.S. 828, 120 S.Ct. 81 (1999). The Court concluded that "[a]lthough these phrases are not common in today's general parlance . . . their use did not deprive appellant of a fair trial." Id. Absent some credible indication that the jury was confused by the instructions (including the instruction on express and implied malice), a defendant's claim that the instructions were confusing is merely "speculative." See Guy, 108 Nev. at 777, 839 P.2d at 583.

Appellant, in this case, does not make any claims or present any evidence that would indicate that the jury was confused. Appellant is simply making the same arguments that have been repeatedly presented to the Nevada Supreme Court and rejected. The currently contested jury instructions presented during the guilt phase of trial were proper.

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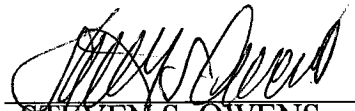
CONCLUSION

For all the foregoing reasons, Appellant's conviction should be affirmed.

Dated this 14th day of October, 2005.

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY 
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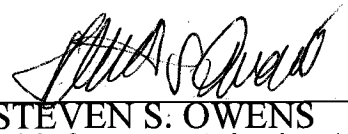
CERTIFICATE OF COMPLIANCE

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 14th day of October, 2005.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

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 October 14, 2005.

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