WILLIAM LESTER WITTER,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 50447





# RESPONDENT'S ANSWERING BRIEF

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

GARY TAYLOR
Assistant Federal Public Defender
Texas Bar #19691650
GERALD BIERBAUM
Assistant Federal Public Defender
Texas Bar #24025252
411 East Bonneville Ave., Suite 250
Las Vegas, Nevada 89101
(702) 388-6577

Counsel for Appellant

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

CATHERINE CORTEZ MASTO
Nevada Attorney General
Nevada Bar No. 003926
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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Nevada Attorney General
Nevada Bar No. 003926
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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**Eighth Judicial District Court, Clark County**

## STATEMENT OF THE ISSUES

1. Did the District Court err by conducting a harmless error analysis after striking two aggravating circumstances against Witter per McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004) and Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006)?
2. Did the District Court err when it determined that the lethal injection protocol does not constitute cruel and unusual punishment?
3. Did the District Court err when it determined that Witter did not demonstrate good cause and prejudice to overcome procedural bars?
4. Did the District Court err when it held that ineffective assistance of counsel was not a good cause to overcome procedural bars?
5. Did the District Court err when it held that the Doctrine of "Law of the Case" was applicable to Witter?
6. Whether procedural default rules relied upon by the district court are arbitrarily and inconsistently applied?

## STATEMENT OF THE CASE

On November 18, 1993, a Criminal Complaint was filed in Justice Court charging William Witter (hereinafter "Witter") with MURDER WITH USE OF A DEADLY WEAPON (Felony – NRS 200.010, 200.030, 193.165); ATTEMPT

MURDER WITH USE OF A DEADLY WEAPON (Felony – NRS 200.010, 200.030, 193.330, 193.165); ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Felony – NRS 200.364, 200.366, 193.330, 193.165); and BURGLARY (Felony – NRS 205.060). Appellant's Appendix, Vol. 1, 1.[1]

On January 7, 1994, a preliminary hearing was held before a Justice of The Peace. AA, Vol. 1, 3-37. The Justice found sufficient evidence to bind Witter over to the District Court. AA, Vol. 1, 35.

On January 21, 1994, an Information was filed charging Witter with: Count 1 - MURDER WITH USE OF A DEADLY WEAPON (Felony – NRS 200.010, 200.030, 193.165); Count 2 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Felony – NRS 200.010, 200.030, 193.330, 193.165); Count 3 - ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Felony – NRS 200.364, 200.366, 193.330, 193.165); and Count 4 - BURGLARY (Felony – NRS 205.060). AA, Vol. 1, 37-41. On January 25, 1994, the State filed its Notice of Intent to Seek the Death Penalty. AA, Vol. 1, 42-44.

A jury trial in the matter commenced on June 19, 1995 and concluded on June 28, 1995 (Eight Court Days). AA, Vol. 1, 72 – Vol. 6, 1310. On June 28, 1995 the jury found Witter guilty of Murder with Use of a Deadly Weapon, Attempted Sexual Assault with Use of a Deadly Weapon, and Burglary. AA, Vol. 7, 1348. A penalty hearing was held on July 10, 1995 through July 13, 1995, after which, by way of special verdict, the jury sentenced Witter to Death by Lethal Injection. AA, Vol. 10, 1996.

Prior to trial the State filed a Notice of Intent to Seek the Death Penalty alleging six (6) aggravating circumstances, including the following:

1. The murder was committed by a person under sentence of imprisonment. NRS 200.033(1).

[1] Appellant's Appendix is hereinafter abbreviated AA.

2. The murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another. NRS 200.033(2).

3. The murder was committed while the person was engaged in the commission of or an attempt to commit Burglary. NRS 200.033(4).

4. The murder was committed while the person was engaged in the commission of or an attempt to commit a Sexual Assault. NRS 200.033(4).

5. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody. NRS 200.033(5). (This aggravator was struck down in the direct appeal by the Supreme Court of Nevada in Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996)).

6. The murder involved torture, depravity of mind or the mutilation of the victim. NRS 200.033(8)

Following the conclusion of the presentation of evidence in the penalty phase, the jury returned a special verdict indicating that the following aggravating circumstances had been proven beyond a reasonable doubt: (1) the murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another; (2) the murder was committed while the person was engaged in the commission of or an attempt to commit burglary; (3) the murder was committed while the person was engaged in the commission of or an attempt to commit sexual assault; (4) the murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.[2] The jury also found that the aggravating circumstances outweighed any mitigating circumstances. AA, Vol. 10, 1996-1997.

The district court filed an amended Judgment of Conviction on August 2, 1995. AA, Vol. 10, 2002.[3] Witter was adjudged guilty of said offense(s), ordered to pay $2,790.00 Restitution and, was sentenced as follows: Count 1 – DEATH BY LETHAL INJECTION; Count 2 – TWENTY (20) YEARS in the Nevada Department

[2] The fourth aggravator was struck down on appeal. *See* Witter, *infra*.
[3] Sentencing took place on August 3, 1995. AA, Vol. 10, 2003.

of Corrections ("NDC"), plus an EQUAL and CONSECUTIVE TWENTY (20) YEARS for the Use of a Deadly Weapon; Count 3 – TWENTY (20) YEARS in the NDC, plus an EQUAL and CONSECUTIVE TWENTY (20) YEARS for the Use of a Deadly Weapon, CONSECUTIVE to Count 2; and Count 4 – TEN (10) YEARS in the NDC, CONSECUTIVE to Count 3. Witter received six-hundred twenty-seven days credit for time served. AA, Vol. 10, 2004-2005.

On July 22, 1996, the Nevada Supreme Court affirmed Witter's conviction and sentence in a published opinion. Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996), *cert. denied,* 520 U.S. 1217 (1997). AA, Vol. 20, 4365-4388.

On October 27, 1997, Witter filed his first Petition for Writ of Habeas Corpus (Post-Conviction). AA, Vol. 10, 2157. Counsel was appointed to represent Witter. On August 11, 1998, Witter's post-conviction counsel filed a supplemental brief in support of the petition. Following an evidentiary hearing at which Witter's trial and appellate counsel testified, the district court denied relief on September 25, 2000. AA, Vol. 20, 4349. The Nevada Supreme Court affirmed the district court's denial of relief on August 10, 2001. AA, Vol. 20, 4312.

On September 4, 2001, Witter filed a petition for habeas corpus under the Federal Habeas Corpus statute. The Federal Public Defender was appointed to represent Witter on September 17, 2001. The Federal Public Defender continues to represent Witter.

Witter failed to file any other petition in Nevada State courts until February 14, 2007. Witter filed a Supplemental Claim to his Second Petition for Writ of Habeas Corpus (Post-Conviction) on March 29, 2007. AA, Vol. 23, 4879. The State filed a Response and Motion to Dismiss on May 1, 2007. AA, Vol. 23, 4891. After Witter filed an Opposition (AA, Vol. 23, 4955) and after the State filed its Reply (AA, Vol. 23, 5028), the district court entertained argument on the matter on July 12, 2007 (AA, Vol. 23, 5038 – Vol. 24, 5069), August 2, 2007 (AA, Vol. 24, 5070-5074), and August 30, 2007 (AA, Vol. 24, 5097-5101).

On September 30, 2007, the District Court entered an Order denying Witter's petition (AA, Vol. 24, 5109); Findings of Fact, Conclusions of Law and Order were filed on September 26, 2007. AA, Vol. 24, 5115.

Witter filed a Notice of Appeal on October 29, 2007. AA, Vol. 24, 5118.

## STATEMENT OF THE FACTS

On November 14, 1993, Kathryn Cox was working as a retail clerk at the Park Avenue Gift Shop in the Luxor Hotel in Las Vegas, Clark County, Nevada. AA, Vol. 4, 745. On that date, Kathryn was forty-four (44) years old and had been married to her husband, James Cox, for approximately twelve (12) years. AA, Vol. 4, 744. James Cox was a fifty-three (53) year-old taxi cab driver for the Yellow Checker Star cab company. AA, Vol. 4, 744-745. On November 14, 1993, Witter sexually assaulted Kathryn Cox, stabbed her, and then brutally killed her husband. The details of this crime are as follows:

On the evening of November 14, 1993, Kathryn finished her shift at 10:00 p.m. and boarded the shuttle bus that would take her to the parking lot where Kathryn's Mercury Tracer was parked. AA, Vol. 4, 750. Kathryn unlocked the driver's door, got inside, and tried to start the car. AA, Vol. 4, 750-751. Kathryn tried several times to start the car, but was unsuccessful. AA, Vol. 4, 751. Kathryn called her husband, James. Kathryn told James that the car would not start and asked if James could pick her up and give her a ride home. AA, Vol. 4, 752-753. James told Kathryn that he was on his way to pick up a passenger and that it would be about 25 to 30 minutes before he could come and pick her up. AA, Vol. 4, 753. Kathryn then returned to her car on the shuttle bus in order to wait for James to arrive. AA, Vol. 4, 754.

When Kathryn arrived at her car, she got inside, locked the driver's door and started to read a book. Id. After about five (5) to ten (10) minutes, the passenger door suddenly opened and the Witter quickly got inside Kathryn's car. AA, Vol. 4, 756-757. Witter immediately stated to Kathryn in a loud voice, "Don't look at me." AA, Vol. 4, 757. Witter then instructed Kathryn, "Drive this car out of the parking lot."

AA, Vol. 4, 758. Kathryn responded that she could not drive the car because it would not start. Id. Witter then angrily stated, "You will drive this out of here, you bitch." Id. Following this statement, Witter stabbed Kathryn with a knife just above the left breast. Id. Witter again instructed Kathryn, "You will drive this car out of here right now." AA, Vol. 4, 760. Kathryn again told Witter that she could not drive the car because the car would not start. Id. Witter then grabbed Kathryn by her hair and pulled her towards him, leaving Kathryn's hair over her face so she could not see. AA, Vol. 4, 761. Witter told Kathryn, "I'm going to kill you, you bitch", and then with his right hand stabbed Kathryn six (6) more times in the left side of her body, between Kathryn's arm pit and left breast, and one (1) time in the back, near her shoulder blade. AA, Vol. 4, 761-762.

Kathryn began screaming and Witter repeatedly told her, "Shut up. I'm going to kill you, you bitch." AA, Vol. 4, 764. Witter then asked Kathryn if she knew that he was going to kill her and Kathryn responded that she was aware Witter would kill her. AA, Vol. 4, 764-765. Witter also asked if Kathryn was aware that he was going to rape her and Kathryn again responded that she was aware that Witter would rape her. Id. Following these questions, Witter unzipped his pants and exposed his penis and told Kathryn to "suck his cock like [she] would for [her] old man and make him feel better or good." AA, Vol. 4, 766. While Witter was making this statement to Kathryn, he placed Kathryn's hand on his flaccid penis and pushed her head down towards his lap. Id. Kathryn was unable to meet Witter's demands because she kept passing out as a result of a collapsed lung that was caused by the stab wounds inflicted by Witter. AA, Vol. 4, 767. When Witter realized Kathryn was not able to comply with his demands, Witter lifted Kathryn's head back up and again told her that he was going to rape her and kill her. AA, Vol. 4, 769. At that point, Kathryn could feel the blood exuding from her multiple stab wounds. Id. Kathryn tried not to breathe very often or very deep in order to decrease her blood loss. Id. Kathryn also tried to keep Witter calm so that he would not rage again and inflict more stab wounds. Id.

At one point, Witter turned his head away from Kathryn and she quickly jumped out of her car and ran away screaming. AA, Vol. 4, 771. Kathryn only ran about 10 to 15 feet when Witter caught her, grabbing her by the back of the neck and hair. Id. Witter dragged Kathryn back to the car and pushed her into the driver's seat again. AA, Vol. 4, 772. After Witter got back inside the car he kissed Kathryn at least one (1) time. AA, Vol. 4, 774.

Witter then tried to remove Kathryn's Levi pants by unbuttoning them, but was unable to because the pants fit tightly. AA, Vol. 4, 775. Witter became frustrated and slashed Kathryn's pants with his knife, leaving four (4) or five (5) knife wounds on Kathryn's right hip. AA, Vol. 4, 776. After Witter cut Kathryn's pants, he pulled the clothing open, exposing Kathryn's vaginal area. AA, Vol. 4, 777. Witter reached over with his hand and began rubbing Kathryn's vaginal area with his hand and fingers. Id. While Witter was rubbing Kathryn's vaginal area, he began kissing her again and reached underneath Kathryn's shirt, undid her bra and began squeezing Kathryn's breast. AA, Vol. 4, 778.

While Witter was attacking her, Kathryn saw in the side-view mirror James's taxi cab pull up along side the car. AA, Vol. 4, 779. Kathryn also noticed that the knife, which has a six-inch blade and four-inch handle, was lying on the dashboard of the car. AA, Vol. 4, 781. Witter, not knowing that the taxi driver was Kathryn's husband, instructed Kathryn to be quiet so he could tell the taxi driver that Kathryn was having a bad cocaine trip and Witter was just trying to help. AA, Vol. 4, 780. James opened the driver's door and asked, "What's going on here?" AA, Vol. 4, 781. Witter told James that Kathryn was having a bad cocaine trip and that he was just trying to help. James responded, "I don't think so. AA, Vol. 4, 782. This is my wife and this is my car and get the hell out." Id. Witter got out of the car through the passenger's door and confronted James. Id. Kathryn noticed that the knife was no longer lying on the dashboard. Id.

After Witter got out of the car, Kathryn could hear James and Witter yelling and scuffling. Id. Kathryn got out of the car and attempted to get inside the taxi cab in order to call for help. AA, Vol. 4, 783. When Kathryn was unable to get inside the taxi, she turned and saw Witter stabbing James in the left shoulder area. AA, Vol. 4, 784. James screamed in pain and Witter continued to stab him repeatedly. AA, Vol. 4, 785. James eventually fell into Kathryn and they both fell to the ground. Id. Kathryn began screaming and kicking and Witter stabbed her in the calf area of her left leg, the knife blade passing completely through Kathryn's leg. AA, Vol. 4, 786. James lay motionless in Kathryn's arms. Id.

Kathryn told James she loved him and she was going to get help and then got up and ran towards the bus stop. AA, Vol. 4, 789. Kathryn lost one shoe while she was running and then Witter caught her again. Id. Witter grabbed Kathryn by the hair and picked her up from the ground. AA, Vol. 4, 790. Witter took Kathryn back to the car and stuffed her into the back seat area on the passenger's side floor. Id. Witter then completely removed Kathryn's pantyhose and Levi's. AA, Vol. 4, 791. Witter left Kathryn in the back seat and Kathryn could hear Witter attempting to move James's body. Id. Witter returned and began touching Kathryn's legs. AA, Vol. 4, 792. Shortly thereafter, Kathryn heard the voices of the hotel security and Witter left her in the back seat of her car. Id.

Security Officer Thomas Pummil was patrolling the Luxor/Excalibur employee parking lot on the evening of November 14, 1993. AA, Vol. 4, 817. After being informed of the attack, Officer Pummil immediately went to the location of Kathryn's car and saw Witter standing between Kathryn's car and James's taxi cab. AA, Vol. 4, 819. It appeared to Officer Pummil that Witter was trying to stuff something in the back seat of Kathryn's car. AA, Vol. 4, 819-820. Officer Pummil got out of his truck and asked Witter, "What is the problem?" AA, Vol. 4, 821. Witter responded, "Nothing." Id. Witter then turned and came towards Officer Pummil from between Kathryn's car and James's taxi cab. Id. Officer Pummil instructed Witter to stop. AA,

Vol. 4, 837. Witter ignored the instructions and stated, "Fuck you", and took several steps towards Pummil. AA, Vol. 4, 840. Officer Pummil retreated several steps to keep a safe distance and again instructed Witter to stop. Witter again ignored the instructions and advanced towards Officer Pummil stating, "Kill me. Go ahead, shoot me. Kill me, mother fucker." AA, Vol. 4, 840-841. Witter repeated these same words several times as he approached Officer Pummil. AA, Vol. 4, 841. After Officer Pummil stepped back a second time, he drew his weapon and ordered Witter to lie on the ground. Officer Pummil also called for backup assistance at this time. Approximately a minute and-a-half after Officer Pummil arrived, Officer Schroeder arrived, walked up behind Witter and placed him in handcuffs. AA, Vol. 4, 843.

After Witter was handcuffed, Officer Schroeder went over near James's taxi cab and noticed James's body lying on the ground partially underneath the taxi cab. AA, Vol. 4, 873. James's face and upper torso were covered with a coat. Id. Officer Schroeder removed the coat and determined that James was not breathing and did not have a noticeable pulse. AA, Vol. 4, 873-874. Officer Schroeder then heard Kathryn's moans coming from the back seat of the car. AA, Vol. 4, 874, 877.

Kathryn was found lying in the back seat with no clothes on from the waist down and several visible stab wounds. AA, Vol. 4, 878. Kathryn told the officers that Witter had stabbed her and tried to rape her. Paramedics soon arrived and Kathryn was transported to the hospital, where she remained for eight (8) days, only leaving to attend James's funeral. AA, Vol. 4, 796.

Officer Candiano of the Las Vegas Metropolitan Police Department (LVMPD) was one of the first police officers to arrive at the crime scene. AA, Vol. 5, 923. Officer Candiano took control of Witter from the security officers. AA, Vol. 5, 924 While Officer Candiano was taking Witter to his patrol car, Witter stated several times that he hated all cops and was going "to kill all the fucking cops he could." AA, Vol. 5, 926. Officer Candiano twice read Witter his Miranda rights, once before placing him inside the patrol car and once after Witter was inside the car. AA, Vol. 5, 926,

928. Witter acknowledged that he understood his constitutional rights. AA, Vol. 5, 929. Officer Candiano noticed that Witter's pants, shoes and hands were all covered in blood. AA, Vol. 5, 931. Witter was taken to the police station and during questioning stated, "I can't believe I did it. I just can't believe I did it." AA, Vol. 5, 939.

Witter was interviewed at the police station by Detective Thowsen. Detective Thowsen showed Witter a Miranda card which Witter read out loud and signed. AA, Vol. 5, 1051-1052. Subsequently, Witter admitted being in the Luxor parking lot, approaching Kathryn and becoming aggressive with her, stabbing James with the hunting knife, and using his jacket to cover James after the stabbing. AA, Vol. 5, 1055-1056, 1058.

Alan Galaspy, a criminalist with the Las Vegas Metropolitan Police Department (herein after "LVMPD"), conducted a scientific analysis of Witter's blood that was drawn on the early morning of November 15, 1993. AA, Vol. 6, 1108. The results of this analysis demonstrated that Witter had a .07 blood alcohol level. Id. Criminalist Mino Aoki signed an affidavit indicating that he found no controlled substances in Witter's blood when it was tested. AA, Vol. 6, 1122.

On November 15, 1993, Dr. Robert Jordan, a Clark County Medical Examiner, performed an autopsy on the body of James Cox. AA, Vol. 6, 1155. The autopsy revealed a total of sixteen (16) stab wounds: one (1) wound in front of the left ear; three (3) wounds through the left ear; one (1) wound behind the left ear; and eleven (11) wounds to the left neck, shoulder and upper left arm. AA, Vol. 6, 1158, 1160. The autopsy also revealed that one of the stab wounds extended through the shoulder muscles and lacerated James's axillary artery, from which James most likely bled to death. AA, Vol. 6, 1161. The autopsy also revealed that one of the stab wounds penetrated James's skull and extended a half inch into his brain. Id. Dr. Jordan concluded that this injury would have caused fatal hemorrhaging, however, the stab wound which lacerated James's axillary artery caused his death first. AA, Vol. 6,

1171. Dr. Jordan concluded that James's injuries were inflicted by a knife and his death was the result of the injuries to his neck and head. Id. Dr. Jordan also concluded that James's death was the result of a homicide. AA, Vol. 6, 1173.

## ARGUMENT

## I

## THE DISTRICT COURT COMMITTED NO ERROR BY CONDUCTING A HARMLESS ERROR ANALYSIS AFTER STRIKING TWO OF WITTER'S AGGRAVATING CIRCUMSTANCES

Witter argues that the district court erred when it conducted a harmless error analysis after striking two of Witter's aggravating circumstances under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004) and Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006). Witter also argues that the district court was in error because the court sat as a jury and conducted an inappropriate harm analysis. Additionally, Witter argues that Bejarano is distinguishable from his case, that the district court's harm analysis must consider all available mitigating evidence, and that the sole remaining aggravator does not outweigh the mitigators. Each of these arguments lack merit.

In regards to Witter's post-conviction petition, the State conceded below that Witter's two felony aggravators must be struck and a harmless error analysis or reweighing must be conducted. The State acknowledged this pursuant to McConnell, 120 Nev. 1043, 102 P.3d 606 and Bejarano, 122 Nev. 1066, 146 P.3d 265. In Bejarano, 146 P.3d at 274, this Court concluded that McConnell is to be applied retroactively. As a result, the State conceded that two of the three[4] remaining aggravators in the instant case (namely the commission of a burglary and attempted sexual assault) are invalid because they were also used as a theory of guilt to obtain convictions for First Degree Murder.

[4] The Nevada Supreme Court made a clerical error when it referred to four remaining aggravators. See Witter, at 930, 921 P.2d at 900. See also, Decision and Order, C117513, September 25, 2000 (holding that a clerical errors in the courts opinion was not of a material consequence and noting that there remained three aggravators and only one was sufficient to invoke the death penalty. NRS 200.030(4)(a)).

The McConnell decision stands for the proposition that the enumerated felonies in Nevada's Felony Murder statute as per NRS 200.030(1)(b) cannot be used both to establish First-Degree Murder and to aggravate the murder to capital status. Id. at 623. The purpose behind such a stance is to sufficiently narrow the death eligibility of defendants who commit felony murder in full satisfaction of the constitutional requirements as set forth in the Constitutions of the United States and of the State of Nevada. The exception to this new rule espoused by the Court is when the jury makes a specific determination during the guilt phase of the trial that their verdict is based independently on an alternative theory such as premeditation and deliberation. Id. at 624.

Under this circumstance, the Court in McConnell deemed it permissible for the State to use the underlying felonies which were the basis for the conviction for First-Degree Murder in the guilt phase as aggravators warranting a sentence of death during the penalty phase. In McConnell, the Court specifically advised the State 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." Id.

NRS 200.033 lists the aggravators which elevate First-Degree Murder to capital status. Over the years the Nevada Supreme Court has specifically held that NRS 200.033 was constitutional and that the statutory aggravators it lists, even "in combination," properly narrow the class of persons eligible for the death penalty. Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985); Gallego v. State, 117 Nev. 348, 370, 23 P.3d 227, 242 (2001); See also, Bennett v. State, 106 Nev. 135, 787 P.2d 797 (1990); (overruled on other grounds by Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002)) (NRS 200.033 subdivision 4 is not constitutionally overbroad or arbitrary); 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 (1996)(subdivision 9 is not constitutionally vague); Leslie v. Warden, 118 Nev. 773, 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).

When this issue was again addressed, this Court fully sanctioned the practice of using an underlying felony as an aggravator in Miranda v. State, 101 Nev. 562, 707 P.2d 1121 (1985) and Atkins v. State, 112 Nev. 1122, 923 P.2d 1119 (1996). In Atkins, this Court specifically rejected the argument that the Felony Aggravator statute did not sufficiently narrow the class of eligible persons for the death penalty. Now the Court has determined that the State may no longer use a Felony Aggravator if a defendant is convicted of First-Degree Murder on the theory of felony murder. The Nevada Supreme Court determined that McConnell overruled precedent and enunciated a new substantive rule. Bejarano, *supra*.

The Court can be assured that such narrowing has occurred where a defendant pleads guilty or is tried solely under a theory of premeditation and deliberation, or if a special verdict form is used when alternative theories are alleged. Id. Because no such special verdict form was previously required under pre-McConnell law, the Nevada Supreme Court held that McConnell applied "whenever it is possible that any juror could have relied on a theory of felony murder in finding the defendant guilty of first-degree murder." Bejarano, *supra*; See also Rippo v. State, 122 Nev. 1086, 146 P.3d 279 (2006),(explaining that McConnell's rationale is not concerned with the adequacy of the evidence of deliberation and premeditation). Where other valid

aggravator's remain, Bejarano requires that the district court conduct a harmless error analysis or reweigh the aggravating and mitigating circumstances.[5]

**A**

**THE DISTRICT COURT DID NOT SIT AS A JURY**

This Court holds that in reweighing aggravating and mitigating circumstances in a death penalty case after striking aggravating circumstances, that the Court and not the jury, is required to determine whether, absent the invalid aggravators, the jury would have imposed a sentence of death. Bejarano, 122 Nev. 1066, 146 P.3d 275-76. If the answer is yes, a jury would have imposed death, then, any error is harmless. Id. If the answer is no, then this Court will remand to the district court for a new penalty hearing. Id.

Furthermore, this Court has reasoned that the reweighing of the evidence is permissible under the Nevada Constitution and does not entail impermissible fact-finding. Bejarano, *supra.*, Leslie v. Warden, 118 Nev. 773, 782, 59 P.3d 440, 447 (2002) (citing Canape v. State, 109 Nev. 864, 859 P.2d 1023 (1993)). This is especially true when the Court has invalidated a heretofore valid aggravating circumstance. Id; *accord* Browning v. State, 120 Nev. 347, 91 P.3d 39, 51 (2004) ("Once an aggravator is stricken, the court either reweighs the aggravating and mitigating circumstances or applies a harmless error analysis."). In State v. Haberstroh, 119 Nev. 173, 69 P.3d 676 (2003) the Court stated:

> The Supreme Court has held that "the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review. It appears that either analysis is

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[5] McConnell "does not 'alter our understanding of what constitutes basic due process,'" but merely removes a specific type of aggravator (one identical to the underlying charge) from consideration in imposing the death penalty. See, Bockting v. Bayer, 399 F.3d 1010, 1020 (9th Cir. 2005) (quoting Brown v. Uphoff, 381 F.3d 1219, 1226-27 (10th Cir. 2004)). McConnell does not disturb the conviction of a defendant, but only addresses the severity of the punishment imposed. If it is to be death, then McConnell narrows those eligible, but it in no way affects a defendant's culpability. The importance of this distinction cannot be overstated.

> essentially the same and that either should achieve the same result. Harmless-error review requires this court to actually perform a new sentencing calculus to determine whether the error involving the invalid aggravator was harmless beyond a reasonable doubt. Reweighing involves disregarding the invalid aggravating circumstances and reweighing the remaining permissible aggravating and mitigating circumstances. In any case, we must provide close appellate scrutiny of the import and effect of invalid aggravating factors to implement the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases.

Haberstroh, at 682. (Internal quotation marks and citations omitted).

> We recognize that many of our duties require us to make factual determination. For example, this court is often called upon to determine whether the jury's verdict is supported by sufficient evidence. With respect to capital cases, we are required to consider whether the sentence was imposed under the influence of passion, prejudice, or any arbitrary factor and whether the sentence is excessive, considering the crime and the defendant. We concluded that reweighing after invalidating an aggravating circumstance is similar to these permissible duties. Therefore, we hold that reweighing is proper under the Nevada Constitution and statutes. We are of the same opinion today.

Leslie, *supra,* at 782-83. (Emphasis added).[6] The State requested that the district court reweigh the aggravating and mitigating circumstances based upon an independent review of the trial record. Bridges v. State, 116 Nev. 752, 6 P.3d 1000 (2000). The Nevada Supreme Court and the United States Supreme Court have held that the re-weighing of aggravating and mitigating circumstances is a function of an appellate court which does not involve the receipt of facts or evidence not found in the trial record. *See* Clemons v. Mississippi, 494 U.S. 738 (1990); See also Canape v. State, 109 Nev. 864, 859 P.2d 1023 (1993). Therefore, Witter is barred from introducing evidence or litigating issues that should have been, could have been, or

[6] The State would agree with this Court's holding in Leslie, 118 Nev. at 782-83, 59 P.3d at 446-47, that the reweighing of aggravators and mitigators by the district court is no different than an appellate court reviewing the sufficiency of the evidence and no different than any other "factual type" determinations that appellate courts make.

actually were disposed of in previous proceedings. Because all of the other claims raised in Witter's post-conviction petition were held to have been previously litigated or procedurally barred, the Court properly refused to consider any exhibits presented by Witter in arguing those claims when considering whether the record supported the imposition of the death penalty.

Here, a review of the transcripts from Witter's post-conviction petition proves that the district court acted accordingly. Witter's contention that it is ironic that the district court stated it does not sit as a fact finder contains no irony at all. Rather, it is the proper statement of law.[7]

Reweighing of evidence is permissible under the Nevada Constitution and does not entail impermissible fact finding. Bejarano, *supra.*, Leslie, 118 Nev. at 782, 59 P.3d at 447 (citing Canape, 109 Nev. at 859). Additionally, once an aggravator is stricken, the district court will conduct a reweighing of aggravating and mitigating circumstances or apply a harmless error analysis. Id; *accord* Browning, 91 P.3d at 51. As such, the district court pulled all evidence from the evidence vault, reviewed it, and reviewed the transcript from the penalty phase.[8] AA, Vol. 24, 5098.

The district court next acknowledged that only one aggravator remained pursuant to NRS 200.033 (2)(b). AA, Vol. 24, 5098. As such, the district court described in detail that Witter was previously convicted in 1996 for stabbing David Rumsey with a butcher knife and the facts surrounding the events. Id.

The district court next detailed the possible mitigators available to Witter pursuant to NRS 200.035. The original jury heard evidence on potential mitigating circumstances but was not asked to find the existence of particular mitigators in a

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[7] Furthermore, a review of the record abrogates Witter's claim that the district court "held" that it was not acting as a fact finder. Rather, the district court was only explaining the process by which it reweighs the aggravators and mitigators under the harmless error analysis. AA, Vol. 24, 5071.

[8] All of the information reviewed by the district court was provided by Witter's counsel. In fact, the district court stated that the information provided by Witter was lengthy and involved. AA, Vol. 24, 5098.

special verdict form.[9] AA, Vol. 10, 1996-8. In regards to NRS 200.035 (1), the district court held that the section was inapplicable in light of the incident that formed the basis for the aggravator[10] plus Witter's California Youth Authority incarceration and other various criminal matters brought forth. AA, Vol. 24, 5099.

In regards to NRS 200.035 (2), the district court held that there was evidence put forth that Witter was under an emotional disturbance because he learned that his girlfriend had an abortion on the same day he committed this crime. AA, Vol. 24, 5099.

In regards to NRS 200.035 (3), the district court held that this was not applicable under the facts because the victim came upon the scene of the attempt sexual assault on his wife and was then killed. AA, Vol. 24, 5099.

In regards to NRS 200.035 (4), the district court held that this was not applicable under the facts because Witter acted alone and was the only person involved at the time of the occurrence herein. AA, Vol. 24, 5099. Additionally, in regards to NRS 200.035 (5), the district court also held that this section was inapplicable because there was no evidence that Witter acted under duress or under the domination of another person. AA, Vol. 24, 5099.

In regards to NRS 200.035 (6), the district court held that this section was inapplicable because Witter was thirty (30) years-old at the time of the murder. AA, Vol. 24, 5099.

In regards to NRS 200.035 (7), that section allowed the district court to consider any other mitigating circumstances. The district court held that there was evidence presented of an extremely dysfunctional family wherein alcohol, controlled substance abuse, and psychological issues were present. The district court also acknowledged that it reviewed evidence concerning whether Witter had a low or

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[9] There is no right to have a jury specify the mitigating circumstances it has found. Gallego v. State, 117 Nev. 348, 23 P.3d 227 (2001).

[10] The 1996 conviction for stabbing David Rumsey.

below average intelligence, had possible Attention Deficit Hyperactivity Disorder (ADHD), a possible Antisocial Personality Disorder and possible Developmental Arithmetic Disorder. AA, Vol. 24, 5099-5100.

The district court then described on the record, taking into account each of the above mitigating circumstances, that it reweighed the aggravators and mitigators as enumerated in the above Nevada Supreme Court case law, and held that there was "harmless-error beyond a reasonable doubt with the aggravator outweighing the mitigators." AA, Vol. 24, 5100. Although the district court judge claimed to have "found" certain mitigators, in context the court was simply articulating that certain mitigators would be considered in the harmless error analsysis based on whether evidence had been presented in support of them at the original trial. Id.

Therefore, because this Court has held that "the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review," Haberstroh, 119 Nev. 173, 69 P.3d at 682, it cannot be argued that the district court sat as a jury. A harmless-error review only requires a district court to perform a new sentencing calculus to determine whether the error involving an invalid aggravator was harmless beyond a reasonable doubt. This is exactly what the district court did. As such, Witter's conviction and sentence of death should be affirmed.

**B**

**THE DISTRICT COURT CONDUCTED A PROPER HARMLESS ERROR ANALYSIS**

Witter argues that the district court erred by conducting an improper harmless error analysis. More specifically, Witter asserts that a jury should have conducted the harmless error analysis because the district court did not know what Witter's jury considered mitigating. These arguments lack merit.

First, the State incorporates its argument from Sect. I, A above against Witter's claim that a jury and not the district court should have conducted the harmless error analysis. Second, Witter's claim that a proper harmless error analysis was not possible because not everything that was in front of the jury was in front of the district court is belied by the record.

Here, a review of the transcripts from Witter's post-conviction petition proves that the district court acted accordingly. The district court pulled all evidence from the evidence vault, reviewed it, and reviewed the transcript from the penalty phase. AA, Vol. 24, 5098. Furthermore, all of the information reviewed by the district court was provided by Witter's counsel. In fact, the district court stated on the record that the information provided by Witter was lengthy and involved. AA, Vol. 24, 5098.

If anything, Witter was afforded an opportunity to put more information in front of the district court than the jury received. However, even if the district court viewed more evidence of mitigation than that which should have been allowed, this Court would not be justified in reversing the judgment if a proper application of the law to the facts demands its affirmance. Goldwsorthy v. Johnson, 45 Nev. 355, 363, 204 P. 505 (1922). See also, DeCarnelle v. Guimont, 101 Nev. 412, 705 P.2d 650 (1985); Hotel Riviera, Inc. v. Torres, 97 Nev. 399, 632 P.2d 1155 (1981); Wyatt v. State, 86 Nev. 294, 468 P.2d 338 (1970). If the judgment is right upon any theory, even though it be upon one never thought of by the trial court, and is sustained by the findings and evidence, it is our duty to affirm it for in doing so we do not have to lend approval to the mental processes of the trial court." Goldsworthy, 45 Nev. at 363, 203 P. 505. Here, as discussed in Sect. I, A, the harmless error analysis was correct in determining that nothing more than harmless error existed. For these reasons, Witter's conviction and sentence of death should be affirmed.

**C**

**WITTER INCORRECTLY DISTINGUISHES BEJARANO FROM HIS OWN CASE**

Witter argues that the analysis used by this Court in Bejarano should be distinguished from the analysis required in this case because Witter has provided substantial mitigating evidence compared to that of Bejarano on post-conviction. This argument lacks merit because Witter misses the Court's holding in Bejarano.

Pursuant to McConnell, this Court's "reweighing" requires answering only one question: "Is it clear beyond a reasonable doubt that absent the invalid aggravators the jury still would have imposed a sentence of death?" However, this Court has guarded that the term "reweigh" is analogous to harmless error. Bejarano, 122 Nev. 1066, 146 P.3d at 276, fn. 68.[11] Therefore, should the only error be harmless, then Witter has no relief.

Here, it is clear that pursuant to NRS 200.033 (2)(b) that one aggravator remained. AA, Vol. 24, 5098. At the post-conviction evidentiary hearing, the district court described in detail that Witter was previously convicted in 1996 for stabbing David Rumsey with a butcher knife and the facts surrounding the events. Id. Additionally, the district court stated that it had reviewed all evidence from the evidence vault and reviewed the transcript from the penalty phase. AA, Vol. 24, 5098. Ultimately, the district court held that it took into account each mitigating circumstance, that it reweighed the aggravator and mitigators as enumerated in Nevada Supreme Court case law, and held that there was "harmless-error beyond a reasonable doubt with the aggravator outweighing the mitigators." AA, Vol. 24, 5100.

This is exactly what this Court provides capital defendants and as such, there can be no error that grants Witter relief just because he offered a larger number of mitigators than Bejarano did. In the harmless error analysis, the court simply removes the felony-aggravators from the equation and considers whether the jury still would have imposed a sentence of death. Bejarano, supra. Witter received every protection

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[11] "We have held that it is proper for this court to engage in reweighing or harmless-error analysis when a jury has erroneously relied upon an invalid aggravating circumstance." Bejarano, 122 Nev. 1066, 146 P.3d at 276, fn. 68; *See* Haberstroh, 119 Nev. at 183, 69 P.3d at 682-84; *accord* Clemons v. Mississippi, 494 U.S. 738, 741, 110 S.Ct. 1441 (1990).

as guaranteed by this Court when the district court made a finding of harmless error. Therefore, Witter's conviction and sentence of death should be affirmed.

**D**

**WITTER INCORRECTLY ARGUES THAT THE HARMLESS ERROR ANALYSIS MUST CONSIDER ALL AVAILABLE MITIGATING EVIDENCE**

Witter asserts that the district court erred because Witter was not allowed to present mitigating evidence extraneous to the evidence presented at trial. Witter's argument lacks merit because this Court has established case law contrary to Witter's position.

The legal standard and reasoning process by which this court is to evaluate the McConnell claim has been explained and implemented by this Court in at least three different published cases. Bejarano, 122 Nev. 1066, 146 P.3d 265; Rippo v. State, 122 Nev. 1086, 146 P.3d 279 (2006); Archanian v. State, 122 Nev. 1019, 145 P.3d 1008 (2006). In Bejarano, the Nevada Supreme Court explained the re-weighing process as follows:

> Reweighing requires us to answer the following question: ***Is it clear beyond a reasonable doubt that absent the invalid aggravators the jury still would have imposed a sentence of death?*** If we answer this question "yes," then the errors were harmless, and Bejarano's McConnell claim is procedurally barred for lack of a showing of prejudice. If we answer this question "no," then prejudice has been shown, and we must remand to the district court for a new penalty hearing. Id. citing State v. Bennett (Bennett III), 119 Nev. 589, 604, 81 P.3d 1, 11-12 (2003); Leslie v. Warden, 118 Nev. 773, 782-83, 59 P.3d 440, 446-7 (2002).

The Bejarano Court then reviewed only that evidence, both aggravating and mitigating, that had been presented at the original penalty hearing absent the invalid felony-aggravators. Id. Although other procedurally defaulted claims existed in the case, such were not considered in the reweighing process. Id. A proper reweighing or

harmless error analysis does not ***add*** to what the jury already found, but asks only whether the outcome would have been the same ***without*** the alleged error.

In a harmless error analysis, the court simply removes the felony-aggravators from the equation and considers whether the jury still would have imposed a sentence of death. Bejarano, *supra*. Removal of the felony aggravators does not change in any way the evidence that was admitted in the penalty hearing. The mere labeling of a prior conviction as an aggravator has only an "inconsequential" impact that can not fairly be regarded as a constitutional defect in the sentencing process. See Brown v. Sanders, 546 U.S. 212, 126 S.Ct. 884 (2006). Faced with exactly the same evidence in aggravation and mitigation, the jury obviously would have still sentenced Witter to death.

Even the case authority relied upon by the defense, follows the same reweighing process of looking only at the evidence actually presented to the jury when an aggravating circumstance is subsequently invalidated. Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002). Although in Leslie the invalidation of the "at random and without apparent motive" aggravator was not found harmless and a new penalty hearing was ordered in that case, the reweighing analysis did not include new matters outside the record. Id. House v. Bell, 547 U.S. 518, 126 S.Ct. 2064 (2006), is distinguished because it is an actual innocence case based on newly discovered evidence. In that case, prisoners asserting innocence as a gateway to defaulted claims "must establish that, ***in light of new evidence***, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Id. In the case of "actual innocence" of the death penalty, petitioner must show that "no reasonable juror would have found him eligible for the death penalty. See Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514 (1992). Such exception is concerned with actual as opposed to legal innocence. Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661 (1986). A McConnell error, on the other hand, has nothing to do with newly discovered evidence or wrongly admitted evidence. Rather, it concerns only an

invalid aggravating circumstance in a legal instruction that should not have been given to the jury.

Contrary to case law, Witter is arguing for a change in law by rejecting the kind of harmless error analysis engaged in by this Court in Bejarano, Rippo, and Archanian, *supra*. However, the district court is bound by this precedent and in the meantime, the law on reweighing remains that when invalidating an aggravating circumstance, the harmless error analysis does not include new evidence that was never presented to the jury. Bejarano, Rippo, and Archanian, *supra*. Therefore, Witter's conviction and sentence of death should be affirmed.

**E**

**THE REMAINING AGGRAVATOR DOES OUTWEIGH THE MITIGATING CIRCUMSTANCES**

In the present case, the Nevada Supreme Court has already re-weighed the aggravating and mitigating circumstance in this case. In 1996, this Court struck down the "prevention of lawful arrest" aggravator. Witter, at 930, 921 P.2d at 900-901. After that aggravator was struck, this Court concluded that the remaining aggravators outweighed the mitigating evidence offered by Witter. Notwithstanding the felony-murder aggravators, Witter's death sentence should be upheld.

In support of the State's aggravator, David S. Rumsey testified that on January 11, 1986, Witter stabbed David in the stomach with a seven-inch butcher knife. AA, Vol. 7, 1441. Rumsey explained that on the evening of January 11, 1986, Witter confronted Rumsey and Gina Martin, Witter's former girlfriend. AA, Vol. 7, 1441-1442. Witter was enraged because Rumsey had gone on a date with Martin. AA, Vol. 7, 1445-1446. Rumsey attempted to resolve the matter by extending his hand to shake Witter's hand, to which Witter responded by plunging a seven-inch butcher knife into Rumsey's stomach. AA, Vol. 7, 1445. Rumsey fled into Martin's house, leaving a trail of blood behind him. AA, Vol. 7, 1446-1447. The defendant followed, but not before slashing Rumsey's tires, breaking out light bulbs, destroying several flower

pots and ripping down the window drapes. AA, Vol. 7, 1447. Ultimately, the defendant fled the scene, but was later apprehended and charged with Attempt Murder with Use of a Deadly Weapon and Assault with a Deadly Weapon. AA, Vol. 7, 1450. Rumsey was hospitalized for approximately four (4) weeks recovering from Defendant's stabbing which severed Rumsey's large and small intestines, cut ten (10) holes in Rumsey's bowels, and extended into Rumsey's rectum AA, Vol. 7, 1448. The defendant eventually pled guilty, pursuant to negotiations, to one (1) count of Assault with a Deadly Weapon and was sentenced to five (5) years in the California State Prison. AA, Vol. 7, 1450-1451.

Linda Rose, a parole officer for the California Department of Corrections, testified that she supervised Witter while he was on parole from the assault conviction. AA, Vol. 7, 1462. Officer Rose indicated that Witter served two (2) years and eight (8) months in prison and then was placed on parole. AA, Vol. 7, 1467. Witter violated the conditions of his parole on three (3) separate occasions and was returned to prison following each violation. AA, Vol. 7, 1467-1472. Witter was discharged from parole on February 9, 1993. Id.

James Ford, a patrol officer with the San Jose, California Police Department, testified that on July 20, 1993 he responded to a call that Witter was throwing rocks through the windows in Shanta Franco's home. AA, Vol. 7, 1490. Officer Ford found Witter outside the house screaming and carrying a six-inch dagger in the back of his pants. AA, Vol. 7, 1491-1492. Ms. Franco told Officer Ford that Witter came to her home looking for his ex-girlfriend, Carmen Kendrick. AA, Vol. 7, 1496. Ms. Kendrick, who was present at the home, told Officer Ford that she was pregnant with Witter's child, but did not want to speak with him. Id. Witter was arrested and charged with Possession of an Illegal Weapon, Vandalism of a Residence, and Public Intoxication. AA, Vol. 7, 1497. Officer Ford also testified that he was familiar with the signs of gang affiliation in California and that Witter wore several tattoos and clothing that suggested Witter's gang affiliation and that in several photographs taken

after Witter was arrested in the present case, Witter was exhibiting "gang signs." AA, Vol. 7, 1498-1507.

Officer Timothy Jackson, a police officer with the San Jose, California Police Department testified that he responded to a call on October 9, 1993 that Witter had beaten his girlfriend, Carmen Kendrick. AA, Vol. 7, 1534. Ms. Kendrick told Officer Jackson that she was pregnant with Witter's child and that Witter had beaten her. Id.

Thomas Pipitone, a corrections officer with the Las Vegas Metropolitan Police Department (LVMPD), testified that on August 4, 1994, he searched Witter's cell at the Clark County Detention Center. AA, Vol. 8, 1548. During this search, Officer Pipitone found a sharpened metal item that had been fashioned from a piece of a clipboard. AA, Vol. 8, 1550, 1552.

James R. Cox, the oldest son of the victim, James Cox, testified about the impact that his father's death had on the Cox family. AA, Vol. 8, 1588-1610. Mr. Cox described his father as an honorable, caring, honest father, husband, and member of the Las Vegas community. Id. Mr. Cox told how his father's death had impacted his father's other children. Id. Finally, Mr. Cox read a letter written by his brother, Matthew Cox, describing Matthew's sentiments regarding his father's death. Id.

Phillip Cox, a brother of James Cox, also described James's positive qualities and characteristics. AA, Vol. 8, 1614-1615. Phillip Cox described James's relationship with his parents, his relationship with his children, and his employment history. AA, Vol. 8, 1616-1621. Phillip Cox also described the loss that had been experienced by himself and the other members of James Cox's family. AA, Vol. 8, 1621-1633.

The State's final witness during the penalty phase was Kathryn Cox. AA, Vol. 8, 1633. Kathryn told of her memories of her husband, James. AA, Vol. 8, 1634-1638. Kathryn read a statement she had previously prepared describing her feelings and emotions regarding Witter's brutal attack and James's murder. AA, Vol. 8, 1638-1640.

The first witness called by the defense was Ruth Fabela, Witter's maternal aunt. AA, Vol. 8, 1665. Ms. Fabela testified that Witter's mother had problems with alcohol and drugs. AA, Vol. 8, 1667. On cross-examination, Ms. Fabela testified that Witter was essentially raised by his paternal grandparents, William and Martha Witter. AA, Vol. 8, 1673-1674.

Tina Whitesell, Witter's sister, testified that her mother was constantly involved in drugs, alcohol, and men. AA, Vol. 8, 1681. Ms. Whitesell testified that her parents frequently fought with each other, sometimes hitting each other and chasing each other with a knife. AA, Vol. 8, 1682. Ms. Whitesell also related how she and Witter were raised by grandparents and that both the grandparents drank heavily. AA, Vol. 8, 1684-1685. Ms. Whitesell also testified that neither she nor her two sisters had been involved in criminal activity during their lives. AA, Vol. 8, 1686-1687.

The defense also called Louis Witter, Witter's father. AA, Vol. 8, 1713. He testified that he had three prior felony convictions and had trouble with alcohol and drugs. AA, Vol. 8, 1715. Louis Witter also testified that Witter's mother had trouble with alcohol and drugs. AA, Vol. 8, 1740. Finally, Louis Witter described how he and Witter's mother constantly fought after drinking excessively.

Elisa Sanders, Witter's sister, testified about the abusive environment in which Witter and his siblings were raised. AA, Vol. 9, 1769-1771. Ms. Sanders also testified about the abuse that occurred while Witter and his siblings were being raised by their paternal grandparents. AA, Vol. 9, 1771-1773. Ms. Sanders related how this upbringing had negatively impacted her own life. Id.

Michael L. Ritchison, Witter's cousin, testified about the drug, alcohol, and physical abuse that was present in Witter's home while he was growing up. AA, Vol. 9, 1796-1799. Mr. Ritchison also testified about the alcohol and physical abuse that was present in his grandparent's home while Witter was living there. Id.

The final witness called by the defense was Dr. Louis Etcoff, a licensed psychologist in the state of Nevada. Dr. Etcoff testified that he had previously

interviewed Witter and conducted various psychological tests on him. AA, Vol. 9, 1815-1817. Dr. Etcoff related the results of these tests and described how the results directly correlated with the information he had acquired regarding Witter's life. AA, Vol. 9, 1817-1818. Dr. Etcoff concluded that Witter may have had Attention Deficit Hyperactivity Disorder, Antisocial Personality Disorder, and Developmental Arithmetic Disorder. AA, Vol. 9, 1820-1823.

Here, it is clear that, even without the felony aggravator, the aggravating circumstance in this case outweighs any evidence of mitigation and the jury still would have returned a death sentence. Witter has a long history of violence using a knife. The killing of James Cox, a man who lost his life when he came to his wife's aid who was being sexually assaulted, was brutal and senseless. This is especially true considering Witter's prior conviction for having stabbed someone and his possession of a shank in jail. Given the brutality Witter exhibited in this crime, Witter's history of violent crimes involving a knife, and the fact that he continued to rely upon knives and "shanks" to commit crimes while incarcerated, each demonstrate the jury's verdict was proper in this case. Therefore, Witter's conviction and sentence of death should be affirmed.

## II

## THE DISTRICT COURT COMMITTED NO ERROR WHEN IT HELD THAT NEVADA'S EXECUTION PROTOCOL WAS CONSTITUTIONAL

Witter argues that the district court erred when it held that Nevada's Lethal Injection Execution protocol does not constitute cruel and unusual punishment. More specifically, Witter argues that the district court erred because reliance on McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2002), was improper, that McConnell no longer controls, and that Nevada's execution protocol is cruel and unusual. These arguments lack merit because they are nothing more than bare legal conclusions belied by current United States law, are procedurally barred, and not ripe for review.

NRS 176.355(1) provides that a sentence of death in Nevada "must be inflicted by an injection of a lethal drug." NRS 176.355(2)(b) requires the Director of the Department of Corrections to "[s]elect the drug or combination of drugs to be used for the execution after consulting with the State Health Officer." See also NRS 453.377(6)(providing that otherwise controlled substances may be legally released by a pharmacy to the Director of the Department of Corrections for use in an execution); NRS 454.221(2)(f).

In State v. Jon, 46 Nev. 418, 211 P. 676 (1923), this Court stated:

> We must presume that the officials intrusted (sic) with the infliction of the death penalty by the use of gas will administer a gas which will produce no such results, and will carefully avoid inflicting cruel punishment. That they may not do so is no argument against the law.
>
> ...The legislature has determined that the infliction of the death penalty by the administration of lethal gas is human, and it would indeed by not only presumptuous, but boldness on our part, to substitute our judgment for theirs.
>
> ...The present statute provides that the judgment of death shall be inflicted by the administration of lethal gas, and that a suitable and efficient inclosure and proper means of the administration of such gas for the purpose shall be provided. We cannot see that any useful purpose would be served by requiring greater detail.

In McConnell, 120 Nev. 1043, 102 P.3d at 616, this Court, found the Jon Court's reasoning to remain sound when concluding that the current method of lethal injection was not cruel and unusual punishment. Since then, a number of defendants have challenged the three drug succession commonly used in carrying out the execution. To date, no court has found either lethal injection in general or the specific lethal injection protocol to be unconstitutional. See Bieghler v. State, 839 N.E. 691 (Ind. 2005); Abdur'Rahman v. Bredesen, 181 S.W.3d 292 (Tenn. 2005); Aldrich v. Johnson, 388 F.3d 159 (5th Cir. 2004)(lethal injection in Texas); Reid v. Johnson, 333

F.Supp.2d 543 (E.D.Va. 2004); Harris v. Johnson, 376 F.3d 414 (5th Cir. 2004); People v. Snow, 65 P.3d 749, 800-01 (Cal. 2003). Sims v. State, 754 So.2d 657 (Fla. 2000); State v. Webb, 750 A.2d 448 (Conn. 2000); LaGrand v. Stewart, 133 F.3d 1253, 1265 (9th Cir. 1998).

A

**A CHALLENGE TO THE LETHAL INJECTION PROTOCOL IS NOT COGNIZABLE IN A PETITION FOR POST-CONVICTION RELIEF**

A post-conviction petition under NRS Chp. 34 may only "request relief from a judgment of conviction or sentence in a criminal case" or challenge the computation of time. NRS 34.720. There is nothing in the statutory language or the legislative history that permits Witter to challenge the execution protocol. Witter was sentenced to Death by Lethal Injection by the court system, but the specific protocol under which Witter's execution is to be carried out is within the discretion of the Department of Corrections. NRS 176.355. Even if Witter was successful in challenging the specific **protocol** used by the department of corrections, Defendant's **sentence** as reflected in the judgment of conviction would remain unchanged. See also State v. Moore, 272 Neb. 71, 718 N.W.2d 537 (2006).

Two recent United States Supreme Court cases have addressed a similar issue. In Nelson v. Campbell, 541 U.S. 637, 124 S.Ct. 2117 (2004), the Court concluded that the appropriate vehicle for a prisoner to challenge a particular lethal injection procedure was an action under 42 U.S.C. §1983, stating **"a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself"** because by altering the procedure, the state could go forward with the execution.

In June 2006, the Court again addressed the proper vehicle for challenging an execution protocol in Hill v. McDonough, 547 U.S. 573, 126 S.Ct. 2096 (2006). The Court observed that, as in Nevada, the implementation of Florida's Lethal Injection protocol was left to the Department of Corrections. The Hill Court also noted that a

prior habeas corpus petition filed by the prisoner did not preclude this §1983 action and that the injunction sought by him enjoining the specific procedure would not foreclose the State of Florida from implementing lethal injection by another procedure and, thus, **it could not be said that the prisoner's suit sought to establish "'unlawfulness [that] would render a conviction or sentence invalid.' "** 126 S.Ct. at 2099, *quoting* Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364 (1994).

The Ninth Circuit has also recognized that the discretionary procedure selected by the director of prisons for an execution is not cognizable in a post-conviction petition which can only challenge the validity of the judgment of conviction or sentence:

> In the instant case, the plaintiff seeks review of the method by which the sentence will be carried out, rather than a review of the fact that he was sentenced to death. He asserts that the defendants, acting under color of state law, will violate his Eighth Amendment and First Amendment rights by their use of California's lethal injection protocol. Thus, Beardlee's claim is more properly considered as a "conditions of confinement" challenge, which is cognizable under § 1983, than as a challenge that would implicate the legality of his sentence, and thus be appropriate for federal habeas review.

Beardslee v. Woodford, 395 F.3d 1064, 1068-9 (9th Cir. 2005). Federal District Courts have found the same:

> The contested method of lethal injection can be shown neither to be statutorily mandated nor to be the sole method by which the State of Texas may accomplish its chosen method of execution. In addition, the Plaintiff is not challenging the State's right to execute him. The Court finds, therefore, that Plaintiff's attack on the method of lethal injection does not comprise an attack on the death sentence itself. Accordingly, Plaintiff's motion for relief properly falls within § 1983 and not within federal habeas corpus.

Harris v. Johnson, 323 F.Supp.2d 797 (S.D.Tex., 2004).

In the instant case, Witter is not arguing that lethal injection is an unconstitutional sentence, but that it might be implemented in an unconstitutional manner. The validity of Witter's death sentence in the Judgment of Conviction remains entirely unaffected by what the prison director may or may not do in the future.

**B**

**CURRENT UNITED STATES SUPREME COURT CASE LAW CONTROLS**

Even if this Court were to entertain the merits of this claim, United States Supreme Court case law is in accordance with these holdings. In Baze v. Rees, ___ U.S. ___, 128 S.Ct. 1520 (2008), the United States Supreme Court addressed the issue whether Kentucky's three-drug lethal injection method of capital punishment posed an unacceptable risk of significant pain that would render it cruel and unusual punishment under the Eighth Amendment.

The United States Supreme Court held that capital punishment is constitutional and therefore, it is necessary that some means be allowed to carry out such punishment. Baze, 128 S.Ct. at 1529. Given the result of execution, the Court held that the "risk of pain is inherent in any method of execution-no matter how humane," therefore, "the Constitution does not demand the avoidance of all risk of pain in carrying out executions." Id.

The Court also addressed the petitioner's claim that the procedures create unnecessary pain. In response, the Court held that even if an execution method may result in pain, either by accident or as a consequence of death, that pain does not establish an "'objectively intolerable risk of harm' that qualifies as cruel and unusual." Baze, 128 S.Ct. at 1531, citing Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374 (1947).[12] Additionally, isolated mishaps alone do not rise to

[12] In that case, the United States Supreme Court upheld a second attempt at executing a prisoner by electrocution after a mechanical malfunction interfered the first time. The Court held that accidents happen for which no man is to blame and that such accidents do not violate the Eighth Amendment. Id, at 462-63, 67 S.Ct. 374.

levels of Eighth Amendment violations. Baze, 128 S.Ct. at 1531. Therefore, in terms of arguing for a safer protocol, "a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." Id. If courts were to allow these arguments, they would be turned "into boards of inquiry charged with determining 'best practices' for executions." Id.

Petitioners in Baze also raised the issue that the risk of improper administration of sodium thiopental, the initial anesthetizing drug in the three-drug protocol, was cruel and unusual pursuant to the Eighth Amendment. The United State Supreme Court disagreed. Id, 128 S.Ct. at 1533. The Court held that since the protocol incorporates several safeguards, including minimal levels of professional experience for individuals who insert the IV, a requirement for a practice session, a backup IV line, and the warden's presence in the chamber, the protocol could not be considered cruel and unusual. Id, 128 S.Ct. at 1533-34.

Lastly, the United States Supreme Court addressed Kentucky's failure to adopt, proposed, allegedly more humane, alternatives to its three-drug protocol. The Court held that this failure to adopt petitioners' proposed alternative was not cruel and unusual because Kentucky's "continued use of the three-drug protocol cannot be viewed as posing an 'objectively intolerable risk' when no other State has adopted the one-drug method" petitioners proffer. Id, 128 S.Ct. at 1535. There is no proof that the one-drug method is an equally effective manner of imposing death. Id. Additionally, the one-drug method has been rejected by Tennessee as that state concluded that a one-drug method would take longer to cause death than the three drug protocol. Id. Given the holding in Baze, Witter's arguments that the district court erred because of its reliance on McConnell and that McConnell no longer controls are without merit.

Lethal Injection has been the method of execution in Nevada since 1983. Witter was first sentenced to death in 1996. In challenging the execution protocol, Witter relies on several documents which appear to support his position that inadequate anesthesia can cause pain and suffering during the execution. Without

addressing the relative merits of each exhibit proffered by Witter, it is clear that each has been known[13] and available for a considerable time prior to the date of this petition. Witter fails to offer any indication why he has failed to raise this issue in a timely manner.

Furthermore, Witter is not in imminent danger of execution and has yet to exhaust his state or federal remedies. It would be premature for this court to consider Nevada's execution protocol in the context of this case where Nevada's execution protocol may be altered by the time Defendant's sentence is finally carried out. Accordingly, the issue is not ripe for review in this case.

## III

## THE DISTRICT COURT COMMITTED NO ERROR WHEN IT HELD THAT WITTER FAILED TO DEMONSTRATE GOOD CAUSE TO OVERCOME PROCEDURAL BARS

Witter argues that the district court erred when it held that Witter's post-conviction petition violated NRS 34.726, NRS 34.800, and NRS 34.810. More specifically, Witter argues that he did provide good cause by arguing that the State suppressed evidence involving Witter's gang activity and through presentation of Witter's juvenile record. Witter also adds that his problems with certain disorders are also a good cause. As such, Witter believes that the failure to allow each of these as a good cause is unfairly prejudicing him. Each of these arguments lack merit.

### A

### NRS 34.726 BARS WITTER'S PETITION AS UNTIMELY

Witter's conviction and sentence were affirmed on July 22, 1996. Witter filed the instant petition on February 14, 2007. This is a delay of ten (10) years; well beyond the statutory deadline of one year delineated in NRS 34.726. Witter argues

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[13] Each of the alleged "botched executions" is over 10 years old. Only two of the executions took place in Nevada. In neither case, did the Defendant state that the condemned were in pain. Bridges complained of "the injustice of signing a petition." Defendant fails to explain how the statutory requirement of signing a petition to protect due process rights equates to "cruel and unusual punishment."

that the failure to raise claims was also the result of ineffective assistance of counsel throughout the past 10 years. This argument is both absurd and without merit. Likewise, it fails to account for Witter's failure to file a petition since 2001.[14]

Prior to the changes in 1993, a defendant, after his appeal was denied, could file a Petition for Post-Conviction Relief in the district court where he was convicted. See NRS 177.325, *repealed* 1993. In the first petition, he could raise any ground which could not have been raised on appeal. See NRS 177.375, *repealed* 1993. If the first petition was denied, a defendant could then file a Petition for Writ of Habeas Corpus in the county where he was incarcerated, essentially raising any grounds he could not raise in the trial court. After reviewing this duplicitous scheme, the Nevada Legislature combined the two forms of relief into one legal vehicle, a Petition for Writ of Habeas Corpus (Post-Conviction). A Petition must now be filed in the county of conviction. NRS 34.738. In addition, the Legislature combined the procedural bars of both chapters into one comprehensive statutory scheme. See NRS 34.720 to 34.830 et. seq.

The statutory scheme now in place creates a variety of procedural bars which a defendant must be in compliance with or his petition is not cognizable. The first limitation is contained in NRS 34.726. That statute states in pertinent part:

> 1. Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the supreme court issues its remittitur.

Contrary to Witter's assertions, the plain language of the statute applies to any petition that challenges the validity of a judgment or sentence. See Dickerson v. State, 114

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[14] Defendant's pursuit of habeas corpus relief in federal court does not constitute "good cause" for his failure to file petition for post-conviction relief within one year after resolution of appeal, as required by statute. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989); See also Shumway v. Payne, 223 F.3d 982 (9th Cir. 2000)(finding that upon remand from federal court, Defendant would be barred from presenting claims under Washington Post-Conviction Relief statute.) Current counsel has represented Defendant since 2001. Counsel may not raise his own ineffectiveness.

Nev. 1084, 967 P.2d 1132 (1998). Nevada Revised Statute 34.726 was enacted, in the words of the Nevada Supreme Court, to create limitations on post-conviction remedies because:

> Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. **In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions.** A showing of prejudice is thus essential to prevent the filing of successive and meritless petitions for post-conviction relief.

Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994) (emphasis added). Therefore, Witter's failure to file this successive petition within one year procedurally bars a review of the petition by the district court. Successive petitions are only heard in extraordinary cases where a defendant can show both cause for the delay and actual prejudice. NRS 34.810; Bejarano v. Warden, 112 Nev. 1466, 929 P.2d 922 (1996).

**B**

**THE STATE PLEAD LACHES IN THIS CASE PURSUANT TO NRS 34.800**

Subsection 2 of NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period of five years [elapses] between the filing of a judgment of conviction, an order imposing sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction ... ." See NRS 34.800. The statute also requires that the State plead laches in its motion to dismiss the petition. Witter's direct appeal was dismissed by the Nevada Supreme Court on July 22, 1996. Witter filed the instant petition for writ of habeas corpus on February 14, 2007. Since over ten years elapsed between the affirmance of Witter's conviction and the filing of this petition, subsection 2 of NRS 34.800 directly applies in this case.

Many of Witter's claims were mixed questions of law and fact that would have required the State to prove facts that were over a decade old. NRS 34.800 was

enacted to protect the State from having to go back years later to reprove matters that have become ancient history. There is a rebuttable presumption of prejudice for this very reason and the doctrine of laches must be applied.

Since the remedy Witter seeks is a new trial, the determination of the issues on the merits would not be based on a purely legal analysis. If courts were to require an evidentiary hearing on long delayed petitions such as in this case, the State would have to call and find long lost witnesses whose once vivid recollections have faded and re-gather evidence that, in many cases, has been lost or destroyed because of the lengthy passage of time. Therefore, not only is this case barred by the one year rule it is also barred by the doctrine of laches. See Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 268 (1984).

## C

## WITTER'S PETITION WAS SUCCESSIVE

As noted previously, the Nevada Legislature added a section severely limiting successive petitions. Witter's petition is not only barred because it was untimely filed, it is barred because it is successive. NRS 34.810, entitled "**Additional reasons for dismissal of petition**", creates a statutory scheme which prevents a successive petition from being heard.

Pertinent portions of NRS 34.810 state:

> 2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the Defendant to assert those grounds in a prior petition constituted an abuse of the writ.
>
> 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 or for presenting the claim again; and
>
> (b) Actual prejudice to the petitioner.

In order to show good cause, Witter has the burden of demonstrating that there was an impediment external to the defense which prevented him from complying with the state procedural default rules. Lozada v. State , 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). Good cause for the delay is defined as "a substantial reason; one that affords a legal excuse." Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). Witter's pursuit of habeas corpus relief in federal court does not constitute "good cause" for his failure to file petition for post-conviction relief within one year after resolution of appeal, as required by statute. Id. In order to establish prejudice, a petitioner must demonstrate that the alleged errors worked to his actual and substantial disadvantage. Hogan v. Warden , 109 Nev. 952, 959, 860 P.2d 710, 716 (1993).

In addition, dismissal of the instant petition will not prejudice Witter. Witter has no legal basis to challenge his conviction, as he has raised many of the issues before, either on direct appeal or in his prior petitions. Thus, the district court's dismissal of this petition as time barred was proper and does not prejudice the Witter.

A finding of prejudice is required to avoid the time bar of NRS 34.726. In regard to this requirement, the Nevada Supreme Court has held that "requiring prejudice to excuse the filing of untimely petitions helps to ensure that claims are raised before evidence is lost or memories fade. Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies." Lozada, 110 Nev. at 358, 871 P.2d at 950. Because Witter was unable to provide either good cause or prejudice so as to avoid application of the statute, the petition should be dismissed.

NRS 34.726, along with the legislative history regarding the restructuring of post-conviction relief avenues, clearly indicate that the one year rule is to apply to all petitions for writ of habeas corpus. Witter had an opportunity to address the issues he raises in this petition in his first petition in 1997. As the speakers to the legislature pointed out during the consideration of the changes to post-conviction relief, the combination of statutes merely streamlined the process. It does not take away any

habeas remedy. There was no denial of due process or equal protection. Therefore, Witter's conviction and sentence of death should be affirmed.

## D

## THE DEFENSE FAILED TO SHOW GOOD CAUSE AND PREJUDICE

The defense below acknowledged that Atkins only exempts the mentally retarded from the death penalty. Atkins v. Virginia, 536 U.S. 304 (2002). Any argument for an extension of that same rationale to fetal alcohol syndrome is a novel argument not endorsed by any court. A claim that requires a change or extension of law can not qualify for consideration in a successive habeas petition because one can not show good cause and prejudice. Only if the Nevada or United States Supreme Court first adopted such a legal ruling would Witter then have cause to overcome the procedural bars.

Many of Witter's other allegations of good cause and prejudice were previously addressed in this case in the context of ineffective assistance of counsel in the first post-conviction proceedings. The Nevada Supreme Court affirmed the district court's denial of relief on August 10, 2001. The District Court's Findings of Fact and Conclusions of Law accompany its order. They are presented as Exhibit 6.4 in Volume 6 of Defendant's Appendix.

*1. Fetal Alcohol Syndrome*

The following Conclusions are relevant to the matter of Fetal Alcohol Syndrome.[15]

> 5) Counsel was not ineffective for choosing not to present evidence at the trial portion of defendant's case. At the evidentiary hearing, counsel explained that he knew if defendant was convicted there would be a penalty phase. Because of the overwhelming evidence of defendant's guilt, counsel felt it was prudent to not present a defense during the guilt phase so as not to impair his credibility at the penalty phase.

[15] For the purpose of consistency, the Conclusions listed throughout are numbered as they are in the district court's order.

6) Trial counsel was effective because he did investigate a FAS defense. Counsel flew to San Jose, California where he researched Defendant's family background and spent one week interviewing witnesses...At the time counsel was preparing for trial, little was known about FAS,[16] yet counsel conducted extensive investigation into this possible defense. Counsel's efforts to investigate FAS were reasonable.

7) Trial counsel was effective because he did attempt to obtain an FAS expert. Counsel learned that he would need a geneticist to support a claim of FAS. To locate a geneticist, counsel contacted three university medical facilities and eventually located a local geneticist, Colene Morris. Counsel contacted Dr. Morris on at least ten occasions, but each time, she refused to speak to him...Counsel eventually contacted FAS experts who resided in Seattle, but they refused to meet with defendant until he was first examined by a geneticist.... Based on counsel's conduct, there is no merit to defendant's claim.

8) Defendant cannot show that counsel was deficient for failing to retain a FAS expert because defendant failed to present any evidence that FAS would have been a valid defense in this case.

9) Defendant was unable to show that the outcome of his case would have been different... because FAS is a mitigator, not an affirmative defense. A diagnosis of FAS, "would place nothing more than a label on [defendant's] lower intelligence and behavioral problems, evidence which was already before the jury. With or without the diagnosis or label, the defense could argue that such evidence mitigated in favor of the lesser sentence." State v. Brett, 892 P.2d 29, 64 (Wash. 1995).

*2. Gang Experts*

The following Conclusions are relevant to the issue of Gang Experts:

10) Counsel was not deficient for failing to present a gang expert during his penalty hearing because he believed that gang evidence was only admissible if defendant had been a gang member at some point in his life. Defendant did not tell counsel of his previous gang affiliation, therefore, counsel could not have anticipated the need to retain a gang expert.

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[16] In his current petition, Defendant cites A Manual on Adolescents with Fetal Alcohol Syndrome with Special Reference to American Indians. (Exhibit 4.4). This manual pertains to the special socioeconomic conditions which exist in the Native American populations/reservations which had led to the abuse of alcohol and the resulting effects on Native American Children. Defendant in this case is a Hispanic from San Jose, California. Counsel cannot reasonably be expected to investigate every publication, and in particular a publication whose relevance is tenuous at best.

11) Counsel's failure to retain a gang expert was not deficient because an expert was not necessary to refute many of the claims made by the State's gang experts.

12) Defendant was not prejudiced by counsel's failure to call a gang expert. The Nevada Supreme Court, upon considering whether defendant was prejudiced by the district court's refusal of a continuance that rendered it impossible for defendant to obtain a gain expert, concluded that even if the defendant had been able to secure an expert to testify as to violence in prisons and the need for a shank, "such testimony would have done little to mitigate his involvement." Witter v. State, 112 Nev. 908, 920, 921 P.2d 886, 894 (1996).

*3. Prejudice*

As to prejudice, the following Conclusion is relevant:

20) Defendant cannot meet the second prong of Strickland because even if counsel were ineffective, defendant was not prejudiced by trial counsel's performance...because no matter what counsel did at trial, no reasonable probability existed that Defendant would not be convicted. There was so much overwhelming evidence of guilt by way of the identification of the defendant by one of the victim (Kathryn Cox), three security guards, and the bus driver; physical evidence of the deceased victim's blood found all over the defendant; and a confession by the defendant that he committed the killing, that defendant cannot show that he was prejudiced by counsel's performance.

*4. Failure to Investigate Witnesses*

Witter devoted a substantial portion of his petition to the allegation that he was "a nice guy" when he was not intoxicated. Witter asserts that trial counsel failed to investigate and interview witnesses who would have testified that if Witter was sober, he was "a great person." Even if the court were to consider this argument, Witter cannot establish that the result would have been more favorable. A defendant who contends that his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004). In the present case, Witter's blood alcohol content was .07. Thus, there was no presumption of

intoxication. Moreover, any claims of Witter being "the nicest guy in the whole world" or a "gentleman who treated a woman with respect," AA, Vol. 11, 2322, "caring and sensitive," AA, Vol. 11, 2249, "didn't have a mean bone in his body," AA, Vol. 11, 2249, and "he never got angry," AA, Vol. 11, 2250, are belied by the following facts elicited at trial.[17]

Kathryn began screaming and Witter repeatedly told her, "Shut up. I'm going to kill you, you bitch." .... Witter unzipped his pants and exposed his penis and told Kathryn to "suck his cock like [she] would for [her] old man and make him feel better or good."....Kathryn was unable to meet Witter's demands, however, because she kept passing out as a result of a collapsed lung that was caused by the stab wounds inflicted by Witter. When Witter realized Kathryn was not able to comply with his demands, Witter lifted Kathryn's head back up and again told her that he was going to rape her and kill her..... Witter dragged Kathryn back to the car and pushed her into the driver's seat again..... Witter became frustrated and slashed Kathryn's pants with his knife, leaving four (4) or five (5) knife wounds on Kathryn's right hip. After Witter cut Kathryn's pants, he pulled the clothing open, exposing Kathryn's vaginal area. Witter reached over with his hand and began rubbing Kathryn's vaginal area with his hand and fingers. While Witter was rubbing Kathryn's vaginal area, he began kissing her again and reached underneath Kathryn's shirt, undid her bra and began squeezing Kathryn's breast.

Under the circumstances, any evidence which emphasized Witter's positive qualities and respect for women would have been belied by the record of nearly a dozen wounds on the body of Kathryn Cox, his intended rape victim, and sixteen (16) stab wounds on the body of James Cox, who came to his wife's aid and paid with his life. Thus, Witter cannot establish that the presentation of this evidence would have rendered a more favorable outcome.

[17] The State notes that Witter has removed this language from the instant appeal.

Although, Witter does not assert the ineffective assistance of appellate counsel as a separate ground, he asserts, that [t]he failure to raise any claims of the claims asserted in this petition which were susceptible to decision on direct appeal was the result of ineffective assistance of counsel on appeal.

This argument lacks merit because this matter dealing with appellate counsel has already been litigated and decided on its merits. Decision and Order, C117513, September 25, 2000. The Nevada Supreme Court affirmed the district court's denial of relief on August 10, 2001. The District Court's Findings of Fact and Conclusions of Law accompany its order.

Ground 3: *Batson*

The following Conclusions are relevant to Appellate Counsel's failure to raise a Batson[18] issue.

> 20) Appellate Counsel was not ineffective for not raising a Batson challenge because the defendant failed to show that the juror in question was a member of a cognizable racial group. At the time of the peremptory challenges, the jurors were not present. Neither the prosecutor nor the Court had noted that the juror was African-American because they were not aware that race was an issue in the case and the defendant appeared to be Caucasian... Due to the uncertainty of the juror's race, appellate counsel chose not to raise this issue on appeal. Appellate was not ineffective because he clearly chose to exclude this weak argument.
>
> 21) Appellate counsel was effective for not raising a Batson challenge because the State offered a race-neutral reason for exercising its peremptory challenge.... Defendant was unable to show that State's reason was not facially valid, therefore, this issue would not have been successful on appeal.

Inasmuch as Defendant presents the Batson issue as a separate claim in Ground 3, this issue has been litigated and decided on its merits during post-conviction proceedings. Therefore, Ground 3 is successive and was properly dismissed.

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[18] Batson v. Kentucky, 476 U.S. 79 (1986).

C. Ground 5(a): Voir Dire of Edward Miller:

This issue was raised and litigated in Defendant's first petition for post-conviction relief. The Court held:

> 28) Appellate counsel was correct in not raising the issue of denial of trial counsel's challenge for cause of juror Miller, who indicated that he would not consider the childhood of Defendant as a mitigating circumstance. The issue would have lost on appeal unless defendant could prove that the trial court abused its discretion.

Therefore, Ground 5(a) is successive and was properly dismissed.

Witter received effective assistance of appellate/post-conviction counsel and none of his claims of good cause and prejudice excuse the seven year delay in Federal Court prior to raising or re-raising such issues in a successive petition. As such, Witter's conviction and sentence of death should be affirmed.

## IV

## THE DISTRICT COURT DID NOT ERR WHEN IT HELD THAT INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL WAS NOT A GOOD CAUSE TO OVERCOME PROCEDURAL BARS

Defendant alleges that ineffective assistance of his post-conviction counsel constitutes good cause for not raising his claims in the successive petition sooner. The State agrees that as a death row petitioner, Defendant had a right to effective assistance of counsel in his first post-conviction proceeding, so he may raise claims of ineffective assistance of post-conviction counsel in a successive petition. See McNelton v. State, 115 Nev. 296, 416 n.5, 990 P.2d 1263, 1276 n.5 (1999); Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997). However, he must raise these matters in a reasonable time to avoid application of procedural default rules. See Pellegrini v. State, 117 Nev. 860, 869-70, 34 P.3d 519, 525-26 (2001) (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that a claim

reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing).

Defendant waited seven years after conclusion of his first post-conviction proceedings in September of 2000 to file the instant petition. Instead of timely filing a successive state petition to challenge the effectiveness of his first post-conviction counsel, Defendant proceeded to Federal Court where he managed to file a timely Federal habeas petition on September 18, 2001, in case 2:01-CV-01034-RLH(LRL). Even then, Defendant waited an additional six years before returning to State court.

The fatal flaw in Defendant's current petition is that he can not demonstrate good cause for this delay. Pursuit of Federal remedies does not constitute good cause to overcome State procedural bars. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989). Colley argued that he appropriately refrained from filing a State habeas petition during the four years he pursued a Federal Writ of Habeas Corpus. The Nevada Supreme Court disagreed:

> Should we allow Colley's post-conviction relief proceeding to go forward, we would encourage offenders to file groundless petitions for federal habeas corpus relief, secure in the knowledge that a petition for post-conviction relief remained indefinitely available to them. This situation would prejudice both the accused and the State since the interest of both the petitioner and the government are best served if post-conviction claims are raised while the evidence is still fresh.

Id. The state procedural rules simply do not afford a petitioner the luxury of Federal counsel and an investigation before being required to bring state claims. Accordingly, no matter how diligent and expansive the Federal investigation may have been, it does not constitute good cause as a matter of law.

## V

## THE DISTRICT COURT COMMITTED NO ERROR BY APPLYING THE LAW OF THE CASE DOCTRINE TO WITTER

It has long been the rule in Nevada that "[t]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." Hall

v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969); see also Bejarano v. State, 106 Nev. 840, 801 P.2d 1388 (1990). The Nevada Supreme Court has decided a number of the issues Defendant raised in his petition. See Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996). Therefore, the district court committed no error by applying the law of the case doctrine.

**A**

**GANG VIOLENCE**

As stated, previously, the issue of Gang Violence Evidence is successive. In addition, the issue has been presented to the Nevada Supreme Court and is barred by the law of the case. Hall, *supra*. The Nevada Supreme Court held that the district court did not abuse its discretion in denying Defendant's motion for continuance to obtain an expert to testify about gang violence. Witter, at 919-920, 921 P.2d at 894. The court noted:

> on June 20, 1995, almost a full year before the penalty hearing, the State notified Witter's counsel that it was investigating a discipline problem (possession of a shank) involving Witter. In addition, Witter's body displays a number of tattoos that are consistent with those worn by members of street gangs in San Jose, California, Witter's hometown. From these facts, we conclude that Witter's counsel had actual notice of Witter's possession of a shank while incarcerated, and his involvement with street gangs."[19]

The court continued:

> We also conclude that even if Witter were able to secure expert testimony regarding gang violence in prisons, such evidence would have done little to mitigate his involvement. Therefore, we conclude that Witter was not prejudiced by the district court's decision to allow only four days between discovery and the penalty hearing.

Id. In addition, Defendant admitted that he was "catching time left and right for gang involvement." (Petition, p. 118). This involvement included attacking "all our

[19] Photographs of Defendant's tattoos and gang sign are attached hereto as Exhibit "1."

enemies from LA." (Petition, p. 118). Defendant's own statements demonstrate that he was a gang member from Northern California. Moreover, on direct appeal, the Nevada Supreme Court held that gang evidence was properly admitted to show future dangerousness.

> In this case, the State presented testimony from the arresting officers indicating that Witter told them that he could heighten his reputation if he were to kill police officers, and from a second officer who stated that from the clothing Witter was wearing and from the tattoos on his arm, he believed that Witter was a member of a violent California gang knows as the "Nortenos." We conclude that this evidence tends to show that Witter posed a threat of future violence to the community...Accordingly, we conclude that the district court properly admitted evidence of Witter's affiliation with a street gang.

Witter, *supra*. Any attempt to deny his involvement in the "Nortenos" is without merit.

**B**

**PROSECUTORIAL MISCONDUCT**

The Nevada Supreme Court held that the State did not commit prosecutorial misconduct so unfair as to deprive Defendant of due process. Witter, at 924-928, 921 P.2d at 897-900. In particular, the court concluded that the any comments regarding "community standards" were an attempt to educate the jury about some of the theories supporting the criminal justice system, and why the death penalty is an available option. Since these are proper areas for prosecutorial misconduct, the court concluded that the prosecutor did not engage in misconduct. Witter, at 924, 921 P.2d at 897.

The court also concluded that any statements regarding a "duty to society at large" were proper comments that focused on the appropriate punishment under the facts and circumstances of the case. Witter, at 925, 921 P.2d at 898.

The court concluded that Witter's argument in regards to the prosecutor's reference to matters outside the record was without merit. Witter, at 926. 921 P.2d at 898. The court stated that the prosecutor did not refer to matters outside of the record or disparage a legitimate defense tactic. Id. Rather, the court concluded, the

statements "merely attempted to keep the jury's focus on the actual victim's in Witter's crime." Id.

The Nevada Supreme Court held that the prosecutor's comments regarding future dangerousness were proper. Witter, at 927-928, 921 P.2d at 899. The prosecutor is allowed to argue future dangerousness based solely on the killing of the victim in the present case. Id.; See also Redmen v. State, 108 Nev. 227, 828 P.2d 395 (1992). Moreover, it was not improper to comment on Defendant's possession of a shank in jail. Id.; See also, Haberstroh v. State, 105 Nev. 739, 782 P.2d 1343 (1989).

In concluding that the prosecutor's statements did not violate the "golden rule" doctrine, the Nevada Supreme Court stated:

> in commenting that anything less than the death sentence would be disrespectful to the dead, we conclude that the prosecutor was merely pointing our to the jury that our society values human life, one who takes a human life in the matter that Witter did should pay for his crime with his own life. Furthermore, the prosecutor's statement painted a vivid picture for the jury, and any reference to 'you' appears to be merely rhetorical.

Witter, at 928, 921 P.2d at 899-900.

**C**

**LIMITING VOIR DIRE AND DEATH QUALIFICATION OF THE JURY**

The Nevada Supreme Court held that the trial court did not abuse its discretion when it precluded Defendant's counsel from asking prospective jurors "If there was evidence that Defendant had a prior felony conviction involving the use or threat of violence, would you still consider all three sentencing alternatives in your deliberations." Witter, at 915-16, 921 P.2d at 891-892.

In addition, the Court held, "we do not read Morgan[20] or the Witherspoon[21] decisions to allow for one side to gain such an unfair advantage. Moreover, the record shows that other questions properly death qualified the jury." Witter, at 915, 921 P.2d

[20] Morgan v. Illinois, 504 U.S. 719 (1992)
[21] Witherspoon v. Illinois, 391 U.S. 510 (1968).

at 892. Thus, Defendant's assertion that the trial court erred in not considering Morgan v. Illinois (Petition, p. 155)is barred by the law of the case. Hall, *supra.* In addition, Ground 9 is barred by the law of the case. Hall, supra.

Likewise, any argument that the district court erred based on the refusal to allow trial counsel to question jurors about an article in the newspaper is barred by the law of the case. The Nevada Supreme Court held that the "district court would have run a greater risk of contamination if it were to have allowed Witter's counsel to question the jurors about the article. Under the circumstances, we conclude that Witter was not prejudiced by the district court's refusal to allow his counsel to question the jury about Schulze's article." Witter, at 916, 921 P.2d at 892.

**D**

**JURY INSTRUCTIONS**

The Nevada Supreme Court held that the jury instructions submitted to the jury were proper, and that the district court did not err when it refused Witter's instruction defining deliberation. Witter, at 918, 921 P.2d at 893. In regards to SCR 250, the Nevada Supreme Court stated. "[w]e conclude that the procedures followed by the district court were sufficient to guarantee that any legitimate objections Witter may have had about the jury instructions were considered by the district court and preserved in the record. Accordingly, we conclude that the procedures used by the district court satisfy SCR 250." Witter, at 918-919, 921 P.2d at 894.

Defendant alleges that the statutorily mandated reasonable doubt instruction unconstitutionally minimizes the State's burden of proof. This issue was thoroughly explored by the Ninth Circuit when it declared that the statutory definition of reasonable doubt in place at the time of Defendant's conviction was constitutional. See Ramirez v. Hatcher, 136 F.3d 1209 (9th Cir. 1998) cert. denied, 525 U.S. 967, 119 S.Ct. 415 (1998). Defendant states, "No other state currently uses this language in its reasonable doubt instruction and the few states that have previously used it have since disapproved it." (petition, p. 184). Defendant does not cite a single state that has

disapproved this language. Bare and naked assertions will not support relief. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Defendant states that the jury could have concluded that there need be unanimity to find mitigating and aggravating circumstances. Clearly, this is mere speculation unsupported by any legal or factual authority. Judge Learned Hand once wrote that the consideration of possible reasons for a jury's decision is to "consider too curiously, unless all verdicts are to be upset on speculation." Steckler v. United States, 7 F.2d 59, 60 (2nd Cir. 1925) (L. Hand, J.). Clearly, this cautionary advice is to be heeded in this case.

The State submits that, because the same jury was empanelled for the guilt phase and the penalty phase, it was unnecessary to review the elements of the underlying felony offenses in a specific jury instruction. Clearly, the jury knew and understood the elements because they rendered a guilty verdict during the guilt phase.

**E**

**VICTIM IMPACT TESTIMONY**

The Nevada Supreme Court concluded that Defendant's motion for a mistrial was properly denied because Witter was not denied a fair trial based on the testimony of Kathryn Cox. Witter, at 922, 921 P.2d at 896. The court stated:

> We conclude that in asking the jury to "show no mercy," Kathryn was not expressing her opinion as to what sentence Witter should receive. Rather, we conclude that Kathryn was asking that the jury return the most sever verdict that it deemed appropriate under the facts and circumstances of this case. **Kathryn's statements also emphasis the devastating effect this crime had on her and her family's life.** Such sentiments are admissible victim-impact statements. NRS 175.552(3).

Id. (emphasis added).

In addition, all of Witter's other claims in his petition were found to be without merit. NRS 175.552(3) provides that "[i]n the [penalty] hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant, or victim and on any other matter which the court deems relevant to

sentence, whether or not the evidence is ordinarily admissible." Thus, James R. Cox's testimony and Phil Cox's testimony are proper commentary on the circumstances of the offense and the impact on the victim's family.

Therefore, the district court committed no error by applying the law of the case doctrine. As such, Witter's conviction and sentence of death should be affirmed.

## VI

## NEVADA COURTS CONSISTENTLY APPLY PROCEDURAL DEFAULTS

Witter asserts that the Nevada Supreme Court as well as the district courts do not have to follow the procedural rules contained in NRS 34.720 to 34.830 et. seq. because those rules are not consistently applied. In essence, Witter argues that this Court should ignore the law because it has been ignored in the past.

The Ninth Circuit Court of Appeals has put to rest any allegation that Nevada has been inconsistent, finding:

> [Defendant] argues, however, that the Nevada Supreme Court's procedural bar rules are not adequate because that court does not consistently apply them. To be adequate, a state's procedural rule must be consistently applied. Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir.1994).
>
> We reject [Defendant]'s argument. The Nevada Supreme Court has consistently applied the state rule which prohibits review of the merits of an untimely claim unless the petitioner demonstrates cause. See, e.g., Birges v. State, 107 Nev. 809, 820 P.2d 764, 765-66 (1991); Glauner v. State, 107 Nev. 482, 813 P.2d 1001, 1003 (1991); Colley v. State, 105 Nev. 235, 773 P.2d 1229, 1230 (1989). Even before the Nevada State Legislature adopted the procedural rules which bar [Defendant]'s claims in state court, the Nevada Supreme Court dismissed petitions without reviewing the merits if the delay was unreasonable and prejudicial. Groesbeck v. State, 100 Nev. 259, 679 P.2d 1268, 1269 (1984).
>
> . . .

> We conclude that the Nevada Supreme Court consistently applies its procedural rules to bar review of the merits of an untimely claim in the absence of a showing of cause and lack of prejudice to the State. Our review of the merits of [Defendant]'s claims, therefore, is precluded unless [Defendant] can establish cause and prejudice or that a miscarriage of justice would result in the absence of our review.

Moran v. E.K. McDaniel, 80 F.3d 1261, 1269-70 (1996) (citations omitted); see Bargas v. Burns, 179 F.3d 1207, 1211-13 (9th Cir. 1999) (the court concluded that the Nevada Supreme Court "firmly established and regularly followed" Nevada law in finding claims procedurally barred when raised in a subsequent petition and not raised on appeal); Valerio v. State, 112 Nev. at 389-90, 915 P.2d at 878 (1996). Also, the Nevada Supreme Court had repeatedly upheld Nevada's procedural bars against attacks that they are unconstitutional or are applied in an arbitrary and capricious manner. See Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001). The latest word in this line of cases again held that the bars are mandatory and have been consistently applied. State v. Dist. Ct. (Riker), 121 Nev. 225, 112 P.3d 1070 (2005). Thus, Witter's assertion in this regard has been soundly and repeatedly rejected by the Nevada Supreme Court.

Additionally, Witter's reliance on Rippo is misplaced. Contrary to Witter's assertion, the Nevada Supreme Court did not disregard the procedural bars. Instead, the Court in Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006) and Rippo v. State, 122 Nev. 1086, 146 P.3d 279 (2006) held that the **petitioners established good cause to overcome** the procedural bars. Good cause for failing to file a timely petition or raise a claim in a previous proceeding may be established where the factual or legal basis for the claim was not reasonably available. Bejarano, 146 P.3d at 270. Based on the precedent established in Rippo and Bejarano, the State conceded in the district court that a challenge under McConnell establishes good cause to overcome procedural bars as they relate only to **that single issue of whether Witter's death**

**sentence may be upheld** in the absence of the aggravators based upon the convictions for burglary and attempted sexual assault. Defendant raised that issue in Ground 4 of his petition. Based on the foregoing, Witter's claim that the procedural bars are not consistently applied was without merit in regard to Claims 1-3 and 5-18 in his post-conviction petition. As such, the district court properly denied this argument made by Witter.

Therefore, the district court committed no error by applying procedural default rules. As such, Witter's conviction and sentence of death should be affirmed.

## CONCLUSION

WHEREFORE, in light of the foregoing, the State respectfully requests that Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) be DENIED.

Dated this 13th day of August, 2008.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY _____
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

## 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 13th day of August, 2008.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

## 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 13th day of August, 2008.

GARY TAYLOR
GERALD BIERBAUM
Assistant Federal Public Defenders
411 East Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101

Eileen Davis

Employee, Clark County
District Attorney's Office

SSO/Michael Radovcic/ed