IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Mar 24 2010 10:02 a.m.
Tracie K. Lindeman

MICHAEL DAMON RIPPO, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 53626

RESPONDENT'S ANSWERING BRIEF

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

DAVID ANTHONY
Assistant Federal Public Defender
Nevada Bar #007978
411 East Bonneville Ave., Ste. 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL DAMON RIPPO, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 53626

RESPONDENT'S ANSWERING BRIEF

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

STATEMENT OF THE ISSUES

1. Did the District Court Err in Finding Defendant's Second Petition, which was filed nine years after Remittitur was issued, as Procedurally Barred Pursuant to NRS 34.726?

2. Did the District Court Err in Finding Previously Raised Claims 1, 2, 3, 5, 7, 9, 12, 13, 15, 16, 17, 19 and 21 Procedurally Barred under NRS 34.810(2) as Successive and/or under the Doctrine of Law of the Case?

3. Did the District Court Err in Finding Claims 2, 4, 6, 8, 19, 11, 14, 18 and 20 Procedurally Barred under NRS 34.810(1)(b) as Successive Given That They Should Have Been Raised on Direct Appeal or in Defendant's First Petition for Writ Habeas Corpus.

4. Did the District Court Err in Dismissing Claim 22 on the Basis that a Challenge to Nevada's Lethal Injection Protocol Cannot Be Made in a Post-Conviction Petition?

STATEMENT OF THE CASE

(This Statement of the Case was adopted in part from the State's Response Brief, SC No. 44094)

Original Proceedings in State District Court

On June 5, 1992, Michael Damon Rippo (hereinafter "Defendant") was indicted by a Clark County Grand Jury for the crimes of Murder (Felony - NRS 200.010, 200.030), Robbery (Felony - NRS 200.380), Possession Stolen Vehicle (Felony - NRS 205.273), Possession of Credit Cards Without Cardholder's Consent (Felony - NRS 205.690), and Unauthorized Signing of Credit Card Transaction Document (Felony - NRS 205.750), committed at and within Clark County, on or between February 18, 1992, and February 20, 1992. (1 JA 235-238).

Notice of Intent to Seek the Death Penalty was filed on June 30, 1992, listing the following aggravating circumstances: 1) The murders were committed by a person under sentence of imprisonment; 2) The murders were committed by a person who was previously convicted of a felony involving the use or threat of violence to another person; 3) The murders were committed while the person was engaged in the commission of or an attempt to commit robbery; and 4) The murders involved torture, or the mutilation of the victim. (1 JA 239-241).

On July 6, 1992, the Honorable Gerard Bongiovanni continued the arraignment to July 20, 1992 on the grounds that Defendant had not yet received a copy of the Grand Jury transcript. (1 JA 242-245). On July 20, 1992, Defendant again appeared before Judge Bongiovanni and entered pleas of not guilty to all of the charges against him. Defendant waived his right to a speedy trial and upon agreement of both the State and Defendant, trial was scheduled for February 8, 1993. (2 JA 246-251). The Court also ordered that discovery would be provided by the District Attorney's Office.

At a motion hearing on January 31, 1994, counsel for Defendant informed the Court that he had subpoenaed both of the Deputy District Attorneys prosecuting this case, John Lukens and Teresa Lowry. (2 JA 322-333). Mr. Dunleavy stated that the Deputy District Attorneys had conducted a search pursuant to a search warrant and that in the process of

seizing items in the search, the attorneys became witnesses for the defense. Counsel for Defendant further argued that the entire District Attorney's Office should be disqualified from the prosecution of this case. (Id.). The Court ordered that the motion be submitted in writing and supported by an affidavit.

On March 7, 1994, an evidentiary hearing was held regarding Defendant's Motion to Disqualify the District Attorney's Office. Deputy District Attorney Chris Owens represented the State. (2 JA 403-485, 3 JA 486-564). Two days later the motion to remove Chief Deputy District Attorney Lukens and Deputy District Attorney Lowry from the case was granted. (3 JA 565-569). The Court, however, refused to disqualify the entire District Attorney's Office and ordered the appointment of new District Attorneys. The Court was informed that Chief Deputy District Attorneys Dan Seaton and Mel Harmon were going to replace Lukens and Lowry on March 11, 1994. (3 JA 570-574).

A status hearing was held on March 18, 1994 and was continued on the basis of the State's request to amend the Indictment and new discovery provided to the defense. (3 JA 575-582). The District Court denied the State's request to amend the Indictment. The State filed for a Writ of Mandamus, which was granted on April 27, 1995. An Amended Indictment was filed on January 3, 1996, including Felony Murder and Aiding and Abetting. (3 JA 629-633).

Jury selection began on January 30, 1996, and the trial commenced on February 2, 1996. (3 JA 634-795). A continuance was granted for Defendant to interview witnesses from February 8, 1996, to February 20, 1996. The trial commenced again on February 26, 1996. (9 JA 2055-2185, 10 JA 2189-2232).

Final arguments were made on March 5, 1996, (14 JA 3121-3357), and guilty verdicts were returned on March 6, 1996, of two counts of First Degree Murder, and one count each of Robbery and Unauthorized Use of a Credit Card. (15 JA 3399-3402). The penalty hearing was held from March 12, 1996 to March 14, 1996. (15 JA 3413-3593, 16 JA 3594-3808, 16 JA 3835-3840). The jury found the presence of all six aggravating factors and returned with a verdict of death. (16 JA 3835-3840).

On May 17, 1996, Defendant was sentenced to: Count I - Death; Count II - Death; Count III -Fifteen (15) years for Robbery to run consecutive to Counts I and II; and Count IV- Ten (10) years for Unauthorized Signing of Credit Card Transaction Document, to run consecutive to Counts I, II, and III; and pay restitution in the amount of $7,490.00 and an Administrative Assessment Fee. (17 JA 4014-4036).

The Judgment of Conviction was filed on May 31, 1996. (17 JA 4037-4039).

Direct Appeal – SC No. 28865

A direct appeal was taken challenging Defendant's conviction and sentence. (23 JA 5349-5452). On October 1, 1997, this Court rejected Defendant's contentions and affirmed Defendant's judgment of conviction and sentence of death. The opinion was published in Rippo v. State (I), 113 Nev. 1239, 949 P.2d 1017 (1997).

Defendant filed a Petition for Rehearing on October 20, 1997. On February 9, 1998, Defendant's petition for rehearing was denied. A Petition for Writ of Certiorari was filed with the United States Supreme Court and subsequently denied on October 5, 1998. Rippo v. Nevada, 525 U.S. 841, 119 S.Ct. 104 (1998). The Remittitur was filed on November 3, 1998.

First Petition for Writ of Habeas Corpus (State)

Defendant filed a Petition of Writ of Habeas Corpus (Post Conviction) (hereinafter "First Petition") on December 4, 1998. (17 JA 4040-4047). On August 8, 2002, Defendant filed a Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus. (17 JA 4052-4090). On October 14, 2002, the State filed an opposition. (18 JA 4154-4201). On February 10, 2004, Defendant filed a Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). (18 JA 4206-4256). On March 12, 2004, Defendant filed an ERRATA to Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). (18 JA 4257-4258). On April 6, 2004, the State filed a Response. (18 JA 4259-4315).

On August 20, 2004, an evidentiary hearing was held. (19 JA 4321-4346). Defendant's trial attorneys, Steve Wolfson and Phillip Dunleavy testified. (Id.). At that

hearing, the district court ruled that Defendant had not received ineffective assistance of trial counsel. (Id.). On September 10, 2004, the evidentiary hearing continued. (19 JA 4347-4408) On that day, Defendant's appellate counsel, David Schieck testified. The district court ruled that Defendant had not received ineffective assistance of appellate counsel. An order denying the Petition for Writ of Habeas Corpus (Post-Conviction) was filed on December 1, 2004. (19 JA 4936-4986).

Appeal from Denial of First State Petition for Post-Conviction Relief – SC No. 44084

On October 12, 2004, Defendant appealed from an order of the district court denying his post-conviction petition for a writ of habeas corpus.

This Court affirmed Defendant's conviction and issued an opinion on November 16, 2006. See Rippo v. State (II), 122 Nev. 1086, 146 P.3d 279 (2006). (22 JA 5101-5123, 5124-5143). The Remittitur was filed on January 19, 2007.

Federal Habeas Proceedings

On April 18, 2007, Defendant filed a petition for writ of habeas corpus in federal court (Case No: 2:07-CV-00507-ECR-PAL).

Second State Petition for Writ of Habeas Corpus (State)

Defendant filed his Second State Petition for Writ of Habeas Corpus (hereinafter "Second Petition") on January 15, 2008. (19 JA 4415-4570.) The State filed its Motion to Dismiss and Response to Defendant's Petition for Writ of Habeas Corpus (hereinafter "Opposition to the Second Petition" or "Motion to Dismiss") on April 21, 2008. (27 JA 8747-8757, 36 JA 8673-8746.) Defendant filed an opposition to the State's Motion to Dismiss on May 21, 2008, (37 JA 8758-8866), as well as a motion for leave to conduct formal discovery. (42 JA 9989-10014.) The State filed a Reply to Defendant's opposition to the motion to dismiss, (48 JA 11564-11574), and an opposition to Defendant's discovery motion on June 9, 2008. (48 JA 11558-11563). The District Court held an oral argument on the matter on September 22, 2008. (48 JA 11586-11602.) The District Court denied the Second Petition and entered its findings that it was procedurally barred by NRS 34.726, 34.810(2), 34.810(1)(B) and the doctrine of law of the case. (48 JA 11648-11658.)

Appeal from Denial of Second State Petition for Post-Conviction Relief - SC No. 53626

Defendant filed the instant appeal (hereinafter "Defendant's Brief" or "Def. Br.") on October 19, 2009, to which the State responds as follows:

STATEMENT OF THE FACTS

(The Statement of the Facts were adopted from the State's Response Brief, SC No. 28865)

On February 20, 1992, the bodies of Denise Lizzi and Lauri Jacobson were found in Jacobson's apartment at the Katie Arms Apartment Complex. The bodies were found by the apartment manager, Wayne Hooper.

On February 17 or 18, 1992, Hooper noticed Lauri Jacobson driving away from the apartment building in her black Datsun with a tire that was nearly flat. She was being followed by a red car. The red car belonged to Wendy Liston, who followed Jacobson to Discount Tire in her car and dropped her back off at her apartment.

By February 20, 1992, Hooper became concerned about Jacobson because her car had not been moved for some time and she had not paid her rent. Mr. Hooper decided to go up to the apartment and see what was going on. Mac Holloway, the security guard at the building accompanied Mr. Hooper to the apartment. Hooper knocked a number of times on the door, and upon failing to get any response, used his master key to unlock the door. Upon entering, the apartment appeared to have been ransacked. Hooper walked over to the bathroom and closet light switches and turned them on at the same time. Upon turning on the lights, he noticed the two bodies in the closet. The bodies were next to each other, lying face down. Mr. Hooper left the apartment, informed his wife of the bodies and she called the police.

Officer Darryl Johnson, along with his partner Officer Gosler, was the first responding officer to the scene. There, he met with the maintenance man and Hooper and after hearing what they had discovered, he entered the apartment. He also observed the two women lying face down in the closet area. Homicide was then called to the scene as was Mercy Ambulance. The ambulance attendant checked the bodies for any signs of life, but did not move them or change their positions in any way.

Crime Scene Analysts arrived on the scene and conducted an investigation. Allen Cabrales testified that when he arrived there were two victims, both lying face down on the floor in the closet. Analyst Cabrales detected no evidence of forced entry to the apartment. When found, Denise Lizzi was wearing only a pink pair of panties, a white sweatshirt, a black muscle shirt and a pair of white socks. Lauri Jacobson was wearing a white T-shirt, blue sweat pants and a pair of white socks.

A Hamilton Beach iron was recovered from a trash bag in the kitchen area and a Clairol hair dryer was recovered from underneath the east day bed. Both of the appliances were missing their cords. Also recovered was a black leather strip found in a trashcan in the bathroom; a telephone cord found by the entertainment center in the living room; and two pieces of black shoelace found on the carpet below Denise Lizzi in the closet. Glass fragments were also recovered. They had been scattered about on the living room-kitchen floor area.

Dr. Green's testimony of Denise Lizzi's autopsy indicated that when she was found she had a gag placed in her mouth, which was a sock pushed into her mouth and secured by a black brassiere, which encircled her head. He further testified that there was evidence that restraints were used. Pieces of cloth were found tied around each of her wrists, each with one end free.

Dr. Green testified that the gag had been pushed back so far into the mouth that at least part of it was actually underneath Lizzi's tongue and was pushing it towards the back of her throat, closing the epiglottis and blocking her airway. Lividity of the body indicated that Lizzi had been lying face down after death. Very early decomposition changes had begun taking place.

Lizzi's injuries included: scraping injuries of the skin of the forehead, on the chin, under the chin, and on her right cheek; cutting wounds of the neck; and lines from a two-wire lamp cord being wrapped around her neck. The neck wounds were characterized as stab wounds of slightly less than half an inch long and fairly shallow. The wounds showed evidence of bleeding and were caused by an item with a fairly sharp point. There were wrist

and ankle ligature marks on the body. She also had tiny pinpoint hemorrhages in the insides of her eyelids and on the white parts of her eyes.

As to Lizzi's internal injuries, Dr. Green testified to finding a great deal of hemorrhage in the deeper tissues of the neck and ligaments, which controlled the voice box. Dr. Green testified that the results were indicative of both manual and ligature strangulation. He testified that it looked as though some effort had been made at manual strangulation and that the ligature strangulation probably came later on.

Lizzi's death was due to asphyxia, or lack of oxygen, which Dr. Green held could have come either from the gag or from the strangulation or both. Dr. Green was not able to testify as to whether the stab wounds or the ligature wounds occurred first. Both methamphetamine and amphetamine were found in Lizzi's system. Time of death was determined to have been 36 to 48 hours earlier.

As to Lauri Jacobson, Dr. Green testified that her state of decomposition was more advanced than that of Denise Lizzi. He found a scratch on her neck, which went from about the midline of the neck toward the left, and ended in a very superficial penetrating stab wound. There was bruising behind her right ear with a quarter inch V shaped penetrating stab wound about a quarter of an inch deep. There was a small penetrating stab wound underneath her chin in the middle of her neck, as well. There was also a two and a half inch scratch on her right forearm, which Dr. Green believed occurred after her death.

The internal examination of Lauri indicated a great deal of hemorrhage in the soft tissues around the muscles in the neck, around the thyroid gland and the presence of a fracture of the cartilage, which formed the larynx.

Dr. Green testified that the damage was consistent with manual strangulation. Death was due to asphyxiation due to the manual strangulation. No drugs were identified in either her liver or kidneys. Dr. Green testified that it appeared that she had been dead longer than Lizzi but he could not be absolutely certain. No evidence of ligature marks was found on Lauri.

Linda Errichetto, Director of Laboratory Services for the Las Vegas Metropolitan Police Department Forensic Laboratory, testified that there was no evidence of sexual activity on either Lauri or Lizzi.

Diana Hunt was arrested and charged with the killing and robbery of Denise Lizzi and Lauri Jacobson on April 21, 1992. Ms. Hunt testified as part of a plea negotiation at the trial of Michael Rippo. She described the events of the murder for the jury.

Ms. Hunt stated that she was Defendant's girlfriend at the time of the murders. They had lived together in a house on Gowan Road in Las Vegas for about three weeks, but at the time of the murders they had moved in with Deidre D'Amore. Hunt testified that on February 17, 1992, Defendant had helped Lauri Jacobson move.

On February 18, 1992, Defendant woke Hunt up in the morning and told her they had to go. They went to the Katie Arms Apartments and found Lauri Jacobson at home alone. Hunt testified that Defendant and Lauri Jacobson began injecting themselves with morphine.

Denise Lizzi arrived and Lauri briefly left the apartment to go outside and speak to her. While Lauri was out of the apartment, Defendant closed the curtains and the window and asked Diana Hunt to give him the stun gun that was in her purse. Defendant then made a phone call.

After a few minutes, Lauri and Lizzi returned to the apartment. Lizzi went into the bathroom and Lauri joined her. Defendant brought Diana Hunt a beer and told her that when Lauri answered the phone, Diana should hit Lauri with the bottle so that Defendant could rob Lizzi. When Hunt stated that she did not want to hit Lauri, Defendant told her to do as she was told.

A few minutes later the phone rang. Lauri came out of the bathroom and answered the phone. Diana hit Lauri with the bottle and she fell to the floor in a daze. When Diana hit Lauri, Defendant went into the bathroom, where Lizzi was.

After striking Lauri, Diana heard the stun gun going off and heard Defendant and Lizzi yelling. Defendant was fighting with Lizzi and wrestled her across the hall into a big closet. Diana continued to hear the stun gun going off, so she ran to the closet where she

observed that Defendant had wrestled Lizzi to the ground and he was sitting on her and stunning her with the stun gun. Diana told the Defendant to stop and he told her to shut up.

Diana went back out into the living room and helped Lauri sit up. Defendant then emerged from the closet with a knife in his hand. Diana had never seen the knife before. Defendant used the knife to cut the cords off various appliances in the apartment.

Defendant told Lauri to lie down. She argued with him but ended up complying. Defendant instructed her to put her hands behind her back and tied them. He then tied her feet. Defendant put a purple bandana in her mouth and tied it around her head.

Diana could hear Lizzi, still in the closet, crying. She went and looked in the closet and saw Defendant in there with Lizzi. He had tied her hands behind her back and was asking her lots of questions about where drugs were and other things.

At that point, Wendy Liston approached the apartment. Defendant stuffed something in Lizzi's mouth to keep her quiet. Diana pleaded with Defendant to just leave the apartment, but he shoved her and told her not to tell him what to do. Diana was crying and Defendant put his hand over her mouth and told her to quit crying. Liston came to the door of the apartment and was knocking and yelling for Lauri. Lauri was still gagged and was unable to answer.

After Liston left, Defendant's attitude changed. He said that he was sorry that he got out of control and said that if everyone cooperated everything would be alright. Defendant then walked out to where Lauri was lying bound on the floor and began stunning her with the stun gun. Diana attempted to get the stun gun away from him but ended up tripping over Lauri and falling.

Defendant then took out another cord or belt-type object and put it through the ties on Lauri's feet and wrists and put it around her back which enabled him to pick her up like a suitcase and drag her across the floor. Defendant dragged her in that fashion across the floor to the closet. Lauri was choking as Defendant dragged her.

Diana crawled across the floor and began throwing up in a trash bag. She heard a noise coming from the closet and went over to see what it was. She saw Defendant with his

knee in the small of Lizzi's back, pulling on an object he had placed around her neck, choking her. Defendant was pulling so hard that the whole front of Lizzi's body was up off of the ground and Defendant's arms were straining. Diana testified that the noise that Denise Lizzi was making was a noise that she had never heard the likes of, an animal noise.

The next thing Diana was aware of was Defendant shaking her, telling her that they needed to go. Diana accused Defendant of choking the women and he told her that he had just cut off their air and that they had to hurry up and leave before they woke up. Both of the women were lying face down and they were both still tied up. Defendant instructed Diana to put everything into a gym bag he was holding. Defendant also wiped the apartment down with a rag.

Diana and Defendant left the apartment and Defendant closed the door and locked the deadbolt lock. Defendant walked Diana to the Pinto they were driving and told her to stop crying and go home and wait for him. He told her that nobody had gotten hurt and that nobody had to. Diana went to Deidre D'Amore's house in the Pinto. Diana testified that after hearing the noise made by Lizzi and seeing what happened, she knew that the women were not alive.

Diana testified that at one point during the clean up of the apartment, Defendant went into the closet, took off Lizzi's boots, rolled her over, undid her pants and pulled them off. Diana asked Defendant what he was doing and he stated that he had bled on her pants and that he had to remove them. Defendant also untied Lauri's hands and feet before he left the apartment.

Later that evening, Defendant called Diana at Deidre's house. He told her to meet him at his friend's shop and gave her directions. Diana then went to the shop, which belonged to Tom Sims. When she arrived, Defendant was there with Sims and another man. He told her that he had a car for her and showed her a maroon Nissan that she believed belonged to Denise Lizzi, although he did not tell her who it belonged to at the time. Defendant told her that he stole the car from some people who would be out of town and instructed her to get

some paperwork for the car. Diana felt that she could get the paperwork from her friend, Tom Christos. On Defendant's orders, Diana drove the Nissan to Tom Christos' residence.

On February 19, 1992, Diana met up with Defendant and they went to the Meadows Mall. On the way, Defendant told Diana that he had purchased an air compressor and some tools on a credit card earlier that morning. They then went to a shop in the mall and purchased sunglasses. Defendant paid for the glasses using a gold Visa card.

Later that day, back at Deidre's house, Diana went into Defendant's wallet when he was upstairs to take some money to get away from him because she was scared. Diana was scared to call the police, as Defendant had threatened to kill Deidre and her little girl if Diana went to the police. Diana did not find any money in Defendant's wallet but she took a gold Visa card belonging to Denny Mason.

Diana then went back to Christos' house where she was supposed to pick up the paperwork for the car, but the paperwork was not ready. However, it was Teresa's, Christos' girlfriend's, birthday, so she went out to celebrate with Diana. Because they were dressed up, they took the Nissan.

They started to go back to Christos' after picking up the Nissan, but Teresa was crying and stated that he had been beating her and that she did not want to go back there. Instead of going home, they went to a bar named Marker Downs. They also went to the shopping mall. Defendant had discovered that the card was missing and was calling around telling her to give it back. Diana told him that she would meet him at the mall to give the card back and that Defendant had to bring her some money. Defendant never showed up at the mall so Diana decided to use the card to purchase perfume for Teresa for her birthday.

After leaving Marker Downs, Teresa and Diana went to another bar named Club Rock. Diana called Christos from the bar and told her that Teresa was drunk and that she needed to bring her home. Christos was mad and told her that he did not want her back. Diana got a room at the Gold Coast and she and Teresa went back there with some people they had picked up at the bar. The room was paid for with Denny Mason's credit card.

Sometime during the night with Teresa, Diana went to a friend's house and got some

spray paint. She got some primer and sprayed the front fender of the Nissan. While she was at the house where she got the paint, Diana heard that the murders had been discovered. She knew for sure then that she was driving Lizzi's car so she drove it to the Albertsons on Rainbow and left it there.

Around February 29, 1992, with Deidre's help, Diana attempted to get in touch with Kyle Edwards of the Las Vegas Metropolitan Police Department. She got in touch with Edwards as Defendant was trying to get into Deidre's apartment. Defendant came into the house and Diana left. Either that same day or the next, Diana called back to Deidre's house and asked her if Defendant was there and Deidre said that he was not. Diana went over to the house to get the rest of her belongings and Defendant was waiting in the house for her. As she got in her car to leave, Defendant got in also. Defendant refused to get out of the car and kept telling Diana not to leave. Diana started driving to a friend's house and Defendant told her that he wanted to kill a lot of people, including her and started telling her what he would do to her if she left. She suggested that they go to the police but Defendant said no. During the conversation, Defendant told her that he had cut the women's throats and had jumped up and down on them. He also described setting up the phone call to distract Lauri with his friend Alice. At one point, the car ran out of gas and Diana ran out of the car and flagged down the first car that came by. She went to the gas station up the road and called her friend Doug. When she got back to the car, some of the belongings were missing.

Diana went to a home on Nelson Street owned by her friend Brenda's uncle. Defendant later showed up at the residence. Diana did not expect him and did not want to see him again. Diana and Defendant had a confrontation outside of the residence. Defendant began yelling at Diana and she yelled back that he had killed those girls and that she could prove it. Defendant ran around the front of Deidre's truck that he had driven and began punching Diana in the face. Others, including Michael Beaudoin and Brenda were present for the fight. Defendant continued to hit Diana in the face and then began stunning her with the stun gun. Defendant then began choking Diana and banging her head. When Diana became aware that she was passing out she looked at Michael Beaudoin and told him that

she could prove it. With that, Beaudoin pulled Defendant off of her. Diana suffered black eyes and a split lip. The police arrived but Defendant had run away.

Diana gave a statement to the police later the next morning. Out of fear for her safety, she did not tell the officers what she knew about the murders. She informed the officers that she was leaving town for Yerington, Nevada. She was arrested in Yerington on April 21, 1992. Pursuant to a plea negotiation, Diana pled guilty to robbery and received a fifteen-year sentence. In return, she agreed to cooperate with the prosecution in this case.

Diana told the jury that before the murders Defendant had been upset with Lauri and Lizzi for burning him in a drug deal. She further testified that prior to the murders Defendant had used her to demonstrate to his friends how to restrain someone by tying her hands and feet with a karate belt.

Tom Christos corroborated Diana's claims that she had gone to him regarding altering the color and acquiring paperwork for a maroon 300ZX. He further testified that on February 20, 1992, Defendant called his house looking for Diana. Defendant left a message for Diana that "The cat is out of the bag."

Michael Beaudoin testified that he had met with Defendant, who showed him Lizzi's empty wallet and one of her garage openers. He also stated that on February 29, Defendant was fighting with Diana, punching her and stunning her.

David Levine, a friend of Defendant's in jail, testified that he had a lot of conversations with Defendant while they were in jail together. Defendant told him that he had killed the two girls. At one point, Defendant wrapped a sheet around the veins in his arm, and then wrapped a three pronged extension cord around his arm and tapped his veins. Defendant stated that was how he "did" Lizzi.

Denny Mason testified at the trial that Denise Lizzi was his girlfriend off and on for four or five years. He testified that about a week before the murders he gave Lizzi his credit card to buy some things for his house. When shown charge slips, he could not account for charges on his bill to: SunTeleGuide, Gold Coast Hotel and Casino; The Sunglasses Company; 7-Eleven; and Texaco, Inc. He could also not account for charges made on his

Dillards Card on Feb. 19, 1992. Mason further testified that the charge slip from Sears was not in the handwriting of Denise Lizzi.

Tom Sims testified that Defendant showed up at his shop on February 18, 1992 with the maroon Nissan. Defendant offered to sell the car to Sims. When Sims asked about the ownership of the car, Defendant told him that someone had died for it. Sims told Defendant that he wanted nothing to do with the car and to get it away from his shop.

Sims testified that Defendant left his shop and the car for a period of time and returned with Diana Hunt. Defendant had a great deal of money with him that he said he had obtained by winning a royal flush. Sims told Defendant that he wanted the car gone by the next morning and it was.

On February 21, 1992, Sims heard a report that two women had been killed and one of them was named Denise Lizzi. This struck Sims because Defendant had given Sims tapes with the initials D.L. on them. Sims then became suspicious and looked at a suitcase Defendant had left with him. The nametag on the suitcase indicated that it belonged to Lauri Jacobson.

Sims next came into contact with Defendant on February 26, 1992, when Defendant called and asked to come by and pick up some morphine that he had left in Sims' refrigerator. Sims did not want to meet with Defendant at his shop, so he met him in a Kmart parking lot. When Sims asked about the murders, Defendant confessed to them. Defendant told Sims that he had choked those two bitches to death. He added that he had killed the first one accidentally so he had to kill the other.

Defendant also told Sims that as he was carrying one of the girls into the back her face hit the coffee table. He informed Sims that Diana Hunt had been with him at the apartment. Sims asked Defendant if he thought he could trust Diana and Defendant replied that Diana had hit one with a bottle and he trusted her.

Sims asked Defendant why one of the girls had been found without pants on and Defendant replied that he had bled on the girl during the murders and bled on her pants so he

had to dispose of them. Defendant told Sims that the girls were both "fine" and that he could have fucked both of them but he did not, which meant that he was cured.

Carlos Caipa, an employee of Sears, testified that in February, 1992, he was employed in the hardware department at Sears. He identified Defendant as the man who purchased a compressor, sander, spray gun, and couplings, all with extended warranties, with Denise Lizzi's credit card. He stated that the name on the card was Denise Lizzi and the signature on the card was that of Denny Mason.

William Leaver, questioned document examiner with the Las Vegas Metropolitan Police Department testified that he had examined documents identified to The Sunglasses Company and Sears signed D. Mason. He stated that there were similarities between the signatures on the slips and the known writing of Defendant.

The jury found Defendant guilty of two counts of first-degree murder, and one count each of robbery and unauthorized use of a credit card.

During the penalty hearing, numerous witnesses came forward to testify about Defendant's past criminal conduct and about the effect the murder of these two girls had on the family and friends.

Laura Conrady testified about her brutal rape at the hands of Defendant in January 1982. She told the jury that she was awakened with a knife to her throat and Defendant sitting on top of her. Laura clearly identified Defendant as the man who assaulted her. Defendant was wearing gloves and in one hand was the butcher knife and the other was over her mouth. Defendant asked her where her money was but she did not have any.

At some point, Defendant tied up Laura's hands with her bathrobe tie and her feet with cords that she believed Defendant cut off of her vacuum cleaner. When Laura asked Defendant who he was and how he got there, he hit her and told her to shut up. Defendant cut the sweatshirt off of Laura with his knife by slitting it down the back. At that point, Laura was naked from the waist up, so she asked Defendant if she could put some clothes on. Defendant went to her drawer, threw everything out, and told her to put on a tube top that he found. Soon after, Defendant cut off Laura's sweat pants. He asked her if "she wanted to

fuck." Laura testified that she got hysterical at that point and was begging Defendant not to do anything. Defendant laughed at her. Defendant asked Laura if she had any scissors and she told him they were in the living room. Defendant got the scissors, placed Laura, still tied up, in a chair and cut off some of her hair.

Defendant then used the scissors to cut the cords off Laura's legs. At one point, Laura felt as though she was going to throw up. Defendant used a cord that he put around Laura's neck to drag her into the bathroom. Defendant then took Laura into the bedroom, told her that he wanted to fuck and put her on the bed. Defendant cut off her panties with the knife, spread her legs and said: "I want to fuck." Defendant pulled his pants down, got on top of Laura and raped her. Defendant penetrated Laura but did not ejaculate.

After he was finished, Defendant got up and pulled Laura into the other room by her tube top. Defendant was touching her breasts in a sexual fashion as they walked into the living room. Defendant took Laura to a sofa and sat her down. He then cut off the tube top, gagged her with it and tied it in the back. Defendant took the knife and was going around her nipples with it. He told Laura that one time he cut a girl's nipples off, but she was already dead. Defendant also took a fountain pen and inserted it into Laura's vagina.

As Laura became more upset, Defendant got more violent. He pushed her onto the floor face down and kicked her while she was on the ground. Laura was lying naked on the floor, in a crouched position and Defendant began to beat her with nunchucks. Laura felt that she was about to pass out but felt that if she did, she was going to die. She worked the tube top out of her mouth and begged Defendant not to hurt her anymore. Laura even offered Defendant her car if he would just leave.

Defendant told Laura that he could not leave because she knew what he looked like. As he said this, Laura noticed that Defendant was pointing the knife at her back. Laura said that she would not tell anyone and Defendant told her that if she did, he would come back and kill her.

Sometime during the attack, Defendant unwound wire hangers to make them into a long piece. He wrapped them around Laura's neck and was pulling on them. Laura could not breathe and felt as though she was going to die.

Laura told Defendant where her car keys were and he went and got them. Defendant left and Laura went to the kitchen and cut her bindings off. She went and got her robe and tried to use the phone, which did not work. Laura then went and got help from a neighbor.

As a result of the attack, Laura received fifteen stitches behind her ear, a concussion, black, swollen eyes and a huge bump on her leg that might have been the result of a bone chip. Laura never went back to the apartment. She testified that even to this day, she is never alone, and watches carefully over her children.

Jack Hardin testified about his investigation of the burglary of a Radio Shack in 1981. He told the jury about receiving a tip that identified the suspects as Defendant and another individual. Hardin responded to the address belonging to the other individual's father. As Hardin introduced himself to Mr. Stevenson, the father, the boys (Defendant and the other individual) were tipped off about the officers' presence and fled. Officers pursued the boys and they were apprehended. Inside the residence, Officer Hardin found a great deal of computers and property belonging to Radio Shack. Also recovered was a .22 caliber blue steel Luger, a .22 caliber Luger revolver; a .357 Luger and a .25 caliber Bauer.

Defendant was eventually booked for three counts of burglary and two counts of possession of stolen property. At a plea hearing, Defendant admitted committing the burglaries. The losses sustained by the businesses involved were in the amounts of $10,186.84 and $3,142.27. Defendant was committed to Spring Mountain Youth Camp on April 29, 1981 and released on August 26, 1981.

John Hunt testified that on December 18, 1981, he was called to the home of JoAnne Pinther based on her report that her son had information about burglaries in the area, including one at her own home. The boys questioned by Officer Hunt told him about a person dealing in stolen property and that he received it from Defendant and another boy. Defendant was a runaway at the time, so officers went to the other boy's home to investigate.

Inside the attic of that home officers found two rifles, a shotgun and four handguns. The other boy in the burglaries implicated the Defendant.

On January 20, 1982, Defendant was in juvenile custody for a different charge and was served with the burglary warrants. Defendant admitted to the burglaries but refused to cooperate with the officers.

The reason Defendant was in custody on January 20, 1982, was because he had been arrested outside the home of Katherine Smith on January 18, 1982. Defendant was waving a handgun around and trying to gain entry into Ms. Smith's home.

Other witnesses were presented for information on Defendant both by the State and by Defendant. Defendant also exercised his right of allocution. After all the witnesses were heard and closing statements, the jury returned verdicts of death, finding all six charged aggravating factors.

ARGUMENT

I

THE DISTRICT COURT PROPERLY DETERMINED THAT NEVADA'S PROCEDURAL BARS REQUIRE THE DISMISSAL OF DEFENDANT'S ENTIRE SECOND PETITION

The District Court properly concluded that Defendant's Second Petition violated numerous procedural bars and therefore determined that the entire petition must be dismissed. (48 JA 11648-11658). Specifically, the District Court recognized that this Second Petition was in clear violation of the one-year time bar under NRS 34.726, given that the Second Petition was filed 1) more than more ***nine (9) years after*** this Court issued Remittitur on direct appeal and 2) more than ***three (3) years after*** the District Court denied his First Petition. (Id. at 11649), (Supra at p. 5)

In light of this extraordinary delay of ***virtually a decade***, the District Court also properly concluded that Claims 1, 2, 3, 5, 7, 9, 12, 13, 15, 16, 17, 19 and 21 were procedurally barred as successive under NRS 34.810(2) and/or barred under the doctrine of law of the case. (48 JA 11649-11650). The District Court also properly determined that Claims 2, 4, 6, 8, 10, 11, 14, 18 and 20 were procedurally barred under NRS 34.810(1)(B)

as successive, because the should have been raised on direct appeal or in Defendant's First Petition. (Id. at 11650). Lastly, the District Court properly concluded that Claim 22 was not a cognizable claim to be addressed in a post-conviction writ for habeas relief. (Id.).

After reviewing the briefs submitted by both parties as well as oral arguments that occurred on September 22, 2008, the District Court properly concluded that the Defendant failed to establish any good cause or prejudice sufficient to overcome each of these procedural bars. (48 JA 11650: 6-8, 15-17, 28 – 11651: 1, 14-15). Defendant's good cause argument, utilized for virtually every issue in Second Petition and now on appeal, specifically that his first post-conviction counsel was ineffective for failing to raise the issue in his First Petition, failed because that claim itself was procedurally barred. A more detailed discussion on this issue is found infra at p. 24-28.

In responding to Defendant's appeal, the State will address initially address procedural bars, but will also specifically address each claim on the basis in which it was dismissed by the District Court.

A. The District Court Properly Determined that Defendant's Second Petition Was Procedurally Barred Pursuant to NRS 34.726

The District Court properly concluded that since there was no good cause or prejudice to excuse Defendant's ***nine year delay*** in bringing his Second Petition to district court, Defendant's Second Petition was procedurally time-barred barred under NRS 34.726. (48 JA 11649). Defendant now challenges this ruling on appeal and more specifically attacks the District Court's determination that there was no good cause or prejudice sufficient to excuse this ***near decade long delay***. (Def. Br. at 3-10).

When evaluating a district court's findings regarding whether there is good cause or prejudice sufficient to overcome procedural bars, this Court has clearly expressed its strong desire to not disturb a district court's ruling except in clear cases of abuse of discretion. Colley, 105 Nev. at 236, 773 P.2d at 1230. NRS 34.726(1) clearly states:

> 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 judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur***. For

> purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> a) That the delay is not the fault of the petitioner; and,
>
> b) that dismissal of the petition as untimely will unduly prejudice the petitioner.

(emphasis added).

The one year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly construed and the "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory." State v. District Court (Riker), 121 Nev. 225, 331 112 P.3d 1070, 1074 (2005). Primarily, because the excessive number of habeas corpus petitions that are filed years after conviction have placed an "unreasonable burden on the criminal justice system." Id.

An example of the strict application of these procedural bars can be found in Gonzales v. State, 118 Nev. 61, 590 P.3d 901 (2002), where this Court rejected a habeas petition that was filed two days late, pursuant to the "clear and unambiguous" mandatory provisions of NRS 34.726(1). In sum, "NRS 34.726(1) . . . evinces intolerance toward perpetual filing of petitions for relief, which clogs the court system and undermines the finality of convictions." Pellegrini v. State, 117 Nev. 875, 34 P.3d 529 (2001). This Court extends such deference to the district court because it recognized that the court system "must give finality to criminal cases" and that the interests of both Defendant and the State "are best served if post-conviction claims are raised while the evidence is still fresh." Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

Here, Defendant's Second Petition fell far outside the one-year time limitation. Defendant's Judgment of Conviction was filed on May 31, 1996 and his conviction was affirmed on direct appeal by this Court on October 1, 1997. Remittitur was issued on November 3, 1998. Under the clear guidelines set forth by NRS 34.726, Defendant had until November 3, 1999 to file this petition yet waited ***nine years after remittitur was issued*** before finally filing his Second Petition on January 15, 2008. This Second Petition was without a doubt untimely. Since Defendant failed to establish to the District Court in his Second Petition as well as during a hearing on the Second Petition that there was either good

cause or prejudice to overcome this near decade long delay, the District Court properly enforced this well-established procedural bar.

B. The District Court Properly Concluded that Previously Raised Claims 1, 2, 3, 5, 7, 9, 12, 13, 15, 16, 17, 19 and 21 Were Successive under NRS 34.810(2) and/or Barred by Law of the Case

In denying Defendant's Second Petition, the District Court properly concluded that the vast majority of claims raised in Defendant's second post-conviction petition were raised previously, and moreover, were denied on the merits of each issue, thus requiring their procedural bar as successive as well as under the doctrine of law of the case. (48 JA 11649-11650). On appeal, Defendant failed to dispute the fact that the District Court concluded these specific claims were raised previously and in his Second Petition ***conceded*** that these claims were raised either on direct appeal or in his First Petition. (19 JA 4423-4424).

NRS 34.810 (2) states:

> "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 petitioner to assert those grounds in a prior petition constituted an abuse of the writ." (Emphasis added).

Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

In Lozada, this Court stated: "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." Id. This Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, ***successive petitions may be dismissed based solely on the face of the petition***." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995)(emphasis added). If the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991).

Furthermore, when an issue has already been decided on the merits by this Court, this Court's ruling is law of the case, and the issue will not be revisited. Hogan v. Warden, 109 Nev. 952, 959, 860 P.2d 710, 715 (1993); see also Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); Pellegrini, 117 Nev. at 860, 34 P.3d at 519; McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996). The law of a first appeal is the law of the case in all later appeals in which the facts are substantially the same; this doctrine "cannot be avoided by more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Hogan, 109 Nev. at 952, 860 P.2d at 710 (citing Hall, 91 Nev. 314, 535 P.2d 797); see also McNelton, 115 Nev. 396, 990 P.2d 1263. Here, the District Court properly concluded that the claims Defendant raised in his Second State Petition that were previously decided on their merits by this Court were successive and/or barred by the law of the case doctrine, thus necessitating their dismissal. (48 JA 11649-11650).

C. The District Court Properly Dismissed Claims, 2, 4, 6, 8, 10, 11, 14, 18 and 20 as Procedurally Barred Under NRS 34.810(1)(B) as Successive, Because The Claims Should Have Been Raised on Direct Appeal or in Defendant's First Petition

NRS 34.810(1)(b) provides:

> The court ***shall*** dismiss a petition if the court determines that:
> . . .
> The petitioner's conviction was the result of a trial and the grounds for the petition could have been: (1) Presented to the trial court; (2) Raised in a direct appeal or a prior petition for writ of habeas corpus or post conviction relief; or (3) Raised in any other proceeding that the petitioner has taken to secure relief from his conviction and sentence, unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner. (Emphasis added).

"A court must dismiss a habeas petition if it presents claims that ***either were or could have been presented*** in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-647, 29 P.3d 498, 523 (2001) (emphasis added).

Here, the District Court noted that these specific claims must be considered procedurally waived, because they could have been raised on direct appeal, or in

Defendant's First Petition. (48 JA 11650). Defendant's claim of ineffective assistance of counsel offered as good cause to avoid this bar was insufficient, as discussed infra p. 24-28, to overcome this procedural bar. Accordingly, the District Court properly dismissed these claims on this additional ground.

D. The District Court Properly Determined that Defendant Failed to Establish Any Good Cause or Prejudice Sufficient to Excuse Filing His Second Petition *Nine Years After* Remittitur

The District Court properly concluded that there was no good cause or prejudice sufficient to overcome these procedural bars. (48 JA 11650: 6-8, 15-17, 28 – 11651: 1, 14-15). "In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 71 P.3d 503, 506 (2003); citing Pellegrini , 117 Nev. at 886-87, 34 P.3d at 537; Lozada, 110 Nev. at 353, 871 P.2d at 946. Such an external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable". Hathaway, 71 P.3d at 506; quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986); see also Gonzalez, 53 P.3d at 904; citing Harris v. Warden, 114 Nev. 956, 959-60 n. 4, (64 P.2d 785 n. 4 (1998). Moreover, the delay in filing of the petition ***must not*** be the fault of the petitioner. NRS 34.726(1)(a). Furthermore, the excuse that a defendant exclusively sought out a federal remedy and thus failed to seek a state petition for writ of habeas corpus within the one-year time bar ***does not amount*** to good cause sufficient to overcome NRS 34.726(1)(a). Colley, 105 Nev. at 235, 773 P.2d at 1229 (expressly rejecting defendant's argument that pursuing federal habeas corpus remedy excused his failure to file post-conviction relief in state court for a period of four years).

Additionally, a claim of ineffective assistance of counsel ***that is in itself procedurally barred cannot constitute good cause for excusing the procedural bars for itself or any other claim.***

> A claim of ineffective assistance of counsel may also excuse a procedural default if counsel was so ineffective as to violate the Sixth Amendment. However, in order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be

> procedurally defaulted. ***In other words, a petitioner must demonstrate cause for raising the ineffective assistance of counsel claim in an untimely fashion.***

Riker, 121 Nev. at 225, 112 P.3d at 1070 (emphasis added). See also Edwards v. Carpenter, 529 U.S. 446, 453 (2000) (procedurally barred ineffective assistance of counsel claim is not good cause). See generally Hathaway, 119 Nev. at 252-53, 71 P.3d at 506-07 (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).

Here, the District Court properly determined that there was not any good cause or prejudice sufficient overcome the procedural bars and Defendant's near decade long delay in raising this twenty-two claim Second Petition. (48 JA 11650: 6-8, 15-17, 28 – 11651: 1, 14-15). Defendant's primary good cause justification for this near decade-long delay was the alleged ineffective assistance of his post-conviction counsel in failing to raise these claims in the First Petition. (See generally Def. Br.; 19 JA 4423-4424). On appeal, Defendant claimed that: 1) The State conceded post-conviction counsel was ineffective, (Def. Br. at p. 6), but also that the District Court's ruling committed reversible error because it ignored whether this explanation was sufficient good cause to overcome the procedural bars. (Def. Br. at p. 9: 6-8). However, these claims are utterly belied by the record.

As to the State, at no point in its Opposition to the Second Petition or at oral argument on the petition did it concede that Defendant's post-conviction counsel was ineffective. (See generally "Opp. To 2nd Pet.": 36 JA 8673-8746; "09/22/08 Hearing on 2nd Pet.": 48 JA 11586-11602) Rather, it maintained and continues to reiterate in the instant brief that Defendant's alleged ineffective assistance of post-conviction counsel good cause argument is insufficient to overcome these procedural bars.

As to the allegation that the District Court ignored this good cause explanation, the Court's Findings expressly reject this argument. In denying the Second Petition, the District Court not only acknowledged the heart of Defendant's good cause argument, ineffective assistance of post-conviction counsel, but repeatedly rejected it in stating the following:

> "The Court finds that Mr. Rippo has failed to establish good cause for failing to present these claims in an earlier proceeding, and has failed to establish actual prejudice… neither Brady nor ***ineffectiveness of post-conviction counsel constitutes good cause*** for rearguing these ten-year old facts in a successive petition… neither Brady nor ***ineffectiveness of post-conviction counsel constitutes good cause*** for re-raising these claims where no material facts are alleged and there is no reasonable probability of a different conviction or sentence for Rippo."

(48 JA 11650: 6-8, 15-17, 28 – 11651:1) (emphasis added). The record reveals that the District Court clearly took this argument under consideration, but ultimately concluded that based on the facts and circumstances of this case, it was wholly insufficient to overcome the near decade long delay in bringing the Second Petition.

Here, a review of the record demonstrates that sound ruling of the District Court in rejecting the good cause argument of ineffective assistance of post-conviction counsel. This argument was in itself untimely raised, and thus, cannot be offered as good cause, because it is procedurally barred. Riker, 121 Nev. at 225, 112 P.3d at 1070; see also Edwards v. Carpenter, 529 U.S. at 453. Specifically, Defendant's first post-conviction counsel filed his First Petition on December 4, 1998. The District Court denied the First Petition and issued its Finding of Fact on December 1, 2004. Thus, if Defendant was unhappy with his first post-conviction counsel, specifically his failure to raise a certain issue in the First Petition, Defendant could have immediately filed another post-conviction petition citing his first post-conviction counsel's ineffectiveness. As will be discussed more specifically with each claim the issues Defendant believed his post-conviction counsel should have raised were not claims that need any further investigation as all of the alleged appealable issues occurred during the trial, ***which began all the way back in January 1996***.

However, Defendant did not seek to return to District Court in a timely manner with a second petition. Instead, Defendant ***waited another three years*** until his current and second post conviction counsel filed his Second Petition on January 15, 2008. This ***three-year delay*** demonstrates that Defendant's good cause argument of ineffective assistance of post conviction counsel was wholly untimely, and thus is itself procedurally barred. Riker, 121 Nev. at 225, 112 P.3d at 1070; Edwards, 529 U.S. at 453. Further compounding Defendant's blatant and inexcusable procrastination in bringing this claim, was Defendant's decision to

file a Federal Petition for Writ of Habeas Corpus, rather than returning to District Court on April 18, 2007 – ***nearly one year before*** eventually filing his untimely Second Petition in District Court. As discussed, seeking a federal remedy and thus failing to seek state habeas relief within the one-year time bar also ***does not amount*** to good cause sufficient to overcome NRS 34.726(1)(a). Colley, 105 Nev. at 235, 773 P.2d at 1229. Accordingly, in light of this three-year delay and his election to seek federal rather than state relief, Defendant's good cause argument of ineffective assistance of post-conviction counsel is itself untimely, and thus, cannot serve to excuse Defendant's decade long delay in bringing these claims.

To the extent, Defendant contends that the clock for the procedural bar began, not at the District Court's denial of his First Petition, but rather at the date this Court issued remittitur affirming the District Court's denial of the First Petition, Defendant and his second petition counsel ***still waited nearly a year after remittitur*** before bringing this claim. To date, there is not a single published case that states that a defendant's second post-conviction counsel is entitled to an additional one-year window in order to bring a ***second*** post-conviction writ of habeas corpus. Defendant had one year from the issuance of Remittitur ***from his direct appeal*** to raise all of his post-conviction issues. He failed to do so in waiting over ten years to bring this claim. The fact that Defendant was able and did file a federal habeas petition on April 18, 2007 belies any claim that the Second Petition filed on January 18, 2008 was timely.

The Court also specifically considered Defendant's lesser used good cause argument of intervening case law and like the ineffective assistance claim, rejected it as being insufficient to overcome these procedural bars. The District Court stated:

> "Any alleged intervening case authority fails to establish new grounds that were previously unavailable to Rippo, has no application to this case, or does not stand for the proposition alleged***. Accordingly, intervening case authority does not provide good cause for the instant petition***."

(48 JA 11651: 12-15) (emphasis added). Here, Defendant clearly failed to provide any sufficient good cause to justify this near decade long delay. In light of this factual record, the District Court properly determined that this claim was procedurally barred.

E. The District Court's Denial of the Second Petition as Procedurally Barred was Proper, as Nevada Courts Consistently Apply These Procedural Bars

The District Court's denial of the Second Petition was in accordance with this State's consistent enforcement of the procedural default rules. This Court has taken great measures to expressly reject the notion that it has arbitrarily and inconsistently applied Nevada's procedural default rules. See Riker, 121 Nev. at 236, 112 P.3d at 1077; see also Pellegrini, 117 Nev. at 860, 34 P.3d at 519.

In Riker, the Court stated:

> ***We accept neither Riker's premise that we regularly disregard the bars nor his conclusion that disregard or inconsistency on our part would excuse his own procedural default.*** First, any prior inconsistent application of statutory default rules would not provide a basis for this court to ignore the rules, which are mandatory, as we explained in Pellegrini v. State. Second, ***we flatly reject the claim that this court at its discretion ignores procedural default rules.*** Riker offers a number of flawed, misleading, and irrelevant arguments to back his position that this court 'has exercised complete discretion to address constitutional claims, when an adequate record is presented to resolve them, at any stage of the proceedings, despite the default rules contained in [NRS] 34.726, 34.800, and 34.810.

Riker, 121 Nev. at 236, 112 P.3d at 1077. (emphasis added) The Court's stern and unequivocal rejection of claims that Nevada courts inconsistently apply procedural default rules completely reinforces the District Court's decision in this case. The United States Supreme Court recently ruled that even regularly applied discretionary state procedural bars are adequate to bar federal review of post-conviction claims. Beard v. Kindler, 130 S. Ct. 612, 618 (2009). In Beard, the Supreme Court explicitly held that state bars that "permit consideration of a federal claim in some cases but not others" are adequate if they are firmly established and regularly followed. Id.

Moreover, it illustrates why the District Court's rulings regarding these procedural bars should be affirmed by this Court, because in short, Defendant's Second State Petition is precisely why the State legislature crafted these procedural bars. Nevada Revised Statutes

34.726 and 34.810 were designed in order to prevent "perpetual filing of petitions for relief, which clogs the court system and undermines the finality of convictions." Pellegrini, 117 Nev. at 875, 34 P.3d at 529. Despite this issuance of remittitur on direct appeal nearly twelve years ago, Defendant continues to file habeas petitions in State and Federal court. Recognizing this fact, the District Court properly denied this wholly untimely petition.

II
THE DISTRICT COURT PROPERLY DETERMINED THAT CLAIMS 1, 2, 3, 5, 7, 9, 12, 13, 15, 16, 17, 19 AND 21 WERE PROCEDURALLY BARRED UNDER NRS 34.810(2) AS SUCCESSIVE AND UNDER THE DOCTRINE OF LAW OF THE CASE

While the State has extensively discussed why the District Court properly denied the Second Petition in its entirety, the State will now specifically address why the District Court properly determined that the following claims were properly dismissed pursuant to NRS 34.810(2) and/or by the doctrine of law of the case.

1. Claim 1: Alleged Judicial Bias

An extensive portion of the instant appeal focuses on Defendant's contention that there was allegedly good cause and prejudice to re-raise the issue of judicial bias during his trial. (Def. Br. at p. 11-27). In short, Defendant contends on appeal that the District Court's finding that there was insufficient good cause or prejudice to re-raise this 12 year old issue constituted reversible error. On appeal, Defendant went so far as to allege that the District Court, as well as the State, simply ignored the good cause and prejudice arguments he raised in his Second Petition. (Def. Br. at p. 6). However, this claim is belied by the record and upon review, as discussed supra at p. 25-26, the District Court's determination was a proper exercise of discretion for the following reasons.

First, as properly noted by the District Court in its findings, Defendant has already raised this issue of judicial bias before this Court on direct appeal and, thus it cannot be reconsidered any more. (48 JA 11650: 11-17). This Court, in expressly rejecting Defendant's judicial bias claim ***twelve years ago*** stated:

> [N]o evidence exists, beyond the allegations set forth by the defense, that Judge Bongiovanni knew either Denny Mason or his alleged business

> partner. Even if a relationship existed, Rippo has not shown that the judge's alleged acquaintance with Mason's business partner would result in bias.

Rippo (I), 113 Nev. at 1248, 946 P.2d at 1023. Since this Court issued a ruling on the merits, the decision is now law of the case and cannot be reviewed again. McNelton v. State, 115 Nev. 396, 415, 990 P.2d 1263, 1275 (2000).

Second, Defendant's appeal on the this issue utterly failed to ***specifically illustrate why*** the District Court's finding that there was no good cause or prejudice to overcome the procedural bars of NRS 34.810(2) and the doctrine of law of the case was erroneous abuse of discretion. Colley, 105 Nev. at 235, 773 P.2d at 1229. This failure is most likely due to the fact that Defendant's appeal on this issue is simply a virtual word-for-word regurgitation of his Second Petition's judicial bias claim. (Compare Def. Br. at p. 11-27 with 19 JA 4445-4461). There is nothing that Defendant puts forth on appeal that demonstrates how the District Court's ruling regarding the lack of good cause and prejudice was an arbitrary abuse of discretion. Colley, 105 Nev. at 236, 773 P.2d at 1230.

Specifically, Defendant's failure to prove the arbitrariness of the District Court's ruling is fully illustrated by his argument that his good cause and prejudice arguments were simply ignored by the State and the District Court. (See Def. Br. 11-27). This contention is flatly rejected by the record. (48 JA 11650: 11-17; 48 JA 11587:5 – 11588:8). The crux of Defendant's good cause and prejudice argument centers on supposed "new information" that Defendant's latest post-conviction counsel allegedly discovered, specifically that: 1) Judge Bongiovanni failed to disclose that he was subject of a federal criminal investigation; 2) the District Attorney's Office misrepresented it was not involved with the investigation of Judge Bongiovanni and 3) Judge Bongiovanni misrepresented that he did not know a witness named Denny Mason. (See Def. Br. at 11-27).

However, during oral argument on the Second Petition, the State directly challenged Defendant's good cause and prejudice claim and established that all of this allegedly "new" information was known by Defendant's trial counsel back in 1996 through the federal investigation into Judge Bongiovanni. (48 JA 11587:5 – 11588:8; see also 17 JA 4002-4007;

17 JA 4008-4013). First, the State pointed out that this matter had already been decided on the merits by this Court in 1997 on direct appeal. (Id.). Second, the State explained that this alleged "new" information was the focal point of the Motion for New Trial that Defendant's trial counsel filed back in 1996 as well as on direct appeal from the denial of that motion. (Id.). Given that Defendant possessed this information since 1996, the State established that there was absolutely no good cause presented by Defendant through his Second Petition that would excuse over a decade-long delay in raising this issue.

Moreover, in properly concluding that Defendant was procedurally barred from re-raising the claim of judicial bias on the grounds that it was successive under NRS 34.810(2), but also barred under the doctrine of law of the case, the District Court expressly rejected Defendant's "new" good cause and prejudice arguments by stating:

> The record shows that more than a decade ago, Rippo's trial counsel knew and alleged that the State was involved in the Federal sting operation by indicating Terry Salem and manipulating the random assignment of the case and also that Bongiovanni failed to disclose a prior relationship with witness Denny Mason who was the business partner of reputed Buffalo mob associate Ben Spano. ***Accordingly, neither Brady nor ineffectiveness of post-conviction counsel constitutes good cause for re-arguing these ten year old facts in a successive petition.***

(48 JA 11650: 11-17) (emphasis added). The record is clear that the District Court considered the alleged "new" good cause and prejudice arguments, but ultimately rejected them as being insufficient to overcome the State's procedural bars. The record also reveals that the District Court's ruling was proper for the following reasons: 1) This information was known to Defendant for over a decade; and 2) The Supreme Court has already issued a ruling on the merits of this issue during Defendant's direct appeal ***over 12 years ago***. Accordingly, the record illustrates that not only did the District Court consider Defendant's new good cause arguments but also expressly rejected based on reasons supported by the factual record and procedural history of this case. Accordingly, District Court properly determined that Defendant's claim of judicial bias was procedurally barred.

Moreover, the District Court also properly determined that there was not enough prejudice present to warrant re-raising this decade-old issue. Defendant points to no actual bias or prejudice in the form of judicial rulings at trial that would have altered the state of the

evidence or would have caused the jury to find differently. None of this evidence regarding alleged judicial bias would be so significant to dissuade a jury from reaching the conclusion they made in this case – that the trial evidence demonstrated beyond a reasonable doubt that Defendant murdered these two women by strangulation and use of a stun gun. More specifically, during this trial the State even presented a victim who survived being sexually assaulted by Defendant. She recounted how the method he used to attack her - being strangled with a ligature and using a stun gun upon her - mirrored his method of murder with the two victims in this case. Even if this evidence of judicial bias was considered, the overwhelming evidence of guilt would not have changed the jury's verdict. The District Court's ruling was proper.

2. Claim 2: Alleged Brady Violations and Prosecutorial Misconduct

Defendant mistakenly claims that the District Court erred in rejecting the various claims he raised under Brady v. Maryland. 373 U.S. 83 (1963). The District Court, however, properly rejected these alleged Brady violations on two different grounds. (48 JA 11649-11650). First, since Defendant had been aware of each Brady claim for the past twelve years, yet failed to raise the matters until his Second Petition, the District Court procedurally barred these claims as successive under NRS 34.810(b)(2). (Id.). Second, even upon an evaluation on the merits, Defendant's allegations failed to meet all three prongs of the Brady test, thus each claim was rejected. (48 JA 11650).

Since a review of whether a District Court properly denied a Brady claim raised in a Petition for Writ of Habeas Corpus involves both questions of fact and law; this Court should conduct a *de novo* review of the issue. Mazzan v. Warden, 116 Nev. 48, 993 P.2d 25 (2000) "Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment." Id., 116 Nev. at 66, 993 P.2d at 36. "[T]here are three components to a Brady violation: the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material." Id. Furthermore, when a witness receives "substantial benefits" from the State in exchange for testifying at trial,

these benefits must be disclosed pursuant to Brady. Singh v. Prunty, 142 F.3d 1157, 1162-63 (9th Cir.1998). However, with respect to second prong of Brady, specifically the withholding of evidence, this Court has consistently held that there is no Brady violation if the defendant, exercising reasonable diligence, could have obtained the information. Rippo (I), 113 Nev. at 1257, 946 P.2d at 1028. Thus, if the information is readily available there can be no Brady violation. Furthermore, if the bases for Defendant's claims are bare and unsubstantiated by any factual support, the claim must be dismissed. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Here, Defendant's Brady claims in Claim 2 of his Second Petition centered on the following State witnesses: 1) Thomas Sims; 2) Michael Beaudoin; 3) Thomas Christos; 4) David Levine and James Ison; as well as 5) Miscellaneous allegations of prosecutorial misconduct. (See 19 JA 4462-4477; Def. Br. at p.27-50).

a. Thomas Sims

On appeal, Defendant claims that the State withheld from Defendant the benefits Thomas Sims received in exchange for his testimony at Defendant's trial. (Def. Br. at 34-36). Mr. Sims was a witness with a criminal background who had, around the time of his testimony in this trial, several pending charges against him. (Id.). The crux of Defendant's Brady claim as it pertains to Mr. Sims is the fact after his testimony was given that since some of the charges were continued, dismissed or reduced after his testimony was provided, Defendant assumes, without a shred of evidentiary or testimonial support, that Mr. Sims must have brokered a deal with the State and the State, in turn, withheld this information from Defendant. (Id.).

However, as noted in the Opposition to Defendant's Second Petition, this allegation is wholly belied by the record and fails to meet each of the three prongs of the Brady test for the following reasons. First, there was no favorable evidence to withhold. As discussed, the State need only disclose substantial benefits given to a witness if in fact a deal had been brokered between the State and the witness. Singh v. Prunty, 142 F.3d 1157, 1162-63 (9th

Cir.1998). However, no such deal ever took place, and thus, there was nothing for the State to disclose to Defendant.

In its Opposition to the Second Petition, the State established through review of the factual record that despite Defendant's unsubstantiated allegations that Thomas Sims received a deal for his testimony, ***Mr. Sims expressly stated at trial that he never received any inducements or benefits for his testimony***, nor did he have any interest in being a witness for the State in this case. (32 JA 8713-15). The record also established that under cross-examination by Defendant, Mr. Sims steadfastly asserted that he had no deal in place for the State in exchange for his testimony. (Id.). On appeal, Defendant readily admits the existence of this uncontroverted testimony, (Def. Br. at p. 34: 9-19), yet rather than finding any testimony from Mr. Sims to the contrary, Defendant simply ignores what the witness testified to under oath and reargues the fact that since some of his charges were reduced, there must have been a backroom deal reached between the parties. Defendant's claim is utterly unsubstantiated by facts and wholly belied by the record. The record is clear - there was never a deal reached by Mr. Sims and the State in exchange for his testimony at Defendant's trial, and thus, there was no favorable evidence for the State to withhold. Since Defendant's claim is without merit, he cannot satisfy the first prong of Brady. Mazzan, 116 Nev. at 66, 993 P.2d at 36.

Second, even assuming this information about Mr. Sims was material, no information was ever withheld from Defendant. The second prong of Brady requires Defendant to prove that the alleged material information was withheld from him. Id. Thus, one of the burdens that befall a defendant is establishing the material information could not have been acquired through exercising reasonable diligence, but could only have been ascertained by a disclosure from the State. Rippo (I), 113 Nev. at 1257, 946 P.2d at 1028.

Here, the only information that Defendant relies upon to support his claim that Mr. Sims received a deal in exchange for his testimony, are public court records that evidence the procedural history of crimes charged against Mr. Sims. (See 19 JA 44624464; Def. Br. at 34-36). All this information could have been acquired by Defendant, and it appears in this case

that it was, through exercising some reasonable diligence. Rippo (I), 113 Nev. at 1257, 946 P.2d at 1028. In its Opposition to the Second Petition, the State expressly asked Defendant to explain how he acquired this information, not only to determine if it was acquired through the use of due diligence, but also to ascertain how long Defendant possessed these public records. The date of Defendant's possession of these materials would also serve another valuable purpose – ***to determine if this claim had been timely raised.*** (36 JA 8713: 12-17). Rather than responding to this inquiry at oral argument on the Second Petition on appeal, Defendant simply refused to provide this information. (See 48 11586-11602) Despite Defendant's lack of disclosure on how and when he acquired this information, the Second Petition and the Appeal serve as proof that Defendant acquired this information either through collecting the public record himself or at some juncture these records were provided to him by the State. In either instance, the record clearly demonstrates no information was ever withheld from Defendant within the meaning of Brady's second prong. Mazzan, 116 Nev. at 66, 993 P.2d at 36. Thus, Defendant's claim as it relates to the second prong of Brady is without merit.

Lastly, this Brady claim involving Mr. Sims was untimely and was properly dismissed as being successive and thus procedurally barred. The record clearly reveals that the evidentiary basis for this claim comes from public records that Defendant acquired. Although Defendant, to date, has still refused to disclose when he acquired these public records, it is clear based on the procedural history of these other cases related to Mr. Sims that Defendant could have been aware of them as early as the time of or shortly after Defendant, thus over a decade before. Since there has been absolutely no good cause or prejudice offered by Defendant to excuse this decade long delay, the District Court properly dismissed this claim as untimely and successive.

b. Michael Beaudoin

Defendant also erroneously contends that the State withheld a brokered deal with State's witness, Michael Beaudoin, in which various criminal charges were either dropped or reduced in exchange for his testimony. (Def. Br. 36-38). Defendant also claimed that Mr.

Beaudoin received "other undisclosed benefits" from the State. However, this claim fails for a number of reasons.

First, this claim fails the first prong of Brady because there was no favorable evidence to withhold. Only substantial benefits given to a witness need to be disclosed by the State. Singh, 142 F.3d at 1162-63. However, there never was a deal consummated, thus the State had nothing to disclose to Defendant. In its Opposition to the Second Petition, the State established that despite Defendant's unsubstantiated allegations, not only did ***Mr. Beaudoin expressly state at trial the various pending charges that were against him but also that he never received any inducements or benefits for his testimony***. (36 JA 8715-8717). The State's Opposition to the Second Petition also identified in the record that under cross-examination by Defendant, Mr. Beaudoin flatly rejected the suggestion that he received a deal for his testimony. (Id. at 8716). Defendant's claim is belied by the record. The facts demonstrate that there was no deal between the State and Mr. Beaudoin in exchange for his trial testimony, thus there was nothing for the State to disclose to Defendant. Moreover, Defendant's claim that there were "other undisclosed benefits" provided by the State, (19 JA 4466: 3-6), are totally devoid of any factual support and accordingly, must be rejected as "bare" and "naked" allegations are not sufficient. Hargrove, 100 Nev. at 498, 686 P.2d at 222. Accordingly, Defendant cannot prove the first prong of Brady.

Second, Defendant's claim fails because he is also unable to satisfy the second prong of Brady, as there was no material information ever withheld from Defendant. Under Brady's second prong, Defendant must show that the alleged material information was withheld from him. However, the record demonstrates that the information could have been acquired through exercising reasonable diligence, as all of the information relied upon by Defendant were public records. Rippo (I), 113 Nev. at 1257, 946 P.2d at 1028.

Like his Sims claim, the source of the information that Defendant relies upon are public court records that illustrate the procedural history of crimes charged against Mr. Beaudoin. (See 36 JA 8715-8717; Def. Br. at 36-38). Defendant could have gathered this information prior to trial and it appears that eventually it was, through exercising some

reasonable diligence. Like the Sims' claim, Defendant failed to explain how and when he collected this information. Regardless, the fact that the source of this claim is solely derived from readily accessible public records establishes that the State could not have withheld this information as defined by Brady's second prong. Mazzan, 116 Nev. at 66, 993 P.2d at 36. Accordingly, the claim fails to meet the Brady's second prong.

Lastly, the Beaudoin Brady claim also was untimely and was properly dismissed as being successive. Although Defendant refused to explain when and where he acquired the information to raise this claim, the record clearly reveals that this information came from public records that Defendant acquired. While Defendant will not acknowledge whether he possessed these records prior to trial, the record establishes that by no later than the date of Mr. Beaudoin's testimony, when Mr. Beaudoin discussed his pending charges at trial, Defendant learned of this information. (12 JA 2841-2842, 13 JA 2884, 2910-2911, 2946-2947). This disclosure at trial establishes that Defendant possessed all of this information before his post-conviction proceeding began. Yet despite possessing this information, Defendant failed to raise these claims either on direct appeal or in his First Petition. Rather, Defendant waited over ten years to raise this untimely claim in his Second Petition. To date, Defendant fails to offer any good cause or prejudice to excuse this decade long delay, thus the District Court ruling finding the claim to be untimely and successive was proper.

c. Thomas Christos

The District Court properly rejected Defendant's Brady claim as it relates to State's witness, Thomas Christos, for the following reasons. First, Defendant failed through his Second Petition or Appeal to offer a shred of evidentiary support for the bald assertion that a deal must have been struck between the State and Mr. Christos, in exchange for his testimony, since pending charges against him were not resolved until three years after the charges were filed. There many possible reasons why his pending charges were not resolved until three years later. The accusation that the only possible reason was a deal between the State and Mr. Christos is utterly devoid of any factual basis. "Bare" and "naked" allegations

are wholly insufficient in a post conviction petition and thus must be rejected. Hargrove, 100 Nev. at 498, 686 P.2d at 222.

Furthermore, this claim was also properly dismissed as being procedurally barred under NRS 34.810(2). See also Phelps v. Director of Prisons, 104 Nev. 656, 659, 764 P.2d 1305 (1988). Mr. Christos' arrest occurred in 1994 and Defendant has been or should have been aware of this charge for well over a decade. Yet, despite possessing this information, Defendant failed to raise this Brady claim in either his direct appeal or in his First Petition. Defendant failed to provide to this Court on appeal any good cause or prejudice sufficient to excuse the over decade long delay in raising this claim. Thus, the claim should be barred.

d. David Levine and Jason Ison

Defendant mistakenly claims that the State failed to disclose material exculpatory and impeachment information about State witnesses David Levine and Jason Ison. However, these two claims are procedurally barred given that Defendant knew of the subject matter of these claims since the time of Defendant's trial – well over ten years ago. Here, the central issue of both Brady claims centers on the discrepancies between two different statements that each witnesses gave to the police about the murder confessions Defendant provided to Mr. Levine and Mr. Ison. Despite the testimony both witnesses provided under oath at trial in which they explained the details of Defendant's confession to them, Defendant claims their testimony is false.

The only basis for this accusation is Defendant's reliance on two letters, purportedly from Mr. Levine and Mr. Ison, written in November 2007 in which both men gave accounts of the confessions that varied from their trial testimony. However, neither of these "letters" from Mr. Ison and Mr. Levine are notarized or in any way authenticated, thus Defendant failed to provide this Court or the District Court any method to verify their authenticity. Accordingly, since there is no way to verify the letters authenticity each cannot be relied upon as evidence of an alleged Brady claim.

Furthermore, the subject matters of these letters, the varied descriptions of Defendant's confession to each, were repeatedly delved into on cross examination, when Mr.

Ison and Mr. Levine testified at trial. At trial, Defendant's trial counsel questioned these witnesses about what Defendant actually confessed to them, as both witnesses had given slightly varied statements about the Defendant's confession prior to trial. (12 JA 2815-2825, 13 JA 3041-3043, 3047-3049). Thus, Defendant was acutely aware of this issue as his post-conviction proceedings began. However, despite possessing this knowledge, Defendant failed to raise this alleged Brady claim on direct appeal nor did Defendant raise the matter during his First Petition. Defendant could have interviewed and obtained letters from these witnesses at any time. Instead, Defendant, without any justification, waited over ten years before finally bring this issue before the Court. To date, Defendant has yet to offer any good cause or prejudice to justify waiting over a decade to bring these claims. Thus, given this untimely delay, the District Court properly determined these issues to be procedurally barred under NRS 34.810.

e. Prosecutorial Misconduct

Defendant erroneously claims that he deserves a new trial because of an extensive list of alleged acts of prosecutorial misconduct, specifically over "sixty-plus" instances of misconduct.

As the State pointed out in its Opposition to Defendant's Second Petition, "defense counsel failed to object to ***any*** of the alleged "sixty-plus" improper comments cited in Defendant's petition," thus these issues are precluded from appellate review. Not only are these alleged acts of misconduct not of a constitutional dimension, but at trial Defendant's counsel failed to object and thus preserve these issues for appellate review. Valdez v. State, 124 Nev. 97, 196 P.3d 465, 481 (2008). Prosecutorial misconduct claims that are not objected to at trial and preserved will not be reviewed on appeal unless the claims constitute "plain error." Id.; Leonard v. State, 17 P.3d 397, 415 (2001). More specifically "particularly egregious errors…that seriously affect the fairness, integrity or public reputation of the judicial proceedings." United States v. Young, 470 U.S. 1, 15 (1980)(internal quotations omitted). This claim fails for the following reasons.

First, the District Court dismissed this petition in its entirety pursuant NRS 34.726 as being well outside the one-year time bar. Second, this particular claim was also dismissed on the grounds that it was procedurally barred pursuant to NRS 34.810. Defendant has known about all of these trial-related misconduct claims since the trial and penalty phase occurred well over a decade ago, yet failed to raise these matters in his direct appeal or in his First Petition. Rather, Defendant waited until 2008 to raise these issues in his Second Petition. To date, Defendant has still failed to provide any good cause or prejudice to excuse this decade long delay. (Supra at p. 24-28). Moreover, to the extent that any of these claims were raised on direct appeal, each was rejected by this Court as being insufficient to amount to reversible error. See Rippo (I), 113 Nev. at 1239, 946 P.2d at 1017.

Second, Defendant failed to demonstrate, on appeal, why these claims should not be procedurally barred due to untimeliness or the doctrine law of the case. (Def. Br. at 40-43). As discussed supra at p. 24-28, Defendant also failed to establish any good cause or prejudice for his decade long delay in raising the majority of these claims. Finally, Defendant failed to establish on the merits how these allegations were tantamount to plain error.

Instead, Defendant's appeal sought to paint an inaccurate picture of this Court's prior ruling on various prosecutorial misconduct issues. For example, Defendant sought to point out that on direct appeal this Court seemingly viewed the prosecutor's actions as particularly egregious given its statements that the "prosecutor made impermissible references to Rippo's failure to call any witnesses…," (Def. 2nd Pet. at p. 41), and the prosecutor's reference to "interviews and 'things' [that] happen outside of the courtroom were improper reference to evidence not presented at trial." (Id.) However, Defendant totally neglected to highlight this Court's overriding belief that it considered both errors "***harmless in light of the overwhelming evidence"*** of Defendant's guilt. Rippo (I), 113 Nev. at 1254-55, 946 P.2d at 1026-27.

On appeal, Defendant also rehashed another argument raised on direct appeal, specifically that the State prosecutors impermissibly inserted their personal beliefs about the

evidence. (Def. Br. 42-43). However, as already noted to the District Court in the State's Opposition to the Second Petition, this contention was already considered and squarely rejected by this Court on direct appeal. Rippo (I), 113 Nev. at 1255, 946 P.2d at 1027; (36 JA 8720-8721). This Court expressly stated on this issue: "We conclude that the statements do not contain prosecutorial vouching. The prosecutor did not characterize the testimony of the witnesses, nor did he express a personal belief concerning evidence before the jury." Id. Accordingly, as this ruling amounts to law of the case, this issue cannot now be revisited again in a second post-conviction petition. Hogan, 109 Nev. at 952, 860 P.2d at 710. Thus, the District Court's rejection of these previously settled issues were wholly proper.

Defendant raised another prosecutorial misconduct claim that stemmed from the issue of whether or not the State's witnesses received "undisclosed benefits" for their testimony. Defendant on appeal contends that it was improper for the State to say that none of the witnesses, sans Mr. Burkett, received any consideration for their testimony. As discussed supra, the record reflects that there were no benefits or deals brokered between the State and its witnesses, thus any comment of that nature was not improper, but rather a proper reflection of the facts. As discussed supra, Defendant utterly failed to provide any evidentiary support for the accusations that witnesses received deals in exchange for their testimony, thus the State's comments during closing arguments were not improper.

f. The Proceedings on these Brady Issues Illustrate the District Court's Ruling was Proper

At oral argument on the Second Petition, the State established that none of the witnesses at the center of Defendant's alleged Brady violations ever stated that "they had inducements given to them." (48 JA 11588). The State also pointed out that the information Defendant relied upon to make his Brady claims not only came from "publicly available documents from Justice Court and/or District Court…" but also was known to Defendant's trial counsel at the time of trial. (Id.). In light of the fact that this publicly available information was available for the last twelve to fourteen years, the State correctly asserted that the State would be prejudiced, due to this extensive delay, if forced to re-argue these long settled issues. (Id.). Arguably most importantly, the State properly stated that due to this

delay and due to the wide spread availability of these public documents, Defendant failed in meeting his burden of showing good cause to justify "why [Defendant is] now just coming forward with these public documents, public records, of other cases that these witnesses had that have always been available to them…." (Id.).

Defendant could not either through his Second Petition or at oral argument offer a sufficient reason for the near decade long delay in bringing up these claims that he discovered from publicly available documents. Accordingly, the District Court rejected these alleged Brady claims not only on the merits, but also on the grounds that there was no good cause and prejudice to overcome the procedural bars. In a clear explanation of the rationale and factual basis for its ruling on these alleged Brady issues the District Court expressly stated:

> The record shows that ***Rippo's trial counsel was well aware that several witnesses had past or pending criminal case against them*** and cross-examined regarding continuances, quashed bench warrants, and future benefits. ***Twelve years later, the various dispositions of such collateral cases are not new evidence of undisclosed inducements, but are consistent with the trial testimony that no benefits were given and that such cases would rise or fall on their own merits.***
>
> ***The State has never suppressed such case dispositions (which are a matter of public record), they are not favorable to the defense as either exculpatory or impeaching, and none of the allegations are material so as to undermine confidence in the verdict.*** None of the jailhouse informants have recanted their testimony that Rippo confessed to the murders. ***Accordingly, neither Brady, nor ineffectiveness of post-conviction counsel constitutes good cause for re-raising these claims where no new material facts are alleged and there is no reasonable probability of a different conviction or sentence for Rippo.***

(48 JA 11650-11651) (emphasis added). The District Court properly dismissed this claim as not only being sufficient under the Brady test, but also procedurally barred as successive. Here, Defendant had two prior opportunities to raise these claims, however Defendant chose not to do so. Accordingly, since there were two other chances to raise this issue previously, this claim is procedurally barred. NRS 34.810(2); Phelps, 104 Nev. at 659, 764 P.2d at 1305.

3. Claim 3: Trial Counsel's Alleged Failure to Present Mitigating Evidence

Defendant's third claim of his Second Petition mistakenly argues that it was an error for the District Court to dismiss his ineffective assistance of counsel claim as it related to his

trial counsel's presentation of mitigating evidence during the penalty phase. An ineffective assistance of counsel claim presents this Court with a mixed question of law and fact, and thus, it is subject to independent review. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). However, this Court must give deference to a district court's factual findings on appeal, so long as they are supported by substantial evidence and are not clearly wrong. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

In order to assert a claim for ineffective assistance of counsel a defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984). See also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). This test applies to both the guilt and penalty phases of a trial. Strickland, 466 U.S. at 686-87, 104 S.Ct. at 2063-64. Under this test, the Defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694, 104 S.Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970). Furthermore, this Court may review these prongs in any order and need not consider both prongs if the defendant fails to make sufficient showing on either one. Strickland, 466 U.S. at 697, 104 S.Ct. at 2069.

In considering whether trial counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information that is pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of

hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. Once such a reasonable inquiry has been made by counsel, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280, citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Finally, counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

Based on the above law, the court begins with the presumption of effectiveness and then must determine whether or not the defendant has demonstrated by "strong and convincing proof" that counsel was ineffective. Homick v State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996), citing Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981); Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991). The role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978), citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977).

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

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."

Strickland, 466 U.S. at 689, 104 S.Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992), citing Strickland, 466 U.S. at 690, 104 S. Ct. at 2066; see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), citing Strickland, 466 U.S. at 687. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." McNelton, 115 Nev. at 403, 990 P.2d at 1268, citing Strickland, 466 U.S. at 687-89, 694.

Here, the District Court concluded that this ineffective assistance of trial claim was barred by NRS 34.726 and NRS 34.810(2) as successive. (48 JA 11649-11650). All of these alleged errors occurred during the penalty phase of Defendant's trial. While Defendant raised ineffective assistance of trial counsel claims in his First Petition, Defendant did not raise any of these specific claims at that time. See Rippo v. State (II), 122 Nev. at 1095, 146 P.3d at 285. Thus, Defendant allowed over a decade to pass before bringing these issues before the District Court.

On appeal, the only good cause argument Defendant submits is that his first post conviction counsel was ineffective for failing to raise this claim in the First Petition. (Def. Br. 50: 3-5). As discussed supra at p. 24-28, this good cause argument is wholly insufficient to overcome these procedural bars. His First Petition was denied by the District Court. If Defendant really was unhappy with his first post-conviction counsel's performance he would have immediately filed a second petition. Defendant, however, chose not to do so. Instead he ***waited two years and sought federal habeas relief*** and a year after that he finally returned to State court with his Second Petition. Thus, Defendant unjustifiably ***waited three years*** before raising this issue in State court. These claims are clearly untimely, and the District Court's conclusion to find them procedurally barred was entirely proper.

Furthermore, the District Court's ruling found that even on the merits, Defendant failed to bring a successful ineffective assistance of counsel claim. (48 JA 11651). Further expounding upon this Court's prior denial of an ineffective assistance of trial counsel from his First Petition, the District Court once again found that the additional mitigation evidence presented in the Second Petition "was not particularly compelling." (Id.). The District Court concluded that the "new" evidence of prior Defendant's family history was cumulative to what was already presented." (Id.). The District Court also concluded that the evidence of psychological testing failed to reveal a diagnosis that would have compelled a verdict less than death. (Id.). Moreover, the District Court ruled that in light of the strength of the aggravating evidence, including his strangulation and use of a stun gun of his two victims as well as his prior sexual assault conviction, none of the new mitigation evidence would have had a reasonable probability of changing the death sentence he received.

On appeal, Defendant failed to demonstrate how the District Court's ruling was in error. Under Strickland it is entirely improper to use hindsight in an effort to criticize the strategic decisions of counsel. Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992). Yet that is precisely what Defendant did in bringing this claim over a decade after remittitur was issued. Defendant's entire ineffective assistance claim is simply an exercise in second guessing the decision making process of his trial counsel. For example, although Defendant's trial counsel called several witnesses to discuss the difficult upbringing he had as a child, particularly with his step-father, (36 JA 8726-8730), Defendant, over a decade later, claims even more witnesses should have been called to rehash and cumulatively discuss the exact same issue. (Def. Br. at p. 50-55).

As pointed out in the State's Opposition to the Second Petition, Defendant's trial counsel had to engage in a delicate balancing act when presenting mitigating evidence. (36 JA 8730). During the penalty phase, the jury listened to testimony about how Defendant planned to rob his victims, repeatedly used a stun gun on both women, forced them into a closet, bound and gagged them and ultimately strangled them to death. The jury also listened to the manner in which Defendant systematically cleaned up the crime scene including

removing the victims' clothes to conceal his own blood. Moreover, the jury heard how Defendant told a friend that he "choked those bitches to death." Not only did the jury hear how he murdered these women, but also how he stole their property afterwards as well as the fact that he was previously convicted of brutally sexual assaulting another woman.

In light of that evidence, Defendant's trial counsel made the decision to present mitigating evidence about the difficulties of his client's upbringing through several witness, however, trial counsel wisely made the strategic choice not to overload the jury with witness after witness telling the same hard luck story about his client. The very real danger in employing that tactic was potentially offending jurors by creating an atmosphere that ***his client was the victim***, rather than the two women he viciously murdered. Trial counsel's well reasoned tactical decisions accomplished two goals: 1) Demonstrating that there were mitigating factors in his client's case without; 2) Offending the sensibilities of the jury.

Yet, with hindsight being twenty-twenty, on appeal Defendant seeks to revaluate these strategic decisions and punish trial counsel for failing to convince the jury that the death penalty was not warranted, even in the face of a mountain of aggravating evidence. This type of rationale is wholly inappropriate under the Strickland test. Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992). Furthermore, Defendant failed to prove how more witnesses talking about his upbringing or additional psychological experts would have changed the jury's sentencing decision. Defendant, a man previously convicted of sexual assault, bound, gagged, electrocuted and strangled two women to death. Additionally, psychological testimony was not going to sway this jury, given these grizzly set of circumstances. Consequently, on appeal as well as in his Second Petition, Defendant not only failed to demonstrate how his trial counsel's decisions were objectively unreasonable but also how the verdict of the jury would have been any different.

At no point on appeal does Defendant challenge the factual findings of the District Court on appeal, thus the findings remain an accurate reflection of the evidence not only presented at trial, but also during the Second Petition. Accordingly, this Court should defer to these factual findings on appeal given that they are supported by substantial evidence.

Riley, 110 Nev. at 647, 878 P.2d at 278. The record demonstrates that the District Court's ruling was well grounded as a matter of law and fact. Since Defendant's claim was not only procedurally barred, but also failed to satisfy either prong of Strickland, the denial of this claim should be affirmed.

4. Claim 5: Alleged Ineffective Assistance of Trial Counsel During Trial

Defendant erroneously claims the District Court improperly dismissed his claim that his trial counsel was ineffective in a variety of different ways during the trial. However, all of these claims were raised in Defendant's First Petition, which was previously denied by the District Court, and this Court affirmed the denial of this petition on November 11, 2006. Accordingly, the District Court recognized that not only were the re-raising of these claims in the Second Petition successive under NRS 34.810(b), but also barred by the doctrine of law of the case. (48 JA 11650).

Although Defendant desires to re-litigate these matters, these claims have been previously raised and adjudicated by this Court on appeal from the District Court's denial of Defendant's First Petition. As such, the claims are successive pursuant to NRS 34.810(b) and are barred by the doctrine of law of the case. Hogan, 109 Nev. at 952, 860 P.2d at 710. Moreover, as discussed supra at p.24-28, Defendant has failed to demonstrate good cause and actual prejudice, to warrant further consideration of these long settled issues.

5. Claim 7: Alleged Failure to Properly Define Deliberation in the Jury Instructions

On appeal, Section 9 of Defendant's appeal brief deals with the alleged errors the District Court committed during trial, specifically with respect to jury instructions. (Def. Br. 79-84). Subsection "a" deals with the Premeditation Instruction, which when raised in Defendant's Second Petition fell under Claim 7 of his petition. (19 JA 4527-4529). In Claim 7 of his Second Petition, Defendant challenged the deliberation instruction for its alleged merging of the definition of terms "premeditation and deliberation." (Id.) The District Court dismissed Claim 7 on the grounds that it was: 1) Procedurally barred by NRS 34.726; 2) Procedurally barred under NRS 34.810(2) as successive; and 3) Barred under the doctrine of law of the case. (48 JA 11649-11650) The District Court's ruling was proper given that this

claim has been raised on direct appeal as well as in the First Petition, and accordingly, been rejected in both instances.

However, on appeal, Defendant alters the argument presented in his Second Petition and now raises what is more commonly known as a Kazalyn instruction challenge. (Def. Br. 79-82). Defendant claims that he is justified in altering his argument on appeal due to intervening changes in the law (Def. Br. at p.79: 27-28). However, Defendant's Kazalyn challenge fails for the following reasons:

a. Defendant's "*Kazalyn*" Argument Must Be Dismissed Because it is Procedurally Barred

This very same Kazalyn instruction challenge was already considered by this Court on Defendant's appeal from the denial of his First Petition and ultimately, this Court rejected it on its merits. This Court expressly stated:

> Rippo claims that appellate counsel was ineffective for not appealing on grounds that the jury instruction defining premeditation and deliberation was unconstitutional. This claim was not preserved for review by this court on direct appeal, so counsel would have had to show that any error was plain and affected Rippo's substantial rights. ***Rippo contends his counsel should have challenged "the Kazalyn instruction" that this court abandoned in 2000 in Byford v. State. 116 Nev. 215, 233-36, 994 P.2d 700, 712-14 (2000). But Byford is not retroactive, and use of the Kazalyn instruction in a case predating Byford is no ground for relief. Rippo has failed to demonstrate any deficient performance by counsel. The district court did not err in denying this claim.***

Rippo (II), 122 Nev. at 1096-97, 146 P.3d at 286 (emphasis added). The State noted this fact in its Opposition to the Second Petition (36 JA 8738), and thus, the District Court considered this prior ruling when denying Claim 7. Accordingly, since this issue was previously ruled on it is therefore barred by law of the case. Hogan, 109 Nev. at 952, 860 P.2d at 710.

Additionally, Claim 7 is procedurally barred under NRS 34.726 as well as NRS 34.810(2). Defendant failed to immediately challenge the instructions following this Court's decision to replace the Kazalyn instructions in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000) and Garner v. State, 116 Nev. 770, 6 P.3d 1013 (2000). Instead, Defendant waited eight years to raise this issue for the very first time in the instant petition. Defendant's only argument regarding good cause is the conclusory allegation that the "intervening changes in

the law," (Def. Br. at p. 79:27-28), provide him sufficient good cause to raise this claim. However, these intervening changes in the law were ***around for eight years*** prior the filing of this Second Petition, and thus, this precise argument could have been filed with the Second Petition, let alone at some time after 2000. Thus, Defendant's intervening changes argument is truly meritless, given the extensive delay in raising this issue. Furthermore, to the extent the District Court considered this matter, this intervening changes claim was expressly rejected in the Court's findings when it stated: "Any alleged intervening case authority fails to establish new grounds that were previously unavailable to Rippo, has no application to this case, or does not stand for the proposition alleged. Accordingly, intervening case authority does not provide good cause for the instant petition." (48 JA 11651: 12-15). Accordingly, the District Court properly determined that this near decade-long delay in raising this issue mandates that this claim is procedurally barred under NRS 34.726 and moreover, that it is waived under NRS 34.810, as it could have been raised previously.

b. As Noted by This Court Over Three Years Ago, Defendant Is Not Entitled to a *Byford* Instruction Because His Conviction was Final Three Years Prior to the Publication of *Byford*

As this Court clearly pointed out in its affirmance of his First Petition in 2006, Defendant is not entitled to the benefit of Byford, since his conviction was final three years earlier. Moreover, Defendant's reliance on the Ninth's Circuit decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007) in an attempt to circumvent this Court's earlier holding is wholly misplaced, in light of this Court's recently issued decision in Nika v. State. 198 P.3d 839, 124 Nev. Adv. Op. 103 (2008). In Nika, the Supreme Court explained the Polk decision as it relates to Byford. Id. The Supreme Court held that the "'use of the Kazalyn instruction in trials which predate Byford does not constitute plain or constitutional error' and the new Byford instructions . . . are a new requirement with prospective force only.'" Nika, 198 P.3d at 848, 124 Nev. Adv. Op. at 17 (citing Garner, 116 Nev. at 789, 6 P.3d at 1025).

Furthermore, the Nika Court distinguished Polk holding that:

> The fundamental flaw, however, in Polk's analysis is the underlying assumption that Byford merely reaffirmed a distinction between "willfulness," "deliberation," and "premeditation." It was based on that assumption that Polk concluded that the Kazalyn instruction was erroneous and that the instructional error violated the federal Constitution by omitting an element of the offense. That underlying assumption ignores our jurisprudence.
> We take this opportunity to reiterate that Byford announced a change in state law. Nika, 198 P.3d at 849, 124 Nev. Adv. Op. 19-20.

This Court stated that Byford was not based upon constitutional grounds, rather Byford clarified a state statute and thus ***did not require retroactive application***. Id. "As such, the Kazalyn instruction correctly reflected Nevada law before Byford." Id., 198 P.3d at 850, 124 Nev. Adv. Op. at 22. "This court previously has held that Byford has no retroactive application on collateral review. We reaffirm that decision today." Id., 198 P.3d at 850, 124 Nev. Adv. Op. at 23.

Here, Defendant's conviction became final on May 31, 1996, when the District Court filed its Judgment of Conviction and this Court issued remittitur on November 3, 1998. These procedural matters that cemented the finality of Defendant's conviction came four and two years, respectively, ***before*** the Byford decision. This Court in Nika held, "in the post-conviction arena, we rejected claims of ineffective assistance of counsel concerning the Kazalyn instruction, observing that Byford had no retroactive application and that the use of that instruction in cases predating Byford provides no ground for relief." Nika, 198 P.3d at 848, 124 Nev. Adv. Op. at 18.

Thus, whereas defendant Polk was entitled to the change in law under Byford because his case was not yet final when Byford was published in 2000, Defendant does not receive this benefit as his case became final long before Byford's publication. Accordingly, since there is no retroactive application of Byford, Defendant did not suffer any constitutional deprivations that would entitle him to relief on this ground, thus illustrating that the District Court's ruling was not in error.

6. Claim 9: Allegation of Witness Intimidation - Alice Starr

Defendant also challenges the District Court's ruling that Claim 9 of his Second Petition was procedurally barred. In his appeal brief, Defendant deviates from the order in

which he presented these issues in his Second Petition. Claim 9 of his Second Petition, (19 JA 4532-4540), the alleged intimidation of an alibi witness, Alice Starr, was moved into the second main section of Defendant's appeal brief dealing with various claims of prosecutorial misconduct. (Def. Br. at p. 28-31).

In denying Claim 9, the District Court concluded in its findings that the issue was procedurally barred under NRS 34.726, 34.810(2) as well as under the doctrine of law of the case. (48 JA 11649-11650). Defendant's appeal fails to demonstrate how this was an arbitrary abuse of discretion. The District Court's ruling procedurally barring this matter was proper for several reasons.

First, this exact issue was raised on direct appeal thirteen years ago and this Court found that no constitutional violation took place. Specifically, this Court expressly stated "[W]e conclude that prosecutor's did not conduct witness intimidation warranting reversal." Rippo (I), 113 Nev. at 1251, 946 P.2d at 1025. Defendant freely acknowledged the procedural history of this issue, and more importantly, this Court's determination in his appeal brief. (Def. Br. at 30-31). Thus, since there was a definitive ruling on this claim over a decade ago, it cannot be re-raised and re-litigated. Hogan, 109 Nev. at 952, 860 P.2d at 710; NRS 34.810(2).

Second, Defendant did not provide any sufficient good cause or prejudice to justify rehashing an issue that this Court already definitively ruled on over a decade ago. The only justification Defendant could muster on appeal was pointing out the minute detail that this Court and the District Court never "acknowledged Mr. Lukens' testimony at trial regarding his involvement in securing benefits for the state's witnesses and his conduct during the discovery litigation." (Def. Br. at p 31: 2-4). The fatal flaw in this good cause argument is that it is itself simply procedurally barred. Defendant was aware of this alleged improper conduct for over a decade and yet failed to raise this claim at trial, direct appeal, or in his First Petition. Furthermore, to the extent Defendant seeks to make the good cause argument that his first post-conviction counsel was ineffective for failing to raise this issue earlier, this contention is wholly insufficient given the three year delay in raising an ineffective

assistance of post-conviction counsel argument as discussed supra at p. 24-28. Now, without any justifiable explanation for this delay, Defendant now seeks to re-raise an issue long settled in his Second Petition. As a matter of law, Defendant is procedurally barred from doing so. In light of this Court's clear ruling on the matter over a decade ago, the District Court correctly determined that the issue was procedurally barred by NRS 34.726, 34.810(2) and the doctrine of law of the case.

7. **Claim 12: Alleged Improper Admission of Victim Impact Evidence**

Defendant contends in Claim 12 that the trial court erred in allowing victim impact statements from both victims' family members and photo albums during the penalty phase because he felt that the family members' testimonies were prejudicial, irrelevant, and did not speak to the value of the life of either victim. (Def. Br. 69-73). The District Court's denial of this claim was proper for the following reasons.

First, the District Court properly determined that this claim was procedurally barred by NRS 34.726 and NRS 34.810(2) as well as the doctrine of law of the case. On appeal, despite repeated allegations that his trial counsel and first post-conviction counsel were ineffective for failing to raise and properly preserve this issue for appeal, Defendant simply ignored the fact that this was already reviewed by this Court on a direct appeal. See Rippo (I), 113 Nev. at 1261, 946 P.2d at 1031.

In reviewing the introduction of this victim impact evidence during the penalty phase that is now the subject of Claim 12, this Court concluded twelve years ago:

> We conclude that each testimonial was individual in nature, and that the admission of the testimony was neither cumulative nor excessive. Thus, we conclude that the district court did not abuse its discretion in allowing all five witnesses to testify.

Rippo (I), 113 Nev. at 1261, 946 P.2d at 1031. Since this matter was definitely resolved by this Court over a decade ago it cannot now be revisited.

Second, Defendant failed to establish any good cause or prejudice to overcome these procedural bars. To the extent Defendant attempts to avoid these bars by claiming ineffective assistance of his post-conviction counsel in failing to re-raise the issue sooner, the argument is clearly meritless as discussed supra at p. 24-28. Since there is no good cause or

prejudice to overcome the procedural bars of NRS 34.726, 34.810(2) as well as the doctrine of law of the case, the District Court's dismissal of this claim was proper.

8. Claim 13: Alleged Insufficient Evidence to find a Torture Aggravator

On appeal Defendant erroneously argues that it was an error to dismiss Claim 12 as there was constitutionally insufficient evidence to sustain a torture aggravating circumstance. (Def. Br. at 62-64). Despite Defendant's acknowledgement that this very same issue has already been put before this Court on direct appeal, twelve years ago, and this Court found there was sufficient evidence to sustain such an aggravator, Defendant nonetheless contends this Court ruled in error. (Def. Br. at 62-64). The denial of this claim was proper for the following reasons.

First, the claim is procedurally barred by NRS 34.726 and 34.810(2) and Defendant failed to demonstrate any good cause or prejudice to re-raise the issue. Second, discussion of this issue is precluded by the doctrine of law of the case. On direct appeal, this Court in considering this very issue held:

> When we review the facts of this case and consider the entire episode as a whole – the strangulation and restraint, accompanied by the frightful, multiple blasts with a painful high voltage stun gun – we conclude that even though the stun gun shocks were not the cause of death, there is still evidence, under our interpretation of murder perpetrated by means of torture, to support a jury finding that there was, as an inseparable ingredient of these murders, a "continuum" or pattern of sadistic violence that justified the jury in concluding that these two murders were "perpetrated by means of … torture."

Rippo (I), 113 Nev. at 1264, 946 P.2d at 1033. This Court reached that decision based on the conclusion that Defendant's repeated use of the stun gun on both victims was for a "sadistic purpose."

> There seems to be little doubt that when Rippo was shocking these victims with a stun gun, he was doing so for the purpose of causing them pain and terror and for no other purpose. Rippo was not shocking these women with a stun gun for the purpose of killing them but, rather, it would appear, with a purely "sadistic purpose."

Id. Thus, this Court concluded that:

> [T]here is evidence which would support a finding of "murder by means of … torture" because the intentional infliction of pain is so much an integral part of these murders. Person who taunt and torture their murder victims as

> part of the killing process will not be allowed to escape the murder-by-torture aggravating factor merely because the torturing is not the actual cause of death.

Id., 113 Nev. at 1264, 946 P.2d at 1032. As this Court has already ruled on this issue, it is the State's position that this issue is precluded from reconsideration by the law of the case doctrine. Hogan, 109 Nev. at 958, 860 P.2d at 715 (stating that "[t]he doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings.")

Finally, insomuch as Defendant contends, without any legal authority, that Ms. Hunt's testimony does not support the jury finding that Defendant used a stun gun in perpetrating his crimes, this Court in Phoenix v. State, 114 Nev. 116, 118 954 P.2d 739, 740 (1998), relied on Rippo (I), 113 Nev. at 1263, 946 P.2d at 1032, and noted that in Rippo (I), the testimony of the witness (Diana Hunt) was sufficient to sustain a finding of a ""pattern or continuum" of sadistic violence."

Furthermore, on appeal in Defendant's fifth section, he contends that Claim 13 as well as Claim 14 were improperly found to be aggravators, and thus, these invalid aggravators negated all possible aggravators that Defendant was found guilty for and consequently, resulted in a sentence of death. (Def. Br. At 62-69). However, as noted above as well in this brief's discussion of Claim 14, infra at p. 75-76, both of these aggravators remain valid and accordingly, Defendant's claim of actual innocence under the death penalty is without merit.

9. Claim 15: The Alleged Erroneous Harmless Error Analysis

On appeal, it appears that due to Defendant's failure to raise an argument regarding the denial of Claim 15, Defendant concedes that the District Court's dismissal of the claim was not in error. (See generally Def. Br.). Given that this Court ruled on this exact issue in Defendant's appeal from the denial of his First Petition, its finding is now law of the case. Hall, 91 Nev. at 315, 535 P.2d at 798. After striking three of the six original aggravating circumstances pursuant to this Court's 2004 decision in McConnell v. State (I), 120 Nev. 1043, 102 P.3d 606 (2004), this Court considered the specific issue of whether the jurors

could have found that the aggravating circumstances outweighed the mitigating circumstances "even it they had considered only the three valid aggravating circumstances rather than six." Rippo (II), 122 Nev. 1094, 146 P.3d at 284. This Court reviewed the mitigating circumstances presented during the penalty phase, and concluded:

> The evidence in mitigation was not particularly compelling. We conclude beyond a reasonable doubt that the jurors would have found that the mitigating circumstances did not outweigh the three valid aggravating circumstances and, after consideration of the evidence as a whole, would have rendered a sentence of death.

Id. Thus, since this issue was already decided by this Court, and is barred from reconsideration by the doctrine of law of the case, the District Court's denial of Claim 15 was proper.

10. Claim 16: Alleged Failure to Instruct the Jury that Weighing Must Be Found Beyond a Reasonable Doubt

Despite the fact that this issue was clearly procedurally barred under NRS 34.726 and 34.810(2), Defendant contends that the District Court should not have dismissed Claim 16, because the jury was never instructed that the State must prove that the aggravating circumstances must outweigh the mitigating circumstances beyond a reasonable doubt. (Def. Br. at 60-62). However, as readily acknowledged by Defendant on appeal, this Court has recently considered whether or not a jury must be instructed as such in McConnell v. State (II). 125 Nev. ___, 212 P.3d 307 (2009). In examining this very issue this Court expressly rejected this notion and held that

> ***Nothing in the plain language of these provisions requires a jury to find, or the State to prove, beyond a reasonable doubt that no mitigating circumstances outweighed the aggravating circumstances in order to impose the death penalty.*** Similarly, this court has imposed no such requirement. In DePasquale v. State, we rejected an invitation to overturn previously established case law and require the State to prove beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances. 106 Nev. 843, 852, 803 P.2d 218, 223 (1990)….

McConnell, 125 Nev. at ___, 212 P.3d at 314-15 (emphasis added). Despite this clear ruling on the issue, Defendant steadfastly maintains that this Court is "simply wrong." (Def. Br. at

p. 60). Regardless of Defendant's opinion on this Court's ability to properly interpret the State's laws, the precedent from this jurisdiction is clear: There is no requirement to instruct the jury that the State must prove that the aggravating circumstances must outweigh the mitigating circumstances beyond a reasonable doubt. Accordingly, the District Court's denial of this claim was proper.

11. Claim 17: Alleged Erroneous Jury Instruction Suggesting That Mitigation Had to Be Found Unanimously and an Anti-Sympathy Instruction

On appeal, Defendant argues that it was an error to dismiss his claim regarding the erroneous jury instruction that suggested that mitigation outweighing the aggravators had be found unanimously. In addition to being procedurally barred pursuant to NRS 34.726 and NRS 34.810(2) this issue was raised on appeal and this Court rejected the arguments. Consequently, its findings are now law of the case. Hall, 91 Nev. at 315, 535 P.2d at 798.

On appeal from the denial of his First Petition, this Court raised the issue of the erroneous mitigating circumstance jury instruction in striking three of the six aggravating circumstances. This Court noted that the last sentence of Jury Instruction #7 "included an incorrect application regarding the consideration of mitigating circumstances." Rippo (II), 122 Nev. at 1095, 146 P.3d at 285. Nonetheless, this Court concluded:

> [D]espite the inaccurate wording at the end of the instruction, the instruction clearly and properly stated that each individual juror could find mitigating circumstances without the agreement of any other jurors and further provided that the jurors had to be unanimous in finding that the aggravating circumstances outweighed the mitigating circumstances. It is extremely unlikely that jurors were misled to believe that they could not give effect to a mitigating circumstance without the unanimous agreement of the other jurors. We conclude that the error was harmless beyond a reasonable doubt.

Id. Of particular import is this Court's footnote 18, in which this Court observed:

> ***The latter statement contains a slight mistake that actually favored Rippo.*** Aggravating circumstances need not outweigh mitigating circumstances to impose a death sentence; rather, NRS 200.030(4)(a) provides in part that a defendant is eligible for death if "any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances.

Id. (emphasis added). Therefore, the District Court's ruling in finding this claim procedurally barred pursuant to NRS 34.726, 34.810(2) and the doctrine of law of the case was proper.

Although Defendant readily acknowledges that this ruling has already been decided by this Court, he contends this Court simply made the wrong ruling and seeks yet another bite at the apple. As good cause for raising this issue, is the wholly unsubstantiated accusation that former Nevada Supreme Court Justice and current Deputy District Attorney of the Clark County District Attorney's office, Nancy Becker, ruled against Defendant on this issue, solely in an attempt to curry favor with the District Attorney's office. (Def. Br. At 57-59). Defendant believes, without a shred of evidence to support his theory that Nancy Becker made this ruling in order to secure a job with the District Attorney's office. Although Defendant has no idea as to when Nancy Becker sought out this new position, Defendant has made the illogical leap that 1) it must have been at the time she issued a ruling on this matter and 2) was done in an effort to secure herself a position with the District Attorney's office.

To the extent Defendant alleges that Nancy Becker faced pressure to rule in favor of the State and therefore, should have recused herself from Defendant's case, Defendant's bare claim is utterly devoid of any factual support which would entitle him to relief of his claim. Hargrove, 100 Nev. at 502, 686 P.2d at 225 (a defendant seeking post-conviction relief must raise more than conclusory claims for relief; he must support his claims with specific allegations which "if true would entitle him to relief.")

12. Claim 19: The Alleged Improper Reasonable Doubt Instruction

On appeal, Defendant claims that the reasonable doubt instruction submitted to the jury at trial was unconstitutional because it allegedly lessened the State's burden of proof. (Def. Br. at p. 84). However, the District Court's denial of this claim was proper for several reasons. First, the District Court ruled that this claim was procedurally barred by NRS 34.726. The facts at the heart of this claim originated from events at trial that took place twelve years ago, yet now, Defendant brings forth this issue over a decade later. As

discussed supra at p. 24-28, Defendant has not alleged any good cause or prejudice to re-raise this claim.

Second, Defendant failed to preserve this issue for appeal in failing to make an objection during trial. McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983). Despite this fact, this Court still reviewed this issue on appeal from the denial of his First Petition under the guise of ineffective assistance of appellate counsel for failing to appeal on this issue. Rippo (II), 122 Nev. at 1095, 146 P.3d at 285. Upon considering the matter this Court rejected the argument on the grounds that Defendant failed to show that any plain error was committed or that his substantial rights were affected. Id.

Despite Defendant's admission that this Court has "rejected this claim on numerous occasions," (Def. Br. at 83-84), Defendant still is inclined to raise the matter again. However, Defendant offered no sufficient good cause to explain the unacceptable delay in raising this matter. Accordingly, since there is no good cause or prejudice to overcome these procedural bars, as well as the fact that this Court has already considered the matter, the District Court's dismissal of this claim was proper. In his first petition, Defendant alleged trial counsel was ineffective for failing to object to the reasonable doubt instruction because that jury instruction "imposes an impermissibly high standard for the quantum of doubt required for acquittal." Id., at 52. Stated another way, Defendant argued that the reasonable doubt instruction lessened the State's burden of proof. Thus, the instant claim is successive pursuant to NRS 34.810(1)(b)(2) and should be dismissed absent good cause and actual prejudice.

However, should this Court, in its discretion, consider the merits of Defendant's claim, the precedent set forth by this Court demonstrates that this identical jury instruction has been upheld as constitutional and determined to not minimize the State's burden of proof. See e.g., Leonard v. State, 114 Nev. 1196, 969 P.2d 288 (1999); Noonan v. State, 115 Nev. 184, 980 P.2d 637 (1999); Chambers v. State, 113 Nev. 974, 944 P.2d 805 (1997); Evans v. State, 112 Nev. 1172, 926 P.2d 265 (1996); Quillen v. State, 112 Nev. 1369, 929 P.2d 893 (1996); Bollinger v. State, 111 Nev. 1110, 1115, 901 P.2d 671 (1995); Lord v.

State, 107 Nev. 28, 806 P.2d 548 (1991), (citing Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985)); Beets v. State, 107 Nev. 957, 963, 821 P.2d 1044 (1991). This is in all likelihood due to the fact that in the instant case, the jury instruction relating to reasonable doubt mirrors the exact language of NRS 175.211(1), which states:

> A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

Id. Since there is no reasonable probability that the jury believed the instruction allowed the conviction of Defendant based on a lesser quantum of evidence than is required by the Constitution, the District Court's denial was proper.

13. Claim 21: Alleged Cumulative Error

On appeal, Defendant claims that were enough errors committed by the District Court and his prior proceedings to warrant a reversal of his convictions and death sentence. (Def. Br. at p. 92-93). This Court has held that under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994), (citing Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986)); see also Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The relevant factors to consider in determining "whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" Big Pond, 101 Nev. at 3, 692 P.2d at 1289. The doctrine of cumulative error "requires that numerous errors be committed, not merely alleged." People v. Rivers, 727 P.2d 394, 401 (Colo. App. 1986); see also People v. Jones, 665 P.2d 127, 131 (Colo. App. 1982). Evidence against the defendant must therefore be "substantial enough to convict him in an otherwise fair trial" and it must be said "without reservation that the verdict would have been the same in the absence of the error." Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988).

Here, the record is clear that no error were committed by the District Court in denying his Second Petition and thus, there is and can be no cumulative error worthy of reversal. LaPena v. State, 92 Nev. 1, 14, 544 P.2d 1187, 1195 (1976) ("nothing plus nothing plus nothing is nothing."). Defendant's claims of error are meritless. His Second Petition was properly procedurally barred pursuant to NRS 34.726, NRS 34.810(2), NRS 34.810(1)(B) and the doctrine of law of the case. Defendant failed to demonstrate any good cause of prejudice sufficient to overcome a near decade-long delay. Furthermore, given the extension nature of these post-conviction proceedings, it is not surprising that this Court has already rejected Defendant's claim of cumulative error. see Rippo (I), 113 Nev. at 1255, 946 P.2d at 1027, Thus, this claim is barred from further review by the law of the case doctrine. Hall, 91 Nev. at 314, 535 P.2d at 797. Accordingly, Defendant's 21st Claim was properly dismissed.

III
THE DISTRICT COURT PROPERLY DISMISSED CLAIMS 2, 4, 6, 8, 10, 11, 14, 18 AND 20 AS PROCEDURALLY BARRED UNDER NRS 34.810(1)(B) AS SUCCESSIVE BECAUSE THEY SHOULD HAVE BEEN RAISED ON DIRECT APPEAL OR IN DEFENDANT'S FIRST PETITION.

1. Claim 2: Alleged Brady Violations and Prosecutorial Misconduct

Please see the State's argument on this issue at supra p. 32-43.

2. Claim 4: Alleged Ineffective Assistance During Voir Dire

Defendant claims that the District Court erred in dismissing his ineffective assistance of counsel claims specifically as it related to the juror voir dire process. (Def. Br. at 86-89). Defendant argues that his trial counsel was ineffective during the voir dire process. (Id. at 86). It appears that since it has taken over ten years to finally bring this claim, Defendant also implies his first post conviction counsel was ineffective for failing to raise this ineffective assistance of trial counsel claim. Claim 4 of Defendant's Second Petition was properly dismissed by the District Court for the following reasons.

First, the District Court correctly dismissed this petition in its entirety pursuant NRS 34.726 as being well outside the one-year time bar. (48 JA 11649). This claim should have been raised within one year of the issuance of remittitur on direct appeal, but was not

brought to the District Court's attention until over a decade had elapsed. Second, this particular claim was also dismissed on the grounds that it was procedurally barred pursuant to NRS 34.810(1)(B). (Id. at 11650). Defendant has known about all of these trial-related jury voir dire claims since the beginning of trial well over a decade ago, yet failed to raise these matters either in his direct appeal or in his First Petition. Rather, Defendant waited until 2008 to raise these issues in his Second Petition. To date, Defendant has still failed to provide any good cause or prejudice to excuse why it took him over a decade to bring claims that originated at the beginning of his trial. Thus, District Court's determination that this claim is procedurally barred was proper. (48 JA 11649-11650).

Second, to the extent Defendant contends that the "good cause" for his delay was the ineffectiveness of his first post-conviction counsel, in failing to raise this claim earlier; this argument is wholly insufficient as well. As discussed supra at p. 24-28, Defendant must show that his delay was caused by "an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway, 119 Nev. 248, 71 P.3d at 506 (2003). Moreover, the delay in filing of the petition ***must not*** be the fault of the petitioner. NRS 34.726(1)(a). Additionally, a claim of ineffective assistance of counsel ***that is in itself procedurally barred cannot constitute good cause for excusing the procedural bars for itself or any other claim.*** Riker, 121 Nev. at 225, 112 P.3d at 1070 (emphasis added).

Here, Defendant failed to prove that his "good cause" argument of ineffective assistance of post-conviction counsel was timely, thus this lone good cause argument is procedurally barred, and consequently, so is his original ineffective assistance of trial counsel claim regarding the voir dire process. As discussed, if Defendant was displeased with his first post-conviction counsel, specifically his failure to raise this voir dire issue in the First Petition, Defendant could have immediately filed another post-conviction petition citing his first post-conviction counsel's ineffectiveness. The matter required no further investigation as all of the alleged failures of trial counsel occurred at the outset of his trial, ***which began all the back in January 1996***. However, Defendant did not seek to return to

District Court in a timely manner with a second petition. Instead, Defendant ***waited another three years*** before filing his Second Petition on January 15, 2008. This three-year delay demonstrates that Defendant's good cause argument of ineffective assistance of post conviction counsel was wholly untimely, and thus is itself procedurally barred. Riker, 121 Nev. at 225, 112 P.3d at 1070; Edwards, 529 U.S. at 453. Further compounding Defendant's inexcusable delay, was Defendant's decision to file a Federal Petition for Writ of Habeas Corpus, rather than returning to District Court on April 18, 2007 – ***nearly one year before*** he filed the Second Petition in District Court. As discussed, seeking a federal remedy and thus failing to seek state habeas relief within the one-year time bar also ***does not amount*** to good cause sufficient to overcome NRS 34.726(1)(a). Colley, 105 Nev. at 235, 773 P.2d at 1229. Accordingly, in light of this three-year delay, Defendant's good cause argument of ineffective assistance of post-conviction counsel is itself untimely and thus cannot serve to excuse Defendant's decade long delay in bringing Claim 4.

To the extent, Defendant contends that the clock for the procedural bar began, not at the District Court's denial of his First Petition, but rather at the date this Court issued remittitur affirming the District Court's denial of the First Petition, Defendant and his second petition counsel ***still waited nearly a year after remittitur*** before bringing this claim. To date, there is not a single published case that states second post conviction counsel are entitled to an additional one-year window in order to bring a ***second*** post-conviction writ of habeas corpus. Defendant had one year from the issuance of remittitur ***from his direct appeal*** to raise all of his post-conviction issues. He failed to do so in waiting over ten years to bring this claim. He also failed to provide any sufficient good cause as his lone argument of ineffective assistance of post-conviction counsel was also wholly untimely. In light of this factual record, the District Court properly determined that this claim was procedurally barred.

Assuming *arguendo*, that this Court found this claim to be timely, Defendant still failed to bring a successful ineffective assistance of trial counsel claim. As discussed, supra at p. 24-28, in order to assert a claim for ineffective assistance of counsel a defendant must

prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S.Ct. at 2063-64. Under this test, the Defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694, 104 S.Ct. at 2065, 2068; Lyons, 100 Nev. at 432, 683 P.2d at 505.

Every effort by this Court must be made to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. Because as this Court has recognized, "[e]ven the best criminal attorneys would not defend a particular client in the same way." Id. Accordingly, "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Id. Accordingly counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

Here, Defendant cannot meet either prong of Strickland. Regarding the first prong of Strickland, Defendant fails because the crux of this claim is Defendant's use of hindsight to second guess the tactical choices made by trial counsel. (Def. Br. at 86-89). On appeal, Defendant questions why certain questions were not asked, why trial counsel chose to not raise an objection at certain points in the voir dire proceedings or why trial counsel decided to keep certain prospective jurors rather than striking them. Just because Defendant's latest counsel would have chosen a different tactical strategy during these proceedings, does not mean his trial counsel's performance was objectively unreasonable, because "[e]ven the best criminal attorneys would not defend a particular client in the same way." Id. Claim 4 of Defendant's Second Petition simply assails tactical decisions made by his trial counsel, and these decisions are unequivocally not a proper basis to deem counsel as ineffective under

Strickland. Doleman, 112 Nev. at 846, 921 P.2d at 280. Thus, Defendant failed to satisfy the first prong of Strickland.

Defendant also cannot show prejudice under Strickland. Despite being specifically addressed in the State's Opposition to the Second Petition, (Opp. to 2nd Pet. at p. 59-60), on appeal Defendant still failed prove that not only were any jurors actually biased toward him but also that but for these alleged errors of trial counsel that there was a reasonable probability that the outcome would have been different. Here, the jury was presented with overwhelming evidence that Defendant bound, gagged, electrocuted with a stun gun and strangled his two female victims. The absence of these alleged errors, would not have altered the verdict that Defendant received. Accordingly, even after a review on the merits, Claim 4 fails to meet the either prong of Strickland.

3. Claim 6: Alleged Failure to Include Aider & Abettor Jury Instructions

Defendant claims that it was erroneous for the District Court to dismiss Claim 6, specifically as it related to the failure to include a jury instruction requiring the jury to "find that Mr. Rippo possessed the specific intent to commit first-degree murder under an aiding and abetting theory." (Def. Br. at p. 83). The District Court's ruling was proper for several reasons.

First, Claim 6 of Defendant's Second Petition was procedurally barred under NRS 34.726 as well as under 34.810(1)(b). Essentially, Defendant's lone good cause argument, was the oft repeated contention throughout this appeal that his 1) trial counsel, 2) appellate counsel and 3) first post-conviction counsel were ineffective for not raising the claim earlier. (Def. Br. at p. 83: 1-2). However, as discussed supra at p. 24-28, this argument fails. Since this issue has been aware to Defendant since the conclusion of trial, he has had over ten years to raise this issue. Defendant simply has refused to do so whether it be on direct appeal or in his First Petition. Even if this Court were to accept this claim of Defendant's unhappiness with his trial, appellate and first post-conviction's counsel's failure to raise this claim whether at trial, on direct appeal or in the First Petition, Defendant could have immediately filed another post-conviction petition citing his first post-conviction counsel's

ineffectiveness as well as all other prior counsel after the District Court's findings as to the First Petition were issued on December 1, 2004. But Defendant, as he has with every other claim where he cites as good cause the claim of ineffective assistance of counsel, did not follow that course and instead ***waited another three years*** until January 2008 to finally raise this issue. Defendant even took the time to seek federal habeas relief in 2007, rather than file a second state petition. This three-year delay demonstrates that Defendant's good cause argument of ineffective assistance of post conviction counsel was wholly untimely, and thus is itself procedurally barred. Riker, 121 Nev. at 225, 112 P.3d at 1070; Edwards, 529 U.S. at 453.

Even if this Court were to find there was good cause to review this matter on the merits, Claim 6 is without merit. Here, Defendant was neither charged nor convicted under the theory of accomplice liability. Defendant was indicted with Counts 1 and 2 – Murder (Felony - NRS 200.010, NRS 200.030), Count 3 – Robbery (Felony - NRS 200.380), and Count 4 – Unauthorized Signing of Credit Card Transaction Document (Felony - NRS 205.750). Accordingly, Jury Instruction #4 informed the jury:

> Count I - MURDER
>
> Defendant MICHAEL DAMON RIPPO did, on or between February 18, 1992, and February 20, 1992, then and there willfully, feloniously, without authority of law, with malice aforethought and premeditation and/or during the course of committing Robbery and/or Kidnapping and/or Burglary, kill LAURI M. JACOBSON, a human being, by strangulation, *Defendant being aided or abetted by DIANA LEE HUNT in the perpetration of said crime* by Defendant and/or DIANA LEE HUNT entering 3890 South Cambridge, Apt. 317, Las Vegas, Clark County, Nevada, by Defendant deciding to rob LAURI M. JACOBSON and/or DENISE M. LIZZI, by Defendant privately discussing how the crime was to be committed with DIANA LEE HUNT, by Defendant surreptitiously arranging to have another person make a diversionary telephone call to LAURI M. JACOBSON so that she might more easily be overpowered, by DIANA LEE HUNT striking LAURI M. JACOBSON on the head with a bottle, by Defendant using a stun gun to subdue DENISE M. LIZZI, by Defendant binding the hands and feet and tying gags around the mouths of both female victims, by Defendant demanding to know the location of drugs, money, and other valuables; Defendant being assisted by DIANA LEE HUNT in forcefully removing property from the person or presence of the two victims, Defendant and/or DIANA LEE HUNT killing LAURI M. JACOBSON and/or DENISE M. LIZZI, Defendant wiping off surfaces touched inside the apartment and Defendant and DIANA LEE HUNT then fleeing the scene of the crime with a stolen 1988 Nissan automobile, a stole Citibank Gold Visa Credit Card, and other stolen property.

Count II - MURDER

> Defendant MICHAEL DAMON RIPPO did, on or between February 18, 1992, and February 20, 1992, then and there willfully, feloniously, without authority of law, with malice aforethought and premeditation and/or during the course of committing Robbery and/or Kidnapping and/or Burglary, kill DENISE M. LIZZI, a human being, by strangulation, *Defendant being aided or abetted by DIANA LEE HUNT in the perpetration of said crime* by Defendant and/or DIANA LEE HUNT entering 3890 South Cambridge, Apt. 317, Las Vegas, Clark County, Nevada, by Defendant deciding to rob LAURI M. JACOBSON and/or DENISE M. LIZZI, by Defendant privately discussing how the crime was to be committed with DIANA LEE HUNT, by Defendant surreptitiously arranging to have another person make a diversionary telephone call to LAURI M. JACOBSON so that she might more easily be overpowered, by DIANA LEE HUNT striking LAURI M. JACOBSON on the head with a bottle, by Defendant using a stun gun to subdue DENISE M. LIZZI, by Defendant binding the hands and feet and tying gags around the mouths of both female victims, by Defendant demanding to know the location of drugs, money, and other valuables; Defendant being assisted by DIANA LEE HUNT in forcefully removing property from the person or presence of the two victims, Defendant and/or DIANA LEE HUNT killing LAURI M. JACOBSON and/or DENISE M. LIZZI, Defendant wiping off surfaces touched inside the apartment and Defendant and DIANA LEE HUNT then fleeing the scene of the crime with a stolen 1988 Nissan automobile, a stole Citibank Gold Visa Credit Card, and other stolen property.

Petitioner's Ex. #219 (Jury Instruction #4) (emphasis added). After a fourteen day jury trial, the jury found Defendant guilty of all four counts – two counts of First Degree Murder, one counts each of Robbery and Unauthorized Use of a Credit Card. (AA, Volume II, page 000412).

Although Defendant alleges that there was question as to whether Diana Hunt killed the victims, she was not tried as a co-conspirator (or an accomplice) to the murders. At the time of trial, Hunt pled guilty to robbery. This fact was made known to the jury. Accordingly, there is absolutely no evidence that Defendant was prejudiced in anyway by the jury instructions regarding accomplice liability. Accordingly, the District Court's ruling finding Claim 6 procedurally bar was proper.

4. Claim 8: The Trial Court Allegedly Failed to Grant Discovery

Defendant mistakenly claims that it was a reversible error for the District Court to deny Claim 8 which alleges he was wrongfully denied the opportunity to conduct discovery during the penalty phase to support his defense. (Def. Br. 74-76). The original genesis for this claim is his belief that the trial court abused its discretion by denying Defendant his

discovery request for a copy of his prison records, failing to provide Defendant with Diana Hunt's medical, psychiatric and prison records, and failing to provide Defendant with copies of alleged FBI wiretaps between Defendant and other individuals including Thomas Sims.

This claim which originated over a decade ago is unquestionably untimely. Thus, the only way for this claim to avoid being procedurally barred by NRS 34.726 and 34.810(1)(B) is by establishing good cause and prejudice to overcome this bars. The District Court properly dismissed this claim as procedurally barred for the following reasons.

There is absolutely no sufficient good cause to excuse this decade long delay. Defendant failed to raise any claim previously arguing that the trial court abused its discretion in making this ruling and thus the argument is long since waived and procedurally barred. However, although it is never explicitly stated it appears that Defendant's good cause for not raising a claim against the trial court is his contention that his trial counsel was ineffective for failing to fully litigate this matter with the trial court. (Def. Br. 74-76). To excuse this delay, as good cause for his failure to raise an ineffective assistance of trial counsel claim, Defendant apparently is claiming that his post-conviction counsel was ineffective for failing to raise the issue of ineffective assistance of trial counsel in his First Petition. (Id.).

The flaw in claiming that his trial counsel is ineffective at this juncture is the fact that Defendant already raised an ineffective assistance of trial counsel claim in his First Petition and this Court concluded that his trial counsel provide effective assistance. To the extent, that this specific aspect of alleged ineffective assistance of trial counsel was not raised in his first petition, it is now waived pursuant to NRS 34.810(1)(B). To the extent that Defendant claims that his first post-conviction's counsel's failure to raise this specific ineffective assistance of trial counsel argument was in itself tantamount to ineffective assistance, as discussed supra at p. 24-28, there is no good cause to excuse this delay. The record is clear that over the last decade, Defendant has had opportunity after opportunity to bring either the original claim regarding the trial court's alleged abuse of discretion or his various counsel's ineffectiveness in a direct appeal or a post-conviction petition, yet he chose not to do so.

Instead, Defendant ignored these issues and in the interim, filed a direct appeal, a First Petition, a Federal Petition before finally improperly raising the matter in his Second Petition. There is simply no good cause or prejudice for this decade long delay.

Accordingly, since all of these issues were capable of being raised on direct appeal or in his prior post-conviction petition writ, these claims are procedurally barred pursuant to NRS 34.726 and 34.810(1)(B). Thus, the District Court ruling barring this claim on these grounds was sound exercise of discretion. Accordingly, Claim 8 was properly dismissed.

5. Claim 10: Alleged Misconduct During Jury Selection

The District Court's denial of Claim 10, which alleged improper comments during voir dire, as being procedurally barred pursuant to NRS 34.726 as well as NRS 34.810(1)(B) was proper for the following reasons. First, this claim is clearly untimely. Defendant has been aware of this issues since the beginning of trial and yet failed to raise them until over decade later. Second, as discussed, supra at p. 24-28, there is simply no sufficient good cause offered by Defendant to excuse this monumental delay. Defendant has had multiple opportunities to raise these matters, but instead elected to sit back and wait while also pursuing federal habeas remedies rather than returning as promptly as he could to District Court with his Second Petition. Accordingly, this claim must be procedurally barred.

Third, even if there was sufficient good cause and prejudice, Defendant failed to preserve this matter for appellate review, given his failure to object to these comments during trial. Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992). Moreover, the only basis upon which to review this conduct would be for plain error and the record demonstrates that none was committed. McGuire v. State, 100 Nev. 153, 677 P.2d 1060 (1984) ("Plain error is error which either (1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings.") In this case, Defendant has not established that any of the jurors were actually affected by the comments of the district court. Thus, Defendant has not established error or that such error resulted in prejudice from the district court's comments. Accordingly, the District Court dismissal of this claim was proper.

6. Claim 11: The Alleged Failure to Issue a Cautionary Jury Instruction

The District Court properly dismissed Defendant's 11th Claim as procedurally barred under NRS 34.726 and 34.810(1)(B). Since Defendant utterly failed to raise this claim in a timely manner, the issue is waived unless Defendant provided sufficient good cause and prejudice to over come the procedural bars. However, Defendant only offered his insufficient claim that his post-conviction counsel was ineffective for failing to raise the matter. However, as discussed supra 24-28, this is a wholly insufficient good cause argument, thus illustrating the propriety of the District Court's ruling on the issue.

Here, if Defendant was truly concerned over first post-conviction counsel's failure to raise this claim could have immediately filed a second petition raising this issue immediately after the District Court denied his petition in 2004. However, Defendant did not follow that course. He waited three additional years before finally filing a second petition in 2008 and prior to that Defendant sought federal habeas relief in 2007. Thus, the record demonstrates this claim is clearly untimely, and the District Court in denying this Second Petition properly determined that this claim was procedurally barred under NRS 34.726 as well as NRS 34.810(1)(b)

Nonetheless, should this Court find that Defendant demonstrated good cause sufficient to overcome these procedural bars, Defendant's claim is still without merit. . In settling jury instructions, "[t]he district court has broad discretion and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 121 P.3d 582 (2005). Cautionary instructions dealing with the credibility of a witness is required only where the "testimony is uncorroborated and favored when the testimony is corroborated in critical respects." Buckley v. State, 95 Nev. 602, 604, 600 P.2d 227, 228 (1979), (citing Crowe v. State, 84 Nev. 358, 367, 441 P.2d 90, 95-6 (1968) (finding that the district court did not err in refusing to give the cautionary instruction relating to witnesses credibility where the testimony was substantially corroborated by other evidence), see also Browning v. State, 120 Nev. 347, 367, 91 P.3d 39, 53 (2004) (finding that the district court did not err in refusing to give the cautionary instruction on the witnesses'

credibility where there was substantial evidence corroborating the testimony and a general jury instruction on the weight and credibility of a witnesses testimony and another on the credibility of a witness with felony conviction); Cf. James v. State, 105 Nev. 873, 875, 784 P.2d 965, 967 (1989) (holding district court erred in refusing to give cautionary instruction regarding witnesses credibility despite other corroborating evidence. However, the court found the error was harmless in light of the overwhelming evidence of guilt.)

Here, the jury was informed of the favorable treatment Hunt received in exchange for her testimony and that her plea bargain in the instant case was the result of her testimony. The jury was also well-aware of Hunt's involvement in the crimes. Moreover, Hunt's testimony was substantially corroborated by the other evidence presented at trial. Finally, the jury was given a general jury instruction on the weight and credibility of a witness. Thus, the district court did not error in refusing to give the cautionary instruction.

However, even if this Court finds that the district court erred in failing to give a limiting or cautionary instruction on Hunt's credibility, the error was harmless in light of the overwhelming evidence against Defendant. Judicial error with respect to jury instructions is subject to harmless error analysis and a conviction will not be reversed if the error was harmless beyond a reasonable doubt. Id., 121 Nev. at 744, 121 P.3d at 586. An error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." Wegner v. State, 116 Nev. 1149, 1155, 14 P.3d 25, 30 (2000), overruled on other grounds by Rosas v. State, 147 P.3d 1101 (2006). This Court has held on numerous occasions that errors may be harmless when the "evidence of guilt is overwhelming." See, e.g., McIntosh v. State, 113 Nev. 224, 227, 932 P.2d 1072, 1074 (1997); Kelly v. State, 108 Nev. 545, 552, 837 P.2d 416, 420 (1992). Also, erroneous jury instructions are reviewable according to a harmless error analysis. Wegner, 116 Nev. at 1155, 14 P.3d at 30, (citing Neder v. United States, 527 U.S. 1, 13-15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)); Collman v. State, 116 Nev. 687, 720, 7 P.3d 426, 447 (2000).

> Generally, the defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be. Further, jury instructions should be clear and unambiguous.

> The district court may, however, refuse a jury instruction on the defendant's theory of the case that is substantially covered by other instructions. In addition, a district court must not instruct a jury on theories that misstate the applicable law.

Vallery v. State, 118 Nev. 357, 46 P.3d 66, 76-77 (2002).

In the present case, this Court has already determined that the evidence presented at trial overwhelmingly proved Defendant's guilt. Rippo (I), 113 Nev. at 1254, 946 P.2d at 1026. Thus, any error caused by a defective jury instruction was harmless.

7. Claim 14: The Alleged Improper Use of a Prior Conviction as an Aggravator

Defendant contends, it was an error for the District Court to dismiss Claim 14 regarding Defendant's claim that the use of Defendant's prior felony conviction as an aggravating circumstance was improper because the guilty plea was not voluntarily, intelligently and knowingly given and Defendant was a minor when he committed the crime. However, the District Court's ruling was proper for a reason – it is procedurally barred.

Here, Defendant failed to raise this claim in either his First Petition or on direct appeal. Accordingly to raise this issue over a decade later renders that matter time barred. NRS 34.726. As clearly demonstrated by Defendant's Motion to Strike Aggravating Circumstances Numbered 1 and 2 for Specificity as to Aggravating Circumstance Number 4, filed on August 20, 1993, Defendant has long known of this issue, and could have brought this claim earlier, yet he failed to do so.

Once again the only good cause offered by Defendant is the oft repeated claim that his prior counsel was ineffective for not raising it sooner. However, as discussed supra at p. 24-28, this claim is wholly insufficient to excuse this near decade long delay. Accordingly, this issue was properly dismissed as time barred.

Additionally, to the extent that Defendant alleges the use of his prior felony conviction violates the mandates of Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183 (2005), Defendant's reliance on Roper is misplaced. Roper 543 U.S. at 578, 125 S.Ct. at 1200, held, "The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 *when their crimes were committed*." (Emphasis added). The defendant in Roper was 17 years of age when he committed murder for which

he was sentenced to death. Id., 543 U.S. at 556, 125 S.Ct. at 1187. Unlike Roper, Defendant was an adult when he committed the present capital offense. Thus, Roper is inapposite to the instant case.

Furthermore, on appeal in Defendant's fifth section, he contends that Claim 14 as well as Claim 13 were improperly found to be aggravators, and thus, these invalid aggravators negated all possible aggravators that Defendant was found guilty for and consequently, resulted in a sentence of death. (Def. Br. At 62-69). However, as noted above as well in this brief's discussion of Claim 14, supra at p. 56-58, both of these aggravators remain valid and accordingly, Defendant's claim of actual innocence under the death penalty is without merit.

8. Claim 18: Ineffective Assistance of Trial Counsel Regarding the Admission of Gruesome Photos

Defendant claims that the District Court erred in dismissing Claim 18 of his Second Petition, specifically his trial counsel's failure to renew an objection over the admission of gruesome photographs of the victims, on the ground that they were more prejudicial than probative. NRS 48.025, NRS 48.035(1); (Def. Br. at 89-91). Defendant argues that his trial counsel was ineffective for failing to object a second time to the admission of the evidence at trial. (Id. at 89). It appears that in light of the ten year delay in bringing this claim, Defendant employs his stock good cause argument that his first post conviction counsel was ineffective for failing to raise this ineffective assistance of trial counsel claim. Claim 18 of Defendant's Second Petition was properly dismissed by the District Court for the following reasons.

First, the District Court correctly dismissed this petition in its entirety pursuant NRS 34.726 as being well outside the one-year time bar. (48 JA 11649). This claim should have been raised within one year of the issuance of remittitur on direct appeal, but was not brought to the District Court's attention until after a decade had elapsed. Second, this particular claim was also dismissed on the grounds that it was procedurally barred pursuant to NRS 34.810(1)(B). (Id. at p. 2). Defendant has known about the admission of these photographs since the start of trial well over a decade ago, yet failed to raise these matters either in his direct appeal or in his First Petition. Instead, Defendant waited until 2008 to

raise these issues in his Second Petition. To date, Defendant has still failed to provide any sufficient good cause or prejudice to excuse why it took him over a decade to bring claims that originated at the trial. Thus, District Court's determination that this claim is procedurally barred was proper. (48 JA 11649-11650).

Second, to the extent Defendant contends that the "good cause" for his delay was the ineffectiveness of his first post-conviction counsel, in failing to raise this claim earlier, (Def. Br. at p. 89: 13-17), this argument is wholly insufficient as well. Given the fact that Defendant has known of this issue since trial, his good cause argument of ineffective assistance of post conviction counsel fails because it is wholly untimely. As discussed, supra at p. 24-28, Defendant had an opportunity after the dismissal of his First Petition to raise this trial based claim, as he did with virtually every other trial based claim raised on appeal, but instead sat back for another three years before filing the Second Petition. Moreover, Defendant elected to seek Federal habeas relief one year beyond filing his second petition. There simply no excuse for this delay and the District Court properly recognized this fact and concluded this claim was untimely and should have been raised earlier.

Assuming *arguendo*, that this Court found this claim to be timely, Defendant still failed to bring a successful ineffective assistance of trial counsel claim. As discussed, supra at p. 24-28, in order to assert a claim for ineffective assistance of counsel a defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S.Ct. at 2063-64. Under this test, the Defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694, 104 S.Ct. at 2065, 2068; Lyons, 100 Nev. at 432, 683 P.2d at 505.

Here, Defendant cannot meet either prong of Strickland. With respect to the first prong, trial counsel's conduct was objectively reasonable. Initially, trial counsel did object to the admission of these photographs, but was overruled. On appeal, Defendant now seeks to have his action deemed unreasonable because he did not continue to object. (Def. Br. at p.

89). However, trial counsel cannot be deemed ineffective for failing to make futile motions or objections. Ennis v. State, 122 Nev. 694 (2006). Here, the instances in which Defendant desired a repeated objection from his trial counsel would have been futile, because 1) he had already been overruled on the matter and 2) the evidence was more probative than prejudicial. Specifically, with respect to the probative value of gruesome photographs, this Court has stated that their admissibility, "'lies within the sound discretion of the district court and, absent an abuse of discretion, the decision will not be overturned.'" Flores v. State, 120 P.3d 1170, 1180 (2005) (quoting Turpen v. State, 94 Nev. 576, 577, 583 P.2d 1083, 1084 (1978)). Moreover, this Court has held repeatedly that such photographic evidence is probative if it is "utilized to show the cause of death and when it reflects the severity of wounds and the manner of their infliction." Browne v. State, 113 Nev. 314, 933 P.2d 192(1997). Here, the three particular photos Defendant takes issue with Ex. 31, 53 and 54 were autopsy photos used during the testimony of Dr. Giles Sheldon Green to discuss and explain the nature, severity and causes of each victim's deaths as well as determining the degree of decomposition. (TT 2/27/96 p. 11, 15, 77-81, 105-11). These pictures were vital in ascertaining the truth about how the victims died and thus were properly admitted. Any further attempts by trial counsel to exclude them would have been futile.

Second, Defendant also cannot show prejudice under Strickland. Even if this Court were to assume the photos to be more prejudicial than probative, the absence of these photos in evidence would not have altered the jury's verdict. Here, the jury was presented with overwhelming evidence that Defendant bound, gagged, electrocuted with a stun gun and strangled his two female victims. Even without these pictures, the jury's verdict would have remained the same. Accordingly, even after a review on the merits, Claim 18 fails to meet the either prong of Strickland.

9. Claim 20: Alleged Unfair Opportunity to Litigate Post-Conviction Issues

Defendant's 20th Claim contends that there are a variety of reasons why he was denied a fair opportunity to litigate his post-conviction issues during the evidentiary hearings

held on August 20, 2004, and September 10, 2004. However, the District Court properly determined that this claim procedurally barred pursuant to NRS 34.726 and NRS 34.810(2).

Simply put, Defendant should have presented these claims in his 2005 direct appeal from the district court order denying his First Petition but he did not. Instead, Defendant waited another four years before finally raising them in his Second Petition. As discussed supra at p. 24-28, there has been no sufficient good cause to excuse this delay. Accordingly, the claim is waived per NRS 34.810(1)(b) and Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994).

IV
THE DISTRICT COURT PROPERLY DISMISSED CLAIM 22 – A CHALLENGE TO NEVADA'S LETHAL INJECTION PROTOCOL – AS IT WAS NOT COGNIZABLE IN A POST-CONVICTION PETITION

Defendant contends that the District Court erred in denying his challenge to the State's lethal injection protocol. (Def. App. at p. 91-92). However, the District Court decision was proper for the following two reasons.

1. The District Court Was Required to Dismiss this Claim Because a Writ of Habeas Corpus Cannot Be Used to Challenge Nevada's Lethal Injection Procedure.

This claim is a clear attack on the manner in which the lethal injection procedure is administered by the Nevada State prison system. This claim has nothing to do with the validity of his death sentence, but rather it is a challenge to the manner in which his death sentence will be carried out.

However, a post conviction writ of habeas corpus cannot be used to challenge the constitutionality of Nevada's lethal injection procedure. The District Court properly recognized this fact when it issued its Findings of Facts and Conclusions of Law. The District Court properly concluded that this challenge to the lethal injection procedure was not cognizable in a post-conviction petition. (48 JA 11650: 9-10)

Last year, this Court took up this precise challenge via a post conviction writ of habeas corpus in McConnell v. State II, and reaffirmed the rationale and prudence of this District Court's decision. 212 P.3d 307, 310-11 (2009). In McConnell II, this Court

recognized that this type of post conviction writ can only address two types of claims: "(1) '[r]equests [for] relief from a judgment of conviction or sentence in a criminal case' and (2) '[c]hallenges [to] the computation of time that the petitioner has served pursuant to a judgment of conviction.'" Id. at 310. This Court determined that since this challenge had nothing to do with the computation of time, the only possible way that a post conviction writ of habeas corpus could be an appropriate vehicle to challenge the State's lethal injection protocol, is if this challenge could provide "relief for a judgment of conviction or sentence in a criminal case." Id.

This Court expressly held that such a challenge could not. Id. at 311. It held that a challenge to the "validity of the death sentence" protocol "falls ***outside the scope*** of a post-conviction petition for writ of habeas corpus." Id. (emphasis added) (accord Ex Parte Alba, 256 S.W.3d 682, 685-86 (Tex. Crim. App. 2008). Specifically, because "a challenge to the lethal injection protocol in Nevada ***does not implicate the validity of a death sentence because it does not challenge the death sentence itself but seeks to invalidate a particular procedure for carrying out the sentence."*** McConnell II, 212 P.3d at 311. The Supreme Court further elaborated on the futility of granting such relief through a post conviction writ when it stated:

> Because the lethal injection protocol is not mandated by statute, granting relief on a claim that a specific protocol is unconstitutional ***would not implicate the legal validity of the death sentence itself.*** Rather, while granting relief on such claim would preclude the Director [of the Department of Corrections] from using the particular protocol found to be unconstitutional, ***the Director would be free to use some other protocol to carry out the death sentence.***

Id. Accordingly, this Court expressly ruled that such a challenge falls out of the scope of the type of relief that can be provided by a post conviction writ of habeas corpus. Id. Thus, Defendant's arguments on appeal are without merit and the law is clear that he cannot challenge Nevada's lethal injection protocol through such a post conviction writ. Consequently, the District Court's ruling was proper.

2. Defendant's Claim is Also Procedurally Barred.

Even if a post-conviction writ of habeas corpus could provide relief of this ground, the claim would still be procedurally barred pursuant to the one year time bar of NRS 34.726, subject to laches under NRS 34.800 as well as waived under NRS 34.810. Furthermore, as discussed repeatedly throughout this response brief, Defendant failed to offer any sufficient good cause for this decade long delay in bringing up this challenge to Nevada's lethal injection procedure. Defendant had repeated opportunities to raise this issue, but choose not to do so. Accordingly, the District Court's ruling was proper.

CONCLUSION

Based on the foregoing arguments the State respectfully requests the Defendant's Appeal be DENIED.

Dated this 22nd day of March, 2010.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY */s/ Steven S. Owens*

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 22nd day of March, 2010.

Respectfully submitted

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY */s/ Steven S. Owens*
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 SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 22, 2010. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General

DAVID ANTHONY
Assistant Federal Public Defender

STEVEN S. OWENS
Chief Deputy District Attorney

/s/ eileen davis
Employee, Clark County
District Attorney's Office

SSO/Christopher Hamner/ed