EXHIBIT 107

EXHIBIT 107

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONEALE L. FEAZELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37789

FILED

NOV 14 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART AND VACATING IN PART

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus in a death penalty case.

The district court convicted appellant Doneale Feazell of first-degree murder and attempted robbery, both with the use of a deadly weapon. Feazell received a death sentence for the murder. This court affirmed Feazell's conviction and sentence.[1] Feazell subsequently filed a timely first petition for habeas relief in the district court. The district court appointed counsel to represent Feazell and denied the petition following an evidentiary hearing. This appeal followed.

Feazell claims that his trial and appellate counsel were ineffective for failing to challenge the following adverse rulings by the district court: refusing to provide Feazell with fees in excess of $300.00 for

[1]Feazell v. State, 111 Nev. 1446, 906 P.2d 727 (1995).

SUPREME COURT
OF
NEVADA

(O) 1947A

02-19595

an investigator; refusing Feazell's request for an eyewitness identification expert; and limiting objections to the defense attorney conducting the examination. Feazell also claims that his counsel should have challenged the admission of "victim impact" testimony at the guilt phase of the trial and the district court's denial of Feazell's pretrial petition for a writ of habeas corpus in which he complained of the introduction of allegedly improper evidence at his grand jury proceeding.

A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review.[2] To establish ineffective assistance of counsel, a claimant must show both that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense.[3] To establish prejudice, the claimant must show that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different.[4]

Feazell's claims of ineffective assistance of counsel lack merit. First, Feazell failed to include the relevant transcripts of the district court's adverse rulings making assessment of its exercise of discretion

---

[2]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[3]Strickland v. Washington, 466 U.S. 668,687 (1984).

[4]Id. at 694.

difficult. Further, Feazell has failed to establish that additional funds for an investigator would have altered the outcome of his trial.[5] He has also failed to demonstrate that he was entitled to an eyewitness identification expert.[6] Also, we perceive no error in the district court's limiting objections to the defense attorney conducting the examination. The "control of the conduct of counsel in trial rests largely in the discretion of the trial judge and will not be disturbed absent an abuse of such discretion."[7] And although Feazell failed to provide this court with the relevant transcript, it appears that the district court limited objections to one defense counsel to avoid "double-teaming" and would have imposed

---

[5]See NRS 7.135 (providing that "[c]ompensation to any person furnishing . . . investigative . . . services must not exceed $300.00 . . . unless payment in excess of that limit is . . . [c]ertified by the trial judge . . . as necessary to provide fair compensation for services of an unusual character or duration").

[6]Cf. Echavarria v. State, 108 Nev. 734, 745-47, 839 P.2d 589, 597-98 (1992) (holding that the district court erred in refusing to allow a defendant the services of an eyewitness identification expert where descriptions of the perpetrator were entirely inconsistent and where identifications apparently influenced by exposure to pre-trial publicity and were "cross-cultural" in nature.); see also White v. State, 112 Nev. 1261, 1263, 926 P.2d 291, 292 (1996) (holding that the district court did not err in denying a defendant an expert in eyewitness identification where eyewitness identifications did not suffer from "considerable doubt").

[7]Campus Village v. Brown, 102 Nev. 17, 18, 714 P.2d 566, 567 (1986).

the same restriction on the State if it were represented by two attorneys.[8] Nor are persuaded that the State improperly introduced "victim-impact" evidence at the guilt phase of the trial. The testimony of the victim's mother tended to establish that the victim would not willingly part with his car. Her testimony was therefore relevant to the State's prosecution of Feazell for attempted robbery.[9] With regard to the testimony of the victim's aunt, it appears to be irrelevant but in no wise prejudicial. Finally, at the grand jury proceeding, the prosecutor adequately instructed the grand jurors that evidence of the Vegas World shooting was applicable only against Feazell's original co-defendant Sean White.[10] We

---

[8]See Schoels v. State, 114 Nev. 981, 966 P.2d 735 (1998), rehearing granted, 115 Nev. 33, 975 P.2d 1275 (1999) ("A trial judge has authority to assure protection of public interests including assuring fairness to the prosecution.").

[9]See NRS 200.380 (defining robbery in part as "[t]he unlawful taking of personal property from the person of another . . . against his will"); see also NRS 48.015 (providing that "'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence"); NRS 48.025 (providing that relevant evidence is generally admissible).

[10]See State v. Babayan, 106 Nev. 155, 175, 787 P.2d 805, 819 (1990) (indicating that segregation of evidence presented to a grand jury can cure a defect in the presentation of evidence that is admissible only against one defendant); see also Rowland v. State, 118 Nev. ___, 39 P.3d 114, 122 (2002) (reaffirming that the ultimate issue is "'whether the jury can

continued on next page . . .

therefore conclude that Feazell has failed to demonstrate either that his counsel's performance was objectively unreasonable or that he was prejudiced.

However, our review of the record reveals that Feazell's jury found both the robbery and "receiving money" aggravating circumstances based on the same facts. They were therefore improperly duplicative.[11] Feazell did not raise the issue of duplicative aggravators in his opening brief. Nonetheless, given the particular circumstances of this case, we will reach the merits of this claim.

First, absent a showing of good cause and prejudice, the claim regarding duplicative aggravating circumstances would be procedurally barred: Feazell's conviction was the result of a trial, and the issue could have been raised in the instant habeas petition.[12] However, good cause

---

. . . *continued*
reasonably be expected to compartmentalize the evidence as it relates to separate defendants'") (quoting Jones v. State, 111 Nev. 848, 854, 899 P.2d 544, 547 (1995)).

[11]See Lane v. State (Lane II), 114 Nev. 299, 304, 956 P.2d 88, 91 (1998); NRS 200.033(4), (6).

[12]See NRS 34.810(1)(b)(3) (providing, in pertinent part, that this court shall dismiss a petition where conviction was the result of a trial, and the grounds for the petition could have been presented to the trial court, raised in a direct appeal or raised in any other proceeding that the

continued on next page . . .

exists to excuse the procedural bar because Feazell has a right to effective counsel in this proceeding,[13] and, as we explain, Feazell's post-conviction counsel was ineffective in failing to raise this issue in the instant petition.[14] Counsel was ineffective and prejudice resulted because this claim has merit; the aggravators are duplicative, rendering the "receiving money" aggravator invalid. No purpose is served by requiring Feazell to submit this claim in a successive petition in which he also demonstrates good cause and prejudice. Similarly, this court has reached the merits of a claim of ineffective assistance on direct appeal, without requiring that it

---

. . . continued

petitioner has taken to secure relief from his conviction and sentence absent cause for the failure to present the claim and actual prejudice).

[13]See NRS 34.820(1)(a) (providing that appointment of counsel for a habeas petitioner sentenced to death is mandatory if "the petition is the first one challenging the validity of the petitioner's conviction or sentence"); Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997) (holding that if a petitioner in a first petition is entitled to and appointed counsel pursuant to the statutory mandate of NRS 34.820(1)(a), then petitioner is also entitled to the effective assistance of that counsel).

[14]See Crump, 113 Nev. at 302-04, 934 P.2d at 252-53 (stating that ineffective assistance of counsel can constitute good cause to defeat procedural default).

be raised in the first instance in the district court, where the record clearly demonstrated that counsel's actions were ineffective as a matter of law.[15]

Second, Feazell argued unsuccessfully on direct appeal that his two aggravators were duplicative.[16] Normally, the doctrine of the law of the case bars reassertion of a claim in habeas,[17] but we have discretion to revisit legal conclusions when warranted.[18] It is warranted in this case because after the disposition of Feazell's appeal, this court held in Lane II that the same aggravators in question here are duplicative.[19] Moreover, Lane II did not announce a new rule of law. On the contrary, it relied upon well-established Nevada law in ruling the aggravators duplicative.[20]

---

[15]See Mazzan v. State, 100 Nev. 74, 79-80, 675 P.2d 409, 412-13 (1984); see also Hill v. State, 114 Nev. 169, 178-79, 953 P.2d 1077, 1084 (1998).

[16]Feazell, 111 Nev. 1449, 906 P.2d at 729-30.

[17]See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

[18]See Pellegrini v. State, 117 Nev. ___, ___, 34 P.3d 519, 535-36 (2001).

[19]114 Nev. at 304, 956 P.2d at 91; cf. Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994) (holding that where a claim had merit, denial of relief by this court constituted an impediment external to the defense that would excuse appellant's default in presenting the same claim in a successive petition).

[20]Lane II, 114 Nev. at 304, 956 P.2d at 91.

Thus, issues of retroactive and prospective application do not arise.[21] Accordingly, we strike the "receiving money" aggravator because there are no facts to support it apart from the robbery of the victim, and it is therefore duplicative.

When an aggravating circumstance is not supported by sufficient evidence or is otherwise invalid, this court may reweigh the valid aggravators against the mitigating evidence, remand for a new penalty hearing or impose a sentence of imprisonment for life without the possibility of parole.[22] We conclude that it is most appropriate here to remand Feazell's case to the district court for a new penalty hearing.

For the reasons discussed above, we AFFIRM the district court's denial of Feazell's claims of ineffective assistance of trial and

---

[21]Cf. Gier v. District Court, 106 Nev. 208, 212, 789 P.2d 1245, 1248 (1990) ("New rules apply prospectively unless they are rules of constitutional law."); see also Murray v. State, 106 Nev. 907, 910, 803 P.2d 225, 226-27 (holding that Supreme Court decision could be applied retroactively where decision did not announce new constitutional rule, but merely explained state statutory law as it existed at time of habeas petitioner's original sentencing).

[22]See Canape v. State, 109 Nev. 864, 877-83, 859 P.2d 1023, 1031-35 (1993) (explaining, pursuant Clemmons v. Mississippi, 494 U.S. 738 (1990), that this court may weigh aggravators and mitigators); NRS 177.055(3).

appellate counsel, VACATE his sentence of death, and REMAND for a new penalty hearing consistent with this order.

It is so ORDERED.

Maupin, C.J.

Young, J.

Shearing, J.

Agosti, J.

Rose, J.

Leavitt, J.

Becker, J.

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General/Carson City
Clark County District Attorney
Scott L. Bindrup
Clark County Clerk

EXHIBIT 108

EXHIBIT 108

IN THE SUPREME COURT OF THE STATE OF NEVADA

JESSE JAMES HANKINS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 20780

FILED

APR 24 1990

Clerk of Supreme Court

By CHIEF DEPUTY CLERK

ORDER OF REMAND

This is a proper person appeal from an order of the district court denying a petition for post-conviction relief.

On May 25, 1988, appellant was convicted, pursuant to a jury verdict, of one count of grand larceny. The district court also determined that appellant had suffered two prior felony convictions and sentenced appellant to twelve years in the Nevada State Prison as a habitual criminal. Appellant filed a direct appeal challenging his conviction, and this court later dismissed that appeal. See Hankins v. State, Order Dismissing Appeal, Docket No. 19185, filed December 8, 1988. On June 23, 1989, appellant filed in the district court a petition for a writ of mandamus requesting that the district court order the Clark County Public Defender to provide him with his case file. Four months later, on October 12, 1989, appellant filed in the district court the instant petition for post-conviction relief. The state opposed the petition and on December 13, 1989, the district court denied the petition. This appeal followed.

On March 12, 1990, this court entered an order which noted that appellant's petition alleged that his counsel was ineffective at trial, at sentencing and on appeal. Despite this, however, the district court failed to make any findings of fact or conclusions of law regarding the effectiveness of appellant's counsel at any of those proceedings. See NRS

177.365(3) (requiring the district court to enter specific findings of fact and conclusions of law in an order denying post-conviction relief). We also noted, erroneously, that appellant was represented by the Clark County Public Defender at trial and on direct appeal. Despite this apparent conflict of interest, the district court allowed the Clark County Public Defender to represent appellant at the hearing on the petition for post-conviction relief. Thus, we concluded that the district court may have erred when it denied appellant's petition. Accordingly, we directed respondent to show cause why this appeal should not be remanded to the district court for proper consideration of the allegations contained in appellant's petition.

Respondent asserts in response to the order to show cause that this court erroneously determined that the Clark County Public Defender represented appellant at his trial. Specifically, it states that Stephen Dahl, Esq., represented appellant at trial and was at that time a member of a private law firm, Vannah and Roark. Our review of the record on appeal reveals that this is true. We note, however, that the record also discloses affirmatively that appellant was represented at sentencing by Daniel Hastings, Esq., a deputy employed by the Clark County Public Defender. The record further discloses that appellant was represented in his direct appeal by the Clark County Public Defender. Finally, contrary to respondent's assertions, the record affirmatively discloses that Deputy Public Defender Daniel Hastings, Esq., the attorney who represented appellant at sentencing and whose performance was challenged in appellant's petition, appeared on appellant's behalf at the hearing on appellant's petition and that he participated in those proceedings. Under these circumstances, we conclude that the appearance of impropriety created by

counsel's conflict of interest in this case was sufficient to violate the public trust and confidence in the impartiality of our criminal justice system. See generally Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985). Accordingly, we vacate the order of the district court denying appellant's petition for post-conviction relief, and we remand this matter to the district court for an evidentiary hearing. To further lessen the appearance of partiality based upon hearings already had, the proceedings on remand shall be conducted before a different district court judge. The district court shall appoint new counsel to represent appellant on remand, and shall enter specific findings of fact and conclusions of law to support its decision on remand.

It is so ORDERED.[1]

Young, C.J.

Steffen, J.

Springer, J.

Mowbray, J.

Rose, J.

cc: Hon. Stephen L. Huffaker, District Judge
Hon. Brian McKay, Attorney General
Hon. Rex Bell, District Attorney
Jesse James Hankins
Loretta Bowman, Clerk

[1]This order shall constitute our final disposition of this appeal. Any challenge to the district court's decision on remand shall be docketed as a new proceeding.

EXHIBIT 109

EXHIBIT 109

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD LEE HARDISON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 24195

FILED

MAY 24 1994

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REMAND

This is an appeal from an order of the district court denying appellant's amended petition for post-conviction relief. On June 26, 1987, appellant was convicted, pursuant to a jury trial, of one count of first degree murder with use of a deadly weapon and was sentenced to death. At trial, appellant was represented by court-appointed counsel, Robert Legakes, who is since deceased. This court affirmed appellant's conviction and sentence on appeal. See Hardison v. State, 104 Nev. 530, 763 P.2d 52 (1988).

On March 2, 1989, appellant petitioned the district court for post-conviction relief. The district court denied appellant's petition without conducting an evidentiary hearing. This court dismissed appellant's subsequent appeal. See Hardison v. State, Docket No. 20073 (Order Dismissing Appeal, February 22, 1990).

Appellant then filed in the U.S. District Court a petition for a writ of habeas corpus which the U.S. District court held was a "mixed" petition containing both exhausted and unexhausted claims for relief. On September 20, 1991, the U.S. District Court stayed appellant's petition so that he could exhaust his claims in state court.

On November 13, 1991, appellant filed in the Nevada district court an "amended petition for post-conviction relief." On February 4, 1993, the district court dismissed the petition

without conducting an evidentiary hearing. This appeal followed. Appellant contends, among other things, that counsel was ineffective during the penalty phase of his trial. We agree.

To state a claim of ineffective assistance of counsel that is sufficient to invalidate a death sentence, appellant must show that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984), cert. denied, 471 U.S. 1004 (1985).

At the penalty phase of appellant's trial, appellant's counsel presented no witnesses or evidence and made only a brief closing argument:

> I'm going to try to make a point. I hope I make it. You look at man [sic] being shot twice in the back for no apparent motive. I was trying to think of the words that came to me as I looked at these facts: shocking, horrendous, terrible, bad, mean, incomprehensible, ignorant, no explanation. I mean, especially without apparent motive.
>
> You and I don't operate in the environment that Richard Lee Hardison was operating in. . . .
>
> That's what makes this case -- so senseless. And the point I'm trying to make, and hopefully I can, is -- is that Richard Lee Hardison was operating at a level that he lived in. We heard the testimony of -- Lockett who says that by noon, himself and Mr. Johnson were already high on drugs and alcohol and bouncing off the street walls.
>
> I would submit that is the only environment that Richard Lee Hardison knew. He was operating in that environment. Obviously you and I don't take a weapon to settle our beefs, settle our differences. Thank God most people don't.
>
> But let's not deceive ourselves as to what the environment was on August 21st, 1986, 709 or 703 Madison Avenue. On behalf of Richard and his family, I ask you to spare his life. He's a member of a human family. He's 30 years old. I can't believe that there is not some good in Richard that the rest of his life can't produce even if that is in the prison in Nevada. Thank you.

In support of the instant petition, appellant submitted several affidavits regarding potential mitigating testimony that was not presented by counsel on his behalf. The affidavits were from appellant, appellant's aunt, appellant's grandmother, and appellant's father. The affidavits state that the affiants had spoken to trial counsel and were willing to testify, but that they were never called. In summary, the affidavits state, among other things, that: (1) the victim was a crack and PCP dealer with a reputation as a neighborhood bully; (2) the victim had previously stabbed and beaten appellant; (3) appellant had been exposed to drugs as an infant, was brain damaged, had an I.Q. of 66, and had difficulty reading and writing; (4) appellant had been beaten up and abused during his childhood by older, bigger boys because he was quiet and small; (5) appellant had a drug problem and was fearful of everyone; (6) appellant had dropped out of high school after the 10th grade; (7) appellant was a soft, kind boy who helped the neighborhood elderly; and (8) appellant was shy and would never intentionally hurt someone unless absolutely pressed to defend himself.

District courts must afford a death-eligible defendant every opportunity to present mitigating evidence because possession of the most complete information possible regarding the defendant's life and characteristics is essential to the selection of the appropriate sentence. See Harris v. State, 106 Nev. 667, 799 P.2d 1104 (1990). Nevertheless, decisions on what mitigating evidence to present may constitute a strategic choice of counsel. See Mazzan v. State, 105 Nev. 745, 783 P.2d 430 (1989). Trial counsel in this case, however, presented no mitigating evidence whatsoever and the record does not suggest that it was a strategic decision.[1] Cf. Canape v. State, 109 Nev. 864, 859 P.2d 1021

[1]We note that this case is complicated because appellant's trial counsel died eight months after appellant's trial, making an inquiry into counsel's tactics impossible.

(1993) (defendant requested that trial counsel not call family members at penalty phase).

We have previously suggested that presenting no mitigating evidence, as opposed to presenting only some of the available mitigating evidence, can approach per se ineffective assistance of counsel. See, e.g., Wilson v. State, 105 Nev. 110, 771 P.2d 583 (1989) (counsel was ineffective at the penalty phase of a death trial for failing to present a large body of mitigating evidence and presenting a damaging argument to the sentencing panel); Mazzan v. State, 100 Nev. 74, 675 P.2d 409 (1984) (counsel was ineffective at the penalty phase of a death trial as a matter of law when counsel presented no witnesses or mitigating circumstances and made a counterproductive argument to the jury).

Although we do not conclude that the presentation of no mitigating evidence is per se ineffective assistance of counsel, under the unique circumstances of this case, we conclude that appellant received ineffective assistance of counsel. Counsel's apparent failure to call appellant's family to testify to appellant's childhood, disposition, and prior history with the victim, coupled with a questionable closing argument fell below an objective standard of reasonableness.

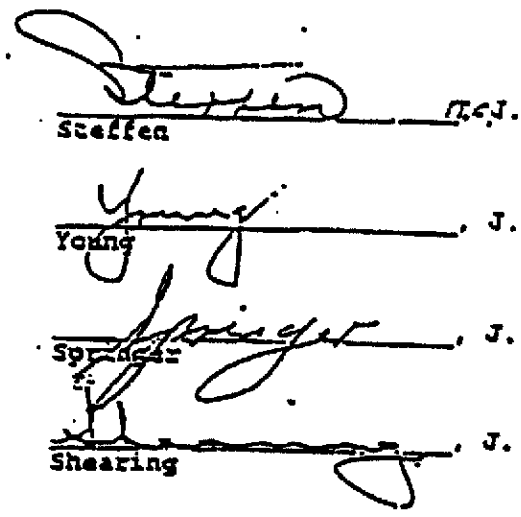
Further, we conclude that appellant has demonstrated prejudice. If the jury had heard the affiants testify in the manner their affidavits state they would have testified, there is a reasonable probability that the jury would have better understood trial counsel's closing argument and not have returned the death penalty.

Accordingly, we conclude that appellant received ineffective assistance of counsel at the penalty phase of his trial.[3] Therefore, we reverse the district court's order denying

[3]We have considered appellant's other contentions regarding the ineffectiveness of trial counsel during the guilt phase and (continued...)

appellant's petition and vacate appellant's sentence of death. We remand this matter to the district court for a new penalty hearing before a three-judge panel.

It is so ORDERED.[3]



Steffen, C.J.

Young, J.

Springer, J.

Shearing, J.

cc: Hon. Jack Lehman, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Rex A. Bell, District Attorney
Potter Law Offices
Loretta Bowman, Clerk

---

[3](...continued)
they are without merit. Further, appellant's contention that he was denied a fair trial because of prosecutorial misconduct is meritless.

[3]The Honorable Robert E. Rose, Chief Justice, did not participate in the decision of this appeal.

EXHIBIT 110

EXHIBIT 110

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES EARL HILL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 18253

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court summarily dismissing appellant's proper person petition for post-conviction relief. Our review of the record on appeal reveals a jurisdictional defect. Specifically, we note that the district court entered its order denying appellant's petition on March 17, 1987, and that appellant had thirty days from that date within which to file his notice of appeal with the clerk of the district court. See NRAP 4(b). An untimely notice of appeal is insufficient to vest jurisdiction in this court to entertain an appeal. See Jordan v. Director, Dep't of Prisons, 101 Nev. 146, 696 P.2d 998 (1985).

In the present case, appellant sent his notice of appeal to the clerk of this court within the time specified in NRAP 4(b). Appellant did not file his notice of appeal with the clerk of the district court, however, until June 16, 1987, well beyond the time specified in NRAP 4(b). It therefore appears that this court lacks jurisdiction to entertain this appeal. See Jordan, 101 Nev. at 148, 696 P.2d at 999; see also Golden v. McKim, 43 Nev. 350, 353, 204 P. 602, 603 (1922) (a document is filed when it is deposited with and received by the proper officer for filing).

We note, however, that appellant's petition below challenged the propriety of a death sentence, and that under the unique circumstances of this case a dismissal with

prejudice would be inappropriate. Accordingly, we dismiss this appeal without prejudice to appellant's right to re-file his petition for post-conviction relief in the district court. If appellant elects to re-file his petition, the district court shall hold an evidentiary hearing and appoint counsel to represent appellant in the proceedings held on the renewed petition.

It is so ORDERED.[1]

Gunderson C. J.

Young J.

Mowbray J.

---

[1] In light of this disposition, we deny as moot appellant's motion for appointment of counsel to represent him in this appeal.

cc: Hon. Earle W. White, Jr., District Judge
Hon. Brian McKay, Attorney General
Hon. Rex Bell, District Attorney
Morgan D. Harris, Public Defender
Loretta Bowman, Clerk

EXHIBIT 111

EXHIBIT 111

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL STEVEN JONES,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 24497

FILED

AUG 28 1996

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court denying appellant's petition for post-conviction relief. Appellant Daniel Steven Jones pleaded guilty to the murder of Donald Woody. A three-judge panel sentenced appellant to death. Appellant then filed a direct appeal with this court, and we affirmed the conviction. Jones v. State, 107 Nev. 632, 817 P.2d 1179 (1991). Appellant subsequently filed a petition for post-conviction relief in the district court. The district court dismissed appellant's petition without an evidentiary hearing. Appellant appeals, contending that the district court erred by dismissing his petition.

Appellant first argues that the Nevada court lacked jurisdiction to prosecute the murder. "'The effect of the plea of guilty, generally speaking, is a record admission of whatever is well charged in an indictment . . . .'" Giese v. Chief of Police, 87 Nev. 522, 525, 489 P.2d 1163, 1164 (1971) (quoting Ex parte Dickson, 36 Nev. 94, 101, 133 P. 393, 396 (1913)). The indictment, on its face, confers jurisdiction and this is supported by the evidence presented by the state. Under the state's theory of the case, jurisdiction is established. The question is not whether the state had jurisdiction, but whether the state proved the facts which establish that jurisdiction. By pleading guilty, appellant relieved the state of the burden of

proving the facts in the state's theory. Appellant's argument therefore without merit.

Appellant next argues that his plea was entere involuntarily because he was not competent at the time he pleade guilty. There is nothing in the record to suggest that Jones wa not competent to enter a plea. See Dusky v. United States, 36: U.S. 402, 402 (1960) (the test for competence is whether defendant is able to consult with counsel with a reasonable degree of rational understanding and has rational and factual understanding of the proceedings). We therefore conclude that this argument is without merit.

Appellant next argues that the three-judge sentencing panel is unconstitutional. This is not an appropriate issue for a post-conviction petition.[1] Therefore, we need not consider this issue.

Appellant next argues that his trial counsel was ineffective. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, an appellant must demonstrate that his counsel's performance fell below an objective standard of reasonableness. Further, an appellant must demonstrate a reasonable probability that, but for counsel's errors, appellant would not have pleaded guilty and would have insisted on going to trial. See Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984), cert. denied, 471 U.S. 1004 (1985). Appellant has failed to satisfy either part of this test, and we conclude that his argument is without merit.

Appellant next argues that his appellate counsel was ineffective. However, we conclude that appellant has failed to

---

[1]NRS 34.810(1)(a) provides that a post-conviction petition shall be dismissed if "not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel."

show that appellate counsel failed to meet an objective standa: of reasonableness or that appellant was prejudiced by t performance of appellate counsel.

Finally, appellant argues that the district court erre by denying him an evidentiary hearing. All of the factua allegations made by appellant are belied by the record, s appellant is not entitled to an evidentiary hearing. Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

Having considered all of appellant's arguments and concluding that they are without merit, we

ORDER this appeal dismissed.

Steffen, C.J.

Young, J.

Springer, J.

Shearing, J.

Rose, J.

cc: Hon. Gene T. Porter, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Stewart L. Bell, District Attorney
Philip H. Dunleavy
Loretta Bowman, Clerk

EXHIBIT 112

EXHIBIT 112

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL STEVEN JONES,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K. MCDANIEL AND FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA,
Respondents.

No. 39091

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's petition for a writ of habeas corpus in a death penalty case.

On September 24, 1990, appellant Daniel Steven Jones pled guilty to first-degree murder, and a three-judge panel sentenced him to death. This court affirmed appellant's conviction and sentence.[1] Remittitur issued on October 25, 1991. On December 27, 1991, appellant, with the assistance of counsel, filed a timely petition for post-conviction relief in the district court pursuant to former NRS 177.315-.385. The

[1]Jones v. State, 107 Nev. 632, 817 P.2d 1179 (1991).

district court denied appellant relief, and this court dismissed appellant's appeal from the denial.[2]

On May 1, 2000, appellant filed his current post-conviction petition for a writ of habeas corpus in the district court pursuant to NRS 34.720-.830. The State filed an opposition alleging that appellant's petition was untimely and therefore procedurally barred. Appellant filed a response to the State's opposition. After hearing argument, the district court determined that appellant had not shown good cause for the delay in filing the petition and dismissed it as untimely. The court did, however, reserve a ruling on the issue of whether the State failed to disclose a benefit allegedly received by a State witness for his testimony at appellant's penalty hearing. The court subsequently heard argument on this issue. On December 14, 2001, the district court filed its written findings of fact, conclusions of law, and order denying appellant's petition. This appeal followed.

Procedural default

NRS 34.726(1) provides that absent a showing of good cause for delay, a petition challenging the validity of a judgment or sentence must be filed within one year after this court issues its remittitur on direct appeal. Good cause requires the petitioner to demonstrate that the delay

---

[2]Jones v. State, Docket No. 24497 (Order Dismissing Appeal, August 28, 1996).

was not his fault and that dismissal of the petition will unduly prejudice him.[3]

Appellant filed his current habeas petition almost nine years after this court issued its remittitur from his direct appeal. Appellant insists, however, that this court must review his allegations of constitutional error for a number of reasons despite the procedural bar. First, appellant contends that he has established good cause for the delay. In particular, appellant submits that any delay was not his fault because in regard to his first petition the district court (1) provided appointed counsel insufficient time to develop an adequate petition; (2) "denied an evidentiary hearing, refused to bring [appellant] to court, and summarily denied the petition"; and (3) failed to inform appellant and appellant's counsel of the potential consequences of failing to raise all available claims in the initial petition as was required under former NRS 177.380.[4] Second, appellant complains that he never signed the amended petition or saw it before his first post-conviction counsel filed it. Appellant finally

---

[3]NRS 34.726(1).

[4]See 1987 Nev. Stat., ch. 539, § 34(3), at 1228-29 (providing that, in a death penalty case, "[t]he court shall inform the petitioner and his counsel that all claims which challenge the conviction or imposition of the sentence must be joined in a single petition and that any matter not included in the petition will not be considered in a subsequent proceeding").

ascribes his untimely petition to the allegedly ineffective assistance of his first post-conviction counsel. Appellant further alleges he was prejudiced because the issues raised in his habeas petition have merit.

Appellant has failed to establish good cause for his delay in filing his habeas petition. First, the errors alleged against the district court and the defects identified in the first post-conviction petition do not speak to the issue of appellant's delay in filing his second post-conviction petition and therefore cannot excuse it. Second, appellant filed his first post-conviction petition in December 1991. "At that time, there was no constitutional or statutory right to post-conviction counsel. Where there is no right to counsel there can be no deprivation of effective assistance of counsel and hence, 'good cause' cannot be shown based on an ineffectiveness of post-conviction counsel claim."[5]

Appellant next claims that this court cannot apply NRS 34.726(1) to his current petition because that provision was not in effect when he filed his original post-conviction petition and therefore impermissibly extinguishes his prior right to file a second post-conviction petition unaffected by the one-year filing limitation. He further contends that this court's recent decision in Pellegrini v. State, in which we held

---

[5]Pellegrini v. State, 117 Nev. ___, ___, 34 P.3d 519, 537-38 (internal quotations and citations omitted).

that the procedural bar applies to successive petitions,[6] constitutes a new default rule that cannot, consistent with constitutional principles of due process and equal protection, be given retroactive effect. Appellant also contends that this court's Pellegrini decision "in itself violates due process and equal protection." We disagree.

In Pellegrini, this court acknowledged that

> [p]rior to the effective date of [NRS 34.726], the sole statutory considerations for timely filing under Chapter 34 were laches . . . and that a prior post-conviction petition pursuant to NRS Chapter 177 had to be timely filed. If a petitioner was not barred by laches and had met the prior petition prerequisite, his Chapter 34 petition was not subject to dismissal on grounds of failing to meet a one-year filing rule.[7]

The court then noted that "'the legislature cannot extinguish an existing cause of action by enacting a new limitation period without first providing a reasonable time after the effective date of the new limitation period in which to initiate the action.'"[8] We concluded that "petitioners whose convictions were final before the effective date of NRS 34.726 and who had

---

[6]Id. at ___, 34 P.3d at 525-31.

[7]Id. at ___, 34 P.3d at 529.

[8]Id. (quoting Brown v. Angelone, 150 F.3d 370, 373 (4th Cir. 1998) (citing Block v. North Dakota, 461 U.S. 273, 286 n.23 (1983))).

filed a timely first petition under Chapter 177 were entitled to a reasonable period of time after the effective date of the new limitation period in which to file any successive petitions."[9] We further determined that "it is both reasonable and fair to allow petitioners one year from the effective date of the [statutory] amendment to file any successive habeas petitions."[10] We continue to consider this reasoning sound. Because NRS 34.726(1) became effective on January 1, 1993, and because his current habeas petition was not filed until 2000, appellant does not qualify "for timely filing under this narrow exemption from the requirements of NRS 34.726."[11] Moreover, we reject appellant's argument that in Pellegrini we announced a new rule that should only apply prospectively. In Pellegrini, we noted that we "had previously applied the time bar at NRS 34.726 to successive petitions"[12] and that "the plain language of the statute indicates that it applies to all petitions filed after its effective date of January 1, 1993."[13] A case interpreting the plain language of statutes and

---

[9]Id.

[10]Id.

[11]Id.

[12]Id. at ___, 34 P.3d at 526.

[13]Id. at ___, 34 P.3d at 529.

existing case law does not announce a new rule and, therefore, may be given retroactive effect.[14]

Next, appellant contends that refusing to review his constitutional claims on the basis of either NRS 34.726 or NRS 34.810[15] "would violate the due process and equal protection right to consistent treatment of similarly-situated litigants" because this court allegedly applies these procedural bars so inconsistently that "they do not provide adequate notice of when they will be applied or excused." We reject this contention and conclude that the instant petition is both untimely and successive. As we concluded in Pellegrini: "We have been consistent in requiring good cause and actual prejudice to overcome the procedural bars," and we see no reason to revisit this issue. We particularly reject

---

[14]See Murray v. State, 106 Nev. 907, 910, 803 P.2d 225, 227 (1990).

[15]NRS 34.810(2) provides that a second or successive petition must be dismissed if it fails to allege new grounds for relief and the prior determination was on the merits or, if new grounds are alleged, the failure to assert those grounds in a prior petition constituted an abuse of the writ. NRS 34.810(3) requires a petitioner to plead and prove specific facts that demonstrate good cause for failing to present a claim before or presenting a claim again and actual prejudice.

appellant's reliance on unpublished dispositions as cognizable support for his claim of inconsistent application of the procedural bars.[16]

Additionally, appellant raises a number of claims that were in substance previously asserted, either on direct appeal or in the first petition for post-conviction relief.[17] 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.[18] Any attempt by appellant to reformulate his direct appeal

---

[16]See SCR 123 (providing that "[a]n unpublished opinion or order of [this court] shall not be regarded as precedent and shall not be cited as legal authority" subject to exceptions that do not apply here).

[17]Specifically, appellant reasserts that (1) jurisdiction was improperly exercised by Nevada courts; (2) trial counsel failed to object to the allegedly improper exercise of jurisdiction; (3) trial counsel's failure to object to the exercise of jurisdiction by Nevada courts rendered appellant's guilty plea involuntary; (4) trial counsel failed to have appellant properly evaluated by a neuropsychologist and psychiatrist, which failure allegedly resulted in an involuntary plea; (5) trial counsel "unreasonably failed to investigate and discover exculpatory evidence" on two Florida homicides that were presented by the State at appellant's penalty hearing; (6) trial counsel should have objected to the State's charging appellant with three aggravating circumstances and should have presented additional mitigation evidence; (7) withdrawal of appellant's original trial counsel rendered appellant's guilty plea involuntary; (8) the prosecutor committed misconduct to which defense counsel often failed to object; and (9) appellate counsel rendered ineffective assistance.

[18]Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

claims as claims of ineffective assistance is similarly unavailing. To the extent appellant claims that our previous review of his case was inadequate or our prior determinations erroneous, we reject the contention and conclude that the issues reargued in this petition do not warrant further discussion.[19]

Appellant also raises numerous claims that are waived because they were not raised in an earlier proceeding.[20] Further,

---

[19]Cf. Pellegrini, 117 Nev. at ___, 34 P.3d at 535-36 (acknowledging that "a court of last resort has limited discretion to revisit the wisdom of its legal conclusions when it determines that further discussion is warranted").

[20]Specifically, appellant argues that (1) he was deprived of an impartial tribunal; (2) his conviction and sentence are invalid due to the (a) inadequacy of the charging document, (b) "systematic exclusion of minorities from the grand jury," (c) failure to "conduct all proceedings in public, and in appellant's presence and to make an adequate record of the proceedings," and (d) alleged unconstitutionality of Nevada's definitions of first-degree murder, implied malice and reasonable doubt; (3) "the death penalty as administered in Nevada does not satisfy constitutional standards"; and (4) trial counsel failed to investigate and present (a) evidence of childhood abuse, neglect and other family-history evidence and (b) evidence to rebut the aggravating circumstances. See 34.810 (2), (3); see also Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) (holding that claims that are appropriate on direct appeal must be pursued on direct appeal, or they are waived), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

appellant has not shown that an impediment external to the defense prevented him from complying with procedural default rules.[21]

Nevertheless, if appellant showed that important claims were never presented to the courts, or were inadequately presented, this court could overlook the lack of good cause if the prejudice from failing to consider the claims amounted to a "fundamental miscarriage of justice."[22] "We have recognized that this standard can be met where the petitioner makes a colorable showing he is actually innocent of the crime or is ineligible for the death penalty."[23] We conclude that none of appellant's claims implicate this standard.

State's alleged failure to disclose impeachment evidence

Appellant contends that a "key prosecution witness, Robert Bezak, received benefits as a result of his testimony and those benefits were not disclosed to the defense" in violation of Brady v. Maryland and its progeny.[24] Bezak testified at appellant's penalty hearing that when he

---

[21]See Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994) ("To establish good cause to excuse a procedural default, a defendant must demonstrate that some impediment external to the defense prevented him from complying with the procedural rule that has been violated.").

[22]See Pellegrini, 117 Nev. at ___, 34 P.3d at 537.

[23]Id.

[24]Brady, 373 U.S. 83 (1963); see also Kyles v. Whitley, 514 U.S. 419 (1995); Giglio v. United States, 405 U.S. 150 (1972).

and appellant were cell mates, Bezak became aware of appellant's plan to escape from prison and his possession of two "shanks," knife-like instruments apparently fashioned from wire removed from a broom. Appellant alleges that in exchange for this information, six of seven pending charges against Bezak were dropped, that he received a lenient sentence on the remaining charge to which he pled guilty and that the district attorney subsequently sent a letter to the parole board informing it of Bezak's assistance in the instant case. In an attempt to establish good cause for failing to raise this claim in an earlier proceeding, appellant contends that the letter sent by the State to the parole board was not disclosed in federal habeas proceedings "in response to a formal subpoena duces tecum until repeated searches of the prosecution files were conducted." Appellant further alleges that the prosecutor "knowingly presented false testimony to the sentencing panel" when he asked Bezak whether homicide detectives had not made it "perfectly clear" that they could not provide him with any benefit in exchange for his testimony.

Brady and its progeny require a prosecutor to disclose favorable exculpatory and impeachment evidence that is material to the defense.[25] There are three components to a Brady violation: the evidence at issue is favorable to the accused; the State failed to disclose the evidence, either intentionally or inadvertently; and prejudice ensued, i.e.,

---

[25]See Strickler v. Greene, 527 U.S. 263, 280 (1999).

the evidence was material.[26] The evidence is material if there exists a reasonable probability that the result of the proceedings would have been different had disclosure occurred.[27] Appellant's instant petition for habeas relief is untimely and successive; therefore, to avoid procedural default, he has the burden of pleading and proving specific facts that demonstrate both good cause for his failure to timely present his claim in earlier proceedings and prejudice.[28] In Mazzan v. State, this court explained that "[c]ause and prejudice parallel two of the three Brady violation components. If [an appellant] proves that the state withheld evidence, that will constitute cause for not presenting his claim earlier. If he proves that the withheld evidence was material under Brady, that will establish actual prejudice."[29]

Appellant is not entitled to relief on this claim. First, we are not persuaded that he has established that the State withheld evidence of inducements offered to Bezak in exchange for his testimony at appellant's penalty hearing. The single most compelling evidence in the record of such an agreement is a declaration of appellant's agent, an investigator

---

[26]Id. at 281-82.

[27]Id. at 280.

[28]See NRS 34.726(1); 34.810(3).

[29]Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000).

with the Office of the Federal Public Defender, documenting statements allegedly made to him by Bezak in an interview conducted in August 1998. While this declaration asserts that Bezak acknowledged providing information to the State in exchange for more lenient treatment and lying under oath when he denied receiving any benefit, Bezak subsequently disavowed the declaration in a statement made to an agent of the Nevada Attorney General's Office. Second, even assuming Bezak received a benefit for his testimony, appellant cannot demonstrate that he was prejudiced. Bezak's testimony was unrelated to any of the three aggravating circumstances found by the three-judge panel--that the murder was committed by a person previously convicted of a violent felony; that the murder was committed by a person under sentence of imprisonment; and that the murder was committed in furtherance of a robbery[30]--and they therefore retain their vitality. Also, evidence was presented at the penalty hearing that appellant was the perpetrator of a double homicide in Florida to which he later pled guilty. Moreover, at the penalty hearing, defense counsel elicited information from Bezak that he had several felony convictions, including robbing a church, and called into question Bezak's motive for testifying and whether he, not appellant, had planned a violent escape and possessed the shanks found in the cell that he shared with appellant. Finally, another witness testified that

[30]See Jones, 107 Nev. at 635, 817 P.2d at 1181.

appellant possessed a handcuff key that he had carved from the head of a toothbrush, thus corroborating Bezak's testimony that appellant planned to escape from custody. We therefore conclude that appellant has failed to raise a colorable Brady claim that would excuse his procedural default.

Three-judge sentencing panel

Appellant argues that "the three-judge sentencing procedure is unconstitutional." In support, appellant cites, among other grounds, the United States Supreme Court's recent decision in Ring v. Arizona.[31] Even assuming Ring's recent date provides appellant with good cause for failing to raise it in an earlier proceeding,[32] we conclude that appellant suffered no prejudice because appellant's reliance on Ring is inapposite. Ring concerned a defendant who pled not guilty and went to trial. Unlike Ring, appellant pled guilty and waived his right to a jury trial.[33] The Supreme

---

[31]122 S. Ct. 2428 (2002) (holding that a capital sentencing scheme which places the determination of aggravating circumstances in the hands of a judge following a jury adjudication of a defendant's guilt of first-degree murder violates the Sixth Amendment right to a jury trial).

[32]See Lozada, 110 Nev. at 353, 871 P.2d at 946.

[33]See Boykin v. Alabama, 395 U.S. 238, 243 (1969) (holding that the valid entry of a guilty plea in a state criminal court involves the waiver of several federal constitutional rights, including the right to trial by jury); see also Abrego v. State, 118 Nev. ___, ___, 38 P.3d 868, 871-72 (2002) (concluding that a defendant affirmatively waived his right to have a jury decide a sentence-enhancing fact).

Court noted that "Ring's claim [was] tightly delineated" and declined to reach issues not explicitly asserted in his appeal.[34] We do not read Ring as altering the legitimacy or effect of a defendant's guilty plea. We also conclude that appellant's other grounds for challenging the three-judge sentencing panel are meritless. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[35]

Shearing, J.

Leavitt, J.

Becker, J.

cc: Hon. Donald M. Mosley, District Judge
Attorney General/Carson City
Clark County District Attorney
Federal Public Defender
Clark County Clerk

---

[34]Ring, 122 S. Ct. at 2437 n.4.

[35]Cause appearing, we deny appellant's motion for oral argument.

EXHIBIT 113

EXHIBIT 113

IN THE SUPREME COURT OF THE STATE OF NEVADA

RONNIE MILLIGAN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 21504

ORDER DISMISSING APPEAL

This is an appeal from a decision of the district court denying appellant's petition for post conviction relief in a death penalty case.

Appellant first contends that he was improperly convicted based upon the uncorroborated testimony of an accomplice. This court held in Orfield v. State, 105 Nev. 107, 771 P.2d 148 (1989), that Ramon Houston was not an accomplice. The facts, the crime, and the participants were the same in Orfield and in this case. We hold Orfield to be controlling authority and reject appellant's contentions on this issue.

Milligan next contends that there was ineffective assistance of counsel during the trial, penalty and appellate phases of this case. Appellant has failed, however, to demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See Strickland v. Washington, 466 U.S. 668 (1984). Accordingly, Milligan's contention on this issue is without merit.

Finally, appellant argues that the death penalty as applied to him lacks proportionality and is cruel and unusual punishment. We disagree. In Milligan's direct appeal to this court the issue of proportionality was addressed as follows:

> We have reviewed our other cases in which the sentence of death has been imposed to determine whether Milligan's sentence

leads us to conclude that the sentence of death is neither disproportionate nor excessive.

We also conclude from the record that the . . . [sentence] of death . . . [was] not imposed under the influence of passion, prejudice or any arbitrary factor.

Milligan v. State, 101 Nev. 627, 639, 708 P.2d 289, 296-97 (1985). These statements are now the law of the case.

Appellant's contentions lacking merit, we hereby ORDER this appeal dismissed.

Mowbray, C.J.

Springer, J.

Rose, J.

Steffen, J.

Ames, D.J.[1]

cc: Hon. Llewellyn A. Young, Judge
Hon. Frankie Sue Del Papa, Attorney General
David Sarnowski, Deputy Attorney General
William H. Smith
Annette R. Quintana
Susan E. Harrer, Clerk

[1]The Honorable Jack B. Ames, Judge of the Fourth Judicial District Court, was designated by the Governor to sit in place of the Honorable Cliff Young, Justice. Nev. [illegible]

EXHIBIT 114

EXHIBIT 114

IN THE SUPREME COURT OF THE STATE OF NEVADA

RONNIE MILLIGAN,
Appellant,
vs.
WARDEN, SOUTHERN DESERT CORRECTIONAL CENTER, SHERMAN HATCHER,
Respondent.

No. 37845

FILED

JUL 24 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus.[1]

Appellant Ronnie Milligan, along with Terry Bonnette, Paris Leon Hale, and Katherine Orfield, was convicted of murdering Zolihan Voinski, a 77-year-old woman, in July 1980. Ramon Houston, who was also present at the murder, testified for the State against the four defendants at their trials. (Milligan was tried first in January 1981. Bonnette was tried individually, and Hale and Orfield were tried jointly.) Among other things, Houston testified that Milligan hit the victim in the head with a sledgehammer. Only Milligan received a death sentence, and this court affirmed his conviction and sentence.[2]

[1]On March 27, 2002, Milligan filed a motion to strike from respondent's answering brief all references to a statement made by "Little Kathy" Orfield. The references are based on evidence presented at the evidentiary hearing held in this case and pertinent to elucidate decisions made by the prosecutor and trial counsel at Milligan's trial. We therefore deny the motion.

[2]Milligan v. State, 101 Nev. 627, 708 P.2d 289 (1985).

In 1987, Milligan filed a petition for post-conviction relief which was denied after an evidentiary hearing, and this court dismissed Milligan's appeal from the denial.[3]

Milligan filed a second post-conviction petition, seeking habeas relief, in December 1992 and an amended habeas petition in May 1993. In May 1994, the district court dismissed the petition on procedural grounds without conducting an evidentiary hearing. On appeal, this court reversed because it could not determine from the existing record whether Milligan had made credible allegations that Houston's testimony was false and coerced, that Houston and Hale claimed that Milligan was not present at the murder, that the State withheld exculpatory evidence, and that new case law excused Milligan's failure to raise claims previously. We therefore remanded for an evidentiary hearing.[4] On remand, the district court held a three-day evidentiary hearing; it again dismissed Milligan's petition as procedurally barred.

Procedural default

NRS 34.726(1) provides that absent a showing of good cause for delay, a petition challenging the validity of a judgment or sentence must be filed within one year after this court issues its remittitur on direct appeal. Good cause requires the petitioner to demonstrate that the delay was not his fault and that dismissal of the petition will unduly prejudice

---

[3]Milligan v. State, Docket No. 21504 (Order Dismissing Appeal, June 17, 1991).

[4]Milligan v. State, Docket No. 25748 (Order of Remand, July 23, 1996).

him.[5] NRS 34.810(2) provides that a second or successive petition must be dismissed if it fails to allege new grounds for relief and the prior determination was on the merits or, if new grounds are alleged, the failure to assert those grounds in a prior petition constituted an abuse of the writ. NRS 34.810(3) requires a petitioner to plead and prove specific facts that demonstrate good cause for failing to present a claim before or presenting a claim again and actual prejudice.

Actual prejudice requires a petitioner to demonstrate "'not merely that the errors [asserted] created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'"[6] To show good cause, a petitioner must demonstrate that an impediment external to the defense prevented him from complying with procedural default rules.[7]

Additionally, 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.[8]

Milligan urges this court to review his allegations of constitutional error regardless of any procedural bars. However, absent a

---

[5]NRS 34.726(1).

[6]Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)).

[7]Crump v. Warden, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997).

[8]Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

fundamental miscarriage of justice, this court does not have discretion to disregard the statutory procedural bars when they are applicable.[9]

Ineffective assistance of counsel can in some cases constitute cause to overcome procedural default.[10] However, in post-conviction proceedings there is no right to effective assistance of counsel under either the Sixth Amendment or the Nevada Constitution.[11] A post-conviction petitioner does have a right to effective assistance of counsel when a statute requires appointment of counsel for the petitioner.[12] But when appointment of counsel is discretionary, the petitioner has no right to effective assistance by that counsel.[13] Milligan had various counsel during the course of his first proceedings seeking post-conviction relief. The record before the court does not reveal whether these counsel were appointed or, if so, when. Until October 1, 1987, NRS 177.345(1) required a court to appoint counsel for an indigent petitioner within ten days of the filing of a petition for post-conviction relief.[14] Thus, it may be that

---

[9]See Pellegrini v. State, 117 Nev. ___, ___, 34 P.3d 519, 537-38 (2001).

[10]Crump, 113 Nev. at 304, 934 P.2d at 253 (citing Coleman v. Thompson, 501 U.S. 722, 753-54 (1991)).

[11]McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 257-58 (1996).

[12]Id. at 165 n.5, 912 P.2d at 258 n.5; Crump, 113 Nev. at 303, 934 P.2d at 253.

[13]Bejarano v. Warden, 112 Nev. 1466, 1470 & n.1, 929 P.2d 922, 925 n.1 (1996).

[14]See 1987 Nev. Stat., ch. 539, § 42, at 1230; NRS 218.530.

Milligan had mandatory appointed counsel pursuant to this statute and sc the right to effective assistance by that counsel.

The parties have not addressed this issue, and Milligan argues only that his trial counsel, not his first post-conviction counsel, were ineffective. In this case, a claim of ineffective trial counsel does not constitute cause to overcome procedural default because that claim should have been raised in the first post-conviction petition. Further, Milligan does not raise any claims now--including his allegations that the prosecution unconstitutionally withheld information--that could not have been raised in his first post-conviction petition. Thus, as discussed more fully below, Milligan has failed to demonstrate good cause, and his claims are procedurally barred.

Nevertheless, if Milligan showed that important claims were never presented to the courts, or were inadequately presented, this court could overlook the lack of good cause if the prejudice from failing to consider the claims amounted to a "fundamental miscarriage of justice."[15] "We have recognized that this standard can be met where the petitioner makes a colorable showing he is actually innocent of the crime or is ineligible for the death penalty."[16] Again as discussed below, we conclude that none of Milligan's claims implicate this standard.

---

[15]See Pellegrini, 117 Nev. at ___, 34 P.3d at 537.

[16]Id.

Claims involving Brady v. Maryland

Milligan's primary contention is that the prosecution violated Brady v. Maryland[17] by failing to disclose exculpatory information about a number of matters, including that its main witness, Houston, lied. The record largely belies these claims and shows that Milligan and his various counsel either knew or should have known about these matters. These claims therefore fail to constitute cause or prejudice to overcome the procedural bars.

Determining whether the State adequately disclosed information under Brady involves both factual and legal questions and requires de novo review by this court.[18] Brady and its progeny require a prosecutor to disclose evidence favorable to the defense if the evidence is material either to guilt or to punishment.[19] Evidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed.[20]

Milligan first contends that the prosecution concealed that immunity was granted to Houston in exchange for his testimony. The record belies this contention.

Before trial, Milligan moved for disclosure of any grants of immunity, and in January 1981 a hearing was held on the motion. The

---

[17]373 U.S. 83 (1963).

[18]Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000).

[19]See Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996).

[20]Id. at 619, 918 P.2d at 692.

prosecutor stated that aside from "Little Kathy" Orfield (the sixteen-year old daughter of defendant Katherine Orfield), "There's been no formal immunity granted to any other witness." But immunity had been granted to Houston more than two months earlier at an ex parte hearing without notice to the defendants or their counsel. Based on these facts, Milligan asserts that the prosecutor lied and the jury was not informed that Houston's testimony came in exchange for immunity. We conclude that this assertion is frivolous.

To begin with, the trial court said nothing when the prosecutor stated that immunity had been granted only to Little Kathy. The court's silence indicates either that it had forgotten the grant to Houston, condoned concealing the information, or knew that Milligan had already learned about Houston's immunity. The record shows the last to be true. When Houston testified during the trial the prosecutor asked him if he had "been given a grant of immunity in exchange for [his] testimony," and Houston said no. (At all the proceedings related to this case, Houston spoke Spanish and communicated through an interpreter.) The prosecutor continued.

> Q Do you understand what immunity is?
>
> A Yes.
>
> Q Do you remember a proceeding several months ago in this courtroom before this judge?
>
> A Yes.
>
> Q At that time do you remember anything being said to you as to whether or not you would be prosecuted as a result of those events?
>
> A They told me I wasn't being accused of any crime.

During closing argument, Milligan's counsel said: "We know [Houston] was the first one who spoke, that he was granted immunity . . . ." Counsel also asked the jury, "Why do you offer immunity to a man who is not an accomplice?" And the trial court, prosecutor, and trial counsel even discussed in front of the jury the type of immunity that Houston had received.

In his reply brief, Milligan dismisses trial counsel's express acknowledgement of the grant of immunity, declaring it "well established that the arguments of counsel are not evidence." This reasoning is specious. An attorney's arguments are not evidence at trial for determining guilt, but in post-conviction proceedings they are certainly evidence for determining what the attorney knew. Milligan also claims that the prosecution did nothing to correct Houston's "false and perjured testimony" that he had not been granted immunity. However, as set forth above, the prosecutor did correct Houston's testimony, to the apparent satisfaction of Milligan's trial counsel, who did not object.

Milligan argues finally that the prosecutor misled the jurors regarding immunity, telling them that Houston's former testimony could be used to prosecute him. This argument has no merit. The record shows that the prosecutor correctly maintained that, pursuant to NRS 178.572(1), Houston would not be prosecuted based on any evidence he provided. The prosecutor told the jury at one point that Houston "was given a grant of immunity after he had testified at the preliminary hearing. That testimony could have been used against him." It is evident that the prosecutor meant that the testimony could have been used before immunity was granted, not after.

Next, Milligan asserts that Houston lied on the stand about the extent of his criminal history and that the prosecution remained willfully ignorant of that history. Milligan claims that Houston revealed more of his criminal history at the subsequent trials of Milligan's codefendants and that the prosecution obtained more of that history, including aliases used by Houston, that should have been provided to Milligan. This issue also lacks merit.

Questioned by the prosecutor at the joint preliminary hearing in this case, Houston testified that he received a sentence of one year and eight months for a robbery in Mexico. He said that he was arrested other times in Mexico, including for knifing a detective, which carried a sentence of five days. He also said that he received a 32-day sentence for a robbery in San Antonio, Texas. Under cross-examination by one defense counsel, Houston said he was convicted in Mexico for three robberies and a knifing. During cross-examination by another, he said that in Mexico he had been convicted of stealing a pig and of breaking into a car and stealing books and jewels; he received a sentence of three and a half years for the latter crime. At Milligan's trial, during direct examination Houston testified that in Mexico he was convicted of stealing a pig and of stabbing a detective. On cross-examination, trial counsel asked if Houston had "been in trouble before?" He answered, "Yes. I have been in many problems." Counsel asked if he had been "in jail in Mexico one time," if he was "once arrested for stabbing a detective," and if he "went to jail in San Antonio, Texas, for stealing?" Houston answered yes to all three questions.

Based on Houston's preliminary hearing testimony, Milligan asserts that Houston lied at trial during the case in chief and the prosecutor "did nothing to elicit the truth." This assertion is

unpersuasive. The record shows that Houston answered every question posed by either attorney about his criminal history. The prosecutor's questioning was rather haphazard and incomplete (as was trial counsel's) and did not elicit all the convictions alluded to at the preliminary hearing, but there is no indication that the prosecutor withheld any material information from the defense or the jury. Nor was it his duty to impeach his own witness.

Milligan also points to Houston's testimony at the codefendants' trials. At Bonnette's trial, the prosecutor elicited that in Mexico Houston had been convicted of stealing "a pig or two," stealing a fan, breaking into a car where some books were "lost," and a knifing. He admitted being accused of rape but said he had not been convicted. He had also been convicted in the United States of stealing a pair of pants and some shirts. Bonnette's defense counsel asked Houston whether he had been convicted of rape on April 23, 1979, and confronted him with a document. Houston maintained that he had not been convicted. At the trial of Hale and Orfield, on direct examination Houston admitted to what appear to be basically the same crimes elicited by the prosecution at Bonnette's trial. Defense counsel for Hale established that Houston had been charged with rape in Mexico in 1979, and Houston admitted that police had talked to him "for fracturing someone's jaw" and that he had been accused of stealing some jewelry.

The record also includes documents showing that the prosecution sought and obtained information on Houston's background. The earliest document is dated April 1981, about three months after Milligan's conviction. Milligan concludes that the prosecutor waited to obtain any information so that Milligan could not use it to impeach

Houston. Even assuming that the prosecutor did not seek information on Houston until after Milligan's trial, we do not discern any misconduct. Any relevant information was obviously intended for use at the subsequent trials of the other defendants, and it seems unlikely the prosecutor expected to keep Milligan from learning of any significant new impeachment evidence. Nor does Milligan point to any significant evidence that surfaced after his trial. He implies that the testimony at the subsequent trials and the information in the later documents revealed much more about Houston's criminal past. We disagree. Houston's basic criminal record was revealed at Milligan's preliminary hearing. The accusation of rape was probably the only development of some significance, but Houston consistently denied that he had been convicted of rape, and Milligan provides no proof of a conviction.[21] More important, he does not show that the State had such proof.

Milligan also cites a letter sent to the prosecutor by a prison inmate who claimed that Houston had committed armed robberies with him in northern Nevada before the instant murder. The inmate suggested, "Maybe we can help each other." The prosecutor received this letter almost a year after Milligan's conviction and did not consider it credible. The prosecutor testified at the evidentiary hearing[22] that he did not remember if he disclosed it to defense counsel. Milligan says that this

---

[21]A witness can generally be impeached only with an appropriate felony conviction, not mere arrest. NRS 50.095; Sheriff v. Hawkins, 104 Nev. 70, 75 & n.5, 752 P.2d 769, 773 & n.5 (1988).

[22]Unless otherwise noted, references to the evidentiary hearing are to the hearing that was held on Milligan's instant post-conviction petition in 1998.

letter was important evidence to impeach Houston. Even if the prosecutor did not disclose the letter, Milligan has failed to demonstrate that the inmate's claim was credible and therefore material under Brady.

The jury at Milligan's trial was informed that Houston was an ex-felon. The prosecutor did not keep information about Houston's criminal history from Milligan, and Milligan's trial counsel were free to investigate this matter and cross-examine Houston about it. No Brady violation occurred.

Milligan next asserts that the defense was not informed that while Houston was held as a material witness he received inducements for his testimony. We conclude that Houston's treatment was appropriate and largely known to the defense.

Houston was held for months in the Humboldt County jail as a material witness in the trials of Milligan and his codefendants. At the ex parte hearing regarding immunity, the prosecutor informed the trial court that because Houston was "a guest rather than a prisoner, we're attempting to make his stay as comfortable as possible." He was being provided with Spanish books, newspapers, and magazines. The prosecutor said, "I think it is routine practice that many of the law enforcement officers, including myself, have donated a small amount of funds to make sure he has cigarettes and Coca-Cola money and things of that sort." The court agreed with this treatment.

At the evidentiary hearing, the prosecutor testified that Houston's treatment was not a secret and he assumed that the defense knew about it. Houston had "trusty" status at the jail, allowing him to do things such as buy commissary items, leave the cell, go to the recreation yard, and work. Milligan's trial counsel testified that he learned soon

after the trial through news reports that Houston had received special privileges and money. Trial counsel also stated, "We knew that [Houston] had some special privileges down at the jail, because he was not being held in a--he would be roaming around down there when you went down to the jail to see your clients."

The record shows that the defense was aware that Houston had trusty status and was not being held as a typical jail inmate. This status was appropriate since Houston was a material witness, not a defendant. It appears that the defense did not know specifically that money was given to Houston. This information was relevant to impeachment, and the prosecution probably should have affirmatively given it to the defense. However, Brady was not offended because it appears that the defense could have obtained the information itself with reasonable diligence.[23] Regardless, the information would not have made a material difference because the amounts of money were small and simply allowed Houston to buy commissary items.

Milligan claims next that the prosecution did not timely inform him of statements made by codefendant Orfield alleging that Houston had murdered the victim. The record belies this claim.

The record includes three documents reporting statements by Orfield implicating Houston in the murder. The defense indisputably received one of these documents. This occurred after trial had commenced, and Milligan declares in conclusory fashion that he was therefore precluded "from using such evidence effectively or even at all."

---

[23]See Rippo v. State, 113 Nev. 1239, 1257, 946 P.2d 1017, 1028 (1997) ("[A] Brady violation does not result if the defendant, exercising reasonable diligence, could have obtained the information.").

He also declares that "[t]he evidence is quite clear" that he never received the other two documents. We conclude that the evidence indicates the contrary. At the evidentiary hearing, the prosecutor testified that he maintained an open file policy and believed that the information had been passed on to the defense. And Milligan's trial counsel testified that he learned before trial that Orfield had implicated Houston, but Orfield's attorney would not allow her to be interviewed. (At her own eventual trial, Orfield testified that she did not know who attacked the victim.) The record shows that Milligan was informed in a timely way that Orfield had implicated Houston in the murder.

Next, Milligan asserts a Brady violation based on allegations made in a civil complaint filed in federal court on Houston's behalf after Milligan's trial. Houston sued Humboldt County, the prosecutor, a deputy sheriff, and others, claiming that his thirteen-month detention as a material witness violated his rights. He also alleged among other things that the deputy sheriff had subjected him to two mock executions. He eventually settled the suit for $80,000. Milligan contends that this information could have been used to impeach Houston as to the voluntariness and veracity of his testimony. This contention establishes no grounds for relief: Milligan fails to demonstrate how the prosecution violated Brady. The complaint was filed eleven months after Milligan's trial, so the prosecution had no knowledge of it when Milligan was tried. Nor did the civil defendants admit any liability in settling the suit.

All of Milligan's claims of Brady violations fail to constitute cause or prejudice to overcome statutory procedural bars. They also reveal no fundamental miscarriage of justice.

Milligan also claims that the cumulative effect of all the alleged Brady violations warrants relief. Likewise, he complains of prosecutorial misconduct, relying on the same alleged violations. Given the lack of merit of the underlying Brady issues, these claims also fail to show cause or prejudice.

Other barred claims

Milligan argues that his trial counsel were ineffective in conceding his guilt and in failing to conduct an adequate investigation. But he does not provide good cause for not raising these issues in his first post-conviction petition, nor does he demonstrate that failure to consider these issues would result in a fundamental miscarriage of justice. Milligan cites among other cases our decision in Jones v. State for the proposition that a counsel's concession of a client's guilt requires reversal.[24] Jones is not on point because it involved counsel's concession of guilt without the client's approval and despite the client's testimonial disavowal of guilt.[25] Here Milligan presented no evidence that trial counsel's concession that Milligan committed second-degree murder was made without his approval, and the record repels such a claim. Milligan also complains that his trial counsel did not investigate Houston's background, the special treatment Houston received from the State, or the condition of Houston's clothing. Even if trial counsel should have investigated these matters, however, the evidence in question does not

---

[24]110 Nev. 730, 877 P.2d 1052 (1994).

[25]See id. at 737-39, 877 P.2d at 1056-57.

indicate that Milligan is actually innocent or ineligible for the death penalty.

Two other claims are procedurally barred because they have already been decided by this court. First, citing Brady, Milligan claims that the State unconstitutionally withheld evidence regarding blood on Houston's shoe and wetness and stains on his clothes when he was taken into custody. In his first post-conviction proceeding, Milligan claimed that his trial counsel were ineffective in not presenting this same evidence to the jury, and this court concluded that despite any errors by counsel there was no reasonable probability of a different result. Raising this issue now as a Brady claim avoids neither the procedural bars nor the conclusion that this evidence does not create a reasonable probability of a different result. Second, Milligan claims that the prosecutor impermissibly vouched for the credibility of Houston. But this issue was already raised unsuccessfully in Milligan's brief to this court on direct appeal as part of his unsuccessful claim of prosecutorial misconduct.[26]

Alleged errors during the evidentiary hearing

Finally, Milligan alleges that the district court committed two errors in conducting the evidentiary hearing on his instant petition.

First, Milligan called as a witness the lawyer that prosecuted Houston's civil complaint in federal court against Humboldt County and other defendants. Regarding the allegation that Deputy Sheriff Donald Fox subjected Houston to two mock executions, the witness stated, "I think Fox is the guy that . . . held the gun to Houston's head in the jail on at

[26]Milligan, 101 Nev. at 639, 708 P.2d at 296.

least one, maybe more than one, occasion--" The State objected, arguing that the witness lacked personal knowledge. The witness stated, "Mr. Fox admitted it to me." The State then objected on the basis of hearsay, and the witness responded that it was not hearsay but an admission against interest. The district court sustained the objection.

Milligan now claims that the district court erred because the statement should have been admitted as a statement against penal interest under NRS 51.345. Milligan has not preserved this issue for appeal: although Milligan's witness raised the issue, Milligan's own counsel said nothing when the court sustained the State's objection.[27] Nor was there any error.[28] NRS 51.345(1) provides in part that a statement which, when made,

> tended to subject the declarant to civil or criminal liability . . . is not inadmissible under the hearsay rule if the declarant is unavailable as a witness. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Under this statute, Milligan had to show that the declarant was unavailable and had to establish corroborating circumstances clearly indicating the trustworthiness of the statement. He did neither.

---

[27]See Rippo, 113 Nev. at 1259, 946 P.2d at 1030 (stating that failure to object below generally precludes appellate consideration of an issue).

[28]See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

Second, Milligan contends that the district court erred when it refused to grant his motion to continue the evidentiary hearing. During the hearing, Milligan asked for a continuance, informing the court that his former codefendant Hale was unavailable to testify because he was in custody in Virginia on robbery and DUI charges. Milligan expected Hale to testify that Milligan was not present at the murder and to identify a letter in which Houston purportedly incriminated himself in the murder. Milligan's attorney admitted that earlier that year Hale was available and had refused to testify at a scheduled deposition in this case. In its written order denying the motion, the district court also noted that when Milligan first sought post-conviction relief in 1987, Hale alleged in an affidavit that Milligan was not present at the murder, Milligan's attorneys agreed to strike the affidavit from the record, and the attorneys decided not to call Hale to testify. The court ruled that Milligan had shown no good cause for failing to present Hale's testimony before.

The record now before us supports the district court's ruling. It includes affidavits by Hale in 1987 and 1988 that exculpated Milligan and inculpated Houston and Bonnette. At the 1988 evidentiary hearing on Milligan's first post-conviction petition, the parties agreed to strike Hale's affidavit. One of Milligan's attorneys explained at the hearing that Hale had given them an "exculpatory" yet "equivocal" statement, but after exploring what Hale meant, they found they "could not use his testimony." Thus the court correctly found no cause for not raising this issue earlier.

In addition to the procedural bar, we have cause to conclude that the district court acted reasonably in denying the motion to continue. Granting or denying a motion for a continuance is within the sound

discretion of the district court.[29] Where the purpose of the motion is t procure important witnesses and the delay is not the particular fault o counsel or the party, denying a reasonable continuance may be an abuse o discretion.[30] Here, the delay was not Milligan's fault, but the requested continuance was not reasonable because Milligan could not provide either a date by which Hale would be available or assurance that he would testify if available. Milligan has also not shown that Hale was an important witness, given the decision of earlier counsel not to use his testimony. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Maupin, C.J.

Agosti, J.

Leavitt, J.

cc: Hon. Dan L. Papez, District Judge
Roeser & Roeser
Attorney General/Carson City
White Pine County District Attorney
White Pine County Clerk

---

[29]Mulder v. State, 116 Nev. 1, 9, 992 P.2d 845, 850 (2000).

[30]Id. at 9-10, 992 P.2d at 850.

EXHIBIT 115

EXHIBIT 115

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD ALLAN MORAN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 28188

FILED

MAR 21 1996

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus.[1] The district court dismissed appellant's petition solely on procedural grounds.

On August 2, 1984, at approximately 4:30 a.m., appellant Richard Allan Moran and a companion entered the Red Pearl Saloon. Two other persons were in the saloon: a barmaid and a customer. A short time later, without warning or provocation, Moran shot at point blank range both the barmaid and the customer. Each victim was hit with multiple bullets as Moran emptied the clip of his eight shot .45 caliber automatic pistol. Moran then robbed the victims and the saloon. By his own admission, he had to take two trips to his car in order to transport all of the items he stole. He then attempted to burn the saloon down to destroy evidence.

Nine days later, on August 11, 1984, Moran went to the apartment of his former spouse. Without giving her any warning, he fired seven shots from the same pistol used in the saloon massacre. Several of these shots hit Moran's former spouse, killing her. Moran then shot himself with the last bullet in the

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal. We have decided this appeal on the record and on briefs that were submitted by the parties on an expedited basis. See NRAP 4(c). We deny as moot appellant's motion to expedite the transmission of the record, briefing, oral argument, and disposition of this appeal.

pistol. When the wound he inflicted proved to be non-fatal, he attempted to cut his wrists to finish the suicide attempt.

Moran confessed to the killings several times. Although the details of the confessions were not always entirely consistent, there is no doubt concerning any of the relevant facts of the slayings.

Moran was charged with two counts of first degree murder with use of a deadly weapon, two counts of robbery with use of a deadly weapon and one count of first degree arson with respect to the saloon incident. In a separate case, Moran was charged with one count of first degree murder with use of a deadly weapon in connection with the slaying of his former spouse. The cases were consolidated for all purposes in the district court and in all subsequent proceedings in this court.

Although counsel was appointed to represent Moran, Moran waived his preliminary hearing against the advice of counsel, and proceeded to district court. In district court, Moran insisted on representing himself, and refused even the appointment of standby counsel. The district court conducted a very thorough canvass of Moran before allowing him to exercise his absolute right to represent himself. See Faretta v. California, 422 U.S. 806 (1975). Moran stated that he wanted to represent himself because "I don't want [counsel] to present any mitigating evidence. I don't want this presented, and they have to -- they feel they have to." In response to further questioning by the district court, Moran indicated that "he did not want to put up any defense." Moran acknowledged that he understood that he would not be able to argue in post-conviction proceedings that his attorneys were ineffective in representing him.

Following a very thorough canvass, Moran pleaded guilty to all of the charges against him. A sentencing hearing was conducted before a three judge panel. See NRS 175.558. Moran

presented no evidence or argument of any kind on his own behalf. The panel sentenced Moran to death with respect to each of the three killings. In a separate proceeding, the district court sentenced Moran to a total of seventy-five years in the Nevada State Prison for the robberies and arson.

On appeal, this court affirmed all of Moran's judgments of conviction and the death penalties with respect to the two killings in the saloon. We reversed the death penalty with regard to the killing of the former spouse, however, on the ground that the aggravating circumstances relied on by the panel could not be sustained. We instead imposed a sentence of life in prison without the possibility of parole. Moran v. State, 103 Nev. 138, 734 P.2d 712 (1987).

Moran petitioned the district court for post-conviction relief. The district court denied the petition, and Moran appealed. We dismissed Moran's appeal on March 15, 1989. Moran v. Warden, Docket No. 19161 (Order Dismissing Appeal, March 15, 1989). The United States Supreme Court denied Moran's petition for a writ of certiorari. Moran v. Whitley, 493 U.S. 874 (1989).

Moran then petitioned the federal district court for a writ of habeas corpus. Moran's petition was unsuccessful at the federal district court level, and Moran appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit granted Moran some relief, see Moran v. Godinez, 972 F.2d 263 (9th Cir. 1992), but the determination of the Ninth Circuit was reversed by the United States Supreme Court. Godinez v. Moran, 509 U.S. 389 (1993). On remand, the Ninth Circuit affirmed the denial of Moran's petition for a writ of habeas corpus. Moran v. Godinez, 57 F.3d 690 (1995). Moran's petition to the United State's Supreme Court for a writ of certiorari was denied. Moran v. McDaniel, 116 S. Ct. 479, ___ U.S. ___ (November 13, 1995).

Thereafter, on December 8, 1995, almost eleven years after the entry of the judgments of conviction and more than six years after this court finally resolved his first state court petition for post-conviction relief, Moran filed in state district court a post-conviction petition for a writ of habeas corpus. The state moved to dismiss the petition as procedurally barred, and Moran opposed the motion. The state filed opposition to the petition for a writ of habeas corpus, again asserting procedural reasons for dismissing the petition, and Moran filed supplemental opposition to the motion to dismiss. The district court dismissed the petition as untimely, as an abuse of the writ and as procedurally barred pursuant to statutory provisions. This timely appeal followed.

Initially, we note that in his petition in the district court, and in this court, appellant does not raise any question concerning the facts of the crimes committed. There is no doubt that the murders were committed, and that they were committed by appellant. Appellant raises general challenges to this state's death penalty scheme and technical challenges regarding the validity of his judgments of conviction. All of these claims are procedurally barred.

Further, based on our complete review of the record and the briefs that have been submitted, we conclude, as explained below, that the district court properly dismissed appellant's petition as procedurally barred without resolving the merits of any of his claims. We also dispose of appellant's claims on procedural grounds; any discussion of the merits of any of appellant's claims in this case is strictly for the purpose of demonstrating that appellant cannot overcome his procedural defaults by a showing of cause and prejudice.

Appellant contended below, and contends in this court, that procedural bars cannot be applied to his present petition

consistently with the Equal Protection and Due Process Clauses of the United States and Nevada Constitutions because this court has not consistently applied procedural bars in past cases. We emphatically reject this assertion.

Arguments regarding the consistent or inconsistent application of a procedural bar are generally directed at the federal courts, and generally concern the question of whether a federal court will be precluded from reviewing a federal question after a state court has refused to address the federal question based on a valid state procedural bar. McKenna v. McDaniel, 65 F.3d 1483, 1488 (9th Cir. 1995); Kills on Top v. State, 901 P.2d 1388, 1386 (Mont. 1995). None of the general equal protection cases cited by appellant directly supports appellant's contention that the unequal application of a rule of procedural default may itself constitute an equal protection violation. Further, the United State's Supreme Court has recognized that absolute consistency in the application of procedural defaults is not necessary to establish that a state procedural bar is an adequate and independent state ground precluding collateral federal review. Dugger v. Adams 489 U.S. 401, 411 n.6 (1989). In any event, contrary to appellant's assertions,[2] we note that this court has consistently applied post-conviction procedural bars. Thus, if applicable, those bars may be applied to the claims raised in appellant's most recent petition.

---

[2]See McKenna v. McDaniel, 65 F.3d 1483, 1488 (9th Cir. 1995) (in a case involving the doctrine regarding federal habeas review of questions procedurally barred in state court, the Ninth Circuit stated that the failure to raise constitutional claims on direct appeal in Nevada does not necessarily bar consideration of those claims on collateral review) (citing Pertgen v. State, 110 Nev. 554, 560, 875 P.2d 361, 364 (1994)). In Pertgen and other cases, the proposition is clear that a petitioner must establish good cause and actual prejudice to overcome a post-conviction procedural bar. See, e.g., Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

As a final initial matter, we note that appellant's opening brief is entirely directed at generic arguments regarding whether procedural bars should have been applied to this case at all. Because appellant cannot prevail in this court unless he properly pleaded in his petition in the district court some claim which is either not procedurally barred or with regard to which the procedural bar can be overcome by a proper showing of cause and prejudice, we conclude that it would be more effective to address the claims raised in the petition than to attempt to address the general arguments contained in the brief. In doing so, we will necessarily resolve all of the true issues contained in the brief.

NRS 34.726 provides that a post-conviction petition for a writ of habeas corpus must be filed within one year of the final determination of a direct appeal unless good cause can be shown for the delay. Good cause is defined as a showing by the petitioner that the delay is not the fault of the petitioner and that the petitioner will suffer undue prejudice if the petition is dismissed as untimely. NRS 34.800(1)(a) provides that a post-conviction petition for a writ of habeas corpus may be dismissed if delay in the filing of the petition has prejudiced the state in its ability to respond to the petition, unless the petition is based on grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred. Similarly, NRS 34.800(2) provides that such a petition may be dismissed if delay has prejudiced the state in its ability to retry the petitioner unless the petitioner can demonstrate that a miscarriage of justice has occurred. A presumption of prejudice arises if a period of five years has elapsed between the final decision of the direct appeal and the filing of the post-conviction petition. NRS 34.800(2).

The instant petition was filed more than seven years after the direct appeal was completely resolved, and more than five years after this court dismissed appellant's appeal from the denial of his first petition for post-conviction relief. Appellant has not specifically demonstrated that the delay in raising the issues in this petition was not his fault, nor can he demonstrate prejudice with respect to any of his claims. Finally, appellant has made no attempt to demonstrate that the state has not been prejudiced in its ability to respond to this petition and in its ability to retry petitioner. Thus, appellant's entire petition is properly procedurally barred. We consider this procedural bar to be an independent basis for affirming in its entirety the dismissal of appellant's petition. Nevertheless, out of an abundance of caution, we will address the specific issues raised in appellant's petition to demonstrate that each issue is specifically procedurally barred.

In his petition below, appellant contended that his guilty plea was invalid because it was involuntarily entered. In support of this contention, appellant argued that he should have been informed that he could not be convicted of first degree murder on a felony murder theory if he formed the intent to rob the victims only after he committed the murders. In our order denying appellant's first petition for post-conviction relief, we determined that appellant's plea was voluntarily entered after an appropriate plea canvass. Moran v. Warden, Docket No. 19161 (Order Dismissing Appeal, March 15, 1989). That determination is the law of this case. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975) (the law of the first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same). Nevertheless, appellant argues that this court did not decide the precise issue raised in this contention when it determined that appellant's plea was voluntarily entered. Thus, appellant asserts

that our prior decision is not the law of this case with respect to the narrow issue presented. We disagree. "The 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." Id. at 316, 535 P.2d at 799.

Even if we were to consider this a new issue raised for the first time in this proceeding, appellant cannot avoid the procedural bar that applies to new issues that could have been, but were not, raised in a previous appeal or post-conviction proceeding. NRS 34.810(2)&(3) (petitioner must demonstrate good cause and prejudice for raising a new issue in a successive post-conviction petition). As cause for not having raised this issue in his prior petition, appellant asserts only that he is a layman at law and that he did not waive his right to have prior counsel raise every conceivable issue on his behalf. That appellant is a layman is not cause, Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988), and appellant has no right to have counsel raise every conceivable issue, Jones v. Barnes, 463 U.S. 745 (1983).

Even assuming appellant had some right to have counsel raise this issue in the first post-conviction proceeding, appellant cannot demonstrate cause for his failure to have raised the issue in a proceeding filed after his first petition was finally resolved, but before more than five additional years had elapsed. Pursuit of habeas corpus relief in federal court does not constitute good cause for delay in filing a state court petition for post-conviction relief. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989).[3] Finally, as discussed more fully

---

[3]We recognize that appellant was represented by the same attorney during the entire period he was pursuing his federal remedies. Nevertheless, the record reveals that other counsel also represented appellant during this period, and we are unwilling to conclude that a defendant can neglect to raise issues (continued...)

below, appellant cannot demonstrate prejudice with respect to this claim, because the claim lacks merit.

In support of the argument that appellant could not have been properly convicted of first degree murder, appellant asserts that his guilty plea was based entirely on a theory of felony murder, i.e., that the murders were committed while appellant was engaged in the commission of a robbery. NRS 200.033(4). Appellant asserts further that the record demonstrates that he did not form the intent to rob the victims until after the victims were dead. Appellant argues that the sentencing panel removed the only basis for the conviction of first degree murder when it failed to find as an aggravating circumstance that the murders were committed during the commission of a robbery, and found that the murders were random and motiveless. Appellant asserts that the sentencing panel in essence acquitted him of having committed the murders during the commission of a robbery. We disagree.

First, evidence in this case clearly exists to support a finding that the saleon murders were deliberate and premeditated. Appellant agreed to plead guilty without any negotiations, and without specifying any basis for the finding of first degree murder. In canvassing appellant, however, the district court seemed to rely solely on the felony murder theory for accepting appellant's guilty plea. Thus, it may fairly be argued that appellant's plea rests on a theory that he committed the murders while engaged in the commission of a robbery.

We note, however, that appellant admitted at the plea canvass that he committed the murders while engaged in the

---

[3](...continued)
for such a long period of time simply because he or she is represented by counsel who allegedly has a conflict of interest. Other defendants have petitioned for relief in proper person even when represented by counsel, and the prejudice to the state is substantial when a delay of many years occurs before issues are raised. We conclude that appellant cannot demonstrate cause for the unreasonable delay in this case.

commission of a robbery. Evidence in the record did not establish when appellant formed his intent to rob the victims. Appellant asserted to one police officer that he formed the intent after the murders were committed. However, during his tape recorded confession, he asserted that he formed the intent to rob before committing the murders. The question of guilt was not before the sentencing panel when it determined not to rely on the pleaded aggravating factor that the murders were committed during the commission of a robbery. In fact, the record reveals that the sentencing court was concerned whether both aggravating factors, that the crime was committed during the commission of a robbery and that the murders were random and motiveless, could be found in the same case. Thus, the panel elected to find the random and motiveless factor, and not to find the factor that the crime was committed during the commission of a robbery. In so doing, the panel noted that appellant indicated that he did not know why he killed his victims, and that he had not formed the intent to rob when he entered the saloon. The panel did not suggest that appellant did not form the intent to rob the victims before killing them, nor did the panel find that appellant did not commit the murders during the course of a robbery. Indeed, appellant pleaded guilty to and was sentenced for the robbery. The panel simply declined to find and weigh as an aggravating factor that the crime was committed during the commission of a robbery. The panel was not obligated to find all proposed aggravating circumstances, even if those factors would have been supported by the evidence. Finally, the sentencing panel expressed no opinion regarding, and its decision had no effect upon, the determination that appellant was guilty of first degree murder, as he solemnly declared at the time of entry of his guilty plea. Thus, even if appellant could establish cause for having raised this claim in

such a tardy fashion, appellant cannot demonstrate error or prejudice sufficient to excuse his procedural default.

Appellant next contended that the three judge panel was unconstitutional because appellant had no opportunity to voir dire the panel members, because the Nevada Constitution does not provide for a three judge district court, the panels are unfairly biased in favor of returning a death penalty and there are no safeguards for ensuring that the panels are impartial. This claim could have been presented in appellant's direct appeal. Appellant has not established cause for not having raised this issue in his direct appeal. Further, this court has rejected similar challenges to three judge panels. See Paine v. State, 110 Nev. 609, 877 P.2d 1025 (1994) (and cases cited therein). Although Moran's arguments are not exactly the same as the arguments previously rejected, they are closely related and rely on the same basic legal analysis. In any event, we are persuaded that Moran cannot demonstrate prejudice sufficient to overcome his procedural default.

Appellant next contended that the aggravating factor that the killings were committed at random and without apparent motive is unconstitutionally vague and irrational, impermissibly shifted the burden of proof, and was not supported by substantial evidence. Appellant also contended that the aggravating factor that the murders were committed by a person who knowingly created a great risk of death to more than one person is unconstitutionally vague and irrational, could not be applied to the facts of this case, and was not supported by substantial evidence. Although appellant has somewhat expanded his attacks on the validity of the aggravating and mitigating factors, we note that we expressly considered the validity of these factors to the facts of this case, and found both to be constitutional and well supported by the record. Moran v. State, 103 Nev. 138, 734 P.2d

712 (1987). Our prior determination is the law of this case, and appellant has not demonstrated any basis for our not applying that doctrine to the specific facts of this case. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

Appellant further contended that the sentencing panel erred in refusing to consider as a mitigating factor petitioner's history of drug and alcohol abuse and his state of cocaine intoxication at the time of the murders. Appellant asserts that a sentencing panel must find as a mitigating circumstance any matter that is presented in mitigation. This issue was raised in appellant's direct appeal, but was not directly addressed by this court in the opinion resolving that appeal. Nevertheless, we noted in that opinion that we had considered all of appellant's remaining contentions, and that we found them to be without merit. Thus, our rejection of this claim is the law of this case. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

Further, the record demonstrates that appellant's assertion that the panel did not consider the mitigating evidence is false; the panel considered the evidence of appellant's intoxication and history of drug abuse, but did not find it to be mitigating in this case. Although the sentencing panel was required to consider all mitigating evidence presented, nothing in state or federal law required the sentencing panel to find the evidence to be a mitigating circumstance. See Parker v. Dugger, 498 U.S. 308 (1991) (death penalty upheld where record demonstrated that the sentencer had considered and weighed proffered mitigating evidence); cf. Wilson v. State, 105 Nev. 110 771 P.2d 583 (1989) (a sentencer cannot refuse to consider relevant mitigating evidence). Indeed, in a case closely analogous to this case, this court specifically rejected the argument that a sentencer must find all presented mitigating evidence to be a mitigating circumstance. Farmer v. State, 101

Nev. 419, 705 P.2d 149 (1985) (sentencing panel was not required to find defendant's mental impairment a mitigating circumstance where the record demonstrated that the panel had considered the evidence and was aware of the law). Thus, appellant cannot demonstrate prejudice sufficient to overcome the doctrine of law of the case.

Appellant next contended that the district court and the prosecution had a duty to present evidence of mitigation on appellant's behalf despite appellant's steadfast refusal to present such evidence on his own behalf. Appellant asserts that more evidence concerning his family history of alcoholism and his history of drug abuse was known to the prosecution, and should have been presented to justify a sentence less than death. Again, this issue could have been presented in appellant's direct appeal, but was not. Further, the panel was aware of appellant's history and of his intoxication; counsel's assertion that had more emphasis been placed on these facts the penalty would not have been imposed is speculation, and is not supported by the record in this case. Appellant steadfastly, knowingly and voluntarily waived his right to present mitigating evidence. He therefore cannot demonstrate prejudice resulting from any supposed obligation of the state to present evidence on his behalf against his expressed will.

Appellant contended that the Nevada Supreme Court had a duty to conduct "an adequate and rational appellate review of the conviction and sentence." Appellant asserts that this court did not conduct such a review, because we did not address in our opinion every issue raised in appellant's direct appeal. Appellant also asserts that this court did not afford sufficient weight to the mitigating evidence when we reviewed the sentence for excessiveness and disproportionality. Appellant asserts that this court has a duty to state reasons for its conclusion that the

sentence was not affected by passion, prejudice or other arbitrary factors, and that it must inform defendants of the method by which it conducts its review. Appellant concludes that the statute requiring proportionality review is unconstitutionally vague.

These bald assertions, which are based on counsel's belief that we reached the wrong decision with regard to the validity of appellant's sentence, are simply false. This court carefully considers all of the evidence presented in the cases before it, especially in death cases. There is no indication in the record that this court did not properly fulfill its constitutional duties in ruling on appellant's direct appeal. The former statute which required proportionality review was not unconstitutionally vague because it did not require this court to inform defendants of the method it employs in reviewing cases.

Further, assuming some basis for counsel's assertions did exist, appellant could have pursued these claims in his prior petition for post-conviction relief or, at the very least, could have asserted these claims in a petition filed in a more timely fashion than the petition filed below.

Petitioner contended that the issues raised in his prior petition for post-conviction relief were wrongly decided by this court. Petitioner incorporated his prior petition into this petition. Our determination that the prior petition lacked merit is the law of this case. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). Petitioner cannot overcome the doctrine of law of the case by simply asserting that prior counsel did not explain the issues clearly enough for this court to understand their merit. We decline to revisit the claims raised in appellant's prior petition.

Appellant contended the death penalty is per se unconstitutional because it constitutes cruel and unusual

punishment. We decline counsel's invitation to engage in a discussion of policies regarding the death penalty.

Finally, appellant contended that his counsel on his direct appeal and in his first petition for post-conviction relief was ineffective for failing to raise all of the issues contained in this petition. Appellant asserts that counsel's ineffectiveness should constitute cause for his failure to have raised these claims before. Appellant notes that he had the same attorney for his direct appeal and for his first post-conviction petition. Appellant asserts that counsel had a conflict of interests because he could not properly raise the claim that he had been ineffective in the direct appeal. Appellant asserts that this conflict of interests amounts to per se ineffective assistance of counsel, and should result in this court's remanding this petition to the district court for a review of the merits of all of appellant's claims.

Initially, we note that most of the issues raised above could and should have been raised in appellant's direct appeal. At the time of appellant's direct appeal, counsel had no conflict of interests. Appellant argues, however, that he was precluded from discovering these issues and raising them in his first post-conviction petition because of counsel's conflict of interests, which appellant asserts was not disclosed. We note that the public defender was originally appointed by the district court to represent appellant in his direct appeal. Without order from this court or any indication of a conflict, private counsel substituted into the appeal, and the same counsel continued to represent appellant throughout his first state and his federal collateral challenges to his judgments of conviction. It appears, therefore, that appellant selected his counsel, was apparently satisfied with his representation, and therefore waived his right to challenge that representation at this late stage of these proceedings.

More importantly, however, to state a claim of ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they caused actual prejudice to the defendant's case. See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984), cert. denied, 471 U.S. 1004 (1985). As has been demonstrated above, appellant cannot demonstrate any prejudice arising from any act or failure to act of his counsel on direct appeal or in his first post-conviction proceeding. Further, appellant cannot justify his failure following the dismissal of his first petition to assert these claims for more than five years. Thus, the conflict alleged by appellant is not sufficient to justify ignoring appellant's procedural defaults.

We conclude that the district court did not err in dismissing petitioner's petition as procedurally barred. Accordingly, we dismiss this appeal. We direct the clerk of this court to issue the remittitur in this case forthwith.

It is so ORDERED.[4]

Steffen, C.J.

Young, J.

Shearing, J.

Rose, J.

---

[4]The Honorable Charles E. Springer, Justice, was unavoidably unavailable, and did not participate in the decision of this appeal.

cc: Hon. Robert J. Miller, Governor
Hon. Myron E. Leavitt, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Stewart L. Bell, District Attorney
James J. Jackson, State Public Defender
E.K. McDaniel, Warden, Ely State Prison
Robert Bayer, Director, Department of Prisons
Loretta Bowman, Clerk

EXHIBIT 116

EXHIBIT 116

IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMY NEUSCHAFER,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
Respondent.

No. 18371

FILED
AUG 19 1987
JUDITH FOUNTAIN
CLERK, SUPREME COURT

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus.

On August 27, 1985, this court affirmed appellant's judgment of conviction and sentence of death for murder in the first degree. See Neuschafer v. State, 101 Nev. 331, 705 P.2d 609 (1985). Thereafter, on October 22, 1985, appellant filed a proper person petition for a writ of habeas corpus in the district court. Appellant requested that the district court stay execution of his sentence pending review of his petition and appoint counsel to represent him in the post-conviction proceedings. The district court denied appellant's request for a stay, declined to hold an evidentiary hearing and dismissed the petition without prejudice. The district court later appointed counsel to assist appellant with pursuing his state post-conviction remedies. This court subsequently affirmed the order dismissing appellant's proper person petition, "without prejudice to counsel filing an amended petition for post-conviction relief and/or habeas corpus with the district court. . . ." See Order Dismissing Appeal No. 16815, filed November 1, 1985.

Nonetheless, rather than pursue any available state post-conviction remedies, appellant elected to file a petition for a writ of habeas corpus in the federal district court with

the assistance of a federal public defender. In the federal habeas corpus proceedings, appellant asserted the same claims which he had raised in his direct appeal to this court. Appellant was eventually denied federal habeas relief. See Neuschafer v. Whitley, 656 F. Supp. 891 (D. Nev. 1987); Neuschafer v. Whitley, 816 F.2d 1390 (9th Cir. 1987) (recounting the protracted history of the federal proceedings). Notably, the Court of Appeals vacated a stay of execution of appellant's sentence when appellant's counsel informed the court that his conscientious review of the record revealed that a writ of certiorari would not be granted by the United States Supreme Court.

Thereafter, on July 21, 1987, respondent filed an application in the Nevada district court requesting the issuance of a warrant of execution. At the district court hearing on this request on August 4, 1987, appellant requested the court to release all of his previous attorneys, including the Nevada State Public Defender, from any further responsibilities in this matter. The district court canvassed appellant, and all counsel who were present at the hearing, and then discharged all previous counsel. The court then scheduled the execution of appellant's sentence for August 20, 1987.

On August 5, 1987, the following day, appellant, acting in proper person, filed the post-conviction petition that is the subject of this appeal. Appellant further requested that an attorney be appointed to represent him in these proceedings. On that same day, the district court entered an order again appointing the State Public Defender to represent appellant in all further proceedings. The public defender then moved the district court to stay execution of appellant's sentence.

On August 10, 1987, respondent requested that the district court dismiss appellant's petition. On August 17, 1987, at the beginning of the hearing on respondent's motion, State Public Defender Terri Roeser informed the court that a possible conflict of interest existed respecting her office's representation of appellant. Specifically, Roeser noted that appellant's petition challenged the effectiveness of his counsel during his trial and his direct appeal, and that her office had initially represented appellant at his trial. Further, Roeser indicated that her office had represented a primary witness against appellant on at least three prior occasions and that investigators in her office had been involved in prior unrelated criminal proceedings involving appellant. Appellant then indicated that Roeser had explained these possible conflicts to him and that he wanted the public defender to withdraw from the case. Deputy Public Defender Michael Powell also noted for the record that he questioned appellant's capacity to make an "intelligent and knowing waiver at this particular time to be represented by counsel." Nonetheless, the district court concluded that appellant had knowingly and understandingly released the State Public Defender from the case. After hearing respondent's arguments on the motion to dismiss, the district court granted the motion and dismissed the petition. This appeal followed.

Preliminarily, we note that the State Public Defender has filed this appeal on appellant's behalf. Respondent contends that the public defender's office is not authorized to pursue this appeal because the district court previously relieved that office of its responsibility in this matter. The affidavit of attorney Powell, which accompanies the notice of appeal, however, asserts that appellant's competency to waive counsel is in question. Further, Powell asserts that pursuant

to NRS 180.060(3)(b), the public defender's office is authorized to prosecute any appeals it considers to be in the interest of justice. Although we have serious doubts concerning the authority of the State Public Defender to pursue this appeal, we nevertheless elect not to decide that issue and to treat the appeal as one properly invoking our jurisdiction given the gravity of appellant's sentence.

In dismissing appellant's petition for post-conviction relief, the district court concluded that the several claims asserted by appellant were conclusory, did not warrant an evidentiary hearing, and did not entitle him to habeas relief. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984) (a defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations that are either unsupported or repelled by the record). Having reviewed the record on appeal, for the reasons expressed below, we have determined that appellant cannot demonstrate error on appeal, that the district court properly denied appellant relief, and that briefing and oral argument are unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).

First, appellant contended below that his conviction is infirm because the district judge that presided over his trial did not recuse himself. Specifically, appellant alleged that the trial judge was formerly the district attorney and was in charge of prosecuting appellant in a previous murder trial. Appellant contended that the district judge was biased or prejudiced against appellant as a result of the judge's supervisory role in prosecuting appellant for the prior murders. Appellant's counsel also added that the judge's secretary worked previously at the district attorney's office, that this secretary's husband testified against appellant

during the penalty phase, that the judge's former deputy district attorney and law associate also testified at the penalty phase, and that the judge's law clerk, who was eventually in charge of the jury, also testified at the penalty phase. We note, however, that none of these facts is relevant to the question of whether the judge was personally biased against appellant. More importantly, we note that the record of appellant's trial in this case belies appellant's allegations of prejudice because in response to the judge's inquiries, appellant personally informed the district judge that he had no objection to the judge presiding over the trial in this case. Moreover, the trial judge expressly denied any bias, and appellant has not identified a single instance where he was unfairly treated or prejudiced by the trial court's rulings. We therefore conclude that appellant was not entitled to an evidentiary hearing on this claim for relief. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984); Doggett v. State, 91 Nev. 768, 542 P.2d 1066 (1975).

Second, appellant argued that the district court erred by dismissing appellant's previous state post-conviction petition without first appointing counsel and conducting an evidentiary hearing. We agree with the district court, however, that these claims are not appropriate grounds for habeas relief. They do not challenge the constitutionality of appellant's conviction or sentence, or otherwise state a cognizable claim for relief under NRS 34.370(4). Moreover, because appellant's previous petition was dismissed without prejudice, appellant obviously was not aggrieved by the lower court's rulings in this regard.

Appellant next contended that the jury instructions at the trial misstated the law and did not include an instruction on lesser included offenses. Appellant, however, failed to

identify which jury instructions incorrectly stated the law. Further, appellant failed to specify any prejudice resulting from the allegedly improper jury instructions. Moreover, the record of appellant's trial reveals that the jury was properly instructed on the elements of first degree murder and the lesser included offense of second degree murder. We therefore conclude that the district court did not err when it refused to conduct an evidentiary hearing on this claim for relief. See Doggett v. State, 91 Nev. 768, 542 P.2d 1066 (1975).

Appellant also complained that his counsel failed to request a change of venue prior to his trial. Appellant emphasized that he was convicted of two previous murders in the same county as the instant offense. Again, however, appellant stated this claim for relief in only vague and conclusory terms; he failed to set forth any specific facts to show that news coverage or other pretrial publicity tainted the jury or otherwise deprived him of a fair trial. See Dobbert v. Florida, 432 U.S. 282 (1977); Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985). Accordingly, the district court properly denied appellant's request for an evidentiary hearing on this claim for relief. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).[1]

Next, appellant contended that the district court improperly failed to excuse a juror during the penalty phase of his trial after it was discovered that a juror knew of appellant's prior murders.[2] As the district court noted, however, appellant did not identify the juror to whom he was

---

[1]We reject counsel's arguments that appellant could not substantiate this claim because he was incarcerated and did not have access to newspaper articles and clippings pertaining to his case.

[2]Specifically, appellant claimed that "one juror had been advised of my prior murders by a citizen of the community but was left on the jury panel."

referring, did not state exactly what facts the juror knew, or state how this alleged error prejudiced him. Appellant's appointed counsel later identified the juror as Ms. Martin and argued that this contention should not be summarily rejected because appellant did not have access to his trial transcript to substantiate his claim. Counsel also stated that this particular juror worked with and was good friends with the mother of one of the teenagers that appellant previously murdered. In a separate proceeding during the penalty phase, the juror testified to her realization, after the guilt phase of the trial had concluded, that she recalled the mother's anguished state regarding her daughter's disappearance and murder. Yet, counsel added, appellant's trial counsel failed to object to the juror remaining on the panel because appellant had already been found guilty and only the penalty phase remained. Arguing that the penalty phase is a critical stage of the proceedings, counsel suggested that the district court should have, sua sponte, excused this juror because she could not have remained impartial or indifferent in light of this personal knowledge.

Our review of the record of appellant's trial indicates that juror Martin was specifically questioned by the trial court. She acknowledged the above facts, and testified that she could fairly weigh the aggravating and mitigating factors presented in the penalty phase. She also noted that she was unaware of the specifics of appellant's prior crimes, the existence of which were properly revealed to all jurors during the penalty phase of the trial. Thus, it appears that appellant was not prejudiced by the continued participation of this juror. We conclude, therefore, that the record repels appellant's claim of error in this regard, and that appellant

was not entitled to an evidentiary hearing on this issue. See Doggett v. State, 91 Nev. 768, 542 P.2d 1066 (1975).

Next, appellant contended that his counsel failed to present any evidence of mitigating factors at the penalty phase of his trial other than the testimony of his attorney. We note, however, that appellant's petition did not specify the particular mitigating factors he felt could have been presented or state how he was prejudiced by counsel's failure. Significantly, the jury relied upon three aggravating circumstances in imposing the death sentence in this case: 1) commission of the murder by a person under sentence of imprisonment; 2) commission of a murder by a person previously convicted of another murder; and 3) commission of a murder involving torture, depravity of mind or mutilation of the victim. See Neuschafer v. State, 101 Nev. 331, 705 P.2d 609 (1985); Neuschafer v. Whitley, 816 F.2d 1390 (9th Cir. 1987). Thus, even assuming the existence of some mitigating factors, we conclude that their admission would not have affected appellant's sentence. See Neuschafer v. Whitley, supra.

Appellant also contended that his conviction is infirm because he was not permitted to call two witnesses from out of state in his own defense. As the district court noted, however, appellant's petition failed to identify the witnesses, the supposed substance of their testimony, or whether their testimony would have changed the result of appellant's trial -- a proposition of the slightest weight given the overwhelming evidence of appellant's guilt. Thus, this claim for relief consisted of mere naked allegations, unsupported by any factual matter, and the district court, therefore, properly refused to conduct an evidentiary hearing on this issue.

Appellant also contended below that his conviction is infirm because the trial court failed to suppress an allegedly

involuntary confession made by appellant. We note, however, that appellant raised this claim in his direct appeal and in prior federal habeas corpus proceedings. The denial of this claim in those previous proceedings is the law of the case for purposes of this appeal, and appellant was therefore precluded from again litigating this claim below. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). Thus, the district court did not err when it refused to hold an evidentiary hearing on this claim for relief.

Finally, appellant contended below that he was denied effective assistance of counsel at his trial and in his direct appeal. Specifically, appellant contended that his counsel was ineffective for "failure to investigate, failure to object to jury instructions, failure to disqualify judge, failure to move for change of venue and failure to present mitigating factors at penalty phase." Appellant further contended that after counsel was appointed, he would be better able to answer. Appellant failed to set forth any facts which would support any of the particulars of his claim of ineffective assistance of counsel. As noted above, appellant failed to specify the nature of the investigation that counsel should have performed, failed to identify any errors in the jury instructions and failed to identify any mitigating circumstances that counsel could have presented to the jury that would have altered the sentence that appellant ultimately received. Further, appellant failed to assert that any of his counsel's alleged deficiencies deprived appellant of a trial in which the result was reliable. Accordingly, we conclude that appellant failed to state a claim of ineffective assistance of counsel entitling him to an evidentiary hearing. See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d

504 (1984), cert. denied, 471 U.S. 1004 (1985); Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

As we previously noted in our opinion affirming appellant's judgment of conviction and death sentence, the evidence of appellant's guilt in this case was overwhelming and the verdict was free from doubt. See Neuschafer v. State, 101 Nev. at 336, 705 P.2d at 612. For the reasons expressed above, we hereby dismiss this appeal and deny appellant's request for a stay of execution. See Chap. 176, 1987 Nev. Stat. ch 539, § 22, at 1220-1221.

It is so ORDERED.

_____, C. J.

_____, J.

_____, J.

cc: Hon. Michael E. Fondi, District Judge
Hon. Brian McKay, Attorney General
Terri Steik Roesser, State Public Defender
Alan Glover, Clerk

EXHIBIT 117

EXHIBIT 117

SUPREME COURT OF THE STATE OF NEV

THOMAS NEVIUS,

Petitioner,

vs.

GEORGE SUMNER, Director, State of Nevada, Department of Prisons,

Respondent.

No. 17059

THOMAS NEVIUS,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR THE COUNTY OF CLARK, STATE OF NEVADA, and the HONORABLE JOSEPH PAVLIKOWSKI, District Judge thereof,

Respondents.

THE STATE OF NEVADA,

Real Party in Interest.

No. 17060

ORDER DISMISSING APPEAL NO. 17059 AND DENYING PETITION NO. 17060

In Docket No. 17059, Nevius appeals from two orders of the district court denying his petition for post-conviction relief and his post-conviction petition for a writ of habeas corpus. In both petitions, Nevius alleged that several of his constitutional rights were violated at his trial by the prosecutor's allegedly discriminatory use of his peremptory challenges during the voir dire of the jury panel. The district court denied both of Nevius' petitions, without holding an evidentiary hearing. The district court noted that this court had already concluded that Nevius' constitutional rights were not violated in this regard, when we affirmed Nevius' judgment of conviction in Nevius v. State, 101 Nev. 238, 699 P.2d 1053 (1985). In Docket

EXHIBIT "A"

No. 17060, [redacted] filed a petition for a writ of [illegible], seeking to compel [redacted] district court to hold an evi[illegible]iary hearing on the merits of his petitions.

Finally, Nevius seeks a stay of execution of his death sentence, currently scheduled to be carried out on Friday, February 21, 1986, pending the United States Supreme Court's decision in Batson v. Kentucky, cert. granted, 105 S. Ct. 2111 (1985). Nevius asserts that the Court in Batson may render an opinion departing from its previous approach to peremptory challenge issues set forth in Swain v. Alabama, 380 U.S. 202 (1965), which we applied in our opinion affirming Nevius' judgment of conviction. See Nevius v. State, supra.

Although Nevius has not yet transmitted the full record on appeal to the clerk of this court, our review of the documents Nevius has provided us reveals that Nevius will not be able to demonstrate error on appeal and that further briefing and oral argument in this matter are not necessary. See generally Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976). Specifically, we note that this court fully considered and rejected Nevius' contention that his constitutional rights were violated by the prosecutor's use of his peremptory challenges, when we affirmed Nevius' direct appeal from his judgment of conviction. Nevius v. State, supra. While it is true that this court followed the traditional approach set forth in Swain v. Alabama, supra, we also noted in footnote 3 of our opinion that we were satisfied on the record that Nevius would not be able to demonstrate a constitutional violation even under the more liberal approach to peremptory challenge issues, as set forth in such cases as Weatherby v. Morris, 708 F.2d 1493 (9th Cir. 1983), cert. denied, 104 S. Ct. 719 (1984). See Nevius

v. State, supra. Accordingly, even if the United States Supreme Court did decide Batson to deviate from the more traditional approach of Swain in favor of the type of analysis set forth in Weatherby, Nevius would still not be able to demonstrate a constitutional violation. In short, we conclude that this issue has already been laid to rest, and we will not permit Nevius to raise the issue once again. See generally Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

Further, we note that the district court did not act arbitrarily or capriciously by denying Nevius' request for an evidentiary hearing on the merits of his post-conviction petitions. Nevius asserts that the evidentiary hearing was necessary to provide the prosecutor the opportunity to place his reasons on the record for exercising his peremptory challenges. However, as we noted in our opinion in Nevius v. State, supra, the prosecutor did in fact voluntarily place his reasons for exercising his peremptory challenges on the record at Nevius' trial, and again this court has already concluded that Nevius would not be able to demonstrate a constitutional violation in the face of this record. Therefore, an evidentiary hearing would have served no useful purpose.

In light of the above, we conclude that Nevius will not be able to demonstrate that the district court erred by denying his post-conviction petitions without an evidentiary hearing. Accordingly, we hereby dismiss Nevius' appeals in Docket No. 17039, and we further deny Nevius' petition for a writ of

---

[1] We reiterated this conclusion to Nevius in our order denying his petition for rehearing in the above matter, issued on December 23, 1983.

mandamus in Docket 17060. Finally, in light of the above, we deny Nevius' motion for a stay of execution of his death sentence.

It is so ORDERED.

Mowbray, C. J.

Fitzinger, J.

Gunderson, J.

Steffen, J.

Young, J.

cc: Hon. Joseph Pavlikowski, District Judge
Hon. Brian McKay, Attorney General
Hon. Robert J. Miller, District Attorney
Lovell, Porter & Pilcher
Graves, Leavitt, Cavley & Koch
Hon. Richard Bryan, Governor
George Sumner, Warden
Loretta Bowman, Clerk

EXHIBIT 118

EXHIBIT 118

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS NEVIUS,

Petitioner,

vs.

WARDEN, NEVADA STATE PRISON, E.K. MCDANIEL; AND ATTORNEY GENERAL OF NEVADA, FRANKIE SUE DEL PAPA,

Respondents.

No. 29027

FILED

OCT 09 1996

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

THOMAS NEVIUS,

Appellant,

vs.

WARDEN, NEVADA STATE PRISON,

Respondent.

No. 29028

ORDER DISMISSING APPEAL AND

DENYING PETITION FOR WRIT OF HABEAS CORPUS

Docket No. 29027 is an original petition for a writ of habeas corpus. Docket No. 29028 is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. For purposes of clarity, we will refer to petitioner/appellant Thomas Nevius as appellant, and to respondents as the state.

On November 12, 1982, appellant was convicted, pursuant to a jury verdict, of one count each of murder in the first degree, attempted sexual assault, robbery, and burglary, all with the use of a deadly weapon. The jury imposed the sentence of death with respect to the murder. Appellant's judgment of conviction and sentence were affirmed by this court on direct appeal. Nevius v. State, 101 Nev. 238, 699 P.2d 1053 (1985).

On February 11, 1986, appellant filed in the Eighth Judicial District Court a post-conviction petition for a writ of habeas corpus. On February 13, 1986, the district court summarily

denied appellant's petition on the merits and because it was filed in the wrong venue. On February 14, 1986, appellant filed in the Eighth Judicial District Court a petition for post-conviction relief.[1] On February 18, 1986, the district court summarily denied the petition "on the merits."

Appellant appealed to this court from the denial of his two post-conviction petitions. Appellant also filed in this court a motion for a stay of execution pending appeal, and a petition for a writ of mandamus. These documents were docketed in this court as Docket Nos. 17059 (both appeals) & 17060 (mandamus). On February 19, 1986, this court dismissed the appeals and denied the petition for a writ of mandamus.

Also on February 19, 1986, appellant filed in federal district court a post-conviction petition for a writ of habeas corpus. Appellant filed a supplemental petition on March 6, 1986. On November 1, 1986, the federal district court dismissed appellant's petition for a writ of habeas corpus without an evidentiary hearing. Appellant appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit issued its decision affirming the denial of habeas relief on July 28, 1988. Nevius v. Sumner, 852 F.2d 463 (9th Cir. 1988), cert. denied, 490 U.S. 1059 (1989).

On June 7, 1989, appellant filed in the First Judicial District Court a post-conviction petition for a writ of habeas corpus. Although ordered by the district court to file an answer to appellant's petition, the state did not file an answer, and took no action with respect to the petition for almost five years. Then, without offering any explanation whatsoever for the delay,

---

[1]This petition was essentially identical to the petition for a writ of habeas corpus that had been denied on February 13, 1986. The reason for the separate filing was to correct the jurisdictional defect in the original petition.

the state moved to dismiss appellant's petition on April 11, 1994.[2] Without conducting an evidentiary hearing,[3] the district court denied appellant's petition on July 18, 1996. This appeal (Docket No. 29028) followed.

On August 23, 1996, appellant filed in this court an original petition for a writ of habeas corpus (Docket No 29027). Because appellant's appeal and his original petition both involve the same facts and similar issues, we have consolidated them for purposes of disposition. NRAP 3(b).

Initially we note that this is at least appellant's third post-conviction petition challenging the validity of his judgment and sentence.[4] Based on our complete review of the record and the pleadings that have been submitted, we conclude, as explained below, that the district court properly dismissed appellant's petition as procedurally barred without resolving the merits of any of his claims. We also dispose of appellant's claims on procedural grounds; our discussion of the merits of appellant's claims in this order is strictly for the purpose of

---

[2]We are concerned about the almost five year delay in this case, and surprised that the state offered no explanation for its lack of diligence. Appellant had an obligation, as petitioner, to prosecute his petition to resolution, and should have notified the district court within a reasonable time of the state's dereliction. We note, however, that appellant was apparently not represented by counsel during this period of delay, because his motion for the appointment of counsel had not been ruled on by the district court. In any event, we have conscientiously reviewed the record in this case, and we do not believe the delay prejudiced appellant or denied him due process.

[3]The district court did conduct a hearing, and allowed the parties to call witnesses. However, the issue at the hearing was whether appellant would be afforded a complete evidentiary hearing. The district court denied appellant's motion for an evidentiary hearing.

[4]Under the circumstances of this case, appellant's first two petitions in the Eighth Judicial District Court might fairly be characterized as one petition for purposes of applying applicable procedural bars.

demonstrating that appellant cannot overcome his procedural defaults by a showing of actual prejudice.

In 1989, when the instant petition for a writ of habeas corpus was filed, NRS 34.810 provided in relevant part:

> 1. The court shall dismiss a petition if the court determines that:
>
> . . . .
>
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> (1) Presented to the trial court;
> (2) Raised in a direct appeal or a prior petition for a 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.
>
> 2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Under NRS 34.810(1)(b) above, the district court had discretion to dismiss appellant's petition of June 7, 1989, if it raised new issues that could have been raised in a prior proceeding challenging the judgment of conviction, and appellant did not show cause and prejudice. Most of the issues raised in appellant's 1989 petition are arguably new issues, because they relate to the effectiveness of appellant's trial and appellate counsel, and no issues regarding the effectiveness of appellant's counsel were raised in any of the prior proceedings.[5] Further,

---

[5]The state argues that the issue of effectiveness of counsel was raised at every level of the prior proceedings. This argument is supported by a very selective and out of context reading of each of the previous petitions to find language that could be construed as a claim that counsel was ineffective. Based on our (continued...)

there is no reason why any of appellant's claims could not have been raised in a prior proceeding. Thus, appellant has the burden of demonstrating cause and prejudice in order to overcome this procedural default.

Under NRS 34.810(2) above, the district court had an obligation to dismiss appellant's successive petition if the petition raised issues that were previously raised and were decided on their merits against petitioner, or if the petition raised new issues, and the district court found that the failure to raise the issues previously was an abuse of the writ. As noted above, most of the issues are arguably new issues. Thus, the district court properly dismissed the petition if the failure of appellant to raise these issues previously constitutes an abuse of the writ.

If appellant can show cause and prejudice for not raising these issues prior to this 1989 petition sufficient to satisfy the procedural requirement of NRS 34.810(1)(b) above, then it cannot be said that this petition is an abuse of the writ. If petitioner cannot show cause and prejudice, then this petition is an abuse of the writ. Thus, under the circumstances of this case, the relevant focus is cause and prejudice. Cf. Bonin v. Calderon, 77 F.3d 1155, 1158-59 (9th Cir. 1996), cert. denied, ___ U.S. ___, 116 S.Ct. 980 (February 23, 1996) (the analysis of a miscarriage of justice is the same whether the proposed bar to review is procedural or an abuse of the writ).[6]

---

[5](...continued)
review of the record, we conclude that, even with the most liberal reading of the prior petitions, the claim of ineffective assistance of trial or appellate counsel cannot be found.

[6]Not all of appellant's claims and arguments in his petition below included allegations of ineffective assistance of counsel. Some of appellant's arguments are simply reargument of issues already resolved against appellant, albeit in a more focused fashion. To the extent that appellant's petition could be (continued...)

As cause for his procedural default, appellant claims that he was represented by the same attorneys at trial, on direct appeal, in his original state court post-conviction proceedings and in all of his federal proceedings. The first time appellant was represented by independent counsel was in the filing of the instant petition below. Appellant argues that his prior counsel's conflict of interest precluded him from raising claims regarding the effectiveness of trial and appellate counsel. Appellant argues further that this conflict of interest is an impediment, external to the defense, that prevented him from raising in his prior post-conviction proceedings his claims of ineffective assistance of trial and appellate counsel. See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). Alternatively, appellant argues that his counsel in his first post-conviction proceedings were ineffective for failing to raise the claims he now raises, and that counsel's ineffectiveness is cause for his procedural defaults.

This court has held that under circumstances amounting to a denial of the Sixth Amendment right to counsel, a valid claim of ineffective assistance of counsel may be sufficient cause to overcome a procedural default, assuming a showing of actual prejudice can be made. Mazzan v. Warden, 112 Nev. ___, ___ P.2d ___ (Adv. Op. No. 110, July 22, 1996); Pertgen v. State, 110 Nev. 554, 560, 875 P.2d 361, 364 (1994). Further, an attorney's conflict of interest might, under some circumstances, be sufficient cause to excuse a procedural default. Without

---

[6](...continued)
construed as raising again old issues, our consideration of the merits of these old claims is barred by NRS 34.810(2), and by the doctrine of the law of the case. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). "The 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." Id. at 316, 535 P.2d at 799.

suggesting that counsel acted inappropriately or deciding the issue of whether appellant was entitled to effective assistance of counsel in his first post-conviction challenge to his judgment of conviction, we have determined under the unusual circumstances of this case that it is arguable that appellant can show sufficient cause to overcome his procedural defaults. Thus, we have considered the merits of the issues raised by appellant in his petition below in order to determine whether appellant can show sufficient actual prejudice to overcome his procedural defaults. We conclude that he cannot.

The most significant issue raised by appellant in his petition below concerns whether the prosecutor at his trial had improper motives for excluding all potential minority jurors by use of his peremptory challenges. Appellant's trial counsel has made serious allegations against the prosecutor, including the claim that the prosecutor referred to the challenged African-American jurors as "niggers" shortly after trial. Appellant's specific claim in this appeal is that counsel was ineffective for not having brought the prosecutor's alleged prejudicial statements to the attention of the courts in a timely fashion.

If counsel's allegations are true, they are very disturbing. Nevertheless, we have reviewed the record, and we conclude that counsel's accusations are not credible,[7] and in any event would not afford appellant a basis for relief in the context

---

[7]Although the focus of all of appellant's post-trial challenges to his judgment of conviction has always been the prosecutor's motives in striking the minority jurors, appellant's trial counsel did not accuse the prosecutor of improper comments in the trial court, on direct appeal, in his first two state post-conviction proceedings or in his first post-conviction proceeding in federal court. Counsel made this startling accusation, almost as an afterthought, for the first time at the end of a hearing in federal court in response to the federal district judge's inquiry whether counsel was aware of any other basis for granting appellant an evidentiary hearing. Under the circumstances that the accusation was made, years after the comments were allegedly uttered, the accusation seems incredible.

of this case. We note that the prosecutor executed an affidavit in which he denied the substance of appellant's accusations and averred that he did not exercise his peremptory challenges for any improper reason. At the time of appellant's trial, the motives of the prosecutor in exercising peremptory challenges could not be examined. See Swain v. Alabama, 380 U. S. 202 (1965).[8] Nevertheless, the prosecutor in this case voluntarily placed in the record his reasons for excluding the African-American venire persons from the jury. This court, the federal district court and the Ninth Circuit Court of Appeals all concluded that the prosecutor's reasons were proper. Indeed, the reasons cited by the prosecutor for excluding the minority jurors would likely have influenced any prosecutor to peremptorily challenge[9] the prospective jurors, regardless of race.[9] Thus, even if trial counsel had made a timely record of the prosecutor's alleged comments, this court would not have reversed on appeal appellant's judgment of conviction on this basis.

An evidentiary hearing at this point in time on this issue would serve no purpose because the record contains all of the evidence that such a hearing might produce. We have closely reviewed the record, and we are of the opinion that appellant cannot show any prejudice sufficient to establish a claim of ineffective assistance of counsel with regard to these alleged comments, because the record repels appellant's claim that the prosecutor exercised his peremptory challenges for any improper

---

[8]Swain was overruled by Batson v. Kentucky, 476 U.S. 79 (1986). Batson is not retroactive. Allen v. Hardy, 478 U.S. 255, 260-61 (1986).

[9]The prosecutor's stated reason for challenging one prospective alternate juror may not have been as strong as his reasons for challenging the other minority jurors. However, as noted by the Ninth Circuit, no alternate juror deliberated in appellant's case, so appellant cannot demonstrate any prejudice based on the exclusion of the alternate juror.

reason. See Strickland v. Washington, 466 U.S. 668 (1984) (prejudice prong of claim of ineffective assistance of counsel is established if a defendant can show that an error of counsel was so severe that the result of the proceeding would likely have been different absent the error).

Appellant contended in his petition below that his appellate attorneys were ineffective because they did not petition the United States Supreme Court for a writ of certiorari after this court dismissed appellant's direct appeal. At that time, Batson[10] was pending before the United States Supreme Court. Appellant argues that if his attorneys had petitioned the United States Supreme Court for a writ of certiorari, his case would not have been final when Batson was decided, and Batson could have been applied to appellant's case.[11]

This argument is idle speculation. Counsel had no obligation to pursue a discretionary appeal on the chance that the law might change in a non-retroactive manner in the interim. Indeed, counsel expressly considered petitioning the Supreme Court for a writ of certiorari and elected for tactical reasons not to file such a petition. Tactical decisions of counsel are virtually unchallengeable absent extraordinary circumstances. Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990). In any event, we are persuaded that the prosecutor's exercise of his peremptory challenges would have satisfied the Batson standard. Thus, appellant cannot demonstrate either that counsel's performance was deficient or that he was prejudiced.

Appellant alleged in his petition below that his trial and his appellate counsel were ineffective for failing to

---

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

[11]Batson is not retroactive. Allen v. Hardy, 478 U.S. 255, 260-61 (1986).

demonstrate that appellant's sentence of death violates the Eighth and Fourteenth Amendments because it was the product of racial bias. As noted above, appellant's death sentence was not the product of racial bias. Thus, this contention lacks merit.

In addition to the claims discussed above, appellant raised the following claims in his petition below: (1) Trial counsel were ineffective for failing to develop evidence to support a claim of systematic exclusion of minorities by the prosecutor; (2) trial counsel were ineffective for failing to request a jury instruction on the necessity of corroboration of accomplice testimony; (3) trial counsel were ineffective for failing to suppress the in-court identification of appellant as the killer because that identification was the product of improper pretrial identification procedures; (4) trial counsel were ineffective for failing to object to the prosecutor's inappropriate arguments, thus failing to preserve the issue of prosecutorial misconduct for appeal.

We have carefully reviewed each of these claims of ineffective assistance of counsel, and we conclude under the standard of Strickland v. Washington, 466 U.S. 668 (1984), that the claims lack merit.

In a supplemental memorandum in support of his petition below, appellant argued that jury instruction 10 at the penalty phase of the trial shifted the burden of proof regarding mitigating circumstances, and that the anti-sympathy instruction violated appellant's constitutional rights. This court determined in appellant's direct appeal that the anti-sympathy instruction was proper. Havius, 101 Nev. at 251, 699 P.2d at 1061. Our ruling on this issue is the law of the case. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). The suggestion that jury instruction 10 shifted the burden of proof lacks merit. Nothing

in that instruction could be construed as shifting the burden of proof.

In any event, both of these claims are procedurally barred under NRS 34.810, and appellant made no attempt whatsoever to demonstrate that these claims are not barred. Appellant did not allege that counsel was ineffective for not raising these claims, and even if he had, a claim of ineffective assistance of counsel regarding these claims would have been without merit.

No other claims are properly before this court in appellant's appeal from the denial of his post-conviction petition for a writ of habeas corpus (Docket No. 29028). We conclude, therefore, that even if appellant could show cause for his procedural defaults, he cannot show prejudice. Therefore, the district court properly denied appellant's petition as procedurally barred. We dismiss appellant's appeal in Docket No. 29028.[12]

Docket No. 29027 is an original petition for a writ of habeas corpus. Appellant seeks a review by this court of his judgment of conviction and death sentence. Generally, a petition for a writ of habeas corpus must be brought in the first instance in the appropriate district court. NRAP 22; NRS 34.738. Nevertheless, in this case the issues raised by appellant are clearly without merit. Thus, in order to avoid a remand to the district court and another round of unnecessary litigation, we have elected to address the merits of this petition.

In the petition, appellant raises four "substantive issues:" (1) Appellant's judgment of conviction and sentence are invalid due to the practice of systematically excluding minority prospective jurors from criminal juries in cases involving

[12]We lift the stay of execution of appellant's death sentence, which was imposed by this court's order of September 3, 1996.

criminal defendants; (2) the discriminatory exclusion of minority jurors from appellant's jury renders his conviction constitutionally invalid; (3) appellant's trial and appellate counsel were ineffective;[13] and (4) the jury instruction on reasonable doubt given at appellant's trial was unconstitutional.

Of course, all of these claims are procedurally barred pursuant to NRS 34.810 and the doctrine of law of the case. The first three were raised before in the petition which resulted in the appeal also discussed in this order. The last issue is a new issue. Appellant cannot conceivably show cause and prejudice for raising the first three claims again, or for not raising the fourth claim previously, and this petition is clearly an abuse of the writ.

With respect to the new claim, that the jury instruction on reasonable doubt is unconstitutional, we have previously upheld the instruction against constitutional challenge. See Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991). We emphatically reject appellant's claim that the jury instruction given in this case would not satisfy the constitutional standard applied in Victor v. Nebraska, 511 U.S. 1, (1991).

Appellant also raises four "procedural issues" in his petition: (1) The state should be estopped from invoking procedural default as a basis for dismissal of this petition; (2) the first collateral proceedings cannot be considered a procedural default because appellant did not knowingly authorize counsel to waive any potential claims on his behalf or to fail to raise any conceivable claim that might be available to him, and counsel's conflict of interest destroyed the principal-agent relationship

---

[13]Under this heading, appellant makes all of the arguments regarding the effectiveness of counsel that were raised in appellant's prior petition and appeal, discussed previously in this order.

between appellant and his attorneys; (3) appellant has shown sufficient cause to overcome any procedural default; and (4) this court cannot apply procedural bars against appellant because this court has not consistently applied such bars in the past.

We have reviewed each of these contentions, and we conclude that they lack merit. Accordingly, we deny the petition in Docket No. 29027.[14]

It is so ORDERED.[15]

Steffen, C.J.

Young, J.

Springer, J.

Rose, J.

cc: Hon. Robert J. Miller, Governor
Hon. Michael R. Griffin, District Judge
Hon. Joseph S. Pavlikowski, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Stewart L. Bell, District Attorney
Robert Bayer, Director, Department of Prisons
E.K. McDaniel, Warden, Ely State Prison
John Ignacio, Warden, Nevada State Prison
Terri Steik Roesser
Michael Pescetta, Asst. Federal Public Defender
Alan Glover, Clerk
Loretta Bowman, Clerk

---

[14]We deny as moot petitioner's motion for a stay of execution pending our resolution of this petition. We grant the state's motion for leave to file a response to appellant's original petition in this court and motion for a stay of execution (Docket No. 29027), and we direct the clerk of this court to file the state's response, which was received by this court on August 29, 1996.

[15]The Honorable Miriam Shearing, Justice, did not participate in the decision of these cases.

EXHIBIT 119

EXHIBIT 119

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS NEVIUS,

Petitioner,

vs.

WARDEN, NEVADA STATE PRISON, E.K. MCDANIEL; AND ATTORNEY GENERAL OF NEVADA, FRANKIE SUE DEL PAPA,

Respondents.

No. 29027

FILED

JUL 17 1998

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

THOMAS NEVIUS,

Appellant,

vs.

WARDEN, NEVADA STATE PRISON,

Respondent.

No. 29028

ORDER DENYING REHEARING

This is a petition for rehearing of this court's order of October 9, 1996, dismissing Thomas Nevius's petition for an original writ of habeas corpus (Docket No. 29027) and his appeal from an order of the district court denying postconviction habeas relief (Docket No. 29028). Nevius also has moved for leave to present oral argument, and on February 7, 1997, he submitted a Supplemental Petition for Original Writ of Habeas Corpus.

Nevius maintains that his supplemental habeas petition is proper because it asserts a claim which arose only after he filed his original habeas petition in August 1996. Nevius does not consider that he submitted his supplemental petition after this court had already denied his original habeas petition and was considering his instant petition for rehearing. NRAP 40(c)(1) provides that "no point may be raised for the first time on rehearing," and the state has moved us to transfer the supplemental petition to district court pursuant to NRAP 22.

However, in the interest of judicial economy, we deny the state's motion, order that the supplemental petition (and Exhibit No. 57 to the habeas petition) be filed, and address the merits of Nevius's latest claim.

Nevius claims in his supplemental petition that he has been subjected to cruel and unusual punishment due to the issuances of death warrants and stays of execution in this case. Nevius contends that the state sought the death warrants simply to inflict psychological torture upon him and asks this court to overturn his death sentence as a consequence. Nevius does not argue that the length of his confinement on death row constitutes cruel and unusual punishment.

We conclude that the state in seeking the death warrants and the district court in issuing them acted within their statutory authority. See NRS 176.491(2). We also conclude that staying an execution six days before it could be carried out in no way amounts to a "mock execution," as Nevius contends. We have reviewed the authorities cited by Nevius, and none of them stand for the proposition that the issuances of the death warrants and stays of execution he experienced constituted cruel and unusual punishment. We conclude that this claim has no merit.

In his petition for rehearing, Nevius informs this court that his former counsel first referred to alleged improper statements by the prosecutor in a motion for discovery filed in March 1986, following the filing of his federal habeas petition. In our order, we stated that counsel first made his accusation at the end of a hearing in federal court. This hearing was in August 1986. Although we overlooked counsel's earlier reference, made six months before the hearing, this oversight was not material and does not constitute grounds for rehearing. NRAP 40(c)(2). Nor has Nevius shown that rehearing is warranted on any other grounds. We therefore deny his motion for leave to

present oral argument and his petition for rehearing, and we lift the stay of execution of Nevius's death sentence, imposed January 7, 1997.

It is so ORDERED.

Rose, J.

Young, J.

Maupin, J.

cc: Hon. Michael R. Griffin, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Stewart L. Bell, District Attorney
Terri Steik Roeser
Michael Pescetta, Assistant Federal Public Defender
Loretta Bowman, Clerk

SPRINGER, C.J., dissenting:

I would grant rehearing for the reasons stated in my dissent in this matter, filed June 24, 1998. There is credible evidence in the record to support Nevius' complaint that his prosecutor admitted to saying, "You don't think I want all those niggers on my jury do you?" I can think of no plainer admission that the prosecutor deliberately stacked the jury in a manner that would exclude black jurors. For this reason, and for the reasons stated in my dissent in Nevius v. Warden, 114 Nev. ___, ___ P.2d ___ (Adv. Op. No. 76, June 24, 1998), I dissent.

Springer, C.J.

EXHIBIT 120

EXHIBIT 120

FRANKIE SUE DEL PAPA
Attorney General
DOROTHY NASH HOLMES
Deputy Attorney General
Nevada Bar No. 2057
Criminal Justice Division
100 North Carson Street
Carson City, Nevada 89701-4717
Telephone: (702) 687-3533

Attorney for Respondents.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

THOMAS NEVIUS,

Petitioner,

vs.

E. K. McDANIEL, et al.,

Respondents.

Case No. CV-N-96-785-HDM(RAM)
(DEATH PENALTY CASE)

RESPONSE TO NEVIUS' SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AMENDED SECOND SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS

Respondents, through FRANKIE SUE DEL PAPA, Attorney General of Nevada, by DOROTHY NASH HOLMES, Deputy Attorney General in the Criminal Justice Division, hereby respond to the supplemental memorandum filed by Petitioner THOMAS NEVIUS with permission of this district court, following a two year delay of proceedings to allow for the completion of other proceedings initiated by Nevius in the Ninth Circuit Court of Appeals and the Nevada Supreme Court. This response is based upon the entire file in this case, and the following Points and Authorities.

POINTS AND AUTHORITIES

Nevius has filed a memorandum of points and authorities and additional exhibits O through T-6. He also filed a motion seeking permission to conduct discovery on his new claim 5 in his second successive petition. (Respondents have filed a separate response to that motion.) Respondents understood the district court's order permitting a supplemental filing as providing the opportunity fo-

the parties to address any issues pertinent to the current matter, which may have been raised by federal appellate and Nevada Supreme Court litigation for which this matter had been stayed. Inste with one exception (the exhaustion discussion of claim 5 at pp. 2-3), Petitioner Nevius has mer reargued the issues previously discussed in his amended petition and traverse, filing what is, in essen a reply to our Reply to Traverse. Mostly, however, Nevius cites a whole slew of new second authorities and treaties and treatises (some to which the United States is not even a party) to make t argument that it is torture or a "mock execution" for Respondents' counsel or the Clark Coun prosecutor to have sought an execution warrant.

He provides additional exhibits, allegedly in support of both his new P's and A's and h discovery motion, however, none were generated in the litigation in the appellate court or the Nevac Supreme Court (or the United States Supreme Court), which occasioned the delay in this case. H provides a new declaration authored by a Deputy Federal Public Defender in August, 1999, to bolste his "mock execution/psychological torture" claim 5. (Exh. O). He provides a new report by psychologist, dated June 25, 1999, apparently prepared after an April, 1999 evaluation of Nevius, t bolster his claim 5. (Exh. Q). He provides old prison mental health reports to bolster his claim 5 (Exh. R). He provides copies of pleadings from 1996 in Clark County to bolster his claim 5. He doesn't explain why none of such exhibits were produced earlier, nor why he should be entitled to continue to build on his petition *ad infinitum*. Clearly, Nevius is "taking another bite of the apple" in attempting to yet again argue the merits of his petition. More clear is the inference that Nevius used two years' worth of Ninth Circuit and Nevada Supreme Court litigation (and appeals of that to the United States Supreme Court) merely to "buy time" and to postpone this matter while he acquired new evidence to offer. Respondents urge this court to reject Nevius' efforts and deny him that "second bite of the apple", both by striking his P's and A's and denying him use of the supplemental exhibits. Nevius should not be permitted to manipulate the court's order in this way, nor should he be permitted to prolong this litigation indefinitely with additional argument and exhibits.

The only update Nevius did provide this court was in his brief discussion of the exhaustion of claim 5 by the Nevada Supreme Court, found at pp. 2-3 of his supplement. While Nevius made no other legal gains in his two-years of delaying tactics as all rehearings, reconsiderations, appeals and

Attorney C 's Office
100 N. C 1 Street
Carson City, Nevada 89701-4717

petitions for certiorari were denied by the Nevada Supreme Court, the Ninth Circuit and the Un States Supreme Court (*see* Third Supplemental Index of Exhibits[1] filed herewith by Respondents) did manage to frustrate the Nevada Supreme Court into considering what should have bee procedurally barred claim (claim 5 in this case), thus exhausting the same. In its Order Deny Rehearing (Exh 180), the Nevada Supreme Court noted that Nevius did not properly raise that n Eighth Amendment claim (which he submitted to them in his Supplemental Petition for Writ (E 174)) pursuant to NRAP 40(c)(1) because it was raised for the first time on rehearing[2], but it did n procedurally default the claim. Instead, "in the interests of judicial economy" and, more than likely, c of its utter frustration with the litigious Mr. Nevius and to get the matter out of the Nevada Supren Court once and for all, the court addressed the claim on its merits, saying:

> "Nevius claims in his supplemental petition that he has been subjected to cruel and unusual punishment due to the issuances of death warrants and stays of execution in this case. Nevius contends that the state sought the death warrants simply to inflict psychological torture upon him and asks this court to overturn his death sentence as a consequence. Nevius does not argue that the length of his confinement on death row constitutes cruel and unusual punishment.
>
> We conclude that the state in seeking the death warrants and the district court in issuing them acted within their statutory authority. See NRS 176.491(2). We also conclude that staying an execution six days before it could be carried out in no way amounts to a "mock execution," as Nevius contends. We have reviewed the authorities cited by Nevius, and none of them stand for the proposition that the issuances of the death warrants and stays of execution he experienced constituted cruel and unusual punishment. We conclude that this claim has no merit."

Thus, Respondents now withdraw its statement (from our Answer) that the Eighth Amendment claim in the instant petition is unexhausted. While it was unexhausted when Respondent answered the petition, it no longer is.

The ruling on the merits by the Nevada Supreme Court is entitled to complete deference in this case and is conclusive as to all issues of fact or law, because it did not involve an unreasonable

---

[1] In various status reports to this court, Respondents or petitioner provided copies of the orders of the other courts nevertheless, Respondents have compiled them together into a Third Supplemental Index of Exhibits so they are properly included as part of the record in this case, rather than just informational material to update this court. Respondents also have included one other exhibit submitted to the Nevada Supreme Court by Nevius in support of his Original Writ Petition and Supplemental Petition, which was inadvertently omitted in our Second Supplemental Index of Exhibits.

[2] It also noted that Nevius could not supplement a petition that had already been denied.

Attorney's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

application of clearly established federal law as determined by the United States Supreme Court and not involve an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(1) and (2) and (e) Nevada's highest court resolved the issue based upon Nevada statute and rejected all the articles treaties and treatises Nevius proffered to support his "mock execution" claim. State court findings entitled to the presumption of correctness. *Bressette v. N. Y. Division*, 2 F.Supp. 383, 386 ( ), cit *Nevius v. Sumner (Nevius I)*, 852 F.2d 463, 469 (1989). This court therefore has no basis on which grant relief on claim 5 of the instant petition.

While the Ninth Circuit in its clarifying order, *Nevius v. McDaniel (Nevius III)*, 104 F.3d 11 (1997), decided that Nevius could file a second successive "application" that includes more than just t one "reasonable doubt instruction" claim for which it found a sufficient prima facie showin Respondents nevertheless assert that said position is an erroneous one and continue to object to t filing of other claims. "Post AEDPA, no other circuit has considered the Ninth Circuit's position" [th once it approves a second successive petition on one claim, other claims may be filed by petitioner *Atkins v. Tessmer*, No. 97-71492 (1999 US LEXIS 8641) (E.D. Mich. 1999). The Sixth Circuit ha ruled that the new petition is limited only to the claim approved. *See U.S. v. Moore*, 131 F.3d 59 (1997) and *U.S. v. Campbell*, 168 F.3d 263 (1999). Respondents state that claims 1, 2, 3 and 5 therefor constitute an abuse of the writ and do not qualify for review by this court pursuant to 28 U.S.C. § 2244.

Nor is Nevius authorized to assert his claim 5 based upon the ruling in *Stewart v. Martinez Villareal*, 523 U.S. 1618, 118 S.Ct. 1618 (1998). That opinion only authorized a successive *Ford* v *Wainwright*, 477 U.S. 399 (1986) claim of "incompetence to be executed." The United States Supreme Court held that a claim of "incompetence to be executed" could not be raised until the petitioner wa actually experiencing that level of mental incompetence and that did not occur until after tha petitioner's previous habeas petitions were litigated, therefore that could be raised later. While the Federal Public Defender persists in interpreting *Martinez-Villareal* as authorizing a host of successive claims that have nothing to do with "incompetence to be executed," that was not the ruling in *Martinez-*

...

[1] For a decision discussing more recent precedents and rejecting the Ninth Circuit's reasoning regarding *Cage* retroactivity, and declining to follow *Nevius v. Sumner*, 105 F.3d 453 (9th Cir. 1996). *see Rodriguez v. Superintendent, Bay State Correctional Center*, 139 F.3d 270 (1st Cir. 1998).

Attorney G... 's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

Villareal and the case cannot properly be read to extend beyond *Ford v. Wainwright* claims. Clai cannot now be raised.

Unlike Nevius, Respondents will not reiterate our arguments presented in our Answer or R to Traverse, but will simply update them based upon the passage of two years and subseq authorities cited by Nevius in his supplemental P's and A's.

Nevius' old and new arguments justifying claim 4, his "reasonable doubt instruction" claim, defeated by the subsequent ruling of the Ninth Circuit Court of Appeals in *Ramirez v. Hatcher*, F.3d 1209 (9th Cir. 1998). Furthermore, the United States Supreme Court denied certiorari, 119 S. 415 (1998), so there is no potential reversal looming out there by which Nevius can urge this court disregard *Ramirez*. Claim 4 must be dismissed.

Nevius argued previously that AEDPA abolished procedural bars and argued that Responden argument that claims 1-4 were procedurally barred must fail. Subsequently, the Ninth Circuit Court Appeals addressed that issue in *Ortiz v. Stewart*, 149 F.3d 923 (1998), and specifically stated th "[C]ontrary to what Ortiz argues, Chapter 154 does not in any way suggest that in passing AEDP Congress intended to abolish pre-AEDPA procedural default law or affect its applicability with rega to states not governed by Chapter 154." *Ortiz* at p. 931. The United States Supreme Court also denie certiorari on that case, too, (119 S.Ct. 1777 (1998)) so again, there is no potential reversal looming o there to diminish the value of this precedent. Respondents' procedural default arguments shoul prevail.

Interestingly, in that same *Ortiz* case, the appellate court also cited *Nevius II*, *Nevius v. Sumne* 105 F.3d 453, 460 (9th Cir. 1996) to reject the identical argument Nevius tries to make yet again in hi second and successive petition—ineffective assistance of counsel due to inherent conflict of interes (claim 3 in this petition).

Previously, Nevius argued that *Nevius II* could not be "law of the case" because he had petition for rehearing and request to recall the mandate pending. The rehearing was denied and th mandate was not recalled and has been set upon the record. (Exhs. 180 and 187) and certiorari has beer denied on Nevius' effort to get U.S. Supreme Court review. (Exhs. 182 and 186). Therefore, law of the case does apply and Nevius cannot now re-assert the same "inherent conflict-agency claim" which ha

Attorney G Office
100 N. Carson Street
Carson City, Nevada 89701-4717

already been considered and rejected by the district court and the Ninth Circuit Court of Appeals. Claim 3 must fail.

Nevius II also determined that any successive petition was not to be treated as Nevius' first petition so law of the case governs that argument, too, and Nevius' reassertion that this should be treated as a first petition must be rejected as well.

Likewise, claims 1 and 2 in the instant petition are also governed by law of the case. In Nevius' first appeal to the Ninth Circuit, that court found that *Batson v. Kentucky*, 476 U.S. 79 (1986), was not retroactive and that the *Swain v. Alabama*, 380 U.S. 202 (1965), claim was not established. It also accepted the findings and conclusions of the Nevada Supreme Court, which also rejected the "racial exclusion of jurors" claim. Recently, the Ninth Circuit reviewed another *Batson* claim case, *Tolbert v. Page*, No. 97-55004 (June 28, 1999) and decided that the lower court's determination on whether or not a *Batson* claim is made is to be given deference and the statutory presumption of correction. Thus, the instant claims 1 and 2 cannot again be raised as they were rejected both by the Nevada Supreme Court and the Ninth Circuit Court of Appeals in *Nevius I, supra*. Nevius has re-asserted them in this case with additional supporting data, but he simply does not get to keep repeating the process until he gets it right. As in *Malone v. Vasquez*, 138 F.3d 711 (8th Circuit 1998), Nevius' redesigned arguments and new statistical claims do not support a *Swain* claim and Nevius has failed to rebut the prosecutor's reasons for striking certain jurors. The prior courts (state and federal) have all found that these claims must fail and nothing new changes that position. Claims 1 and 2 are not entitled to review or relief.

Finally, while referencing a barrage of additional secondary authorities to try to make the facts of this case fit some theory of "mock execution" or "psychological torture" in claim 5, Nevius fails to provide any persuasive Ninth Circuit or U.S. Supreme Court decision that supports his claim. He also has failed to refute Respondents' citation to *Woratzeck v. Stewart*, 118 F.3d 648 (9th Circuit 1997) wherein the Ninth Circuit said "If Woratzeck's death sentence does not violate the Eighth Amendment then neither does the scheduling of his execution." As with the other cases cited by Respondents, on this case, too, certiorari was denied (520 U.S. 1173, 117 S.Ct. 1443 (1997) and a rehearing was also denied. 520 U.S. 1260, 117 S.Ct. 2427 (1997). The Nevada Supreme Court has found that the facts in

...

Attorney Gen's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

In the Supreme Court of the State of Nevada

WILLIAM P. CASTILLO, Petitioner, vs. E.K. McDANIEL, Warden, Ely State Prison, CATHERINE CORTEZ MASTO, Attorney General for Nevada, Respondents.	No. 56176

APPELLANT'S APPENDIX

Appeal from Order Denying Petition for Writ of Habeas Corpus (Post-Conviction)

Eighth Judicial District Court, Clark County

VOLUME 9 of 21

FRANNY A. FORSMAN
Federal Public Defender
GARY A. TAYLOR
Assistant Federal Public Defender
Nevada Bar No. 11031C
411 East Bonneville Ave, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Counsel for Appellant

APPEARANCES:

FOR THE STATE:	TIMOTHY O'BRIEN, ESQUIRE DEPUTY DISTRICT ATTORNEY 3401 EAST BONANZA ROAD LAS VEGAS, NEVADA 89101

ALSO PRESENT:

FOR THE NEVADA STATE WELFARE:	MR. PATRICK DONOHUE, SUPERVISOR 145 PANAMA STREET HENDERSON, NEVADA 89015
FOR THE DEPARTMENT OF PAROLE AND PROBATION:	MS. ELIZABETH ALVARADO 1111 LAS VEGAS BOULEVARD SOUTH LAS VEGAS, NEVADA 89104

LAS VEGAS, NEVADA; THURSDAY, JULY 29, 1982; 10:00 A.M. CALENDAR

* * * * *

THE COURT: THIS IS IN THE MATTER OF WILLIAM PATRICK CASTILLO. ARE YOU WILLIAM?

THE SUBJECT MINOR: YES, SIR.

THE COURT: ARE YOU JOE AND BARBARA CASTILLO?

MR. CASTILLO: YES, WE ARE.

MRS. CASTILLO: YES.

THE COURT: ELIZABETH ALVARADO FOR THE DEPARTMENT OF PAROLE AND PROBATION; FOR THE STATE, MR. TIM O'BRIEN.

MS. ALVARADO?

MS. ALVARADO: YES, SIR. THE PARENTS OF BILLY, JOE AND BARBARA CASTILLO, HAVE TRIED REPEATEDLY TO OBTAIN EFFECTIVE TREATMENT FOR BILLY, WHO HAS BEEN A HABITUAL RUNAWAY AND SET FIRE TO THE FAMILY HOME WHICH BURNED DOWN. THEY HAVE NOT BEEN SUCCESSFUL, AND BILLY HAS IN THE PAST ENGAGED IN OTHER DESTRUCTIVE AND BIZARRE BEHAVIORS.

IN ORDER FOR BILLY TO RECEIVE APPROPRIATE TREATMENT WHILE HE'S YOUNG, I RESPECTFULLY RECOMMEND THAT BILLY BE MADE A WARD OF THE COURT AND PLACED IN THE CUSTODY OF THE DIVISION OF MENTAL HYGIENE AND MENTAL RETARDATION AND NEVADA STATE WELFARE DIVISION FOR APPROPRIATE PLACEMENT. AND THE TREATMENT PLAN, I WOULD RECOMMEND BE SUBMITTED BY THE ADMINISTRATOR OF THE DEPARTMENT OF HUMAN RESOURCES WITHIN 45 DAYS.

THE COURT: THANK YOU. ANYTHING, MR. DONOHUE?

MR. DONOHUE: YOUR HONOR, I THINK THE TREATMENT PLAN WOULD OBVIOUSLY BE SUBMITTED BY WHATEVER AGENCY HAS CUSTODY. THE ADMINISTRATOR WOULD NOT BE SUBMITTING THAT.

THE COURT: ALL RIGHT.

MR. DONOHUE: ON BEHALF OF THE WELFARE DIVISION,

WE FEEL BILLY'S PROBLEMS ARE SUCH THAT WE HAVE NOTHING TO OFFER HIM IN TERMS OF TREATMENT. IT IS PRIMARILY A MENTAL HEALTH PROBLEM. HOWEVER --

THE COURT: WELL, I HAVE ONE REPORT THAT SAYS THAT'S NOT THE CASE FROM DR. HECTOR. I THINK IT SAYS THERE'S NO --

MR. DONOHUE: SHE'S RECOMMENDING SOME OUT OF STATE FACILITIES.

THE COURT: SHE SAYS IT'S A BEHAVIORAL PROBLEM, A LEARNED RESPONSE, NOT A -- THERE'S NO EVIDENCE OF PSYCHOSIS OR SEVERE EMOTIONAL PROBLEMS. THEY'RE TOTALLY BEHAVIORAL.

MR. DONOHUE: AGAIN, THAT WOULD BE MENTAL HEALTH.

THE COURT: LET ME TALK TO THE PARENTS.

MOM, WHAT DO YOU WANT TO TELL ME ABOUT BILLY?

MRS. CASTILLO: WELL, YOUR HONOR, I FEEL AT THIS TIME THAT I CANNOT COPE WITH MY SON IN RAISING HIM THE PROPER WAY BECAUSE HE HAS A PROBLEM AND I DON'T KNOW HOW TO DEAL WITH IT.

AND THE ONLY THING I CAN SAY, YOU KNOW, WE SOUGHT HELP AND, YOU KNOW, WE'RE WILLING TO GO ALONG WITH ANYBODY'S OPINION.

THE COURT: OKAY, ALL RIGHT. ANYTHING TO ADD, MR. CASTILLO?

MR. CASTILLO: YEAH, BILLY'S BEEN WITH ME FOR THREE YEARS. AND EVER SINCE HE CAME TO LIVE WITH ME, YOU KNOW, HE'S HAD THIS JUST VERY DESTRUCTIVE BEHAVIOR.

THE THING ABOUT IT, YOU KNOW, THE THINGS HE DOES, HE DOES THEM BY INSTINCT. HE WAS EVALUATED BY A PSYCHIATRIST, YOU KNOW; AND I'M HOPING TO BE ABLE TO GET A SECOND OPINION ON THAT.

MOSTLY BECAUSE, YOU KNOW, HIS BEHAVIOR IS JUST SUCH THAT, YOU KNOW, HE'LL DO THINGS HE DOESN'T REALIZE.

HE HAS NO IDEA OF WHAT THE -- WHEN HE BURNED THE HOUSE DOWN, I ACCEPTED IT WAS ACCIDENTALLY. HE DIDN'T REALIZE THE OUTCOME, WHAT WAS GOING TO HAPPEN.

AFTER HE GOT PICKED UP BY THE POLICE, I TOOK HIM IN SO HE COULD LOOK AT THE HOUSE. NO REACTION, NO EMOTION TO WHAT HE WAS SEEING. HE'D DONE IT BUT, I MEAN, YOU KNOW, HE'S LOOKING AROUND WITH ABSOLUTELY NO --

THE COURT: REMORSE?

MR. CASTILLO: -- EXACTLY. WHILE THE HOUSE IS BURNING, HE'D BEEN SOMEWHERE ELSE PLAYING.

HE'D TAKEN A KNIFE, A BUCK KNIFE, A HUNTING KNIFE OF MINE WITH HIM. AND HE'D SUPPOSEDLY BEEN OUT THERE LITTERING AND DAMAGED -- SLICED SOME KID'S TIRES AND BROKE SOMEBODY ELSE'S SPEEDOMETER, BECAUSE LATER ON I WAS APPROACHED BY THIS PARTY FOR REIMBURSEMENT OF THE DAMAGE HE'D DONE, LATER ON IN THE COURSE OF THE DAY.

NOW, I DON'T CONSIDER HIM A BAD BOY. HE'S GOOD IN THE SENSE THAT HE TRIES AND HE MAKES AN EFFORT. BUT THERE'S SOMETHING IN HIM, YOU KNOW, LIKE THERE'S TWO SIDES OF HIM, YOU KNOW, JUST UNCONTROLLABLE BEHAVIOR AND JUST SOME -- HE DOES THINGS BY INSTINCT LIKE I SAY.

HE HAS NO IDEA AT ALL OF WHAT HE DOES. HE MAY REALIZE IT AFTERWARDS, AND THEN, YOU KNOW, I THINK THAT'S PROBABLY WHY HE STARTED RUNNING AWAY. AFTER HE'D DONE SOMETHING, BY RUNNING AWAY, HE REALIZED HE LIKED DOING THAT. THEN IT WAS A CONTINUOUS THING. BUT HE HAS NO, YOU KNOW -- LIKE HE REALLY DOESN'T UNDERSTAND AT ALL WHAT HE DOES.

THE COURT: THANK YOU. APPRECIATE YOUR RESPONSE.

I'M GOING TO MAKE WILLIAM A WARD OF THE COURT UNDER NEGLECT ADJUDICATION. I'M GOING TO PLACE CO-CUSTODY IN NEVADA STATE WELFARE AND THE DEPARTMENT OF MENTAL HYGIENE AND MENTAL RETARDATION.

I'M GOING TO ASK THAT BILLY APPEAR BEFORE YOUR JOINT COUNSEL FOR PLACEMENT AFTER THE 45-DAY EVALUATION PERIOD TO SEE WHERE WE'RE GOING TO PLACE HIM, WHETHER HE'S GOING TO BE PLACED BY NEVADA STATE WELFARE OR ANOTHER PLACEMENT BY THE STATE.

THE MOM AND DAD TO PAY $105 IN THIS PROGRAM. HAS THAT BEEN DISCUSSED WITH YOU?

MR. CASTILLO: IT HAS BEEN, YES, YOUR HONOR.

THE COURT: LIKE TO HAVE THE ADMINISTRATOR OF HUMAN RESOURCES SUBMIT THIS TREATMENT PLAN TO THE COURT WITHIN 45 DAYS. AND LET'S BRING IT BACK ON -- IS THAT ENOUGH TIME ALSO TO MEET WITH THE JOINT COUNSEL FOR PLACEMENT, MS. QUALLS?

MS. QUALLS: YES, YOUR HONOR.

THE COURT: LET'S PUT IT BACK ON CALENDAR IN ABOUT 60 DAYS.

THE CLERK: OKAY. NOW, SHOULD WE PUT IT ON WELFARE DAY ON TUESDAY OR THURSDAY?

THE COURT: MIGHT AS WELL PUT IT ON TUESDAY.

THE CLERK: 21ST OF SEPTEMBER.

THE COURT: THANK YOU.

THE BAILIFF: WILL HE REMAIN DETAINED, YOUR HONOR?

THE COURT: YES.

MS. ALVARADO: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU.

* * * * *

ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF THE PROCEEDINGS.

KAREN R. HOBLEY, C.S.R. NO. 180

FILED

JAN 12 11 12 AM '83

J-26174

DEPT. IX

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

SITTING IN SEPARATE SESSION AS A JUVENILE COURT

IN THE MATTER OF:
WILLIAM PATRICK CASTILLO
A MINOR UNDER 18

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE FREDRICK FISHER, CHIEF REFEREE OF THE COURT

TUESDAY, DECEMBER 7, 1982

REPORT AND DISPOSITION

APPEARANCES

For the State: No one present

Present:
PAM THOME AND JOES SOMERS
Nevada State Welfare

ERIC MANSINGER
CBS

DENNIS HINSON
CBS

JOE AND BARBARA CASTILLO
Parents of the minor

WILLIAM PATRICK CASTILLO
The minor

LAS VEGAS, NEVADA TUESDAY, DECEMBER 7, 1982

PROCEEDINGS

BY THE COURT: This is Case Number J-26174, in the matter of William Patrick Castillo. William is present, along with his parents, Joe and Barbara Castillo; Pam Thome and Joe Somers of Nevada State Welfare; Eric Mansinger of C.B.S. and Dennis Hinson of C.B.S.

Ms. Thome?

BY MS. THOME: On November 12th, 1982, Billy admitted--at a Plea Hearing, Billy admitted to running away.

I'm recommending that he be made a Child In Need of Supervision. I'm asking for a six-month review, hoping that this will get Billy's attention and realize that there are repercussions for the runaway behavior. He's had seven to eight runaways from C.B.S. since he's been placed there--mostly from the school. It seems that if he has constant supervision--100% supervision, he doesn't have the problem with running away. It's when he's left on his own.

He has been home on weekend visits and he was also on a vacation with the parents just recently. They said they had to watch him real close. As long as he was watched closely, he was okay. They still have reservations about--in which they have spoken to me about the treatment that he is getting over at the Oasis Program and they feel that they don't see any improvement in his behavior and they had talked about searching for an alternative placement for him--an out-of-state placement. I do have some information at the office on Boys Town, which I have told them they can look at, so they can explore that possibility.

Your Honor, I do believe there was a Court date set--I'm not sure what that date was, but if you set it for a six month Review, I would like to have that other Court date vacated.

BY THE COURT: Ma'am, would you stand up, please.

Is there anything you would like to say here this morning?

BY THE MOTHER: Yes, your Honor.

I did tell my son--it was in the Report, that I did mention, he did runaway and that he's not allowed to come home anymore. The reason for this, your Honor, is that I was four-and-a-half months pregnant and lost the baby and the stress and Billy's conduct and behavior is just entirely too much on me and my family and I a--the reason why I thought C.B.S.--we would like to seek other facilities because my son has to have constant supervision and at home, he can only get--you know, he can only get a--we can only do that with a lot of stress--you know, it's not a very good atmosphere because we have to constantly keep an eye on him. It's getting--everything is just getting so tight now and it's just getting so rough that I feel he--C.B.S.is a good program, but it's not good enough for my son because he does need constant, constant supervision and I'm just--everytime he is released on his own--on coming home and stuff and it's just so much to keep up with that constant supervision and I feel he needs it. We're not professionals, but he does need a professional help a lot more than he's getting at C.B.S.

BY THE COURT: Ma'am, I think your view of counselling and what counselling can do is really--at least in my--what I see down here is a little bit too optimistic. The main reason that C.B.S. has a program where children can come home on weekends is because, sooner or later if this young man can be worked back home, his future is going to be very dismal.

BY THE MOTHER: I know that, your Honor.

BY THE COURT: And I mean, what happens at home might be more important than what's happening there at C.B.S. And we know that it's very tough--it's very tough for everybody concerned.

That is one of the basic parts of the program, if not, the basic part of the whole program is that he be able to come home on the weekends and try to resolve some of the things that are happening in the family.

BY THE MOTHER: Yes, your Honor, but what I'm trying to say is that he don't have a home to come to because, you know, the pressure alone, with the way his behavioral problem is on me and my family, is not working on us any better. You know, we're not stable enough to have him home, he won't have a home to come to is what I'm saying.

BY THE COURT: Sir, is there something you would like to say?

BY THE FATHER: Yes, sir.

Okay, what my wife was trying to say was, it's not our opinion that C.B.S. is not really the place for him. We have got together with the houseparents that are right now in charge of his supervision and we have all agreed, you know, CBS has a lot to offer for certain kids, but not for Billy. Billy's at the age--okay, he knows the whole system about CBS and he makes a mockery out of it. Okay, he knows that if he has a bad week, all he has to do is spend one day building up points--he's on the point system. He knows he'll be right out of it. He's got everything pinned down to a T. He knows there are no consequences at the other end. Okay, CBS is great--we have no complaints as far as everything that has been done--what they've tried to do for Billy. But for his case--it's really advanced. He's very smart; but, he's smart in the wrong ways. His history goes back to when he was six-years-old. He's been with me since he was six-years-old and instead of progress, I've only seen him become more (garbled) as he goes along. Now the burning of the house was an accidental thing because he wanted to play with gas--wanted to see what would happen. The outcome, unfortunately,

he burned the house down. I don't blame him for that, but a--
well, it is his fault in a way, you know. If he hadn't been
playing with the gas, it would have never happened. But these
are the kind of things that he does. Okay, he finds it very
difficult to differentiate from right and wrong--things that he's
suppose to do and things that he's not suppose to do. He's got
this thing about him that he needs constant supervision and it's
the kind of supervision where, you know, it makes it very hard
for us to give him and the same time CBS cannot provide that
for him at this point. It's not that kind of a place.

At one point, I had him on house arrest for one month.
House arrest, I mean, you know if we were for some reason we
felt something coming on, I got a lock on his door. I had his
shoes out of his room; I had his clothes out of his room. He
was just coming out of that.

Now Billy can go for two months--he can go for one-
month, two-months where he's perfect. All of a sudden he feels
like he's going to take off and consequences a--you know, don't
mean nothing to him. He's been threatened many a times and that
hasn't done any good.

BY THE COURT: Okay, thank you, sir.

Mr. Mansinger, is there anything you would like to say?

BY MR. MANSINGER: I would just add--the program has
been effective, only inasmuch as we have been in direct contact
with Bill. In that instance, his running has diminished. It's
been, a--I don't know the exact time, but I would guess, maybe,
a month-and-a-half. It's been seven weeks since his last run,
so there has been some effect there. But I also question Bill's
change-of-heart as to whether or not this will occur.

My wife and I will be leaving the program after three
weeks. She represented a change in Bill's life and I would be
cautious as to the new teaching parents coming in and whether or
not Bill's behavior will resume.

BY THE COURT: Mr. Hinson, is there anything you'd like to say this morning?

BY MR. HINSON: No, your Honor.

BY THE COURT: Do you have an Order?

BY MS. THOME: Yes, I do.

BY THE COURT: Thank you.

Bill, is there anything you would like to say this morning?

BY THE MINOR: No, your Honor.

BY THE COURT: What do you think all this legal process is about--where do you think it's leading?

BY THE MINOR: Mostly in to trouble. When I get bigger, it's not going to be easier.

BY THE COURT: You are not really going to get much bigger before the axe falls on you, young man.

You know, you are into the system right now to the extent where if you come back to this Court, we can send you up to Spring Mountain or Elko. I don't like to send nine-year-olds up to Spring Mountain Youth Camp, but I might not have much of a choice in your case.

Why do you think we don't like to send kids up to Spring Mountain--especially, young kids?

BY THE MINOR: They can get hurt up there.

BY THE COURT: They can get hurt and a lot of bad things can happen to them. We have to lock them up, take them away from their parents. All those things are bad. The worse thing about it is that we know they won't have much of a future--their chances of a good future are less and that is what this is all about.

We have you in CBS, trying to work things out with your parents. Doesn't mean anything to you though, does it--you are just going to run away--if you get the feeling to run away.

BY THE MINOR: I haven't run away in a long time because my mama told me something--that I want to be able to go home again.

BY THE COURT: Why do they have to watch you every minute when you go home on weekends?

BY THE MINOR: So I don't do anything wrong.

BY THE COURT: Why can't they trust you?

BY THE MINOR: Because I ran away. They're not really a--going to know what is going to happen next.

BY THE COURT: Now, William, you think you are going to get into trouble when you get older--when you get bigger, you are in trouble right now, and if we have to take you and lock you up at Spring Mountain Youth Camp so that we can watch you everyday and make sure that you go to school, then I guess that we'll do that. You are really not going to give us much of a choice if you don't get your act together here real soon. You belong at home. The sooner you figure that out, the, the better it's going to be for you.

Is there anything else that you want to say this morning?

BY THE MINOR: No.

BY THE COURT: THE ORDER WILL BE that William will remain a Ward of the Juvenile Court with co-custody to Nevada State Welfare and to the Department of Human Resources, Division of Mental Health--or Mental Hygiene and Mental Retardation.

HE IS ADJUDICATED A CHILD IN NEED OF SUPERVISION and placed on Formal Supervision until May the 7th, 1983.

IT IS FURTHER ORDERED that his parents are to pay the sum of $105.00 per month for his care.

We'll set this matter for a Formal Review on the 7th day of June.

...

BY THE FATHER: Your Honor, I was wondering--a--if we could review that--or if a--who I could contact about the $105.00 a month. Things have gotten really bad with my job and they've got me on part-time right now. And because of the burning of the house, nothing has been settled yet with the insurance. This could drag on for another year--year-and-a-half. I have to replace a lot of the things to move into the house and it's left me in a very financial a--situation, and I was wonderings a--you know, a--

BY THE COURT: Are you working right now?

BY THE FATHER: Yes, I am.

BY THE COURT: Where do you work?

BY THE FATHER: I work for the Desert Inn.

BY THE COURT: What do you do ther?

BY THE FATHER: I'm a floorman there.

BY THE COURT: I think I'll make that Order--if the things with the house isn't resolved, then I'll go ahead and put it back on Calendar in the next month or two. But a--the problem is, it costs the Court $1,400.00 a month--something like that, I would imagine--twelve- to fourteen-hundred a month to do everything and a--it's a drop-in-the-bucket--

BY THE FATHER: Well, if we could do--no, if we could leave it on record, when the settlement takes places, you know, I would be happy to pay any back a--

BY THE COURT: Well, if you are going to get behind a couple of months, we're not going to come and execute any of your wages or anything like that--we understand that, so there will be no problem catching it up.

Okay, that will be all here this morning.

...

...

...

* * * *

ATTEST: This is a full, true and accurate transcript of the proceedings.

CORRAINE JONES
Electronic Recorder/Transcriber

Case No. J26174

Department No. XVI

Kristy Diamond

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK
SITTING IN SEPARATE SESSION AS A JUVENILE COURT

In the Matter of:

WILLIAM PATRICK CASTILLO
DOB: 12/28/72
AGE: TEN YEARS

a minor.

DISPOSITIONAL REPORT

January 25, 1983

REASON FOR HEARING: WILLIAM PATRICK CASTILLO admitted to the allegations in Petition #3 on January 10, 1983, charging him with first degree arson. On the same day, he further admitted to Petition #4 of the same charge and Petition #5, charging him with runaway (see Exhibits A, B and C).

LENGTH OF DETAINMENT: On January 1, 1983, WILLIAM was booked into Detention at Juvenile Court Services, and has remained there since (see Exhibit D). This was after WILLIAM and another boy ran away from Children's Behavioral Services (CBS). Both boys were picked up by the authorities and booked after an investigation proved they were responsible for setting several fires in Circus Circus Hotel and Casino, and a separate fire at the Oz Chinese restaurant. WILLIAM'S attitude has been one of nonchalance, seemingly uncaring about his detainment or the seriousness of the charges. He seems to be more concerned with impressing his peers in Detention with possible commitment to Elko or Spring Mountain Youth Camp. He feels it would be a lot of fun to be there. Example C of the Dispositional Court Report dated July 29, 1982, gives a history of WILLIAM'S involvement with the Juvenile Court Services. In addition, WILLIAM turned himself into Detention on October 20, 1982, after another

runaway from the Manager apartment at CBS. On December 7, 1982, WILLIAM became a Child in Need of Supervision as a result of this charge.

POLICE REPORT: (See Exhibit E). In addition, a detailed report was made by the Clark County Fire Department on the circumstances of the fires. Please be aware in the Fire Department report of the seriousness of the fire setting and the preplanning which took place in the setting of these fires (see Exhibit F).

SCHOOL REPORT: A recent school report was included as Exhibit A in the Dispositional Court Report dated December 7, 1982.

PSYCHOLOGICAL REPORT: A psychological report was included as Exhibits F and G in the Dispositional Court Report dated July 29, 1982. In addition, a neurological report was done by Dr. Kirby Read on January 14, 1983 (see Exhibit G).

FAMILY COMPOSITION AND CHARACTERISTICS: No significant changes from the Dispositional Court Report dated December 7, 1982.

PREVIOUS SERVICES: (See Exhibit H).

INDIVIDUAL'S ATTITUDE: No significant changes from the Dispositional Court Report dated December 7, 1982.

PEERS: See Dispositional Court Report dated December 7, 1982.

CONCLUSIONS AND RECOMMENDATIONS: On January 20, 1983, the Youth Services Panel met, discussed WILLIAM CASTILLO and recommended he be placed in the Adolescent Unit at Children's Behavioral Services.

THEREFORE, IT IS RESPECTFULLY RECOMMENDED that WILLIAM PATRICK CASTILLO remain a Ward of the Juvenile Court and placed in the co-custody of Nevada State Welfare Division and the administrator of the Department of Human Resources, Division of Mental Hygiene and Mental Retardation.

IT IS FURTHER RECOMMENDED that WILLIAM PATRICK CASTILLO be placed in the Adolescent Unit at Children's Behavioral Services.

/////

IT IS FURTHER RECOMMENDED that WILLIAM PATRICK CASTILLO be adjudicated a Delinquent Child and placed on Formal Probation for a period of six months.

IT IS FURTHER RECOMMENDED that Mr. and Mrs. Castillo continue to pay $105 per month in child support.

IT IS FURTHER RECOMMENDED that this matter be brought back for Formal Review in six months.

Respectfully submitted,

Vincent F. Fallon
District Office Manager IV
Nevada State Welfare Division

By: _____
Patrick Donohue, Supervisor

By: _____
Pamela Thome, Social Worker

Submitted by:

D. BRIAN McKAY
Attorney General
State of Nevada

By: _____
Deputy Attorney General
Counsel to Welfare Division
700 Belrose Street
Las Vegas, Nevada 89158

/////

/////

/////

/////

/////

/////

/////

/////

FILED

FEB 2 2 18 PM '83

LORETTA BOWMAN
CLERK

BY Mary Strong

J-26174

DEPT. XVI

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

SITTING IN SEPARATE SESSION AS A JUVENILE COURT

IN THE MATTER OF:

WILLIAM P. CASTILLO

A MINOR UNDER 18 years

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE FREDRICK FISHER, CHIEF REFEREE OF THE COURT

TUESDAY, JANUARY 25, 1983

REPORT AND DISPOSITION

APPEARANCES

For the State: DAN HOLLINGSWORTH
Deputy District Attorney

Also Present: DENNIS HINSON
CBS

PAM THOMS
Nevada State Welfare

JOE AND BARBARA CASTILLO
Parents of the minor

WILLIAM PATRICK CASTILLO
The minor

LAS VEGAS, NEVADA TUESDAY, JANUARY 25, 1993

PROCEEDINGS

BY THE COURT: This is the time set for the Report and Disposition in Case Number J-26174, in the matter of William Patrick Castillo. Let the record show that Patrick is present, along with his parents, Mr. and Mrs. Castillo; Pam Thome of Nevada State Welfare; Dennis Hinson from C.B.S. and Dan Hollingsworth of the Attorney General's Office.

Ms. Thome?

BY MS. THOME: Your Honor, on January 10th, Billy pled guilty to the allegations in Petitions three, four and five. Three and four were first-degree arson and five was runaway.

January 1st, he'd been booked into Detention after setting some fires--several fires at Circus Circus Casino and another fire over at the Oz Chinese restaurant--he and another boy.

The board--the Youth Services Board did meet last Thursday morning and their recommendation was that Billy be placed over at Children's Behavioral Services, in the Youth Hospital. The reason being that they felt that that was the only secure unit in the State of Nevada.

BY THE COURT: Do they file any kind of written report or any kind of reasons.

BY MS. THOME: No, they didn't. This was--Dennis was in the meeting also. There was no written report filed. That was the recommendation given to me from them.

So I'm recommending that Billy be placed over at Children's Behavioral Services in the Adolescence Secure Unit and that he remain a ward of Juvenile Court in the co-custody of Nevada State Welfare and the Department of Human Resources. That he be placed in the adolescent unit of the hospital at CBS. That he be adjudicated a Delinquent Child and placed on Probation for

six months--Formal Probation for six months. I don't have the terms of the Probation. I'm getting those typed up at the office and will get them signed and sent through later. And also, that the Castillos continue to pay the $105.00 a month child support and that we bring this back for Review in six months.

BY THE COURT: Mr. Hinson, do you agree with the recommendation of the Report?

BY MR. HINSON: Yes, your Honor. I concur with Ms. Thome's report. Since she mentioned that I'm a member of the Youth Service's Panel, we looked at the allegations and charges and felt that they were severe, and we feel that Billy is a clear and present danger to the community. As such, we looked at such areas as Spring Mountain or Elko and felt them not secure and would not meet his immediate needs. It's our feelings and impressions that a minimum of six months in a locked hospital setting, that we may provide him with some additional services--testing, and we feel that's the best for the community at this time.

BY THE COURT: Thank you. Mr. and Mrs. Castillo, or Mrs. Castillo, is there anything you would like to say here today?

BY MS. CASTILLO: No, your Honor.

BY THE COURT: Do you agree with the recommendation of having this young man go to CBS Adolescent Unit?

BY THE MOTHER: (Shakes head, affirmatively)

BY THE COURT: Is your husband also in agreement with that?

BY THE MOTHER: Yes, sir, but I don't know if he has anything to say about that.

BY THE COURT: Well, we'll wait for him to come back. William, is there anything you want to say here today?

BY THE MINOR: No, your Honor.

BY THE COURT: Understand you'd rather go up to Spring

Mountain or to Elko, is that right?

BY THE MINOR: Huh-uh.

BY THE COURT: Well, you've been saying things like that over in Detention. Think you are a big man to go out and commit Arson, is that it?

BY THE MINOR: No.

BY THE COURT: How hard is it to light a match?

BY THE MINOR: Not hard at all.

BY THE COURT: Is there anything you want to say here this morning?

BY THE MINOR: No.

BY THE COURT: Mr. Castillo, are you in agreement with the recommendation of having William go back to the CBS program?

BY THE FATHER: Well, the new program, yes; not the old one. My main concern as I mentioned to them both is that somehow in his mind--I mean he looks up to the kids in Detention and his--in his mind, he has this picture painted about Elko and Spring Mountain, that it's a nice place to go. And my only concern was, you know, that he was in a place where he would be restricted from doing any of these other things because in my mind, you know, if he has any chance--he wants to go to these places so bad, there's the chance now that he might continue doing the things. What I understand, it's a very locked-unit, so basically on that, yes, I agree 100-percent.

BY THE COURT: Okay, thank you.

William, I don't know--you probably don't realize that you are very lucky as to what's happening here. You know, we know what happens to kids who go to Spring Mountain and Elko and I can tell you this, usually, their futures are very dismal and that's why everybody is trying so hard to avoid sending you to Spring Mountain or Elko. Certainly we can do that based on these charges. We could send you up there and just lock you up.

We'd much rather have you work out your problems here at CBS. We know if you can, your future will be a lot brighter. Now I don't know what you think the big deal is about going up to one of these institutions, but frankly, we do everything we can to avoid sending kids there. You'd better take advantage of the opportunity you have here.

THE ORDER WILL BE THAT William Castillo is to remain a Ward of the Juvenile Court, placed in the co-custody of Nevada State Welfare and the Department of Human Resources, Division of Mental Hygiene and Retardation. He will be placed in the Adolescent Unit at CBS.

IT IS FURTHER ORDERED that William be adjudicated a Delinquent Child and he is to be placed on Formal Probation for a period of six months.

The parents are to continue to pay the sum of $105.00 per month.

We will set this matter for Review six months from today. And it will be on the 26th of July, at the hour of 9:00.

BY MR. HINSON: Excuse me, your Honor, may I have permission to transport Billy this morning?

BY THE COURT: Yes. Billy will be released to Mr. Hinson for transportation to CBS.

* * * * *

ATTEST: This is a full, true and accurate transcript of the proceedings.

CORRINNE JONES
Electronic Recorder/Transcriber

EXHIBIT 80

EXHIBIT 80

FAMILY COURT
OF ST. LOUIS COUNTY
501 South Brentwood Boulevard
Clayton, Missouri 63105
(314) 615-4400
TTY: (314) 615-0618

August 9, 2005

Mr. John Aliseo
Law Offices of the Federal Public Defender
330 S. Third Street – Suite 700
Las Vegas, Nevada 89101

RE: William P. Castillo AKA William P. Thorpe
St. Louis County Police Department Reports: #85-0137481, 85-0137452 & 85-0195322

Dear Mr. Aliseo:

In response to your recent request, we have enclosed copies of the aforementioned police reports.

Sincerely,

William R. Seely
Court Administrator

/ml

Enclosure

WT ASTILL 0044-0000186

DATE: *08/08/05* PAGE *1*
TIME: *16:04*
Requested By : RECORDS

SAINT LOUIS COUNTY POLICE DEPARTMENT
INVESTIGATIVE REPORT

UCR CODE COMPLAINT NUMBER *85-0137452*

ENTERED BY *1834* REPORT DATE *06/04/85* REPORT TIME *21:49* REVIEWED BY
CALL DATE *06/04/85* RECD TIME *21:22* DISP TIME *21:22* ARRIVED TIME *21:32*
POLICE UNIT *2108* COGIS *1201* PCT/DIST *01* SECTOR *1* NATURE *BURGLARY*
RESPOND LOCATION *3818 JUSTICE RD UNI* APT/SUITE/RM
CITY *SAINT LOUIS COUNTY*
CALLER'S NAME *ARCHAMBAULT* AC PHONE *831-2254*
ADDR
REPORTING OFFICER *1132-DAY* DEPT *FIRST PRECINCT*
REPORTING JURIS *SAINT LOUIS COUNTY*
REPORTING FOR JURIS *SAINT LOUIS COUNTY*
CASE STATUS *ACTIVE* CALL RECEIVED *RADIO*
OFFENSE/FACTS *BURGLARY & LARCENY UNDER 150*
PREMISE *GARAGE - ATTACHED*
OCCURED FROM DAY *TUE* DATE *06/04/85* TIME *20:00*
TO DAY *TUE* DATE *06/04/85* TIME *20:30*
OCCURED LOCATION *3818 JUSTICE RD UNI* APT/SUITE/RM
CITY *SAINT LOUIS COUNTY* APT/SUB/BUS *SACRED COURE*
ENTRY POINT *DOOR GARAGE* EXIT POINT *DOOR GARAGE*
ENTRY VISIBLE TO PATROL? *Y* ENTRY METHOD *OPEN DOOR/WINDOW*
TOOL USED *UNKNOWN* WEAPON/OBJECT USED

OTHER AGENCY

WC ASTILLO 044-00000187

VICTIM PERSON INFORMATION

NAME LAST *ARCHAMBAULT* SURNAME FIRST *CHARLES* MIDDLE *P*
BUSINESS ADDR *11133 DUNN* APT/SUITE/RM
CITY *ST. LOUIS* STATE *MO* ZIP
HOME ADDR *3818 JUSTICE* APT/SUITE/RM
CITY *ST. LOUIS* STATE *MO* ZIP
BUSINESS AC *314* PHONE *355-2300* EXT CONTACT NAME
HOME AC *314* PHONE *831-2254* EXT CONTACT NAME
RACE *WHITE* SEX *MALE* DOB *02/03/50* AGE *35*
PERSON CODE *UNKNOWN* MARITAL STATUS *MARRIED*
SSN *000-00-0000* BIRTH PLACE *ST LOUIS* RESIDENT STATUS
OCCUPATION *TRUCK DRIVER*
VICTIM PROSECUTE? *Y* VICTIM INJURED? *N* DOMESTIC ABUSE? *N*

EMOTION COMMENT

WITNESS INFORMATION

WITNESS ROLES:
REPORTING PARTY *OWNER*
PERSON DISCOVERING
NAME LAST *SEE VICTIM #1* SURNAME FIRST MIDDLE
HOME ADDR APT/SUITE/RM
CITY *ST. LOUIS* STATE *MO* ZIP *00*
HOME AC PHONE EXT CONTACT NAME
RACE SEX DOB AGE
OCCUPATION RESIDENT STATUS

INSURANCE INFORMATION

INSURANCE COMPANY *PRUDENTIAL*
AGENT'S NAME *ERNIE JOHNSON*
BUSINESS ADDR *N HWY 67* APT/SUITE/RM
CITY *ST. LOUIS* STATE *MO* ZIP
BUSINESS AC *000* PHONE *000-0000*

PROPERTY INFORMATION

PROPERTY CODE *MISCELLANEOUS*
PROPERTY ROLE
QUANTITY *1* DESCRIPTION *BICYCLE*
SERIAL NUMBER BRAND *COLUMBIA*
MODEL PROPERTY VALUE *75.00* RECOVERED VALUE
OPERATION IDENT USED? *N* OPERATION
ADDITIONAL INFO
BOY'S/YEL FRAME & SEAT/BLK TIRES/26"

TOTAL:
RECOVERED TOTAL:

NARRATIVE INFORMATION

NEIGHBORHOOD CANVASSED? N
SEND A TELETYPE? N
COMPUTER MESSAGE/TELETYPE REFERENCE #
ENTER BY
WAS ANY EVIDENCE SEIZED? N NARRATIVE? Y

Upon arrival, I contacted the victim who stated that his wife had left the residence at 8:00 pm to go to the store. When she returned at 8:30 pm she found one bike laying in the middle of the garage floor, but a second bike had been removed from the garage.

It should be noted the overhead garage door was left open during this 30 minute period; however, nothing else was removed from the garage.

Nothing further at this time.

Relative to a Burglary 2nd and Stealing reported at #3818 Justice,
I have the following to submit.

Officer Terry Day, DSN 1132, recovered the aforementioned bicycle (Columbia) at #951 Justice. There were no witnesses. Relative to this incident was a Burglary also reported at #961 Justice. For further information see report number 85-137481.

Two Juvenile suspects were taken into custody, [redacted] and William Thorpe. Both juveniles were apprehended while riding the bicycles across the parking lot at #169 Flower Valley. The juveniles were apprehended by Officer Day, DSN 1132, and Officer Carroll, DSN 2165.

Both juveniles were held at the Precinct Station, at which time the [redacted] subject stated that they had taken several bicycles off of Justice and left two others.

[redacted] was released into the custody of her parent, [redacted]

F-11 Form was filled out. Thorpe's guardian, Vida Thorpe, was contacted, at which time she stated that the juvenile should be taken to Juvenile Detention. An F-11 Form was filled out and the juvenile was transported to Juvenile Detention by Officer Carroll, DSN 2165.

Nothing further.

The bike stolen at 3818 Justice was located at 961 Justice.

It should be noted, at 961 Justice 2 other bikes were stolen.

For further details see report #85-137481.

Supplemental to a report of a Burglary 2nd at 3818 Justice Road, I have the following to submit. Victim Archambault found at his residence 1 child's dirt bike, Racing Pro brand, 20", with a serial #6544113. Ar
chambault brought the bicycle to the precinct station.
Owner is unknown at this time. The bicycle was not listed as stolen, per an NCIC inquiry.

Evidence was properly marked and will be sent to Property Control.

Nothing further to report at this time.

DATE: *08/08/05* PAGE *1*
TIME: *16:04*
Requested By : RECORDS

SAINT LOUIS COUNTY POLICE DEPARTMENT
SUPPLEMENT REPORT #1

COMPLAINT NUMBER *85-0137452*

ENTERED BY *2239* REPORT DATE *06/05/85* REPORT TIME *05:18* REVIEWED BY
REPORTING OFFICER *2165-CARROLL* DEPT *FIRST PRECINCT*
RECLASSIFY INCIDENT? *Y* RECLASS DESCRIPTION *CLEARED BY ARREST*

OTHER AGENCY

WCASTILO044-00000191

SUSPECT INFORMATION

SUSPECT ROLE: *ARRESTED-BOOKED AT POLICE STATION*
CHARGES:
BURGLARY 2ND *STEALING UNDER 150*
CAUTION CODES:

NAME LAST [redacted] SURNAME FIRST [redacted] MIDDLE *M*
ALIAS SSN *000-00-0000*
MARITAL STATUS RESIDENT STATUS
RACE *WHITE* HAIR *BROWN* HOW WORN
SEX *FEMALE* EYES *BROWN* WGT *115* HGT FT *5* IN *2* +/-
PHYSICAL
CLOTHING
SCARS/MARKS/TATTOOS
DOB *04/10/72* AGE *13* PERSON CODE *JUVENILE*
BIRTH PLACE
EMPLOYED? *N* PRESENT/LAST EMPLOYER
OCCUPATION
HOME ADDR [redacted] APT/SUITE/RM
CITY *ST. LOUIS* STATE *MO* ZIP
HOME AC *314* PHONE *837-9477* CONTACT NAME
SUSPECT ARRESTED? *Y* MIRANDA GIVEN? *N* SEND TELETYPE? *N*
APPLY FOR WARRANTS? *N* SUSPECT RELEASED? *N* SUSPECT INJURED? *N*

EMOTION COMMENT

SUSPECT ROLE: *ARRESTED-BOOKED AT POLICE STATION*
CHARGES:
BURGLARY 2ND *STEALING UNDER 150*
CAUTION CODES:

NAME LAST *THORPE* SURNAME FIRST *WILLIAM* MIDDLE *P*
ALIAS SSN *000-00-0000*
MARITAL STATUS RESIDENT STATUS
RACE *WHITE* HAIR *BROWN* HOW WORN
SEX *MALE* EYES *BROWN* WGT *85* HGT FT *5* IN *0* +/-
PHYSICAL
CLOTHING
SCARS/MARKS/TATTOOS
DOB *12/28/72* AGE *12* PERSON CODE *JUVENILE*
BIRTH PLACE
EMPLOYED? *N* PRESENT/LAST EMPLOYER
OCCUPATION
HOME ADDR *20 CHARLOTT* APT/SUITE/RM
CITY *ST. LOUIS* STATE *MO* ZIP
HOME AC *314* PHONE *838-1316* CONTACT NAME
SUSPECT ARRESTED? *Y* MIRANDA GIVEN? *N* SEND TELETYPE? *N*
APPLY FOR WARRANTS? *N* SUSPECT RELEASED? *N* SUSPECT INJURED? *N*

EMOTION COMMENT

PROPERTY INFORMATION

PROPERTY CODE *MISCELLANEOUS*
PROPERTY ROLE
QUANTITY *1* DESCRIPTION *BICYCLE*
SERIAL NUMBER BRAND *COLUMBIA*
MODEL PROPERTY VALUE *0.01* RECOVERED VALUE *75.00*
OPERATION IDENT USED? *N* OPERATION
ADDITIONAL INFO
BOY'S/YELLOW FRAME/BLACK SEAT/RECOVERED

TOTAL:
RECOVERED TOTAL:

NARRATIVE INFORMATION

NEIGHBORHOOD CANVASSED? *N*
SEND A TELETYPE? *N*
COMPUTER MESSAGE/TELETYPE
REFERENCE # ENTER BY
WAS ANY EVIDENCE SEIZED? *Y* NARRATIVE? *Y*

Relative to a Burglary 2nd and Stealing reported at #3818 Justice, I have the following to submit.

Officer Terry Day, DSN 1132, recovered the aforementioned bicycle (Columbia) at #951 Justice. There were no witnesses. Relative to this incident was a Burglary also reported at #961 Justice. For further information see report number 85-137481.

Two Juvenile suspects were taken into custody, [redacted] and William Thorpe. Both juveniles were apprehended while riding the bicycles
across the parking lot at #169 Flower Valley. The juveniles were apprehended by Officer Day, DSN 1132, and Officer Carroll, DSN 2165.

Both juveniles were held at the Precinct Station, at which time the [redacted]ubject stated that they had taken several bicycles off of Justice and left two others.

Yates was released into the custody of her parent, [redacted]
F-11 Form was filled out. Thorpe's guardian, Vida Thorpe, was con-

tacted, at which time she stated that the juvenile shou
ld be taken
to Juvenile Detention. An F-11 Form was filled out and the juvenile
was transported to Juvenile Detention by Officer Carroll, DSN 2165.

Nothing further.

The bike stolen at 3818 Justice was located at 961 Justice.

It should be noted, at 961 Justice 2 other bikes were stolen.

For further details see report #85-137481.

DATE: *08/08/05*
TIME: *16:04*
Requested By : RECORDS

SAINT LOUIS COUNTY POLICE DEPARTMENT
SUPPLEMENT REPORT #3

COMPLAINT NUMBER *85-0137452*

ENTERED BY *1314* REPORT DATE *06/06/85* REPORT TIME *04:38* REVIEWED BY
REPORTING OFFICER *2165-CARROLL* DEPT *FIRST PRECINCT*
RECLASSIFY INCIDENT? *N* RECLASS DESCRIPTION

OTHER AGENCY

NARRATIVE INFORMATION

NEIGHBORHOOD CANVASSED? *N*
SEND A TELETYPE? *N*
COMPUTER MESSAGE/TELETYPE
REFERENCE # ENTER BY
WAS ANY EVIDENCE SEIZED? *Y* NARRATIVE? *Y*

Supplemental to a report of a Burglary 2nd at 3818 Justice Road, I have the following to submit. Victim Archambault found at his residence 1 child's dirt bike, Racing Pro brand, 20", with a serial #6544113. Archambault brought the bicycle to the precinct station. Owner is unknown at this time. The bicycle was not listed as stolen, per an NCIC inquiry.

Evidence was properly marked and will be sent to Property Control.

Nothing further to report at this time.

DATE: *08/08/05*
TIME: *16:03*
Requested By : RECORDS

SAINT LOUIS COUNTY POLICE DEPARTMENT
INVESTIGATIVE REPORT

UCR CODE COMPLAINT NUMBER *85-0137481*

ENTERED BY *1834* REPORT DATE *06/04/85* REPORT TIME *22:17* REVIEWED BY
CALL DATE *06/04/85* RECD TIME *21:57* DISP TIME *21:57* ARRIVED TIME *21:57*
POLICE UNIT *2108* COGIS *1201* PCT/DIST *01* SECTOR *1* NATURE *LARCENY*
RESPOND LOCATION *961 JUSTICE CT UNI* APT/SUITE/RM
CITY *SAINT LOUIS COUNTY*
CALLER'S NAME *MCDERMOTT* AC PHONE *831-7995*
ADDR
REPORTING OFFICER *1132-DAY* DEPT *FIRST PRECINCT*
REPORTING JURIS *SAINT LOUIS COUNTY*
REPORTING FOR JURIS *SAINT LOUIS COUNTY*
CASE STATUS *ACTIVE* CALL RECEIVED *RADIO*
OFFENSE/FACTS *BURGLARY & LARCENY OVER 150*
PREMISE *GARAGE - ATTACHED*
OCCURED FROM DAY *TUE* DATE *06/04/85* TIME *21:30*
TO DAY *TUE* DATE *06/04/85* TIME *22:00*
OCCURED LOCATION *961 JUSTICE CT UNI* APT/SUITE/RM
CITY *SAINT LOUIS COUNTY* APT/SUB/BUS
ENTRY POINT *DOOR GARAGE* EXIT POINT *DOOR GARAGE*
ENTRY VISIBLE TO PATROL? *Y* ENTRY METHOD *OPEN DOOR/WINDOW*
TOOL USED *OTHER* WEAPON/OBJECT USED

OTHER AGENCY

VICTIM PERSON INFORMATION

NAME LAST *MCDERMOTT* SURNAME FIRST *MIKE* MIDDLE *J*
BUSINESS ADDR *10850 BAUER ROAD* APT/SUITE/RM
CITY *ST. LOUIS* STATE *MO* ZIP
HOME ADDR *961 JUSTICE COURT* APT/SUITE/RM
CITY *ST. LOUIS* STATE *MO* ZIP
BUSINESS AC *314* PHONE *895-9840* EXT CONTACT NAME
HOME AC *314* PHONE *831-7995* EXT CONTACT NAME
RACE *WHITE* SEX *MALE* DOB *10/30/51* AGE *33*
PERSON CODE *UNKNOWN* MARITAL STATUS *MARRIED*
SSN *000-00-0000* BIRTH PLACE *ST LOUIS* RESIDENT STATUS
OCCUPATION *SYSTEMS TECH AT&T*
VICTIM PROSECUTE? *Y* VICTIM INJURED? *N* DOMESTIC ABUSE? *N*

EMOTION COMMENT

WITNESS INFORMATION

WITNESS ROLES:
REPORTING PARTY *OWNER*
PERSON DISCOVERING
NAME LAST *SEE VICTIM #1* SURNAME FIRST MIDDLE
HOME ADDR APT/SUITE/RM
CITY *ST. LOUIS* STATE *MO* ZIP *00*
HOME AC PHONE EXT CONTACT NAME
RACE SEX DOB AGE
OCCUPATION RESIDENT STATUS

INSURANCE INFORMATION

INSURANCE COMPANY *AMERICAN FAMILY*
AGENT'S NAME *FRANK PAGANO*
BUSINESS ADDR *13685PO BOX* APT/SUITE/RM
CITY *FLORISSANT* STATE *MO* ZIP
BUSINESS AC *314* PHONE *741-3182*

PROPERTY INFORMATION

PROPERTY CODE *MISCELLANEOUS*
PROPERTY ROLE
QUANTITY *1* DESCRIPTION *BICYCLE*
SERIAL NUMBER BRAND *COLUMBIA*
MODEL PROPERTY VALUE *200.00* RECOVERED VALUE
OPERATION IDENT USED? *N* OPERATION
ADDITIONAL INFO
10 SPD/BOY'S/26"/RED W/BLK SEAT

PROPERTY CODE *MISCELLANEOUS*

PROPERTY ROLE
QUANTITY *1* DESCRIPTION *BICYCLE*
SERIAL NUMBER BRAND *ROSS*
MODEL PROPERTY VALUE *175.00* RECOVERED VALUE
OPERATION IDENT USED? *N* OPERATION
ADDITIONAL INFO
3 SPD/GIRL'S/SIL GRY/W/BASKET/24"

TOTAL:
RECOVERED TOTAL:

NARRATIVE INFORMATION

NEIGHBORHOOD CANVASSED? *Y*
SEND A TELETYPE? *N*
COMPUTER MESSAGE/TELETYPE
REFERENCE # ENTER BY
WAS ANY EVIDENCE SEIZED? *N* NARRATIVE? *Y*

While at the address at 3818 Justice Court, handling a burglary from a garage, where a boy's bike had been stolen, Mr. McDermott from 961 Justice knocked on the door and stated that someone had apparently left two bikes in his garage and taken his bikes.

After going to the address of 961 Justice, I found the bike that had been taken from 3818 Justice.

The garage door at 961 Justice was open at the time of occurrence, and I found two bikes inside the garage.

No other garage doors we
re left open on Justice.

Nothing further at this time.

Neighborhood canvass was negative.

Relative to the report of a Burglary and Stealing at 961 Justice between 9:30 pm and 10:00 pm, I have the following to submit.

Two Juveniles, [redacted]nd William Thorpe (hereinafter to be referred to as Juveniles #1 & #2), were apprehended at 169 Flower Valley while riding two bicycles that had been stolen from 961 Justice; a 26", Ross, girl's bicycle and a 26", Columbia, men's bicycl
e. Both

juveniles were apprehended by Officer Terry Day, DSN 1132, and Officer Carroll, DSN 2165.

Both juveniles were taken into custody, at which time Juvenile #1 ([redacted]) stated that they had taken several bicycles from Justice Court that evening (for further information see report 85-137452). Juvenile #1 was released into custody of her parent, [redacted] and an F-11 Form was filled out. Juvenile #2's guardian, Vida Thorpe, was notified and stated that the juvenile should be taken to Juvenile Detention.

Juvenile #2 was transported to Juvenile Detention by Officer 2165 and an F-11 Form was filled out. Victim Michael McDermott responded to the First Precinct Station and identified the property. Evidence Release Form was filled out and the property was released to the owner.

Nothing further.

Reference to a Burglary 2nd from 961 Justice Road, this officer has the following to report. Victim McDermott found 1 20" Huffy dirt bike, black in color, serial #H A072873, at his residence. He brought the bicycle to the precinct station, where it was properly marked and packaged as evidence. It should be noted that the bicycle has not been entered as stolen, per a NCIC check.

Nothing further to report at this time.

DATE: *08/08/05* PAGE *1*
TIME: *16:03*
Requested By : RECORDS

SAINT LOUIS COUNTY POLICE DEPARTMENT
SUPPLEMENT REPORT #1

COMPLAINT NUMBER *85-0137481*

ENTERED BY *2239* REPORT DATE *06/05/85* REPORT TIME *05:44* REVIEWED BY
REPORTING OFFICER *2165-CARROLL* DEPT *FIRST PRECINCT*
RECLASSIFY INCIDENT? *Y* RECLASS DESCRIPTION *CLEARED BY ARREST*

OTHER AGENCY

SUSPECT INFORMATION

SUSPECT ROLE: ***ARRESTED-BOOKED AT POLICE STATION***
CHARGES:
BURGLARY 2ND ***STEALING OVER 150***
CAUTION CODES:

NAME LAST [redacted] SURNAME FIRST [redacted] MIDDLE *M*
ALIAS SSN *000-00-0000*
MARITAL STATUS RESIDENT STATUS
RACE *WHITE* HAIR *BROWN* HOW WORN
SEX *FEMALE* EYES *BROWN* WGT *115* HGT FT *5* IN *2* +/-
PHYSICAL
CLOTHING
SCARS/MARKS/TATTOOS
DOB *04/10/72* AGE *13* PERSON CODE *JUVENILE*
BIRTH PLACE
EMPLOYED? *N* PRESENT/LAST EMPLOYER
OCCUPATION
HOME ADDR [redacted] APT/SUITE/RM
CITY *ST. LOUIS* STATE *MO* ZIP
HOME AC *314* PHONE *837-9477* CONTACT NAME
SUSPECT ARRESTED? *Y* MIRANDA GIVEN? *N* SEND TELETYPE? *N*
APPLY FOR WARRANTS? *N* SUSPECT RELEASED? *N* SUSPECT INJURED? *N*

EMOTION COMMENT

SUSPECT ROLE: ***ARRESTED-BOOKED AT POLICE STATION***
CHARGES:
BURGLARY 2ND ***STEALING OVER 150***
CAUTION CODES:

NAME LAST *THORPE* SURNAME FIRST *WILLIAM* MIDDLE *P*
ALIAS SSN *000-00-0000*
MARITAL STATUS RESIDENT STATUS
RACE *WHITE* HAIR *BROWN* HOW WORN
SEX *MALE* EYES *BROWN* WGT *85* HGT FT *5* IN *8* +/-
PHYSICAL
CLOTHING
SCARS/MARKS/TATTOOS
DOB *12/28/72* AGE *12* PERSON CODE *JUVENILE*
BIRTH PLACE
EMPLOYED? *N* PRESENT/LAST EMPLOYER
OCCUPATION
HOME ADDR *20 CHARLOTT* APT/SUITE/RM
CITY *ST. LOUIS* STATE *MO* ZIP
HOME AC *314* PHONE *838-1316* CONTACT NAME
SUSPECT ARRESTED? *Y* MIRANDA GIVEN? *N* SEND TELETYPE? *N*
APPLY FOR WARRANTS? *N* SUSPECT RELEASED? *N* SUSPECT INJURED? *N*

EMOTION COMMENT

PROPERTY INFORMATION

PROPERTY CODE *MISCELLANEOUS*
PROPERTY ROLE
QUANTITY *1* DESCRIPTION *BICYCLE*
SERIAL NUMBER BRAND *COLUMBIA*
MODEL PROPERTY VALUE *0.01* RECOVERED VALUE *200.00*
OPERATION IDENT USED? *N* OPERATION
ADDITIONAL INFO
10 SPEED/RED/BOY'S

PROPERTY CODE *MISCELLANEOUS*
PROPERTY ROLE
QUANTITY *1* DESCRIPTION *BICYCLE*
SERIAL NUMBER BRAND
MODEL PROPERTY VALUE *0.01* RECOVERED VALUE *175.00*
OPERATION IDENT USED? *N* OPERATION
ADDITIONAL INFO
GIRL'S/3 SPEED

TOTAL:
RECOVERED TOTAL:

NARRATIVE INFORMATION

NEIGHBORHOOD CANVASSED? *N*
SEND A TELETYPE? *N*
COMPUTER MESSAGE/TELETYPE
REFERENCE # ENTER BY
WAS ANY EVIDENCE SEIZED? *Y* NARRATIVE? *Y*

Relative to the report of a Burglary and Stealing at 961 Justice between 9:30 pm and 10:00 pm, I have the following to submit.

Two Juveniles, [redacted] and William Thorpe (hereinafter to be referred to as Juveniles #1 & #2), were apprehended at 169 Flower Valley while riding two bicycles that had been stolen from 961 Justice; a 26", Ross, girl's bicycle and a 26", Columbia, men's bicycle. Both juveniles were apprehended by Officer Terry Day, DSN 1132, and Officer Carroll, DSN
2165.

Both juveniles were taken into custody, at which time Juvenile #1 [redacted] stated that they had taken several bicycles from Justice Court that evening (for further information see report 85-137452).

Juvenile #1 was released into custody of her parent, [redacted] and an F-11 Form was filled out. Juvenile #2's guardian, Vida Thorpe, was notified and stated that the juvenile should be taken to Juvenile Detention.

Juvenile #2 was transported to Juvenile Detention by Officer 21 65 and an F-11 Form was filled out. Victim Michael McDermott responded to the First Precinct Station and identified the property. Evidence Release Form was filled out and the property was released to the owner.

Nothing further.

DATE: *08/08/05*
TIME: *16:03*
Requested By : RECORDS

SAINT LOUIS COUNTY POLICE DEPARTMENT
SUPPLEMENT REPORT #2

COMPLAINT NUMBER *85-0137481*

ENTERED BY *1314* REPORT DATE *06/06/85* REPORT TIME *04:43* REVIEWED BY
REPORTING OFFICER *2165-CARROLL* DEPT *FIRST PRECINCT*
RECLASSIFY INCIDENT? *N* RECLASS DESCRIPTION

OTHER AGENCY

NARRATIVE INFORMATION

NEIGHBORHOOD CANVASSED? *N*
SEND A TELETYPE? *N*
COMPUTER MESSAGE/TELETYPE
REFERENCE # ENTER BY
WAS ANY EVIDENCE SEIZED? *Y* NARRATIVE? *Y*

Reference to a Burglary 2nd from 961 Justice Road, this officer has the following to report. Victim McDermott found 1 20" Huffy dirt bike, black in color, serial #HA072873, at his residence. He brought the bicycle to the precinct station, where it was properly marked and packaged as evidence. It should be noted that the bicycle has not been entered as stolen, per a NCIC check.

Nothing further to report at this time.

DATE: *08/08/05* PAGE *1*
TIME: *16:06*
Requested By : RECORDS

SAINT LOUIS COUNTY POLICE DEPARTMENT
INVESTIGATIVE REPORT

UCR CODE COMPLAINT NUMBER *85-0195322*

ENTERED BY *1834* REPORT DATE *08/07/85* REPORT TIME *17:04* REVIEWED BY
CALL DATE *08/05/85* RECD TIME *18:56* DISP TIME *18:58* ARRIVED TIME *19:06*
POLICE UNIT *2207* COGIS *1530* PCT/DIST *01* SECTOR *1* NATURE *RESIDENTIAL BURGLARY*
RESPOND LOCATION *1909 TEALWOOD COVE* APT/SUITE/RM
CITY *SAINT LOUIS COUNTY*
CALLER'S NAME *MEYER* AC PHONE *838-9141*
ADDR
REPORTING OFFICER *2212-PANZER* DEPT *SECOND PRECINCT*
REPORTING JURIS *SAINT LOUIS COUNTY*
REPORTING FOR JURIS *SAINT LOUIS COUNTY*
CASE STATUS *ACTIVE* CALL RECEIVED *RADIO*
OFFENSE/FACTS *BURGLARY 1ST & LARC OVER 150*
PREMISE *GARAGE - ATTACHED*
OCCURED FROM DAY *MON* DATE *08/05/85* TIME *17:00*
TO DAY DATE TIME
OCCURED LOCATION *1909 TEALWOOD COVE* APT/SUITE/RM
CITY *SAINT LOUIS COUNTY* APT/SUB/BUS
ENTRY POINT *DOOR GARAGE* EXIT POINT *DOOR GARAGE*
ENTRY VISIBLE TO PATROL? *Y* ENTRY METHOD *OPEN DOOR/WINDOW*
TOOL USED WEAPON/OBJECT USED
INVESTIGATIVE DEPARTMENTS

DSN	NAME	DEPARTMENT NAME
1266	RAKONICK .	FIRST PRECINCT

OTHER AGENCY

MCASTILLO044-00000205

VICTIM PERSON INFORMATION

NAME LAST *MEYER* SURNAME FIRST *SUSAN* MIDDLE *E*
HOME ADDR *1909 TEALWOOD* APT/SUITE/RM
CITY *ST. LOUIS* STATE *MO* ZIP
HOME AC *314* PHONE *838-9141* EXT CONTACT NAME
RACE *WHITE* SEX *FEMALE* DOB *12/04/49* AGE *35*
PERSON CODE *UNKNOWN* MARITAL STATUS *MARRIED*
SSN *000-00-0000* BIRTH PLACE *ST LOUIS* RESIDENT STATUS
OCCUPATION *HOUSEWIFE*
VICTIM PROSECUTE? *Y* VICTIM INJURED? *N* DOMESTIC ABUSE? *N*

EMOTION COMMENT

WITNESS INFORMATION

WITNESS ROLES:
REPORTING PARTY
LAST PERSON IN POSSESSION
PERSON DISCOVERING
PARENT
NAME LAST *SEE VICTIM #1* SURNAME FIRST MIDDLE
HOME ADDR APT/SUITE/RM
CITY *ST. LOUIS* STATE *MO* ZIP *00*
HOME AC PHONE EXT CONTACT NAME
RACE SEX DOB AGE
OCCUPATION RESIDENT STATUS

WITNESS ROLES:
OWNER
NAME LAST *MEYER* SURNAME FIRST *DAVID* MIDDLE
HOME ADDR *1909 TEALWOOD* APT/SUITE/RM
CITY *ST. LOUIS* STATE *MO* ZIP *00*
HOME AC *314* PHONE *838-9141* CONTACT NAME
RACE SEX DOB AGE
OCCUPATION RESIDENT STATUS

WITNESS ROLES:
WITNESS
NAME LAST *CHESTER* SURNAME FIRST *BRIAN* MIDDLE
HOME ADDR *1913 ACORN TRAILS* APT/SUITE/RM
CITY *ST. LOUIS* STATE *MO* ZIP *00*
HOME AC *314* PHONE *837-1824* CONTACT NAME
RACE SEX DOB AGE
OCCUPATION RESIDENT STATUS

INSURANCE INFORMATION

INSURANCE COMPANY *AMERICAN FAMILY*
AGENT'S NAME *DAN NELSON*
BUSINESS ADDR *11992FRANCLAR* APT/SUITE/RM
CITY *ST. LOUIS* STATE *MO* ZIP
BUSINESS AC *314* PHONE *291-1968*

COMPLAINT NUMBER *85-0195322*

PROPERTY INFORMATION

PROPERTY CODE *MISCELLANEOUS*
PROPERTY ROLE
QUANTITY *1* DESCRIPTION *DIRT BIKE*
SERIAL NUMBER *0283535527* BRAND *ROSS*
MODEL PROPERTY VALUE *180.00* RECOVERED VALUE
OPERATION IDENT USED? *N* OPERATION
ADDITIONAL INFO
83 BLACK & CHROME

TOTAL:
RECOVERED TOTAL:

NARRATIVE INFORMATION

NEIGHBORHOOD CANVASSED? *N*
SEND A TELETYPE? *Y*
COMPUTER MESSAGE/TELETYPE *STOLEN ARITCLE SENT BY TP ON 080585*
REFERENCE # *TT 53* ENTER BY *2033*
WAS ANY EVIDENCE SEIZED? *N* NARRATIVE? *Y*

Upon arrival, I contacted the reporting party, Meyer. She stated that her son's bicycle had been stolen from their garage which is attached to their house.

David Meyer, 8 yoa, son of Susan Meyer, had been out riding his bike around Riverwood Trails subdivision all afternoon. At 4:30 pm he came home for dinner parking his bicycle in the left side of the garage. When he went back out at 5:00 pm the bicycle was gone. It should be noted the garage door was open all day.

Brian Chester, a neighbor boy, saw 2 white males about 15 years old riding down Riverwood Trails on bicycles. One of the males was wearing blue jeans, and stripped shirt. He also was tall and thin, with blond hair. This subject was riding a bike exactly like David Meyer's. Brian did not recognize either one of the boys as being from the subdivision, nor could he give any further description.

The stolen bicycle was 20" tall, it had a broken rear reflector, yellow hand grips, with yellow and black st reamers, and a speedometer on the

center of the handle bars.

Notification was made to Pyatt, DSN 460, of Communications.

Burglary Detective Rakoneck, DSN 1266, also responded.

DATE: *08/08/05*
TIME: *16:06*
Requested By : RECORDS

SAINT LOUIS COUNTY POLICE DEPARTMENT
SUPPLEMENT REPORT #1

COMPLAINT NUMBER *85-0195322*

ENTERED BY *2106* REPORT DATE *08/09/85* REPORT TIME *08:38* REVIEWED BY
REPORTING OFFICER *1266-RAKONICK* DEPT *CRIMES AG PROPERTY*
RECLASSIFY INCIDENT? *N* RECLASS DESCRIPTION
INVESTIGATIVE DEPARTMENTS

DSN	NAME	DEPARTMENT NAME
1614	STAFFORD .	FIRST PRECINCT

OTHER AGENCY

SUSPECT INFORMATION

SUSPECT ROLE: *ARRESTED-BOOKED AT POLICE STATION*
CHARGES:
BURGLARY FIRST
CAUTION CODES:
MENTAL CONDITION
NAME LAST *CASTILLO* SURNAME FIRST *WILLIAM* MIDDLE *PATRICK*
ALIAS *WILLIAM THORPE* SSN *000-00-0000*
MARITAL STATUS RESIDENT STATUS
RACE *WHITE* HAIR *BROWN* HOW WORN
SEX *MALE* EYES *BROWN* WGT *90* HGT FT *5* IN *0* +/-
PHYSICAL
CLOTHING
SCARS/MARKS/TATTOOS
DOB *12/28/72* AGE *12* PERSON CODE *JUVENILE*
BIRTH PLACE
EMPLOYED? *N* PRESENT/LAST EMPLOYER
OCCUPATION
HOME ADDR *20 CHARLOTTE* APT/SUITE/RM
CITY *FLORISSANT* STATE *MO* ZIP
HOME AC *314* PHONE *838-1316* CONTACT NAME
SUSPECT ARRESTED? *Y* MIRANDA GIVEN? *N* SEND TELETYPE? *N*
APPLY FOR WARRANTS? *Y* SUSPECT RELEASED? *N* SUSPECT INJURED? *N*

EMOTION COMMENT

SUSPECT ROLE: *ARRESTED-BOOKED AT POLICE STATION*
CHARGES:
BURGLARY FIRST
CAUTION CODES:
MENTAL CONDITION
NAME LAST [redacted] SURNAME FIRST [redacted] MIDDLE *MARIE*
ALIAS SSN *000-00-0000*
MARITAL STATUS RESIDENT STATUS
RACE *WHITE* HAIR *BROWN* HOW WORN
SEX *FEMALE* EYES *HAZEL* WGT *120* HGT FT *5* IN *2* +/-
PHYSICAL
CLOTHING
SCARS/MARKS/TATTOOS
DOB *07/10/72* AGE *13* PERSON CODE *JUVENILE*
BIRTH PLACE
EMPLOYED? *N* PRESENT/LAST EMPLOYER
OCCUPATION
HOME ADDR [redacted] APT/SUITE/RM
CITY *FLORISSANT* STATE *MO* ZIP
HOME AC *314* PHONE *837-9477* CONTACT NAME
SUSPECT ARRESTED? *Y* MIRANDA GIVEN? *N* SEND TELETYPE? *N*
APPLY FOR WARRANTS? *Y* SUSPECT RELEASED? *N* SUSPECT INJURED? *N*

EMOTION COMMENT

PROPERTY INFORMATION

PROPERTY CODE *MISCELLANEOUS*
PROPERTY ROLE
QUANTITY *1* DESCRIPTION *20" BOYS BIKE*
SERIAL NUMBER *0283535527* BRAND *ROSS*
MODEL *DIRT BIKE* PROPERTY VALUE *0.01* RECOVERED VALUE *194.00*
OPERATION IDENT USED? *N* OPERATION
ADDITIONAL INFO
SPEEDOMETER, BLACK

TOTAL:
RECOVERED TOTAL:

NARRATIVE INFORMATION

NEIGHBORHOOD CANVASSED? *Y*
SEND A TELETYPE? *N*
COMPUTER MESSAGE/TELETYPE
REFERENCE # ENTER BY
WAS ANY EVIDENCE SEIZED? *N* NARRATIVE? *Y*

At 4:00 p.m. on Wednesday, August 7, 1985, I received a phone call from Police Officer Mel Schillinger, DSN 10, of the Edmundson Police Department, business phone 428-4577, who said that he had recovered a stolen bicycle, which had been reported stolen from 1909 Tealwood Cove in a burglary.

I responded to the Edmundson Police Department at 4440 Holman Avenue, along with Detective Jim Stafford, DSN 1614, of the I.D. Bureau, who photographed the bicycle described as a boy's, 20", Ross
brand bicycle, black in color, serial number 0283535527.

Police Officer Shillinger stated that the bike had been recovered in a wooded area on August 6, 1985, under Edmundson Police Department complaint number 85-597 and that witnesses had reported that two white juvenile subjects had left the bicycle there. These two subjects matched the description of two juvenile subjects described above, who were taken into custody for "Armed Robbery" on August 6, 1985, under Edmundson Police Dep
artment complaint number
85-592.

The bike was conveyed and released to the victim, Mrs. Susan Meyer, at 1909 Tealwood Cove, who signed the Property Release Form, which will be placed into evidence.

The recovered value of the bicycle is a $194.00.

Teletype #53, of August 5, 1985, was cancelled per Clerk 1834 on Teletype #509, of August 7, 1985.

Further investigation to follow, the results of which will be forwarded in a supplemental report.

This incident remains "Active".

DATE: *08/08/05*
TIME: *16:06*
Requested By : RECORDS

SAINT LOUIS COUNTY POLICE DEPARTMENT
SUPPLEMENT REPORT #2

COMPLAINT NUMBER *85-0195322*

ENTERED BY *1839* REPORT DATE *08/27/85* REPORT TIME *15:09* REVIEWED BY
REPORTING OFFICER *1266-RAKONICK* DEPT *CRIMES AG PROPERTY*
RECLASSIFY INCIDENT? *N* RECLASS DESCRIPTION

OTHER AGENCY

NARRATIVE INFORMATION

NEIGHBORHOOD CANVASSED? Y
SEND A TELETYPE? N
COMPUTER MESSAGE/TELETYPE REFERENCE #
ENTER BY
WAS ANY EVIDENCE SEIZED? Y NARRATIVE? Y

In reference to the burglary at 1909 Tealwood Cove and in an attempt to interview the juvenile subject, Castillo, I contacted his grandmother, Mrs. Vida Thorpe, at 20 Charlotte, Florissant, Missouri, who stated that her grandson had been sent by a Juvenile Court Order to live with his mother, Mrs. Barbara Castillo, residing at 401 Red Stone Drive, Las Vegas, Nevada, H.P. 702-363-1084, where he would be under the supervision of that state's Juvenile authorities.

The [redacted] subject, cur rently in Juvenile Detention, has been assigned to Deputy Juvenile Officer Trish Kahill, B.P. 831-0808, who advised that [redacted] had employed an attorney, namely Mr. Jerry Suddarth, 320 Sonderen Drive, O'Fallon, Missouri, 63366, B.P. 1-272-7644.

I called Mr. Suddarth about interviewing [redacted] and he said that he has advised her not to talk about it at this time.

A copy of this report will be forwarded to the Juvenile Court for any further action.

Request this offense be classified as " CLEARED".

DATE: *08/08/05* PAGE *1*
TIME: *16:06*
Requested By : RECORDS

SAINT LOUIS COUNTY POLICE DEPARTMENT
SUPPLEMENT REPORT #3

COMPLAINT NUMBER *85-0195322*

ENTERED BY *2101* REPORT DATE *09/13/85* REPORT TIME *17:39* REVIEWED BY
REPORTING OFFICER *1614-STAFFORD* DEPT *SECOND PRECINCT*
RECLASSIFY INCIDENT? *N* RECLASS DESCRIPTION

OTHER AGENCY

NARRATIVE INFORMATION

NEIGHBORHOOD CANVASSED? *N*
SEND A TELETYPE? *N*
COMPUTER MESSAGE/TELETYPE
REFERENCE # ENTER BY
WAS ANY EVIDENCE SEIZED? *N* NARRATIVE? *Y*

This officer was requested at Edmundson Police Department at 5:00 p.m., on 8/7/85, by Detective Rakonick, DSN 1266, St. Louis County Burglary Unit, to photograph the recovered stolen property.

Photograph one is a close up view of the recovered bicycle.

DISPOSITION: Forwarded to Photo Lab.

IN THE

JUVENILE COURT

County of St. Louis, Missouri

In The Interest of:

Castillo William
A CHILD a/k/a Thorpe

September 5 19 85

No. 76584

Comes now Susan Goodwin, attorney for the Juvenile Office, and moves to cancel the dispositional hearing set on September 13, 1985, in the above entitled cause. Juvenile has returned to Nevada and is under the jurisdiction of the Clarke County, Nevada, Court. Case closed. Costs taxed against parents

FILED
SEP 06 1985
RAYMOND V. CLIFFORD
CIRCUIT CLERK, ST. LOUIS COUNTY

cc: Wm Castillo
Barbara & Joe Castillo
Vida Thorpe
Dorothy Schuchat, GAL
Wm. Klages, Atty
R J Fontana
S Goodwin

SO ORDERED Robert N Branom, Commissioner 9/5/85

Susan Goodwin
Attorney

phone

Judge

Attorney

phone

Form No. 13

31

WCASTILLO044-0000000220

FORM D - 110

IN THE
JUVENILE COURT
County of St. Louis, Missouri

IN THE INTEREST OF Castillo William Cause No. 76584 (B)
Last First Middle Lifetime No. 0082641-01

Male/Female, age 12
B.D. 12-28-72
County of Residence Clarke Co St. Louis City
Nevada

FILED
AUG 16 1985
CLIFFORD

ST. LOUIS COUNTY DETENTION ORDER TO RELEASE JUVENILE HELD IN EXCESS OF 48 HOURS

The above-named juvenile has been detained by Court Order(s) since 06-05-85. It is now recommended that the above-named juvenile be released for the reason: juvenile being returned to Nevada - Courtesy Supervision has been ~~being~~ rescinded.

Time: 0750 Date: 08-16-85 Carol Portman
~~Chief~~/Deputy Juvenile Officer
Mel 8/15/85

☒ ORDER BY JUDGE/COMMISSIONER TO RELEASE JUVENILE HELD MORE THAN 48 HOURS

It is ordered that the above-named ~~juvenile~~ be released to Transported to Airport for flight (name) to Nevada by Rea Meyer, DYS+ (relationship) Carol Portman, DJO (address) on behalf of Nevada Juvenile Parole Board
(mother, father, custodian, other adult).

Time: 10:30 am Date: 8/16/85 By [signature]
Judge/Commissioner

32

MCASTILLO-0044-0000221

Form D - 120

IN THE
JUVENILE COURT
County of St. Louis, Missouri

AKA THORPE William

IN THE INTEREST OF Castillo William
Last First Middle

Cause No. 76584 (B)

Lifetime No.

Male/Female Male, age 12

B.D. 12-25-72

County of Residence ~~St Louis Co St. Louis City~~

FILED

AUG 7 1985

RAYMOND V. CLIFFORD
CIRCUIT CLERK ST. LOUIS COUNTY

ORDER TO CHANGE PLACE OF DETENTION

The above-named juvenile was detained by Court Order issued by the Judge/Commissioner on 7/31/85 at 9:45 Am to hold the above-named juvenile in the following place of detention:

Juvenile Center	Court Foster Home	Fam. Serv. Foster Care	Other	
☐	☐	☐	☒	BSC / 501 S Brentwood (specify)

It is now recommended that the place of detention be changed for the reason that: Juvenile ran away from Boys Shelter Care on 8/1/85 Juvenile also suspected of being involved in Burglary 1st and Robbery while on the Run.

The parents have been notified on 8/6/85 by Postman of the proposed change in place of detention.

Cheryl Campbell
Chief/Deputy Juvenile Officer
Cmc 8/7/85

Time: 11:30 Date: 8/6/85

On the basis of the above recommendation, it is now ordered that the above last place of detention of the above-named juvenile be changed to:

NEW PLACE OF DETENTION (check one)

Juvenile Center	Court Foster Home	Fam. Serv. Foster Care	Other	
☒	☐	☐	☐	(specify)

☐ Payment to be made by St. Louis County per General Administrative Order of 11/1/77 for a period not to exceed 60 days.

By Judge/Commissioner

Time: 1530 Date: 8-7-85

33

CASTILLO044-0000222

IN THE INTEREST OF:

CASTILLO, WILLIAM a/k/a THORPE Cause No. 76584

S# 008264101

~~Male~~/Female Age: 12 d/b: 12-28-72

FINDINGS AND RECOMMENDATION/ORDER OF JUDGE/COMMISSIONER
(Sec. 211.031-1(2) or (3), RSMo)

FILED
AUG 07 1985
RAYMOND V. CLIFFORD
CIRCUIT CLERK

FINDINGS

☐ A. Leave is granted to the Juvenile officer to dismiss without prejudice the allegations contained in paragraph(s) _____ of the Petition/Supplemental Petition/Amendment to Petition (app. #s: _____)

☒ B. The allegations of the Petition/~~Supplemental Petition/Amendment to Petition/Motion~~ as amended (app. #s: 3) are true and the juvenile comes/continues to come within the provisions of Section 211.031-1(2)/(3) RSMo.:

☒ 1. By admission and consent.

☐ 2. After denial and hearing, by finding of the Judge/Commissioner.

☐ a) The allegations of page 1 of the Petition/Supplemental Petition/Amendment to the Petition/Motion are true and the juvenile comes within the provisions of the juvenile code by reason of the following acts and/or conditions:

_____

_____

_____

_____

_____

Cause No. 265-54

☐ b) The allegations of paragraph(s) _____ of the Petition/ Supplemental Petition/Amendment to Petition/Motion (app. #(s):_____ _____) are not true and are dismissed by Judge/Commissioner.

☒ 3. Dispositional hearing set on 9/13/85 at 10:30 AM

Predispositional investigation ordered _____

C. ☐ 1. The juvenile is in need of care and treatment which cannot be furnished by placing the juvenile in the home of the juvenile, but which requires the care, custody and discipline of a facility of the Division of Youth Services and therefore the Court determines a suitable community based treatment service does not exist or has proven ineffective.

☐ 2. The juvenile has been under the Court's supervision after an adjudication under the provisions of subdivision (2) or (3) of subsection 1 of Section 211.031 RSMo.

☐ D. _____

Robert H. Branon
Commissioner 8/5/85

ORDER, JUDGMENT AND DECREE/RECOMMENDATION

☐ A. The Petition/Supplemental Petition/Amendment to Petition/Motion (app. #(s): _____ _____) is dismissed on the _____ day of _____, 19____ unless otherwise ordered by the Court. Cost waived/taxed against parents.

WCASTILLO044-0000000224

IN THE

JUVENILE COURT

County of St Louis, Missouri

In The Interest of:

Castillo William
A CHILD

August 5 1985

No. 76584

Comes now Susan Gwodzin, attorney for the Juvenile Office, and moves to dismiss, without prejudice, allegation 4-B-III of the Amendment to the Petition filed on June 13, 1985, in the above-entitled cause.

Cc: Wm. Castillo
Barbara & Joe Castillo
Vida Thorpe
Dorothy Schuchat, C.A.C.
Wm. K. Clay, atty.
A. Jo Pastore
S. Gwodzin

FILED
AUG 05 1985
RAYMOND V. CLIFFORD
CIRCUIT CLERK, ST. LOUIS COUNTY

SO ORDERED Robert H. Branom 8/5/85
Commissioner

Susan Gwodzin
Attorney

phone

Judge

Attorney

Form No. 13

phone

36

AA002058

MCASTILLO044-0000225

Form D - 120

IN THE
JUVENILE COURT
County of St. Louis, Missouri

IN THE INTEREST OF Castillo aka Thorpe, William
Last First Middle

Cause No. 76584 (B)

Lifetime No. 0082641-01

Male/Female, age 12

B.D. 12-28-72

County of Residence St. Louis St. Louis City

ORDER TO CHANGE PLACE OF DETENTION

The above-named juvenile was detained by Court Order issued by the Judge/Commissioner on 06-05-85 at _____ to hold the above-named juvenile in the following place of detention:

Juvenile Center [X] Court Foster Home [ ] Fam. Serv. Foster Care [ ] Other [ ] _____ (specify)

It is now recommended that the place of detention be changed for the reason that:
secure detention not deemed necessary.

grandmother
The parents have been notified on 07-29-85 by DBO of the proposed change in place of detention.

Carol Portman
Officer/Deputy Juvenile Officer
Mel 7/31/85

Time: 1400 hrs. Date: 07-30-85

FILED
JUL 31 1985
RAYMOND V. CLIFFORD
CIRCUIT CLERK, ST. LOUIS COUNTY

On the basis of the above recommendation, it is now ordered that the above last place of detention of the above-named juvenile be changed to:

NEW PLACE OF DETENTION (check one)

Juvenile Center [ ] Court Foster Home [ ] Fam. Serv. Foster Care [ ] Other [X] Boys Shelter Care (specify)

[ ] Payment to be made by St. Louis County per General Administrative Order of 11/1/77 for a period not to exceed 60 days. Robert H Brandon, Commissioner 7/31/85 1:05 p.m.

By _____
Judge/Commissioner

Time: 945 am Date: 7/31/85

37

WCASTILLO044-00000226

DELINQ

IN THE

JUVENILE COURT

County of St. Louis, Missouri

6-13-85 amend B

In the Interest of
CASTILLO, WILLIAM P. A.K.A.
THORPE, WILLIAM P.
A Juvenile

6-12, 1985

Date of birth: 12/28/72

No. 76584 (B)

S008264101

AMENDMENT TO PETITION

Comes now Kenneth Hensiek, Juvenile Officer, by and through his attorney, Ellyn L. Sternfield, and by leave of Court, amends the Petition, page 2, paragraph 4 by inserting the following subparagraph:

4. B. III. Said juvenile, contrary to Section 569.120 R.S. Mo., did commit the class B misdemeanor of property damage in the third degree in that on or about May 15, 1985 in St. Louis County, Missouri said juvenile knowingly damaged a glass door at 12 Mercury Drive, which property was possessed by Van Kim Quon, by striking the glass door with a rock causing it to shatter.
(App. 4; Florissant Police Report #85-8500 MB2334)

FILED

JUN 13 1985

RAYMOND V. GILMORE
CIRCUIT CLERK

Ellyn L. Sternfield, Attorney for the Juvenile Officer 6-7-85

SO ORDERED:

Milton A. Lutz JUDGE

gb 6/12/85

38

WCASTIL 0044-0000227

JUVENILE COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

STATEMENT OF FINDINGS AND RECOMMENDATIONS - JUVENILE DETENTION HEARING

IN THE INTEREST OF
Wm. Castillo, a/k/a Thorpe
Male/Female Age 1

CAUSE # 76584
DATE 6-10-85

Appearances Present
Juvenile

Vida Thorpe, S. Mathew
Parents Other

C. Bartman
Juvenile Officer

A. Walker
Attorney for Juvenile

E. Stanfield
Attorney for Juvenile Officer

Other Attorney

The juvenile was detained by order of Judge M. Saitz on 6/5/85
A detention hearing pursuant to the Supreme Court Rules has been requested by
The Juvenile Officer has filed a petition pursuant to Rule 114.01, or the juvenile is under jurisdiction of the Court under a prior judgment.

The Court has reviewed the following written reports or social records offered to the Court

With respect to the continued detention of the juvenile, the Court has reviewed the positions of the parties which are summarized as follows:

1. The position of the juvenile and his attorney release to grandmother

2. The position of the parents of the juvenile

3. The position of other interested parties present Vida Thorpe - release to her custody

4. The position of the Juvenile Officer Held - under jurisdiction of Nevada Juvenile Court (Las Vegas) supervision 6/5/85

☐ It is recommended that the juvenile be released from detention in the custody of _____, pending the hearing, subject to the special conditions on the back.

☒ It is recommended that the juvenile be detained pending further proceedings to insure the presence of the juvenile at the hearing to safeguard the juvenile or other persons pending such hearing.

Walter Lemay, Commr.

NOTICE OF RIGHT TO REHEARING

The juvenile or his/her custodian is entitled to a rehearing by the Juvenile Court if, within 10 days after receiving the notice of the above findings and recommendations, any of them files a request in writing with the Court for a hearing. If no hearing before the Judge is requested within 10 days after the parties have received notice, the above findings and recommendations shall become the decree of the Court, if and when adopted and confirmed by an Order of the Judge.

WAIVER

(I), (We), the undersigned, have read the above Notice of Right to rehearing and do hereby waive the right to request a rehearing before the Juvenile Court and do hereby consent to the immediate entry of an order by the Judge adopting and confirming the above findings and recommendations, (I), (We) also waive the right to receive a copy of the Order by the Judge.

Juvenile | Custodian* | Attorney

Custodian* | Custodian* | Attorney

Custodian* | Attorney | Attorney

The above findings and recommendations are adopted and confirmed.
SO ORDERED:

DATE JUDGE

* Custodian means parent(s), step-parent(s), juvenile's adult spouse, guardian ad litem, person/agency/institution having legal or physical custody of juvenile.

CASTILLO 0044-0000228

FORM D-100 aka C. St. 110 IN THE JUVE[illegible] COURT, COUNTY OF ST. LOUIS

IN THE INTEREST OF Thorpe, William L. Cause No. _____
Last First Middle

Lifetime No. _____

D.J.O. Assign Rittman

Male/Female _____, Age 12, Date of birth 12-28-72

County of Residence St. Louis ~~St. Louis City~~

TEMPORARY DETENTION BY THE JUVENILE OFFICER OF JUVENILE FOR A PERIOD NOT TO EXCEED 24 HOURS

☒ Temporary Detention of Juvenile authorized by the Juvenile Officer/person in charge of detention facility

Juvenile Center ☒ Court Foster Home ☐ Temp. Custody w/Div. Fam. Serv. Foster Care ☐ Other ☐ _____ (Specify)

REASON: Burglary 2nd (2 counts) & SRC

Time: 0035 Date: 6/5/85 _____
Detention Supervisor/Chief/deputy juvenile officer

☐ RELEASE BY THE JUVENILE OFFICER OF THE JUVENILE HELD LESS THAN 24 HOURS

The above-named juvenile was released to _____
(name)

_____ (circle one: mother/father/custodian/other adult)
(address)

On the promise of such person to bring the juvenile to Court at such times as the Court may direct.

Time: _____ Date: _____ _____
Detention Supervisor/Chief/deputy juvenile officer

☐ Payment by St. Louis County per Gen. Admin. Order of 7/1/84 for period of detention.

☐ Payment by Division Family Services for period of detention.

Time: _____ Date: _____ by _____
Judge/Commissioner

It is now requested that the Court order that the above-named juvenile further detained for more than 24 hours for the reason that: _____

Further Investigation

Time: 9:35 Date: 6/5/85 Marie D. Rayburn
Chief/deputy juvenile officer

FILED

JUN - 6 1985

RAYMOND V. CLIFFORD
CIRCUIT CLERK, ST. LOUIS COUNTY

40

AA002062

Cause No._____

☑ Probable Cause hearing held.

☑ Initial detention admission form received in evidence.

☐ Police report received in evidence.

☑ Signed statement of Officer Carroll received in evidence.

☐ Upon the basis of a review of the foregoing record, the Court finds that at this time no probable cause exists to believe that the juvenile comes within the provisions of Sec. 211.031.1(2) or (3), R.S. Mo., and therefore, the Court orders the deputy juvenile officer or his or her delegate to release the juvenile forthwith.

Time:_____ Date_____ By _____
Judge

☑ Upon the basis of a review of the foregoing record, the Court finds that at this time probable cause exists to believe that the juvenile comes within the provisions of Sec. 211.031.1(2) or (3) R.S. Mo.

☑ ORDER BY JUDGE to hold juvenile in excess of 24 hours in the following place of detention until further Order of the Court.

Juvenile Center ☐ Court Foster Home ☐ Temp. Custody w/Div. Fam. Ser. Foster Care ☐ Other ☐ _____ (Specify)

Address:_____

☑ TEMPORARY DETENTION LEAVE NOT TO EXCEED 8 HOURS AUTHORIZED BY DJO

☑ TEMPORARY DETENTION RELEASE AUTHORITY TO DJO SUBJECT TO SUBSEQUENT APPROVAL BY JUDGE/COMMISSIONER

Time: 10:00 pm Date 6/5/85 By M. Autry
Judge

☐ Police Report received: Time:_____ Date:_____ By_____

DETENTION HEARING: Date: 6/10/85 Time: 0830

Rev. 8/84

CASTILLO 0044-00000230

DELINQ FELONY

STATE OF MISSOURI
SS.
County of St. Louis

orig B1 B2 original

IN THE JUVENILE COURT
THE JUVENILE DIVISION OF THE CIRCUIT COURT
COUNTY OF ST. LOUIS

IN THE INTEREST OF

CASTILLO, WILLIAM P. AKA
THORPE, WILLIAM P.
Male/~~Female~~, B.D. 12-28-72
Age 12

No. 76584

S008264101

PETITION

Now comes the Juvenile Officer of St. Louis County, Missouri, and states to the Court, upon information and belief:

1. This petition is filed in the interest of:

NAME	BIRTH DATE	RESIDENCE
William P. Castillo AKA William P. Thorpe	12-28-72	20 Charlotte, Florissant, MO 63031

2. The name of the Juvenile's parents is/~~are~~:

NAME	RESIDENCE
Barbara and Joe Castillo	401 Red Stone, Las Vegas, NV 89128

The name of the juvenile's legal guardian or nearest known relative is:

NAME	RESIDENCE
Vida Thorpe, grandmother	20 Charlotte, Florissant, MO 63031

3. The juvenile is in the custody of:

NAME	ADDRESS
St. Louis County Juvenile Court	Detention Center

FILED
JUN 1985
RAYMOND V. CLIFFORD
CIRCUIT CLERK ST. LOUIS COUNTY

42

AA002064

4.

A. The juvenile, William P. Castillo AKA William P. Thorpe, is in need of care and treatment because the juvenile comes within the provisions of Section 211.031.1(2) of the Juvenile Code, to-wit: the behavior or associations of the juvenile are injurious to his/her welfare or to the welfare of others.

B. The juvenile, William P. Castillo AKA William P. Thorpe, has violated state law(s) or municipal ordinance(s) and therefore comes within the provisions of Section 211.031.1(3) of the Juvenile Code, to-wit:

I. Said juvenile, contrary to Section 569.170 R.S. Mo., did commit the class C felony of burglary in the second degree in that on or about June 4, 1985 in St. Louis County, Missouri, said juvenile in concert with another knowingly entered unlawfully in a building, located at 961 Justice Court and possessed by Mike J. McDermott for the purpose of committing the crime of stealing therein.
(App. 3; St. Louis County Police Report #85-137481 FC2352)

II. Said juvenile, contrary to Section 570.030 R.S. Mo., did commit the class C felony of stealing in that on or about June 4, 1985, in St. Louis County, Missouri, said juvenile appropriated a Columbia boy's ten speed bicycle and a Ross three speed girl's bicycle of a value of at least one hundred fifty dollars, which said property was in the possession of Mike J. McDermott, and said juvenile appropriated such property without the consent of Mike J. McDermott and with the purpose to deprive him thereof.
(App. 3; St. Louis County Police Report #85-137481 FC24021A)

5. The juvenile is in such condition or surroundings that his welfare requires that his custody be immediately assumed by the Court, for the reason that _____

6. The juvenile is (~~xxxxx~~) now in detention.

WHEREFORE, petitioner prays that the Court make and enter such judgment as the Court shall find to be necessary in the interest of the juvenile.

sc 6/7/85

Corinne Louise Richardson
Attorney for the Juvenile Officer of
St. Louis County
2-7-86

4. A. The juvenile, William P. Castillo AKA William P. Thorpe, is in need of care and treatment because the juvenile comes within the provisions of Section 211.031.1(2) of the Juvenile Code, to-wit: the behavior or associations of the juvenile are injurious to his/her welfare or to the welfare of others.

B. The juvenile, William P. Castillo AKA William P. Thorpe, has violated state law(s) or municipal ordinance(s) and therefore comes within the provisions of Section 211.031.1(3) of the Juvenile Code, to-wit:

I. Said juvenile, contrary to Section 569.170 R.S. Mo., did commit the class C felony of burglary in the second degree in that on or about June 4, 1985 in St. Louis County, Missouri, said juvenile in concert with another knowingly entered unlawfully in a building, located at 961 Justice Court and possessed by Mike J. McDermott for the purpose of committing the crime of stealing therein.
(App. 3; St. Louis County Police Report #85-137481 FC2352)

II. Said juvenile, contrary to Section 570.030 R.S. Mo., did commit the class C felony of stealing in that on or about June 4, 1985, in St. Louis County, Missouri, said juvenile appropriated a Columbia boy's ten speed bicycle and a Ross three speed girl's bicycle of a value of at least one hundred fifty dollars, which said property was in the possession of Mike J. McDermott, and said juvenile appropriated such property without the consent of Mike J. McDermott and with the purpose to deprive him thereof.
(App. 3; St. Louis County Police Report #85-137481 FC24021A)

5. The juvenile is in such condition or surroundings that his welfare requires that his custody be immediately assumed by the Court, for the reason that _____

6. The juvenile is (~~is not~~) now in detention.

WHEREFORE, petitioner prays that the Court make and enter such judgment as the Court shall find to be necessary in the interest of the juvenile.

sc 6/7/85

Corinne Louise Richardson
Attorney for the Juvenile Officer of
St. Louis County
6-7-85

WCASTILLO045-00000002

Saint Louis COUNTY POLICE

Colonel Jerry Lee
Chief of Police
7900 Forsyth Boulevard
St. Louis, Missouri 63105
Voice/TTY (314) 889-2341

BUREAU OF CENTRAL POLICE RECORDS - (314) 615-5317
ARREST RECORD INFORMATION
RECORD CHECK INFORMATION REFLECTS ARREST/CRIMINAL INFORMATION FOR ST. LOUIS CITY AND ST. LOUIS COUNTY ONLY
DOES NOT INCLUDE TRAFFIC VIOLATION INFORMATION
RECORD CHECK APPLICATIONS WILL NOT BE ACCEPTED BY FAX

SECTION A: MUST BE COMPLETED PERSONALLY BY INDIVIDUAL REQUESTING RECORD CHECK

NAME William P. Castillo (THORE) RACE ____ SEX M HT. ____ WT. ____

ADDRESS ____ DATE OF BIRTH 12-28-72

CITY ____ STATE ____ ZIP ____ PLACE OF BIRTH ____

SOCIAL SECURITY # 513-72-7752 DRIVERS LICENSE # ____ STATE ____

THIS INFORMATION IS CURRENT AS OF ____ BUT MAY NOT FULLY REFLECT DISPOSITIONS INSTITUTED THEREAFTER IN THE JUDICIAL PROCESS OR DURING JUDICIAL REVIEW.

I authorize the St. Louis County Police Department to release arrest/conviction information concerning myself which is on file at the Regional Justice Information Service in compliance with Chapter 610, Revised Missouri Statutes. I further understand that I am required to provide satisfactory verification of my identity prior to release of this information and that I am subject to a fee in accordance with County ordinance. The intent of the record check is for:

☑ St. Louis City and St. Louis County Arrest/Conviction Information - OPEN RECORDS ONLY

☐ Record Challenge (St. Louis County Arrest/Conviction Information - BOTH OPEN AND CLOSED RECORDS)

☐ Child Care and Nursing Home Employment

OFFICIAL NOTICE OF DISCLAIMER

THE RECORD INFORMATION SHOWN ON THIS FORM INCLUDES OPEN ARREST INFORMATION AND CERTAIN CLOSED INFORMATION WITHIN ST. LOUIS COUNTY AS DEFINED BY MISSOURI STATE STATUTE. /ICTION INFORMATION WITHIN ST. LOUIS COUNTY AS WELL AS R ST. LOUIS CITY. The information provided is based on comparison of , date of birth and Social Security number provided by the applicant and, tion provided belongs to the applicant. Since the only positive means of l fingerprinting was not part of this record check, the Police Department ngs to the applicant.

RECEIVED
JUL 0 8 2005
Federal Public Defender
Las Vegas, Nevada

7-3-05
Date of Request

E FOR ARREST RECORD INFORMATION

AA002067

CASTILLO 045-0000003

DEFINITIONS

1. **Open Arrest Records** - Reflects that a person has been arrested and charged and has either been: 1) convicted in court; or 2) the case has not yet been heard in court. ***IF THE CASE HAS NOT YET BEEN RESOLVED IN COURT, THE INDIVIDUAL IS NOT CONSIDERED GUILTY UNDER THE LAW. AN ARREST IS NOT CONSIDERED A CONVICTION.***

2. **Suspended Imposition of Sentence (SIS)** - Suspension of sentence is a suspension of active proceedings in a criminal prosecution. It is not a final judgement or the equivalent of "no prosecution" nor does it represent a discharge of the accused. A disposition of "suspended imposition of sentence" becomes a closed record upon successful completion of probation.

SECTION B: TO BE COMPLETED BY BUREAU OF CENTRAL POLICE RECORDS (COUNTY POLICE)

The Commander, Bureau of Central Police Records, St. Louis County Police, Missouri, hereby validates the record information noted below. Not valid without signature and raised official Police Department seal.

NO RECORD
ST. LOUIS COUNTY, MISSOURI
POLICE DEPARTMENT
DATE 7-3-05 PER 2033
Record check reflects criminal information for St. Louis County ONLY.

Commander, Central Police Records, per Clerk

For Subpoena Duces Tecum

DATE	CHARGE	DISPOSITION	ARRESTING AGENCY

Subject Has Reports Where He Was A Juvenile. You Would Need A Court Order From Juvenile Court To Get These Reports Or Contact Juvenile Court At (314) 615 4400 or write To: St. Louis County Juvenile Court 501 S. Brentwood Blvd Clayton, Mo. 63105

Report #'s
85-137481
85-137452
85-195322

K02160

EXHIBIT 81

EXHIBIT 81

ORIGINAL

FILED

Jul 30 11 38 AM '96

CLERK

0322
DAVID M. SCHIECK, ESQ.
NEVADA BAR NO. 0824
302 E. CARSON, STE. 600
LAS VEGAS, NV 89101
702-382-1844

PETER LAPORTA, ESQ.
STATE PUBLIC DEFENDER'S OFFICE
NEVADA BAR NO. 3754
309 South Third #401
LAS VEGAS, NEVADA 89101
702-455-6265

ATTORNEYS FOR CASTILLO

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. WILLIAM CASTILLO, Defendant.	Case No. C 133336 Dept. No. VII Docket No. P

MOTION TO EXCLUDE OTHER BAD ACTS
AND IRRELEVANT PRIOR CRIMINAL ACTIVITY

DATE: 8-12-96
TIME: _____ ___.m.

COMES NOW, Defendant, WILLIAM CASTILLO by and through his attorneys, PETER LAPORTA, ESQ. and DAVID M. SCHIECK, ESQ., and moves this Court to exclude any introduction of prior bad acts, character evidence and irrelevant prior criminal activity from the trial phase of the proceedings.

This Motion is made and based upon the Points and Authorities attached hereto, all the documents and pleadings on file

herein and such argument as the Court may allow at the hearing of the Motion.

NOTICE OF MOTION

TO: THE STATE OF NEVADA, Plaintiff

TO: STEWART BELL, DISTRICT ATTORNEY

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the above and foregoing Motion on for hearing on the 12 day of Aug, 1996, at the hour of 9 a.m., before the above entitled Court, at the Clark County Courthouse, or as soon thereafter as counsel may be heard.

I.

STATEMENT OF FACTS

WILLIAM CASTILLO is charged with First Degree Murder with Use of a Deadly Weapon and six (6) other felonies, including arson, burglary and robbery. The trial date is set for August 26, 1996. Discovery and transcripts of the preliminary hearing show that there are certain items of evidence that should not properly come before the jury at the trial phase of the trial. The evidence and expected testimony is listed below. CASTILLO at this time is not addressing whether such evidence may be admissible at the penalty hearing should one be held.

II.

POINTS AND AUTHORITIES

As a general proposition, evidence of prior crimes and other bad acts of a criminal defendant is inadmissible character evidence unless it falls within certain specific exceptions. See, NRS 48.045.

Reference to a prior criminal history of a defendant is

David M. Schleck
302 E. Carson Ave., Ste. 918
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
302 E. Carson Ave., Ste. 918
Las Vegas, NV 89101
(702) 382-1844

reversible error. Witherow v. State, 104 Nev. 721, 765 P.2d 1153 (1988). The test for determining whether a reference to criminal history occurred is whether "a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity" Manning v. Warden, 99 Nev. 82, 659 P.2d 847 (1983), citing Commonwealth v. Allen, 292 A.2d 373, 375 (Pa 1972)

This court in Manning, supra, detailed a number of different cases where in indirect references to prior acts were found to be references to criminal history. See e.g. Gehrke v. State, 96 Nev. 581, 613 P.2d 1028 (1980); Reese v. State, 95 Nev. 419, 596 P.2d 212 (1979); Geary v. State, 91 Nev. 784, 544 P.2d 417 (1975); Founts v. State, 87 Nev. 165, 483 P.2d 654 (1971). Most interestingly, the State in Manning, supra, conceded that in a majority of jurisdiction, an improper reference to criminal history is a violation of due process since it affects the presumption of innocence. Id at 87.

Many years ago this Court well summarized the position of the Appellant herein:

> "The danger of allowing prejudicious remarks and testimony during a trial is not confined to their momentary effect upon the juror. Trial tactics are influenced immeasurably. Counsel is forced to object and argue repeatedly. Defendant may be compelled to testify when it is his right not to do so. Ibsen v. State, 83 Nev. 42, 422 P.2d 543 (1967)
>
> This reversal for a new trial is a hard burden to bear because Walker is a confirmed criminal. But it is a proud tradition of our system that every man, no matter who he may be, is guaranteed a fair trial. As stated by Chief Justice Traynor in People v. Cahan, 282 P.2d 905 at 912 (Cal. 1955) 'Thus, no matter how guilty a defendant might be or how outrageous his crime, he must not be deprived of a fair trial, and any action, official or otherwise,

that would have that effect would not be tolerated.

> The requisites of a trial free of prejudicial atmosphere are too deeply implanted to require repetition; for when the death penalty is executed, its consequences are irretrievable. A fair trial therefore is a very minimal standard to require before its imposition."

Walker v. Fogliani, 83 Nev. 154, 157, 425 P.2d 794 (1983)

III.

ARGUMENT

Known testimony that the State may try to elicit in violation of the above points and authorities are:

(1) That Castillo had been in prison previously;

(2) That Castillo got his tattoos while he was in prison:

(3) That Castillo had pending criminal cases and that he needed money to pay his attorney to handle such matters.

CONCLUSION

It is respectfully requested that the Court enter its order precluding the State from introducing any of the above evidence along with any other prior bad acts, character evidence or unrelated criminal activity at the trial herein.

DATED this 29 day of July, 1996.

SUBMITTED BY:

DAVID M. SCHIECK, ESQ.

David M. Schieck
302 E. Carson Ave., Ste. 818
Las Vegas, NV 89101
(702) 382-1844

EXHIBIT 101

EXHIBIT 101

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD GORDON BENNETT,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

CASE NO. 38934

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment Of Conviction
Eighth Judicial District Court, Clark County

FRANNY A. FORSMAN
Federal Public Defender
Nevada Bar No. 00014
330 South Third Street, Suite 700
Las Vegas, Nevada 89101
(702) 388-6577

MICHAEL PESCETTA
Assistant Federal Public Defender
Nevada Bar No. 2437
330 South Third Street, #700
Las Vegas, Nevada 89101
(702) 388-6577

Counsel for Appellant

STEWART L. BELL
Clark County District Attorney
Nevada Bar No. 000477
Clark County Court House
200 South Third Street, Suite 701
Post Office Box 552212
Las Vegas, Nevada 89155-2211
(702) 455-4711

FRANKIE SUE DEL PAPA
Nevada Attorney General
Nevada Bar No. 000192
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD GORDON BENNETT,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

CASE NO. 38934

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment Of Conviction
Eighth Judicial District Court, Clark County

FRANNY A. FORSMAN
Federal Public Defender
Nevada Bar No. 00014
330 South Third Street, Suite 700
Las Vegas, Nevada 89101
(702) 388-6577

MICHAEL PESCETTA
Assistant Federal Public Defender
Nevada Bar No. 2437
330 South Third Street, #700
Las Vegas, Nevada 89101
(702) 388-6577

Counsel for Appellant

STEWART L. BELL
Clark County District Attorney
Nevada Bar No. 000477
Clark County Court House
200 South Third Street, Suite 701
Post Office Box 552212
Las Vegas, Nevada 89155-2211
(702) 455-4711

FRANKIE SUE DEL PAPA
Nevada Attorney General
Nevada Bar No. 000192
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD GORDON BENNETT,)
Appellant,)
v.) CASE NO. 38934
THE STATE OF NEVADA,)
Respondent.)

APPELLANT'S/ CROSS-RESPONDENT'S REPLY AND ANSWERING BRIEF

Appeal from Order Denying Post-Conviction Relief
Eight Judicial District Court, Clark County

STATEMENT OF THE ISSUES

1. Whether the district court erred in refusing to dismiss, as procedurally barred, a post-conviction petition for habeas corpus that raised the same issues as a previously filed petition and that was filed more than eight years after the statutory deadline for such petitions elapsed.

2. Whether the District Court erred in granting a new penalty phase hearing eleven years after the original trial and conviction, upon a finding that the State allegedly suppressed evidence that was not exculpatory and that would have been insufficient to warrant the granting of a new trial had such request been timely made eleven years ago.

STATEMENT OF THE CASE

The State incorporates by reference the Statement of the Case set forth in its Opening Brief.

STATEMENT OF FACTS

The State incorporates by reference the Statement of Facts set forth in its Opening Brief.

ARGUMENT

I.

THE DISTRICT COURT ERRED WHEN IT PARTIALLY GRANTED THE DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS BASED ON GOOD CAUSE.

In argument one, the Defendant alleges that a Brady violation occurred that grants the Defendant good cause to overcome numerous procedural bars. In addition, the Defendant asserts that the district court's denial of the Defendant's first post-conviction counsel's request for investigator fees is good cause to waive the time bar for the Defendant's almost three year delay in filing his second post-conviction petition.

Despite the fact that this Court and the district court on several occasions have rejected many of the Defendant's same arguments, he attempts to argue them before this Court again. The Defendant bases this argument on the district court's belief that a statement by a co-defendant to a jail house snitch, which changed twelve (12) years after he made it, was material and exculpatory enough to warrant good cause to bypass the procedural bars. In addition, the district court held that failure to investigate the first petition was an impediment external to the defense which warranted good cause to waive the procedural bars. The district court made an erroneous ruling not based on the facts or the law.

A.

Defendant Has Not Demonstrated Good Cause or Actual Prejudice to Bypass the Procedural Bars as the Defendant Has Not Demonstrated a Brady Violation.

A Defendant's due process rights are violated when the State withholds evidence, irrespective of good or bad faith, that is material and favorable to the defense. Strickler v. Greene, 527 U. S. 263 (1999). There are three components to

a Brady violation: (1) the evidence at issue must be favorable to the accused; (2) the evidence in question was withheld, intentionally or unintentionally, by the State or its actors; and (3) the evidence was material to a degree that prejudice occurred. Id.

The prosecution has an affirmative duty to disclose evidence that is favorable to a defendant. Brady v. Maryland, 373 U. S. 83 (1963). Suppression of evidence favorable to the accused is itself sufficient to amount to the denial of due process. Id. "The prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf." Kyles v. Whitley, 514 U. S. 419, 433-434 (1999). However, it is up to the prosecution's discretion to determine whether the evidence in question is material and should be disclosed. Lay v. State, 116 Nev. 1185, 14 P.3d 1256, 1262 (2000).

Evidence is considered to be material when there is a reasonable probability that the result would be different if the evidence had been disclosed. Id. A reasonable probability exists where the petitioner has shown that the nondisclosure undermines the confidence in the outcome of the trial. United States v. Bagley, 473 U. S. 667, 676 (1985). In determining whether a piece of evidence is considered to be favorable and material, the Court looks at the existing evidentiary record and determines if the impact of that evidence is so great that there is a reasonable probability that the outcome of the trial would have been different had the evidence been disclosed. Kyles, 514 U. S. at 436.

In determining whether the State adequately disclosed exculpatory evidence to the defense, the Nevada Supreme Court must consider both factual and legal circumstances. Mazzan v. Warden, Ely State Prison, 116 Nev. 48, 993 P.2d 25 (2000). Therefore the Court's review of Brady issues is *de novo* and not through the clearly erroneous standard. Id. *See* (Cross-Appellant's Opening Brief, hereinafter "CAOB," 5).

In Mazzan v. Warden, the defendant was convicted of first degree murder and had filed successive habeas petitions for relief. The Court determined that Mazzan

had good cause to overcome procedural bars when it was determined that a Brady violation had occurred and material evidence was not properly released to the defense. Police reports detailing specific information about other suspects created a reasonable probability that the outcome of the trial would have been different. Those reports indicated that the victim was involved in drug dealings and that the people involved in killing the victim were involved with drugs. In addition, it outlined information that made it a near impossibility that the defendant killed the victim. The Mazzan Court determined that the evidence in question was so favorable and so material that it no longer had faith in the outcome of the trial. 116 Nev. 48, 993 P.2d 25 (2000).

I.

Richard Perkins Statement to Investigators Is Not Favorable or Material to the Defendant.

The Defendant claims that a Brady violation occurred during his sentencing hearing when the State did not disclose a statement that was made to investigators regarding an alleged admission by the Defendant's co-defendant. The Defendant argues that Perkins' statement to investigators was material and exculpatory evidence that should have been disclosed to the defense. The Defendant's argument lacks merit; there was not a Brady violation as the statement in question was not material and not favorable to the defense.

On October 3, 1988, fifteen days before Defendant's sentencing hearing, Richard Perkins made a statement to Detective Leavitt regarding the murder at the Stop N Go. Perkins stated that Joe Beeson informed him that the Defendant shot and killed the victim, Michelle Moore, and that Beeson was suppose to kill the other guy but did not have the nerve. (Appellant's Appendix, hereinafter "AA," 12).

The Defendant argues that Perkins' statement, if revealed to the defense at the time of the penalty phase, would have had a reasonable probability of changing the outcome of the penalty phase. The district court erred when it ruled that the Perkins statement was considered a Brady violation.

This Court must determine the factual and legal basis for the district court's ruling as described in Mazzan, 116 Nev. 48, 993 P.2d 25. There are numerous aspects for this Court to analyze in determining that Perkins statement would not have changed the outcome of the trial. First, the only statement in question is the statement that Perkins made at the time of the sentencing hearing, not the testimony he gave twelve (12) years later. Kyles, 514 U. S. at 439. Second, the Court must weigh the credibility of Richard Perkins and the believability that his statement was truthful and accurate. (AA, 35). Third, the Court must consider the overwhelming evidence that was presented against the Defendant at the penalty hearing. Fourth, this Court already determined the defense presented an effective and well planned defense with mitigating evidence, despite the overwhelming evidence against the Defendant. Finally, Perkins' statement itself, supported the prosecution's theory of the case, that the Defendant murdered Ms. Moore by firing a high caliber weapon at close range through her head.

During the evidentiary hearing to determine if there had been a Brady violation, Richard Perkins testified as to what he allegedly said to Detective Leavitt and prosecuting attorney Mel Harmon. During his testimony, Perkins recanted everything that he told the detectives twelve (12) years earlier and stated the complete opposite. Then he was presented with a signed transcription of his taped conversation with the detectives, Perkins stated that it was not accurate. He stated that although he did sign the transcript at the time, he did not verify it when he signed it. (AA, 48). Immediately after Perkins testified, Detective Leavitt testified as to the contents of the transcript and his conversation with Perkins. (Respondent's Appendix, hereinafter "RA," 3659). Detective Leavitt confirmed the accuracy of the statement. Despite the fact that Richard Perkins has been convicted of fraudulent crimes on numerous occasions and the fact that Joe Beeson is now deceased, the district court determined that Richard Perkins, twelve (12) years later, was more believable than a detective, a

well-respected prosecutor, and a signed transcript of his own taped statement. (RA, 3949).

The only statement in question before this court is the Perkins statement that the State had in its possession at the time of the penalty hearing. Any testimony or statement that was made during the evidentiary hearing does not bear any weight towards the materiality of the original statement. A Brady violation consists of the State withholding evidence that it had at the time of the penalty hearing. Kyles, 514 U. S. at 439. The fact that Perkins changed his statement during the evidentiary hearing is irrelevant to the question at issue which is: did the State withhold favorable material evidence that if given to the defense would create a reasonable probability that the outcome of the penalty phase would have been different.

Perkins' taped statement indicated that Joe Beeson told Perkins that Beeson and the Defendant went to the Stop N Go with the intent to rob the place and kill any witnesses. (AA, 12). Beeson also stated to Perkins that it was the Defendant who shot and killed Michelle Moore and that Beeson lost his nerve to kill the "other guy." (AA, 12; AA, 14). Beeson indicated to Perkins that the Defendant was trying to peg the crime on him in order to get the Defendant acquitted. (AA, 14).

This four page statement was not favorable to the defense and was not material to the penalty hearing. Therefore, this statement does not create a reasonable probability that the outcome of the penalty hearing would be different.

2.

Chidester's Testimony Was Declared to Be Properly Admitted by the Nevada Supreme Court.

The Defendant attempts to re-argue Jeffrey Chidester's testimony as being false testimony that should not have been admitted. (CAOB, 11). In his direct appeal, the Defendant attempted to argue the exact same argument, however the Nevada Supreme Court denied the claim, stating that it was not prejudicial to the defense. The defense now attempts to hide the argument within an accusation that the State committed a

Brady violation, by withholding information regarding Chidester's involvement with Utah Police. The defense argues that Chidester's testimony was not voluntary and that he was a bias witness. This is a specious claim that should be dismissed based on the law of the case. NRS 34.810(1)(b).

"The law of a first appeal is the law of the case on all subsequent appeals in which facts are substantially the same." Bejarano v. State, 106 Nev. 840, 841, 801 P.2d 1388, 1389 (1990); *citing* Hall v. State, 91 Nev. 314, 315, 535 P.2d 797 (1975); *see also* Dawson v. State, 108 Nev. 112,113, 825 P.2d 593, 593(1992). In Bejarano, the defendant was convicted of first degree murder and had been sentenced to death. Bejarano, 106 Nev. at 841, 801 P.2d at 1389. On an appeal from a petition for post-conviction relief, the defendant challenged the legality of his death penalty on the basis that four of the six aggravating circumstances were inapplicable as a matter of law, or that they were not proved as a matter of fact. Id. This issue, however, had been decided on the direct appeal. Id. The Court stated that the ruling on the direct appeal was now the law of the case, therefore, it would not be disturbed. Id. Furthermore, "[t]he doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument." Pertigen v. State, 110 Nev. 554, 557-58, 875 P.2d 361, 363 (1994).

In Bennett v. State, 106 Nev. 135, 787 P.2d 797 (1990), (Bennett 1) this Court addresses the exact argument now presented. "Any inconsistencies in Chidester's testimony, however, were brought out during cross-examination." Bennett 1, 106 Nev. at 139, 787 P.2d at 799. Although the Defendant tries to conceal this repetitive argument within his Brady claim, this Court has already decided the issue. This Court found that Chidester's testimony did not prejudice the Defendant's substantive rights at trial. Id. The Defendant's argument should be denied as it has already been addressed by this court, and the Defendant should not be given another bite of the apple.

B.

The Defendant's Post-conviction Counsel's Failure to Investigate Claim Does Not Qualify as Good Cause and Actual Prejudice as it Is Not an Impediment External to the Defense.

The district court erred when it granted the Defendant's second petition based on the Defendant's claim that his first post-conviction counsel was not granted fees for an investigator. The Defendant contends that if his first post-conviction counsel had been granted fees for an investigator, the Defendant would not have waited almost three years to file his second post-conviction petition. The Defendant believes that if he is able to have this Court review the same issues again, somehow he would no longer be facing death or be guilty of first degree murder. This allegation is meritless.

The Nevada Supreme Court has held that errors of counsel are insufficient to constitute good cause as a matter of law. Good cause is defined as a "an impediment external to the defense which prevented [the petitioner] from complying with the state procedural rules." Crump v. Warden, 113 Nev. 293, 295, 934 P.2d 247, 252 (1992). Such impediments do not include the lack of counsel in preparing a petition or even the failure of trial counsel to forward a copy of the file to a petitioner. *See* Phelps v. Director Nevada Department of Prisons, 104 Nev. 656, 660, 764 P.2d 1303 (1988); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

The district court initially denied the Defendant's first post-conviction counsel's claim for investigator fees due to the fact that counsel had waited three (3) years to bring the claim before the court. The district court's reasoning for denying the claim was that the petition for writ of habeas corpus was time barred, was a successive claim, and barred by law of the case. However, upon appeal the Nevada Supreme Court graciously waived the procedural bars and reached the merits of the initial post-conviction petition. By addressing the merits of the Defendant's claims, the Court believed they would remedy the Defendant's first post-conviction counsel's delay. The

Court then reviewed the merits and denied all of them and affirmed the Defendant's conviction.

The Defendant's first post-conviction counsel's failure to investigate in 1990 through 1995 is not an "impediment external the defense" to warrant a finding of good cause for the Defendant's failure to file a timely second post-conviction petition. Lozada v. State, 110 Nev. 349, 934 P.2d 247 (1997). After the Nevada Supreme Court reviewed the substantive merits of the Defendant's first post-conviction claim, the Defendant then waited an additional two and a half (2.5) years to file another petition for post-conviction relief. (RA, 2199). Remittitur from the Defendant's second appeal was filed on January 11, 1996, the Defendant's petition was filed on July 7, 1998. (RA, 2199). The Defendant is now trying to argue before this Court that the additional two and a half (2.5) year delay was due to the Defendant's first post-conviction counsel's delay between 1990 and 1995. This claim is specious and should be rejected. The Defendant cannot claim that denial of money to investigate the first post-conviction claim, to which the Nevada Supreme Court still reviewed on the merits, was the reasoning that the Defendant failed to file a timely claim on the second post-conviction claim. The Defendant is not arguing that the district court denied him his motion to investigate after his second appeal (after 1995), he is merely tacking on an old issue from his first petition with the hope to sway the court into ignoring the procedural bars put in place by the Nevada Legislature. The Defendant's claim does not present an impediment external to the defense that would warrant a finding of good cause.

Despite the fact that the Defendant does not have good cause for his second post-conviction petition delay, he also does not have the required actual prejudice to support a waiver of the procedural bars. By the Defendant claiming that his first post-conviction counsel failed to investigate does not create an actual prejudice on the Defendant's delay in his second post-conviction petition. In fact the Defendant cannot claim that he was even prejudiced in the first post-conviction claim due to the fact that

this Court waived the procedural bars when it addressed the first petition on its merits. Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676, 679 (1995). The Defendant has been anything but prejudiced considering that the district court gave him ample opportunities to argue his petition and that this court is now hearing the Defendant's third appeal with little to no new arguments from the other appeals.

The Defendant's specious argument that his first post-conviction counsel's failure to investigate somehow caused his delay in his second post-conviction petition should be denied for lack of good cause and actual prejudice.

II.

THE DISTRICT COURT CORRECTLY DENIED PARTS OF THE DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS BASED ON PROCEDURAL GROUNDS.

The district court granted the Defendant's petition for writ of habeas corpus for a rehearing of the Defendant's penalty phase. However, the district court denied the Defendant's claims in his petition asking for a new trial based on the fact that the Defendant failed to meet the procedural bars set forth in NRS 34.726 and NRS 34.810. The Defendant is appealing the district court ruling stating that the district court was mistaken in denying that portion of the Defendant's writ.

A.

The Defendant's Claims Were Properly Dismissed as the Grounds Were Time Barred by NRS 34.726 and No Good Cause or Actual Prejudice Was Presented.

Nevada Revised Statutes (NRS), 34.726(1) mandates that a post-conviction writ for habeas corpus be filed within one (1) year after the judgment of conviction if no direct appeal is filed or within one (1) year after the State Supreme Court issues its remittitur on direct appeal, unless good cause is shown for the delay. NRS 34.726; see also, Moran v. McDaniel, 80 F.3d 1261 (9th Cir. 1996); Passanisi v. Director, Nevada Dept. Of Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989). If the petition is not filed within one (1) year, and good cause for the delay is not shown, the petition should be summarily dismissed. Id. at 67. The Nevada Supreme Court has carefully upheld this

one year time bar. See Gonzales v. State, 118 Nev. Adv. Op. No. 61 (2002)(language of NRS 34.726(1) "is clear and unambiguous").

Good cause for delay exists if the petitioner demonstrates to the satisfaction of the Court that the delay is not the fault of the petitioner and that dismissal of the petition as untimely will unduly prejudice the petitioner. NRS 34.726(1). See Hood v. State, 111 Nev. 335, 338, 890 P.2d 797, 798 (1995)("Counsel's failure to send appellant his files did not prevent appellant from filing a timely petition, and thus did not constitute good cause for appellant's procedural default."); Harris v. Warden, 114 Nev. 956, 960, 964 P.2d 785, 788 (1998)(trial counsel's failure to inform defendant of right to appeal does not constitute good cause to excuse untimely filing of petition). In order to show good cause, a defendant has the burden of demonstrating that there was an impediment external to the defense which prevented him from complying with the procedural default rules. Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). Pursuing relief in the federal courts does not constitute good cause for delay in the state court petition. See Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

In the present case, the Defendant filed his petition for writ of habeas corpus on July 7, 1998, two (2) and a half years after remittitur was issued on his second appeal to the Nevada Supreme Court. This is a clear violation of NRS 34.726, however, the district court believed that the Defendant had good cause for only two (2) claims of the thirty-seven (37) claims presented by the Defendant. (RA, 3949) (RA, 2199). Although the court erred when it ruled that good cause was presented for two (2) of the claims, the district court was correct when it denied the other thirty-five (35) based on procedural grounds. The Defendant does not present good cause for the thirty-five claims and therefore the claims should be denied.

B.

The District Court Properly Denied Appellant's Petition as Successive Pursuant to NRS 34.810

The Defendant makes numerous claims in this most recent appeal that have been raised in the previous two appeals before this Court. It is apparent that the Defendant is raising these claims again so that he can have another chance at litigating issues that were already decided against him. It is his hope that this Court will ignore the numerous procedural bars that are in place to limit abuse of the system, in order for him to hopefully get something to go his way. When the Nevada Supreme Court was gracious enough to review the Defendant's last appeal on the merits despite the procedural violations, the Defendant was still unable to prevail based on the merits. Today the Defendant wants the Court to again be gracious and re-review the same issues that the Court has reviewed twice before. The Defendant's claims must be dismissed as successive and barred by the law of the case.

In February of 1990 this Court decided the Defendant's direct appeal. Bennett v. State, 106 Nev. 135, 787 P.2d 797 (1990). (hereinafter "Bennett 1"). In its decision the Nevada Supreme Court stated that: (1) Jeffrey Chidester's testimony was properly admitted and that any inconsistent testimony was brought out during cross examination; (2) the district court did not error in admitting the Defendant's poetry writings; (3) there were no statements made by the prosecutor that warranted reversal for prosecutorial misconduct; (4) robbery, burglary, and absence of apparent motive could be used as aggravating circumstances; (5) evidence presented supported a finding that the Defendant killed without an apparent motive; and (6) the capital sentencing process was not unconstitutionally vague and overbroad. Id.

Then in August of 1995 the Court decided the merits of the Defendant's post conviction petition for writ of habeas corpus. Bennett v. State, 111 Nev. 1099, 109 P.2d 676 (1995). (hereinafter "Bennett 2"). It was stated that: (1) the prosecutor's discussion of penology did not warrant prosecutorial misconduct; (2) the prosecutor's

paraphrasing certain evidence had a subtle distinction and did not prejudice the Defendant to warrant prosecutorial misconduct; (3) comments regarding prosecutor's personal opinion were not improper or prejudicial; (4) trial counsel's strategic decision to not investigate certain mitigating factors, such as Defendant's mental and psycho-social state, did not warrant ineffective assistance of counsel when there was overwhelming evidence of the Defendant's guilt; and (5) the district court properly instructed the jury regarding the contemplation of aggravating over mitigating circumstances.

1.

The Defendant's Attempts to Relitigate Numerous Claims Which Should Be Denied Based on the Law of the Case.

"The law of a first appeal is the law of the case on all subsequent appeals in which facts are substantially the same." Bejarano v. State, 106 Nev. 840, 841, 801 P.2d 1388, 1389 (1990) *citing*, Hall v. State, 91 Nev. 314, 315, 535 P.2d 797 (1975); See also Dawson v. State, 108 Nev. 112, 113, 825 P.2d 593, 593 (1992). Further, "[t]he doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument." Pertgen v. State, 110 Nev. 554, 557-58, 875 P.2d 361, 363 (1994). Although Appellant has added additional facts and cited additional law in support of these issues, they have already been decided by the Nevada Supreme Court. Because subsequent appeals in which the facts are substantially the same may not be relitigated, Appellant's claims are barred by the doctrine of the law of the case. Bejarano 106 Nev. at 841.

In the Defendant's Answer/Cross-Appeal Opening Brief he places every single issue that has already been decided by this Court before this Court again. Section three (3) of the brief is where the mainstay of issues are located.

Issue 3a asserts that counsel failed to have the Defendant properly evaluated by a neuropsychologist and psychiatrist for the purposes of presenting mitigating factors at sentencing. (CAOB, 28). This Court decided that very issue in Bennett 2 on page

1107, when this Court stated "Bennett's counsel performed effectively in the face of overwhelming evidence of guilt and aggravating circumstances." Bennett 2, 111 Nev. at 1108, 901 P.2d at 682.

Issue 3b asserts that counsel failed to present evidence regarding the Defendant's turbulent childhood and instances of good character. (CAOB, 32). This Court considered this very issue in Bennett 2 when this Court recognized the value of the Defendant's father giving emotional testimony regarding the Defendant's background and childhood. Bennett 2, 111 Nev. at 1108, 901 P.2d at 682.

Issue 3c asserts that counsel failed to sufficiently cross-examine State's witnesses and properly prepare for defense witnesses. (CAOB, 37). Yet this Court reviewed trial counsel's performance and made a judgement on the effectiveness of that performance in the Defendant's last appeal. This Court stated, "It is difficult to imagine what Bennett's counsel could have done differently in order to obtain a more favorable verdict." Bennett 2, 111 Nev. at 1108, 901 P.2d at 683.

Issue 3d asserts that trial counsel failed to object to the State's use of the Defendant's poetry writings that had been subject to an unlawful search and seizure. (CAOB, 39). The Defendant again disregards the prior opinion and re-asserts a claim that has already been decided. In the Defendant's direct appeal this Court addressed this issue and decided that the seizure of the writings was proper, and that the poetry was properly admitted into evidence by the district court. Bennett 1, 106 Nev. at 139-40, 787 P.2d at 800 (1990).

Issue 3i asserts that the Defendant would not have received a sentence of death if mitigating factors and rebuttal evidence had been brought to the attention of the jury. (CAOB, 44). In his brief, the Defendant even indicates that this Court has litigated this issue previously but wants another review in the hopes that a small fact will change this Court's ruling. (CAOB, 44). In Bennett 2, the Nevada Supreme Court looked at all the factors of mitigation and determined that trial counsel had performed effectively under the burden of overwhelming evidence of guilt. The Court believed that the

argument that trial counsel did not effectively argue for mitigation was a baseless claim as trial counsel was able to convince the jury of three (3) mitigating factors. Bennett 2, 111 Nev. at 1108, 901 P.2d at 682.

Issue 3j asserts that the Defendant would not have been convicted of first-degree murder and sentenced to death had trial counsel investigated his mental state. (CAOB, 47). Again, the Defendant asserts not only a claim that has previously been litigated before this Court, but re-argues a claim that was previously addressed in his brief, 3a. (CAOB, 28). As argued *supra*, the Nevada Supreme Court addressed this issue in Bennett 2 and stated that trial counsel's strategy to not investigate the Defendant's mental condition did not warrant ineffective assistance of counsel. Bennett 2, 111 Nev. at 1108, 901 P.2d at 682.

Issues 3B1 and 3B2 assert that aggravating factors such as the killing being committed at random and without apparent motive are constitutionally invalid. (CAOB, 48). In Bennett 1, this court rejected this argument and stated, "this killing was not necessary to accomplish burglary or robbery. We conclude, therefore, that under these circumstances, substantial evidence supports the jury's finding that Appellant killed without apparent motive." Bennett 1, 106 Nev. at 143, 787 P.2d at 802.

Issue 3B3 asserts that prosecutorial misconduct was committed when the State used improper metaphors and statements. (CAOB, 51). This claim has not only been litigated once before this Court, but in fact it has been litigated twice before this Court. In Bennett 1 and Bennett 2, the Defendant attempts to argue that the State committed prosecutorial misconduct in its statements made to the jury. The Nevada Supreme Court rejected this argument in two different decisions. The Defendant is now asking the Court to weigh this issue again because allegedly this Court did not "consider the effects of the misconduct on the jury." (CAOB, 59). Not only did the Defendant get two chances for review he is now criticizing the Nevada Supreme Court's efforts and wants a third review of the exact same issue. *See* (CAOB, 60)

Issues 3B6 and 3B16 assert that the trial court improperly admitted the Defendant's poetry in the proceedings. (CAOB, 64, 81). The Defendant already asserted this argument within his brief, *supra - issue 3d*, which was also already litigated in the two previous appeals that the Nevada Supreme Court has given the Defendant. Bennett 2, 111 Nev. at 1107-8, 901 P.2d at 682; Bennett 1, 106 Nev. at 140, 787 P.2d at 800.

Issue 3B7 asserts that witness Jeffrey Chidester was improperly influenced by monetary and other inducements from the State. (CAOB, 67). The Court addressed this issue in the Defendant's direct appeal stating, "Chidester did not find out about the reward until several days after he made his statement to the police." Bennett 1, 106 Nev. at 139, 787 P.2d at 799. "Chidester's testimony was properly admitted." Id.

Issues 3B12 and 3B13 assert that the aggravating factors of in commission of a burglary and in commission of a robbery are invalid. (CAOB, 76-78). The Court addresses this issue in Bennett 1 and then dismissed it as a specious claim that does not hold legal or factual weight. Bennett 1, 106 Nev. at 142, 787 P.2d at 801.

Issue 3B22 asserts that the death penalty as administered to the Defendant does not satisfy constitutional standards. (CAOB, 86). However, the Defendant already argued this very point to this Court in Bennett 1. 106 Nev. at 144, 787 P.2d at 802. This Court rejected that argument by stating, "This Court has repeatedly rejected these contentions and has held that Nevada's sentencing procedure is constitutional." Id.

2.

The Defendant's Petition Is a Successive Petition and Should Be Denied.

As indicated throughout subsection one of this argument, the Defendant has made successive petitions throughout the judicial system. With respect to successive petitions, NRS 34.810(2) provides as follows:

> 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.

The Defendant has clearly had his day in court. The fact that numerous similar issues are back before this Court is a testament to Defendant's persistent attempts to take advantage of the criminal justice system. This case has been constantly litigated since Defendant was originally charged in 1988. In the twelve (12) years since the crime was committed there was a full trial, numerous hearings, a flood of motions, and a number of petitions and appeals. At some point justice requires finality. These issues have not only been raised with a lower court previously, but have been appealed to the highest court of this State and denied. This Court stated in its 1995 decision that there was "overwhelming" evidence of Defendant's guilt. Bennett 2, 111 Nev. at 1108, 901 P.2d at 683. Defendant has aptly demonstrated his ability to invent and reinvent arguments in this case. Without procedural bars in place to stop the flood of non-meritorious litigation, this process could go on *ad infinitum*. The district court clearly had sufficient basis to bar Defendant's claims and, therefore, did not err in denying this portion of Defendant's petition.

3.

Defendant's Failure to Raise these Claims on Direct Appeal and in His Petitions for Writ of Habeas Corpus and Are Therefore Barred by NRS 34.810(1)(b)(2)

Defendant asserts claims within his petition for writ of habeas corpus and now within this appeal that are procedurally barred based on NRS 34.810(1)(b). Defendant's claims 3e, 3f, 3g, 3h, 3B4, 3B5, 3B8, 3B9, 3B10, 3B11, 3B14, 3B17, 3B20, and 3B21 were never asserted by the Defendant in his direct appeal or subsequent post-conviction proceedings. Due to the fact that the Defendant failed to raise these issues on direct appeal or in post-conviction proceedings, he is not entitled to relief on these grounds, and his petition was properly denied. NRS 34.810(1)(b)(2).

NRS 34.810(1)(b) states:

> 1. The court shall dismiss a petition if the court determines that:
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> (1) Presented to the trial court;
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief;
> (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.

A defendant cannot raise issues in post-conviction proceedings which should have been raised on direct appeal. Warden v. Sparks, 91 Nev. 627, 629, 541 P.2d 651 (1975). In Warden v. Sparks, the Nevada Supreme Court stated the following:

> [W]e now hold, that this court will consider as waived those issues raised in a post-conviction relief application which might properly have been raised on direct appeal, where no reasonable explanation is offered for petitioner's failure to present such issues. 91 Nev. at 629; *quoting* Johnson v. Warden, 89 Nev. 476, 477, 515 P.2d 63, 64 (1973)).

When a criminal defendant fails to raise a claim in a direct appeal and then attempts to revive that claim in a petition for writ of habeas corpus, that complaint is deemed waived unless the defendant therein can present facts constituting good cause for the failure. NRS 34.810(3); Kimmel v. Warden, 101 Nev. 6, 692 P.2d 1282 (1985); Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983). The Defendant has not shown good cause for not raising these issues on direct appeal and they should not be considered by this Court.

In the instant matter, claims 3e, 3f, 3g, 3h, 3B4, 3B5, 3B8, 3B9, 3B10, 3B11, 3B14, 3B17, 3B20, and 3B21 should have been raised on the Defendant's direct appeal or previous post-conviction proceedings. The Defendant has provided no good cause for failing to raise these issues. The Defendant's argument that alleged Brady violations prevented the Defendant from raising these issue is specious and should be denied. None of these thirteen (13) issues relate to any of the evidence the Defendant

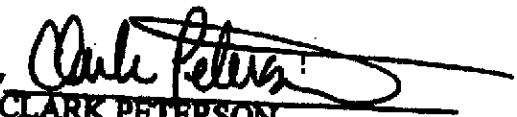
claims were withheld from his defense. Defendant asserts that the jurors were biased, that venue was improper, that the discretion of the District Attorney was improperly delegated to the victim, etc. These claims could have been raised in direct appeal and in the first post conviction proceeding. They were not and pursuant to NRS 34.810(1)(b) they were properly dismissed by the district court.

CONCLUSION

The State's Opening Brief, along with the foregoing, demonstrate that the District Court erred by granting Defendant's motion for new penalty hearing. The District Court's errors are procedural in nature. The Defendant's Answering Brief is unable to present this Court with any authority justifying the trial court's decision. Therefore, it is respectfully requested that this Court reverse the District Court's decision to grant Defendant a new penalty hearing and reinstate the jury's verdict.

Dated this 26th day of November, 2002.

STEWART L. BELL
Clark County District Attorney
Nevada Bar No. 000477

By 
CLARK PETERSON
Chief Deputy

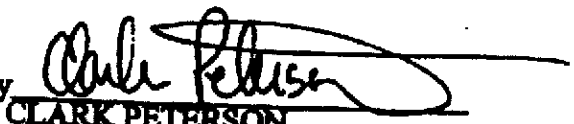
Office of the Clark County District Attorney
Clark County Courthouse
200 South Third Street, Suite 701
Post Office Box 552212
Las Vegas, Nevada 89155-2211
(702) 455-4711

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 26th day of November, 2002.

STEWART L. BELL
Clark County District Attorney
Nevada Bar No. 000477

By 
CLARK PETERSON
Chief Deputy

Office of the Clark County District Attorney
Clark County Courthouse
200 South Third Street, Suite 701
Post Office Box 552212
Las Vegas, Nevada 89155-2211
(702) 455-4711

CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing RESPONDENT'S ANSWERING BRIEF to the attorney of record listed below on this 26th day of November, 2002.

FRANNY A. FORSMAN
Federal Public Defender
330 South Third Street, Suite 700
Las Vegas, Nevada 89101

MICHAEL PESCETTA
Assistant Federal Public Defender
330 South Third Street, #700
Las Vegas, Nevada 89101

Employee, Clark County
District Attorney's Office

TUFTJ/lml Mac/smallw

EXHIBIT 102

EXHIBIT 102

DISTRICT COURT

CLARK COUNTY, NEVADA

FILED

AUG 10 3 07 PM '95

THE STATE OF NEVADA,

Plaintiff,

vs.

LAWRENCE COLWELL, aka CHARLES DURRANT,

Defendant.

Case No. C123476 CLERK
Dept. No. I
Docket No. "J"

FINDINGS, DETERMINATIONS AND IMPOSITION OF SENTENCE

WHEREAS, LAWRENCE COLWELL, aka CHARLES DURRANT did, on the 30th day of June, 1995, enter an unqualified plea of guilty to the charge of Murder in the First Degree, as set forth in the Information herein; and

WHEREAS, said plea was made before the undersigned, GENE T. PORTER, District Judge; and that thereafter the undersigned GENE T. PORTER, District Judge, the undersigned MICHAEL R. GRIFFIN, District Judge, and the undersigned JERRY CARR WHITEHEAD, District Judge, were duly appointed by the Nevada Supreme Court, pursuant to NRS §175.558 on the 27th day of July, 1995, to conduct a penalty hearing in this case pursuant to NRS §175.552.

NOW THEREFORE, the undersigned judges, and each of them, having heard the evidence, statements of counsel and the Defendant, and the Defendant having been given the opportunity to make a statement, and having done so, find, beyond a reasonable doubt, the existence of the following aggravating circumstances, as set forth in NRS §175.552 and NRS §200.033:

1. The murder was committed while the person was engaged in the commission of or an attempt to commit any Robbery.

GENE T. PORTER
DISTRICT JUDGE
DEPARTMENT ONE
LAS VEGAS, NEVADA 89155

EXHIBIT 237

2. The murder was committed while the person was engaged in the commission of or an attempt to commit any Burglary.

3. The murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another.

4. The murder was committed upon a person at random and without apparent motive.

The undersigned judges and each of them find no mitigating circumstances exist in this case and therefore find beyond a reasonable doubt, that the lack of mitigating circumstances cannot outweigh the aggravating circumstances found as set forth above.

NOW, THEREFORE, GOOD CAUSE APPEARING, the undersigned judges having cast a unanimous vote therefor, set and impose upon LAWRENCE COLWELL aka CHARLES DURRANT, a sentence of Death, said sentence to be imposed and executed pursuant to law.

DATED and DONE this 8th day of August, 1995.

GENE T. PORTER, District Judge

MICHAEL R. GRIFFIN, District Judge

JERRY CARR WHITEHEAD, District Judge

GENE T. PORTER
DISTRICT JUDGE
DEPARTMENT ONE
LAS VEGAS, NEVADA 89155

EXHIBIT 103

EXHIBIT 103

IN THE SUPREME COURT OF THE STATE OF NEVADA

C92959

MARVIN LEWIS DOLEMAN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 33424

FILED

MAR 17 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from an amended judgment of conviction.

Appellant Marvin Lewis Doleman was convicted, pursuant to a jury verdict, of first degree murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and two counts of robbery with the use of a deadly weapon. Doleman was sentenced to death for the murder and a total of one hundred years imprisonment for the other offenses. On direct appeal, this court affirmed the judgment. Doleman v. State, 107 Nev. 409, 812 P.2d 1287 (1991).

Doleman subsequently filed a petition for post-conviction relief in the district court. After holding an evidentiary hearing, the district court denied Doleman's petition. On appeal, this court reversed and remanded for a new penalty determination after concluding that Doleman received ineffective assistance of counsel at the penalty phase. Doleman v. State, 112 Nev. 843, 921 P.2d 278 (1996). This court indicated that it was "not necessary to review Doleman's other contentions in this opinion" in light of its disposition. See id. at 846, 921 P.2d at 279. However, this court recognized that Doleman had raised one claim that did not relate to the penalty determination: Doleman claimed that his counsel failed to object to a malice instruction given to the jury. See id. at 845-46, 921 P.2d at 279-80. The State petitioned for rehearing, but Doleman did not. This court denied the State's petition.

In lieu of a new penalty hearing, Doleman and the State reached a sentencing agreement, which was filed with the district court. The parties stipulated that Doleman [illegible]

FREDERICK L. PAINE
RCV'D 2/5/01 EJDC-126
C92959 (murder, robbery)

murder. However, Doleman retained "the right to seek a determination of the merits of the issue regarding failure to object at the guilt phase to the implied malice jury instruction which was . . . presented to the Nevada Supreme Court" in his prior appeal. On November 13, 1998, the district court entered an amended judgment of conviction in accordance with the parties' agreement. This appeal followed.

On appeal, Doleman again raises the claim previously presented to this court that his trial counsel was ineffective for failing to object to the malice instruction that was given to the jury. This claim does not pertain to the amended judgment of conviction at issue in this appeal. If Doleman believed that this court previously overlooked the claim, he should have sought rehearing. Nevertheless, we clarify that this court previously rejected Doleman's claim, despite the absence of explicit language in our prior opinion resolving the claim. Doleman's claim that counsel was ineffective lacks merit in light of case law upholding the validity of the jury instruction at issue. See Ruland v. State, 102 Nev. 529, 533, 728 P.2d 818, 820 (1986); see also Doyle v. State, 112 Nev. 879, 900-02, 921 P.2d 901, 915-16 (1996).[1]

Having concluded that Doleman is not entitled to relief in this matter, we

ORDER this appeal dismissed.

Young, J.

Agosti, J.

Leavitt, J.

cc: Hon. Ronald D. Parraguirre, District Judge
Attorney General
Clark County District Attorney
Patricia Erickson
Clark County Clerk

[1]Doleman's attempt to distinguish Ruland lack-

EXHIBIT 104

EXHIBIT 104

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT J. FARMER,

Appellant,

vs.

DIRECTOR, NEVADA DEPARTMENT OF PRISONS, GEORGE SUMNER,

Respondent.

No. 18052

ORDER DISMISSING APPEAL

This is an appeal from the district court's order denying appellant's petition for a writ of habeas corpus.

Robert Farmer pled guilty to a murder committed on January 18, 1984. He was sentenced to death by a three-judge panel, and we affirmed the sentence on direct appeal. See Farmer v. State, 101 Nev. 419, 705 P.2d 149 (1985). In September 1986, Farmer filed his petition for a writ of habeas corpus. An evidentiary hearing was held by the lower court on February 5, 1987. Following the hearing, the lower court ordered the petition dismissed.

Farmer contends that evidence was admitted at his penalty hearing which violated the Eighth Amendment of the United States Constitution, requiring that the death sentence be set aside. In Booth v. Maryland, ___ U.S. ___, 107 S. Ct. 2529 (1987), the Supreme Court held that the introduction of a victim impact statement at the sentencing phase of a capital murder trial did violate the guarantees of the Eighth Amendment. Farmer alleges several violations of the Eighth Amendment as announced in Booth: (1) representations by the prosecutor that he observed and spoke with Mrs. Gelunas about the devastating impact of her son's death, (2) the introduction of a presentence report from Washoe County concerning the impact of an unrelated homicide and the representations of the son of the victim of the

unrelated homicide, and (3) testimony of Mrs. Cobb, a victim of an unrelated kidnapping, relating to the impact on her son and herself.

Respondent argues, and Farmer admits, that this issue was not raised prior to this appeal. It was not raised at the sentencing hearing; it was not raised on direct appeal; and it was not raised at the habeas corpus proceedings below. Generally, this court will not consider an issue that is raised for the first time on appeal. Gibbons v. State, 97 Nev. 520, 523, 634 P.2d 1214, 1216 (1981). Procedural default has similarly been applied to post-conviction relief actions. See Junior v. Warden, 91 Nev. 111, 532 P.2d 1037 (1975); Johnson v. Warden, 89 Nev. 476, 477, 515 P.2d 63, 64 (1973). We note that substantial case law existed at the time of the penalty hearing which supported the court's decision in Booth v. Maryland, ___ U.S. ___, 107 S. Ct. 2529. See Zant v. Stephens, 462 U.S. 862, 879, 885 (1983); Enmund v. Florida, 458 U.S. 782, 798, 801 (1982); Booth v. Maryland, 507 A.2d 1098, 1124 (Md. 1986). Accordingly, we find that Farmer has failed to show cause for this procedural default. Murray v. Carrier, 477 U.S. 478, ___, 106 S. Ct. 2639, 2645-2646 (1986).

Furthermore, we note that Farmer's direct appeal was final on August 27, 1985. Booth v. Maryland, ___ U.S. ___, 107 S. Ct. 2529, was not decided until June 15, 1987. Farmer has failed to direct this court's attention to any cases which suggest that Booth should be applied retroactively to decisions which were final prior to the date of the Court's ruling. The United States Supreme Court has not defined the limits of retroactive application of the Booth decision, and absent the high court's direction we will not extend the application of that decision to the degree which reversal this case would

require. See Solem v. Stumes, 465 U.S. 638, 643, 650-651 (1983).

Farmer alleges that there were several instances of prosecutorial misconduct at the penalty hearing. Respondant admits that certain statements made by the prosecutor were improper. However, a claim of prosecutorial misconduct could have and should have been presented on direct appeal. Accordingly, Farmer is procedurally barred from bringing this claim. Kimmel v. Warden, 101 Nev. 6, 7-8, 692 P.2d 1286, 1287-1288 (1985); Junior v. Warden, 91 Nev. 111, 532 P.2d 1037 (1975).

Farmer contends that the lower court abused its discretion in concluding that he knowingly and intelligently entered his pleas of guilty. On the morning of his trial, March 26, 1984, Farmer withdraw his original plea and pled guilty to murder with the use of a deadly weapon and robbery with the use of a deadly weapon. We have stated that the following minimal requirements must be shown affirmatively in cases where a guilty plea has been accepted: (1) an understanding waiver of constitutional rights and privileges, (2) absence of coercion by threat or promise of leniancy, (3) understanding of consequances of the plea, the range of punishments, and (4) an understanding of the charge and the elements of the offense. Hanley v. State, 97 Nev. 130, 133, 624 P.2d 1387, 1389 (1981). The issues in the instant case relate to the latter two requirements.

During the entry of the guilty pleas, the court questioned Farmer as to whether the pleas were voluntarily and knowingly made. The court specifically asked Farmer whether the pleas were made freely and voluntarily and without any fear, threat, or promises, whether he was aware of the maximum penalties possible, death for murder and two consecutive fifteen

year terms for robbery with the use of a deadly weapon, and whether he was aware of his constitutional rights which he was waiving by pleading guilty. Farmer was then asked whether he had discussed both counts with his attorney and whether his attorney had explained the elements of the crimes, the State's burden of proof, and the maximum sentences. Farmer responded affirmatively to all questions. Farmer then stated that there was a plan between himself and two others to rob the victim and that during the robbery he stabbed and killed the victim and then proceeded to take the property from the victim's home. At the penalty hearing, eyewitness testimony was presented in support of Farmer's admissions. Based on our review of the record under the totality of circumstances test as announced in Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986), we conclude that the lower court did not abuse its discretion in concluding that Farmer knowingly and intelligently entered his pleas of guilty.

Farmer contends that testimony presented at the penalty hearing by an eyewitness was insufficient to support the finding of aggravating circumstances. Farmer argues that Melanie Marks, the eyewitness, was an accomplice to the crime charged and her testimony was unsupported. Respondent does not admit that Marks was, in fact, an accomplice, and we find it unnecessary to resolve that issue.

When Farmer pled guilty, he admitted that he stabbed and killed the victim, and that he remembered taking things from the victim's home following the murder. Additionally, he made self-incriminating statements at the penalty hearing, including a statement that he left the victim's home in a motor vehicle which apparently was at the victim's home and belonged to the victim's mother.

Given this additional evidence, we find that the testimony of Melanie Marks was sufficiently corroborated so as to support the panel's finding of the aggravating circumstances.

Lastly, Farmer contends that he received ineffective assistance of counsel. Farmer attempts to support this claim based largely upon the alleged error which we have resolved above. However, Farmer also alleges that his counsel ineffectively investigated and presented mitigating evidence. He argues that his counsel neglected to present relevant medical and psychiatric evidence at the penalty hearing. Farmer maintains in his brief that "the exact nature of his medical, physical and psychiatric makeup are [sic] undocumented and unexplained." Given the fact that Farmer has still failed to obtain this evidence and include it in the record, it must be concluded that there has been no showing of prejudice. Without such a showing, Farmer has not met his burden of proof. Strickland v. Washington, 466 U.S. 668 (1984).

In summary, we find that the contentions raised by Farmer have been either procedurally barred, or that Farmer has failed to sustain his burden of proof or show prejudice. Accordingly, we hereby

ORDER this appeal dismissed.

Gunderson, C.J.

Steffen, J.

Young, J.

Springer, J.

Mowbray, J.

cc: Hon. Michael E. Fondi, District Judge
Hon. Brian McKay, Attorney General
Brian Hutchins, Chief Deputy Attorney General
David Sarnowski, Deputy Attorney General
Terri Steik Roesar, State Public Defender
Michael K. Powell, Chief Appellate Deputy
Alan Glover, Clerk

EXHIBIT 105

EXHIBIT 105

IN SUPREME COURT OF THE STATE OF NEVADA

ROBERT JEFFREY FARMER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondant.

No. 22562

FILED

FEB 20 1992

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court denying a petition for post-conviction relief.

On May 11, 1984, appellant was convicted, pursuant to a guilty plea, of one count each of first degree murder wit. use of a deadly weapon, and robbery with use of a deadly weapon. A three judge panel santanced appellant to death. This court affirmed appellant's judgment of conviction and santance. Farmer v. State, 101 Nev. 419, 705 P.2d 149 (1985), cert. denied Farmer v. Nevada, 476 U.S. 1130 (1986). On September 19, 1986, appellant filed in the district court a petition for a writ of habeas corpus. On March 20, 1987, the district court denied that petition. This court dismissed the subsequent appeal. Farmer v. Director, Nevada Dep't of Prisons, Docket No. 18052 (Order Dismissing Appeal, March 31, 1988), cert. denied Farmer v. Sumner, ___ U.S. ___, 109 S.Ct. 1331 (1989).

On October 13, 1989, appellant filed in the district court the instant petition for post-conviction relief. That petition was opposed by the state. The district court appointed counsel to represent appellant, and conducted a brief hearing at which no evidence was taken.[1] On September 13, 1991, the district court denied appellant's petition. This appeal followed.

[1]The district court appointed James E. Mayberry to represent appellant. Mayberry had previously represented appellant in the United States District Court, and had filed the instant petition for post-conviction relief. It is unclear why the petition languished for so long in the district court.

Appellant contends that the district court erred in denying his petition. In his petition for post-conviction relief, appellant's sole contention, restated in various ways, was that his various attorneys were ineffective for failing to challenge adequately his sentence of death based on Booth v. Maryland, 482 U.S. 496 (1987).[1] Specifically, appellant argued that his previous attorneys should have argued that Booth had retroactive application to appellant's case.

We note that Booth has recently been overruled. Payne v. Tennessee, ___ U.S. ___, 111 S.Ct. 2597 (1991). Further, in our order of March 31, 1988, we indicated that this court would be unwilling to apply Booth retroactively without a specific command to do so from the Supreme Court of the United States. Accordingly, appellant cannot demonstrate prejudice from the failure of his previous attorneys to argue the Booth issue. See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984), cert. denied, 471 U.S. 1004 (1985).

Appellant's contentions lacking merit, we

ORDER this appeal dismissed.

Mowbray, C.J.

Springer, J.

Rose, J.

Steffen, J.

Young, J.

---

[1]Booth limited the use of victim impact statements in death penalty hearings.

EXHIBIT 106

EXHIBIT 106

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT JEFFREY FARMER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 29120

FILED

NOV 20 1997

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is a proper person appeal from an order of the district court denying appellant's third post-conviction petition for a writ of habeas corpus in a death penalty case.

Appellant was convicted of first degree murder and robbery pursuant to a guilty plea for the 1982 stabbing death of a cab driver in Las Vegas. This court affirmed appellant's conviction and sentence on direct appeal. Farmer v. State, 101 Nev. 419, 705 P.2d 149 (1985), cert. denied, Farmer v. Nevada, 476 U.S. 1130 (1986). Appellant subsequently filed two post-conviction petitions. Counsel was appointed to represent him in both petitions, hearings were held, and both petitions were denied. This court dismissed appellant's appeals from the orders denying both petitions. Farmer v. Director, Nevada Dept. of Prisons, Docket No. 18052 (Order Dismissing Appeal, March 31, 1988), cert. denied, Farmer v. Sumner, 489 U.S. 1060 (1989) and Farmer v. State, Docket No. 22562 (Order Dismissing Appeal, February 20, 1992). On August 28, 1995, appellant filed a third petition for post-conviction relief. On March 1, 1996, the

district court entered an order denying that petition. This appeal followed.

In the petition below, appellant raised numerous new claims which he had not raised in any previous appeal or petition for relief. He also raised claims which had been previously considered in appellant's prior appeals and petitions. We have carefully reviewed the record on appeal, and we conclude that appellant's claims are all procedurally barred pursuant to NRS 34.810(2) and (3).[1]

Appellant argued below that there was good cause for raising prior claims again because the prior court decisions were incorrect and because additional facts required re-examination of the issues. He claimed that good cause existed for raising new claims because his prior counsel were ineffective and because he is a layman who did not understand the legal significance of the issues.

---

[1]NRS 34.810(2) and (3) provide as follows:

> 2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.
> 3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
> (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
> (b) Actual prejudice to the petitioner.

Appellant cannot demonstrate good cause for raising claims again in a subsequent petition by refining the issues presented and previously resolved. "The 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." Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975) (a defendant cannot justify raising claims again by refining arguments raised in a prior petition). These claims are procedurally barred pursuant to NRS 34.810(2) and (3).

Further, appellant cannot demonstrate good cause by claiming to be inexperienced or by having relied on prior counsel. See, e.g., Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988) (appellant's limited intelligence or poor assistance in framing issues will not overcome procedural bar). Finally, as the district court correctly found, appellant's claims have no substantive merit; therefore appellant did not demonstrate prejudice. See Pertgen v. State, 110 Nev. 554, 559, 875 P.2d 361, 364 (1994) (petitioner must demonstrate both good cause and actual prejudice to overcome procedural bars).

Absent from this record on appeal is a "basis for a finding of good cause attributable to a 'fundamental miscarriage of justice'" or any showing of factual innocence which would "justify elevating concerns of fundamental justice over the need to demonstrate good cause" and prejudice. Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993) (citing McCleskey v.

Zant, 111 S.Ct. 1454, 1470 (1991) and United States v. Frady, 456 U.S. 152, 170 (1982)).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant cannot demonstrate error in this appeal, and that briefing and oral argument are unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976). Accordingly, we

ORDER this appeal dismissed.[3]

Shearing, C.J.

Springer, J.

Rose, J.

Young, J.

Maupin, J.

[3]Although petitioner has not been granted permission to file documents in this matter in proper person, see NRAP 46(b), we have received and considered petitioner's proper person documents. We conclude that the relief requested therein is not warranted. In view of our decision today, we deny as moot respondent's motion to appoint counsel for appellant.

cc: Hon. Stephen L. Huffaker, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Stewart L. Bell, District Attorney
Franny Forsman, Federal Public Defender
Michael L. Pescetta, Nevada Appellate and
Post-Conviction Project
Robert Jeffrey Farmer
Loretta Bowman, Clerk