IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM P. CASTILLO, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 56176

RESPONDENT'S ANSWERING BRIEF

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

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RESPONDENT'S ANSWERING BRIEF

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

STATEMENT OF THE ISSUE(S)

1. Whether Defendant's petition is time-barred.
2. Whether Defendant's petition is successive.
3. Whether Defendant's claims are barred by the doctrine of laches.
4. Whether Defendant's claims are barred by the doctrine of law of the case.
5. Whether Defendant's petition was properly dismissed by the district court.
6. Whether Defendant demonstrated good cause to overcome the procedural bars.

STATEMENT OF THE CASE

Pre-Trial and Trial Phase

On January 19, 1996, William Patrick Castillo, hereinafter "Defendant," and Michelle C. Platou were charged by way of Indictment with one count each of Conspiracy to Commit Burglary and/or Robbery, Robbery of a Victim Sixty-Five Years of Age or Older, Murder with Use of a Deadly Weapon, Conspiracy to Commit Burglary and Arson, First Degree Arson, and two counts of Burglary. II AA 389-393. An Amended Indictment alleging the

same charges was filed on May 29, 1996. II AA 397-385. The State filed Notice of Intent to Seek the Death Penalty on January 23, 1996, alleging five (5) aggravating factors. III 693-695. Those aggravators were: (1) the crime was committed by a person previously convicted of a felony involving violence, (2) the crime was committed during the course of a robbery, (3) the crime was committed during the course of a burglary, (4) the crime was committed to avoid or prevent lawful arrest, and (5) the crime was committed for financial gain. Id.

Defendant's jury trial began on August 26, 1996. XIII AA 3114. On September 4, 1996, the jury returned a verdict of guilty on all counts. XVII AA 4117-4119. The penalty phase began on September 19, 1996. XVII AA 4138. On September 25, 1996, the jury found that four (4) aggravating circumstances had been established beyond a reasonable doubt: (1) the crime was committed by a person previously convicted of a felony involving violence, (2) the crime was committed during the course of a robbery, (3) the crime was committed during the course of a burglary, and (4) the crime was committed to avoid or prevent lawful arrest. II AA 403-404. The jury also found the existence of three (3) mitigating circumstances: (1) the youth of the defendant at the time of the crime, (2) the murder was committed while the defendant was under the influence of extreme mental or emotional stress, and (3) any other mitigating circumstances. II AA 406. The jury also found that the aggravating circumstances outweighed the mitigating circumstances and selected a sentence of death for Count IV – Murder with Use of a Deadly Weapon. II AA 408.

On November 4, 1996, the district court sentenced Defendant on the remaining counts. A Judgment of Conviction was filed on November 12, 1996. II AA 384-387. Defendant filed a timely Notice of Appeal on November 4, 1996. II AA 416.

Direct Appeal

Defendant's Opening Brief was filed on March 12, 1997. II AA 420. This Court rejected Defendant's appellate claims and affirmed his conviction and sentence in Castillo v. State, 114 Nev. 271, 956 P.2d 103 (1998). Defendant filed a Petition for Rehearing on August 21, 1998. III AA 501-506. This Court filed its Order Denying Rehearing on

November 25, 1998. III AA 508-509. Remittitur issued on April 28, 1999, after Defendant's petition for Writ of Certiorari was denied by the U.S. Supreme Court.

Defendant raised the following eight (8) issues in his direct appeal:

1. Whether It Was Error for the District Court to Permit References to Booties Knitted by the Victim for Her Grandchildren.

Defendant contended that the testimony concerning the booties was irrelevant, prejudicial, and amounted to an improper appeal to the jury's sympathy. II AA 449-452. He also claimed that the admission of this evidence violated his rights to due process and a fair trial. Id. This Court rejected Defendant's arguments and held that the booties were relevant and the testimony was sufficiently brief as not to have caused Defendant prejudice. Castillo, 114 Nev. at 277, 956 P.2d at 108.

2. Whether It Was Error for the District Court to Admit Photographs of the Victim and Her Family into Evidence.

In ground 2 of his direct appeal, Defendant argued that the admission of a family photograph and autopsy photos of the victim constituted improper victim impact testimony during the guilt phase of the trial. II AA 453-456. This Court rejected Defendant's arguments and held that the family photograph was relevant on the issue of the victim's identity and provided a comparison with her appearance in the autopsy photos. Id. at 278, 956 P.2d at 108.

3. Whether the District Court Erred in Not Granting Defendant's Motion for a Mistrial.

The district court granted a pre-trial motion preventing the State from admitting evidence that Defendant was previously charged with a misdemeanor Battery. II AA 457. However, the State was permitted to admit evidence that Defendant owed money to his former attorney who represented him in connection with that case. Id. This was admissible as to the issue of motive. During trial, a witness testified that Defendant owed money "for another case that was ongoing." II AA 458. Defendant requested a mistrial based upon the admission of this evidence which was denied.

On appeal, this Court upheld the district court's ruling. It found that since the nature of the case was not revealed, i.e. whether it was civil or criminal, the prosecutor had not violated the district court's ruling. Castillo, 114 Nev. at 279, 956 P.2d at 108. Moreover, it also concluded that, even if the testimony was improper, the "inadvertent reference to [Defendant's] prior criminal conduct did not warrant a mistrial." Id.

4. Whether the Prosecutor Committed Misconduct During the Penalty Phase.

Defendant claimed that the prosecutor's statements during closing arguments of the penalty phase concerning Defendant's future dangerousness went beyond the bounds of proper argument. II AA 461-463. Defendant argued that the comments amounted to an improper argument concerning future victims. Id. This Court found that portions of the prosecutor's argument were improper. Id. at 280, 956 P.2d at 109. However, it also concluded that Defendant was not prejudice due to the overwhelming evidence of his guilt. Id. at 281, 956 P.2d at 110.

5. Whether the District Court Erred in Admitting Autopsy Photos Into Evidence.

Defendant also claimed that it was error for the district court to admit the victim's autopsy photographs. II AA 463-465. He claimed their probative value was outweighed by their prejudicial effect due to their gruesome nature. Id. This Court also found that the district court had not abused its discretion in admitting the autopsy photos because they demonstrated the severity of the victim's injuries. Castillo, 114 Nev. at 278, 956 P.2d at 108.

6. Whether the Victim Impact Testimony of the Victim's Daughter and Granddaughters Was Unduly Prejudicial.

Defendant implored this Court to interpret the Nevada Constitution to limit the nature and scope of victim impact testimony, and claimed the testimony presented by the victim's relatives was improperly repetitive and cumulative. II AA 466-470. This Court declined Defendant's invitation to reinterpret the Nevada Constitution. Id. at 280, 956 P.2d at 110. It also held that under relevant Nevada case law the district court had not abused its discretion in permitting the testimony. Id.

7. Whether the District Court Erred in Giving the "Anti-Sympathy" Jury Instruction.

The district court gave the following instruction during the penalty phase: "A verdict may never be influence by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law." II AA 471. Defendant argued that the inclusion of the term "sympathy" within this instruction violated his Eighth Amendment rights because it undermined the jury's obligation to consider mitigating evidence. II AA 471-473. This Court also rejected this argument, noting that the instruction had been approved in prior case law. Id. at 281-282, 956 P.2d at 110. This Court also noted that Defendant's counsel argued mitigation during his penalty phase closing argument, the district court properly instructed the jury to consider mitigating evidence, and the jury had found the existence of three mitigating factors. Id. at 282, 956 P.2d at 110.

8. Whether the District Court Erred in Refusing to Give Defendant's Proposed Instruction Regarding Five Non-Statutory Mitigating Circumstances.

The final issue Defendant raised in his Direct Appeal regarded a proposed jury instruction which listed several mitigating factors Defendant contended were supported by the evidence. II AA 474. Those factors included that Defendant: (1) admitted his guilt of the offense, (2) demonstrated remorse for the offense, (3) cooperated with the police, (4) had not planned the murder, and (5) had a difficult childhood. Id. The district court refused to give the instruction because the "catch all" mitigating circumstance would allow the defense to argue its theory to the jury. This Court found that the record demonstrated that the jury had clearly considered the mitigating circumstances, and the district court properly refused to give the proposed instruction because it would have amounted to an inappropriate comment on the evidence by the court.[1] Id. at 282, 956 P.2d at 111.

[1] This Court also concluded that the death sentence imposed was not the product of passion, prejudice, or any other arbitrary factor. Castillo, 114 Nev. at 283, 956 P.2d at 111. The Court further noted that the sentence was not excessive in light of the gravity of the crime and the defendant. Id.

First State Post-Conviction Petition for Writ of Habeas Corpus

Defendant filed his first Petition for Writ of Habeas Corpus (Post-Conviction) in the district court on April 2, 1999. III AA 511-517. Defendant's court-appointed counsel, Christopher Oram, filed a Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) on October 12, 2001. III AA 536-590. The State filed its Opposition to Defendant's Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) on December 12, 2001. I AA 65-81.

On August 2, 2002, the district court held a limited evidentiary hearing in order to address Defendant's claims of ineffective assistance of counsel. XIX AA 4732-XX AA 4755. Subsequently, Defendant filed his Second Supplemental Brief in Support Defendant's Post-Conviction Petition for Writ of Habeas Corpus on September 27, 2002. I AA 95-104. The State filed its Response on November 26, 2003. III AA 597. On January 22, 2003, the district court heard brief argument and denied Defendant's petition in its entirety. XX AA 4757-4763. The court's Findings of Fact, Conclusions of Law, and Order denying the petition were filed on June 11, 2003. III AA 595-602.

Defendant filed a Notice of Appeal appealing the denial of his petition on February 19, 2003. III AA 592-593. Defendant filed his Opening Brief on October 2, 2003. III AA 604-665. This Court rejected Defendant's claims and affirmed the district court's denial of Defendant's petition in its Order of Affirmance filed on February 5, 2004. III AA 667-676. Defendant filed a Petition for Writ of Certiorari with the U.S. Supreme Court on May 5, 2004. I AA 149-182. The Court denied Defendant's petition on October 4, 2004. III AA 183.

Defendant raised the following issues in his first Petition for Writ of Habeas Corpus (Post-Conviction) and on appeal from its denial:

1. Ineffective Assistance of Counsel: Failure to Adequately Challenge the Prosecutor's Improper Arguments during the Penalty Phase.

As noted above, Defendant's appellate counsel challenged the prosecutor's argument concerning future victims on direct appeal. This Court found the comments to be improper, but not reversible error. In his first petition, Defendant argued his appellate counsel was

ineffective for failing to challenge additional language in the prosecutor's statement when he argued, "[t]he issue is do you…have the resolve and the courage, the determination, the intestinal fortitude, the sense of commitment to do your legal and moral duty." III AA 630-636. The district court denied this ground on the basis that it was barred by the doctrine of law of the case and that counsel at the time did not have the benefit of the case law condemning such language. III AA 598-599.

This Court disagreed with the district court and found that Defendant's appellate counsel acted unreasonably in not raising this issue. III AA 672. However, it also concluded that "[t]he aggravating circumstances and the other evidence presented against [Defendant] relevant to his sentence were of such force that the result of his appeal would not have changed even if counsel had challenged the improper argument on both grounds." Id.

2. Whether a Crowbar Is a Deadly Weapon and the Constitutionality of NRS 193.165(5).

Defendant raised a freestanding claim that the tire iron or crowbar used to kill the victim was not properly considered a deadly weapon. III AA 636-639. He also argued that NRS 193.165(5) was unconstitutionally vague and ambiguous. III AA 639-643. This Court held that this claim was procedurally barred pursuant to NRS 34.810,[2] and Defendant had failed to establish good cause for failing to raise these claims before. III AA 675.

3. Ineffective Assistance of Counsel: Failure to Object to Bad Character Evidence.

Defendant argued that both his trial and appellate counsel were ineffective for failing to object to jury instructions concerning the use of character or "other matter" evidence in the penalty hearing. Defendant relied on the instructions subsequently set forth in Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001). III AA 643-646. This Court affirmed the denial of this claim and held that Defendant's counsel were not ineffective. III AA 673.

[2] See the discussion concerning cumulative error below.

4. Ineffective Assistance of Counsel: Failing to Properly Investigate the Case and Failing to Present a Psychological Defense in the Guilty Phase.

Relying on Dumas v. State, 111 Nev. 1270, 903 P.2d 816 (1995), Defendant argued that his counsel was ineffective for failing to present the psychological evidence that was put forth in the penalty phase during the guilty phase and for failing to investigate his psychological issues. III AA 646-652. Defendant claimed that had this evidence been presented during the guilty phase the jury would likely have found him guilty of Second Degree Murder. Id.

This Court found that Defendant's claims lacked merit. III AA 673. It noted that Defendant had failed to identify what evidence his counsel failed to uncover. Id. Moreover, it also found the Dumas case to be factually distinguishable and that Defendant's counsel believed that the psychological evidence he presented during the penalty phase was only relevant to that proceeding and may have been damaging at the guilt phase. III AA 675. As such, it concluded "that the record shows that defense counsel acted reasonably in investigating [Defendant's] mental condition and deciding not to offer psychological evidence in the guilt phase." Id.

5. Cumulative Error.

Defendant raised the substantive claim of cumulative error. III AA 652-653. This Court noted that any grounds in which Defendant failed to argue specifically that his trial or appellate counsel was ineffective with regards to an issue or show good cause for failing to raise the issue previously would be considered procedurally barred pursuant to NRS 34.810. III AA 675. It also noted that Defendant's assertion that his conviction was unconstitutional because of cumulative error and that he was systematically deprived of effective assistance of both trial and appellate counsel was an unacceptable, conclusory, catchall attempt to assert ineffective assistance of counsel. Id.

6. The Death Penalty Constitutes Cruel and Unusual Punishment.

Defendant argued that the death penalty violates the Eighth Amendment prohibition of cruel and unusual punishment. III AA 654-657. This Court found this claim to be procedurally barred pursuant to NRS 34.810. III AA 675-676.

7. Defendant's Conviction and Sentence Violates International Law.

Defendant argued that his conviction and sentence violate the International Covenant on Civil and Political Rights. III AA 657-658. This Court found this claim to be procedurally barred pursuant to NRS 34.810. III AA 675-676.

8. The Constitutionality of Nevada's Capital Punishment System.

Finally, Defendant challenged the constitutionality of Nevada's capital punishment system and argued that it operated in an arbitrary and capricious manner. III AA 658-662. This Court found this claim to be procedurally barred pursuant to NRS 34.810. III AA 675-676.

Defendant's Federal Petition

Defendant filed a petition for writ of habeas corpus in federal district court on June 22, 2004. XX AA 4800. On July 31, 2007, Defendant filed a pro per pleading in which he requested to waive his federal habeas rights and requested that his execution be carried out. XX AA 4801-4809. The federal district court granted his request and dismissed his petition. Id. Defendant reinstated federal proceedings on May 15, 2008. XX AA 4815.

Second (Instant) State Post-Conviction Petition for Writ of Habeas Corpus

Defendant filed the instant petition, his second, on September 18, 2009. I AA 184-II AA 369. The State filed its Response and Motion to Dismiss on December 2, 2009. XX AA 4770-4797. Defendant filed an Opposition to the State's Motion to Dismiss on February 22, 2010. XX AA 4821-4846. The State filed its Reply to Defendant's Opposition to State's Motion to Dismiss on March 18, 2010. XXI AA 5094-5101.The district court denied Defendant's petition after argument on April 9, 2010. XXI AA 5104-5124. The Findings of Fact, Conclusions of Law, and Order denying the petition were filed on May 12, 2010. XXI AA 5127-5135.

STATEMENT OF THE FACTS

The following facts were found by this Court in its resolution of Defendant's direct appeal in Castillo v. State, 114 Nev. 271, 273-277, 956 P.2d 103, 105-107 (1998):

In late November 1995, appellant William Patrick Castillo held a job as a roofer in Las Vegas. Harry Kumma, a former co-worker, contacted Castillo and two other roofing employees, Kirk Rasmussen and Jeff Donovan, about completing a side job. The side job involved re-roofing the residence of the victim, Isabelle Berndt.

Kumma, Rasmussen, Donovan, and Castillo worked on Berndt's roof on November 25, 1995. While performing ground cleanup at Berndt's residence, Castillo indicated to Donovan that he found a key to Berndt's home and wanted to enter. Donovan told Castillo that he should not and directed Castillo to return the key to the place where he found it. In response, Castillo stated "I'll just come back later at nighttime."

At some time during the roofing job, Castillo asked Kumma to lend him $500 so that Castillo could pay his lawyer for services rendered in connection with an unrelated criminal battery charge. Kumma did not lend Castillo the money.

Prior to these events, Castillo began residing with his girlfriend, Tammy Jo Bryant, and a friend, Michelle Platou. At about 6:00 p.m. on December 16, 1995, Castillo left the apartment with Platou in Platou's car. The two returned to the apartment at approximately 3:00 a.m. on the morning of December 17, 1995, with a VCR, a box containing silverware, and a bag containing knit booties. A few minutes later, Castillo and Platou again departed. They returned about twenty minutes later.

At about 9:00 or 10:00 a.m. on December 17, 1995, Castillo and Platou allegedly informed Bryant that they had committed a robbery and stolen several items. According to Bryant, Castillo and Platou further informed her that while in the house, Platou inadvertently bumped into a wall and made some noise. Castillo and Platou allegedly told Bryant that Castillo then hit a sleeping person with a tire iron Castillo brought into the house. The two then departed the scene. According to Bryant, they further stated that, out of fear that they

left incriminating fingerprints on the wall of the house, they returned to the residence at 3:00 a.m. to burn down the house.

In the early morning hours of December 17, 1995, neighbors notified the police that Berndt's residence was ablaze. Firefighters found Berndt's body inside the house. An arson investigator determined that two independent fires, set by "human hands," using some type of accelerant, caused the blaze. Investigators found a charred bottle of lighter fluid at the scene and several spots in the living room where an accelerant was present. Laboratory tests confirmed these findings.

According to the coroner's autopsy report, Berndt suffered "multiple crushing-type injuries with lacerations of the head, crushing injuries of the jaws," and several broken teeth. Berndt also had deep lacerations on the back of the head and injuries to the face and ears. According to the coroner, all injuries were contemporaneous. The coroner testified that Berndt died as a result of an intracranial hemorrhage due to blunt force trauma to the face and head. The coroner further testified that these injuries were consistent with blows from a crowbar or tire iron.

A Las Vegas Metropolitan Police Department crime analyst investigated Berndt's residence and observed fire, smoke and water damage in the living room, kitchen and master bedroom. He noted that dresser drawers had been opened, two jewelry boxes had been opened, and the house had been "ransacked." The crime analyst also observed blood marks on the wall next to Berndt's body, which was found lying on a bed.

On December 17, 1995, Berndt's only child, Jean Marie Hosking, arrived at Berndt's residence. She searched the house and determined that her mother's silverware was missing. This silverware featured a distinctive floral pattern, had an engraved "B" on each piece, and was stored in a wooden box on the shelf in Berndt's bedroom. Also missing were a VCR, Christmas booties Berndt was knitting for her grandchildren, and eight $50 U.S. savings bonds.

On December 19, 1995, Rasmussen, one of Castillo's coworkers, contacted the police. According to Rasmussen, during the carpool to work on December 18, 1995, Castillo said,

"This weekend I murdered an 86-year-old lady in her sleep." Castillo also allegedly stated that he entered Berndt's house with the intent to steal Berndt's valuables, hit Berndt numerous times with a tire iron, and heard her "gurgling" in her own blood, before he put a pillow over her head to smother her. Castillo also allegedly told Rasmussen that he had stolen a VCR, money, and silverware and that he intended to sell these items to raise money to pay his attorney.

The following morning, Castillo allegedly told Rasmussen that the crime had been reported on the news. On December 19, Rasmussen drove by Berndt's residence, saw that it had been burned, and contacted the police to report what he had learned.

On the evening of December 19, 1995, Charles McDonald, another roofer, visited Castillo's apartment. Castillo offered to sell a set of silverware to McDonald for $500. McDonald testified that the silverware was in a wooden box. When McDonald later viewed Berndt's silverware, he noted that it appeared to be the same silverware that Castillo tried to sell to him.

Based upon the information provided by Rasmussen, police obtained and executed a search warrant on the apartment shared by Castillo, Bryant, and Platou at 10:00 p.m. on December 19, 1995. Castillo and Bryant were present when the police arrived and permitted them to enter; both Castillo and Bryant gave their consent to a search of their apartment. Police recovered the silverware, the VCR, the booties, and a bottle of lighter fluid from the apartment. The officers also located a notebook with the notation "$50, VCR, $75, camera, silverware."

After execution of the search warrant, the officers arrested Castillo. At the detective bureau, Castillo waived his Miranda rights and made statements during two separate, consecutive interviews. During the first interview, Castillo indicated that he had received the VCR and other property from a friend. Shortly after the first interview ended, the detectives returned and informed Castillo of the evidence that had been obtained against him from Bryant and Rasmussen. Castillo then confessed to the killing, robbery, and arson.

Subsequently, Castillo pleaded not guilty on all counts, and a jury trial commenced August 26 and concluded on September 4, 1996. The prosecution presented all the evidence cited above in its case in chief. The defense did not put on a case in chief. The jury returned guilty verdicts on all counts: Conspiracy to Commit Burglary, Burglary, Robbery of a Victim Sixty-Five Years or Older, First Degree Murder with Use of a Deadly Weapon, Conspiracy to Commit Burglary and Arson, And First-Degree Arson.

Castillo's penalty hearing took place from September 19 to September 24, 1996. Bruce Kennedy of the Nevada Youth Parole Board testified about Castillo's extensive juvenile history and record. Kennedy became acquainted with Castillo in 1984 while Kennedy was a parole counselor at the Nevada Youth Training Center in Elko. Kennedy's testimony revealed: (1) Castillo began running away from home regularly when he was nine years old, (2) by 1984, Castillo had already been charged with Attempted Murder, Petty Larceny, and six counts of Arson (including an incident in which he tried to burn down the Circus Circus Hotel in Las Vegas), and (3) much of Castillo's criminal misbehavior remained uncharged. Kennedy also testified that, by the age of fifteen, Castillo had already used marijuana, speed, cocaine, and alcohol.

Due to his extensive misbehavior, Castillo participated in numerous Nevada state juvenile programs, lived with family members in different areas of the country for short periods of time and ultimately returned to Nevada. During his adolescence, doctors determined that Castillo understood the difference between right and wrong, did not suffer from a neurological disorder, but suffered from a personality disorder.

Other State witnesses testified that in 1990, at age seventeen, Castillo escaped from a Nevada youth training facility; Castillo was arrested for Attempted Burglary and later certified to adult status on charges arising from this incident. Castillo served fourteen months in prison, expiring his term. In April 1993, Castillo was convicted of Robbery arising from an incident which occurred in December 1992. Castillo had a gun during that robbery. Castillo was sentenced to three years, served just under two years, committed multiple disciplinary infractions while in prison, and was released in May 1995.

In June 1995, Castillo participated in the armed robbery of a cashier, but was not formally charged. In December 1995, Castillo was charged with Battery upon one of his neighbors. These charges were pending at the time of the instant trial.

After this extensive testimony about Castillo's prior criminal behavior, the State introduced victim impact evidence through testimony by Berndt's granddaughters and Berndt's daughter, Hosking. These individuals testified about their personal interaction with Berndt, the quality of Berndt's life, and the effect of Berndt's death on their lives.

The first defense witness, a neuropsychologist, testified that Castillo: had been emotionally, mentally, physically and behaviorally abused; suffered from "reactive attachment disorder" and "attention deficit hyperactivity disorder;" and came from a dysfunctional family. One correctional officer and one juvenile facility counselor testified as to several positive episodes regarding Castillo.

Thereafter, Castillo's girlfriend, Bryant, testified that Castillo had few social skills, acted like a "big kid," but was trying to improve. Castillo's mother testified that Castillo had a difficult upbringing due to the physical and emotional abuse he received from his biological father, her own lack of affection for Castillo, and the family's instability. At the hearing's conclusion, Castillo read an unsworn statement to the jury expressing his feelings including regret and remorse concerning his conduct.

The jury returned a verdict of death, finding four aggravating circumstances and three mitigating circumstances. The jury found that the aggravating circumstances were that the murder was committed: (1) by a person previously convicted of a felony involving the use or threat of violence, specifically, a robbery committed on December 14, 1992; (2) while Castillo was committing burglary; (3) while Castillo was committing robbery; and (4) to avoid or prevent a lawful arrest. The jury found the following mitigating circumstances: (1) the youth of the defendant at the time of the crime; (2) the murder was committed while the defendant was under the influence of extreme emotional distress or disturbance; and (3) any other mitigating circumstances.

ARGUMENT

"Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory." State v. Eighth Judicial District Court, 121 Nev. 225, 112 P.3d 1070, 1074 (2005). Defendant's instant post-conviction petition is filed more than ten (10) years after his direct appeal, in violation of the one-year time bar under NRS 34.726. By failing to raise the claims alleged in the instant petition in either his direct appeal or prior post-conviction proceedings, Defendant has waived the right to raise those grounds at the present time under NRS 34.810(b)(2). Additionally, the current petition is Defendant's second attempt at post-conviction relief and is barred as a successive petition per NRS 34.810(2).

Where Defendant attempts to allege new or different grounds for relief, this constitutes an abuse of the writ. NRS 34.810(2). The State also affirmatively pleads laches and invokes the five-year time bar of NRS 34.800. Absent a showing of good cause and prejudice to overcome each of these bars, Defendant's petition must be dismissed. In addition, insofar as some of the issues were already raised in previous proceedings and addressed on their merits or found to be procedurally barred, they are barred by the law of the case where the facts are substantially the same.

In Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004), this Court clarified that a preponderance of the evidence is the petitioner's burden of proof for facts underlying claims of ineffective assistance of counsel that are raised in a post-conviction habeas petition that are not otherwise procedurally barred. However, in a successive petition the higher standard of clear and convincing evidence applies. Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993) (quoting Sawyer v. Whitley, 505 U.S. 333, 336, 112 S.Ct. 2514 (1992). Defendant's current petition is his second attempt at post-conviction relief and constitutes as successive petition per NRS 34.810. The burden of proof for such defaulted claims is clear and convincing evidence. This Court reviews a district court's determination regarding good cause to overcome post-conviction procedural bars for an abuse of discretion. Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989) ("Appellate courts will not disturb a

trial court's discretion in determining the existence of good cause except for clear cases of abuse.")

I

DEFENDANT'S PETITION IS TIME BARRED

Defendant's petition was clearly filed beyond the statutory time limit of NRS 34.726. Post-conviction habeas petitions that are filed several years after conviction unreasonably burden the criminal justice system. State v. Eighth Judicial District Court, 121 Nev. 225, 112 P.3d 1070, 1074 (2005). "The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Id.

Pursuant to NRS 34.726, absent good cause for delay, a defendant must file a petition that challenges the validity of a judgment or sentence within one year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within one year after the Supreme Court issues its remittitur. This Court issued its remittitur from Defendant's direct appeal in 1999. As such, Defendant's petition is clearly time-barred as it has been over ten (10) years. Good cause exists for overcoming the procedural bars when: (1) the petitioner establishes that the delay is not his fault; and (2) dismissal of the petition will unduly prejudice him or her. Defendant must show that the delay was due to an external impediment to the defense which prevented him from complying with the procedural default rules. Crump v. Warden, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997) (citing Passanisis v. Director Dep't Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989)). An external impediment might exist where "the factual or legal basis for a claim was not reasonably available to counsel, or [where] 'some interference by officials' made compliance impracticable." Id. at 252. Any delay must not be the fault of the petitioner. NRS 34.726(1)(a). Good cause is defined as a "substantial reason; one that affords a legal excuse." Id.

II

DEFENDANT'S PETITION IS SUCCESSIVE

Defendant's petition is successive and should be dismissed pursuant to NRS 34.810.

"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 postconviction 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.

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." NRS 34.810.

Defendant filed his first petition on April 2, 1999. III AA 511-517. All of Defendant's claims in his current petition could have been or were raised in that first petition. Therefore, all claims Defendant is raising are barred from consideration by the Court under NRS 34.810(1)(b) or (2).

As discussed above, Defendant may overcome procedural default rules if he establishes good cause and actual prejudice. NRS 34.726(1); NRS 34.810(3); Bejarano v. State, 122 Nev. 1066, 146 P.3d 265, 270 (2006). Defendant carries the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his current claims in earlier proceedings and that he has suffered actual prejudice. Phelps v. Director, Dep't Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988). Good cause can be shown for failing previously to raise a claim if a defendant can establish the factual or legal basis for the claim not reasonably being available. Bejarano, 146 P.3d at 270, citing Harris v. Warden, 114 Nev. 956, 959 n.4, 964 P.2d 785, 787 n.4, Murray v. Carter, 477 U.S. 478, 488, 106 S.Ct. 2639 (1986).

Defendant has failed to allege any facts constituting good cause for failing to raise the claims in his current petition. Furthermore, many of Defendant's claims have already been presented. This case is nearly fifteen (15) years old and has involved extensive litigation of

Defendant's multiple assignments of error, all of which have been rejected. Defendant has been represented throughout by multiple highly qualified attorneys with extensive resources. There has been ample time and opportunity to develop each of the issues Defendant now presents, and in fact many have already been litigated. As such, Defendant's petition is successive without good cause shown for overcoming any procedural bar and was properly dismissed by the district court.

III
DEFENDANT'S CLAIMS ARE BARRED BY THE DOCTRINE OF LACHES

NRS 34.800 creates the rebuttable presumption of prejudice to the State if:

> "[a] period exceeding five years between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction…." NRS 34.800

The statute also requires that the State plead laches in its motion to dismiss the petition. NRS 34.800. The State pled laches in its Response and Motion to Dismiss Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). XX AA 4770-4797.

Most of Defendant's claims are mixed questions of law and fact that will require the State to prove facts that are over fifteen (15) years old. Defendant's Judgment of Conviction was filed on November 12, 1996. II AA 384-387. Remittitur on Defendant's direct appeal issued in 1999. Defendant's first petition was filed on April 2, 1999. III AA 511-517.

NRS 34.800 was enacted to protect the State from having to go back years later to re-prove matters that have become ancient history. There is a rebuttable presumption of prejudice for this very reason, and the doctrine of laches must be applied in the instant matter. If courts require evidentiary hearings for long delayed petitions, such as this one, the State would have to call and find long lost witnesses whose once vivid recollections have faded and re-gather evidence that in many cases has been lost or destroyed because of such a lengthy passage of time. As it has been over fifteen (15) years from the time Defendant committed the acts which were the basis of his conviction, this Court should apply NRS 34.800 and affirm the district court's denial of his petition.

IV
DEFENDANT'S CLAIMS ARE BARRED BY THE DOCTRINE OF LAW OF THE CASE

When an issue has already been decided on the merits by this Court, its ruling is law of the case, and the issue will not be revisited. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "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, 91 Nev. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). The doctrine, however, is not absolute, and the Supreme Court has the discretion to revisit the wisdom of its legal conclusions if warranted. Bejarano v. State, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006). Even where the law of the case may be revisited or reconsidered, Defendant still has the burden of demonstrating good cause and prejudice to overcome any procedurally defaulted claims. NRS 34.726; 34.810.

As discussed below, many claims raised by Defendant in the instant petition were raised on appeal and/or in his original petition. These claims have been addressed by this Court and found to be without merit. Accordingly, this Court's ruling on these claims is the law of the case and they should not be revisited. Hall v. State, 91 Nev. 315, 315, 535 P.2d 797, 798 (1975).

V
DEFENDANT'S PETITION WAS PROPERLY DISMISSED BY THE DISTRICT COURT

Defendant spends over one hundred pages arguing the merits of each individual claim and sub-claim. However, because Defendant's claims are procedurally barred, the State will not address them on the merits. Only if this court finds that a particular claim is not procedurally barred due to a showing of good cause and prejudice will such an examination

be warranted. As to any claims where the procedural bars have been overcome, an evidentiary hearing is only proper on those claims not belied by the record which, if true, would entitle Defendant to relief.

Regarding Defendant's ineffective assistance of counsel claims, the district court held:

> Allegations of ineffective assistance of counsel at trial and on appeal were capable of being raised in the first post-conviction proceedings and do not constitute good cause for filing of a second petition. Likewise, any errors of first post-conviction counsel Chris Oram occurred seven to ten years ago between 2000 and 2003 and do not provide good cause for the entire length of delay. This court finds that no alleged error of first post-conviction counsel between 2000 and 2003 can account for the subsequent six year delay in filing the instant petition in 2009.

XXI AA 5128. As discussed in this section and section VI, below, the district court did not err in finding Defendant's claims to be procedurally barred without good cause and prejudice shown to excuse the procedural bars.

A. Inadequate Investigation and Miscellaneous Arguments.

This exact claim of inadequate investigation has been previously raised in Defendant's first post-conviction petition. III AA 646-652. The State contends that Defendant's claim has previously been rejected by this Court (III AA 673) and is precluded from consideration based on the doctrine of law of the case. Moreover, Defendant cannot avoid application of the doctrine of law of the case simply because he now provides a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings. Hall, 91 Nev. at 316, 535 P.2d at 799.

To the extent that Defendant presents a rehashing of his prior arguments that appear to this Court as a new argument in support of this claim, Defendant has failed to allege any impediment or obstacle from asserting the arguments he now alleges in this claim. In fact, he previously presented many of these precise arguments. Accordingly, consideration of any additional arguments in support of this claim, if any exist, is barred pursuant to NRS 34.810. NRS 34.810(1)(b)(2); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994),

disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); Mitchell v. State, 149 P.3d 33 (2006).

Defendant also argued his counsel was ineffective for failing to object to the testimony of two police officers concerning statements of other victims, failing to adequately prepare defense witnesses, and allowing the trial judge broad discretion to excuse prospective jurors. These appear to be new claims not previously raised in Defendant's direct appeal or first petition. As this is a new or different ground for relief it constitutes an abuse of the writ and should not be reviewed. NRS 34.810(2). This issue is also time-barred under NRS 34.726 and subject to laches under NRS 34.800. Furthermore, Defendant has failed to allege any facts or circumstances constituting good cause for failure to previously assert these new arguments in Defendant's direct appeal or first petition.

B. McConnell Claim.

The district court found that Defendant's McConnell claims were time-barred because he delayed five years after McConnell was decided and three years after Bejarano. XX AA 5129. The court went on to find that review of this claim was not warranted under the fundamental miscarriage of justice doctrine because it was not an allegation of new evidence, but concerned an instructional error. Id.

This is a new claim not previously raised in Defendant's direct appeal or first petition. As this is a new or different ground for relief it constitutes an abuse of the writ and should not be reviewed. NRS 34.810(2). This issue is also time-barred under NRS 34.726 and subject to laches under NRS 34.800. Furthermore, Defendant has failed to allege any facts or circumstances constituting good cause for failure to previously assert these new arguments in Defendant's direct appeal or his first petition. As such, the district court did not err in finding this claim procedurally barred.

C. Admission of Evidence of Beliefs or Associations in Violation of First Amendment.

This is a new claim not previously raised in Defendant's direct appeal or first petition. As this is a new or different ground for relief it constitutes an abuse of the writ and should

not be reviewed. NRS 34.810(2). This issue is also time-barred under NRS 34.726 and subject to laches under NRS 34.800. Furthermore, Defendant has failed to allege any facts or circumstances constituting good cause for failure to previously assert these new arguments in Defendant's direct appeal or his first petition.

D. Prosecutorial Misconduct.

1. Testimony Concerning Defendant's "Other Case."

The issue of this testimony has been previously raised in Defendant's direct appeal. Castillo, 114 Nev. at 279, 956 P.2d at 108. The State contends that Defendant's claim has previously been rejected by this Court and is precluded from consideration based on the doctrine of law of the case. Moreover, Defendant cannot avoid application of the doctrine of law of the case simply because he now provides a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings. Hall, 91 Nev. at 316, 535 P.2d at 799.

To the extent that Defendant presents a rehashing of his prior arguments that appear to this Court as a new argument in support of this claim, Defendant has failed to allege any impediment or obstacle from asserting the arguments he now alleges in this claim. In fact, he previously presented these precise arguments on appeal. Accordingly, consideration of any additional arguments in support of this claim, if any exist, is barred pursuant to NRS 34.810. NRS 34.810(1)(b)(2); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); Mitchell v. State, 149 P.3d 33 (2006).

Should this Court determine that this is a new or different ground for relief it constitutes an abuse of the writ and should not be reviewed. NRS 34.810(2). This issue is also time-barred under NRS 34.726 and subject to laches under NRS 34.800. Furthermore, Defendant has failed to allege any facts or circumstances constituting good cause for failure to previously assert these new arguments in Defendant's direct appeal or his first petition.

2. Prosecutor's Emphasis of Defendant's Need to Pay an Attorney During Closing Arguments.

Defendant also claims that the prosecutor's argument during closing that Defendant was facing financial difficulties due to his need to pay an attorney constituted misconduct. The State contends that, for the reasons set forth in Section V, D, 1, above, this claim is precluded by the doctrine of law of the case. Should this Court determine that this is a new or different ground for relief it constitutes an abuse of the writ and should not be reviewed. NRS 34.810(2). This issue is also time-barred under NRS 34.726 and subject to laches under NRS 34.800. Furthermore, Defendant has failed to allege any facts or circumstances constituting good cause for failure to previously assert these new arguments in Defendant's direct appeal or his first petition.

3. Prosecutor's Arguments Concerning Mitigating Factors Not Raised by Defendant.

This is a new claim not previously raised in Defendant's direct appeal or first petition. As this is a new or different ground for relief it constitutes an abuse of the writ and should not be reviewed. NRS 34.810(2). This issue is also time-barred under NRS 34.726 and subject to laches under NRS 34.800. Furthermore, Defendant has failed to allege any facts or circumstances constituting good cause for failure to previously assert these new arguments in Defendant's direct appeal or his first petition.

4. Arguments Concerning Future Victims.

This claim was previously raised in both Defendant's Direct Appeal and First Post-Conviction Petition. II AA 461-463; III AA 630-636. This Court found it to be unworthy of relief in both instances. Castillo, at 281, 956 P.2d at 110; III AA 672. Since Defendant's claim has previously been rejected by this Court, it is precluded from consideration based on the doctrine of law of the case. Moreover, Defendant cannot avoid application of the doctrine of law of the case simply because he now provides a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings. Hall, 91 Nev. at 316, 535 P.2d at 799.

To the extent that Defendant presents a rehashing of his prior arguments that appear to this Court as a new argument in support of this claim, Defendant has failed to allege any impediment or obstacle from asserting the arguments he now alleges in this claim. In fact, he previously presented these precise arguments on appeal. Accordingly, consideration of any additional arguments in support of this claim, if any exist, is barred pursuant to NRS 34.810. NRS 34.810(1)(b)(2); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); Mitchell v. State, 149 P.3d 33 (2006).

Should this Court determine that this is a new or different ground for relief it constitutes an abuse of the writ and should not be reviewed. NRS 34.810(2). This issue is also time-barred under NRS 34.726 and subject to laches under NRS 34.800. Furthermore, Defendant has failed to allege any facts or circumstances constituting good cause for failure to previously assert these new arguments in Defendant's direct appeal or his first petition.

5. Arguments Concerning the Possibility of Defendant's Rehabilitation.

This is a new claim not previously raised in Defendant's direct appeal or first petition. As this is a new or different ground for relief it constitutes an abuse of the writ and should not be reviewed. NRS 34.810(2). This issue is also time-barred under NRS 34.726 and subject to laches under NRS 34.800. Furthermore, Defendant has failed to allege any facts or circumstances constituting good cause for failure to previously assert these new arguments in Defendant's direct appeal or his first petition.

E. The Use of the Kazalyn Instruction.

The district court found that Defendant was not entitled to the application of Byford, and that Defendant's argument concerning Polk did not provide him with good cause since he waited two years after that decision to file his petition. XX AA 5129-530. It also found that Polk did not address the retroactivity of Byford and Nika remains the current law that it is not retroactive. Id.

This is a new claim not previously raised in Defendant's direct appeal or first petition. As this is a new or different ground for relief it constitutes an abuse of the writ and

should not be reviewed. NRS 34.810(2). This issue is also time-barred under NRS 34.726 and subject to laches under NRS 34.800. Furthermore, Defendant has failed to allege any facts or circumstances constituting good cause for failure to previously assert these new arguments in Defendant's direct appeal or his first petition.

F. The Admission of Victim Impact Evidence.

This claim was previously raised in Defendant's Direct Appeal. II AA 466-470. This Court held that the district court had not abused its discretion. Castillo, at 280, 956 P.2d at 110. Since Defendant's claim has previously been rejected by this Court, it is precluded from consideration based on the doctrine of law of the case. Moreover, Defendant cannot avoid application of the doctrine of law of the case simply because he now provides a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings. Hall, 91 Nev. at 316, 535 P.2d at 799.

To the extent that Defendant presents a rehashing of his prior arguments that appear to this Court as a new argument in support of this claim, Defendant has failed to allege any impediment or obstacle from asserting the arguments he now alleges in this claim. In fact, he previously presented these precise arguments on appeal. Accordingly, consideration of any additional arguments in support of this claim, if any exist, is barred pursuant to NRS 34.810. NRS 34.810(1)(b)(2); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); Mitchell v. State, 149 P.3d 33 (2006).

Should this Court determine that this is a new or different ground for relief it constitutes an abuse of the writ and should not be reviewed. NRS 34.810(2). This issue is also time-barred under NRS 34.726 and subject to laches under NRS 34.800. Furthermore, Defendant has failed to allege any facts or circumstances constituting good cause for failure to previously assert these new arguments in Defendant's direct appeal or his first petition.

G. The State's Use of Evidence of Acts Defendant Committed as a Juvenile.

This is a new claim not previously raised in Defendant's direct appeal or first petition. As this is a new or different ground for relief it constitutes an abuse of the writ and should

not be reviewed. NRS 34.810(2). This issue is also time-barred under NRS 34.726 and subject to laches under NRS 34.800. Furthermore, Defendant has failed to allege any facts or circumstances constituting good cause for failure to previously assert these new arguments in Defendant's direct appeal or his first petition.

H. Defendant's Allegedly Excessive Sentence.

This is a new claim not previously raised in Defendant's direct appeal or first petition. As this is a new or different ground for relief it constitutes an abuse of the writ and should not be reviewed. NRS 34.810(2). This issue is also time-barred under NRS 34.726 and subject to laches under NRS 34.800. Furthermore, Defendant has failed to allege any facts or circumstances constituting good cause for failure to previously assert these new arguments in Defendant's direct appeal or his first petition.

I. Nevada's Definition of Deadly Weapon.

This claim was previously raised in Defendant's first post-conviction petition. III AA 636-639. This Court found this claim to be procedurally barred with no good cause shown for failing to raise this claim on direct appeal. III AA 675. Since Defendant's claim has previously been rejected by this Court, it is precluded from consideration based on the doctrine of law of the case. Moreover, Defendant cannot avoid application of the doctrine of law of the case simply because he now provides a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings. Hall, 91 Nev. at 316, 535 P.2d at 799.

To the extent that Defendant presents a rehashing of his prior arguments that appear to this Court as a new argument in support of this claim, Defendant has failed to allege any impediment or obstacle from asserting the arguments he now alleges in this claim. In fact, he previously presented these precise arguments on appeal. Accordingly, consideration of any additional arguments in support of this claim, if any exist, is barred pursuant to NRS 34.810. NRS 34.810(1)(b)(2); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); Mitchell v. State, 149 P.3d 33 (2006).

Should this Court determine that this is a new or different ground for relief it constitutes an abuse of the writ and should not be reviewed. NRS 34.810(2). This issue is also time-barred under NRS 34.726 and subject to laches under NRS 34.800. Furthermore, Defendant has failed to allege any facts or circumstances constituting good cause for failure to previously assert these new arguments in Defendant's direct appeal or his first petition.

J. Nevada's Definition of Reasonable Doubt.

This is a new claim not previously raised in Defendant's direct appeal or first petition. As this is a new or different ground for relief it constitutes an abuse of the writ and should not be reviewed. NRS 34.810(2). This issue is also time-barred under NRS 34.726 and subject to laches under NRS 34.800. Furthermore, Defendant has failed to allege any facts or circumstances constituting good cause for failure to previously assert these new arguments in Defendant's direct appeal or his first petition.

K. Admission of Defendant's Juvenile Records during Penalty Phase.

The district court found these claims to be procedurally barred. XX AA 5128. This is a new claim not previously raised in Defendant's direct appeal or first petition. As this is a new or different ground for relief it constitutes an abuse of the writ and should not be reviewed. NRS 34.810(2). This issue is also time-barred under NRS 34.726 and subject to laches under NRS 34.800. Furthermore, Defendant has failed to allege any facts or circumstances constituting good cause for failure to previously assert these new arguments in Defendant's direct appeal or his first petition.

L. Popular Election of Nevada's Judiciary.

This is a new claim not previously raised in Defendant's direct appeal or first petition. As this is a new or different ground for relief it constitutes an abuse of the writ and should not be reviewed. NRS 34.810(2). This issue is also time-barred under NRS 34.726 and subject to laches under NRS 34.800. Furthermore, Defendant has failed to allege any facts or circumstances constituting good cause for failure to previously assert these new arguments in Defendant's direct appeal or his first petition.

M. Nevada's Lethal Injection Protocol.

This is a new claim not previously raised in Defendant's direct appeal or first petition. As this is a new or different ground for relief it constitutes an abuse of the writ and should not be reviewed. NRS 34.810(2). This issue is also time-barred under NRS 34.726 and subject to laches under NRS 34.800. Furthermore, Defendant has failed to allege any facts or circumstances constituting good cause for failure to previously assert these new arguments in Defendant's direct appeal or his first petition. Moreover, such a claim is not cognizable in a post-conviction petition for writ of habeas corpus. McConnell v. State, 212 P.3d 307, 311 (Nev. 2009).

N. Cumulative Error.

The district court found these claims to be procedurally barred. XX AA 5128. This claim was previously raised in Defendant's first post-conviction petition. III AA 652-653. This Court found this claim to be procedurally barred with no good cause shown for failing to raise this claim on direct appeal. III AA 675. Since Defendant's claim has previously been rejected by this Court, it is precluded from consideration based on the doctrine of law of the case. Moreover, Defendant cannot avoid application of the doctrine of law of the case simply because he now provides a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings. Hall, 91 Nev. at 316, 535 P.2d at 799.

To the extent that Defendant presents a rehashing of his prior arguments that appear to this Court as a new argument in support of this claim, Defendant has failed to allege any impediment or obstacle from asserting the arguments he now alleges in this claim. In fact, he previously presented these precise arguments on appeal. Accordingly, consideration of any additional arguments in support of this claim, if any exist, is barred pursuant to NRS 34.810. NRS 34.810(1)(b)(2); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); Mitchell v. State, 149 P.3d 33 (2006).

Should this Court determine that this is a new or different ground for relief it constitutes an abuse of the writ and should not be reviewed. NRS 34.810(2). This issue is

also time-barred under NRS 34.726 and subject to laches under NRS 34.800. Furthermore, Defendant has failed to allege any facts or circumstances constituting good cause for failure to previously assert these new arguments in Defendant's direct appeal or his first petition.

VI

THE DISTRICT COURT DID NOT ERR IN FINDING THAT DEFENDANT FAILED TO DEMONSTRATE GOOD CAUSE AND PREJUDICE TO EXCUSE THE PROCEDURAL BARS

Defendant fails to show good cause to overcome the procedural bars contained in NRS 34.726, NRS 34.800 and NRS 34.810. Defendant appears to suggest that "good cause" exists for his failure to include these issues in either his previous appeal or petitions for post-conviction relief for several reasons. As noted below, these allegations do not constitute good cause; therefore Defendant cannot meet one of the two prongs necessary to overcome a procedural bar.

A. Defendant's Claim That His Twelve-Year Delay Was Not His Fault is Incongruous.

Defendant claims that any delay was not his fault because he was unable to file a petition on time pro se. However, this argument is without merit. The lack of the assistance of counsel when preparing a petition and even the failure of trial counsel to forward a copy of the file to a petitioner do not constitute good cause. See Phelps v. Director, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

Moreover, Defendant's claim that he was prevented from filing a timely petition due to his alleged mental deficiencies is nonsense as they clearly did not prevent him from filing his first petition or his federal petition on time and subsequently be appointed counsel. A defendant is merely required to file a timely petition. Nothing prevents subsequent investigation or supplemental briefing by appointed or retained counsel. As such, these claims are clearly inadequate to overcome procedural default.

Defendant attempts to excuse most defaulted claims with a catch-all argument that his former counsel was ineffective for failing to raise them. However, Defendant's ineffective assistance of trial, appellate and post-conviction counsel claims are, in themselves, untimely and therefore cannot constitute good cause to overcome the procedural bars. A claim of ineffective assistance of counsel must itself be timely raised:

> A claim of ineffective assistance of counsel may also excuse a procedural default if counsel was so ineffective as to violate the Sixth Amendment. However, in order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted. In other words, a petitioner must demonstrate cause for raising the ineffective assistance of counsel claim in an untimely fashion.

State v. District Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005).

Any errors of first post-conviction counsel, appellate counsel, or trial counsel which occurred more than ten years ago cannot possibly provide good cause for the current second post-conviction petition. Even in cases where a petitioner may file a successive petition in order to allege ineffective assistance of first post-conviction counsel, he or she must raise these matters in a reasonable time to avoid application of procedural default rules. See Pellegrini v. State, 117 Nev. 860, 869-70, 34 P.3d 519, 525-26 (2001) (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing).

Defendant's ineffective assistance of trial and appellate counsel claims are filed more than ten years from the issuance of remittitur following direct appeal. Defendant's ineffective assistance of first post-conviction counsel claims are filed more than five years from issuance of remittitur following his appeal from the denial of his first petition. As such, these claims are clearly untimely. Moreover, the Federal Public Defender's Office seems to believe it, and it alone, is capable of rendering competent representation to death penalty

defendants.[3] However, even if this were true, the absence of the representation by a particular attorney or office does not constitute good cause to overcome procedural bars.

The fatal flaw in Defendant's current petition is that he cannot demonstrate good cause for his delay. Defendant elected to pursue federal remedies by filing a pro per habeas petition on June 22, 2004, in federal district court which he could have filed in state court. He litigated his federal claims for five years from 2004 to 2009 in Case #2:04-cv-00868-RCJ-GWF. During such time, Defendant waived his federal rights, dismissed his petition, and agreed to be executed. Defendant then elected to reinstitute his federal petition. XX AA 4799-4820. However, pursuit of federal remedies does not constitute good cause to overcome state procedural bars. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989). In Colley, the defendant argued that he appropriately refrained from filing a state habeas petition during the four years he pursued a federal writ of habeas corpus. This Court disagreed:

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

Id.

The state procedural rules simply do not afford a petitioner the luxury of federal counsel and an investigation before being required to bring state claims. Accordingly, no matter how diligent and expansive the federal investigation may have been, it does not constitute good cause as a matter of law. There was no impediment external to the defense which prevented Defendant from discovering and raising all of his claims in a timely manner. The purpose of the one-year time bar is to require petitioners to investigate, discover

[3] This is demonstrated by the claim that "it was only through federal habeas proceedings that [Defendant] had the opportunity to have the circumstances of his conviction and sentence, as well as the effectiveness of the representation he received, reviewed by qualified counsel." Appellant's Opening Brief p. 108.

and raise all of their claims within one year or be forever barred. Under Colley, the delay occasioned by Defendant's voluntary choice to pursue federal relief to the exclusion of state habeas remedies simply does not constitute good cause.

Other than implying that any "fault" in the delay was that of his attorneys, Defendant presents no evidence of an external impediment. Defendant's convoluted analysis which argues that there are separate standards of good cause in each of the procedural bars is clearly faulty and contrary to this court's precedent. The claim that the legislature intended two separate standards is absurd. Defendant had been previously represented by multiple attorneys throughout pre-trial, trial, appeal, and post-conviction proceedings spanning over fifteen (15) years. He continually alleges every single one was ineffective. It seems as though Defendant is arguing that the only effective counsel is the Federal Public Defender's Office or one that achieves the results he desires. That is clearly not the standard.

Moreover, as to the claims of ineffective assistance of counsel that were brought in prior petitions and decided on their merits, these claims would be successive, and new arguments in support of the claims would be an abuse of the writ. So they are also procedurally barred under NRS 34.810 and cannot constitute good cause for delay. Any claims that were not previously raised in the first post-conviction petitions would be waived and barred under NRS 34.810(1)(b) and likewise cannot establish good cause for delay. Thus, Defendant's claims of ineffective assistance of counsel do not establish good cause for overcoming the procedural bars.

B. Intervening Changes in the Law Do Not Constitute Good Cause.

1. Polk v. Sandoval and Byford v. State

Defendant alleges that the first-degree murder instruction (the "Kazalyn" instructions) failed to properly instruct the jury concerning the "premeditation and deliberation" elements of the capital offense. Defendant claims that his due process rights were violated because the instruction failed to define willfulness, premeditation, and deliberation as separate elements for First-Degree Murder.

Although Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007) was published on September 11, 2007, the basis for the Ninth Circuit's ruling, as stated in Polk, was not new law but was grounded on the clearly established federal principle that a defendant is deprived of due process if a jury instruction relieves the State of the burden of proof as to the defendant's state of mind. See Sandstrom v. Montana, 442 U.S. 510, 521 99 S.Ct. 2450 (1979); Francis v. Franklin, 471, U.S. 307, 326, 105 S.Ct. 1965 (1985), In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970) (Cases relied upon in Polk to justify the Ninth Circuit's jurisdiction in the matter). As such, the underlying argument and authority relied upon in Polk has always been available to the defense and, therefore, does not the provide Defendant with any new claim.

Furthermore, Polk does not apply to Defendant's murder conviction, which became final on February 26, 1987, upon issuance of Remittitur following Defendant's direct appeal. Although this Court rejected the Kazalyn instruction in Byford v. State, 116 Nev. 215, 234-37, 994 P.2d 700, 713-15 (2000), the Court also held that Byford applies only prospectively and does not affect cases that gave the Kazalyn instruction prior to the decision in Byford. See Garner v. State, 116 Nev. 770, 789, 6 P.3d 1013, 1025 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868, 872 (2002). The prospective application of Byford was recently reaffirmed by this Court in Nika v. State, 198 P.3d 839 (2008). As the Nika Court explained, Byford does not apply retroactively because the Court did not hold that the Kazalyn instructions were constitutional error, but rather announced a change in Nevada law. Nika, 198 P.3d at 849-50. Defendant's reliance on the Ninth Circuit's decision in Polk v. Sandavol, 503 F.3d 903 (Nev. 2007) is, therefore, misplaced.[4]

Finally, at Defendant's 1996 murder trial, the Kazalyn instruction comported with Nevada's statutory definition of Murder[5], which viewed the term "deliberate" as simply redundant to "premeditated." Powell v. State, 108 Nev. 700, 708-10, 838 P.2d 921, 926-27

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[4] It should also be noted that in Nika this Court pointed out that it is not obligated to follow Polk. Nika, 198 P.3d at 848.

[5] NRS 200.030(1) (a) provides, in relevant part, that murder perpetrated by "willful, deliberate and premeditated killing" is first-degree murder.

(1992). In fact, the terms "premeditated," "deliberate," and "willful," were viewed as a single phrase, as opposed to separate elements. Greene v. State, 113 Nev. 157, 168, 931 P.2d 54, 61 (1997). Accordingly, the Kazalyn instruction used in Defendant's trial was a correct statement of law, as it was understood in 1996. Where premeditation and deliberation are synonymous, there is no unconstitutional mandatory presumption or failure to instruct on a material element.

Only in 2000 did Nevada depart from the Kazalyn instruction and require separate definitions. Byford, 116 Nev.235-36, 994 P.2d 700, 713. Polk's direct appeal was pending when Byford was decided, therefore the Ninth Circuit determined that Polk was entitled to the benefit of the Byford decision. The Ninth Circuit disagreed with the Byford holding that the Kazalyn instruction was not error but that better instructions should be used in future cases to define the term "willful deliberate, and premeditated." Byford, 116 Nev. at 235, 994 P.2d at 714.

The Nika Court recently distinguished Polk and clarified Byford; holding that:

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

In short, the Court stated that Byford's rejection of the Kazalyn instruction was not based upon constitutional grounds, but rather was the result of a change in state law and thus did not require retroactive application. Id. This Court recognized, "As the Supreme Court has indicated, the question of whether a particular state court interpretation of a state criminal statute constitutes a change in--rather than a clarification of--the law is a matter of state law. **It is thus for this court to determine whether a decision of this court changed or merely clarified state law**." Id. (citing Bunkley v. Florida, 538 U.S. 835, 839-840, 123 S.Ct. 2020 (2003); Fiore v. White, 531 U.S. 225, 228, 121 S.Ct. 712 (2001)) (emphasis added). The Nika Court reaffirmed its previous holding that "Byford has no retroactive application on

collateral review" because "the Kazalyn instruction correctly reflected Nevada law before Byford." "Id. at 850. Furthermore, "if a rule is new but not constitutional, it has no retroactive application to convictions that are final at the time of the change in law." Id. In this case, because Defendant's conviction was final when Byford was decided, Byford's change in law and subsequent replacement of the Kazalyn instruction do not apply retroactively to his case. As such, Defendant is not entitled to a new trial with the benefit of the Byford instruction, and his alleged incapability of deliberating is irrelevant. Moreover, the facts of the case clearly belie such a claim. The jury found that Defendant had committed the crime in order to avoid a lawful arrest. It would be illogical and contradictory for a jury to find that Defendant had done so without deliberation. As such, there is no "fundamental miscarriage of justice."

It is readily apparent that Defendant disagrees with this Court's decision in Nika. However, the fact remains that Nika is the current law pertaining to this issue, and Byford is not retroactive. The Ninth Circuit did not discuss state retroactivity rules and did not apply its reasoning to cases that were already final at the time Byford was decided. Polk, 503 F.3d 903. Defendant's arguments about what the law should be on this issue and how this Court's reasoning in Nika is completely wrong are nothing more than an extrapolation of law rather than existing precedent. An argument for a change in the law or in anticipation of how the Ninth Circuit might respond to Nika is insufficient to overcome the procedural bars. Because of Nika, there is no intervening case authority at this time upon which Defendant may rely to overcome the procedural bars.

2. McConnell v. State and Bejarano v. State

Defendant also argues that this Court's decisions in McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004) and Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006) constitute good cause to overcome the procedural bars. However, McConnell was decided in 2004, and Defendant delayed for an additional five (5) years before raising this claim. Moreover, Defendant delayed three (3) years after this Court held that the McConnell

decision would be made retroactive in Bejarano in 2006. As such, Defendant has failed to timely raise this claim and offers no cause, much less good cause, to excuse his delay.

Even if this Court determines Defendant has demonstrated good cause, he still is not entitled to have his claim reviewed. As this Court held in Bejarano, he must show prejudice before his claim can overcome the procedural bars. In particular, this Court "may excuse the failure to show cause where the prejudice from a failure to consider the claim amounts to a 'fundamental miscarriage of justice.'" Pellegrini. State, 117 Nev. 860, 887, 34 P.2d 519, 537 (2001). This requires Defendant to demonstrate that he is ineligible for the death penalty. Id. at 887, 34 P.3d at 537. He must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible. Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993), citing Sawyer v. Whitely, 505 U.S. 333, 112 S.Ct. 2514 (1992).

The district court made a finding that even if Defendant was entitled to the application of McConnell the jury would have still selected the death penalty absent the erroneous aggravating circumstances. XXI AA 5129. This Court may assess the validity of a death sentence following the striking of an invalid aggravating circumstance by either reweighing the aggravating and mitigating evidence or conducting a harmless error analysis. Archanian v. State, 122 Nev. 1019, 145 P.3d 1008 (2006) (citing Clemons v. Mississippi, 494 U.S. 738, 754 (1990)). "In reweighing, this court disregards the invalid aggravating circumstances and reweighs the remaining permissible aggravating and mitigating circumstances. A harmless error analysis requires a new sentencing calculus to determine whether the error of the invalid aggravating circumstance was harmless beyond a reasonable doubt. Either analysis asks the same question: is it clear that absent the erroneous aggravator the jury would have imposed death?" Browning v. State, 120 Nev. 347, 363-364, 91 P.3d 39, 51 (2004) (internal citations omitted).[6]

[6] Defendant acknowledges that this is the standard employed by this Court, but claims Clemmons is invalid. This argument is without merit and will not be substantively addressed by the State since Clemmons is currently good law.

This Court reviews the reweighing of aggravating and mitigating circumstances *de novo*. Haberstroh, 119 Nev. 173, 184, 69 P.3d 676, 683 (2003). This Court will uphold a death sentence after an invalid aggravating circumstance has been stricken if it can conclude beyond a reasonable doubt that the jury would have: (1) found the defendant death eligible and (2) imposed death absent the erroneous aggravating circumstances. A new penalty hearing is not required unless the Court is unable to make that determination. See Browning, 120 Nev. at 363-64, 91 P.3d at 51; Leslie v. Warden, 118 Nev. 773, 784, 59 P.3d 440, 448 (2002); Haberstroh, 119 Nev. at 183, 69 P.3d at 683. Using either analysis, it is clear beyond a reasonable doubt that the jury would still have imposed the death penalty.

First, it should be noted that the aggravators which could be stricken pursuant to McConnell involved the underlying facts of the crime itself. As a result, the jury would have been aware of the facts underlying the stricken aggravators regardless of whether they were used as aggravators. See Rippo v. State, 122 Nev. 1086, 1093, 146 P.3d 279, 284 (2006) (noting that multiple stricken felony aggravators based on the facts of the crime only eliminate "the weight of roughly one major aggravator").

Where the evidence at the penalty hearing would remain exactly the same, any error in the "labeling" of aggravating circumstances would have only an "inconsequential impact" and cannot be said to have skewed the jury's weighing process. Brown v. Sanders, 546 U.S. 212, 126 S.Ct. 884 (2006). Thus, it is unlikely the two stricken aggravators carried substantial weight in the jury's mind when finding Defendant death eligible.

Moreover, the remaining aggravators of convicted of a prior crime of violence and murder committed to prevent or avoid lawful arrest are extremely compelling when weighed against the mitigating evidence presented to the jury.[7] The jury found the following

[7] This Court should only consider the mitigating evidence presented to and considered by the jury and not any mitigation evidence presented for the first time in post-conviction proceedings. See Bejarano, 122 Nev. at 1081, 146 P.3d at 276 ("Reweighing requires us to answer the following question: Is it clear beyond a reasonable doubt that absent the invalid aggravators the jury still would have imposed a sentence of death?"); Rippo v. State, 122 Nev. 1086, 1093-94, 146 P.3d 279, 284 (2006) (striking three McConnell aggravators and reweighing, looking only to the record for mitigating evidence); Archanian v. State, 122 Nev. 1019, 1040-41, 145 P.3d 1008, 1023 (2006) (same); State v. Haberstroh, 119 Nev. 173,

mitigating circumstances: (1) the youth of the defendant at the time of the crime, (2) the murder was committed while the defendant was under the influence of extreme mental or emotional stress, and (3) any other mitigating circumstances.[8] II AA 406. The murder of an elderly woman by way of multiple blows with a crowbar to her head in order to prevent her from reporting the robbery/burglary of her home in of itself would be more than sufficient to outweigh the mitigating circumstances presented to the jury. With the addition of Defendant's prior history of violent crime, it is clear beyond a reasonable doubt the jury would have found Defendant death eligible.

It is equally clear beyond a reasonable doubt that the jury would still have imposed the death penalty after finding Defendant death eligible. The evidence demonstrated that Defendant was an extremely violent individual with a long history of criminal activity. Castillo, 114 Nev. at 273-277, 956 P.2d at 105-107. In addition to the brutal beating of an elderly woman in which he crushed her face and then burned down her house to cover up his crime, Defendant had been involved in previous acts of violence ranging from battery, to arson, to attempted murder. Id. Not only did Defendant beat his victim mercilessly with a crowbar, he then smothered her with a pillow as she gurgled on her own blood. Id. Accordingly, Defendant has clearly failed to demonstrate by clear and convincing evidence a reasonable probability that absent the challenged aggravators, the jury would not have imposed death.

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184 n. 23, 69 P.3d 676, 684 n. 23 (2003) (reweighing does not involve factual findings "other than those of the jury at the original penalty hearing"); Bridges v. State, 116 Nev. 752, 766, 6 P.3d 1000, 1010 (2000) (this court reweighed based on a "review of the trial record").

[8] Moreover, while it may not be determined what specific "other mitigating factors" the jury found, this has no impact on this Court's ability to reweigh or conduct a harmless error analysis. This Court simply needs to look at all evidence and mitigation which was admitted at the hearing and heard by the jury.

C. This Court's Alleged Deficient Application of the Procedural Bars Does Not Constitute Good Cause.

Defendant further claims that this Court's application of the statutory default rules is discretionary and arbitrary.[9] This identical issue was decided in Valerio v. State, 112 Nev. 383, 389-90, 915 P.2d 874, 878 (1996).

> We note at the outset that reversal of the district court's order for its failure to recognize this court's "policy" of reviewing plain constitutional error is not mandated. Moreover, arguments regarding the consistent or inconsistent application of a procedural bar are aimed at the federal courts rather than this court. See Kills on Top v. State, 273 Mont. 32, 901 P.2d 1368, 1386 (1995). In any event, contrary to the assertion of the Ninth Circuit, we note that this court has not inconsistently applied post-conviction procedural bars. Id.

This court has already rejected Defendant's claim. Furthermore, "this rule has no legitimate application to our review in habeas, and we have rejected the assertion that this court inconsistently applies the procedural default rules." Pelligrini v. State, 117 Nev. 860, 880, 34 P.3d 519, 532 (2001).

The Federal Public Defender's Office repeatedly confuses the Court's discretion to entertain issues on appeal with the Court's requirement to apply procedural bars. The general judicial practice to decline considering issues not first raised below is a policy designed to help an appellate court orderly manage its caseload. Just because a court may depart from this judicial principle in an appropriate case does not equate with ignoring procedural bars. Such issues may be considered within the framework of good cause and prejudice, a fundamental miscarriage of justice, or actual innocence consistent with application of the procedural bars.

The United States District Court for the District of Nevada issued an order on January 9, 2008, concluding that Nevada regularly and consistently applies its procedural bars. See Howard v. McDaniel, Slip Copy, 2008 WL 115380 (D. Nev.). In Howard, the appellant

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[9] As this Court has stated, "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, 354-59, 871 P.2d 944, 946-50; Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993)." Valerio v. State, 112 Nev. 383, 390, Fn. 4, 915 P.2d 874, 878, Fn. 4 (Nev.,1996)

made the same claim as Defendant in that he claimed the Nevada Supreme Court exercises "unfettered discretion" which has led to inadequate holdings in its application of the procedural default rules, primarily NRS 34.726. Id. at 2. The Court analyzed over 200 Nevada Supreme Court opinions presented by the appellant and the respondents and concluded "the Nevada Supreme Court has continued …. to consistently apply NRS 34.726 to untimely petitions." Id. at 7. Thus, this Court's application of the statutory default rules is not arbitrary and discretionary.

Furthermore, Defendant has no federal equal protection or due process right to have the bars ignored in his case when Nevada has held that it does not ignore the bars in other cases. The issue is not whether the federal claim is properly brought in state court, but that Defendant's equal protection claim must fail because it is the law in Nevada that application of procedural bars is consistent and uniform as to all similarly situated petitioners. In State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005), this Court stated:

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

D. Defendant Has Also Failed to Demonstrate Prejudice.

Not only has Defendant failed to satisfy the first prong required to overcome the procedural bars, he has also failed to demonstrate the second, prejudice. Defendant has simply made repeated conclusory claims of prejudice. However, conclusory claims for relief are inappropriate for post-conviction proceedings and do not entitled Defendant to relief. Colwell v. State, 118 Nev. 807, 812, 59 P.3d 463, 467 (2002). Moreover, as this Court noted, there was overwhelming evidence presented of Defendant's guilt. Castillo, 114 Nev. at 281, 956 P.2d at 110. As also discussed above, it is equally clear that the jury would still have

selected death as the appropriate sentence despite Defendant's claims. Therefore, Defendant has clearly failed to meet his burden and his petition was properly dismissed by the district court.

E. The District Court Did Not Err in Finding That an Evidentiary Hearing Was Unwarranted.

A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief, unless the factual allegations are belied by the record. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). "The judge or justice, upon review of the return, answer, and all supporting documents which are filed, shall determine whether an evidentiary hearing is required." NRS 34.770(1). However, "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record." Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984); citing Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981).

Even assuming all of Defendant's factual allegations are true, he still would not be entitled to relief on this second petition. Defendant's stated need for an evidentiary hearing in order to demonstrate good cause and prejudice to overcome the procedural bars is contrary to law. Defendant must first offer a good cause explanation for filing an untimely successive petition and prejudice such that he would have been entitled to a new trial or penalty hearing if the claim had been timely filed. As argued above, none of Defendant's allegations rise to this level.

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CONCLUSION

Based on the foregoing arguments, the denial of Defendant's untimely, successive petition should be affirmed.

Dated this 3rd day of June, 2011.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 3rd day of June, 2011.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 3, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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