IN THE SUPREME COURT OF THE STATE OF NEVADA

ERICK BROWN
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

CASE NO: 60197

FAST TRACK RESPONSE

1. Name of party filing this fast track response: The State of Nevada

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

Steven S. Owens
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3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

Same as (2) above.

4. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal: None

5. Procedural history.

On January 28, 2003, Erick Brown (hereinafter "Appellant") was charged by was of Information with the following: Count I – Burglary While in Possession of a Firearm (Felony – NRS 205.060, 193.165); Count II – First Degree Kidnapping With Use of a Deadly Weapon, Victim 65 Years of Age or Older Resulting in Substantial Bodily Harm (Felony – NRS 200.310, 193.165, 193.167, 0.060); Count

III – First Degree Kidnapping With Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Felony – NRS 200.310, 193.165, 0.060); Count IV – Robbery With Use of a Deadly Weapon, Victim 65 Years of Age (Felony – NRS 200.380, 193.165, 193.167); and Count V – Robbery With Use of a Deadly Weapon (Felony – NRS 200.380, 193.165). Respondent's Appendix at 1-4 ("RA 1-4"). Appellant pled not guilty and proceeded to trial, where a jury found him guilty of all counts. Appellant's Appendix at 2 ("AA 2").

On August 8, 2006, Appellant was sentenced as follows: as to Count I – twenty-six (26) to one hundred twenty (120) months; as to Count II – fifteen (15) to forty (40) years, plus an equal and consecutive term of fifteen (15) to forty years, Count II to run concurrent to Count I; as to Count III – fifteen (15) to forty (40) years, plus an equal and consecutive term of fifteen (15) to forty years, Count III to run consecutive to Count II; as to Count IV - twenty-six (26) to one hundred twenty (120) months, plus an equal and consecutive term of twenty-six (26) to one hundred twenty (120) months, Count IV to run concurrent to Count III; and as to Count V - twenty-six (26) to one hundred twenty (120) months, plus an equal and consecutive term of twenty-six (26) to one hundred twenty (120) months, Count V to run concurrent to Count IV; with one thousand three hundred forty-nine (1,349) days credit for time served. AA 2-3. Judgment of Conviction was entered on August 16, 2006. AA 1.

Appellant filed a timely Notice of Appeal, and Fast Track Statement. AA 4-21. Subsequently, Appellate Counsel filed an Errata to his Fast Track Statement. AA 22-28. The Nevada Supreme Court did not entertain Appellant's untimely Errata, AA 40-42, however it affirmed his convictions on September 13, 2007. Brown v. State, Docket No. 47856. Remittitur issued on October 9, 2007. Id.

On October 10, 2008, Appellant filed a Petition for Writ of Habeas Corpus (Post-Conviction). AA 29-42. On May 22, 2009, Defendant filed a Supplemental Petition. AA 43-55. On July 17, 2009, the State filed its Response. AA 56-63. On

August 21, 2009, Appellant filed a Reply to the State's Response. AA 64-69. On November 19, 2009, Appellant filed an Amendment to his Petition, seeking email transmissions between various police detectives. AA 70-73. On January 27, 2010, Appellant filed a second Amendment to his Petition seeking physical evidence for forensic testing. AA 74-77.

An Evidentiary Hearing on Appellant's Petition was held on January 27, 2012. AA 78-173. The district court found Appellant received effective assistance of trial and appellate counsel and denied his Petition in its entirety, entering its Findings of Fact, Conclusions of Law and Order to that effect on February 13, 2012. AA 176-84. The instant Fast Track Appeal followed. AA 174-75.

6. Statement of Facts.

Relevant facts discussed *infra*.

7. Issue(s) on appeal.

1. Whether the district court erred in finding Appellant did not receive ineffective assistance of appellate counsel for failing to appeal the district court's decision to limit defense counsel's questioning of the Henderson Police Detective.
2. Whether the district court erred in finding Appellant did not receive ineffective assistance of appellate counsel for failing to federalize appellate issues and raise a due process claim with regard to the kidnapping and robbery charges.

8. Legal Argument, including authorities:

I. DEFENDANT'S PETITION WAS TIME-BARRED AND PROPERLY DENIED, ALBEIT FOR THE WRONG REASON

Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within one year of the 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. NRS 34.726(1). In Gonzales v. State, 118 Nev. 590, 53 P.3d 901, 902 (2002), this Court rejected a habeas petition, pursuant to the mandatory provisions of NRS 34.726(1), that was filed a mere two days late.

Remittitur from Appellant's direct appeal issued on October 9, 2007. AA 58. Appellant therefore had until October 9, 2008, in which to file a Petition for

post-conviction relief. Appellant's Petition was filed on October 10, 2008. AA 29-42. Therefore, Appellant's Petition was untimely. Moreover, Appellant failed to plead good cause for his untimely filing. Crump v. Warden, Nevada State Prison, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997) (the burden is upon the petitioner to show that good cause exists). Any allegation of good cause having been waived below, remand is unnecessary to explore facts not yet alleged.

Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory. State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003). As such, the district court properly denied Appellant's Petition, albeit for the wrong reason. Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (If a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal.)

II. THE DISTRICT COURT PROPERLY FOUND APPELLANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

This court will "review a claim of ineffective assistance of counsel de novo, as a mixed question of law and fact." Rubio v. State, 194 P.3d 1224, 1229 (Nev. 2008). However, the Court will "give deference to the district court's factual findings." Id.

In order to assert a claim of ineffective assistance of counsel, a defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984). Under this test, the defendant must show: first, that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. See Strickland, 466 U.S. at 687–688, 694, 104 S.Ct. at 2065, 2068. "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v.

Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970)).

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 103 P.3d 35 (2004). This analysis does not indicate that the court should "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978); citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

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

To succeed on a claim of ineffective assistance of appellate counsel, the defendant must satisfy the two-prong test set forth by Strickland; that 1) appellate counsel's conduct fell below an objectively reasonable standard; and 2) the omitted issue had a reasonable probability of success. 466 U.S. at 687-688, 694, 104 S. Ct. at 2065, 2068. There is a strong presumption that appellate counsel's performance fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990).

The Nevada Supreme Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). However, the defendant does not have a constitutional right to "compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. In Jones, the Supreme Court recognized that part of professional diligence and competence involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 3313. The Court also held that, "for judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754.

Here, Appellant claims the district court erred in finding his appellate counsel was not ineffective in two respects. The State will dispose of each claim individually.

A. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO APPEAL THE DISTRICT COURT'S DECISION TO LIMIT HIS INQUIRY AT TRIAL INTO THE INVESTIGATION OF THE HENDERSON POLICE DEPARTMENT

In the Petition from which he now appeals, Appellant claimed, *inter alia*[1], that former appellate counsel[2] was ineffective for failing to appeal the district

[1] In his claim below, trial counsel also challenged appellate counsel's failure to raise on appeal the district court's decision to deny internal police documents, internal email communications, and Internal Affairs reports on the detectives who handled the case on appeal. Trial counsel sought these records in an effort to show that Detectives did not investigate an alternate suspect and falsified records. AA 48. The district court denied his requests because there was no reason to believe

court's decision to limit his investigation into the Henderson Police Department. See AA 48-54. Specifically, he claimed, the district court improperly limited his cross-examination of Henderson Police Department Crime Scene Analyst Maria Weir ("Analyst Weir"). Id.

At the evidentiary hearing on Appellant's Petition, the district court (who also presided over the trial) explained the limitation he placed on trial counsel. The district court explained that allowing defense counsel to "place the police department on trial" 1) "suggests to a jury, who is not privy to the police investigations and the workings of the court, that if police had just persisted in the investigation they would have found the real culprit, which is fantasy;" and 2) "when you try the Police Department, it tends to divert the attention of the jury away from the defendant, away from his involvement or the evidence that's been supplied suggesting his involvement, and gets them all on this tangent on the police did or didn't do and should have done." AA 169-71. The district court went on to state: "[a]nd then, of course, that begs the issue of what they saw on the latest TV show where they're supposed to have done this and suppose to have done that. If they had just turned over this one leaf and done a test on it, the whole case would have been solved. So, it's a slippery slope. It's one that almost is never-ending, because we can talk about what could have happened and what might have happened endlessly in any kind of investigation. So for those reasons I made it clear to Mr. Cristalli I would not allow him to pursue that line of inquiry." Id.

In the instant appeal, Appellant claims the district court erred in finding former appellate counsel was not ineffective for failing to appeal the district

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that the Henderson Police Department falsified records or failed to investigate an alternate suspect. AA 49. The district court plainly and correctly stated that defense counsel was on a "fishing expedition." AA 49. In fact, the district court noted defense counsel could ask the Henderson Detectives questions to that effect at trial, which he did, as discussed *infra*. Id. Nevertheless, Appellant claimed former appellate counsel was ineffective for failing to raise the issue on appeal. AA 48-54.

[2] Mr. Michael Cristalli, Esq., represented Appellant at trial and on direct appeal.

court's decision to limit his cross-examination of Analyst Weir. Fast Track Statement at 8 ("FTS 8"). In so doing, Appellant alleges: "[c]learly, the court did not allow Mr. Cristalli to put forth evidence that the Police Department did not conduct an adequate police investigation. This issue would have a reasonable probability of success on appeal." FTS 9.

However, in making this bare assertion, Appellant fails to cite to any portions of the trial transcripts indicating the court did not allow Mr. Cristalli to put forth such evidence. In fact, Appellant failed to provide the trial transcripts on appeal, therefore it is impossible to determine the extent to which the district court limited trial counsel's examination without a record to review. It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (Nev. 1987). As such, Defendant's claim must be summarily denied.

Even if this Court considers this claim on the merits, it carries no weight. First, much of the authority provided by Appellant is wholly inapposite here. Appellant cites to Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)[3] to support his claim, however Kyles dealt with exculpatory evidence which came to defense counsel's attention after trial and was never turned over to the defense in violation of Brady v. Maryland[4]. Id. Here, there is no Brady violation alleged whatsoever. In fact, Mr. Cristalli expressly stated at the evidentiary hearing that he did not have Brady concerns:

> **THE STATE:** So were you concerned that - - did you have any specific indicators that there might have been some Brady material in those communications?

[3] Appellant also relies on two cases cited to in Kyles – Bowen v. Maynard, 799 F.2d 593, 613 (1995), and Lindsey v. King, 769 F.2d 1034 (5th Cir. 1985), to support his claims. These cases, too, deal with alleged Brady violations and are inapposite here, as discussed *supra*.

[4] 373 U.S. 83, 83 S.Ct. 1194 (1963).

> **THE WITNESS:** No. I don't have a recollection that that was a concern of ours. I don't recall the specifics of our motion with regard to gathering evidence from the court, but as far as those specific questions of inquiry; no, I do not.

AA 154. More importantly, Appellant is not claiming any Brady violation on appeal – he is challenging the limitation of his cross-examination of Analyst Weir and former appellate counsel's failure to raise that issue on direct appeal. It is disingenuous for Appellant to make the tenuous connection between nonexistent Brady violations and the limitation of a cross-examination. Thus, Kyles, Bowen, and Lindsey do nothing to support Appellant's contentions.

Appellant also cites to the Ninth Circuit's decision in United States v. Sager, 227 F.3d 1138 (9th Cir. 2000) to support his claim. Sager is more on point than Appellant's other cited authority, however it actually favors the State's position here. In Sager, the district court plainly erred because of comments it made *directly to the jury*:

> We agree with Sager that the district court committed plain error and abused its discretion by instructing the jury not to "grade" the investigation. In one breath, the court made clear that the jury was to decide questions of fact, but in the other, the court muddled the issue by informing the jury that it could not consider possible defects in Morris's investigation. To tell the jury that it may assess the product of an investigation, but that it may not analyze the quality of the investigation that produced the product, illogically removes from the jury potentially relevant information.

Sager, 227 F.3d at 1145. Here, however, no such error occurred. The district court merely stopped counsel's line of inquiry, without commentary to the jury, when counsel went beyond challenging the investigation into a fishing expedition as to the use of non-use of the AFIS fingerprinting database system during the investigation. As such, this case is clearly distinguishable from the egregious comments made by the judge in Sager.

In fact, the Sager court noted:

> ***In circumstances different from these, a court may properly decide that such a line of investigation is to be limited for some independent evidentiary reason***, such as

> that the evidence would be cumulative. See, e.g., United States v. Miller, 874 F.2d 1255, 1266 (9th Cir.1989) (rejecting attempted inquiry on cross-examination into technical violation of FBI's interrogation procedures manual where defendant had already "extensively explored the quality of the investigation and the possible bias that it may indicate," and further inquiry would have been of marginal probative value, outweighed by potential for confusing jury and wasting time). But here, the court's intervention was not proper.

Sager, 227 F.3d at 1146 [Emphasis added.]

Such an "independent evidentiary reason" was present here. As noted by the district court at the evidentiary hearing, although not stated in as many terms, the district court disallowed further questioning regarding the AFIS system because it was irrelevant and/or unduly prejudicial to the State as confusing to the jury. See NRS 48.015 (only relevant evidence is admissible); see also NRS 48.035 (otherwise relevant evidence which is unduly prejudicial as confusing to the jury will not be admissible). In fact, *trial counsel stated he was aware at the time that the fingerprints had been run through AFIS and returned no match*. AA 101-07. Therefore, whatever counsel was trying to infer by asking about the AFIS system was irrelevant and would have done nothing but confuse the jury. Irrelevant evidence is statutorily barred, as is evidence that risks undue confusion to the jury. Id. Thus, the district court's rationale behind limiting the cross-examination of Analyst Weir with regard to AFIS was sound.

Appellant finally cites to Commonwealth v. Reynolds, 429 Mass. 388 (1999), to support his claim that officers may be questioned regarding witness statements to show the inadequacy of the investigation. The State does not contend that fact. Clearly, defense counsel is entitled to call the police's investigation into question. And here, defense counsel did just that. Contrary to Appellant's assertion that "[c]learly, the court did not allow Mr. Cristalli to put forth evidence that the Police Department did not conduct an adequate police investigation," FTS 9, the

record reflects that trial counsel was permitted to put forth evidence of the allegedly substandard investigation[5].

Trial counsel began his cross-examination by questioning Analyst Weir's longer-than-normal 3 hour response time to the scene. AA 40-41. Trial counsel got Analyst Weir to concede that she would have preferred to arrive at the scene earlier if she could have. Id. Trial counsel was then able to elicit an important concession from analyst Weir – that someone had forged her signature on the time log. AA 42. Trial counsel also elicited a concession that whoever forged Analyst Weir's signature also forged one of the other Detectives' signatures. Id.

Next, trial counsel explored a potentially exculpatory earring found at the scene. AA 42-43. The victims told police one of the perpetrators removed his earring, placed it in one of the cleaning machines, and forgot it there when he fled the scene. AA 43. Trial counsel was able to get Analyst Weir to concede she did not test the earring for DNA. Id.

Additionally, trial counsel elicited testimony indicating the police investigation into a bloody footprint left at the scene was less than thorough. He was able to get Analyst Weir to concede that she never compared the bloody footprint to Appellant's footprint. AA 45.

Trial counsel also called Analyst Weir's fingerprint collection into question. AA 43. He elicited testimony that the oils and moisture necessary for a solid fingerprint dissipate over time, relating back to the fact that Analyst Weir had a longer-than-normal three-hour response time. Id. Trial counsel also elicited the fact that, although nine latent prints were lifted from the scene, *none of the prints matched Appellant's*. AA 44. Only when trial counsel attempted to elicit testimony that the prints lifted from the scene were not compared to the AFIS database did the court intervene. Id. The district court did not expressly state, in front of the

[5] For the sake of clarity, the State has attached Ms. Weir's trial testimony in its appendix. See RA 40-50.

jury, why he intervened, however he indicated "we're going into an area we discussed on a previous occasion."[6] Id. Importantly, however, trial counsel was able to pick up that line of questioning later with FBI agent Mr. McAllister. See AA 106-07. At the evidentiary hearing below, trial counsel admitted he was able to explore the AFIS testimony on the subsequent witness which he was seeking to elicit from Analyst Weir before he was stopped by the court. Id.

Considering all of the foregoing testimony, Appellant's claim that the district court did not allow him to put forth evidence of the Henderson Police Department's substandard investigation is patently without merit. Trial counsel explored this area of defense, presented it to the jury, and got his point across. In fact, he admitted as much at the evidentiary hearing, noting that he was able to get his point across to the jury. See AA 130-37. The district court simply limited that inquiry when it became too far-reaching, confusing, misleading and irrelevant. As such, appellate counsel made a sound strategic decision not to raise this issue on appeal, because the claim would have failed. In fact, *former appellate counsel testified at the evidentiary hearing that due to the page limitation of a Fast Track Statement and the weakness of this claim, he made the strategic decision not to raise this issue on appeal in order to focus on his more meritorious claims*. Id.

Not only does counsel have a duty to winnow out weaker arguments in order to emphasize stronger ones, Jones, *supra*, but counsel cannot be deemed ineffective for failing to raise futile arguments. Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006). Since it is up to counsel, not the Defendant, to determine what issues to raise on appeal, see Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002) and Jones v. Barnes, *supra*, appellate counsel was not ineffective for winnowing out this frivolous challenge considering the foregoing testimony. Instead of raising that futile argument, appellate counsel focused his appeal on three of his strongest

[6] The district court later explained his reasoning at the evidentiary hearing on Appellant's Petition. AA 169-171.

claims. See AA 4-21. Appellate counsel made the strategic decision to argue: 1) Appellant's conviction for kidnapping was illegal because it was incidental to the robbery; 2) it was error for the district court to allow the State to "parade" the co-defendant in front of the jury as "evidence" because it was highly prejudicial; and 3) there was insufficient evidence to sustain Appellant's convictions[7]. AA 4-17.

Accordingly, Appellant has failed to show former appellate counsel's decision not to raise the issue on appeal was objectively unreasonable. Additionally, Appellant has failed to show that this issue would have had a reasonable probability of success on appeal. As such, the district court did not err in finding appellate counsel was not ineffective for failing to raise this claim. Considering the great deference afforded to trial counsel in making its factual findings, and the presumption of counsel's effectiveness, Appellant's claim must be denied. See Means, 120 Nev. at 1001, 103 P.3d at 35; see also Rubio, 194 P.3d at 1229.

B. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO FEDERALIZE AN APPELLATE ARGUMENT REGARDING ROBBERY AS INCIDENTAL TO KIDNAPPING

Defendant's claims former appellate counsel was ineffective for failing to "federalize" his wrongful conviction argument (which was premised on his allegation that the kidnapping was incidental to the robbery) into a constitutional due process claim. However, he fails to show that his claim, if "federalized," would have been reviewed under a more favorable standard or was likely to succeed upon federal review. See Browning v. State, 120 Nev. 347, 365, 91 P.3d 39, 52 (2004); see also White v State, 124 Nev. 1518 (2008); see also Com. v. Ali,

[7] Appellate counsel made several sub-arguments in his insufficiency of the evidence claim. He challenged the veracity of the eyewitness identifications, the lack of fingerprint evidence notwithstanding the fact that the witnesses testified there would be fingerprints from the defendants "all over" the jewelry store, the fact that a third individual was found with property stolen from the jewelry store who closely matched Appellant's description, and the fact that Appellant did not wear an earring and the eyewitnesses said he did. AA 15-17.

10 A.3d 282, 317 (Pa. 2010) ("[A]ppellant's global ineffectiveness/'federalization' claim proves nothing in the abstract; to secure relief, he must prove ineffectiveness with respect to some specific federal claim that he feels was inadequately presented on direct appeal."). Defense counsel is not ineffective for winnowing out weak federal issues of appeal. See Johnson v. Howes, 2008 WL 5111891at 7 (E.D. Mich. 2008) ("It is well-established that a criminal defendant does not have a constitutional right to have appellate counsel raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal); see also Jones, *supra*.

In this case, Defendant cannot demonstrate that "federalizing" his unlawful conviction claim would have resulted in success on appeal. In fact, Appellant failed to set forth any analysis to show his claim would have received a more favorable standard of review had he "federalized" it. Thus, appellate counsel was not ineffective for failing to "federalize" Defendant's unlawful conviction claim, and the district court properly denied this claim.

9. Preservation of the Issue.

All issues were preserved.

VERIFICATION

1. I hereby certify that this fast track response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track response has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point and Times New Roman style.
2. I further certify that this fast track response complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is proportionately spaced, has a typeface of 14 points or more and contains no more than 4,667 words or does not exceed 10 pages.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.
Dated this 30th day of April, 2012.

Respectfully submitted,
STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Steven S. Owens*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 30, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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