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WILLIAM WITTER,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

CASE NO. 36927

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment Of Conviction
Eighth Judicial District Court, Clark County

DAVID M. SCHIECK, ESQ.
Nevada Bar No. 000824
Law Office of David M. Schieck
302 East Carson Avenue
Suite 600
Las Vegas, Nevada 89101
(702) 382-1844

Counsel for Appellant

STEWART L. BELL
Clark County District Attorney
Nevada Bar No. 000477
Clark County Court House
200 South Third Street, Suite 701
Post Office Box 552212
Las Vegas, Nevada 89155-2211
(702) 455-4711

FRANKIE SUE DEL PAPA
Nevada Attorney General
Nevada Bar No. 000192
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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v.	)	CASE NO. 36927
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited: **Page Number:**

:

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STATEMENT OF THE ISSUE

Whether the trial court erred in ruling that the defendant's claims of ineffective assistance of counsel did not entitle him to relief.

STATEMENT OF THE CASE

On January 21, 1994, William Lester Witter, hereinafter "the defendant," was charged by way of Information with one count of each of the following offenses: Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.165), Attempt Murder With Use of a Deadly Weapon (Felony - NRS 193.330, 200.010, 200.030, 193.165), Attempt Sexual Assault With Use of a Deadly Weapon (Felony - NRS 193.330, 200.364, 200.366, 193.165), and Burglary (Felony - NRS 205.060). (Appellant's Appendix ("AA" 1-3).

The defendant was adjudged by a jury to be guilty of all four counts. (AA 60-66). Following the penalty phase, the jury determined that the defendant should be sentenced to death by lethal injection for the murder conviction. (AA 60-66). On August 3, 1995, the district court adjudged the defendant guilty and sentenced him to

death for the murder conviction, to four (4) consecutive twenty year terms of imprisonment in the Nevada State Prison for the attempt murder and attempt sexual assault convictions, and to a consecutive ten year term of imprisonment for the burglary conviction. (AA 60-66). An Amended Judgment of Conviction was filed on August 11, 1995. (AA 63-66). The defendant appealed his conviction, this Court denied his appeal and affirmed his conviction in an opinion styled Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996), cert. denied 520 U.S. 1217, 117 S.Ct. 1708, 137 L.Ed.2d 832 (1997). (AA 75-98). The defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction) on October 27, 1997, and filed a Supplemental Points and Authorities in Support of the Petition on August 11, 1998. (AA 67-137). An evidentiary hearing was granted and held on February 26, 1999, following which both the defendant and the State filed post hearing briefs. (AA 178, 230, 245). On September 25, 2000, the district court entered its Findings of Fact, Conclusions of Law and Order in which it denied the defendant's Petition for Writ of Habeas Corpus. (AA 270).

STATEMENT OF FACTS

I. GUILT PHASE

On November 14, 1993, KATHRYN COX was working as a retail clerk at the Park Avenue Gift Shop in the Luxor Hotel in Las Vegas, Clark County, Nevada (Respondent's Appendix ("RA" 2-3). On that date, KATHRYN was forty-four (44) years old and had been married to her husband, JAMES COX, for approximately twelve (12) years. (RA 1-2). JAMES COX was a fifty-three (53) year-old taxi cab driver for the Yellow Checker Star cab company (RA 3). KATHRYN had two (2) children from a previous marriage and JAMES had four (4) children, also from a previous marriage. (RA 2).

On the evening of November 14, 1993, KATHRYN finished her shift at 10:00 p.m. and boarded the shuttle bus that would take her to the parking lot where KATHRYN's Mercury Tracer was parked. (RA 7-8). When the shuttle bus arrived

at the stop nearest KATHRYN's car, she got off and walked alone to her car (RA 8). KATHRYN unlocked the driver's door, got inside, and tried to start the car (RA 8-9). KATHRYN tried several times to start the car, but was unsuccessful (RA 9). KATHRYN got out of the car and contacted a young man that she recognized as a fellow Luxor employee (RA 9). This young man tried to jump start KATHRYN's car, but ultimately was unable to start the car (RA 9-10). After concluding that the car was not going to start, KATHRYN accepted a ride from the young man back to the Luxor Hotel (RA 10).

KATHRYN arrived back at the Luxor around 10:25 p.m. (RA 10). KATHRYN immediately bought a roll of quarters and used one of the quarters to call her husband, JAMES (RA 10-11). KATHRYN told JAMES that the car would not start and asked if JAMES could pick her up and give her a ride home (RA 11). JAMES told KATHRYN that he was on his way to pick up a passenger and that it would be about 25 to 30 minutes before he could come and pick her up (RA 11). KATHRYN then returned to her car on the shuttle bus in order to wait for JAMES to arrive (RA 12).

When KATHRYN arrived at her car, she got inside, locked the driver's door and started to read a book (RA 12). After about five (5) to ten (10) minutes, the passenger door suddenly opened and the defendant quickly got inside KATHRYN's car (RA 14-15, 17-18). The defendant immediately stated to KATHRYN in a loud voice, "Don't look at me." (RA 15-16). Defendant then instructed KATHRYN, "Drive this car out of the parking lot." (RA 16). KATHRYN responded that she could not drive the car because it would not start (RA 16). The defendant then angrily stated, "You will drive this out of here, you bitch." (RA 16). Following this statement, the defendant swung his right hand around and stabbed KATHRYN with a knife just above the left breast (RA 16-17, 231). The defendant again instructed KATHRYN, "You will drive this car out of here right now." (RA 18). KATHRYN again told the defendant that she could not drive the car because the car would not start (RA 18). The defendant then grabbed KATHRYN by her hair and pulled her towards him, leaving KATHRYN's hair over

her face so she could not see (RA 19). The defendant told KATHRYN, "I'm going to kill you, you bitch", and then with his right hand stabbed KATHRYN six (6) more times in the left side of her body, between KATHRYN's arm pit and left breast, and one (1) time in the back, near her shoulder blade (RA 19-21, 231-232, 318-319). KATHRYN began screaming and the defendant repeatedly told her, "Shut up. I'm going to kill you, you bitch." (RA 22). The defendant then asked KATHRYN if she knew the defendant was going to kill her and KATHRYN responded that she was aware the defendant would kill her (RA 22-23). The defendant also asked if KATHRYN was aware that the defendant was going to rape her and KATHRYN again responded that she was aware that the defendant would rape her (RA 23). Following these questions, the defendant unzipped his pants and exposed his penis and told KATHRYN to "suck his cock like [she] would for [her] old man and make him feel better or good." (RA 24). While the defendant was making this statement to KATHRYN, he placed KATHRYN's hand on his flaccid penis and pushed her head down towards his lap (RA 24-25). KATHRYN was unable to meet the defendant's demands, however, because she kept passing out as a result of a collapsed lung that was caused by the stab wounds inflicted by the defendant (RA 25). When the defendant realized KATHRYN was not able to comply with his demands, the defendant lifted KATHRYN's head back up and again told her that he was going to rape her and kill her (RA 27). At that point, KATHRYN could feel the blood exuding from her multiple stab wounds (RA 27). KATHRYN tried not to breathe very often or very deep in order to decrease her blood loss (RA 28). KATHRYN also tried to keep the defendant calm so that he would not rage again and inflict more stab wounds (RA 28).

At one point, the defendant turned his head away from KATHRYN and she quickly jumped out of her car and ran away screaming (RA 29). KATHRYN only ran about 10 to 15 feet when the defendant caught her, grabbing KATHRYN by the back of the neck and hair (RA 30). The defendant dragged KATHRYN back to the car and

pushed her into the driver's seat again (RA 30). After the defendant got back inside the car he kissed KATHRYN at least one (1) time (RA 32). KATHRYN could smell the odor of alcohol on the defendant's breath (RA 32, 58). The defendant then tried to remove KATHRYN'S Levi pants by unbuttoning them, but was unable to because the pants fit tightly (RA 33). The defendant became frustrated and slashed KATHRYN's pants with his knife, leaving four (4) or five (5) knife wounds on KATHRYN's right hip (RA 34). After the defendant cut KATHRYN's pants, he pulled the clothing open, exposing KATHRYN's vaginal area (RA 35). The defendant reached over with his hand and began rubbing KATHRYN's vaginal area with his hand and fingers (RA 35). While the defendant was rubbing KATHRYN's vaginal area, he began kissing her again and reached underneath KATHRYN's shirt, undid her bra and began squeezing KATHRYN's breast (RA 36).

While the defendant was attacking her, KATHRYN saw in the side-view mirror JAMES' taxi cab pull up along side the car (RA 37). KATHRYN also noticed that the knife, which has a six-inch blade and four-inch handle, was lying on the dashboard of the car (RA 39). The defendant, not knowing that the taxi driver was KATHRYN's husband, instructed KATHRYN to be quiet so he could tell the taxi driver that KATHRYN was having a bad cocaine trip and the defendant was just trying to help (RA 38). JAMES opened the driver's door and asked, "What's going on here?" (RA 39). The defendant told JAMES that KATHRYN was having a bad cocaine trip and the defendant was just trying to help (RA 40). JAMES responded, "I don't think so. This is my wife and this is my car and get the hell out." (RA 40). The defendant got out of the car through the passenger's door and confronted JAMES (RA 40). KATHRYN noticed that the knife was no longer lying on the dashboard (RA 40).

After the defendant got out of the car, KATHRYN could hear JAMES and the defendant yelling and scuffling (RA 40). KATHRYN got out of the car and attempted to get inside the taxi cab in order to call for help (RA 41). When KATHRYN was unable to get inside the taxi, she turned and saw the defendant stabbing JAMES in the

left shoulder area (RA 42). JAMES screamed in pain and the defendant continued to stab him repeatedly (RA 43). JAMES eventually fell into KATHRYN and they both fell to the ground (RA 43). KATHRYN began screaming and kicking and the defendant stabbed her in the calf area of her left leg, the knife blade passing completely through KATHRYN's leg (RA 44, 231, 319). JAMES laid motionless in KATHRYN's arms (RA 44-46).

KATHRYN told JAMES she loved him and she was going to get help and then got up and ran towards the bus stop (RA 46-47). KATHRYN lost one shoe while she was running and then the defendant caught her again (RA 47). The defendant grabbed KATHRYN by the hair and picked her up from the ground (RA 48). The defendant took KATHRYN back to the car and stuffed her into the back seat area on the passenger's side floor (RA 48). The defendant then completely removed KATHRYN's pantyhose and Levi's (RA 49). The defendant left KATHRYN in the back seat and KATHRYN could hear the defendant attempting to move JAMES' body (RA 50). The defendant returned and began touching KATHRYN's legs (RA 50). Shortly thereafter, KATHRYN heard the voices of the hotel security and the defendant left her in the back seat of her car. (RA 50).

THOMAS D. McKINNON was working as a shuttle bus driver at the Luxor Hotel on the night of November 14, 1993 (RA 59-61). While driving his route, Mr. McKINNON saw KATHRYN running from the defendant towards the bus stop (RA 61-63, 71). Mr. McKINNON watched the defendant grab KATHRYN by the hair and throw her to the ground (RA 62-63, 70). Mr. McKINNON immediately contacted THOMAS PUMMIL, a hotel security officer, and told them about what he had seen (RA 62, 71). Mr. McKINNON followed Officer PUMMIL back to KATHRYN's car and saw PUMMIL draw his weapon and aim it towards the defendant and saw the defendant take two steps towards PUMMIL (RA 64, 71). Shortly thereafter, Mr. McKINNON saw between five (5) and seven (7) additional security officers arrive (RA 65).

Security Officer THOMAS PUMMIL was patrolling the Luxor/Excalibur employee parking lot on the evening of November 14, 1993 (RA 72-73). At approximately 11:15 p.m., Mr. McKINNON approached Officer PUMMIL and told him that he had just seen a female being chased by a male in the parking lot (RA 75-76). Officer PUMMIL immediately went to the location of KATHRYN's car and saw the defendant standing between KATHRYN's car and JAMES' taxi cab (RA 77). It appeared to Officer PUMMIL that the defendant was trying to stuff something in the back seat of KATHRYN's car (RA 77-78). Officer PUMMIL got out of his truck and asked the defendant, "What is the problem?" (RA 79). The defendant responded, "Nothing." (RA 79). The defendant then turned and came towards Officer PUMMIL from between KATHRYN's car and JAMES' taxi cab (RA 79). The defendant had blood covering the entire front of his legs and waist (RA 79). Officer PUMMIL instructed the defendant to stop (RA 95, 114). The defendant ignored the instructions and stated, "Fuck You", and took several steps towards PUMMIL (RA 95, 98). Officer PUMMIL retreated several steps to keep a safe distance and again instructed the defendant to stop (RA 95). The defendant again ignored the instructions and advanced towards Officer PUMMIL stating, "Kill me. Go ahead, shoot me. Kill me, mother fucker." (RA 95, 98-99, 126). The defendant repeated these same words several times as he approached Officer PUMMIL (RA 99). After Officer PUMMIL stepped back a second time, he drew his weapon and ordered the defendant to lie on the ground (RA 96, 115-116). Officer PUMMIL also called for backup assistance at this time (RA 96). The defendant again took steps towards Officer PUMMIL (RA 97, 117). Approximately a minute and-a-half after Officer PUMMIL arrived, Officer SCHROEDER arrived, walked up behind the defendant and placed him in handcuffs (RA 100-101, 118, 130).

After the defendant was handcuffed, Officer SCHROEDER went over near JAMES' taxi cab and noticed JAMES' body lying on the ground partially underneath the taxi cab (RA 131). JAMES' face and upper torso were covered with a coat (RA

131). Officer SCHROEDER removed the coat and determined that JAMES was not breathing and did not have a noticeable pulse (RA 132). Officer SCHROEDER then heard KATHRYN's moans coming from the back seat of the car (RA 51, 132, 135).

Officers SCHROEDER and REDLEIN went over to KATHRYN's car to offer KATHRYN assistance (RA 136, 214-215). The officers found KATHRYN lying in the back seat with no clothes on from the waist down and several visible stab wounds (RA 136). KATHRYN told the officers that the defendant had stabbed her and tried to rape her (RA 216). Paramedics soon arrived and KATHRYN was transported to the hospital, where she remained for eight (8) days, leaving only to attend JAMES' funeral (RA 52-53, 137-140, 157-158, 163, 216).

Officer BRYON CANDIANO of the Las Vegas Metropolitan Police Department (LVMPD) was one of the first police officers to arrive at the crime scene (RA 180-182). Officer CANDIANO took control of the defendant from the security officers (RA 182). While Officer CANDIANO was taking the defendant to his patrol car, the defendant stated several times that he hated all cops and was going "to kill all the fucking cops he could." (RA 184, 206). Officer CANDIANO twice read the defendant his *Miranda* rights, once before placing him inside the patrol car and once after the defendant was inside the car (RA 184-186). The defendant acknowledged that he understood his constitutional rights (RA 187). Officer CANDIANO noticed that the defendant's pants, shoes and hands were all covered in blood (RA 189). The defendant was taken to the police station and during questioning the defendant stated, "I can't believe I did it. I just can't believe I did it." (RA 195-197).

The defendant was interviewed at the police station by Detective THOMAS D. THOWSEN (RA 235-237). Detective THOWSEN showed the defendant a *Miranda* card which the defendant read out loud and signed (RA 238-239). Subsequently, the defendant admitted being in the Luxor parking lot, approaching KATHRYN and becoming aggressive with her, stabbing JAMES with the hunting knife, and using his jacket to cover JAMES after the stabbing (RA 242-245, 278).

ALAN GALASPY, a criminalist with the Las Vegas Metropolitan Police Department (LVMPD), conducted a scientific analysis of the defendant's blood that was drawn on the early morning of November 15, 1993 (RA 290, 293-296). The results of this analysis demonstrated that the defendant had a .07 blood alcohol level (RA 295). Criminalist MINO AOKI signed an affidavit indicating that he found no controlled substances in the defendant's blood when it was tested (RA 309). Counsel stipulated to the following facts: (1) the blood found on the defendant's hunting knife could have been JAMES' blood, but not the blood of KATHRYN or the defendant; (2) the blood found on the defendant's clothing could have been JAMES' blood, but was not the blood of KATHRYN or the defendant; (3) the blood found on the defendant's hands matched JAMES' blood, but did not match the blood of KATHRYN or the defendant; (4) the blood found on the brown jacket could be JAMES' blood, but not the blood of KATHRYN or the defendant; and (5) the blood found on KATHRYN's clothes could be the blood of KATHRYN or the defendant, but not JAMES' blood (RA 336-337).

On November 15, 1993, Dr. ROBERT JORDAN, a Clark County medical examiner, performed an autopsy on the body of JAMES COX (RA 342-343). The autopsy revealed a total of sixteen (16) stab wounds: one (1) wound in front of the left ear; three (3) wounds through the left ear; one (1) wound behind the left ear; and eleven (11) wounds to the left neck, shoulder and upper left arm (RA 348). The autopsy also revealed that one of the stab wounds extended through the shoulder muscles and lacerated JAMES' axillary artery, from which JAMES most likely bled to death (RA 348). The autopsy also revealed that one of the stab wounds penetrated JAMES' skull and extended a half inch into his brain (RA 348-349). Dr. JORDAN concluded that this injury would have caused fatal hemorrhaging, however, the stab wound which lacerated JAMES' axillary artery caused his death first (RA 348-349). Dr. JORDAN concluded that JAMES' injuries were inflicted by a knife and his death

was the result of the injuries to his neck and head (RA 351, 358). Dr. JORDAN also concluded that JAMES' death was the result of a homicide (RA 359-360).

The defendant chose not to present any evidence or witnesses during the guilt phase of trial (RA 380).

At the conclusion of the guilt phase of the trial on June 28, 1995, the jury found the defendant guilty of the crimes of MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON, ATTEMPT MURDER WITH USE OF A DEADLY WEAPON, ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON, and BURGLARY (AA 63-66).

II. PENALTY PHASE

A. Introduction

The penalty phase of the trial commenced on July 10, 1995 (AA 147).[1] Prior to trial, the State filed a Notice of Intent to Seek the Death Penalty alleging six (6) aggravating circumstances, including the following:

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

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

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

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

5. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody. NRS 200.033(5).

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[1]The Appellant's Appendix submitted by the defendant fails to comply with NRAP Rule 30 because it fails to include the complete record on appeal. *See* Rule 30(b)(3). The State has attempted to augment the record by creating a Respondent's Appendix. However, due to the voluminous nature of the record on appeal, the Respondent's Appendix does not include the entire record on appeal. Therefore, for some of the facts, the State must rely upon the Appellant's Appendix.

(This aggravator was struck down in the direct appeal by the Supreme Court of Nevada in Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996)).

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

(AA 147-148).

An overview of the evidence presented during the penalty phase in support of these aggravating circumstances follows.

B. The Evidence Presented

At the penalty hearing, the State presented evidence of the trauma suffered by KATHRYN COX, the great sense of loss experienced by JAMES COX's family, as well as evidence concerning the defendant's past involvement with the criminal justice system. (AA 148). Likewise, the defendant presented mitigating evidence aimed at depicting the dysfunctional nature of the defendant's childhood home life and his personal problems resulting therefrom. (AA 148).

DAVID S. RUMSEY testified that on January 11, 1986, the defendant stabbed DAVID in the stomach with a seven-inch butcher knife (AA 148). DAVID explained that on the evening of January 11, 1986, the defendant confronted DAVID and GINA MARTIN, the defendant's former girlfriend (AA 148). The defendant was enraged because DAVID had gone on a date with GINA (AA 148). DAVID attempted to resolve the matter by extending his hand to shake the defendant's hand and the defendant responded by plunging this seven-inch butcher knife into DAVID's stomach (AA 148). DAVID fled into GINA's house, leaving a trail of blood behind him (AA 148). The defendant followed, but not before slashing DAVID's tires, breaking out light bulbs, destroying several flower pots and ripping down the window drapes (AA 148). Ultimately, the defendant fled the scene, but was later apprehended and charged with attempt murder with use of a deadly weapon and assault with a deadly weapon (AA 148-149). DAVID was hospitalized for approximately four (4) weeks recovering from Defendant's stabbing which severed DAVID's large and small intestines, cut ten

(10) holes in DAVID's bowels, and extended into DAVID's rectum (AA 149). The defendant eventually pled guilty, pursuant to negotiations, to one (1) count of assault with a deadly weapon and was sentenced to five (5) years in the California State Prison (AA 149).

LINDA ROSE, a parole officer for the California Department of Corrections, testified that she supervised the defendant while he was on parole from the assault conviction (AA 149). Officer ROSE indicated that the defendant served two (2) years and eight (8) months in prison and then was placed on parole (AA 149). The defendant violated the conditions of his parole on three (3) separate occasions and was returned to prison following each violation (AA 149). The defendant was discharged from parole on February 9, 1993 (AA 149).

JAMES FORD, a patrol officer with the San Jose, California Police Department, testified that on July 20, 1993 he responded to a call that the defendant was throwing rocks through the windows in SHANTA FRANCO's home (AA 149). Officer FORD found the defendant outside the house screaming and carrying a six-inch dagger in the back of his pants (AA 149). Ms. FRANCO told Officer FORD that the defendant came to her home looking for his ex-girlfriend, CARMEN KEDRICK (AA 149). Ms. KEDRICK, who was present at the home, told Officer FORD that she was pregnant with the defendant's child, but did not want to speak with him (AA 149). The defendant was arrested and charged with possession of an illegal weapon, vandalism of a residence, and public intoxication (AA 149). Officer FORD also testified that he was familiar with the signs of gang affiliation in California and that the defendant wore several tattoos and clothing that suggested the defendant's gang affiliation and that in several photographs taken after the defendant was arrested in the present case, the defendant was exhibiting "gang signs" (AA 149).

Officer TIMOTHY JACKSON, a police officer with the San Jose, California Police Department testified that he responded to a call on October 9, 1993 that the defendant had beaten his girlfriend, CARMEN KEDRICK (AA 149). Ms. KEDRICK

told Officer JACKSON that she was pregnant with the defendant's child and that the defendant had beaten her (AA 149-150). Officer JACKSON also observed that the defendant had vandalized Ms. KEDRICK's house and car (AA 150). A bench warrant was issued for the defendant's arrest following this incident (AA 150). Officer JACKSON also testified that he was familiar with the signs of gang affiliation in California (AA 150). Officer JACKSON testified that the defendant wore several tattoos that indicated he was a member of a northern California gang called the "Nortenos" (AA 150).

THOMAS PIPITONE, a corrections officer with the Las Vegas Metropolitan Police Department (LVMPD), testified that on August 4, 1994, he searched the defendant's cell at the Clark County Detention Center (AA 150). During this search, Officer PIPITONE found a sharpened metal item that had been fashioned from a piece of a clipboard (AA 150).

JAMES RANDALL COX, the oldest son of JAMES COX, testified about the impact that his father's death had on the COX family (AA 150). Mr. COX described his father as an honorable, caring, honest father, husband, and member of the Las Vegas community (AA 150). Mr. COX told how his father's death had impacted his father's other children (AA 150). Finally, Mr. COX read a letter written by his brother, MATTHEW COX, describing MATTHEW's sentiments regarding his father's death (AA 150).

PHILLIP COX, a brother of JAMES COX, also described JAMES' positive qualities and characteristics (AA 150). PHILLIP COX described JAMES' relationship with his parents, his relationship with his children, and his employment history (AA 150). PHILLIP COX also described the loss that had been experienced by himself and the other members of JAMES' family (AA 150).

The State's final witness during the penalty phase was KATHRYN COX (AA 150). KATHRYN told of her memories of her husband, JAMES (AA 150).

KATHRYN read a statement she had previously prepared describing her feelings and emotions regarding the defendant's brutal attack and JAMES' murder (AA 150).

The first witness called by the defense was RUTH FABELA, the defendant's maternal aunt (AA 150). Ms. FABELA testified that the defendant's mother had problems with alcohol and drugs (AA 150-151). On cross-examination, Ms. FABELA testified that the defendant was essentially raised by his paternal grandparents, WILLIAM and MARTHA WITTER (AA 151).

TINA WHITESELL, the defendant's sister, testified that her mother was constantly involved in drugs, alcohol, and men (AA 151). Ms. WHITESELL testified that her parents frequently fought with each other, sometimes hitting each other and chasing each other with a knife (AA 151). Ms. WHITESELL also related how she and the defendant were raised by grandparents and that both the grandparents drank heavily (AA 151). Ms. WHITESELL also testified that neither she nor her two sisters had not been involved in criminal activity during their lives (AA 151). Ms. WHITESELL related how the defendant began drinking alcohol regularly and smoking marijuana in junior high school (AA 151).

The defense also called LOUIS WITTER, the defendant's father (AA 151). LOUIS WITTER testified that he had three prior felony convictions and had trouble with alcohol and drugs (AA 151). LOUIS WITTER also testified that the defendant's mother had trouble with alcohol and drugs (AA 151). Finally, LOUIS WITTER described how he and the defendant's mother constantly fought after drinking excessively (AA 151).

ELISA ARLENE ALOHALANI SANDERS, the defendant's sister, testified about the abusive environment in which the defendant and his siblings were raised (AA 151). Ms. SANDERS also testified about the abuse that occurred while the defendant and his siblings were being raised by their paternal grandparents AA 151). Ms. SANDERS related how this upbringing had negatively impacted her own life (AA 151).

MICHAEL L. RITCHISON, the defendant's cousin, testified about the drug, alcohol, and physical abuse that was present in the defendant's home while he was growing up (AA 151). Mr. RITCHISON also testified about the alcohol and physical abuse that was present in his grandparent's home while the defendant was living there (AA 151).

The final witness called by the defense was Dr. LOUIS ETCOFF, a licensed psychologist in the state of Nevada (AA 151). Dr. ETCOFF testified that he had previously interviewed the defendant and conducted various psychological tests on the defendant (AA 151). Dr. ETCOFF related the results of these tests and described how the results directly correlated with the information he had acquired regarding the defendant's life (AA 152). Dr. ETCOFF concluded that the defendant may have had attention deficit hyperactivity disorder, antisocial personality disorder, and developmental arithmetic disorder (AA 152).

C. The Jury's Verdict and Sentence

Following the conclusion of the presentation of evidence in the penalty phase, the jury returned a special verdict indicating that the following aggravating circumstances had been proven beyond a reasonable doubt: (1) the murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another; (2) the murder was committed while the person was engaged in the commission of or an attempt to commit burglary; (3) the murder was committed while the person was engaged in the commission of or an attempt to commit sexual assault; (4) the murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody (AA 152). (The fourth aggravator was struck down on appeal). The jury also found that the aggravating circumstances outweighed any mitigating circumstances (AA 152). Finally, the jury concluded the defendant should be sentenced to death for the murder of JAMES COX (AA 152).

ARGUMENT

I.

THE DISTRICT COURT DID NOT ERR IN FINDING THAT THE DEFENDANT FAILED TO SUCCESSFULLY MAKE A CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL

In order to assert a claim for ineffective assistance of counsel, the defendant was required to prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-687, 104 S.Ct. 2052, 2063-2064 (1984); see State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the defendant was required to 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.

A. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

In considering whether trial counsel has met this standard, a court should first determine whether counsel made a "sufficient inquiry into the information . . . pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Once this decision is made, a court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280; citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Finally, counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; see also Howard v State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066; State v. Meeker, 693 P.2d 911, 917 (Ariz. 1984).

Based on the above law, a court begins with the presumption of effectiveness and then must determine whether or not defendant has demonstrated, by "strong and convincing proof," that counsel was ineffective. Homick v State, 112 Nev. 304, 310,

913 P.2d 1280, 1285 (1996); citing Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981). The role of a court in considering allegations of ineffective assistance of counsel, is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978); citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711; citing Cooper, 551 F.2d at 1166. 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. In applying this standard of review, the district court did not err in finding that the defendant was represented by the effective assistance of trial counsel.

1. The District Court Did Not Err In Finding That Defense Counsel's Decision To Not Present a Fetal Alcohol Syndrome Defense, Which Counsel Investigated, Was An Effective Strategic Decision

In his Petition, the defendant alleged that trial counsel was ineffective for failing to investigate and retain an expert on Fetal Alcohol Syndrome ("FAS"). (AA 116-118). The district court found that this claim did not entitle the defendant to relief because trial counsel did investigate a FAS defense. (AA 272-273). The district court further found that counsel's ultimate decision to not present a FAS was effective because even if counsel had presented a FAS defense, such defense would have been unsuccessful. (AA 273).

At the evidentiary hearing, the defendant questioned his trial counsel Phillip Kohn regarding the FAS defense. (AA 182-199). After hearing this testimony, the district court found that trial counsel did investigate a FAS defense. (AA 272-273). This finding was based on the following: Trial counsel flew to San Jose, California

where he researched defendant's family background and spent one week interviewing witnesses. (AA 183). Trial counsel also read The Broken Chord by Michael Doris, which detailed the symptoms and effects of FAS, which was a ground-breaking field in 1994 and 1995. (AA 182, 186). Trial counsel learned that he would need a geneticist to support a claim of FAS. (AA 190). To locate a geneticist, counsel contacted three university medical facilities and eventually located a local geneticist, Dr. Colene Morris. (AA 189-191). Trial counsel contacted Dr. Morris on at least ten occasions, but each time she refused to speak with him. (AA 189-190). Trial counsel then contacted several defense attorneys in an effort to obtain the name of a FAS expert. (AA 195). Trial counsel contacted FAS experts who resided in Seattle, but they refused to meet with defendant until he was first examined by a geneticist. (AA 191). Trial counsel requested a continuance to allow time for such examination, which the trial court denied. (AA 194-195). Trial counsel then contacted five alcohol-related experts, none of whom were able to testify about FAS due to the newness of the field. (AA 197). At the penalty phase of trial, counsel presented testimony from the defendant's family that the defendant's mother was an alcoholic and also presented testimony from a licensed psychologist who testified that defendant may have had attention deficit disorder, antisocial personality disorder, and developmental arithmetic disorder. (AA 273).

The district court's ruling that trial counsel effectively investigated a FAS defense should be affirmed by this Court. At the time counsel was preparing for trial, little was known about FAS, yet counsel conducted extensive investigation into presenting this possible defense. Because a 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," the defendant can not show that the district court erred in finding that trial counsel's investigation of a FAS defense was effective. Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

The district court also did not err in ruling that trial counsel's ultimate decision to not present a FAS defense was effective because a FAS defense would not have been successful. (AA 273). The district court found that the defendant failed to present any evidence that FAS would have been a valid defense in his case. (AA 273). Although the defendant was granted the opportunity to present evidence at an evidentiary hearing, the defendant failed to present evidence as to what a FAS expert would have said had such expert been obtained, which the defendant was required to do under Hargrove v. State, 100 Nev. 498, 500, 686 P.2d 222, 225 (1984). Because the defendant failed to present facts to support his allegations, the district court correctly found that the defendant's bare allegations did not entitled him to relief. (AA 273).

This Court should also affirm the district court's ruling that the defendant was unable to show that the outcome of his case would have been different had trial counsel retained a FAS expert to testify at trial because FAS is a mitigator, not an affirmative defense. (AA 273). A diagnosis of FAS "would place nothing more than a label on [defendant's] lower intelligence and behavioral problems, evidence which was already before the jury. With or without the diagnosis or label, the defense could argue that such evidence mitigated in favor of the lesser sentence." State v. Brett, 892 P.2d 29, 64 (Wash. 1995).

In light of the fact that FAS would not have been a successful defense in this case, the district court did not err in ruling that trial counsel's decision to not present a defense was an effective trial strategy. (AA 273). Trial counsel testified that because of the insurmountable evidence of defendant's guilt, he deliberately chose to not present a defense during the guilt phase so as to preserve his credibility at the penalty phase. (AA 204). The district court's affirmance of trial counsel's decision recognizes that not every crime is defensible, and an attorney is not required to "do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade."

United States v. Cronic, 466 U.S. 648, 656 n.19, 104 S.Ct. 2039, 2046 n.19 (1983). The decision not to dispute defendant's guilt in order to preserve credibility for the penalty phase was a proper trial strategy. People v. Bolin, 956 P.2d 374, 400 (Cal. 1998). Counsel's strategy was a "tactical" decision, as such, it was "virtually unchallengeable absent extraordinary circumstances." Howard v State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

During the penalty phase, trial counsel presented testimony from several members of the defendant's family who testified that the defendant's mother had abused alcohol. (AA 273). Trial counsel also presented testimony from a licensed psychologist who testified that defendant may have had attention deficit disorder, antisocial personality disorder, and developmental arithmetic disorder. (AA 273). Trial counsel also presented testimony from Dr. Etcoff, who testified about the effects of alcohol on the defendant for the penalty phase. (AA 273). Despite this testimony, the jury still found the defendant guilty and still found that death was the appropriate sentence. Therefore, the district court's finding that the defendant failed to sustain his burden of proof under Strickland was not error. (AA 273).

Based on the above, this Court should affirm the district court's ruling that trial counsel effectively investigated a FAS defense and effectively decided to not present a FAS defense.

2. The District Court Did Not Err In Finding That Defense Counsel's Decision To Not Present Testimony From A Gang Expert Was An Effective Strategic Decision

In his Petition, the defendant alleged that trial counsel was ineffective for failing to call a gang expert in order to explain away the testimony the State presented during the penalty phase regarding gangs and gang violence. (AA 118-120). The district court did not err in finding that this claim did not entitle the defendant to relief because counsel could not have anticipated the need to present such testimony and the decision to not present such testimony did not prejudice the defendant. (AA 273-274).

At the evidentiary hearing, the defendant questioned trial counsel Kohn regarding his decision to not call a gang expert during the penalty phase. (AA 198-203). Trial counsel testified that he did not call a gang expert because he believed that gang evidence was only admissible if defendant had been a gang member at some point in his life. (AA 200). However, the defendant did not tell counsel that he previously had been affiliated with a gang. (AA 199). Because counsel relied on the defendant's representations that he was not a gang member, counsel could not have anticipated that the State would present evidence of the defendant's gang involvement. (AA 199). The district court's ruling that trial counsel's decision to not call a gang expert correctly recognized that, "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Krauss v. State, 998 P.2d 163, 165 (Nev. 2000), quoting Strickland, 466 U.S. at 691, 104 S.Ct. at 2054. (AA 273-274).

The district court also did not err in finding that the defendant was not prejudiced by trial counsel's decision to not call a gang expert at the penalty phase. (AA 274). The district court ruled testimony from a gang expert was not necessary to refute many of the claims made by the State's gang experts. (AA 274). This finding is supported by a previous ruling by this Court in this case. (AA 274). In Witter, the defendant claimed that the trial court had abused its discretion in denying his motion for continuance, which counsel had asked for so that he could secure a gang expert to testify at the penalty phase. 112 Nev. at 919, 921 P.2d at 894. In denying this claim, this Court stated in part, "We also conclude that even if Witter were able to secure expert testimony regarding gang violence in prisons, such testimony would have done little to mitigate his involvement." 112 Nev. at 920, 921 P.2d at 894.

The district court properly found that trial counsel's decision not to call a gang expert was reasonable in light of the defendant's representations that he was not a gang

member. (AA 273). Moreover, in light of this Court's ruling that gang expert testimony would have added little to the defense, the district court properly found that habeas relief was precluded because the defendant had failed to meet the prejudice prong of Strickland ineffective assistance of counsel test. (AA 274).

3. The District Court Did Not Err In Finding That Defense Counsel's Decision To Not Object To The State's Closing Argument Was An Effective Tactical Decision

In his Petition, the defendant alleged that trial counsel was ineffective for failing to object to the State's opening statement. (AA 122-124). The district court properly found that this claim did not entitle the defendant to relief because trial counsel's decision to refrain from objecting enabled defense counsel to preserve his credibility for the penalty phase and therefore was an effective trial strategy. (AA 274).

At the evidentiary hearing, the defendant questioned trial counsel Kohn regarding his decision to not object to the State's opening statement. (AA 205-208). Trial counsel testified that he did not object because he was "trying to curry favor with the jury" in the hopes that the jury would be more willing to listen to him during the penalty phase. (AA 206). The district court found that this decision was an effective trial strategy, and as such, was "virtually unchallengeable absent extraordinary circumstances." Howard, 106 Nev. at 722, 800 P.2d at 180. (AA 274-275).

The district court did not err in finding that the prosecutor's statements were appropriate because the prosecutor was entitled to outline his case and propose the facts he intended to prove in his opening statement. Rice v. State, 113 Nev. 1300, __, 949 P.2d 262, 270 (1997). Even if the prosecutor overstates what he is later able to prove, misconduct is not present unless he does so in bad faith. Id. In Browne v. State, 113 Nev. 305, 310, 933 P.2d 187, 190-91 (1997), this Court held that reference to a defendant as a "selfish and cruel man" did not rise to the level requiring reversal. See People v. Benson, 802 P.2d 330, 353-54 (Cal. 1990) (holding prosecutor's comment "this crime is perhaps the most brutal, atrocious, heinous crime," was merely a comment on the nature of the offense and was permissible); see also State v.

Runningeagle, 859 P.2d 169, 173 (Ariz. 1993) (holding that prosecutor's use of the words "horror" and "evil" were merely a characterization of the evidence that should have been in closing argument instead of opening statement, but a new trial was not warranted).

The district court also did not err in ruling that the defendant was not prejudiced by counsel's decision to refrain from objecting because any impropriety in the State's opening statement would have been harmless error. (AA 275). NRS 178.598 says that any error which does not affect substantial rights shall be disregarded. Error is harmless if it appears, beyond a reasonable doubt, that the error complained of did not contribute to the verdict obtained. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967). The question is whether the jury would have returned a verdict of guilty if it had not been exposed to the error. United States v. Hastings, 461 U.S. 499, 510-11, 103 S.Ct. 1974, 1981 (1983). Any impropriety in the State's opening statement would have been harmless because there was overwhelming evidence of the defendant's guilt, which included the identification of the defendant by one of the victims (Kathryn Cox), three security guards, and the bus driver; physical evidence of the deceased victims blood found all over the defendant, and a confession by the defendant that he committed the killing. (AA 276). In light of this overwhelming evidence, the defendant cannot refute the district court's finding that trial counsel's decision to refrain from objecting was an effective trial strategy.

4. The District Court Did Not Err In Finding That Defense Counsel's Decision To Not Offer A Jury Instruction That Informed The Jury That They Could Not Consider Character Evidence Until It Had Weighed the Aggravating Circumstances Against the Mitigating Circumstances Was An Effective Decision

The defendant argued in his Petition that trial counsel was ineffective because he did not propose a jury instruction that informed the jury that it may not consider character evidence until after it had weighed the aggravating circumstances against the mitigating circumstances. (AA 126-127). The district court correctly found that this

claim did not entitle the defendant to relief because such a jury instruction would have been contrary to Nevada law. (AA 276).

In his Petition, the defendant relied upon the case of Brooks v. Kemp, 762 F.2d 1183 (11th Cir. 1985), to support his claim that he was entitled to the above instruction. (AA 126). In the same Petition, the defendant himself acknowledged that this Court "rejected an instruction to this effect in Lisle v. State, 113 Nev. 679, 941 P.2d 459 (1997)." (AA 127). The district court, in rejecting the defendant's claim, found that not only was the defendant not entitled to this instruction, but this instruction was contrary to Nevada law because a defendant's character is relevant to the jury's determination of the appropriate sentence for a capital crime, it is not limited to only after the jury decides the defendant is death eligible. 113 Nev. at 703, 941 P.2d at 475. (AA 276).

In the defendant's current appeal, he now alleges that counsel should have asked for the instruction because the instruction was consistent with this Court's decision in Byford v. State, 116 Nev. Adv. Op. 23, 994 P.2d 700 (2000). (Appellant's Opening Brief ("AOB") 23). In Byford, this Court approved instructing the jury that "[e]vidence of any uncharged crimes, bad acts or character evidence cannot be used or considered in determining the existence of the alleged aggravating circumstance or circumstances." 994 P.2d at 715-16. Even if this Court were to find that the defendant would have been entitled to the above instruction under Byford, the Byford decision was decided well after this defendant was tried. Because a 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," the district court's ruling that trial counsel's decision to not request the above instruction was effective should not be disturbed. Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

B. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Similar to the standards of ineffective assistance regarding trial counsel, in order to assert a claim for ineffective assistance of counsel, the defendant was required to

prove that appellate counsel did not provide "reasonably effective assistance." See Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; Love, 109 Nev. at 1138, 865 P.2d at 323. Under this test, the defendant was required to 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, i.e., that the appellate issue would have entitled the defendant to relief. See Strickland, 466 U.S. at 687-688 & 694, 104 S.Ct. at 2065 & 2068.

In considering whether appellate counsel has met this standard, a court should recognize that a 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." Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983). Moreover, the United States Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones, 463 U.S. at 751 -752, 103 S.Ct. at 3313. 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." Jones, 463 U.S. at 753, 103 S.Ct. at 3313. The Court has therefore 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." Jones, 463 U.S. at 754, 103 S.Ct. at 3314. In applying this standard of review, the district court did not err in finding that the defendant was represented by the effective assistance of appellate counsel, especially in light of the fact that appellate counsel raised fifteen claims on appeal.

5. The District Court Did Not Err In Finding That Appellate Counsel's Decision To Not Appeal The State's Exercise Of Its Peremptory Challenge Under *Batson* Was Effective

The defendant in his Petition argued that appellate counsel should have raised a Batson issue on direct appeal because the State exercised a peremptory challenge against one of only two African-Americans left on the jury panel. (AA 128-130). The district court did not err in ruling that trial counsel's decision to not raise a Batson challenge was effective because this issue would have been unsuccessful on appeal. (AA 277-278).

At the evidentiary hearing, the defendant questioned his appellate counsel Robert Miller regarding his decision to not raise a Batson challenge on appeal. (AA 221-223). After hearing this testimony, the district court found that appellate counsel's decision was effective because the circumstances surrounding the exercise of the peremptory challenge would not have entitled the defendant to relief under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). (AA 277-278).

Batson and its progeny set forth a three-step process for evaluating race-based objections to peremptory challenges. First, the opponent of the peremptory challenge must make a prima facie showing of racial discrimination. 476 U.S. at 95, 106 S.Ct. at 1723. In order to do so, "the defendant must first show that he is a member of a cognizable racial group, . . . and that the prosecutor has exercised peremptory challenges from the venire members of the defendant's race." Id. Once a prima facie showing has been made, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation. Purkett v. Elem, 514 U.S. 765, 767-68, 115 S.Ct. 1769, 1770-71 (1995). If a race-neutral explanation is tendered, step three requires the trial court to decide whether the opponent of the strike has proved purposeful racial discrimination. The inquiry then proceeds to the third step in which the trial court must determine whether the prosecutor was motivated by discriminatory intent. Id.

The district court did not err in finding that appellate counsel's decision to not raise a Batson challenge was effective because such challenge would have been an unsuccessful appellate issue. During jury selection, the defendant objected to the

State's exercise of its peremptory challenge, citing Batson. (AA 164). The district court, which presided over jury voir dire, found that the State's exercise of its peremptory challenge did not violate Batson. (AA 164). Appellate counsel Miller, when asked why he did not raise a Batson issue on appeal, said he had two reasons for choosing not to raise this issue. (AA 221). First, the State provided a race-neutral explanation for excluding the juror. (AA 222). Second, it was unclear whether the juror was African-American. (AA 221). The record indicated that Kohn believed the juror was African-American, while others said they were unsure of the juror's race. (AA 222). The prosecutor indicated to the trial court that he had nothing in his notes regarding the juror's race. (AA 278). Appellate counsel stated that because of the unclarity of the juror's race, he decided this issue was unlikely to succeed on appeal and it was a tactical decision not to raise this issue. (AA 221).

The district court did not err in finding that appellate counsel's decision to not pursue this issue on appeal was an effective decision because it was supported by the record. (AA 278). At the time of the peremptory challenges, the jurors were not present. (AA 278). Neither the prosecutor nor the court had noted that the juror was African-American because they were not aware that race was an issue in the case because the defendant appeared to be Caucasian. (AA 278). The names of the defendant and his family do not suggest any particular race. The district court found that in the instant case, the prosecutor indicated to the trial court that he had nothing in his notes regarding the juror's race. (AA 278). The only notation the prosecutor had with regard to the juror was that he did not believe that she was capable of making a decision. (AA 278). This was a race-neutral explanation. (AA 278). Moreover, the trial court found that the defendant had not proved purposeful discrimination on the part of the prosecutor. (AA 278).

Because the "ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike," and the defendant failed to meet this burden, the district court did not err in ruling that appellate counsel's decision

to not raise a Batson challenge on appeal was effective. Purkett, 514 U.S. at 767-68, 115 S.Ct. at 1770-71. (AA 278).

6. The District Court Did Not Err In Finding That Appellate Counsel's Decision To Not Petition This Court For Rehearing Was Effective

In his Petition, the defendant claimed that appellate counsel should have petitioned this Court for a rehearing of his direct appeal because this Court's decision was based on a misconception of the facts. (AA 130-131). The district court, in finding that appellate counsel's decision to not petition this Court for a rehearing was effective, did not err. (AA 278-279).

On appeal, the defendant claimed that the trial court abused its discretion in denying his motion for a continuance, which defendant argued was necessary to allow him time to employ a gang expert at the penalty hearing. (AA 83). This Court denied the defendant's claim, ruling that on June 20, 1995, almost a full year before the penalty hearing, the State had notified defense counsel that it was investigating an alleged discipline problem (possession of a shank) involving the defendant. (AA 84-85). In his Petition, the defendant claimed that this Court failed to comprehend that the penalty hearing took place in July 1995. (AA 130-131). This Court found that counsel had adequate time to employ a gang expert. (AA 84-85). This Court added that "even if Witter were able to secure expert testimony regarding gang violence in prisons, such testimony would have done little to mitigate his involvement." Witter, 112 Nev. at 920, 921 P.2d at 894.

The district court did not err in finding that appellate counsel's decision to not seek a rehearing was effective because the defendant would not have been entitled to a rehearing. According to NRAP 40(c)(2), a rehearing may only be considered by a court in the following circumstances: I) When it appears that the court has overlooked or misapprehended a material matter in the record or otherwise, or ii) In such other circumstances as will promote substantial justice. Whitehead v. Nevada Commission on Judicial Discipline, 110 Nev. 380, 388, 873 P.2d 946, 952 (1994). In Whitehead,

the petition was not considered proper because it did not address any "material matter," it simply asked the court to withdraw or change "faulty assumptions, misstatements of fact and mischaracterizations of the legal arguments." This Court held that a rehearing should not be granted to review matters that are of no material consequence. Id. Because this Court has already ruled that the defendant was not prejudiced by the inability to present a gang expert at the penalty phase, even if the defendant had petitioned this Court for a rehearing, the defendant would not have been entitled to relief because this was not a material matter.

The district court did not err in finding that appellate counsel's decision to not petition this Court for a rehearing was effective because the defendant would not have been entitled to a rehearing.

7. The District Court Did Not Err In Finding That Appellate Counsel's Decision To Not Argue On Appeal That The State's Closing Argument Shifted The Burden Of Proof To The Defendant Was Effective

In his Petition, the defendant alleged that appellate counsel should have claimed that the prosecutor's closing argument, in which he noted that neither the State nor the defense had called an expert on how alcohol affects a person's state of mind, improperly shifted the burden of proof to the defendant. (AA 131-132). The district court did not err in finding that counsel's decision not to pursue this issue on appeal was effective because there was no improper shifting of the burden of proof. (AA 279-280).

During closing argument, the State noted that the defendant had failed to present any evidence that he might have been impaired by alcohol. (AA 279). Trial counsel objected to this statement. (AA 279). In response, the trial court commented that the jury "knows that there is no burden. He's just saying what was and was not presented at the time of trial." (AA 279-280). At the evidentiary hearing, the defendant questioned his appellate counsel as to why he did not appeal this issue. (AA 224-225). Appellate counsel explained that it was a tactical decision not to raise this issue on

appeal. (AA 225). Counsel believed that the trial court had remedied the problem at the time by saying that the jury knows that the defendant has no burden. (AA 225). Appellate counsel went on to testify that after the objection was sustained, defense counsel did not make a motion to strike or a motion for mistrial and that to the best of his recollection, that was probably the reason he did not appeal this issue. (AA 225).

The district court, relying upon Lisle v. State, 113 Nev. 679, 941 P.2d 459, 476 (1997), found that appellate counsel's decision to not pursue this issue on appeal was effective because it likely would have failed. (AA 279). In Lisle, this Court considered the propriety of a prosecutor's comment on the lack of expert witnesses presented at trial. This Court upheld the statements, finding that the burden had not been shifted to the defendant. Id. In light of the Lisle decision, the district court did not err in finding that had appellate counsel presented a similar claim to this Court, the claim would have been unsuccessful on appeal.

Because appellate counsel believed that any error in the State's comments had been remedied at the time of trial, and his belief was supported by Nevada authority, the district court did not err in finding appellate counsel's decision to not pursue this issue was effective.

8. The District Court Did Not Err In Finding That Appellate Counsel's Decision To Not Appeal The Denial Of Trial Counsel's Challenge For Cause Of Juror Miller Was Effective

In his Petition, the defendant alleged that appellate counsel was ineffective for failing to appeal the denial of trial counsel's challenge for cause of juror Miller. (AA 132-134). The district court did not err in finding that counsel's decision not to pursue this issue on appeal was effective because the district court did not abuse its discretion in denying trial counsel's challenge. (AA 280).

The defendant claimed that juror Miller should have been excused for cause because he initially said that he would not consider evidence that a defendant had suffered from a bad childhood at the mitigation stage. (AA 133). In response to this statement, trial counsel moved to strike the juror for cause. (AA 240). The trial court

then inquired what juror Miller meant, and juror Miller stated that he would consider the evidence of childhood. (AA 240). The trial court denied the defendant's request to remove juror Miller for cause. (AA 240). The defendant then utilized his peremptory challenge to remove juror Miller from the jury venire. (AA 133).

The district court did not err in ruling that appellate counsel's decision to not raise this issue on appeal was effective. (AA 280). At the evidentiary hearing, when questioned why he did not pursue this issue on appeal, appellate counsel stated he could not remember his reason but thought he probably reviewed it and was aware of it. (AA 226). The district court ruled that even if counsel had raised this issue on appeal, it would have been unsuccessful because under United States v. Claiborne, 765 F.2d 784, 800 (9th Cir. 1985), the defendant could not show that the trial court abused its discretion in denying the defendant's request to strike the juror for cause. (AA 280). In Claiborne, the court held that the trial court did not abuse its discretion in failing to dismiss jurors for cause and inviting counsel to use their peremptory challenges to excuse them from the panel. The court reasoned that "[f]ew aspects of a jury trial are more committed to a district court's discretion than the decision whether to excuse a prospective juror for actual bias. Moreover, trial courts possess a peculiar ability to determine whether a prospective juror's claimed ability to decide a case impartially is genuine." Id. (Citations omitted). In Claiborne, the district court determined that the prospective jurors in question on appeal would weigh the evidence impartially despite their initial preconceptions of the defendant's guilt or innocence. The fact that the defendant used peremptory challenges to strike the two jurors, the court found to be "not a denial of justice" but a "proper utilization of the peremptory tool." Id.

The district court also did not err in ruling that the defendant was not entitled to relief under Thompson v. State, 111 Nev. 439, 894 P.2d 375 (1995), which the defendant relied upon in his Petition. In Thompson, this Court found that the trial court erred in failing to exclude a juror for cause. 111 Nev. at 442, 894 P.2d at 377.

Although during voir dire, the juror stated that he had not formed an opinion as to the defendant's guilt, the record indicated that he in fact believed the defendant was guilty. Id. This was not so in the instant case. In this case, prospective juror Miller, in response to a defense question, indicated that he would not consider the childhood of a defendant as a mitigating circumstance. (AA 167). However, nothing in the record suggests that the juror had already formed an opinion about the defendant's guilt or innocence. (AA 167). Additionally, the court had previously instructed defense counsel not to use the term "mitigation" during voir dire, as the court could not conclude what would be allowed as mitigators at this point in the trial. (AA 167).

Because the defendant could not demonstrate that the trial court abused its discretion in denying the defendant's request to strike juror Miller, the district court did not err in ruling that appellate counsel's decision to not pursue this issue on appeal was effective.

9. The District Court Did Not Err In Finding That Appellate Counsel's Decision To Not Appeal The Admission Of Evidence That The Defendant Had Committed Rape As a Juvenile And Had Been Violent In Prison Was Effective

In his Petition, the defendant alleged that appellate counsel should have appealed the admission of the defendant's past violent acts, including that he committed rape as a juvenile and had been violent in prison. (AA 134-135). The district court did not err in finding that counsel's decision not to pursue this issue on appeal was effective because the district court did not abuse its discretion in admitting this evidence. (AA 280-281).

During the penalty phase, Linda Rose, a parole officer for the California Department of Corrections, testified that the Department of Corrections prepares an institutional summary that contains a criminal history section. (AA 168). During her testimony, Officer Rose read from a certified copy of the abovementioned report under the category "sex related offenses" that the defendant in "1978, [subject] was arrested at the age of 15 for rape while residing in Hawaii. He served juvenile hall." (AA 168).

The defendant objected and a bench conference took place, and the following day, the defendant made a record of his objection to this information being admitted citing D'Agostino v. State, 107 Nev. 1001, 823 P.2d 283 (1991). (AA 168). Officer Rose also testified as to the defendant's misconduct by way of force and violence in prison. (AA 168). The defendant did not object to this testimony at the time Officer Rose was testifying and in fact asked her follow up questions regarding this information on cross-examination. (AA 168-169). It was not until the next day that defense counsel put his objection to this information on the record. (AA 169).

At the evidentiary hearing, appellate counsel Miller testified that he did not appeal the admission of this evidence because he felt that a challenge would have been unsuccessful. (AA 226). The district court did not err in finding that appellate counsel's decision to not appeal this issue was effective, because contrary to the defendant's claims, this issue would have been unsuccessful under D'Agostino. In D'Agostino, a jail informant testified that the defendant, while in prison, had told him that he had killed "some old man in New York." 107 Nev. at 1003, 823 P.2d at 284. The informant did not specify the time, place, or identity of the man. Id. This Court opined that absent these details, the defendant was prejudiced by such unverifiable accusations. Id. This Court was careful to point out, however, that "[p]ast criminal activity is one of the most critical factors in the process of assessing punishment." 107 Nev. at 1004, 823 P.2d at 285. The opinion addressed specifically the reliability of jail-house informants that are under pressure to cooperate with the State. Id. In contrast, the information in the instant case regarding the defendant's past acts of violence was reliable. (AA 168). It was part of a certified copy of the record of the Department of Corrections that was read verbatim to the jury by a parole officer. (AA 168). Additionally, it gave the year, place, age of the defendant, and punishment imposed for the sex offense. (AA 168).

In light of the reliability of the evidence, it cannot be said that the district court erred in ruling that defense counsel's decision to not challenge the admission of the evidence on direct appeal was effective.

10. The District Court Did Not Err In Finding That Appellate Counsel's Decision To Not Appeal The Trial Court's Admission Of Photographs Was Effective

In his Petition, the defendant alleged that appellate counsel should have appealed the trial court's admission of photographs, which defendant characterized as gruesome and prejudicial. (AA 135-136). The district court did not err in finding that counsel's decision not to pursue this issue on appeal was effective because the trial court did not abuse its discretion in admitting this evidence. (AA 281).

At trial, the court admitted photographs of the interior and exterior of the cab, the knife (the murder weapon), and autopsy photographs. (AA 281). At the evidentiary hearing, appellate counsel Miller testified that he strategically decided to not appeal the admission of the photographs because he believed the chance that this issue would prevail was almost nonexistent. (AA 227). The district court did not err in finding that counsel's decision was effective in light of Nevada case law, which supported the trial court's admission of the photographs. (AA 281). The admission of photographs of victims, crime scenes, and weapons is within the sound discretion of the trial court, and absent an abuse of this discretion, the decision will be upheld. See Greene v. State, 113 Nev. 157, 931 P.2d 54,60 (1997). In Wesley v. State, 112 Nev. 503, 507, 916 P.2d 793, 800 (1996), this Court held that a trial court did not abuse its discretion when it admitted autopsy photographs of the murder victims. This Court concluded that the probative value outweighed the prejudice because the photographs assisted the jury in understanding the "nature and quality" of the wounds inflicted by the stabbings. The photographs also were used to explain the findings of the autopsy. Id. Similarly, the photographs in this case were probative. The defendant, by pleading not guilty, required the State to present evidence to establish all the elements of the crimes. The trial judge determined that the probative value did

outweigh the prejudice because the crime scene, murder weapon, and manner of death were all relevant to the charged offenses. (AA 281).

Because an argument that the trial court abused its discretion by admitting probative photographs would likely have been unsuccessful on direct appeal, the district court did not err in finding appellate counsel's decision to not pursue this issue was an effective decision.

CONCLUSION

The district court did not err in finding that the performance of both trial and appellate counsel was effective. The district court did not err in ruling that the decisions the attorneys made were tactical and in the best interest of the defendant, and in light of the overwhelming evidence of guilt, the defendant was not prejudiced by any of the decisions of either trial or appellate counsel. The defendant has failed to present this Court with any reason why this Court should find the district court's decision was error. Accordingly, this Court should deny the defendant's claims.

Dated this 14th day of May, 2001.

STEWART L. BELL
Clark County District Attorney
Nevada Bar No. 000477

By 
JAMES TUFTELAND
Chief Deputy

Office of the Clark County District Attorney
Clark County Courthouse
200 South Third Street, Suite 701
Post Office Box 552212
Las Vegas, Nevada 89155-2211
(702) 455-4711

CERTIFICATE OF COMPLIANCE

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

Dated this 14th day of May, 2001.

STEWART L. BELL
Clark County District Attorney
Nevada Bar No. 000477

By _____
JAMES TUFTELAND
Chief Deputy

Office of the Clark County District Attorney
Clark County Courthouse
200 South Third Street, Suite 701
Post Office Box 552212
Las Vegas, Nevada 89155-2211
(702) 455-4711

CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing RESPONDENT'S ANSWERING BRIEF to the attorney of record listed below on this 14th day of May, 2001..

DAVID M. SCHIECK, ESQ.
Law Office of David M. Schieck
302 East Carson Avenue
Suite 600
Las Vegas, Nevada 89101

Employee, Clark County
District Attorney's Office

TUFTj/Susan Pate/mulkn