RSPN
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#01586283

Defendant.

CASE NO: 98C153154

DEPT NO: VI

65 p. - trial issues

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND DEFENDANT'S SUPPLEMENTAL BRIEF AND SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: 4/13/11
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Petition for Writ of Habeas Corpus and Defendant's Supplemental Brief and Second Supplemental Brief in Support of Defendant's Writ of Habeas Corpus (Post-Conviction).

This reponse is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

POINTS AND AUTHORITIES

INTRODUCTION

Donte Johnson (hereinafter "Defendant") filed a Petition for Writ of Habeas Corpus (Post-Conviction) on February 13, 2008. Defendant initiated this post-conviction proceeding after the Nevada Supreme Court affirmed his four death sentences following a previous remand for re-sentencing. The only issues properly before this court concern allegations of ineffective assistance of counsel during the most recent penalty hearing in 2005.

STATEMENT OF THE CASE

On December 18, 2002, the Nevada Supreme Court affirmed Defendant's convictions, pursuant to a jury verdict, of four counts each of First Degree Murder with Use of a Deadly Weapon, Robbery with Use of a Deadly Weapon, And First Degree Kidnapping with Use of a Deadly Weapon, And One Count of Burglary with Use of a Deadly Weapon. However, the Court reversed the death sentences because they were imposed by a three-judge panel of district court judges and not a jury. Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002). Remittitur issued on January 14, 2003.

On August 8, 2003, Defendant filed a Motion for the Automatic Imposition of Life without the Possibility of Parole, or, in the Alternative, Motion for Exercise of Judicial Discretion. The district court denied Defendant's Motion on September 3, 2003.

On April 27, 2004, Defendant filed a Motion to Allow the Defense to Argue Last at The Penalty Phase. Also, on April 27, 2004, Defendant filed a Motion to Bifurcate Penalty Phase. On April 28, 2004, Defendant filed a Motion in Limine Regarding Referring to Victims as "Boys." On May 3, 2004, the court granted Defendant's Motion in Limine Regarding Referring to Victims as "Boys," but denied Defendant's Motions to Allow the Defense to Argue Last and to Bifurcate the Penalty Phase.

On April 12, 2005, Defendant filed a Motion to Reconsider Request to Bifurcate Penalty Phase. On April 18, 2005, the district court granted Defendant's motion to bifurcate the penalty phase of the penalty hearing: death-eligibility and selection, and the district court

granted Defendant's Motion to Suppress Evidence Regarding Darnell Johnson[1].

Defendant's jury trial commenced on April 19, 2005. On April 28, 2005, the jury returned with the special verdict that the aggravating circumstance outweighs any mitigating circumstance or circumstances in all four (4) Murder counts. The one aggravating circumstance was that the defendant has, in the immediate proceeding, been convicted of more than one offense of Murder in the First or Second Degree.

Thereafter, on April 28, 2005, the second portion of Defendant's penalty phase, the selection phase, began. On May 5, 2005, the jury returned a verdict of death on all four (4) counts of Murder of the First Degree with Use of a Deadly Weapon counts.

On June 6, 2005, Defendant was sentenced to death on each of the four (4) counts of First Degree Murder with Use of a Deadly Weapon – XI, XII, XIII, XIV. The Warrant and Order of Execution were signed and filed in open court as was the Order to Stay Execution. The Judgment of Conviction was filed on June 6, 2005. Defendant filed a timely Notice of Appeal on June 30, 2005.

On December 28, 2006, the Nevada Supreme Court affirmed Defendant's death sentences. Johnson v. State, 122 Nev. 1344, 148 P.3d 767 (2006). Remittitur issued on January 28, 2008.

On February 13, 2008, Defendant initiated the present post-conviction proceedings by filing a proper person Petition for Writ of Habeas Corpus (Post-Conviction) and Motion for Appointment of Counsel. Christopher Oram was appointed as counsel for Defendant.

Defendant's counsel filed a Supplemental Brief in Support of Defendant's Writ of Habeas Corpus on October 12, 2009. Additionally, Defendant's counsel filed a Second Supplemental Brief in Support of Defendant's Writ of Habeas Corpus on July 14, 2010. The State's Response to Defendant's Petition, his Supplemental Brief, and his Second Supplemental Brief follows.

---

[1] The evidence regarding Darnell Johnson concerned Defendant's involvement in the homicide of Darnell Johnson. The evidence and testimony provided would have indicated that Defendant strangled Darnell Johnson and then buried his body in the desert. This evidence was admitted in Defendant's 2000 penalty hearing; however, defense counsel was successful in excluding the evidence in Defendant's 2005 penalty hearing.

STATEMENT OF FACTS

The following facts are adapted from the Nevada Supreme Court's decisions in Johnson v. State, 118 Nev. 787, 791-793, 59 P.3d 450, 453 - 454 (2002) and Johnson v. State, 122 Nev. 1344, 1347-1352, 148 P.3d 767, 770 - 773 (2006).

Sometime during the late evening of August 13 or early morning of August 14, 1998, four men were shot to death in a home located at 4825 Terra Linda in Las Vegas. No eyewitnesses to the crimes testified, but the State's witnesses testified that Johnson admitted that he, Sikia Smith, and Terrell Young were responsible. Smith and Young were tried separately, were convicted of Murder and other felonies, and received multiple sentences of life without the possibility of parole. Johnson was convicted of Murder and other felonies and sentenced to death.

At Johnson's trial, Tod Armstrong testified for the State to the following. Many people used his house ("the Everman home") as a place to buy, sell, and use drugs. For approximately two weeks prior to the killings, Johnson and Young spent a substantial amount of time at the Everman home. They kept clothes in the master bedroom and often slept there. Johnson and Young possessed four guns: a .38 caliber handgun, a revolver, a firearm that looked like a sawed-off shotgun, and a .22 caliber rifle. The guns were usually kept in a duffel bag. Several days before the killings, Matt Mowen went to the Everman house to buy rock cocaine, at which time Johnson, Young, Armstrong, and several others were present. Mowen told everyone that he had just returned from touring with a band and selling acid. Later, Johnson asked where Mowen lived, and Ace Hart, Armstrong's friend, eventually took Johnson to Mowen's house. A few days later, Mowen and three others were killed at Mowen's residence.

Armstrong testified that Young and Johnson left the Everman home that night and returned with the duffel bag containing the guns early the next morning, also with a "PlayStation" and a video cassette recorder (VCR). Johnson advised Armstrong as follows: that he, Young, and Smith went to Mowen's house for the purpose of robbing Mowen, but Mowen and Tracey Gorringe did not have cash or drugs. Johnson ordered them to call some

friends and have them bring money. Thereafter, according to Johnson, Peter Talamantez and Jeffery Biddle arrived. Apparently, Talamantez did not take Johnson's demands seriously and would not cooperate with him. Johnson took Talamantez to a back room and shot him in the head. Realizing that there were three witnesses, Johnson went back to the front room and shot the three other victims in the back of the heads, execution style. The next day, Armstrong overheard Johnson telling Ace Hart the same story. Several days later, Armstrong reported what he knew to the police and gave them permission to search his home. Police officers recovered a rifle, duffel bag, pager, VCR, PlayStation, and a pair of black jeans. Armstrong identified the items as ones belonging to Johnson.

LaShawnya Wright, Smith's girlfriend, also testified to Johnson's admissions that he, Young, and Smith were responsible for the shootings. According to Wright, Johnson and Young left her home on the night of the murders carrying a duffel bag that contained a rifle, a handgun, duct tape, and gloves. She testified that the three men returned the next afternoon with a VCR and a Nintendo. She also testified that Smith had a .38 caliber automatic handgun, but later sold it. That same day, she, Smith, Johnson, and some others passed by a newsstand, and Johnson said, "'We made the front page.'" The front-page article described the quadruple murder.

Charla Severs, Johnson's girlfriend at the time of the murders, corroborated Wright's and Armstrong's testimony. Severs remembered the day that Mowen appeared at the Everman house to buy drugs. After he left, Armstrong told Johnson and Young that Mowen had approximately $10,000 and drugs and that they should rob him. Several days later, on the night of the murders, Johnson, Smith, and Young took the duffel bag that contained the guns and did not return for several hours. When he returned, Johnson woke Severs up with a kiss and told her that he had killed someone that night. Johnson said that he went out to get some money from some people and that one of them was "talking mess." Johnson and that person started arguing, and eventually Johnson kicked him and shot him in the back of his head. The next day, Johnson told her to watch the news. The local news reported that there had been a quadruple murder and showed a picture of Mowen. Severs recognized Mowen as a person

who had been to the house recently. Johnson told her that Mowen and another man did not have any money and called two friends to bring over money. He told her that he killed all of them.

Sergeant Robert Honea testified that, three days after the killings, he pulled over a white Ford for speeding. As Sergeant Honea was speaking to the driver at the patrol vehicle, he noticed the passenger had stepped out of the Ford and was holding a small handgun. Sergeant Honea drew his weapon, and the driver and passenger fled. When he searched the Ford, Sergeant Honea found a sawed-off rifle similar to the one described by Armstrong. At trial, Sergeant Honea identified Johnson as the Ford's driver.

Dr. Robert Bucklin, a Forensic Pathologist, testified that the hands and feet of each victim were bound with duct tape and each victim died from a single gunshot wound to the back of the head.

Thomas Wahl, a Las Vegas Metropolitan Police Department Criminalist and DNA Analyst, examined the black jeans that were found at the Everman home. Wahl discovered eight human bloodstains on the right pant leg of the jeans. DNA testing revealed that the blood belonged to Tracey Gorringe, one of the victims. Wahl found another stain in the zipper area of the jeans. After testing, Wahl determined that the stain was a mix of female nucleoid epithelial cells and semen. He concluded that Johnson was the source of the semen.

Although Johnson presented no witnesses, defense counsel aggressively cross-examined each of the State's witnesses. For example, on cross-examination Armstrong admitted that around the time of the killings he had been using rock cocaine extensively. He also admitted that he asked Johnson to steal some rims from a car. While Armstrong denied any involvement in the crimes, defense counsel attempted to show that Armstrong arranged the robberies because he wanted more drugs. With respect to Wright, counsel demonstrated that a district attorney contacted her while she was in custody and called her probation officer on her behalf. Severs admitted that she had given five versions of the killings and lied at the grand jury hearing and that that she had used approximately five different aliases when she had been arrested in the past.

The jury found Johnson guilty on all counts, but it could not reach a unanimous decision on the proper sentence for the murders. Thus, a second penalty hearing was conducted before a three-judge panel. For each of the murders, the panel found two aggravating circumstances: Johnson committed the murders while engaged in Robbery, Burglary, or First-Degree Kidnapping, and he killed or attempted to kill the person murdered or knew or had reason to know that life would be taken or lethal force used; and Johnson had been convicted of more than one count of First-Degree Murder in the immediate proceeding. The panel also found two mitigating circumstances: Johnson's youth at the time of the murders and his "horrible childhood." The panel determined that the aggravating circumstances outweighed the mitigating circumstances and imposed a sentence of death for each of the murders.

[The Nevada Supreme Court] affirmed Johnson's conviction in 2002. But the fact that Johnson was sentenced to death based on findings by a three-judge panel, instead of a jury, violated the Supreme Court's holding in *Ring*[2]. His death sentence was therefore vacated and his case remanded to the district court for a new penalty hearing.

Johnson's new penalty hearing-his third-began in April 2005 before a jury. The district court granted Johnson's pretrial motion to bifurcate it into separate phases: death-eligibility and selection.

I. *Death-eligibility phase*

Johnson's death-eligibility phase lasted four days. Both parties made opening statements to the jury.

State's case in aggravation

The State presented evidence of a single aggravating circumstance it pursued for each of the four murders-that Johnson had been convicted of more than one murder in the immediate proceeding pursuant to NRS 200.033(12).

An aggravator based on NRS 200.033(4) that was found by the three-judge panel during

---

[2] Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002).

Johnson's previous penalty hearing was stricken during a pretrial hearing by the district court pursuant to [the Nevada Supreme Court's] decision in *McConnell v. State,* 120 Nev. 1043, 102 P.3d 606 (2004). Certified copies of the jury verdict forms and transcripts from the original guilt phase were admitted into evidence to establish the quadruple murder by Johnson. The State also presented the testimony of four witnesses. Justin Perkins, a friend of the victims, testified how he discovered their lifeless bodies. Las Vegas Metropolitan Police Department (LVMPD) Detective Thomas Thowsen, who had investigated the four murders since they were first reported in August 1998, gave the bulk of the testimony. He recounted for the jury the criminal investigation and summarized evidence presented through various State witnesses during the guilt phase. He also read portions of the original trial testimony of these witnesses. LVMPD Forensic Crime Lab Manager Berch Henry testified about the DNA analysis linking Johnson to the murders, and Clark County Forensic Pathologist, Medical Examiner Dr. Gary Telgenhoff, summarized the autopsy findings regarding each victim. Each of the victims, according to Dr. Telgenhoff, died from a single gunshot wound to the back of the head at "very close" range-"about an inch or so away from skin." The wrists and ankles of each victim were bound with duct tape, and none had any "defensive wounds." Unlike the other victims, Talamantez also had a laceration and abrasion on his nose "due to blunt force" consistent with being "pistol whipped."

Defense's case in mitigation

Johnson called only members of his family to testify during this phase. They testified that Johnson's mother, who by her own admission was "a little slow," abused alcohol and illegal drugs, including crack cocaine and PCP, when Johnson was a child. She even did so in his presence. She would sometimes leave Johnson and his sisters alone or lock them in a closet. Johnson's father abused his mother in front of Johnson and his sisters, once knocking her teeth out and attempting to throw her out of a hotel window. Johnson was also beaten.

At one point, Johnson, his two sisters, and several of his cousins were forced to live in a one-room shed for about a month. The shed had no running water, no carpet, and no furniture. The children had to go to the bathroom in a bucket and sleep on the floor with no

covers. While living in the shed, the children sometimes did not comb their hair or eat. Because they had no shower, the children often had to go to school with body odor. They were also hungry at times.

The police were eventually contacted, and the children, including Johnson, were taken into foster care. Johnson and his sisters were thereafter sent to live with their grandmother, who was also caring for about ten other children. Johnson's grandfather, according to Johnson's sister Johnnisha Zamora, did the best he could, but she could not recall any time he ever spent with Johnson.

Johnson's grandmother's house was in the Compton area of Los Angeles, where, as Johnson's sister Johnnisha explained, there was "a lot of violence." Johnson and his two sisters were often chased and beaten up at school. His sister Eunisha White testified that Johnson was short and that they were "picked on a lot by different people for no reason."

Johnson's family testified about the positive aspects of his personality and their love for him. A video and several family pictures were admitted into evidence. Johnson's eight-year-old son Allen White, who was in the third grade, read to the jury a letter he wrote to his father which stated in part: "I will love you in my heart, and you will love me in mine."

Special verdict

The State and the defense made closing arguments, and the State argued in rebuttal. The jury was also given instructions. The jury returned four special verdicts, finding the single aggravating circumstance pursued by the State. Seven mitigating circumstances were found: Johnson's youth at the time of the murders (he was 19 years old); he was taken as a child from his mother due to her neglect and placed in foster care; he had "no positive or meaningful contact" with either parent; he had no positive male role models; he grew up in violent neighborhoods; he witnessed many violent acts as a child; and while a teenager he attended schools where violence was common.

The jury found the aggravating circumstance outweighed the mitigating circumstances and that Johnson was eligible for death.

II. *Selection phase*

The selection phase in Johnson's case lasted five days. Both the State and the defense made new opening statements to the jury.

State's case in support of a death sentence

Evidence regarding Johnson's prior bad acts was admitted during this phase of the hearing.

A Los Angeles Police Department lieutenant and a bank manager testified regarding Johnson's participation in an armed bank robbery in 1993, when he was about 15 years old. An LVMPD officer testified that in 1998 Johnson was implicated in the shooting of a man in Las Vegas. That man later died. The district court admitted documents into evidence charging Johnson with Attempted Murder and Battery with the Use of a Deadly Weapon relating to the incident, as well as Johnson's guilty plea and Judgment of Conviction for the Battery charge.

A California Department of Corrections Parole Division officer testified about Johnson's juvenile record in California. The district court admitted Johnson's Judgment of Conviction for the 1993 armed bank robbery into evidence, showing that he was sentenced to four years in the California Youth Authority (CYA) program. Johnson was paroled from the CYA program prior to the expiration of his four-year sentence, but he later absconded from parole.

LVMPD Officer Alexander Gonzalez testified that he worked at the Clark County Detention Center in February 2001 in the unit housing high-risk inmates. He described a fight between Johnson and another inmate, Oscar Irias. With help from a third inmate, Johnson threw Irias over a second-tier railing. Irias survived.

LVMPD Detective James Buczek participated in the quadruple murder investigation. He testified on behalf of Nevada Highway Patrolman Sergeant Robert Honea (who had testified in Johnson's 1998 trial). According to Detective Buczek, Sergeant Honea conducted a traffic stop involving Johnson on August 17, 1998, three days after the murders. Johnson was the driver, but identified himself as "Donte Fleck"; a passenger in the car was one of his accomplices in the robbery and murders. During the stop, Johnson and his passenger

abandoned the car and fled on foot. A rifle loaded with 20 rounds of ammunition was located in the car, along with a clip of ammunition.

In addition to the prior bad act evidence, the State also admitted impact testimony from the families of Johnson's four victims.

Juanita Aguilar, the mother of Peter Talamantez, testified that Peter "was very smart, very caring. He could have done just about anything he wanted to, but at 17, you don't really think too much about what you want to be in the future because you're still out having fun." Peter's murder had caused her severe depression. She lamented: "There's not one day I don't think about my baby."

Marie Biddle, the mother of Jeffery Biddle, testified that Jeffery liked to play sports, he was a "wonderful artist," and someday he either wanted to go into law enforcement or the Air Force. She told the jury that Jeffery's murder had "been very devastating."

Sandy Viau, the mother of Tracey Gorringe, testified that Tracey wanted to become an electrical engineer. She added, "He was a great athlete. He played baseball, he snowboarded, he skied, he water-skied, he roller-bladed, he rode motorcycles." She stated that after his murder, "I don't have any goals now. You know, it's one day at a time."

David Mowen, the father of Matthew Mowen, testified that Matthew was his only son and wanted to study medicine. "He was quite a young man.... He was one of those special individuals that, for whatever reason, he had that ability to connect with many, many different types of people." Of the impact of Matthew's murder, his father testified: "It's the same pain, the same misery, the same angriness that you have every single day. It doesn't get better." Matthew's younger sister Jennifer also testified that she looked up to her brother, who always gave her comfort and strength.

Defense's case for a sentence less than death and State's rebuttal

The defense again called members of Johnson's family, many of whom had already testified during the death-eligibility phase. These family members, including his young son, again testified about the positive aspects of Johnson's character and their love for him.

Much testimony was presented regarding Johnson's involvement with street gangs

beginning when he was about 13 or 14 years old. Johnson joined the Six Duece Brims gang, affiliated with the larger Bloods gang, to stop the harassment of his family. A professor of sociology at the University of California at Berkeley testified about gangs and provided the jury with extensive sociological data.

Several specialists who had worked with Johnson also testified. Johnson's former parole agent for the CYA testified that he supervised Johnson after his release from the juvenile program and found Johnson to be "a small, quiet young man that seemed to be pleasant and workable." A therapist who worked with Johnson in 2000 at the Clark County Detention Center testified that Johnson "was a fairly consistent, decent person in that setting." And a psychologist and clinical neuropsychologist profiled Johnson's personality and summarized his life.

Two inmates testified that they saw inmate Irias fall over the second-tier balcony. Johnson's alleged accomplice in the incident, Reginald Johnson (no relation to the appellant), testified that he alone, without Johnson's participation, "assaulted [Irias] and helped him over the tier" because Irias was a child molester. Reginald's former counsel confirmed that Reginald admitted to her that he did it.

A retired California Department of Corrections officer testified about the life that would be expected for an inmate sentenced to a term of life without the possibility of parole in Nevada's Ely State Prison. To rebut this evidence, the State called the warden of the Southern Desert Correctional Facility.

Johnson made no statement in allocution.

Death sentences

The State made a closing argument, and Johnson's two counsel made closing arguments. The State argued in rebuttal. A new set of written instructions was given to the jury. The jury returned four separate verdicts imposing a sentence of death for each of the murders.

ARGUMENT

I. STANDARD – EFFECTIVE ASSISTANCE OF COUNSEL DURING THE THIRD PENALTY HEARING – 2005.

Upon remand for a new capital penalty hearing, this Court appointed the Special Public Defender to represent Defendant. In April 2005, a jury was impaneled and heard the bifurcated penalty phase.

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

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

722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066. "Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound strategy." State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998) (quoting from Strickland, 466 U.S. at 689, 104 S.Ct at 2052 (1984)).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). The role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978), citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977).

This analysis does not mean that the court "should second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711. In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. ***"[R]elying on "the harsh light of hindsight" to cast doubt on a trial" that took place many years ago "is precisely what Strickland and AEDPA seek to prevent."*** Harrington v. Richter, ___ S.Ct. ___, 2011 WL 148587, January 19, 2011 (No. 09-587) (citing Bell v. Cone , 535 U.S. 685, 122 S.Ct. 1843 (2002))(emphasis added). Moreover, "an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for remote possibilities." Harrington, --U.S. at --.

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S.Ct. at 689. "Strategic choices made by counsel after

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

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice under Strickland , which asks whether it is "reasonably likely" the verdict would have been different, 466 U. S., at 696, ***not whether a court can be certain counsel's performance had no effect on the outcome or that reasonable doubt might have been established had counsel acted differently. There must be a substantial likelihood of a different result.*** Harrington, --U.S. at -- (emphasis added).

II. STANDARD – EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a Judgment of Conviction. Evitts v. Lucey, 469 U.S. 387, 396-97, 105 S.Ct. 830, 836-837 (1985); see also Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The federal courts have held that in order to claim ineffective assistance of appellate counsel the defendant must satisfy the two-prong test set forth by Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

Further, there is a strong presumption that counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See, United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. 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). Finally, in order to prove that appellate counsel's alleged error was prejudicial; the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

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 reaching this conclusion the 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." Id. 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." Id. 753, 103 S.Ct. at 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, 103 S.Ct. at 3314.

III. DEFENDANT'S CLAIMS REGARDING THE INEFFECTIVENESS OF HIS INITIAL TRIAL COUNSEL AND HIS COUNSEL ON DIRECT APPEAL FROM HIS INITIAL TRIAL CONVICTION – 2000 TRIAL AND 2002 DIRECT APPEAL.

On February 13, 2008, Defendant initiated the present post-conviction proceedings by filing a proper person Petition for Writ of Habeas Corpus (Post-Conviction) and Motion for Appointment of Counsel. Christopher Oram was appointed as counsel for Defendant. Defendant's counsel filed a Supplemental Brief in Support of Defendant's Writ of Habeas Corpus on October 12, 2009. Additionally, Defendant's counsel filed a Second Supplemental Brief in Support of Defendant's Writ of Habeas Corpus on July 14, 2010.

Almost all of Defendant's Supplemental Brief contains claims of ineffective assistance of trial counsel regarding Defendant's third penalty hearing which took place in 2005 and his counsel that appealed the 2005 death sentences. The State submits that Defendant's claims regarding the effectiveness of his trial and appellate counsel from his third penalty hearing in 2005 are all timely. Remittitur following Defendant's direct appeal of his four death sentences was issued on January 28, 2008. Johnson v. State, 122 Nev. 1344, 148 P.3d 767 (2006). Accordingly, Defendant's proper person Petition filed on

February 13, 2008 was timely filed.

However, the vast majority of Defendant's claims of ineffective assistance of counsel contained in Defendant's Second Supplemental Brief are regarding Defendant's 2000 jury trial and the direct appeal of his 2000 convictions. On December 18, 2002, the Nevada Supreme Court affirmed Defendant's convictions. The Nevada Supreme Court clearly affirmed Defendant's convictions, pursuant to a jury verdict, of four counts each of First Degree Murder With Use of a Deadly Weapon, Robbery With Use of a Deadly Weapon, and First Degree Kidnapping With Use of a Deadly Weapon, And One Count of Burglary With Use of a Deadly Weapon. Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002). Moreover, the Nevada Supreme Court affirmed the sentences for all of Defendant's convictions except the death sentences pursuant to the four counts of first degree murder with use of a deadly weapon. Id. The Supreme Court reversed the death sentences because the sentences were imposed by a three-judge panel of district court judges, not a jury, and remanded for a new penalty hearing before a new jury. Id. Remittitur was issued on January 14, 2003.

Thus, the State submits that all of Defendant's claims of ineffective assistance of counsel regarding Defendant's 2000 trial and the direct appeal from the 2000 trial are all untimely and barred pursuant to NRS 34.726(1). Defendant's Petition was filed on February 13, 2008, nearly eight years after his convictions, and more than five years after the Nevada Supreme Court issued remittitur on his direct appeal.

Additionally, the State pleads laches and invokes the five-year time bar of NRS 34.800. Without a showing of both good cause and prejudice to overcome each of these bars, the district court has no choice but to dismiss the claims in Defendant's Petition regarding the 2000 trial and the direct appeal from that trial. The State will first discuss the mandatory application of the procedural bars and then demonstrate that Defendant failed to even attempt to present good cause and prejudice to overcome these bars.

Lastly, after the State sets forth the applicable procedural bars, the State will respond to Defendant's specific claims of ineffective assistance of counsel regarding the barred issues only to the extent necessary to show that even if Defendant could have shown good

cause for his delay in filing, his claims would still fail for lack of a showing of prejudice.

A. 34.726(1) – Defendant's Petition is time-barred as it relates to the 2000 trial.

Nevada Revised Statutes (NRS) 34.726(1) reads:

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
> (a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

Defendant's petition does not fall within this statutory time limitation. The Supreme Court of Nevada has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely filed direct appeal. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998). In the instant case, Defendant filed a direct appeal from his Judgment of Conviction and the Supreme Court affirmed the conviction and issued remittitur on January 14, 2003. Thus, the one-year time bar began to run from the date remittitur was issued – January 14, 2003.

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly construed. In Gonzales v. State, 118 Nev. 590, 53 P.3d 901 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the petition within the one-year time limit. The Court declined to extend the prison mailbox rule adopted under Kellogg v. Journal Communications,[3] to petitions for post-conviction relief due to the longer period for filing petitions for post-conviction relief and because the one-year time limit for filing petitions for post-conviction relief may be excused

[3] Kellogg v. Journal Communications, 108 Nev. 474, 835 P.2d 12 (1992), allowed prisoners to use the date on which they delivered court papers to a prison official, rather than the date the papers were received to determine timeliness. The prison mailbox rule was applied to the strict 30 day jurisdictional time limit for filing a notice of appeal.

by a showing of good cause and prejudice.

Furthermore, the Nevada Supreme Court has held that the district court has *a duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial District Court, 121 Nev. 225, 112 P.3d 1070 (2005). The Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

121 Nev. at 231, 112 P.3d at 1074. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." 121 Nev. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars, the rules *must* be applied.

In this case, Defendant filed the instant Petition for Writ of Habeas Corpus outside of the one-year time limit. Defendant's Judgment of Conviction was entered on October 9, 2000. On January 14, 2003, the Nevada Supreme Court issued remittitur on Defendant's direct appeal of his Judgment of Conviction.

Defendant did not file the instant Second Petition until February 13, 2008, which is over four (4) years after the time prescribed in NRS 34.726. Therefore, all of Defendant's claims involving alleged errors occurring during Defendant's initial jury trial and the direct appeal from that trial, are precluded by NRS 34.726. Absent a showing of good cause for this extreme delay, Defendant's claim must be dismissed because of its tardy filing. Because Defendant fails to even allege good cause to overcome the procedural bars, as discussed *infra*, the district court should dismiss the claims in Defendant's Petition which are time-barred.

B. NRS 34.800 – Five Year Laches Rule

Nevada Revised Statutes 34.800 creates a rebuttable presumption of prejudice to the State if a defendant allows more than five years to elapse between the filing of the Judgment

of Conviction and the filing of a post-conviction petition. The statute requires that the State plead laches in its motion to dismiss the petition. The State hereby pleads laches in the instant case.

Defendant's Judgment of Conviction was filed on October 9, 2000. Since well over five (5) years have elapsed between the filing of Defendant's Judgment of Conviction and the filing of the instant petition, NRS 34.800 directly applies in this case. Nevada Revised Statutes 34.800 was enacted to protect the State from having to find and call long lost witnesses whose once vivid recollections have faded and re-gather evidence that in many cases has been lost or destroyed because of the lengthy passage of time. Thus, the State would suffer extreme prejudice if it were now required to bring this case to trial, as memories fade and witnesses disappear. There is a rebuttable presumption of prejudice for this very reason and the doctrine of laches must be applied in the instant matter. Therefore, this Court must summarily dismiss the claims in Defendant's instant petition regarding his initial jury trial and his direct appeal of that trial, pursuant to NRS 34.800, as Defendant's delay in filing the instant petition has prejudiced the State.

C. Defendant did not allege and cannot show good cause sufficient to overcome the application of the procedural bars.

"In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); citing Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi v. Director, 105 Nev. 63, 769 P.2d 72 (1989).

Such an external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Hathaway, 71 P.3d at 506; quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986); see also Gonzalez, 53 P.3d at 904; citing Harris v. Warden, 114 Nev. 956, 959-60 n. 4, 964 P.2d 785 n. 4 (1998).

"[A]ppellants cannot attempt to manufacture good cause[.]" Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 526 (2003). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 71 P.3d at 506; quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). Clearly, any delay in filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a). The lack of the assistance of counsel when preparing a petition and the failure of trial counsel to forward a copy of the file to a petitioner do not constitute good cause. See Phelps, 104 Nev. at 660, 764 P.2d at 1306; Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

Here, Defendant offers no good cause or prejudice whatsoever to explain his failure to follow the correct procedures in filing this petition. Defendant fails to show that an impediment external to the defense prevented him from complying with the procedural rules. See Lozada, 110 Nev. at 353, 871 P.2d at 946.

Defendant cannot show that there was any impediment that prevented him from filing a timely Petition after the Nevada Supreme Court affirmed Defendant's convictions in 2002. The 2002 Supreme Court Order left no doubt as to whether all of Defendant's convictions and sentences, other than his death sentence, were affirmed and final. Thus, Defendant had a full year from January 14, 2003, and no impediment that prevented him from challenging the ineffective assistance of his counsel pursuant to his convictions of four counts each of First Degree Murder With Use of a Deadly Weapon, Robbery With Use of a Deadly Weapon, and First Degree Kidnapping With Use of a Deadly Weapon, and One Count of Burglary With Use of a Deadly Weapon.

Defendant cannot contend that a sentencing re-hearing prevented him from filing a timely petition. Defendant's penalty re-hearing does not excuse non-compliance with the mandatory procedural bars anymore than those petitioners that claim their good cause was the pursuit of federal habeas relief. See Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989). Defendant's pursuit of a third penalty hearing cannot be considered an "impediment" sufficient to prevent Defendant from initiating habeas proceeding regarding all his convictions and sentences that were indisputably final.

Because Defendant has failed to even allege good cause this Court must dismiss the claims in Defendant's instant Petition regarding his initial trial and appeal. Moreover, to the extent that Defendant might allege his good cause was his participation in his third penalty hearing, the State contends that this is an insufficient excuse that in no way prevent Defendant from initiating habeas proceeding anytime between January 14, 2003 and January 14, 2004.

A conviction qualifies as final when judgment has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the Supreme Court has been denied or the time for the petition has expired. Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002). The 9th Circuit Court of Appeals has recognized that a conviction remains final even though a case may be sent back for re-sentencing. Phillips v. Vasquez, 56 F.3d 1030 (9th Cir. 1995). A conviction for Murder is a final judgment even when the death penalty sentence has been reversed and is not yet final. People v. Jackson, 60 Cal.Rptr. 248, 250, 429 P.2d 600, 602 (1967). When a judgment is vacated only insofar as it relates to the death penalty, "the original judgment on the issue of guilt remains final during retrial of the penalty issue and during all appellate proceedings . . ." People v. Kemp, 111 Cal.Rptr. 562, 564, 517 P.2d 826, 828 (1974). Johnson's 2000 Judgment of Conviction was vacated only insofar as the death sentences were concerned and the convictions have remained valid and final.

IV. DEFENDANT CLAIMS HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY INVESTIGATE IN THE THIRD PENALTY PHASE.

A. Defendant's claim that his counsel was ineffective for failing to investigate or present mitigation on Fetal Alcohol Disorders.

Defendant claims that his counsel was ineffective for failing to present or investigate the prospect that he suffered from Fetal Alcohol Spectrum Disorders (hereinafter "FASD"). In support of the possibility that Defendant may have suffered from FASD, Defendant cites to his mother's testimony that she consumed alcohol while she was pregnant with Defendant and that Defendant is of "small stature." Defendant's Supplemental Brief, Oct. 12, 2009, 30 – 31. Defendant argues that his counsel should have obtained an expert to make a determination on FASD because the Center for Disease Control and Prevention describes

poor judgment and reasoning skills as some of the symptoms of FASD and Defendant suffered from "poor reasoning and judgment skills," as evidenced by his criminal record and the facts surrounding the instant case. Id.

A defendant who contends that his attorney was ineffective because he did not adequately investigate must show how a better investigation probably would have rendered a more favorable outcome. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). In order to demonstrate a reasonable probability that, but for counsel's failure to investigate, the result would have been different, it must be clear from the "record what it was about the defense case that a more adequate investigation would have uncovered." Id. Also, "[w]here counsel and the client in a criminal case clearly understands the evidence and the permutations of proof and outcome, counsel is not required to unnecessarily exhaust all available public or private resources." Id. 120 Nev. at 192, 87 P.3d at 538. Here, Defendant cannot show that any further investigation surrounding the possibility that he suffered from FASD would have rendered a more favorable outcome. In fact, the investigation performed on behalf of Defendant's mitigation efforts clearly demonstrated that any further inquiry into FASD would have been fruitless.

Notably, Defendant's extremely qualified mitigation expert, Thomas F. Kinsora, Ph.D., believed that there was no sign that Defendant suffered from FASD. During direct-examination, Dr. Kinsora testified, "I, in talking with Donte, I don't get the sense that he has significant levels of Fetal Alcohol Syndrome or anything like that, that I was able to pick up in just talking with him, and I actually chose not to do a neuropsychological assessment, because I actually find him to be a really bright individual and I don't think that's really any major issue here." Reporter's Transcript of Trial by Jury, Volume XI, May 3, 2005, 42. Additionally, Dr. Kinsora testified that he formed his opinion regarding Defendant and Defendant's psychosocial history based, in part, on defense specialist Tina Francis' mitigation report which was complied in 2000, in preparation for Defendant's initial penalty hearing. Reporter's Transcript of Trial by Jury, Volume XI, May 3, 2005, 36 – 37. The mitigation report prepared in 2000 by Tina Francis stated that there was nothing to suggest

that Defendant's mother used drugs or alcohol during her pregnancy. Reporter's Transcript of Trial by Jury, Volume XI, May 3, 2005, 112.

It is true that Defendant's mother, Eunice Cain, testified that she drank alcohol while pregnant with Defendant. Reporter's Transcript of Trial by Jury, Volume VI – P.M., April 26, 2005, 152. However, during cross-examination, Eunice Cain testified as follows.

> State: Miss Cain, my understanding is you had how many children in total?
> Eunice Cain: Three.
> State: You used alcohol and drugs while you were pregnant with each one of those children?
> Eunice Cain: No. One I didn't.
> State: Which one did you not?
> Eunice Cain: My son.
> State: The defendant?
> Eunice Cain: Yes.
> Reporter's Transcript of Trial by Jury, Volume VI – P.M., April 26, 2005, 164.

Accordingly, there is conflicting testimony presented from Defendant's mother as to whether she consumed alcohol during her pregnancy with Defendant. Moreover, Defendant's assumption that he may have suffered from FASD is premised on the fact that he was of "small stature" and that he suffered from "poor reasoning and judgment skills." While it is true that the record reflects that Defendant is considered short, genetics likely had a bigger role to play in Defendant's height than the possibility that he suffered from FASD. Especially considering the fact that Defendant's maternal grandmother, Jane Edwards, testified that Defendant's father was short, and that Defendant got his height from his short father. Reporter's Transcript of Trial by Jury, Volume VII – A.M., April 27, 2005, 68 – 69.

Inasmuch as Defendant claims that his counsel should have further investigated FASD because he suffered from "poor reasoning and judgment skills," this claim is contrary to the testimony provided by Dr. Kinsora. Dr. Kinsora testified that Defendant was "a really bright individual" that progressed well in his schooling and received good grades in school. Reporter's Transcript of Trial by Jury, Volume XI, May 3, 2005, 42, 121. Accordingly, Defendant's counsel cannot be deemed ineffective for failing to further investigate FASD when all evidence and testimony provides that any further investigation would have been futile.

The fact remains that Defendant still displays none of the physical characteristics associated with the disorders and there are no present tests to diagnose FASD. Notably, FASD is not even represented as a specific mental disorder in the current DSM-IV (*Diagnostic & Statistical Manual for Mental Disorders IV*, American Psychiatric Association).

Moreover, according to the National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect in conjunction with the National Center on Birth Defects and Developmental Disabilities, there are no specific or uniformly accepted diagnostic criteria available for determining whether a person has Fetal Alcohol Syndrome. Centers for Disease Control and Prevention, Nat'l Center on Birth Defects and Developmental Disabilities, Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis, (July 2004), (hereinafter "Guidelines"), p. 2-3.[4] The four broad areas of clinical features that constitute a diagnosis of FASD have remained unchanged since 1973. Id. The Guidelines clearly state, "these broad areas of diagnostic criteria are not sufficiently specific to ensure diagnostic accuracy, consistency, or reliability." Id. at 2. The Guidelines further state, "it is easy for a clinician to misdiagnose FASD." Id. at 3. Moreover, the Guidelines demonstrate that there are no diagnostic criteria to distinguish FAS from other alcohol-related conditions. Id. at 3.

Diagnostic characteristics for FASD vary by provider. This has led to a determination that the lack of specificity can result in inconsistent diagnostic methodology and the inconsistent application of the FASD diagnosis. Id. at 11. For example, one particular method which is widely in use has been criticized because it will result in a number of false-positive findings. Id. at 11. Nine additional syndromes have overlapping features with Fetal Alcohol Syndrome. Id. at 12.

Defendant has failed to allege how Dr. Kinsora's prior evaluation and testimony in this case in regards to FASD is deficient in any way. The record clearly reflects that there was initial investigation into FASD; however, two of Defendant's mitigation experts saw no

---

[4] See http://www.cdc.gov/ncbddd/fasd/documents/FAS_guidelines_accessible.pdf

reason to conduct a further inquiry into FASD. Defendant's claim that his counsel failed to conduct an adequate investigation into the possibility that he suffered from FASD is belied by the record; thus it must fail. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Even assuming that this court feels that Defendant's counsel should have conducted further investigation and evaluation of FASD, Defendant's claim must fail because he cannot meet the second prong of Strickland. As in 2000 and 2005, the fact remains that Defendant still can not be diagnosed with FASD. Defendant has not demonstrated that he suffered any prejudice because he has not even alleged how further investigation would have led to a more favorable outcome.

B. Defendant's claim that his counsel was ineffective for failing to obtain a Positron Emission Tomography Scan.

Defendant claims that his counsel was ineffective for failing to obtain a Positron Emission Tomography Scan (hereinafter "PET Scan"). Defendant's Supplemental Brief, Oct. 12, 2009, 31. Defendant states that a PET Scan is a nuclear medicine imaging technique that produces a three-dimensional picture of the functional processes in the body. Defendant states that PET neuroimaging is based on an *assumption* that areas of high radioactivity are associated with brain activity. Defendant claims that his counsel was ineffective for failing to conduct a PET Scan because counsel should have investigated whether Defendant suffered from internal difficulties within the brain.

Notably, Defendant does not claim that he suffers from internal difficulties within the brain or that a PET Scan would possibly result in any findings that Defendant's brain activity is deficient. Thus, Defendant has not met his initial burden because he has not even attempted to allege how obtaining a PET Scan would have rendered a more favorable outcome. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). In order for Defendant to demonstrate a reasonable probability that, but for counsel's failure to obtain a PET Scan, the result would have been different, it must be clear from the "record what it was about the defense case that a more adequate investigation would have uncovered." Id. Also, "[w]here counsel and the client in a criminal case clearly understands the evidence and the

permutations of proof and outcome, counsel is not required to unnecessarily exhaust all available public or private resources." Id. 120 Nev. at 192, 87 P.3d at 538.

Here, there is absolutely no indication that a better investigation would have rendered a more favorable outcome. Additionally, the record is clear that Dr. Kinsora, a psychologist and clinical neuropsychologist, determined that there was "nothing to suggest there was anything wrong with [Defendant] organically." Reporter's Transcript of Trial by Jury, Volume XI, May 3, 2005, 121 – 122.

Dr. Kinsora also testified regarding Defendant's brain and his internal brain functioning as follows:

> State: You would agree Donte Johnson is not psychotic?
> Dr. Kinsora: I would agree he's not psychotic.
> State: He's not schizophrenic?
> Dr. Kinsora: Correct.
> State: He knows right from wrong?
> Dr. Kinsora: Correct.
> State: He's able to make choices?
> Dr. Kinsora: Correct.
> State: There's no organic brain disorder that Donte Johnson has?
> Dr. Kinsora: Right.
> State: He's very bright, correct?
> Dr. Kinsora: Correct.
> State: You were impressed by that?
> Dr. Kinsora: Yep.
> Reporter's Transcript of Trial by Jury, Volume XI, May 3, 2005, 101.

Thus, on several occasions, Defendant's mitigation expert, a Psychologist and Clinical Neuropsychologist, testified that Defendant did not have any organic brain disorder and that Defendant was very smart. Defendant's counsel cannot be deemed ineffective for failing to obtain a PET Scan to analyze Defendant's brain. Defendant cannot show, nor does he attempt to suggest, what a PET Scan would have uncovered. All the evidence and testimony provided throughout Defendant's case suggests Defendant's brain functions properly.

Even assuming that this court somehow finds Defendant's counsel deficient for failing to conduct a PET Scan, Defendant's claim must still fail because he cannot meet the second prong of Strickland. Defendant has not even attempted to demonstrate that a PET Scan could have possibly led to a more favorable outcome during his penalty hearing.

C. Defendant's claim that his counsel was ineffective for failing to present evidence that the co-Defendants received sentences of LIFE.

Defendant claims that his counsel was ineffective for failing to properly argue proportionality as an issue in mitigation. Defendant's Supplemental Brief, Oct. 12, 2009, 32. Defendant asserts that his counsel was ineffective for failing to investigate and present evidence that neither Sikia Smith nor Terrell Young received death sentences. However, Defendant's counsel did try to argue proportionality as a mitigator. Defendant's counsel argued:

> Sikia Smith was there. He's been convicted of this, and let's talk about that. You have three people who were there. You want to hear a huge mitigator? You want to hear a huge mitigator? Those two guys got life. In a case like this, that's mitigation. Reporter's Transcript of Trial by Jury, Volume VII – P.M., April 27, 2005, 64 – 65.

Thereafter, the State objected to this line of argument and the objection was sustained; however, Defendant's counsel was still able to get out his argument that the co-defendant's received life sentences not death. Id.

Inasmuch as Defendant is arguing that his counsel was ineffective for making this proportionality argument during closing rather than introducing into evidence Sikia Smith's and Terrell Young's judgments of conviction or sentencing transcripts, the State responds as follows. There is likelihood that the trial court would have excluded the evidence regarding the co-defendants' sentences. The co-defendants' sentences were absolutely irrelevant and possibly inadmissible to the proceedings against Defendant. Whether a *different* person, with *different* evidentiary issues, tried by a *different* jury was given a sentence of LIFE in prison without the possibility of parole was irrelevant to Defendant's proceedings. The evidence presented against Defendant differed from that presented against either Sikia Smith or Terrell Young. Notably, the most important evidentiary difference and sentencing consideration among the Defendant, Smith, and Young was that Defendant was the one person that methodically put a gun up to the head of all four young victims and squeezed the trigger that took their lives.

"A guilty plea or conviction of one person is not admissible against another charged with the same offense." Hilt v. State, 91 Nev. 654, 662 541 P.2d 645, 650 (1975); citing

State v. Riddall, 251 Or. 506, 446 P.2d 517 (1968). The fact that others guilty of first-degree murder may have received greater or lesser penalties does not mean that a defendant whose crime, background and characteristics are similar is entitled to receive a like sentence. See e.g., Dennis v. State, 116 Nev. 1075, 13 P.3d 434 (2000). Thus, the trial court would have likely excluded this irrelevant evidence.

Most Importantly, Defendant was not at all prejudiced by his counsel's actions. In fact, defense counsel's actions likely inured to Defendant's benefit. Had defense counsel attempted to file a motion or present the judgments of conviction into evidence, then the court could have, and likely would have, denied Defendant's motion. However, Defendant's skillful attorney was able to complete his argument that the co-defendants merely received sentences of LIFE in prison before the State could object during closing. Thus, defense counsel was able to assure that the jury heard the information about the co-defendant's sentences without running the risk of being prohibited from introducing it.

Additionally, Defendant's instant argument that his counsel was ineffective for not introducing more evidence and elaborating on proportionality as a mitigator cuts both ways and could have very easily hurt Defendant more than it helped him. A jury could have considered that both co-defendants received multiple consecutive sentences of LIFE without the possibility of parole and neither was the person that tragically executed the young men. The Proportionality argument drawn to its obvious conclusion could lead the jury to the determination that the person who actually pulled the trigger four times deserves a sentence proportionally higher than the two men who did not. The fact that the proportionality argument cuts both ways is clearly evidenced by the fact that during Defendant's initial penalty hearing in 2000 the defense filed a motion in limine regarding the admission of the co-defendants' sentences and the State filed an Opposition in an attempt to introduce the sentences during the penalty hearing. 6 ROA 1293 – 1295.

Accordingly, Defendant's counsel cannot be deemed ineffective because (1) the irrelevant evidence would have likely been excluded; (2) Defendant suffered no prejudice because his counsel was able to get out his entire argument for proportionality as a mitigator

during closing before the State objected; (3) defense counsel was able to cleverly ambush the State by sneaking the argument into closing without being rebutted by a devastating counter-argument to proportionality; and (4) Defendant cannot demonstrate that he was prejudiced by his counsel's failure to further argue and admit this evidence because Defendant cannot show that had this evidence been introduced there was a reasonable probability that the penalty hearing would have been different.

Lastly, Defendant concludes this argument with the bare allegation that: "appellate counsel was also ineffective for failure to raise this issue on appeal." Defendant's Supplemental Brief, Oct. 12, 2009, 32. The State is confused regarding exactly what issue appellate counsel should have raised on direct appeal. Defendant's bare allegation that his appellate counsel was ineffective for failing to raise "this issue" on appeal does not warrant relief. In Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), the Nevada Supreme Court held that claims asserted in a petition for post-conviction relief must be supported with specific factual allegations which, if true, would entitle the petitioner to relief. "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. Inasmuch as Defendant is arguing that his appellate counsel should have argued that the trial court abused its discretion in denying Defendant's attempt to introduce his co-defendants' sentences, Defendant cannot demonstrate that appellate counsel's failure to argue that the district court abused its discretion in denying the irrelevant and inadmissible evidence (as argued *supra*) would have had a reasonable probability of success on appeal. Additionally, it should be noted that the district court precluded defense counsel from sneaking in new evidence during closing argument. Technically, the district court did not actually preclude the defense from admitting this evidence; rather, the district court merely precluded the defense from introducing evidence during closing.

District courts are vested with considerable discretion in determining the relevance and admissibility of evidence." Archanian v. State, 122 Nev. 1019, 145 P.3d 1008, 1016 (2006). "A district court's decision to admit or exclude evidence will not be reversed on appeal unless it is manifestly wrong." Archanian, 122 Nev. at 1019, at 1016. Appellate

counsel would not have been able to show that the district court was manifestly wrong in denying evidence and argument regarding a *different* person, with *different* evidentiary issues, tried by a *different* jury. At best, this would have been one of appellate counsel's weaker arguments; thus, he cannot be deemed ineffective for winnowing out this weak argument to focus on the nine stronger arguments. Jones v. Barnes, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 3313 (1983).

D. Defendant's claim that his counsel was ineffective for failing to offer mitigators which had been found by Defendant's first jury.

In Defendant's Supplemental Brief, Defendant claims that his counsel was ineffective for failing to offer all of the mitigating factors to the jury in 2005 that were found by the first jury in 2000. Defendant's Supplemental Brief, Oct. 12, 2009, 32 – 34. In Defendant's Supplemental Brief, Defendant claims "the first jury filled out a mitigation form finding more than thirty (30) mitigators including one indicating the defendant's role in the instant case." Id.

In Defendant's Second Supplemental Brief, Defendant reasserts and refines this claim. Defendant's Second Supplemental Brief, July 14, 2010, 39 – 41. Defendant includes the twenty-three (23) mitigators that were found by the jury during the first penalty hearing on June 15, 2000. Id. Defendant asserts that his trial counsel was ineffective for not filing a pretrial motion to have the district court consider whether a jury had already determined that these 23 mitigators exist. Id. Additionally, Defendant makes the argument that his counsel was ineffective for not arguing to the jury that "there was a question as to who the actual shooter was" and that his counsel "failed to enlighten the court that the first jury did not agree with [the conclusion that Defendant was determined to be the physical killer]." Id.

Defendant's contentions that his counsel should have argued to the jury that the first jury had a "question as to who the actual shooter was" and that the first jury "did not agree with" the conclusion that Defendant was "determined to be the physical killer" is disingenuous and belied by the record. The first jury did not find a mitigator which cast doubt on who the actual shooter was; rather, the mitigator stated: "there was no eyewitness to identify of [sic] shooter." Defendant's Second Supplemental Brief, July 14, 2010, 40;

Exhibit A. This mitigator is in no way an expression of doubt as to who shot and killed all four young men; rather, it is simply a statement that one of the jurors may have felt more comfortable with returning a death verdict had he heard eyewitness testimony from a third-party. Defendant's instant contention that his first jury questioned his role in the physical killings of these young men is explicitly belied by the exact same special verdict form. The special verdict form from the 2000 trial listed, as one of the possible mitigating factors to be found, "The Defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor." Id. Notably, the jury failed to find that this mitigating circumstance existed.

Essentially, Defendant's argument is that his counsel was ineffective for not trying to re-litigate the guilt phase of the trial. Defendant was absolutely found to be the physical killer of these four young men by the first jury and thereafter the Nevada Supreme Court affirmed Defendant's four convictions for First-Degree Murder with Use of a Deadly Weapon. Thus, any assertion to the contrary would have been disingenuous and would have resulted in defense counsel losing credibility with the jury. Moreover, the district court would have summarily dismissed any notion that the jury which convicted Defendant of four counts of First-Degree Murder with Use of a Deadly Weapon had doubts as to Defendant's role in the killings. Lastly, Defendant's case was remanded solely for a new sentencing hearing; thus, any motions attempting to re-litigate the guilt issues would have been denied by the district court. Therefore, any attempt by defense counsel to make these arguments and motions would have been futile and counsel cannot be deemed ineffective for refusing to file futile motions. Ennis v. State, 122 Nev. 694, 137 P.3d 1095, 1103 (2006).

Defendant's next contention is that his defense counsel should have filed a pre-trial motion to have the district court find that a previous jury had already determined that these 23 mitigators exist. Defendant's Second Supplemental Brief, July 14, 2010, 39 – 41. Defendant asserts that his counsel was ineffective for "failing to obtain a pretrial order instructing the jury that the mitigators existed." Id. This argument lacks any merit whatsoever. Essentially, Defendant contends that his defense counsel should have petitioned

the court to usurp the role of the 2005 jury and require them to begin their fact-finding mission from the starting point of 23 mitiigators found and build upon that number. Notably, Defendant offers no case law in support of his position that the district court would have ordered the jury to begin the trial with 23 mitigators conclusively determined. Defendant's assertion that mitigating circumstances should be imposed upon a jury is absurd considering jurors are not even required to find proffered mitigating circumstances simply because there is unrebutted evidence to support them. Gallego v. State, 117 Nev. 348, 366-67, 23 P.3d 227, 240 (2001). Defense counsel cannot be deemed ineffective for failing to file a pre-trial motion that would have been easily denied by the district court and would have been entirely futile. Ennis v. State, 122 Nev. 694, 137 P.3d 1095, 1103 (2006).

Defendant's last assertion is that his counsel was ineffective for not listing each of the mitigators found by the 2000 jury on the special verdict form given to the 2005 jury. Defendant contends that his trial would have been different had his defense counsel argued for more mitigating circumstances and focused on mitigating circumstances found by the 2000 jury. Defendant's argument fails for two reasons: (1) Defendant's contention that his counsel did not argue for as many mitigating circumstances and did not cover the mitigators that the first jury found is belied by the record; and (2) the structure and strategy surrounding the 2005 **bifurcated** penalty hearing was substantially different than the 2000 un-bifurcated penalty hearing that was tried by the same jury that had just been determined Defendant's guilt.

Defendant's 2000 special verdict form only had 5 mitigating circumstances specifically enumerated, 3 of which were found by that jury. The remaining 20 mitigating circumstances were added to the special verdict form by a member of the jury. Defendant's counsel in 2005 enumerated 11 specific mitigating circumstances in the instructions that were provided to the jury. Reporter's Transcript of Trial by Jury, Volume VII – P.M., April 27, 2005, 14 – 15. Defendant's 2005 jury found the existence of seven mitigating circumstances: Defendant's youth at the time of the murders; he was taken as a child from his mother due to her neglect and placed in foster care; he had no positive or meaningful

contact with either parent; he had no positive role models; he grew up in a violent neighborhood; he witnessed many violent attacks as a child; and while a teenager he attended schools where violence was common. Johnson v. State, 122 Nev. 1344, 1350, 148 P.3d 767, 771 (2006).

Additionally, defense counsel argued many other mitigating circumstances to the jury that the jury declined to find existed. Counsel began his argument for mitigation by powerfully conveying to the jury that the love between a father and son outweighs anything else. Reporter's Transcript of Trial by Jury, Volume VII – P.M., April 27, 2005, 44 – 45. Also, counsel argued that the love between a brother and sister who were raised in an environment and survived the equivalent of hell outweighs anything. Id. This was a powerful mitigating argument because Defendant's son and sister loving testified about how much they cared for Defendant and how much he means to them. In the years between the initial penalty hearing in 2000 and the 2005 penalty hearing Defendant's son had reached an age that allowed his testimony and declaration of love for his father to have a powerful impact. Thus, in 2005, defense counsel was able to offer a plea of mercy from Defendant's innocent-young son. This option was not available in 2000 due to his son's age.

Defense counsel went on to cover the lifestyle and environment surrounding the Defendant's victims. Reporter's Transcript of Trial by Jury, Volume VII – P.M., April 27, 2005, 50 – 51. Defense counsel's decision to carefully explain that the victims were involved in a lifestyle of drugs and were loaded on a mixture of methamphetamines and cocaine was much more tactful than Defendant's instant contention that his counsel should have listed this as one of the mitigators on the special verdict form. Listing a mitigator such as this would have likely infuriated the jury because of the insinuation that the young men deserved to die. Rather, counsel effectively argued the information about the victim's lives and let the jury infer the lifestyle they lived.

Defense counsel then moved on to the mitigating circumstance that Defendant complained about above. Counsel argued, "We don't know what happened in that house." Reporter's Transcript of Trial by Jury, Volume VII – P.M., April 27, 2005, 52 – 53. He

argued that we know Defendant was involved, but there are several versions of the events so we cannot be sure what really occurred. This argument goes to the heart of Defendant's desire to have the "no eyewitness" mitigator argued. Defense counsel took this argument a step further and demonstrated that the owner of the .380 gun that killed those young men was Sikia Smith, not Defendant. Reporter's Transcript of Trial by Jury, Volume VII – P.M., April 27, 2005, 54.

Defense counsel then argued a lot of mitigating evidence regarding the planning and setting up of the robbery that led to this devastating outcome. Reporter's Transcript of Trial by Jury, Volume VII – P.M., April 27, 2005, 60 – 64. Counsel argued about Tod Armstrong's heavy involvement and manipulation of Defendant in order to set up this robbery. Defense counsel also hinted at the "coincidence" that the white males involved in this operation received a "pass" while the black Defendant is fighting not to receive a death sentence. Id. Thereafter, defense counsel details all of the many family problems and environmental factors that would lead to mitigating factors in Defendant's case. Reporter's Transcript of Trial by Jury, Volume VII – P.M., April 27, 2005, 66 – 78. This was by far the most extensive mitigating evidence covered.

The State submits that defense counsel effectively argued the mitigating circumstances found by the 2000 jury and then some. After reviewing the record of the eligibility phase of the 2005 penalty hearing, it appears that the only mitigating circumstances from the 2000 trial that were not offered were done so for good reason. Defense counsel was able to successfully petition the district court to bifurcate the penalty hearing which precluded the State from offering a lot of devastating evidence regarding Defendant's past. The State was forced to only offer evidence regarding the single aggravating factor, which the jury was already aware existed – Defendant committed a quadruple homicide. During the eligibility phase, the State was precluded from offering and arguing rebuttal evidence to the jury that included: videotape evidence of Defendant shooting Derrick Simpson in the face and spine, and Simpson's resulting death from the shooting; Defendant's armed robbery as a juvenile; Defendant's involvement with the

attempted murder of Oscar Irias; and Defendant's extensive gang involvement.

Had defense counsel complied with Defendant's instant contention that all of the 23 mitigators found by the first jury be listed and argued, the result would have been devastating to Defendant's strategic advantage to have the penalty hearing bifurcated. For example, had Defendant's counsel offered the following two mitigating circumstances to the jury during the eligibility phase the State would have then been able to rebut these mitigators with the devastating evidence described above: (20) "killings happened in a relatively shor[t] period of time, more isolated incidence [sic] than a pattern;" and (21) "no indication of any violence while in jail." Defendant's Second Supplemental Brief, July 14, 2010, 40; Exhibit A.

Accordingly, there is good reason that defense counsel stayed away from some the 23 mitigating circumstances found in 2000. The 2000 mitigators were found after the entirety of Defendant's penalty hearing; thus, the defense was forced to attempt to spin Defendant's gang involvement into a mitigating circumstance. Here, defense counsel had the advantage of precluding the jury from hearing about Defendant's heavy gang involvement; thus, the reason there was no mitigating factor listed regarding gangs.

For all the reasons detailed above, Defendant's counsel cannot be found deficient for the way he argued and submitted evidence regarding mitigating factors. Even assuming this court was to find that defense counsel was deficient in some way, Defendant cannot demonstrate that absent some deficiency in the way he presented mitigation evidence the jury would not have found that the aggravating circumstance outweighed the mitigating circumstances. Especially considering the fact that the State's case in favor of its aggravating circumstance was that Defendant un-remorsefully and in cold blood murdered four young men. Defendant cannot demonstrate prejudice as a result of any of his counsel's alleged deficiency.

E. Defendant's claim that his counsel was ineffective for failing to present evidence from Defendant's father.

Defendant claims that his counsel was ineffective for failing to call Defendant's father as a witness to testify that Defendant was neglected and abused. Defendant's Supplemental

Brief, Oct. 12, 2009, 34 – 35. Defendant admits that his counsel presented substantial evidence that Defendant was abused by his father and observed his father's abuse of his mother. However, Defendant asserts that his counsel was somehow ineffective for failing to call his father as a witness, even if such an examination was hostile and if the father denied the abuse. Id.

Defendant does not offer a reason why calling Defendant's father as a witness, especially if he denied the alleged abuse, would have benefited Defendant's case. Moreover, there is no indication that Defendant's father could have been located. Inasmuch as Defendant argues that his counsel was ineffective for failing to offer this mitigation evidence that Defendant's father abused the family, this contention is belied by the record and should be dismissed because it was offered repeatedly. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Defense counsel extensively covered the abuse that Defendant and his mother suffered at the hands of Defendant's father. Defendant's mother, sister, and grandmother all testified regarding the abuse and neglect from Defendant's father. See Reporter's Transcript of Trial by Jury, Volume VI – P.M., April 26, 2005, 141 – 142, 156 – 159, 168 – 169, 175 – 177; Reporter's Transcript of Trial by Jury, Volume VII – A.M., April 27, 2005, 5 – 10, 64.

The Nevada Supreme Court has long held, "the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate-and ultimate-responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). "An attorney must make reasonable investigation or a reasonable decision that particular investigations are unnecessary." State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006). Defendant's counsel cannot be deemed ineffective for failing to call a witness that would have likely been hostile and could have hurt Defendant's case by denying the abuse occurred, especially considering counsel was able to repeatedly convey the desired evidence to the jury through other witnesses.

Even assuming this court finds that Defendant's counsel was deficient in some way

for not presenting a witness that would have provided nothing more than duplicative testimony, Defendant cannot show that he was prejudiced. The mitigation evidence was provided to the jury through multiple sources; thus, Defendant cannot show that if this evidence had been offered via his father's testimony then the result of his penalty hearing would have likely been any different.

V. DEFENDANT CLAIMS HIS TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO PRECLUDE THE STATE FROM INTRODUCING AN INADMISSIBLE BAD ACT.

Defendant asserts several claims of ineffective assistance of counsel for not attempting to exclude the bad act evidence regarding Defendant's August 17, 1998, encounter with Officer Robert Honea. Defendant's Supplemental Brief, Oct. 12, 2009, 35 – 37.[5]

The specific facts surrounding this incident are as follows: On August 13, 1998, Defendant, Young, and Smith executed a plan to rob the occupant of 4825 Terra Linda Ave: armed with a Ruger .22 caliber rifle, a Universal Enforcer .30 caliber rifle, and a .380 caliber semi-automatic handgun. See 4 ROA 950 – 955; 7 ROA 1736 – 1742; 7 ROA 1813 – 1821; Reporter's Transcript of Trial by Jury, Volume IX, April 29, 2005, 84 – 86; Reporter's Transcript of Trial by Jury, Volume V, April 25, 2005, 117 – 122. The conspirators drove a white Ford vehicle to the scene of the crime. On August 17, 1998, four days after Defendant murdered the four boys, Defendant was driving the white four-door Ford. Id. The vehicle was pulled over pursuant to a routine traffic stop for speeding and the driver (Defendant) identified himself as "Donte Fletch." Id. Terrell Young was also inside the vehicle. Id. When Officer Honea attempted to place Defendant in handcuffs, Terrell Young exited the vehicle holding a gun in his hand. Id. The officer ordered Terrell Young to drop the weapon, and subsequently Defendant and Young fled from the vehicle. There was a brief foot pursuit; however, Defendant and Young were not apprehended. Id. Sergeant Honea

[5] When referring to this "Bad Act Evidence," Defendant's Petition cites to Volume 4, April 22, 2005, A.M. pp 117 – 122. The State contends that Defendant erred in citing to Volume 4. The proper citation for Defendant's instant claim is Reporter's Transcript of Trial by Jury, Volume V – P.M., April 25, 2005, 117 – 122.

performed a search of the car and located a short barreled shotgun with twenty rounds in the clip, as well as an additional clip. Reporter's Transcript of Trial by Jury, Volume IX, April 29, 2005, 84 – 86. This short barreled shotgun was the Universal Enforcer .30 caliber rifle that was used to execute the robbery four days earlier. Id.

Defendant makes several claims of ineffective assistance of counsel with regard to this bad act: (1) Defendant claims it was ineffective assistance of trial counsel and appellate counsel for permitting the introduction of this evidence into Defendant's 2000 trial; (2) Defendant claims it was ineffective assistance of counsel not to exclude this bad act prior to the 2005 penalty hearing via a pre-trial motion in limine; and (3) ineffective assistance of appellate counsel for failure to raise this issue on direct appeal.

A. Defendant's claims of ineffectiveness from his initial trial and the initial direct appeal.

The State contends that inasmuch as this claim relates to Defendant's initial trial and direct appeal it is procedurally barred and Defendant has not shown good cause to overcome the procedural bars. However, the State will address this claim to the extent necessary to show that even if Defendant could have shown good cause for his delay in filing, his claims would still fail for lack of a showing of prejudice.

First, Defendant's counsel cannot be deemed ineffective for failing to attempt to preclude this evidence because on October 19, 1999, Defendant filed a Motion and Notice of Motion in Limine to Preclude Evidence of Other Guns, Weapons, and Ammunition, not Used in the Crime. 3 ROA 743 – 758. Defendant's Motion in Limine concerned the exact incident that Defendant contends his counsel should have attempted to preclude. Additionally, Defendant's counsel filed a Reply to the State's Opposition to Defendant's Motion on November 15, 1999, wherein Defendant re-asserts the reasons such evidence should be excluded. 4 ROA 950 – 955.

Thereafter, on June 1, 2000, the district court conducted a second hearing regarding Defendant's Motion in Limine to Preclude Evidence of Other Guns and Ammunition Not Used in the Crime. 7 ROA 1813 – 1821. During the hearing the district court clearly determined evidence regarding the gun found by Sergeant Honea was not evidence of other

bad acts; rather, it was relevant evidence to the crimes for which Defendant was charged. Id. The district court determined that a Petrocelli hearing was not necessary because this evidence was being admitted to prove Burglary, Robbery, and Kidnapping *with use of a deadly weapon*, as this was one of the deadly weapons used to carry out these crimes. Id.

Thus, Defendant's counsel cannot be deemed ineffective for failing to attempt to subject this evidence to pre-trial scrutiny because that contention is belied by the record, as Defendant twice filed motions to exclude such evidence and vigorously argued for its exclusion during the hearing regarding these motions. Defendant's claim that his counsel was ineffective for failing to require a Petrocelli hearing regarding this "bad act evidence" is misplaced as this evidence was not admitted as other bad act evidence; rather, it was relevant evidence to the crimes charged. Id.

Furthermore, Defendant's appellate counsel cannot be deemed ineffective for failing to raise this issue on direct appeal from the first trial because Defendant's appellate counsel did in fact raise this issue on direct appeal. The Nevada Supreme Court determined:

> Johnson and his cohorts were charged with robbery, kidnapping, burglary, and murder, all with the use of a deadly weapon. The two rifles admitted in this case matched descriptions of firearms that Johnson and his cohorts possessed immediately before and after the crimes in question. Although the rifles were not used by Johnson to kill the victims, the State contended that his codefendants used the rifles to assist the robberies and kidnappings, **and trial evidence supported this contention. The fact that rifles similar to the ones allegedly used in the crimes were found in Johnson's possession is highly relevant to identity. It makes it more likely that Johnson and his codefendants committed those crimes. Thus, the district court did not abuse its discretion in admitting the guns.** Johnson v. State, 118 Nev. 787, 796 59 P.3d 450, 456 (2002).

Accordingly, Defendant's contentions regarding his trial and appellate counsels ineffectiveness for failing to raise issues that they did in fact raise are without merit and should be dismissed pursuant to Hargrove.

B. Defendant's claims of ineffective assistance of 2005 trial counsel.

Defendant's assertion that his 2005 trial counsel was ineffective for failing to preclude this evidence prior to the third penalty phase fails for several reasons. First, Defense counsel did try to preclude this evidence from being admitted at the third penalty hearing and was partially successful in doing so. See Reporter's Transcript of Trial by Jury,

Volume V, April 25, 2005, 117 – 122. Defense counsel argued, in direct contradiction to the Nevada Supreme Court's holding in 2002, that the evidence regarding this gun was not subject to any pre-trial scrutiny in the first trial and that the evidence was not relevant. Id. This district court sustained defense counsel's objection in part stating that the evidence would not be admitted in the first portion of the bifurcated penalty phase, the eligibility phase; however, it is relevant with regard to the second portion of the penalty phase, the selection phase. Id.

Accordingly, Defendant's counsel did attempt to preclude the evidence from the penalty phase and was partially successful. Thus, Defendant's counsel cannot be deemed ineffective for failing to attempt to preclude this evidence from the third penalty phase when defense counsel most certainly did attempt to preclude this evidence.

Inasmuch as Defendant contends that a pre-trial motion was necessary to prelude the evidence, the State submits that a pre-trial motion was not only unnecessary, but also would have likely resulted in the same ruling or a ruling to the determinate of Defendant. Defendant cannot show that the district court's ruling would have been any different had a pre-trial motion been filed with regard to this evidence. The district court still deliberated, listened to arguments from counsel, and thoughtfully ruled on defense counsel's oral objection to limit this evidence. Moreover, had the State been given time to adequately respond to Defendant's contention that this evidence be excluded because it was irrelevant, the State would have likely quoted the persuasive holding of the Nevada Supreme Court that illustrates the relevance of such evidence. Accordingly, Defendant reaped the benefit of his skillful attorney's timely objection to this evidence because his counsel was prepared to deliver an eloquent and calculated argument to exclude this evidence while the State was left unprepared and forced to argue "on the fly."

Thus, Defendant cannot show that his counsel was deficient in anyway because his counsel made the exact argument which Defendant contends he should have. Moreover, Defendant suffered no prejudice; rather he was advantaged, by his counsel oral objection as opposed to a pre-trial motion.

C. Defendant's claims of ineffective assistance of appellate counsel from his 2005 penalty hearing.

Defendant's final claim with regard to this evidence of the sawed off shotgun is that his appellate counsel was ineffective for failing to raise this issue on direct appeal. The State is unsure of exactly what Defendant feels his counsel was ineffective for failing to argue on direct appeal because he provides no elaboration on his bare allegation on ineffectiveness. In Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), the Nevada Supreme Court held that claims asserted in a petition for post-conviction relief must be supported with specific factual allegations which, if true, would entitle the petitioner to relief. "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.

Although the State feels that this bare and naked assertion is inadequate to support a claim for relief, the State will address the claim under the assumption that Defendant feels that his appellate counsel should have challenged the district court's ruling to admit this evidence in the second portion of the penalty hearing. Appellate counsel was not deficient for failing to challenge the district court's ruling on appeal for the following reasons.

Within this argument for relief, Defendant details and argues this evidence should have been excluded under NRS 48.045(2). However, Defendant's continued assertions that this evidence was evidence other crimes or wrongs is misplaced. The Nevada Supreme Court has already held that this exact evidence was appropriately admitted as evidence concerning the crimes in question on the night Defendant robbed, kidnapped, and murdered four boys. Thus, had appellate counsel decided to re-assert this claim on direct appeal from the third penalty hearing the claim would have been barred by the doctrine of the law of the case.

Where an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue will not be revisited. Pellegrini v. State, 117 Nev. 860, 884, 34 P.3d 519, 535 (2001); see McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); see also Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993). The Supreme Court has already considered and rejected this

exact argument on the merits; thus, appellate counsel cannot be deemed ineffective for failing to raise a futile argument.

Finally, assuming *arguendo* that this claim would not have been barred by the doctrine of the law of the case: the claim still would have failed because it has no merit. NRS 48.045(2) is not the applicable statute regarding the admission of this evidence into the selection phase of a penalty hearing. In a capital sentencing hearing, the rules of evidence do not apply and hearsay is allowed. NRS 47.020(3)(c); NRS 175.552(3). However, evidence may not be offered in violation of the Constitution and must still be relevant and not impalpable or highly suspect. Id.; Hollaway v. State, 116 Nev. 732, 746, 6 P.3d 987, 997 (2000). The decision to admit specific evidence is within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion. McKenna v. State, 114 Nev. 1044, 968 P.2d 739 (1998); Wesley v. State, 112 Nev. 503, 519, 916 P.2d 793, 804 (1996). This Court recognizes that evidence relevant in capital sentencing includes rebuttal evidence which the State can offer to rebut proof of mitigating circumstances. Hollaway v. State, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000).

At no point in time since 1998 has Defendant ever asserted that this encounter with Sergeant Honea did not occur. Rather, Defendant's contention is that it is evidence of other crimes or bad acts. Even assuming that this evidence was solely evidence of an uncharged other bad act or crime, this would not preclude such evidence from being admitted in a penalty hearing. The Nevada Supreme Court has long held that such information is relevant and properly considered by a capital jury. Gallego v. State, 117 Nev. 348, 369, 23 P.3d 227, 241 (2001) (testimony regarding police investigations of defendant's other crimes is admissible at a capital penalty hearing so long as the evidence is not impalpable or highly suspect); Leonard v. State, 114 Nev. 1196, 969 P.2d 288 (1998) (allowing police officer to give hearsay testimony in penalty phase of capital murder trial regarding another murder of which defendant had not yet been convicted was not abuse of discretion where detective's testimony was not impalpable or highly suspect); Homick v. State, 108 Nev. 127, 825 P.2d 600 (1992) (evidence of California homicides, concerning which charges were pending, was

neither impalpable nor highly suspect, and thus could be admitted in penalty phase of Nevada murder trial).

Questions regarding the admissibility of evidence during the penalty phase of a capital trial are left to the discretion of the trial court and will not be disturbed absent an abuse of discretion. Smith v. State, 110 Nev. 1094, 1106, 881 P.2d 649, 656 (1994); see NRS 175.552(3). Defendant cannot show that there is anyway his appellate counsel could have made a successful argument that the district court abused its discretion regarding this evidence.

Accordingly, all of Defendant's claims regarding ineffective assistance of counsel stemming from the evidence surrounding his August 17, 1998 encounter with Sergeant Honea are without merit. Defendant has not shown that his counsel at any stage throughout the proceedings was deficient in anyway, or that he suffered any prejudice from his counsel's performance.

VI. DEFENDANT CLAIMS THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR PROVIDING THE STATE WITH A MITIGATION REPORT FROM TINA FRANCIS.

A. Trial counsel's alleged ineffectiveness.

Defendant claims that his counsel was ineffective for providing the State a copy of Tina Francis' mitigation report since it was used to impeach Dr. Kinsora, Defendant's mitigation expert. Defendant's Supplemental Brief, Oct. 12, 2009, 37 – 39. The State is slightly confused regarding the exact nature of Defendant's argument because it appears from Defendant's Petition that he believes his counsel voluntarily provided the State with a report that they could have easily withheld. However, the State was provided Tina Francis' mitigation report from defense counsel at the direction of the district court. See Reporter's Transcript of Trial by Jury, Volume XI, May 3, 2005, 17.

Before Dr. Kinsora testified, the State objected to several aspects of his proposed testimony. Thus, the district court conducted a brief hearing and voir dire examination of Dr. Kinsora outside the presence of the jury. Reporter's Transcript of Trial by Jury, Volume XI, May 3, 2005, 6 – 28. During this voir dire, the State questioned Dr. Kinsora regarding his basis of knowledge and what he relied upon in order to come to his conclusions about

Defendant and his neuropsychological state. Id. When asked what he relied upon in forming his expert opinion, Dr. Kinsora stated:

> All right. **I derived that, I believe, from a report put together by a woman named Tina** – I don't remember her last name. She's a mitigation specialist who went and interviewed the familes.
> The State: She was a mitigation expert hired by the defense?
> Dr. Kinsora: I believe so.
> The State: **And you relied upon her report, and in fact, you've included that information in your presentation – some of that information**?
> Dr. Kinsora: Some of that information that she derived from family interviews…
>
> State: **Is it fair to say, Dr. Kinsora, some of the other statements pertaining to the defendant specifically came from their mitigation expert**?
> Dr. Kinsora: Some of them did. Some of them came out of testimony. I have transcripts of what appears to be testimony from the original trial that a lot of those details came out of.
> Reporter's Transcript of Trial by Jury, Volume XI, May 3, 2005, 16 – 18.

During the State's voir dire of Dr. Kinsora, the State and the court engaged in the following discussion:

> State: **Judge, we would request copies of those reports from her mitigation expert. We have not been provided with that, and he's clearly relied on that in providing this presentation to the jury.**
> Court: All right.
> Where is the report?
> Defense Counsel: I happen to have one right handy, your Honor.
> Court: **Give him a copy of it.**
> State: Thank you, Judge.
> Id.

The record is clear that the State was never provided a copy of Tina Francis' mitigation report until moments before Dr. Kinsora testified at trial and the only reason the State was provided a copy at that point was the court ordered defense counsel to turn it over. Id. Thus, the State is unsure exactly what Defendant contends was ineffective about his counsel's performance; unless, Defendant feels that his counsel should have refused to comply with the district court's order. However, if Defendant feels that his counsel was ineffective for failing to refuse to comply with the court's declaration that the mitigation report be turned over, Defendant has failed to illustrate under what grounds defense counsel would have been justified in refusing to comply.

It appears that Defendant's citation to Binegar v. Eighth Judicial District Court, 112 Nev. 544, 551-52, 912 P.2d 889, 894 (1996), is the basis for which Defendant felt his

counsel should have refused to comply with the court's order. However, Defendant's assertion that Tina Francis' mitigation report was turned over pursuant to the unconstitutional version of NRS 174.235(2) is misplaced. Although Tina Francis was a non-testifying expert, her report was not turned over pursuant to "reciprocal discovery;" rather, a copy of the mitigation report was provided to the State pursuant to NRS 50.305 because Dr. Kinsora unequivocally stated that he relied on this report as the underlying basis for some of his opinions. NRS 50.305, *Disclosure of facts, data underlying expert opinion*, reads in pertinent part:

> The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, **unless the judge requires otherwise.**
> **The expert may in any event be required to disclose the underlying facts or data on cross-examination.**
> (Emphasis added).

As illustrated above, Dr. Kinsora relied on Tina Francis' mitigation report as the underlying basis for a good deal of his facts and data. Thus, the report, which would constitute underlying facts and data, was the proper subject of cross-examination under NRS 50.305. See also Singleton v. State, 90 Nev. 216, 522 P.2d 1221 (1974). Accordingly, Defendant's attorney would have had no basis to refuse the court's instruction to turn of the mitigation report. Because Defendant's counsel was simply complying with a valid court order, compliance with the court's declaration to turn over the report cannot be said to be unreasonable or deficient under Strickland.

B. Appellate counsel's alleged ineffectiveness.

Defendant's argument that his appellate counsel was ineffective for failing to raise this issue provides no elaboration other than to state, "as it was objected to during trial." Defendant's Supplemental Brief, Oct. 12, 2009, 37 – 39. The State submits this claim is the type of "bare" and "naked" allegation that is not sufficient for post-conviction relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). However, the State will attempt to respond to Defendant's claim for relief as best as possible.

For the reasons stated in the previous section, the district court properly determined that Tina Francis' mitigation report was much of the basis for Dr. Kinsora's expert opinion;

thus, the report was disclosed to the State.

During cross-examination of Dr. Kinsora, the State asked: "This was something that you relied upon in presenting the information you have to the jury." Reporter's Transcript of Trial by Jury, Volume XI, May 3, 2005, 112. Dr. Kinsora responded, "I relied on partly, yes." Id. Thereafter, the State proceeded to cross-examine Dr. Kinsora regarding aspects of the mitigation report. Reporter's Transcript of Trial by Jury, Volume XI, May 3, 2005, 110 – 132. It is a fundamental principle in Nevada jurisprudence to allow an opposing party to explore and challenge through cross- examination the basis of an expert witness's opinion. Blake v. State, 121 Nev. 779, 790, 121 P.3d 567, 574 (2005). Thus, on cross examination, it is competent to call out anything to modify or rebut the conclusion or inference resulting from the facts stated by the witness on his or her direct examination. Singleton v. State, 90 Nev. 216, 219, 522 P.2d 1221, 1222-23 (1974). The credibility of a source used by an expert witness in arriving at an opinion is an underlying fact properly pursued in cross examination. Id. Accordingly, there is no reasonable basis for which appellate counsel could have argued that the district court abused its discretion when instructing defense counsel to turn over the mitigation report. Defendant cannot show that his counsel was deficient, nor can he show that he was prejudiced in anyway by his counsel's failure to raise this argument on appeal.

Lastly, if the basis of Defendant's claim against his appellate counsel is that he should have argued that the district court permitted the State to improperly impeach Dr. Kinsora with the mitigation report, the State submits that scope of the cross-examination was entirely appropriate. A review of the record shows that Dr. Kinsora was questioned regarding instances and opinions contained within the report. Reporter's Transcript of Trial by Jury, Volume XI, May 3, 2005, 110 – 132. However, there came a point during cross-examination when the State asked Dr. Kinsora if Defendant provided Tina Francis with certain information. Reporter's Transcript of Trial by Jury, Volume XI, May 3, 2005, 126 – 130. Although Tina Francis' report contained notations as to who provided her certain pieces of information, defense counsel objected to the State's question because Dr. Kinsora could not know if Defendant provided Tina Francis information because he was not present at the time

of the interview. Id. The district court sustained defense counsel's objection to the State's question and admonished the State to impeach Dr. Kinsora appropriately. Id. Because the district court sustained defense counsel's objection there was nothing for appellate counsel to raise on appeal. Accordingly, appellate counsel cannot be deemed ineffective for failing to argue about a defense objection that was sustained. Additionally, Defendant cannot show that he was prejudiced because the district court limited the State's cross-examination upon appropriate objection.

VII. DEFENDANT CLAIMS THAT HIS TRIAL COUNSELORS WERE INEFFECTIVE FOR DISAGREEING IN FRONT OF THE JURY.

Defendant asserts that during closing argument, "defense counsel argued in contradiction to each other." Defendant's Supplemental Brief, Oct. 12, 2009, 39 – 40. Defendant highlights a passage from each of his counselors closing argument and contends they were ineffective for making such contradictory arguments and "disagreeing" in front of the jury. Defendant has carefully excerpted several lines and phrases from his counselors' arguments and juxtaposed them in such a manner that appears to indicate that they were in disagreement over a key issue. However, in excerpting just a few paragraphs Defendant has failed to demonstrate the true intent and motive behind the arguments presented by his counsel.

Mr. Bret Whipple was Defendant's first counselor to give a closing statement in support of Defendant's case for mitigation. Reporter's Transcript of Trial by Jury, Volume XII, May 4, 2005, 40 – 65. Mr. Whipple cleverly began his argument by recounting Mr. Jim Esten's testimony concerning the life Defendant currently lives in Ely State Prison. Id. Mr. Whipple framed Mr. Esten's testimony in such a way as to illustrate to the jury that Defendant is already suffering a bad fate. Mr. Whipple illustrated that Defendant is already being punished and being held accountable for his crimes: Defendant spends 23 of 24 hours a day in a miniature cell; Defendant is only exposed to four gray walls and a concrete ceiling; he has lost the ability to control any decision in life other than when to sleep and when to go to the bathroom; he is strip-searched if he leaves his room; he is allowed a 15 minute shower three times a week and one 15 minute phone call; and Defendant will spend

the rest of his life in a state of sensory deprivation that is devoid of human companionship or interaction. Id.

Additionally, Mr. Whipple explained another benefit of Mr. Esten's testimony of Defendant's life in prison. Mr. Whipple stated:

> I also brought Mr. Esten in here for a very important reason, and that is to show you that there are no drugs in prison. We know for a fact that those individuals, that Mr. Johnson and the other individuals were simply loaded on drugs. There are no drugs in prison. I spoke to you earlier about what is the similarity, what is the connection between our client and some of the four young men, and it's drugs and youth. You know, I don't know how many of you have ever been under the influence, but when you're on drugs, you make choices that you wouldn't make normally. Donte Johnson and Todd Armstrong told you he was loaded on drugs. He was loaded on drugs when these homicides occurred, and in prison, there are no drugs. You saw the way they searched the inmates as they come and go, there are no drugs in prison. That's another reason that society is protected. These were mind-altering drugs. I mean, you can imagine, those of you who drink alcohol and felt its affect by yourself, how that affects you ability to make choices. The drugs that Mr. Johnson was on, those are mind-altering drugs, and those drugs are not in prison, and that is another way why we in society are protected, and that's why I brought Mr. Esten in here to talk to you. Reporter's Transcript of Trial by Jury, Volume XII, May 4, 2005, 47 – 48.

Mr. Whipple's argument about Mr. Esten's testimony was an attempt to provide the jury with an extra level of security by reminding them that Defendant committed his horrific crimes while under the influence of mind-altering drugs that he would no longer have access to. Mr Whipple also demonstrated Defendant and the victims were youthful and under the influence of drugs: a deadly combination that can not longer occur. While Mr. Whipple clearly expressed that Mr. Esten testified that there were no drug in prison, that was clearly not the primary purpose for which Mr. Esten testified. The primary purpose was to show that Defendant currently lives a life devoid of enjoyment and rights. Mr. Whipple's closing argument was intended to convince the jury that a death sentence was not required because (1) Defendant was already suffering a horrible fate and (2) society is protected because Defendant will not be able to reproduce the harm he once caused.

Mr. Whipple's closing argument was centered on allowing the jury to feel comfortable and justified in returning a verdict of less than death. Mr. Whipple did not argue a lot of mitigation evidence to the jury; rather, he provided the jury with several "excuses" (for lack of a better word) to take comfort in returning the verdict he desired.

Obviously, a jury faced with determining the fate of a man who has taken five[6] people from this earth needs to have some justification for why they should continue to let a man such as Defendant live. Mr. Whipple provided the jury the best possible "excuses" he could.

However, once Mr. Whipple concluded his closing argument, Ms. Alzora Jackson began her argument to the jury which focused more on mitigating circumstances and rebutting the State's more powerful arguments. Without question the State's most powerful rebuttal to the defense's case in favor of a life sentence was that Defendant remains a dangerous threat to society. Defense counsel could do nothing to dispute that Defendant has taken the lives of five individuals. However, defense counsel had to find a way to dispute the State's powerful argument that Defendant was a threat while alive and in prison.

The State introduced powerful evidence that prison guard, Officer Gonzalez, watched Defendant and another inmate attempt to murder Oscar Irias by throwing him off a prison balcony. The events surrounding the attempt murder of Oscar Irias were subject to a great deal of controversy during this trial. Essentially, the State's contention that Defendant was involved in attempting to murder Irias, by throwing him off a balcony, was primarily based upon a prison guard's eyewitness testimony. Therefore, if defense counsel could impeach the credibility of the prison guard's testimony then the jury would once again feel comfortable with the belief that Defendant was not a danger to future lives while he is in prison. Accordingly, Ms. Jackson made the only rebuttal argument should could:

> **Because that incident is the one thing that they point to and say, you see, he cannot be safely housed**...You know, we don't want to believe that guards do things that are wrong, but you know what, there's one thing my learned co-counsel said that I beg to differ; he said there are no drugs in prison. I bed to differ. And you know how they get in prison? The guards. You know how often do we pick up a paper and see where guards have brought drugs into prisons? Inmates can't get them in there. **You know, they're human beings and they make mistakes just like anybody else**. Reporter's Transcript of Trial by Jury, Volume XII, May 4, 2005, 72 – 73.

Once Ms. Jackson had dented the jury's impression that prison guards are always stalwart and truthful, she begins to attack the credibility of Officer Gonzalez. Ms. Jackson

---

[6] The State's reference to Defendant taking five lives includes the four victims in this case and Derrick Simpson. The State was precluded by the district court from introducing evidence (that was admitted at the 2000 penalty hearing) regarding Defendant's involvement in the homicide of a sixth individual.

says that even though Officer Gonzalez seems like a "decent enough young man" he was a new recruit and was probably not where he was suppose to be when Irias was thrown from a balcony so he probably lied about what he saw. Id. Thereafter, Ms. Jackson continues to dispute Officer Gonzalez's credibility by stating lines such as the following:

> Well, why would young Officer Gonzalez say that he saw it? Well, you know, he's broke protocol. He broke protocol. I don't know if it was his idea – **back to my idea of [correctional officers] who are less than perfect**... **I know we don't like to think that guards do things that are wrong and we don't like to come into court and say we have rotten guards**... You know, God help us, we're all flawed, and if somebody did that, it was wrong. But doesn't that give you something to ponder... What we're dealing with here is horrific. **You don't need to come in here and lie on my client**. It's frustrating... **You don't have to find Gonzalez is a bad guy to find out that he is a liar**, and maybe he told this story at first, you know, maybe he told this story because he was not where he was supposed to be pursuant to protocol and he was scared because he's got a family and he wants his job like anybody else, and then once he told the story – you know how it is with that, you kind of have to stick to it. Reporter's Transcript of Trial by Jury, Volume XII, May 4, 2005, 72 – 79.

As illustrated by the entirety of Ms. Jackson's argument, her point in saying that prison guards sneak drugs into prisons was an attempt to get the jury to soften the common perception that anyone in a uniform is a more reliable witness. Ms. Jackson argument was not contradictory to Mr. Whipple's in anyway. Ms. Jackson was not attempting to cause the jury to think that Defendant would be able to get his hands on mind-altering drugs and recreate danger for future lives. Rather, Ms. Jackson was attempting to rebut the State's contention that Defendant posed a future threat to human life; thus, the jury should make sure he never harms another person by giving him the death sentence.

After viewing the arguments in totality and understanding the purposes behind both defense counselors' arguments, it is easy to see that the counselors were not disagreeing with one another. Instead, the counselors were piggybacking off one another to produce the best possible chance for the jury to return a verdict less than death. The State submits that the closing arguments were not in disagreement with one another; thus, defense counselors did not act objectively unreasonable in anyway. Additionally, even if this court finds that Defendant's counsel was unreasonable for the word choice during closing argument, Defendant cannot possibly show that but for this one out-of-context statement, the result of

the penalty proceeding would have been different. The overwhelming evidence of Defendant's horrific acts, lengthy criminal history, and the aggravating circumstance of four murders could not have been overcome if his counselors had not made this one specific statement during closing argument. The State submits the evidence in favor of returning a death sentence as opposed to a life sentence was not even close. Absent this specific closing argument, the jury's verdict would not have changed.

Lastly, Defendant closes this argument with the bare allegation that appellate counsel was ineffective for failing to raise this issue on appeal: this is a naked allegation that is not sufficient to warrant post-conviction relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). The State is unsure of what possible argument appellate counsel could have raised regarding a defense counsel's closing argument. Inasmuch as Defendant contends that his appellate counsel should have raise the issue of ineffective assistance of counsel on direct appeal, such a claim is not proper for a direct appeal. See Johnson v. State, 117 Nev. 153, 160-61, 17 P.3d 1008, 1013 (2001). Defendant cannot show that his counsel was deficient for failing to raise a claim that is typically not appropriate on appeal. Also, Defendant cannot show that there is any reason to believe that the Nevada Supreme Court would have departed from that policy; as such, he cannot show that he has suffered any prejudice.

VIII. DEFENDANT CLAIMS HIS COUNSEL WAS INEFFECTIVE FOR REFERRING TO THE VICTIMS AS KID/KIDS.

Defendant contends that his counsel was ineffective for referring to the victims as "kids." Defendant's Supplemental Brief, Oct. 12, 2009, 41 – 42. Under Strickland, counsel is only deemed ineffective when his actions are considered objectively unreasonable. Here, from the outset of trial, defense counsel recognized that the age of the victims was a sensitive topic. Accordingly, defense counsel filed a motion in limine to prevent the State from referring to the victims as "kids." The goal of this motion was to take a preemptive measure to prevent the State from tugging on the heartstrings of the jury.

As the State's final rebuttal argument of the penalty phase approached, defense counsel once again knew that the State would use the age of the victims as a tactic to

infuriate the jury. Thus in closing argument the defense once again anticipated the State's actions and rendered a preemptive strike. Defense counsel, knowing that the State would have the benefit of speaking last, warned the jury that the State was going to phrase their closing argument in such a way as to make the jury want to "kill him."

The specific argument that Defendant contends made his counsel ineffective is the following:

> Now I'm going to tell you how the State is going to get you in a mode. I want to comment on nerve topics, on some of the things they said, because the way that they're going to get you to be prepared to take the life of another person is not to think about the high road...they're going to get you to think about the terrible, horrendous things that happened. Okay? That's how they're going to prep you...That's why when they start talking about Niagara Falls and joking and laughing, that's why they say that. Does it really matter if Donte Johnson laughed or not after one of these kids are killed? Does it make it any worse? The poor kid is dead...The reason they say these things are to get you in a mode to dehumanize my client, to kill him. Reporter's Transcript of Trial by Jury, Volume XII, May 4, 2005, 54.

Defendant asserts that his counsel's reference to the victims as "kids" was ineffective, especially considering the fact that defense counsel filed a motion in limine to preclude the State from referring to the victims as "kids." The State contends that while a cursory review of defense counsel's word choice might seem to indicate that he was deficient for using the term "kids," the context in which it was used makes the word choice appropriate.

Defense counsel used the term "kids" in closing argument of the penalty phase when referring to the victims only when he was explaining to the jury the way the State was going to touch on their "nerve topics." "Kids" was used as an illustration to show how the State was going to infuriate the jury in an attempt to put the jury in a "mode" to return a death sentence. Defendant asserts that his counsel was deficient for using the precise word that he sought to exclude; however, counsel's word choice in this instance was in-keeping with the spirit behind the motion in limine: precluding the State from subtly "tugging at the jurors' heart strings" throughout the trial. It is indisputable that the age of the victims was a "nerve topic" that the State would easily exploit. Thus, defense counsel effectively preempted the State's imminent argument and achieved the purpose behind the motion, which was to prevent the State from inflaming the jury by characterizing the victims age.

Even assuming this court finds defense counsel's tactic to be objectively unreasonable, Defendant cannot show that he was prejudiced by his counsel's word choice. Regardless of the word choice used to characterize the four people Defendant shot in the back of the head, the fact remains that those four people were 17, 19, 20 and 20 years old. The jury was aware of the victims' ages. Moreover, it was inevitable that the jury would consider and weigh the fact that by contemporary standards 17 to 20 year old males are consider rather young and should have had a great deal of life yet to live. Defense counsel's use of the term (especially in the context with which it was used) did not enlighten the jury of a fact that they were not already aware.

Lastly, on direct appeal, the Nevada Supreme Court already considered whether the Defendant was prejudiced by the State's references to the victims as "boys" or "kids." The Supreme Court found that although the State violated the pre-trial order, "The meaning of the term 'boys' or 'kids' is relative in our society depending on the context of its use and the terms do not inappropriately describe the victims in this case...we conclude that the State's handful of references to them as 'boys' or 'kids' **did not prejudice Johnson**. Johnson v. State, 122 Nev. 1344, 1356, 148 P.3d 767, 776 (2006). Similarly, Defendant cannot now show prejudice from his counsel's word choice and his claim must fail.

IX. DEFENDANT CLAIMS THAT HIS COUNSEL WAS INEFFECTIVE FOR SUCCESSFULLY MOTIONING THE COURT FOR A BIFURCATED PENALTY HEARING.

Defendant alleges that his counsel was ineffective for successfully bifurcating his penalty hearing. Defendant's Supplemental Brief, Oct. 12, 2009, 42 – 45. The fact that Defendant contends that he was "severely prejudiced" by his counsel's petition to bifurcate his trial is utterly disingenuous considering the substantial benefits Defendant received by his counsel's repeated efforts to petition the trial court to allow Defendant a bifurcated hearing.

On April 27, 2004, Defendant filed a Motion to Bifurcate Penalty Phase; however, the trial court denied the motion on May 3, 2004. Thereafter, on April 12, 2005, defense counsel filed a Motion to Reconsider Request to Bifurcate Penalty Phase. On April 18,

2005, the district court granted Defendant's Motion to Bifurcate. The reasons underlying defense counsel's desire to bifurcate Defendant's penalty phase are clear from a review of his motions. Defense counsel claimed:

> Although Defendant believes that it is unconstitutional and a violation of Nevada statute to introduce 'character,' 'bad act' or other evidence suggesting that he is a bad person that is not relevant to the statutory aggravating circumstances, and although he has opposed such evidence in his opposition to Notice State's evidence in support of aggravating circumstances, he is aware that such evidence is often admitted during the penalty phase of a capital trial. See, Allen v. State, 99 Nev. 485, 488, 665 P.2d 238, 240 (1983) (citing NRS 175.552(3)). In the event that such evidence is permitted to be introduced by the prosecution in this case it must not be heard by the jurors prior to the time that they determine whether Mr. Johnson is eligible for the death penalty. Defendant's Motion to Bifurcate Penalty Phase, April 27, 2004, 3.

The basis for Defendant's desire to bifurcate was so the jury did not hear the devastating evidence that these four boys were not the first four people that Defendant had put a gun to the head of and pulled the trigger. No one can fault Defendant for not wanting the jury to see video of Defendant blowing the face off of Derrick Simpson and adding a bullet through his spine for good measure, before the jury weighed the mitigating and aggravating circumstances. Understandably, Defendant would want to see if the jury could independently weigh the mitigating and aggravating circumstances before hearing that he was an insatiable gang member that committed sophisticated armed robberies during his teenage years. The bifurcated penalty hearing allowed Defendant the possibility that his penalty phase would end before the jury heard that while in prison Defendant and another inmate launched Oscar Irias off a prison balcony. Also, Defendant was able to have his jury consider his mitigating factors without hearing victim impact evidence from four families that lost boys at such a young age.

For the reasons listed above, defense counsel's ability to bifurcate Defendant's penalty hearing was nothing short of fantastic. It should also be noted that Defendant argued on direct appeal from his 2000 penalty phase that the district court improperly denied his request to bifurcate. Johnson v. State, 118 Nev. 787, 806, 59 P.3d 450, 462 (2002). Defense counsel's petition to bifurcate Defendant's penalty hearing can in no way be consider objectively unreasonable. When analyzing defense counsel's decision to bifurcate

this 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. ***"[R]elying on "the harsh light of hindsight" to cast doubt on a trial" that took place many years ago "is precisely what Strickland and AEDPA seek to prevent."*** Harrington v. Richter, ___ S.Ct. ___, 2011 WL 148587, January 19, 2011 (No. 09-587) (citing Bell v. Cone , 535 U.S. 685, 122 S.Ct. 1843 (2002))(emphasis added). Moreover, "an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for remote possibilities." Harrington, --U.S. at --.

Even assuming this Court finds that defense counsel's petition to bifurcate Defendant's penalty hearing fell below an objective standard of reasonableness, Defendant must still demonstrate prejudice under Strickland , which asks whether it is "reasonably likely" the verdict would have been different, 466 U. S., at 696, ***not whether a court can be certain counsel's performance had no effect on the outcome or that reasonable doubt might have been established had counsel acted differently. There must be a substantial likelihood of a different result.*** Harrington, --U.S. at -- (emphasis added).

Defendant cannot demonstrate that absent the bifurcation there is a substantial likelihood of a different result. First, Defendant's contention that had the hearing not been bifurcated "three of seven justices would have determined that the disciplinary reports admitted were testimonial hearsay and required confrontation" is immaterial. Nevada law is clear that the right to confrontation does not apply to evidence admitted in a capital penalty hearing. Summers v. State, 122 Nev. 1326, 148 P.3d 778 (2006). Thus, Defendant's confrontation claim was unaffected by the bifurcation of his penalty hearing.

Next, Defendant makes the bare and naked allegation that defense counsel was ineffective for bifurcating because the jury was not instructed on reasonable doubt before deliberating for the selection portion of the penalty phase. Notably, Defendant does not indicate what "reasonable doubt" the jury should have been instructed concerning. This was the selection phase of the trial; thus, there is no such burden while selecting which sentence Defendant will receive. Therefore, Defendant's bare and unsubstantiated claim regarding

reasonable doubt and bifurcation must be dismissed.

Also, Defendant argues that had the penalty hearing not been bifurcated the State would not have been able to give "two opening arguments, two closing arguments, and two rebuttal closing arguments. Whereas, if the case was not bifurcated, the prosecution would make one opening argument, one closing argument, and a rebuttal argument." The State is wholly unaware of how this argument translates to counsel's ineffectiveness. Upon bifurcating, the State got additional arguments as well as the defense. Defendant cannot meet either prong of Strickland with regard to this assertion.

Lastly, Defendant contends that because the penalty hearing was bifurcated the State was able to inform the jury that there may be a second hearing with "additional evidence about Donte Johnson's upbringing." Reporter's Transcript of Trial by Jury, Volume V – A.M., April 25, 2005, 24. Defense counsel cannot be deemed ineffective for bifurcating the penalty hearing because there may be a situation were the State makes an allegedly objectionable argument or hint at evidence to come. Additionally, the court sustained defense counsel's objection to the State's argument. Reporter's Transcript of Trial by Jury, Volume VII – P.M., April 27, 2005, 80.

Defendant claims that his appellate counsel was ineffective for failing to challenge the prosecutor's statement on direct appeal. Even assuming appellate counsel was deficient for failing to assert this claim, Defendant suffered no prejudice. The jury was already very aware that there could be two phases of this penalty hearing. During voir dire selection two phases were discussed and the jury was informed that there will be facts in evidence presented in both phases of the proceedings. So, even assuming that the State's argument was improper there is no way it influenced the jury.

For all the above reasons, Defendant's claim regarding the bifurcation of his trial must be denied.

X. DEFENDANT CLAIMS THAT HIS COUNSEL WAS INEFFECTIVE FOR FAILING TO OFFER A MITIGATION INSTRUCTION.

Defendant asserts that his trial counsel and appellate counsel were ineffective for not challenging a jury instruction that has been previously approved by the Nevada Supreme

Court as an accurate instruction. Defendant's Supplemental Brief, Oct. 12, 2009, 45 – 46. Defendant takes issue with Jury instruction #3, which stated:

> The jury must find the existence of each aggravating circumstance, if any, unanimously and beyond a reasonable doubt. The jurors need not find mitigating circumstances unanimously. Reporter's Transcript of Trial by Jury, Volume VII – P.M., April 27, 2005, 11.

The basis of Defendant's instant complaint is that he contends his counsel was ineffective for failing to offer an instruction or object to the above instruction because his jury should have been advised that a mitigating circumstance can be found if any one juror believes that it exists. While asserting that his trial and appellate counsel were ineffective for failing to challenge this jury instruction, Defendant acknowledges that the Nevada Supreme Court has already considered this issue and found this instruction to be proper in Jimenez v. State, 112 Nev. 610, 918 P.2d 687 (1996). Defendant cannot show that his counsel's representation was objectively unreasonable for not challenging an instruction that the Nevada Supreme court held was appropriate, as follows:

> there was no basis in the instructions for jurors to believe that their own individual views on the existence and nature of mitigating circumstances could not be applied by each of them in weighing the balance between aggravating circumstances and mitigating circumstances. Unanimity is required only in the verdict concerning the presence of aggravating circumstances and the fact that the mitigating circumstances, whatever they are, are not sufficient to outweigh the aggravating circumstances. We therefore conclude that there is no basis for determining that the jury, acting reasonably, could have believed that mitigating evidence could not be considered in its deliberations unless unanimously found to exist. Id. at 625.

Defendant cannot demonstrate that he was prejudiced by his counsel's failure to challenge an instruction that was an accurate statement of the law. Defendant cannot offer any reason why had his counsel challenged the accurate instruction the district court could have overruled Nevada Supreme Court precedent. Thus, this claim must be denied.

Additionally, Defendant's jury was completely aware that the mitigating circumstances did not need to be found unanimously considering defense counsel explained the following to the jury:

> **If one of you, one of you, one of you, one of you, one of you find that any** – and we have in Instruction 10, we listed some – we didn't want to offend you because the law says that whatever you find – it would be that boy's smile, Allen; it could be wanting to let Miss Edwards know that you're not going to kill him; it could just be a feeling. Reporter's Transcript of Trial by Jury, Volume VII – P.M., April 27, 2005, 78.

For all the reasons described above, Defendant's claim must fail.

XI. DEFENDANT CLAIMS HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM REGARDING THE STATE'S IMPEACHMENT OF A DEFENSE WITNESS.

Defendant claims that his appellate counsel was ineffective for failing to raise the issue of the State's improper questioning of a defense witness. Defendant's Supplemental Brief, Oct. 12, 2009, 46 – 48. Moises Zamora was called as a mitigation witness for the defense. Zamora testified regarding his experience joining a gang and living a gang lifestyle in South Central Los Angeles. Reporter's Transcript of Trial by Jury, Volume IX, April 29, 2005, 171 – 187. On direct, Zamora stated that his experience growing up was similar to Defendant's except he was a "Crip" and Defendant was a "Blood." Id. Also, Zamora testified about a time when the police arrested him because he assaulted a female. Id. Zamora then explained how he was able to leave his gang lifestyle behind him. Id.

During cross-examination, the State asked Zamora questions about his experience as a member of the gang "67 Gangster Crips" and his "street name," M-O. Reporter's Transcript of Trial by Jury, Volume IX, April 29, 2005, 188 – 192. The State began to ask Zamora about the last time he considered himself to be "banging" (actively living the gang lifestyle). Id. Zamora had indicated previously, that the last time he was "banging" was the last time he was arrested or put in custody. Id. The cross-examination continued as follows:

State: You're not a convicted felon?
Zamora: No.
State: You don't have any felony conviction or misdemeanor convictions?
Zamora: I have misdemeanor convictions.
Defense Counsel: Your Honor, that's not a proper question for impeachment account.
The Court: **That's correct.**
The State: I'm not trying to impeach him.
The Court: **If you asked him the question, so that's correct. Sustained. The jury is ordered to disregard it.**
The State: My reason for asking is the question is not –
The Court: It's already sustained.
The State: If the purpose is not to impeach, your Honor –
The Court: It's the same effect. It's sustained. I'm not going to argue with you. I already told you. All right?
The State: Were you forced to do any criminal activity in that gang?
Zamora: I think we all were.
Id.

As a review of the record shows, the district court did not commit any error. The

district court immediately sustained defense counsel's objection to the State's question. Importantly, contrary to Defendant's assertion in his Petition, the district court immediately admonished the jury to disregard the comment. Defendant's Petition details the standards for proper impeachment pursuant to NRS 50. 095. Defendant correctly asserts that the State may not impeach a witness with a misdemeanor conviction. However, what Defendant fails to realize is the district court appropriately applied NRS 50.095, sustained the objection, and offered an immediate admonishment.

Appellate counsel's failure to raise this claim cannot be deemed objectively unreasonable because the district court did not commit error. In fact, the district court's immediate instruction to disregard was the appropriate remedy to cure any prejudice the Defendant might have suffered from the State's improper question. The Nevada Supreme Court has stated countless times that it presumes that juries will follow jury instructions. See, e.g., Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006). Instructions from the judge have been found to cure improper remarks when cured by an immediate and specific admonition from the judge. See Allen v. State, 99 Nev. 485, 490, 665 P.2d 238 (1983); Owens v. State, 96 Nev. 880, 883, 620 P.2d 1236 (1980). Thus, Defendant cannot show that he suffered any prejudice as a result of his appellate counsel's failure to raise this claim on appeal.

Additionally, the State contends that Defendant suffered no prejudice during trial by the State's allegedly improper question. Zamora had already testified that he had been an active gang banger and the he was once arrested for assaulting a woman. Therefore, the fact that the State asked if he had any misdemeanor convictions could not have improperly influenced the jury's opinion of Zamora. In fact, the State submits that this question was not an attempt to impeach Zamora; rather, the question was designed to show that defense's mitigation witness that allegedly lived the same gang-banging lifestyle as Defendant did not even have a felony conviction. Thus, Zamora and Defendant's backgrounds and life experiences were not as similar as the defense wanted the jury to believe. The State was attempting to show that had Zamora been a convicted felon his testimony regarding his

comparable upbringing to Defendant would have been more credible. Accordingly, Defendant's claim must be denied because he cannot show that his appellate counsel was deficient, or that he suffered any prejudice as a result of his appellate counsel's failure to bring this claim.

XII. THE DEATH PENALTY IS CONSTITUTIONAL.

Defendant asserts various challenges to the constitutionality of the death penalty and Nevada's capital punishment scheme. Defendant's Supplemental Brief, Oct. 12, 2009, 48 – 60. The State submits that Defendant's claims concerning the constitutionality of the death penalty and Nevada's capital punishment scheme are inappropriately raised in the instant Petition for Writ of Habeas Corpus pursuant to NRS 34.810, which provides in pertinent part:

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

NRS 34.810(1)(b)(emphasis added)

The court further noted in Evans v. State, "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

Notwithstanding the State's contention that these arguments are inappropriately raised the State will briefly respond to each.

A. Defendant asserts that Nevada's Death Penalty scheme does narrow the class of persons eligible for the death penalty.

In Defendant's first sub-argument against the constitutionality of Nevada's capital punishment scheme, he argues that Nevada's scheme does not narrow the class of persons

eligible for the death penalty. Defendant's Supplemental Brief, Oct. 12, 2009, 48 – 49. Defendant asserts that Nevada law permits broad imposition of the death penalty for virtually all First-Degree Murders.

The Nevada Supreme Court has repeatedly concluded that Nevada's death penalty scheme sufficiently narrows the class of people eligible for the death penalty. See Thomas v. State, 122 Nev. at 1361, 1373, 148 P.3d 727, 735-36 (2006); Weber v. State, 121 Nev. 554, 585, 119 P.3d 107, 128 (2005); Leonard v. State, 117 Nev. 53, 82-83, 17 P.3d 397, 415-16 (2001); Middleton v. State, 114 Nev. 1089, 1116-17, 968 P.2d 296, 314-15 (1998).

The Nevada scheme has been held to properly serve its constitutional narrowing function on numerous occasions. See Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742 (1983); Servin v. State, 117 Nev. 775, 785-786, 32 P.3d 1277, 1285 (2001); Gallego v. State, 117 Nev. 348, 370-371, 23 P.3d 227, 242 (2001); see also Evans, 117 Nev. 609, 637, 28 P.3d 498, 517-518 (2001); Deutscher v. State, 95 Nev. 669, 676, 601 P.2d 407, 412 (1979).

In the current case, this Court's past decisions regarding the constitutionality of the Nevada scheme apply. Nevada's capital sentencing scheme sufficiently narrows the class of persons eligible.

B. Defendant asserts that the Death Penalty is Cruel and Unusual Punishment.

Defendant asserts that the death penalty is cruel and unusual punishment. Defendant's Supplemental Brief, Oct. 12, 2009, 49 – 52. The Nevada Supreme Court has held that the death penalty does not violate the prohibition against cruel and unusual punishment found in either the United States Constitution or the Nevada Constitution. See Bishop v. State, 95 Nev. 511, 517-18, 597 P.2d 273, 276-77 (1979).

The United States Supreme Court upheld the death penalty. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909 (1976). Additionally, the Nevada death penalty scheme has been repeatedly held to be constitutional and not cruel and/or unusual punishment under either the Nevada or United States constitutions. See, e.g., Colwell, 112 Nev. at 814-15, 919 P.2d at 408. This Court explained in Colwell:

> Finally, Colwell's counsel claims that the death penalty is cruel and unusual punishment in all circumstances in violation of the Eighth Amendment and the Nevada Constitution. Colwell's counsel concedes that the United States Supreme Court and this court have repeatedly upheld the general constitutionality of the death penalty under the Eighth Amendment. See, e.g., *Bishop*, 95 Nev. at 517-18, 597 P.2d at 276-77. Colwell's counsel merely desires to preserve his argument should this court change its mind. We are not so inclined. We note that this court has also held that the death penalty is not unconstitutional under the Nevada Constitution. *Id.* Accordingly, we conclude that Colwell's counsel's claim on this issue lacks merit.

Colwell v. State, 112 Nev. 807, 814-815, 919 P.2d 403, 408 (1996). The death penalty is constitutional. Defendant's claim must fail.

C. Defendant asserts that Nevada's Death Penalty scheme is unconstitutional because executive clemency is unavailable.

Defendant asserts that his sentence must be vacated because Nevada's death penalty scheme is unconstitutional for failing to have a "functioning clemency procedure." Defendant's Supplemental Brief, Oct. 12, 2009, 52 – 53.

The statutory procedures for administering a grant of clemency do not implicate a constitutionally protected interest. See Niergarth v. State, 105 Nev. 26, 28, 768 P.2d 882, 883 (1989); see generally Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 280-81 (1998) (noting that clemency is a matter of grace).

The U.S. Supreme Court has made it clear that there is no constitutional right to a clemency hearing. See Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 464, 101 S.Ct. 2460 (1981) ("Unlike probation, pardon and commutation decisions have not traditionally been the business of the courts; as such, they are rarely, if ever, appropriate subjects for judicial review.... [A]n inmate has no 'constitutional or inherent right' to commutation of his sentence."); see Joubert v. Nebraska Bd. of Pardons, 87 F.3d 966, 968 (8th Cir.1996) ("It is well-established that prisoners have no constitutional or fundamental right to clemency."), cert. denied, 518 U.S. 1035, 117 S.Ct. 1 (1996).

Nevada's clemency scheme was upheld in Colwell, 112 Nev. at 812. As this Court stated: "NRS 213.085 does not completely deny the opportunity for 'clemency,' as Colwell's counsel contends, but rather modifies and limits the power of commutation. Accordingly, Colwell's counsel's claim lacks merit." Id.

Furthermore, Defendant's argument lacks a logical step. Defendant's argument in essence is that Nevada's clemency laws and procedures must not be working because they are rarely exercised on behalf of defendants. Defendant has cited an effect, and has assumed a specific cause, but has failed to show a causal connection. Defendant's claim must fail.

D. Defendant claims that his sentence is invalid because Nevada's Captial Punishment System operates in an Arbitrary and Capricious Manner.

Defendant's claim that his sentence is invalid because Nevada's Capital Punishment system operates in an arbitrary and capricious manner is a mixture of the above arguments. Defendant's Supplemental Brief, Oct. 12, 2009, 53 – 58. As detailed above, Nevada's capital punishment system has been held to be constitutional. See, e.g., Colwell, 112 Nev. at 814-15, 919 P.2d at 408. Inasmuch as Defendant compares his sentence with the sentence of other individuals, the fact that *different* juries determined *different* sentences after hearing *different* evidence about *different* murders does not make the system arbitrary and capricious. Defendant's claim must fail.

Additionally, when considering Defendant's claim that his jury arbitrarily decided that he should be given a death sentence it should be noted that the Nevada Supreme Court concluded that "the murders he committed were unprovoked, vicious, and utterly senseless. We conclude that a sentence of death was not excessive." Johnson v. State, 122 Nev. 1344, 1359, 148 P.3d 767, 778 (2006).

E. Defendant claims that his sentence is invalid because the proceedings against him violated International Law.

Defendant claims that his conviction and death sentences are invalid because the proceedings against him violated international law. Defendant's Supplemental Brief, Oct. 12, 2009, 58 – 60.

The Nevada Supreme Court has rejected challenges to the constitutionality of the death penalty based on international law. see, eg., Servin v. State, 117 Nev. 775, 787-88, 32 P.3d 1277, 1285-86 (2001); accord Roper v. Simmons, 543 U.S. 551, 575 (2005). Defendant cites the International Covenant on Civil and Political Rights. In Servin, 117 Nev. at 785-786, the Nevada Supreme Court quotes a portion of the United States' reservation from that covenant:

> That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

(quoting 138 Cong.Rec. 8070 (1992); see also S.Exec.Rep. No. 23, 102d Cong., 2d Sess. 21-22 (1992)). Thus, the Nevada Supreme Court has upheld the death penalty in the face of international laws that defendant frequently cite.

DEFENDANT'S CLAIMS FROM HIS SECOND SUPPLEMENTAL BRIEF SHOULD BE DISMISSED BECAUSE THEY ARE PROCEDURALLY BARRED AND DEFENDANT CANNOT DEMONSTRATE GOOD CAUSE OR PREJUDICE.

Defendant's remaining claims are from his Second Supplemental Brief in Support of his Petition. As argued *supra*, the State submits that Defendant's claims of ineffective assistance of counsel regarding his 2000 trial counsel and appellate counsel from that trial are procedurally barred. Defendant's remittitur following his direct appeal was issued on January 14, 2003. Defendant cannot demonstrate good cause or prejudice for failing to bring these claims in a timely manner; accordingly, these claims should be dismissed. The State responds to the remaining issues only to the extent necessary to show that even if Defendant could show good cause for his delay in filing, his claims would still fail because he cannot make out a showing of prejudice.

XIII. DEFENDANT CLAIMS THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO APPEAL DEFENDANT'S JURY SELECTION PROCESS.

Defendant asserts that his appellate counsel was ineffective for failing to raise various claims contesting the constitutionality of his jury selection process. Defendant's Second Supplemental Brief, July 14, 2010, 6 – 21.

A. Defendant claims his appellate counsel was ineffective for failing to argue that his venire panel was unconstitutional.

Defendant asserts that his appellate counsel was ineffective for failing to argue that his venire panel had a less percentage of African Americans than a relevant cross section of the community. Defendant's Second Supplemental Brief, July 14, 2010, 6 – 8. Notably, throughout Defendant's instant argument he never alleges that there was any systematic

exclusion of African Americans. Rather, Defendant merely contends that if his appellate counsel had argued that there were three ostensible minority jurors in a jury venire of 80 then his result on appeal would have been different. Defendant has done nothing to even attempt to demonstrate that there was purposeful discrimination of African Americans.

Defendant cannot show that his appellate counsel was deficient for failing to raise this claim, nor can he show that he was prejudiced from his counsel's failure to raise this claim. In order to prove that appellate counsel's alleged error was prejudicial; the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132. Defendant cannot show that this issue would have succeeded on appeal because he has not even alleged that the system that selected Defendant's jury was not designed to select jurors from a fair cross section of the community. The Nevada Supreme Court recently noted that:

> [t]he Sixth Amendment does not guarantee a jury or even a venire that is a perfect cross section of the community. Instead, the Sixth Amendment only requires that "venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.'" Thus, as long as the jury selection process is designed to select jurors from a fair cross section of the community, then random variations that produce venires without a specific class of persons or with an abundance of that class are permissible.

Williams v. State, 121 Nev. 934, 939-40, 125 P.3d 627, 631 (2005) (citations and footnotes omitted). The Court also noted that "[e]ven in a constitutional jury selection system, it is possible to draw venires containing no (0%) or one (2.5%) African-American in a forty-person venire. It is equally possible that the same venire could contain six (15%) to eight (20%) African-Americans." Id. at 941, 125 P.3d at 632. Juries need not "mirror the community and reflect the various distinctive groups in the population" as long as the juries are "drawn from a source ***fairly*** representative of the community." Taylor v. Louisiana, 419 U.S. 522, 537-8, 95 S.Ct. 692, 702 (1975). (emphasis added).

Because Defendant could not have shown that African Americans were systematically excluded this claim would not have succeeded on direct appeal. Accordingly, Defendant's appellate counsel cannot be deemed ineffective for failing to raise this claim.

B. Defendant claims that his appellate counsel was ineffective for failing to argue that the State unconstitutionally preempted a juror.

Defendant claims that his appellate counsel was ineffective for failing to appeal the district court's denial of defense counsel's Batson challenge on Juror Number 7. Defendant's Second Supplemental Brief, July 14, 2010, 8 – 11. When the State was questioned regarding why it preempted Juror Number 7, the State articulated several race-neutral reasons for excusing the juror. 8 ROA 1829 – 1832. While the State was questioning Juror Number 7, she sat with her hands crossed and the State had a sense that she had some disdain for even questioning her. During questioning the juror stated that it would be "difficult to pass judgment on the defendant." Id. When the juror was asked about her thought about holding people responsible for their action or choices, she said no comment on that. Id. The fact that she said that she had no comment on holding people responsible for their actions was a completely different answer than all the other prospective jurors. Id. Juror Number 7 also indicated that she has a stepson in jail and that she could sentence a person convicted of quadruple homicide to life with parole. Id. Additionally, the juror did not answer number 33 of the questionnaire, which asked her opinion of the death penalty. Id. The fact that she would not answer that question caused the State some concern. Id.

The district court did not find any of the above reasons for preempting Juror Number 7 to be pretext. Thus, defense counsel's Batson challenge was denied. Whether the State exhibited discriminatory intent is a determination of fact for the district court that the Nevada Supreme Court "accords great deference." Diomampo v. State, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036-37 (2008) (quoting Walker v. State, 113 Nev. 853, 867-68, 944 P.2d 762, 771-72 (1997). The Nevada Supreme Court will not reverse the district court's decision unless clearly erroneous.

Defendant has not provided any meritorious issue that his appellate counsel should have raised in challenging the State's neutral explanations. The reasons provided by the State were legitimate causes for concern. Defendant cannot show that his appellate counsel could have possibly succeeded in determining that the district court was clearly erroneous.

Accordingly, Defendant's appellate counsel was not ineffective for failing to raise this issue.

C. Defendant claims that his appellate counsel was ineffective for failing to argue that the State used peremptory challenges on Juror Morine and Juror Calvert.

Defendant's instant complaint is that the State used peremptory challenges to remove "life affirming jurors." Defendant's Second Supplemental Brief, July 14, 2010, 11 – 12. The underlying basis of Defendant's instant complaint is that his appellate counsel should have argued that the State used peremptory challenges on two jurors that would have been more likely to return verdicts of less than death. The State submits that this claim should be dismissed as moot.

The Supreme Court of Nevada holds that the "duty of every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it." NCAA v. University of Nevada, Reno, 97 Nev. 56, 57, 624 P.2d 10 (1981). Furthermore, "[c]ases presenting real controversies at the time of their institution may become moot by the happening of subsequent events." Id. at 58, at 11. When an action fails to present an actual controversy to the court, the action becomes moot and the court must deny the action. See Id.

The actual essence of Defendant's claim is that he was unhappy with the dismissal of jurors that may have been more likely to sentence him to less than death; this claim should be dismissed because the jury that he is complaining of is his 2000 jury. The jury that sentenced Defendant to his current death sentences was the 2005 jury; thus, any claim regarding the dismissal of "life affirming jurors" from the 2000 jury should be dismissed as it became moot when Defendant was given a new penalty hearing.

In the event that this court does not feel this claim is moot, Defendant's claim still fails. Notably, Defendant asserts no basis or law for which his appellate counsel could have used in challenging the State's preemption of Morine or Calvert. Defendant cannot show that he his appellate counsel was objectively unreasonable for failing to raise this issue on appeal, nor can Defendant show that he suffered any prejudice.

Some of the more pertinent sentiments from the State's voir dire of Calvert are as follows:

> State: Okay. You also wrote that you would never vote for the death penalty. Is that true?
> Calvert: Yes.
> State: Okay. Could you actually do it, could you vote for [the death penalty]?
> Calvert: No. No, I couldn't. I know the –
> 12 ROA 2838 – 2839.

Some of the more pertinent sentiment from the State's voir dire of Morine are as follows:

> Morine: I think I would find it difficult to make the judgment to put another human being to death...I have a problem with deciding that another human being should cease going on living, regardless of how terrible an act that person might have done. 11 ROA 2666 – 2672.

Defendant fails to show that his appellate counsel was ineffective for failing to raise an argument regarding the State's use of peremptory challenges on Morine or Calvert. This claim is wholly without merit.

D. <u>Defendant claims that his appellate counsel was ineffective for failing to challenge the district court's denial of his challenges for cause on three potential jurors.</u>

Defendant challenged three jurors for caused based on Defendant's belief that these three jurors would not consider all four forms of punishment. Defendant's contends that his appellate counsel was ineffective for failing to argue that the district court improperly denied the defenses challenges for cause. <u>Defendant's Second Supplemental Brief</u>, July 14, 2010, 12 – 21.

As argued above, this claim should be dismissed as moot. The underlying basis of this claim is that Defendant had to use peremptory challenges on jurors that the district court denied to dismiss for cause. Defendant felt that these jurors were more likely to consider the death penalty than other forms of punishment. Since the 2005 jury, not the 2000 jury, is the one that sentenced Defendant to death the instant claim should be dismissed as moot. <u>NCAA v. University of Nevada, Reno</u>, 97 Nev. 56, 57, 624 P.2d 10 (1981). Defendant's complaints about these potential jurors have nothing to do with their inability to be impartial in determining guilt; rather, Defendant felt that they would not have fairly considered all forms of punishment. In addition to this issue being moot at present, the State contends that

this issue was moot at the time Defendant's counsel appealed his 2000 conviction. A panel of three district court judges sentenced Defendant to death; thus, appellate counsel focused on successfully reversing the three district court judges' sentence rather than argue over prospective members of a jury that did not render a death sentence against Defendant.

In the event that this court does not find this claim moot, the claim still must fail. First, appellate counsel did not error in failing to raise this issue on appeal because the trial court did not error in denying Defendant's challenges for cause against Jurors Fink, Baker, or Shink. The quotations and excerpts that Defendant has provided are taken out of context and do not provide an adequate representation of the prospective jurors' feelings towards capital punishment.

Prospective Juror Fink indicated that he could consider leniency for someone who committed first degree murder, in fact, he stated that sometimes "life without may be the worst punishment." 11 ROA 2663 – 2666. Fink clearly indicated that his determination would depend "on the individual and their state of mind." Id.

Prospective Juror Baker indicated that somebody convicted of murder might deserve something less than the death penalty and could deserve a chance at getting out of prison at some point. 11 ROA 2687 – 2689.

Prospective Juror Shink indicated that he believed that a sentence of life in prison without parole was worse than a death sentence. 11 ROA 2788 – 12 ROA 2793. He also stated that he felt that 50 years should be the maximum punishment in prison for an offense. Id. Mr. Shink indicated that his determination on a possible death sentence would depend on the defense showing good cause and a consideration of the person's background, the way he grew up, and how he was raised. Id. He also stated that he would not automatically give the death penalty to someone convicted of multiple murders. Id. Defendant's assertion that Prospective Juror Shink wanted to pull numbers out of a barrel, similar to "Logan's Run," is a mischaracterization of Shink's attempt to explain his random suggestions about prison overcrowding, future deterrence of crime, and that money spent on prisoners could be better spent on society's youth. 12 ROA 2793 – 2798.

A trial court has broad discretion in its rulings on challenges for cause. Wainwright v. Witt, 469 U.S. 412, 428-29, 105 S.Ct. 844, 854-55, 83 L.Ed.2d 841 (1985). In Witt, the United States Supreme Court noted that the trial judge's "predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record. These are 'factual issues'...." Id. at 429, 105 S.Ct. at 854. The California Supreme Court has noted, "[o]n appeal, if the prospective juror's responses are equivocal, *i.e.*, capable of multiple inferences, or conflicting, the trial court's determination of that juror's state of mind is binding." Walker v. State, 113 Nev. 853, 865, 944 P.2d 762, 770 (1997) (quoting Livaditis, 9 Cal.Rptr.2d at 78, 831 P.2d at 303).

A review of the record shows that Defendant cannot demonstrate that his appellate counsel would have been successful in reversing the trial court's broad discretion in determining that these three prospective jurors' views on capital punishment would have prevented or substantially impaired the performance of their duties as jurors in accordance with the instructions and the oath. See Walker v. State, 113 Nev. 853, 866, 944 P.2d 762, 770 (1997).

Additionally, Defendant has failed to demonstrate prejudice from the trial court's denial of his challenges for cause because all three prospective jurors were peremptorily excused and Defendant cannot show that a seated juror was not fair and impartial. See Weber v. State, 121 Nev. 554, 581, 119 P.3d 107, 125 (2005). Defendant has not even attempted to allege that of the jurors who sat in judgment against him were not fair and impartial; thus, his claim warrants no relief. See Ross v. Oklahoma, 487 U.S. 81, 88-89, 108 S.Ct. 2273, (1988); Thompson v. State, 102 Nev. 348, 350, 721 P.2d 1290, 1291 (1986) ("[A]ppellant has not demonstrated that any other jurors proved unacceptable and would have been excused had an additional peremptory challenge been available.").

Lastly, although Defendant does not actually state that his appellate counsel was ineffective for failing to challenge the trial court's determination to sustain the State's challenges for cause for prospective jurors Davis and Grecco, Defendant continually implies the court's decision was wrong. This assertion is completely without merit. Both Davis and

Grecco unequivocally stated that they would not consider the death penalty as a form of punishment and they would under no circumstance check the box for a death sentence; thus, they were properly excused. See 12 ROA 2897 – 2903, 2941 – 2947.

Accordingly, all of Defendant's claims regarding his voir dire and the constitutionality of his jury selection process should be dismissed.

XIV. DEFENDANT CLAIMS THAT HIS TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO ARGUE THAT HIS CONVICTIONS FOR KIDNAPPING WERE INCIDENTAL TO HIS CONVICTIONS FOR ROBBERY.

Defendant argues that his counselors, both trial and appellate, were ineffective for not arguing that his Kidnapping charges should have been dismissed as contemporaneous and incidental to his Robbery charges. Defendant's Second Supplemental Brief, July 14, 2010, 21 – 23.

In support of Defendant's contention that his Kidnapping charges should have been dismissed as incidental to his Robbery charges, Defendant spends his entire argument merely citing other cases' holdings and facts. Notably, Defendant never once attempts to apply the facts of Defendant's case to case law in order to illustrate why this claim would have had any merit. The State submits that Defendant's instant claim is nothing more than a bare allegation that should be dismissed absent any factual assertion to why the claim has merit.

Notwithstanding, the State contends that neither Defendant's trial counsel, nor his appellate counsel were deficient for failing to raise this meritless argument. Defendant went into the house and duct tape the hands and feet of the four boys so that they were lying face down on the floor. Then, Defendant transported Peter into a back room because he would not cooperate with Defendant. In the back room, Defendant shot Peter in the head. At this point, Defendant realized that he could not leave three witnesses alive. So, he returned to the room where the other three boys were located (obviously, the three boys could not escape after they heard their friend being shot because they were confined with duct tape) and proceeded to execute them. Johnson v. State, 118 Nev. 787, 791, 59 P.3d 450, 453 (2002).

First, the three co-defendants had guns; thus, the confinement of duct tape was certainly not necessary to consummate the robbery. Even assuming *arguendo* that the

victims were confined and moved incidental to the robbery the restraint and movement substantially increased the risk of harm to all the victims. See Mendoza v. State, 122 Nev. 267, 130 P.3d 176 (2006); Wright v. State, 94 Nev. 415, 581 P.2d 442 (1978). The increased risk of harm could not be more apparent than in the instant case where the confined victims were executed because they were restrained from escaping. Importantly, Dr. Telgenhoff testified that none of the victims had any defensive wounds. This further proves that the restraint and confinement increased the danger to the victims because as they were being executed they could not mount any defense.

As such, Defendant's counselors cannot be deemed ineffective for failing to raise this argument. Moreover, Defendant has not even attempted to allege how this argument could have succeeded considering the facts of his case.

XV. DEFENDANT CLAIMS THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT THE TRIAL COURT IMPROPERLY DENIED A MOTION FOR CHANGE OF VENUE.

Defendant asserts that his appellate counsel should have argued that the trial court denied Defendant's requests for a change of venue. Defendant's Second Supplemental Brief, July 14, 2010, 23 – 24. When denying Defendant's request for a change of venue the district court stated: "the court overruled or did not grant, **seeing as there was absolutely no basis whatsoever for a change of venue.**" 13 ROA 3147.

At present, Defendant contends that his appellate counsel was ineffective for not challenging the district court's denial of a change of venue; however, Defendant fails to articulate any basis his appellate counsel would have had to claim that the seated jury was not fair and impartial. Nothing in Defendant's case or his present assertions establish that he was unable to secure an impartial jury or that the publicity was so intense that even an impartial jury would be swayed by the considerable pressure of public opinion. See Hernandez v. State, 194 P.3d 1235, 1245 (2008). In fact, the jurors that Defendant cites to in his brief were not jurors who were seated in his case. Thus, the trial court appropriately found that "there was absolutely no basis whatsoever for a change of venue." As such, Defendant has failed to demonstrate that his appellate counsel was deficient in this respect or

that he suffered any prejudice.

XVI. DEFENDANT CLAIMS THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT THE DISTRICT COURT ERRED IN NOT ALLOWING HIS TRIAL COUNSEL TO INTRODUCE BIAS AND PREJUDICE OF THE STATE'S WITNESS.

Defendant asserts that his appellate counsel should have raised an argument with regard to the district court's exclusion of certain evidence. Defendant's Second Supplemental Brief, July 14, 2010, 24 – 25. Defendant contends that his appellate counsel should have argued that his counsel was precluded from introducing bias and prejudice; however, this contention is a mischaracterization of the attempted cross-examination. After a review of the record it is clear that Defendant cannot demonstrate that his appellate counsel was deficient in this respect or that he suffered any prejudice.

During the cross examination of Tod Armstrong, defense counsel asked Armstrong if he had testified in another murder case, if he was the only witness in that murder case, and then asked "Well, it appears that you were at the wrong place at the wrong time on this – in this other murder case?" 8 ROA 2062. At this point, the State objected and the court listened to argument outside the presence of the jury. 8 ROA 2063 – 2069. Defense counsel argued that because Armstrong was a witness in another murder case, then he must have some "working relationship" with the State and defense should be able to argue that "he suddenly appears at the wrong place at the wrong time for murder cases." Id. After the State assured the court that Armstrong was not receiving "any benefit whatsoever associated with that case or this case," the court decided that defense counsel could not get into the substance of the other case because it was not relevant. Id.

Thereafter, the court found out that Armstrong was not the only witness in this other murder trial; rather, there were countless voluntary statements from people who were at the same party as Armstrong. Id. The court informed defense counsel that when the jury returned he could ask Armstrong a few more questions regarding any benefit that he expects from his testimony in this case or the other case. Id.

When cross-examination resumed, defense counsel immediately disobeyed the court's instructions and asked Armstrong, "In a previous case you identified the shooter in a

previous murder case, am I right?" 8 ROA 2069 – 2071. Armstrong responded, "That's correct. Id. The answer was stricken and defense counsel continued with his probe into Armstrong's bias as follows:

> Defense: The other murder case is unrelated to this case, am I correct?
> Armstrong: Yes.
> Defense: All right. You were a witness for the State in that other case, correct?
> Armstrong: That's correct…
> Defense: You haven't been charged with any crime in this case?
> Armstrong: No.
> Defense: And you're saying you don't expect any benefits for your testimony today?
> Armstrong: No, no benefits.
> Defense: Did you receive any benefit for testifying in the other case?
> Armstrong: No…
> Defense: You testified at two murder trial in one year?
> Armstrong: No.
> Defense: You testified at two murder – in tow murder trials, right?
> Armstrong: Yes, not in one year.
> Defense: In this case you have not been charged with any crime?
> Armstrong: No.
> Id.

As the record clearly reflects, defense counsel was able to question Armstrong regarding any possible benefit he was receiving and he questioned Armstrong about the fact that he happened to be a State witness in two different murder trials. The basis of Defendant's complaint is that he was precluded from delving into the facts of an irrelevant separate murder trial. Defendant continues to argue that Armstrong must have been receiving some benefit even though he "claims" otherwise.

Defendant has failed to show that his appellate counsel was deficient because the district court did not abuse its discretion in precluding irrelevant facts about an unconnected murder trial. "District courts are vested with considerable discretion in determining the relevance and admissibility of evidence." Archanian v. State, 122 Nev. 1019, 145 P.3d 1008, 1016 (2006). "A district court's decision to admit or exclude evidence will not be reversed on appeal unless it is manifestly wrong." Archanian, 122 Nev. at 1019, at 1016. Defendant cannot show that the district court was manifestly wrong considering the court allowed defense counsel to probe bias and only limited counsel's questions about the facts of the other trial.

Even assuming this court finds appellate counsel's actions objectively unreasonable;

Defendant cannot demonstrate that he was prejudiced. Armstrong admitted that he was a State witness in another murder trial and his credibility was further impeached by his admission to extensive cocaine use and possible involvement in setting up the underlying robbery in this case. Defendant cannot show that absent his appellate counsel's failure to bring this claim the result of the proceeding would have been any different.

XVII. DEFENDANT CLAIMS THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE PROSECUTORIAL MISCONDUCT DURING VOIR DIRE.

Defendant claims that his appellate counsel was ineffective for not raising a claim of prosecutorial misconduct for the State's comments during voir dire. Defendant's Second Supplemental Brief, July 14, 2010, 25 – 27.

The first question Defendant takes issue with was during the State's voir dire of Prospective Juror Warren. Warren indicated that when he filled out the jury questionnaire, the issue of capital punishment and actually being in the position to impose such a punishment became real rather than hypothetical. 11 ROA 2639 – 2640. The State then asked Warren, "Do you believe that you have the intestinal fortitude for lack of a better word, to impose the death penalty if you truly believe that it's fit for this crime?" Id. Warren responded, "If I truly believed it, yes. Id. Notably, voir dire of Warren continued without any objection to this question by defense counsel.

At present, Defendant asserts that his appellate counsel was ineffective for not raising an unpreserved and meritless issue on direct appeal. In support of Defendant's claim of ineffectiveness, he cites to a lengthy closing argument by the prosecutor in Castillo v. State. It is true, that somewhere in the closing argument that was found improper in Castillo the prosecutor used the words *intestinal fortitude*. However, other than the similarity of those two words the improper comment is completely unrelated to the State's question of Prospective Juror Warren. The prosecutor in Castillo told the jury that if they did not give a death sentence for the defendant in that case then they were giving a death sentence to a future victim of this defendant.

Additionally, Defendant asserts that his appellate counsel should have raised an

argument regarding the State's questioning of Prospective Juror Morine. Morine had indicated that he was opposed to the death penalty, would likely not consider it, and that a person should just be imprisoned because that person could not harm society any further. 11 ROA 2670 – 2673. The State then questioned Morine about the statement that once someone was imprisoned then no one in society could be further harmed. Id. After four more questions, defense counsel objected, both sides approached the bench and then questioning resumed without incident. Id.

Appellate counsel was not deficient for failing to raise either the unpreserved question during voir dire, or the questioning of Morine because in no way did the State's comments infect Defendant's trial with unfairness as to make the resulting conviction a denial of due process. The State's question of Warren was not even objectionable, and any possible prejudice from the questioning of Morine was alleviated when the State preempted him. It should be noted, inasmuch as Defendant contends that these comments infected this jury's outlook on Defendant's punishment, that contention is belied by the fact that this jury did not sentence Defendant to death. As such, there is no reasonable probability that had appellate counsel raised these meritless issues on appeal the outcome would have been any different. As such, Defendant has failed to demonstrate that his appellate counsel was deficient in this respect or that he suffered any prejudice.

XVIII. DEFENDANT CLAIMS THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THE ADMISSION OF HEARSAY.

Defendant claims that his appellate counsel failed to appeal the admission of hearsay evidence in violation of the Confrontation Clause. Defendant's Second Supplemental Brief, July 14, 2010, 27 – 28. Notably, Defendant fails to explain how this statement was hearsay and how it was a violation of the Confrontation Clause. The alleged hearsay statement was not even objected to at trial; thus, besides being wholly without merit it was also unpreserved.

During direct examination, Armstrong was being questioned about why he and his two friends (Ace and Bryan Johnson) did not tell the police who committed the quadruple

homicide immediately upon finding out. 8 ROA 2020 – 2022. Armstrong, Ace, and Bryan discussed and tried to decide how and if they should tell the police that Defendant committed the murders. Id. The State asked Armstrong how he finally came to the decision to tell the cops and Armstrong explained that he told the cops after they came to Bryan's house regarding a domestic disturbance call. Id. The State asked, "Now when you're standing there with the police, do you hear Bryan tell the police his information? Id. Armstrong responded, "Not it all, just that he knew like that that it – we were – that it was involved with that case, that we knew who did it. And then he separated us and had us write down statements." Id.

Defendant fails to explain how the above statement was an admission of hearsay. The State fails to see what statement is being offered for the truth of the matter asserted. Rather, Armstrong explains what he heard as a basis for why the cops then separated the three boys and made them write down statements. Whether or not Bryan's statement was true is immaterial, the importance is what facilitated Armstrong being separated and producing a written statement. This testimony was relevant only inasmuch as it explained why Armstrong finally told the cops about Defendant's involvement after several day of wavering.

In addition to Defendant failing to explain how this statement was hearsay, Defendant fails to explain how appellate counsel could have possibly succeeded with this claim on direct appeal considering Defendant's own trial counsel's actions. During cross-examination of Armstrong, defense counsel engaged in the following questions:

> Defense: **And at this point suddenly [Bryan] says I know about these quadruple murders?**
> Armstrong: Yes.
> Defense: And then you get up and you – and you tell the police you also know?
> Armstrong: Yes, we all did.
> Defense: Four days later.
> Armstrong: Yes.
> 8 ROA 2058.

Appellate counsel was not deficient for failing to raise a claim that he would have likely been estopped from challenging. Since defense counsel, did not object and proffered

the exact same evidence, he would have been estopped from challenging it on appeal. See Carter v. State, 121 Nev. 759, 121 P.3d 592 (2005).

However, the fact remains that neither Armstrong's statement, nor this question was admitted for the truth of the matter asserted. Bryan's discussion with the police is only relevant for its affect on leading to Armstrong's voluntary statement about who committed the murders.

The State will not engage in a Confrontation Clause analysis because this issue was unpreserved, was not inadmissible hearsay, and appellate counsel would have been estopped from challenging this issue. But, more importantly, defense counsel cross-examined Bryan Johnson regarding this exact issue, so there is absolutely no confrontation violation. 9 ROA 2282 – 2298.

Accordingly, Defendant cannot show this his appellate counsel was objectively unreasonable for failing to raise this issue. In the event that this court feels appellate counsel should have raised this issue Defendant was not prejudiced. Defendant's own counsel delved into the topic and the Nevada Supreme Court stated on appeal that the "issue of guilt was not close." Johnson v. State, 118 Nev. 787, 797, 59 P.3d 450, 457 (2002).

XIX. DEFENDANT CLAIMS THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT THE STATE FAILED TO REVEAL ALL OF THE BENEFITS THE STAR WITNESSES RECEIVED.

The State is unsure about the exact nature of Defendant's instant argument. Defendant seems to contend that his appellate counsel should have raised a Brady claim on direct appeal. Defendant's Second Supplemental Brief, July 14, 2010, 28 – 30. Defendant spends the majority of this argument citing language from Brady and its progeny; yet, there is no application to the facts of Defendant's case. Id.

Defendant's instant claim is yet another insinuation that Tod Armstrong received some secret benefit that the defense did not know about. Defendant has not offered any factual assertion that Armstrong did receive a benefit. Additionally, Defendant cites to LaShawnya Wright's in-court testimony as evidence of some type of Brady violation. Yet, nothing in her testimony indicates that she was receiving any unknown benefit from the

State. 8 ROA 2120 – 2123. Defendant's instant assertion that his appellate counsel was ineffective for failing to raise a Brady claim is a bare allegation insufficient to support habeas relief. Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.

Defendant has offered no assertion that the State committed a Brady violation and no grounds for which a Brady claim would have been successful on appeal. Lastly, the only assertion Defendant makes in the instant petition is from the trial transcript; thus, if there was some sort of violation what prejudice could he have suffered since the jury would have obviously heard the evidence. As such, Defendant has failed to demonstrate that his appellate counsel was deficient in this respect or that he suffered any prejudice.

XX. DEFENDANT CLAIMS THAT HIS TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO RAISE AN ARGUMENT ABOUT THE STATE'S REFERENCE TO "THE GUILT PHASE."

Defendant asserts that his trial counsel and his appellate counsel were ineffective for failing to raise an objection to the State's reference to the trial phase as the "guilt phase." Defendant's Second Supplemental Brief, July 14, 2010, 30 – 31. Defendant points out four instances during voir dire when in the State referred to the initial phase of the trial as the "guilt phase." Defendant does not explain why he feels these four instances could have possibly prejudiced the outcome of his trial or his appeal. Also, Defendant cites to no authority stating the term "guilt phase" is an improper characterization of the phase of trial when the jurors determine a defendant's guilt.

In reviewing the places the State used the term "guilt phase," the State was clearly not attempting to insinuate that Defendant's guilt is a foregone conclusion. In fact, the first instance occurred as follows:

> The State: **If you're convinced beyond a reasonable doubt**, can you promise the State of Nevada that you'll return verdicts of guilty...You understand that sympathy is to play no part in your deliberation during the first phase, the guilt phase of this trial? 12 ROA 2811.

The second instance occurred as follows:

> I understand you're deferring to the Judge, but ultimately you become the judge of the facts in this case, the judge remains the judge of the law throughout the entire case, but you become the judge of the facts in the guilt phase, if – **can you the judge the defendant's conduct, based on the facts, fairly**? 12 ROA 2940.

The third instance occurred as follows:

> You understand that during the first phase of this trial, what we call the guilt, that although you may have some sympathy for the defendant as he sits in court you have to set that aside and **base your verdicts, your decision, solely on the evidence from that witness stand**? 12 ROA 2851.

The fourth instance occurred as follows:

> In what I'll call the first phase of the trial, the guilt phase, **if you're convinced beyond a reasonable doubt that the defendant is, in fact, guilty of all the crimes** we've mentioned thus far, can you promise, **if you believe beyond a reasonable doubt that he's guilty**, can you promise that you'll return verdicts of guilty? 11 ROA 2671.

Thus it is clear from reviewing the State's actual comments why trial counsel did not object. In each instance that the State used the term "guilt phase" there was no indication that Defendant was in fact guilty. Rather, each time the State explained that the jury would determine guilt based on reasonable doubt and the evidence from the witness stand.

Defendant cannot demonstrate that his trial counsel acted objectively unreasonable in failing to object to these characterizations, as they were accurate statements of the law. Additionally, Defendant cannot demonstrate that his appellate counsel was deficient for failing to raise an issue of these unpreserved, un-prejudicial, and un-objectionable comments during voir dire. Lastly, Defendant's counselors cannot be deemed ineffective because Defendant cannot show that had these objections been raised his trial or his appeal would have likely had a different outcome. Thus, his claim must be dismissed.

XXI. DEFENDANT CLAIMS THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING CERTAIN EVIDENCE PRESENTED AT TRIAL.

Defendant contends that he is entitled to a new trial based upon inadmissible evidence being presented and that his appellate counsel was ineffective for failing to raise this claim. Defendant's Second Supplemental Brief, July 14, 2010, 31 – 33. Defendant begins this argument by laying out the case law and statutory rules for evidence of other crimes or acts. Thereafter, Defendant points to several places in the trial when the State asked witnesses if Defendant sold them cocaine and whether he would put the cocaine in a black and mild cigar

box when he sold it to them. Then, Defendant attempts to claim that the State elicited this information solely to demonstrate that Defendant was a person of poor character.

Defendant's instant contention that this information was improperly admitted by the State to show Defendant was a bad person is utterly disingenuous and wholly without merit. The Black and Mild cigar box that was found at the scene of the murder contained Defendant's fingerprints. Thus, the cigar box was substantially incriminating evidence that placed Defendant at the scene of the quadruple homicide. In an attempt to explain away Defendant's presence at the scene of the murders, the defense had a theory which can be illustrated by a review of the following pertinent parts of opening and closing arguments. During opening statements, the defense immediately lays out the following theory:

> The fingerprints on the Black and Mild, Mr. Guymon alluded to the fact but didn't complete the sentence. Matt Mowen purchased drugs from John White. Charla Severs is gonna tell you whenever John With sold drugs to Matt Mowen placed 'em Black and Mild box, he handed to him. **The only fingerprint that is found in that house that matches John White's is to the Black and Mild box, a cigar box that he uses to deliver his drugs to Matt Mowen when Matt Mowen comes over to his house or he goes over to his house to drop off the drugs for Matt Mowen. That's how that fingerprint got there.** Testimony's gonna bear that out. 8 ROA 1895.

During closing argument, defense counsel reiterates the same theory as follows:

> The fingerprints. I talked about the Black and Milds, and I told you before Charla Severs is going to say that the Black and Milds were used by Donte sometimes when he sold drugs. He's no angel. John White over there is no angel and I'm not going to put halos on him, and wings. He's a crack dealer, I'll give you that. He sold crack. Probably why it's easy to do everything and look at him and say he's a bad guy. But he sold drugs, and Charla Severs said this, 30 percent of the times in the Black and Milds. She saw him give the Black and Milds away to somebody, the box itself, with crack cocaine in there. Reporter's Transcript of Jury Trial – Day 4, June 8, 2000, 232.

Defendant's appellate counsel was not objectively unreasonable for failing to argue on direct appeal that evidence regarding Defendant's drug transactions was improperly admitted by the State. Had Defendant's appellate counsel made this argument it would have been summarily rejected as laughable. Defendant's trial theory was based on the fact that his fingerprints were only found at the scene of the crime due to an earlier drug transaction involving the cigar box.

Defendant's appellate counsel would have been estopped from challenging this

evidence on appeal just because its admission did not have the intended effect on the jury. Carter v. State, 121 Nev. 759, 121 P.3d 592 (2005). In Carter, the Nevada Supreme Court found that a sexual assault defendant was estopped from raising any objection that admission of evidence of his prior drug involvement was error, where defendant himself elicited evidence of his illegal drug use. Id. The Court determined that since the defendant participated in the "alleged error", he should be estopped from raising any objection on appeal. Id. This ruling has applied in other cases as well. See Sidote v. State, 94 Nev. 762, 587 P.2d 1317 (1978) (Defendant may not consciously invite district court action perceived as favorable to him and them claim it as error on appeal); Van Valkenberg v. State, 594 P.2d 707 (1979) (defense counsel agreed at trial to instruction so they could not challenge it on appeal).

Defendant cannot show that his counsel was deficient or that had this issue been raised he would have been successful on appeal. Accordingly, Defendant has not met either prong of Strickland and his claim must be denied.

XXII. DEFENDANT CLAIMS THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE SEVERAL CLAIMS REGARDING THE STATE'S CLOSING ARGUMENT.

Defendant contends that his appellate counsel was ineffective for failing to raise three claims regarding the State's closing argument. Defendant's Second Supplemental Brief, July 14, 2010, 33 – 36.

A. Defendant contends the State improperly vouched for witnesses.

Defendant cites to the State's closing argument and contends that it was improper witness vouching. After detailing all the evidence that incriminated Defendant, the State argued that even if you could explain away all that evidence then the jury would be left to consider several witnesses' testimonies that stated Defendant committed the crimes. The State then argued that in order to find Defendant not guilty the jury would have to find that Charla Severs, Tod Armstrong, Bryan Johnson, and LaShawnya Wright must have been lying.

The prosecutor's argument – that for the jurors to believe Defendant did not commit these crimes, they would have to find that several other witnesses were "lying" – was not

improper. See Honeycutt v. State, 118 Nev. 660, 674, 56 P.3d 362, 371 (2002). Plainly, witness credibility is a proper subject for argument. Arguments concerning witness credibility are improper only when they impermissibly vouch for or against a witness and inappropriately invoke the prestige of the district attorney's office. See Rowland v. State, 118 Nev. 31, 39 P.3d 114 (2002); Pascua v. State, 122 Nev. 1001, 145 P.3d 1031 (2006). Accordingly, when "the outcome of a case depends on which witnesses are telling the truth, reasonable latitude should be given to the prosecutor to argue the credibility of the witness -- even if this means occasionally stating in argument that a witness is lying." Rowland, 118 Nev. at 39.

Here, appellate counsel cannot be considered objectively unreasonable for failing to bring this clam because the trial court overruled defense's objection and the Nevada Supreme Court would have likely given great deference to the trial court's determination of the State's inference on the evidence in closing argument. Here, Defendant fails to demonstrate why the trial court's ruling was improper. The State did not vouch for the witnesses; rather, they simply made a logical comment about mutually exclusive determinations. Additionally, Defendant fails to demonstrate that his appeal would have likely had a different result had his appellate counsel raised this argument considering the overwhelming evidence of Defendant's guilt and the minimal prejudicial impact of a statement that was immediately objected to and sustained.

B. Defendant contends the State asked jurors to place themselves in the victims' shoes.

During the State's closing argument, defense counsel made a "golden rule objection" and the district court sustained the objection. 13 ROA 3181 – 3182. Defendant argues that because his trial counsel objected to the State's argument then his appellate counsel must have been ineffective for failing to raise this issue on appeal. However, what Defendant does not explain is what issue he would have liked his appellate counsel to raise.

The trial court contemporaneously sustained defense counsel's objection at trial. Thus, there was no actual error because the remedy to the State's allegedly improper argument was instantly attained by the trial court's decision. Defendant cannot show that his

appellate counsel was objectively unreasonable for failing to raise an issue that the trial court correctly ruled in Defendant's favor. Defendant cannot show how his appellate counsel could have succeeded with an argument on appeal because Defendant succeeded with this argument at trial. Lastly, even if this court finds appellate counsel in error for failing to raise this issue, Defendant suffered no prejudice because the result of his appeal would not have been likely to be any different considering the overwhelming evidence of Defendant's guilt.

C. Defendant contends the State referred to facts that were not adduced at trial.

During closing argument, the State commented as follows:

> Mr. Sciscento asked some questions of Tom Wahl. Tom Wahl testified that there was major component and a minor component of the cigarette butt, that the major component, the source of the major component was Donte Johnson. And Tom Wahl couldn't exclude some of the victims as the source of the minor component. And Mr. Sciscento asked him how is that possible? It is one possibility that somebody might have had dried lips when he took a drag on the cigarette.
> What happens when people get nervous and scared? Do they get cottonmouth? Did Donte Johnson allow the victim to take one last drag before he put a bullet in the back of his --
> Defense: Your Honor, this is my objection with speculation. They can't do it, we can't do it, no one can do it.
> The Court: Overruled.
> The State: Did Donte Johnson allow the victim to take one last drag of that cigarette before he put a bullet in the back of his head? Is that why there's two sources of DNA on that cigarette? We know Donte Johnson smoked the cigarette, we know Donte Johnson was at that crime scene. Reporter's Transcript of Jury Trial – Day 4, 212.

Trial counsel objected to this statement as speculation and the district court overruled the objection. Defendant has not provided any basis for which his appellate counsel could have alleged that the trial court abused its discretion in this instance. Defendant asserts that the State referred to facts that were not in evidence; however, the DNA mixture was in evidence. The DNA expert testified that Donte Johnson's DNA was on the cigarette, and that Smith and Young were excluded as possible contributors to the minor component, but the victims' DNA could not be excluded. Thus, it is completely reasonable to infer that the one of the victims' puffed on the cigarette before Donte took his life. Defendant cannot show that the trial court's decision was error. It should also be noted that the jurors were properly instructed that counselors' arguments are not evidence. Moreover, Defendant cannot demonstrate that had his appellate counsel alleged that this was an error that his

appeal would have had a different outcome.

For all the reasons stated above, Defendant's claims of counselors' ineffectiveness regarding the State's closing argument must be denied.

XXIII. DEFENDANT ASSERTS THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT THE DISTRICT COURT IMPROPERLY ADMITTED AUTOPSY PHOTOS.

Defendant asserts that his appellate counsel was ineffective for failing to raise the district court's admission of autopsy photos. Defendant's Second Supplemental Brief, July 14, 2010, 36 – 37.

On November 23, 1999, Defendant filed a Motion to Exclude Autopsy Photographs that was denied on March 2, 2000. During the testimony of Dr. Robert Bucklin, the forensic pathologist that conducted the autopsies on Defendants victims, the State questioned Dr. Bucklin about several aspects of the autopsies. 10 ROA 2387 – 2427. Dr. Bucklin indicated that the photographs would assist him in describing his findings during the autopsy. 10 ROA 2396. Thereafter, Dr. Bucklin used the photographs to explain his findings regarding the cause of death, the likely size of the weapon used, and the likely distance the gun was from the heads of each victim. 10 ROA 2387 – 2427. Dr. Bucklin also used the photographs to explain the brownish/black discoloration around the borders of the head wounds because of the bullet's temperature upon leaving the gun and how the amount of charring on the wound depends on the distance the gun was from the head. 10 ROA 2400 – 2401, 2408 – 2409, 2413 – 2414, 2421 – 2423. The autopsy photographs were extremely relevant to explain the restraint marks from the duct tape on the victims' wrists and ankles. Additionally, the autopsy photographs of Peter Talamantez were crucial in explaining how the blunt laceration on his scalp was a fresh would that was still bleeding upon death without any healing. 10 ROA 2417 – 2421. The blunt laceration on Peter's scalp helped corroborate the story Defendant told others about how he kicked/pistol whipped Peter before killing him.

Defendant's present contention that his appellate counsel was ineffective for failing to argue that this evidence should not have been permitted does not attempt to elaborate on why this evidence was improper. Defendant simply states that the photos were admitted to

inflame the jury; this is the same argument that was rejected by the district court because the photos were extremely relevant in explaining aspects of the murders.

The decision to admit autopsy photographs as evidence lies within the sound discretion of the court. Turpen v. State, 94 Nev. 576, 583 P.2d 1083 (1978). A district court's decision to admit or exclude evidence rests within its sound discretion and will not be disturbed unless it is manifestly wrong. Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999). Defendant cannot show that his counsel was deficient for failing to bring this claim because there is no basis for which to assert the district court's decision was manifestly wrong. Additionally, Defendant cannot show that he suffered any prejudice from his appellate counsel's actions because Defendant cannot show that this issue would have likely altered the outcome of the appeal.

XXIV. DEFENDANT CLAIMS THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO UNRECORDED BENCH CONFERENCES.

Defendant asserts that his trial counsel was ineffective for failing to object to the bench conferences being unrecorded and failing to place on the record what was stated during the unrecorded bench conferences. Defendant's Second Supplemental Brief, July 14, 2010, 37 – 38.

"While only rarely should a proceeding in a capital case go unrecorded," Archanian v. State, 122 Nev. 1019, 1032, 145 P.3d 1008, 1018 (2006)(quoting Daniel v. State, 119 Nev. 498, 507, 78 P.3d 890, 897 (2003)), "a capital defendant's right to have trial proceedings recorded and transcribed is not absolute" and therefore "the mere failure to make a record of a portion of the proceedings...is not grounds for reversal." Id. at 1033, 145 P.3d at 1018-19 (quoting Daniel, 119 Nev. at 508, 78 P.3d at 897); cf. SCR 250(5)(d). As Defendant has not identified any issue that the Nevada Supreme Court was unable to meaningfully review due to the failure to record a portion of the proceeding, he failed to show that trial counsel was ineffective in this regard. Defendant alleges that he was deprived meaningful appellate review; yet, he cannot assert a single issue that the Nevada Supreme Court was unable to accurately consider on appeal. Thus, Defendant cannot meet the either prong of Strickland

and his claim must be dismissed.

XXV. DEFENDANT CLAIMS THAT HIS COUNSELORS WERE INEFFECTIVE FOR FAILING TO RAISE ARGUMENTS REGARDING SEVERAL JURY INSTRUCTIONS.

A. Premeditation and Deliberation Instruction.

Defendant's first complaint is that his appellate counsel was ineffective for failing to raise a claim against jury instructions 36 & 37 regarding "premeditation and deliberation." Defendant's Second Supplemental Brief, July 14, 2010, 42 – 43; 10 ROA 2577 – 2578. Defendant claims that these jury instructions were improper because of the statement that premeditation "may be as instantaneous as successive thoughts of the mind." However, these instructions reflect a word-for-word recitation of the instruction that the Nevada Supreme Court requires District Courts to use when a defendant is charged with first-degree murder based on willful, deliberate, and premeditated killing. (Compare Byford v. State, 116 Nev. 215, 236, 994 P.2d 700, 714 (2000) to 10 ROA 2577 – 2578).

Defendant fails to demonstrate that these instructions set forth in Byford are improper. Accordingly, Defendant cannot demonstrate why his appellate counsel acted objectively unreasonable by failing to raise a futile issue on appeal. Additionally, there was ample evidence of Defendant's cold, calculated judgment to kill the four boys with premeditation and deliberation. As such, Defendant has failed to demonstrate that his appellate counsel was deficient in this respect or that he suffered any prejudice.

B. The Reasonable Doubt Instruction.

Defendant's second complaint is that the trial court's reasonable doubt instruction is improper. Defendant's Second Supplemental Brief, July 14, 2010, 43 – 44; 10 ROA 2543. Defendant recognizes the Nevada Supreme Court deems this instruction permissible and that this claim is improperly raised in the instant Petition as this exact claim was already considered on the merits and rejected by the Nevada Supreme Court during Defendant's direct appeal. The Nevada Supreme Court stated:

> The district court instructed the jury on the definition of reasonable doubt pursuant to NRS 175.211(1). Johnson contends that this definition is unconstitutional because it does not provide meaningful principles or standards to guide the jury in evaluating the evidence. This court has repeatedly upheld

> this definition of reasonable doubt where, as here, the jury was also instructed on the presumption of innocence and the State's burden of proof. We decline to reconsider the issue. Johnson v. State, 118 Nev. 787, 806, 59 P.3d 450, 462 (2002).

Thus, this claim must be dismissed as it is barred by the doctrine of the law of the case. Pellegrini v. State, 117 Nev. 860, 884, 34 P.3d 519, 535 (2001); see McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); see also Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993).

C. Instruction No. 12.

Defendant's third complaint is that his appellate counsel was ineffective for failing to raise an issue regarding jury instruction 12. Defendant's Second Supplemental Brief, July 14, 2010, 44 – 45. Defendant complains that he was convicted of kidnappings which were all specific intent crimes; yet, jury instruction 12 failed to inform the jury that "defendant cannot be convicted under conspiracy to specific intent crimes unless Defendant had the specific intent to commit those crimes." Id.

The basis of Defendant's complaint is that he was convicted of the specific intent crime of kidnapping, and he may have been convicted of this specific intent crime under an aiding or abetting theory without proof that he aided or abetted specifically in order to kidnap.

First, inasmuch as Defendant claims his appellate counsel was ineffective for failing to raise this issue because his trial counsel objected to it, the State contends that this issue was likely not preserved. A review of defense counsel's objection shows it to be cursory and nothing more than a statement that he objects to instructions 11 through 13. See 13 ROA 3148. There is no indication of the basis for which defense counsel found instruction 12 objectionable. Thus, appellate counsel may not have been able to adequately appeal this issue because it may have been reviewed under a plain error analysis.

Second, it should be noted that Defendant was charged and his jury convicted him of the crime of Conspiracy to Commit Robbery and/or Kidnapping and/or Murder. 10 ROA 2595, 2531 – 2532. Thus, to a certain extent Defendant's jury did find that Defendant

conspired to commit the specific intent crime of Kidnapping.

Third, the State contends that Jury Instruction 17 likely cured any possible defect from instruction 12. Instruction 17 states:

> Where two or more persons are accused of committing a crime together, their guilt may be established without proof that each personally did every act constituting the offense charged.
> All persons concerned in the commission of a crime who either directly or actively commit the act constituting the offense **or who knowingly and with criminal intent aid and abet in its commission** or, whether present or not, who advise and encourage its commission, are regarded by the law as principals in the crime thus committed and are equally guilty thereof.
> **To aid and abet is to assist or support the efforts of another in the commission of a crime.**
> A person aids and abets the commission of a crime **if he knowingly and with criminal intent** aids, promotes, encourages or instigates by act or advice, or by act and advice, the commission of such crime.
> The state is not required to prove precisely which defendant actually committed the crime and which defendant aided an abetted. 10 ROA 2557.

Additionally, jury instruction 19 explains that mere presence is not sufficient; rather, to establish the defendant aided and abetted you must find that the defendant is a participant. 10 ROA 2559.

Fourth, the Defendant's jury found him guilty of First-Degree Kidnapping because he confined, inveigled, enticed, decoyed, abducted, concealed, kidnapped, or carried away these boys with the intent to hold or detain them for the purpose of robbery and/or killing these boys. Accordingly, the State contends that there is little doubt that even if the jury found Defendant guilty of First-Degree Kidnapping only under an aiding an abetting theory of liability that the jury did not find that Defendant had the specific intent to kidnap. Clearly, if the jury found Defendant guilty of the four murders and four robberies then he also had the specific intent to kidnap these boys for the purpose of committing said robberies and murders. Additionally, Defendant and his co-conspirators arrived at the scene of the crime with a bag containing the duct tape used to confine the victims.

Lastly, Defendant's jury did not need to convict Defendant of kidnapping under an aiding and abetting theory. Defendant was the person that took Peter into the back room because he was not taking Defendant's demands seriously and would not cooperate with him. When Defendant transported Peter into the back room he hit him in the back of the

head and then put a bullet through his skull. After killing Peter, Defendant returned to the room where the other three boys were being confined by duct tape and proceeded to execute them. Thus, it is hardly believable that Defendant's jury had any doubt as to Defendant's specific intent to engage in kidnapping, or that he was the one that kidnapped the boys.

Defendant's counsel was not deficient for failing to raise this claim because the instruction Defendant received on June 9, 2000 was still an accurate statement Nevada law. Sharma v. State, the case Defendant currently cites as evidence of the new law, was ordered on October 31, 2002. Defendant's counsel should also not be deemed deficient for focusing his efforts on attempting and succeeding to overturn Defendant's death sentences rather than a lesser crime and sentence that Defendant would never end up serving. In the event this court finds appellate counsel deficient any error did not prejudice Defendant for the reasons detailed above.

D. An Instruction defining Malice

Defendant's fourth complaint regarding jury instructions is that his trial counsel was ineffective for failing to offer a jury instruction that defined malice. Defendant's Second Supplemental Brief, July 14, 2010, 45 – 46. Defendant also contends that his appellate counsel was ineffective for failing to raise this issue. Id. Notably, Defendant cites to no case authority, nor does he elaborate on why failure to define malice prejudiced him in anyway.

First, Defendant does not contend that the jury did not understand the definition of malice, or that defining express or implied malice would have in anyway changed the jury's determination that Defendant deliberately intended to take these four boys' lives when he put a gun to the back of their heads and pulled the trigger. Defendant offers no authority contending that the jury needed to be instructed regarding this term to avoid possible confusion. The jury was properly instructed regarding the need to find malice aforethought in order to find Defendant guilty of a degree of murder rather than voluntary manslaughter. 10 ROA 2584 – 2585.

Additionally, ample evidence was adduced at trial that Defendant killed all for boys in a premeditated and deliberate manner, as well as during the commission of one of the

enumerated felonies for felony murder. Also the jury was provided evidence that after Johnson killed Peter because he was "talking mess," he realized there were three witnesses so he went back to the front room and shot the three others in the back of the heads, execution style. Johnson v. State, 118 Nev. 787, 791, 59 P.3d 450, 453 (2002). Charla Severs testified that Defendant said that he could not leave any witnesses. Defendant did not want to kill Tracey Gorringe because he cooperated but he could not leave one alive.

There is little doubt of malice and intent when Defendant put a .380 semiautomatic handgun inches from another's head and pulled the trigger; thus, any error on the part of Defendant's counselors was harmless and did not prejudice Defendant. Defendant cannot show that had his trial counsel inserted an instruction defining malice there is anyway that such a definition would have changed the result of Defendant's conviction from murder to manslaughter.

XXVI. CUMULATIVE ERROR

Defendant claims that he is entitled to reversal of his conviction and death sentence based upon cumulative error. Defendant's Supplemental Brief, Oct. 12, 2009, 60 – 62; Defendant's Second Supplemental Brief, July 14, 2010, 21, 46 – 47.

The Nevada Supreme Court has held that under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v.State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994), citing Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986); see also Big Pond v. State, 101 Nev. 1, 2, 692 P.2d 1288, 1289 (1985). The relevant factors to consider in determining "whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." Big Pond, 101 Nev. at 3, 692 P.2d at 1289. The doctrine of cumulative error "requires that numerous errors be committed, not merely alleged." People v. Rivers, 727 P.2d 394, 401 (Colo.App. 1986); see also People v. Jones, 665 P.2d 127, 131 (Colo.App 1982). Evidence against the defendant must therefore be "substantial enough to convict him in an otherwise fair trial" and it must be said "without reservation that the verdict would

have been the same in the absence of the error." Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1998).

Insofar as Defendant failed to establish any error which would have entitled him to relief, there is and can be no cumulative error worthy of reversal. Notably, a defendant "is not entitled to a perfect trial, but only a fair trial..." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975), citing Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974). Here, Defendant received a fair trial.

Defendant raised this cumulative error argument on his direct appeal and the Nevada Supreme Court determined that Defendant's trial was fair. Johnson v. State, 122 Nev. 1344, 1359, 148 P.3d 767, 778 (2006). Inasmuch as Defendant is alleging that this court should cumulate errors of his counsel, the State has demonstrated that counsel was not ineffective with any of the specific claims that Lisle now raises, there is no cumulative error for this court to now consider.

XXVII. AN EVIDENTIARY HEARING IS NOT REQUIRED.

Defendant argues that he is entitled to an evidentiary hearing to determine whether the performances of trial and appellate counsels were effective. Defendant's Supplemental Brief, Oct. 12, 2009, 62; Defendant's Second Supplemental Brief, July 14, 2010, 48. However, this opposition has shown that Defendant's claims lack merit.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief. An evidentiary hearing is unnecessary when the claims are belied or repelled by the record. Id. at 1331, at 605. "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). "A defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record." Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984); citing Grondin v. State, 97 Nev. 454,

634 P.2d 456 (1981).

Here, all of Defendant's allegations have been shown to be inadequate, completely unsupported, moot, procedurally barred, have been waived, or are belied by the record. Therefore, there is no need for an evidentiary hearing regarding Defendant's allegations.

CONCLUSION

Based on the foregoing arguments, the State respectfully requests that Defendant's Petition be DENIED.

DATED this 28th day of January, 2011.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 28th day of January, 2011, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

CHRISTOPHER R. ORAM, ESQ.
520 South Fourth Street, 2nd Floor
Las Vegas, Nevada 89101

Eileen Davis
Employee for the District Attorney's Office

SSO/Parker Brooks/ed

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

DONTE JOHNSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 65168

APPEAL FROM DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE ELISSA CADISH, PRESIDING

~~~~~~

APPELLANT'S APPENDIX TO THE OPENING BRIEF
VOLUME XXXIV

~~~~~~

ATTORNEY FOR APPELLANT
CHRISTOPHER R. ORAM, ESQ.
Attorney at Law
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

ATTORNEY FOR RESPONDENT
CLARK COUNTY DISTRICT ATTORNEY
200 Lewis Avenue
3rd Floor
Las Vegas, Nevada 89101
(702) 671-2500

CATHERINE CORTEZ MASTO
Nevada Attorney General
Nevada Bar No. 0003926
100 North Carson Street
Carson City, Nevada 89701-4717

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

IN THE SUPREME COURT OF NEVADA

DONTE JOHNSON, Appellant, vs. THE STATE OF NEVADA Respondent.	CASE NO. 65168

OPENING BRIEF APPENDIX

VOLUME	PLEADING	PAGE NO
7	ADDENDUM TO NOTICE OF EVIDENCE IN SUPPORT OF AGGRAVATING CIRCUMSTANCES (FILED 04/26/2000)	1733-1734
6	AFFIDAVIT OF JOSEPH S. SCISCENTO IN SUPPORT OF THE MOTION TO CONTINUE (FILED 12/14/1999)	1428-1433
19	AMENDED EX PARTE ORDER ALLOWING WITHDRAWAL OF ATTORNEY OF RECORD FOR MATERIAL WITNESS CHARLA SEVERS (FILED 08/24/2000)	4585
7	AMENDED JURY LIST (FILED 06/06/2000)	1823
8	AMENDED JURY LIST (FILED 06/08/2000)	2131
3	AMENDED NOTICE OF MOTION AND MOTION TO VIDEOTAPE THE DEPOSITION OF CHARLA SEVERS (FILED 10/08/1999)	659-681
31	APPELLANT'S OPENING BRIEF (FILED 02/03/2006)	7174-7225
19	CASE APPEAL STATEMENT (FILED 11/08/2000)	4651-4653
42	CASE APPEAL STATEMENT (FILED 03/06/2014)	8200-8202
31	APPELLANT'S REPLY BRIEF (FILED 05/25/2006)	7254-7283

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 9th day of January, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ-MASTO
Nevada Attorney General

STEVE OWENS
Chief Deputy District Attorney

CHRISTOPHER R. ORAM, ESQ.

BY:

/s/ Jessie Vargas
An Employee of Christopher R. Oram, Esq.

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623