IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 65168

RESPONDENT'S ANSWERING BRIEF

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

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STATEMENT OF THE ISSUES

1. Whether the District Court erred denying Johnson's claims of ineffective assistance of counsel regarding his 2000 trial and direct appeal.

2. Whether the District Court erred in denying Johnson's claims of ineffective assistance of counsel regarding his 2005 re-do of the penalty phase and appeal.

STATEMENT OF THE CASE

On December 18, 2002, the Nevada Supreme Court affirmed Donte Johnson's (hereinafter "Johnson") 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, Johnson 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 Johnson's Motion on September 3, 2003. 43 AA 8451-52.

On April 27, 2004, Johnson filed a Motion to Allow the Defense to Argue Last at The Penalty Phase. Also, on April 27, 2004, Johnson filed a Motion to Bifurcate Penalty Phase. On April 28, 2004, Johnson filed a Motion in Limine Regarding Referring to Victims as "Boys." On May 3, 2004, the court granted Johnson's Motion in Limine Regarding Referring to Victims as "Boys," but denied Johnson's Motions to Allow the Defense to Argue Last and to Bifurcate the Penalty Phase. 43 AA 8458-60.

On April 12, 2005, Johnson filed a Motion to Reconsider Request to Bifurcate Penalty Phase. 43 AA 8469. On April 18, 2005, the District Court granted Johnson's motion to bifurcate the penalty phase of the penalty hearing: death-eligibility and

selection, and granted Johnson's Motion to Suppress Evidence Regarding Darnell Johnson[1]. 48 AA 8472.

Johnson's jury trial commenced on April 19, 2005. 20 AA 4654. On April 28, 2005, the jury returned with the special verdict that the aggravating circumstance outweighs any mitigating circumstances in all four (4) murder counts. 26 AA 6169-6180. The one aggravating circumstance was that Johnson has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree. Id.

Thereafter, on April 28, 2005, the second portion of Johnson's penalty phase, the selection phase, began. 26 AA 6181. On May 5, 2005, the jury returned a verdict of death on all four counts of Murder of the First Degree with Use of a Deadly Weapon. 30 AA 7101-03.

On June 6, 2005, Johnson was sentenced to death on each of the four counts– Counts XI, XII, XIII, XIV. 10 AA 2598-600. The Warrant and Order of Execution were signed and filed in open court as was the Order to Stay Execution. 30 AA 7136-

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

41; 30 AA 7146-47. The Judgment of Conviction was filed on June 6, 2005. 30 AA 7142-45. Johnson filed a timely Notice of Appeal on June 30, 2005.

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

On February 13, 2008, Johnson 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 Johnson.

Johnson's counsel filed a Supplemental Brief in Support of Johnson's Writ of Habeas Corpus on October 12, 2009. 32 AA 7308-372. Additionally, Johnson's counsel filed a Second Supplemental Brief in Support of Johnson's Writ of Habeas Corpus on July 14, 2010. 33 AA 7373-421. The State filed its Response on January 28, 2011. 34 AA 7436-530. Defendant filed a Reply on June 13, 2011 and another on August 22, 2011. 35 AA 7579-612; 37 AA 7709-30.

On December 1, 2011, the District Court heard arguments on all Petitions. 38 AA 7782. The Court ordered an evidentiary hearing on post-conviction issues. 38 AA 68.[2] An evidentiary hearing was held on April 4, 2013, wherein David Figler,

[2] The State is unable to see the page numbers in Appellant's Appendix Volume 38 so uses the original page numbers for clarity.

Esq., Joseph Sciscento, Esq., and Bret Whipple, Esq. testified. 41 AA 7972-8075. A second evidentiary hearing was held on June 21, 2013, where Alzora Betrice Jackson Winder, Esq. testified. 42 AA 8210-8283. The Findings of Fact, Conclusions of Law and Order, were filed on March 17, 2014, denying the Petition and Supplements on the merits. 42 AA 8192-96.

Johnson filed a Notice of Appeal on March 6, 2014. 42 AA 8203-04. The State's Response to Johnson's Opening Brief is as follows.

STATEMENT OF THE FACTS

The following facts are adapted from the Nevada Supreme Court's decisions in Johnson v. State, 118 Nev. 787, 791-93, 59 P.3d 450, 453-54 (2002) and Johnson v. State, 122 Nev. 1344, 1347-52, 148 P.3d 767, 770-73 (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 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*[3]. 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.

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

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 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.

III. Evidentiary Hearing

On April 4, 2013, the District Court held an evidentiary hearing regarding Defendant's Petition, Supplemental Petition and Second Supplemental Petition. 40 AA 7972. David Figler, Joseph Sciscento, and Bret Whipple testified. 40 AA 7973.

David Figler was Johnson's trial counsel in his first trial, penalty hearing, and three judge panel hearing in 2000. 40 AA 7979. Figler also helped Lee McMahon, another attorney, to write Defendant's appeal from the sentence of the three judge panel. 40 AA 7981. Figler testified that he felt McMahon should have put every single possible issue into the appellate brief. 40 AA 8004. He further stated that McMahon should have brought up the issue of the kidnapping as incidental to the underlying offense, even though Nevada law did not change regarding this issue until 2006, well after the appeal was filed. 40 AA 8014-15.

Figler requested that the first penalty hearing be bifurcated, but was denied. 40 AA 8009. There were multiple mitigating factors found in the first penalty hearing, many of them written-in by hand by the jury. 40 AA 7983. Figler testified that he spoke with Mr. Bret Whipple and Ms. Alzora Jackson Winder, Johnson's counsel for this third penalty hearing, about these various mitigating factors. 40 AA 7984.

Figler further testified that he believed Judge Sobel had been unfair regarding the jury selection process in Johnson's first trial, as well as during various bench

conferences and rulings. 40 AA 7999-80. He was unable to recall whether he believed any of the seated jurors to be biased, but did believe the process was unfair. 40 AA 8001-02.

Jospeh Sciscento, who also represented Johnson during his trial, first penalty phase, and second penalty phase with the three-judge panel, testified that while he felt minorities were underrepresented on the jury panel, he did not believe he could have statistically shown minorities were underrepresented systematically. 40 AA 8031-32, 41. He testified that there was a Batson v. Kentucky, 476 U.S. 79 (U.S. 1986) challenge, but it was denied as the Court did not believe the State's reasoning that the juror's son was currently in jail to be pretextual. 40 AA 8041-42.

Brett Whipple, Johnson's counsel during the third penalty phase, testified that no one has been able to prove systematic exclusion of minorities during jury selection in Clark County. 40 AA 8056, 8067.

On June 21, 2013, the District Court heard from Johnson's other third penalty hearing counsel, Alzora Betrice Jackson Winder. 42 AA 8210-11. Jackson testified that at the time of the penalty hearing, she regretted not hiring an expert on Fetal Alcohol Syndrome. 42 AA 8235-36. However, she testified that she did not become as informed about Fetal Alcohol Syndrome until after approximately 2011 to 2012, as not as much was known about this issue in 2006. 80 AA 8236. Jackson also testified that her own expert stated that there was no evidence of alcohol

consumption during Johnson's mother's pregnancy. 40 AA 8240. Jackson further requested that Johnson be transported in order to have a brain scan but the Court would not allow it. 40 AA 8241.

Jackson also testified regarding the various mitigating factors found by the jury, including Johnson's childhood, gang participation, and drug usage. 42 AA 8252-58. She testified that looking over the special verdict form from 2000, which included multiple handwritten mitigators, she and her co-counsel had presented essentially the same mitigation evidence and instructions to the jury as had been presented in the first penalty hearing. 42 AA 8258. Further, Jackson recalled telling the jury that they could find any other evidence mitigating that was not specifically listed, and they were not limited in any way. 42 AA 8259. Regarding Jackson's father specifically, though she wanted to present him to the jury during mitigation, she was unable to find him. 42 AA 8259. Jackson testified she believes it was in Johnson's best interest to request bifurcation. 42 AA 8263.

SUMMARY OF THE ARGUMENT

The District Court properly dismissed Johnson's Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Initial Petition"), Supplemental Brief in Support of Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Supplemental Petition"), and Second Supplemental Brief in Support of Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Second Supplemental

Petition"). Johnson's ineffective assistance of counsel claims regarding his trial and appeal in 2000 are procedurally barred and Johnson fails to overcome the procedural bars by making a showing of good cause and prejudice. This Court should affirm the District Court's Order dismissing Johnson's ineffective assistance of trial and appellate counsel claims regarding his third penalty phase in 2005 as they have no merit. Trial counsel was not deficient in the presentation of mitigating evidence or investigation. Counsel's decision not to present further evidence regarding Fetal Alcohol Syndrome was a reasonable strategy based on the testimony of Johnson's mother and the defense expert. Counsel's decision not to present the co-defendants' sentences, or every mitigating factor found in the first penalty hearing was reasonable based on the bifurcation of the third penalty hearing. Additionally, counsel was not deficient for failing to present Johnson's father to testify, as counsel was unable to locate him. Trial and appellate counsel were not ineffective in attempting to exclude Johnson's prior bad act, as reasonable measures were taken by counsel to exclude this act, and there was not a probability of success on appeal. Trial counsel was not deficient for providing the State with a copy of the defense expert's report, as she was ordered to do so by the Court, and counsel's arguments in closing and rebuttal were not in contradiction to one another. Johnson was not prejudiced by his counsel's use of the term "kids." Bifurcation of the penalty hearing was to Johnson's benefit, and thus counsel was not ineffective for succeeding in the

Motion for Bifurcation. Appellate counsel was not ineffective in failing to argue that the State improperly impeached a defense witness, as the claim had no merit and thus no probability of success on appeal. Finally, Johnson's claims regarding the death penalty are improper in a post-conviction Petition for Writ of Habeas Corpus, and are also without merit. Johnson fails to bring forth any claims with merit, and does not successfully show counsel was deficient, or that he was prejudiced by the alleged deficiency.

ARGUMENT

I. STANDARDS OF REVIEW

Johnson seeks review of the District Court's Order dismissing his Initial Petition, Supplemental Petition, and Second Supplemental Petition. This Court gives deference to the district court's factual findings, but will review the court's application of the law to those facts de novo. State v. Huebler, 128 Nev. ___, 275 P.3d 91, 95 (2012), *citing* Lott v. Mueller, 304 F.3d 918, 922 (9th Cir. 2002) (stating that district court's findings of facts are reviewed for clear error, but question of law are reviewed de novo); see also Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005) (using similar reasoning for review of claims of ineffective assistance of counsel).

A. Effective Assistance of Trial Counsel

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 Johnson 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.

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.

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 v. Richter, 562 U. S. at 90 (2011).

B. 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.

II. JOHNSON'S CLAIMS REGARDING INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL DURING THE 2000 JURY TRIAL AND DIRECT APPEAL ARE PROCEDURALLY BARRED

The State argues that Johnson's claims as to the 2000 jury trial and direct appeal are procedurally barred for which no good cause has been shown. The District Court addressed and denied the Petition, Supplemental Petition, and the Second Supplemental Petition on the merits.[4] 42 AA 8194. The State contends that while the District Court was correct in its result, it was incorrect in the rationale used in its denial.

"[I]f a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal". Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970); See also Bellon v. State, 121 Nev. 436, 443-44, 117 P.3d 176, 180 (2005) (noting that trial court's decision may be upheld if court reached right result even though it was based on incorrect grounds); Kraemer v. Kraemer, 79 Nev. 287, 291, 382 P.2d 394, 396 (1963) (holding that a correct result will not be reversed simply because it is based on the wrong reason).

[4] The District Court stated that as there was not any binding authority on this issue, the "issue [is] still up in the air frankly." 35 AA 7533. The Court then determined that the time bar did not apply. Id. at 7534.

The latter part of Johnson's Opening Brief contains claims of ineffective assistance of trial counsel regarding Johnson's third penalty hearing which took place in 2005 and his counsel that appealed the 2005 death sentences. The State submits that Johnson's claims regarding the effectiveness of his trial and appellate counsel from his third penalty hearing in 2005 are all timely. Remittitur following Johnson'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, Johnson's proper person Petition filed on February 13, 2008 was timely filed.

However, Johnson's claims of ineffective assistance of counsel regarding his 2000 jury trial and the direct appeal of his 2000 convictions are procedurally barred. On December 18, 2002, this Court affirmed Johnson's convictions. This Court clearly affirmed Johnson'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 Johnson'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.

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.

Thus, the State submits that all of Johnson's claims of ineffective assistance of counsel regarding Johnson's 2000 jury trial and the direct appeal from the 2000 trial are all untimely and barred pursuant to NRS 34.726(1). Johnson'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 Johnson's Petition regarding the 2000 trial and the direct appeal from that trial.

Johnson's Petition is Time Barred as it Relates to the Jury Trial and Direct Appeal

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.

Johnson'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, Johnson 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,[5] 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 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

[5]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.

1070 (2005) (emphasis added). 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, Johnson filed his post-conviction Petition for Writ of Habeas Corpus outside of the one-year time limit. Johnson's Judgment of Conviction was entered on October 9, 2000. 19 AA 4631-35.[6] On January 14, 2003, the Nevada Supreme Court issued remittitur on Johnson's direct appeal of his Judgment of Conviction.

[6] While Johnson uses the page numbers denoted with the NSC number from the instant case in his Opening Brief, the Table of Contents uses the original page numbers from what appears to be a separate and earlier appeal. As there is no new bates stamped NSC number on this page, the State has used the number matching the Table of Contents. However, throughout the Answering Brief the State has endeavored to use the new bates stamped page numbers where possible, in order to match Appellant's Opening Brief.

Johnson did not file his Second Petition until February 13, 2008, which is over **five years** after the issuance of remittitur. Therefore, all of Johnson's claims involving alleged errors occurring during Johnson'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, Johnson's claim must be dismissed because of its tardy filing. Because Johnson fails to even allege good cause to overcome the procedural bars, as discussed *infra*, the district court should dismiss the claims in Johnson's Petition which are time-barred.

B. <u>NRS 34.800 – Five Year Laches Rule</u>

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 pleaded laches below. 34 AA 7454-55.

Johnson's Judgment of Conviction was filed on October 9, 2000. Since well over five (5) years have elapsed between the filing of Johnson's Judgment of Conviction and the filing of the Second Petition, NRS 34.800 directly applies in this case. NRS 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. This Court should affirm the denial of the claims from trial and direct appeal based on the procedural bars.

C. Johnson Cannot Show Good Cause Sufficient to Overcome the Application of the Procedural Bars

A petitioner has the burden of pleading and proving facts to demonstrate good cause to excuse the delay. State v. Haberstroh, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003). "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 v. Director, Nev. Dep't of Prisons, 104 Nev. at 660, 764 P.2d at 1306 (Nev. 1988); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

Here, Johnson offers no good cause or prejudice whatsoever to explain his failure to follow the correct procedures in filing this petition. Johnson 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.

Johnson cannot show that there was any impediment that prevented him from filing a timely Petition after the Nevada Supreme Court affirmed Johnson's convictions in 2002. The 2002 Supreme Court Order left no doubt as to whether all of Johnson's convictions and sentences, other than his death sentence, were affirmed and final. Thus, Johnson 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.

Johnson cannot contend that a sentencing re-hearing prevented him from filing a timely petition. Johnson's penalty re-hearing does not excuse non-compliance with the mandatory procedural bars. Johnson's pursuit of a third penalty hearing cannot be considered an "impediment" sufficient to prevent Johnson from initiating habeas proceeding regarding all his convictions and sentences that were indisputably final.

Because Johnson has failed to even allege good cause, this Court must dismiss the claims in Johnson's Opening Brief regarding his initial jury trial and direct appeal. Moreover, to the extent that Johnson 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 prevented Johnson from initiating habeas proceeding.

D. Johnson Cannot Show Prejudice to Overcome the Procedural Bars

Under the Strickland standard, Johnson must show both good cause and prejudice to overcome the procedural bars. Johnson is unable to show prejudice for the ineffective assistance of counsel claims regarding his conviction from 2000 and direct appeal. The State addresses the claims on the prejudice prong to the extent

necessary to show their lack of merit and because the court below did not apply the procedural bars and denied the following claims on their merits.

1. The District Court was Correct in Finding Appellate Counsel was Not Ineffective for Failing to Raise the Alleged Unconstitutionality of Johnson's Jury Selection Process

Johnson asserts that his appellate counsel was ineffective for failing to raise various claims contesting the constitutionality of his jury selection process. Appellant's Opening Brief (AOB), Jan. 9 2015, p. 31. Johnson is unable to show prejudice.

a. The District Court was correct in finding that appellate counsel was not ineffective for failing to argue that the jury venire was unconstitutional

Johnson asserts that his appellate counsel was ineffective for failing to argue that his venire panel had a less percentage of minorities than a relevant cross section of the community. AOB at 31-33. The District Court was correct in finding that "there is no evidence presented that this was a systematic underrepresentation and the issue, if raised on appeal, would not have been successful." 42 AA 8193. Notably, throughout Johnson's instant argument he never alleges that there was any systematic exclusion of African Americans. AOB at 31-33. Rather, Johnson merely contends that if his appellate counsel had raised the issue that "his venire panel insufficiently represented a cross section of the community according to statistics provided by the United States Census" the outcome of his appeal would have been

different. Id. at 33. Johnson has done nothing to even attempt to demonstrate that there was purposeful discrimination of minorities, other than to reference his trial counsel's testimony at a post-conviction evidentiary hearing that he felt his Batson objection was not frivolous.

Johnson 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. Johnson cannot show that this issue would have succeeded on appeal because he has not even alleged that the system that selected Johnson'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 Johnson could not have shown that African Americans were systematically excluded this claim would not have succeeded on direct appeal. Accordingly, Johnson's appellate counsel cannot be deemed ineffective for failing to raise this claim.

b. The District Court was correct when finding that appellate counsel was not ineffective for failing to argue that the State unconstitutionally preempted a juror

Johnson 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. AOB 33-34. The District Court was correct in finding that there is no merit to this claim. 42 AA 8194.

When the State was questioned regarding why it preempted Juror Number 7, the State articulated several race-neutral reasons for excusing the juror. 8 AA 1829-31. 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. Id. During questioning the juror stated that it would be "difficult to pass judgment on the defendant." Id. When the juror was asked about holding people responsible for

their action or choices, she said no comment, which was a completely different answer than a majority of 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. Id. at 1831. 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.

Johnson 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. Johnson cannot show that his appellate counsel could have possibly succeeded in determining that the district court was clearly erroneous. Accordingly, Johnson's appellate counsel was not ineffective for failing to raise this issue, and he has failed to prove prejudice.

c. The District Court was correct in finding that appellate counsel was not ineffective for failing to argue regarding the State's use of peremptory challenges

Johnson argues that appellate counsel was ineffective for failing to argue that the State used peremptory challenges to remove "life affirming jurors." AOB at 39. The District Court was correct in finding that this issue was not likely to succeed on direct appeal as there is no authority finding the State's actions improper. 42 AA 8193. Therefore, Johnson's claim must fail as counsel cannot be deemed ineffective for not raising an issue with no probability of success.

The underlying basis of Johnson'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, 624 P.2d 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 Johnson'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 Johnson 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 Johnson was given a new penalty hearing.

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

1 RA 249-250.

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 AA 2669.

Johnson fails to show that the district court abused its discretion in finding that his appellate counsel was not 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. The District Correct was correct in finding that appellate counsel was not ineffective for failing to argue the trial court improperly denied Johnson's challenges for cause

Johnson challenged three jurors for cause based on Johnson's belief that these three jurors would not consider all four forms of punishment. Johnson contends that his appellate counsel was ineffective for failing to argue that the district court improperly denied the defenses challenges for cause. AOB at 41. The District Court was correct in finding that because the jurors in question did not sit on the jury that made decisions regarding Johnson's case, that the claim "likely would have been rejected if raised on appeal." 42 AA 8194. Additionally, the District Court found

there was no evidence of improper biases and no authority to support Johnson's contention other than a dissenting opinion. Id.

As argued above, this claim should be dismissed as moot. Since the 2005 jury, not the 2000 jury, is the one that sentenced Johnson to death, the instant claim should be dismissed as moot. NCAA v. University of Nevada, Reno, 97 Nev. 56, 57, 624 P.2d 10 (1981). Additionally, Johnson's complaints about these potential jurors have nothing to do with their inability to be impartial in determining guilt; rather, Johnson 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 Johnson appealed his 2000 conviction. A panel of three district court judges sentenced Johnson 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 Johnson.

In the event that this court does not find this claim moot, the claim still must fail. First, appellate counsel did not err in failing to raise this issue on appeal because the trial court did not err in denying Johnson's challenges for cause against Jurors Fink, Baker, or Shink. The quotations and excerpts that Johnson 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 AA 2664. 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 AA 2688.

Prospective Juror Shink indicated that he believed that a sentence of life in prison without parole was worse than a death sentence. 11 AA 2788. 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. Johnson'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. Id. at 2790-92.

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 People v. Livaditis, 9 Cal.Rptr.2d at 78, 831 P.2d at 303 (Cal. 1992)).

A review of the record shows that Johnson 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, Johnson 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 Johnson 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).

Johnson 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 Johnson 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, Johnson continually implies the court's decision was wrong.[7] 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 RA; 11 AA 2823-24.

Accordingly, Johnson is unable to show that the district court abused its discretion in finding that appellate counsel was not ineffective regarding jury selection, and has therefore failed to show prejudice to overcome the procedural bars.

[7] Johnson once again cites to the incorrect page in the record regarding Juror Davis' testimony.

e. Any alleged error was not cumulative

Johnson contends that he is "entitled to a new trial for multiple reasons connected with the unconstitutional nature in which voir dire was conducted. Johnson provides no law regarding the analysis of cumulative error specific jury voir dire. AOB at 55. Therefore the State relies on its cumulative error analysis infra. See infra III(M).

2. The District Court Did Not Err in Finding that Trial Counsel Was Not Ineffective for Failing to Object or File a Motion Arguing the Kidnapping as Incidental to the Robbery and Appellate Counsel was Not Ineffective for Failing to Raise the Issue on Appeal

Johnson 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. AOB at 56. The District Court was correct when finding that "under applicable case law, the movement and restraints used in this case would likely have been found to have substantially increased the risk of harm to the victims and the motion would not have been successful." 42 AA 8194. Thus, Johnson is unable to show prejudice and his claim must be denied. Id.

In support of Johnson's contention that his kidnapping charges should have been dismissed as incidental to his robbery charges, Johnson spends his entire argument merely citing other cases' holdings and facts. Notably, *Johnson never once attempts to apply the facts of Johnson's case to case law* in order to illustrate

that this claim has merit. The State submits that Johnson's claim is nothing more than a bare allegation that should be dismissed.

Notwithstanding, the State contends that neither Johnson's trial counsel, nor his appellate counsel, were deficient for failing to raise this meritless argument. Johnson went into the house and duct taped the hands and feet of the four boys so that they were lying face down on the floor. Johnson v. State, 118 Nev. 787, 792, 59 P.3d 450, 454 (2002). Then, Johnson transported Peter into a back room because he would not cooperate with Johnson. Id. at 91, 59 P.3d at 453. In the back room, Johnson shot Peter in the head. Id. At this point, Johnson realized that he could not leave three witnesses alive. Id. 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. Id.

First, the three co-defendants had guns; thus, the confinement of duct tape was certainly not necessary to consummate the robbery. Id. 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. Johnson, 122 Nev. at 1349, 148 P.3d at 771.

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, Johnson has not even attempted to allege how this argument could have succeeded considering the facts of his case.

3. The District Court Did Not Abuse its Discretion in Finding that Appellate Counsel Was Not Ineffective for Failing to Raise the Issue of Change of Venue on Direct Appeal

Johnson asserts that his appellate counsel should have argued that the trial court denied Johnson's requests for a change of venue. AOB at 58. When denying Johnson'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 AA 3147. The District Court was correct when finding no merit to this claim. 42 AA 8194.

At present, Johnson contends that his appellate counsel was ineffective for not challenging the district court's denial of a change of venue; however, Johnson fails to articulate any basis his appellate counsel would have had to claim that the seated jury was not fair and impartial. Nothing in Johnson'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).

Of the jurors Johnson mentions in his Opening Brief, only Juror Juarez and Juror Sandoval were on the final jury list. 8 AA 2131. Juror Juarez's comment that he had heard about the case and Juror Sandoval's comment that the summary "rang a bell" does not establish a bias necessary to grant a change of venue motion. In fact, Juror Juarez agreed that he had heard "a little" about this case, but could be an impartial juror. 11 AA 2682. Thus, the trial court appropriately found that "there was absolutely no basis whatsoever for a change of venue." As such, Johnson has failed to demonstrate that his appellate counsel was deficient in this respect or that he suffered any prejudice.

4. The District Court Did Not Err when Finding that Appellate Counsel Was Not Ineffective for Failing to Argue Regarding the District Court's Denial of Trial Counsel to Introduce Alleged Bias and Prejudice from State's Witnesses

Johnson asserts that his appellate counsel should have raised an argument with regard to the trial court's exclusion of certain evidence. AOB at 60. Johnson 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 Johnson cannot demonstrate that his appellate counsel was deficient in this respect or that he suffered any prejudice. The District Court was correct in

determining that Johnson was unable to show ineffectiveness under the Strickland standard. 42 AA 8194.

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 AA 2062. At this point, the State objected and the court listened to argument outside the presence of the jury. 8 AA 2063-69. 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. at 2063. 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. at 2064.

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. at 2065-66. 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. at 2066-68.

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 AA 2069. 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 two murder trials, right?
> Armstrong: Yes, not in one year.
> Defense: In this case you have not been charged with any crime?
> Armstrong: No.

Id. at 2069-71.

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 Johnson's complaint is that he was precluded from delving into the facts of

an irrelevant separate murder trial. Johnson continues to argue that Armstrong must have been receiving some benefit even though he "claims" otherwise.

Johnson 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. Johnson 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; Johnson 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. Johnson cannot show that absent his appellate counsel's failure to bring this claim the result of the proceeding would have been any different.

5. The District Court was Correct When Finding that Appellate Counsel was Not Ineffective for Failing to Raise Prosecutorial Misconduct on Direct Appeal

The District Court did not err when determining that appellate counsel was not ineffective for failing to raise a claim of prosecutorial misconduct based on the State's comments during voir dire. AOB at 63-65; 42 AA 8194.

The first question Johnson 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 AA 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.

Johnson asserts that his appellate counsel was ineffective for not raising an unpreserved and meritless issue on direct appeal. In support of Johnson's claim of ineffectiveness, he cites to a lengthy closing argument by the prosecutor in Castillo v. State.114 Nev. 271, 956 P.2d 103 (1998) 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, Johnson 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 AA 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. at 2672. After four more questions, defense counsel objected, both sides approached the bench and then questioning resumed without incident. Id. at 2672-73.

Appellate counsel was not deficient for failing to raise either the unpreserved question during voir dire of Warren, or the questioning of Morine, because in no way did the State's comments infect Johnson'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 Johnson contends that these comments infected this jury's outlook on Johnson's punishment, that contention is belied by the fact that this jury did not sentence Johnson 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, Johnson has failed to demonstrate that his appellate counsel was deficient in this respect or that he suffered any prejudice.

6. The District Court Did Not Abuse its Discretion When Finding that Appellate Counsel was Not Ineffective for Failing to Argue the Admission of Hearsay

Johnson claims that his appellate counsel failed to appeal the admission of hearsay evidence in violation of the Confrontation Clause during the direct examination of Todd Armstrong. AOB at 65. The District Court did not abuse its discretion in determining this claim had no merit. 42 AA 8194. Notably, in the Opening Brief, Johnson 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 AA 2020-22. Armstrong, Ace, and Bryan discussed and tried to decide how and if they should tell the police that Johnson committed the murders. Id. 2021-22. 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.

at 2022. 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.

Johnson 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 Johnson's involvement after several day of wavering.

In addition to Johnson failing to explain how this statement was hearsay, Johnson fails to explain how appellate counsel could have possibly succeeded with this claim on direct appeal considering Johnson'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 AA 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 effect 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 AA 2282 – 2298.

Accordingly, Johnson 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 Johnson was not prejudiced. Johnson's own counsel delved into the topic and the Nevada Supreme Court stated on appeal that the "issue of guilt was not close." Johnson, 118 Nev. at 797, 59 P.3d at 457.

7. The District Court Was Correct When Finding that Appellate Counsel Was Not Ineffective for Failing to Reveal Alleged Benefits to State's Witnesses

The State is unsure about the exact nature of Johnson's instant argument. Johnson seems to contend that his appellate counsel should have raised a Brady claim on direct appeal. AOB at 67-68. Johnson spends the majority of this argument citing language from Brady v. Maryland, 373 U.S. 83, (1963) and its progeny; yet, there is no application to the facts of Johnson's case. Id. The District Court did not abuse its discretion in denying this claim as neither prong of Strickland was met. 42 AA 8194.

Johnson's instant claim is yet another insinuation that Todd Armstrong received some secret benefit that the defense did not know about. AOB at 67. Johnson has not offered any factual assertion that Armstrong did receive a benefit. Additionally, Johnson cites to LaShawnya Wright's in-court testimony as evidence of some type of Brady violation. Id. Yet, nothing in her testimony indicates that she was receiving any unknown benefit from the State. 8 AA 2120 – 2123.

Johnson'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.

Johnson 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 Johnson makes in the instant petition is from the trial transcript; thus, no prejudice was suffered as the jury heard the evidence. As such, Johnson has failed to demonstrate that his appellate counsel was deficient in this respect or that he suffered any prejudice.

8. The District Court Did Not Err When Finding that Trial Counsel was Not Ineffective for Failing to Object to the Prosecutor's References to the Trial and Guilty Phase

Johnson 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." AOB at 70. The District Court was correct in determining that counsel was not ineffective in this matter. 42 AA 8194.

Johnson contends that during voir dire the State referred to the initial phase of the trial as the "guilt phase." Johnson does not explain why he feels these four instances could have possibly prejudiced the outcome of his trial or his appeal. Also, Johnson 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 Johnson's guilt is a foregone conclusion. In the first instance occurred as follows:

> Does it trouble you at all that once the guilt phase is concluded and **if there's a conviction** you would be sitting as a juror to determine the punishment in this case?

11 AA 2634.

> The State: We have a guilt phase and a penalty phase. If we get to that penalty phase. . . . **if we do that and ask for the death penalty**, can you give that serious consideration?

11 AA 2656. The next instance occurred as follows:

> The State: Can you promise me that if, in the first phase of the trial, the guilt phase, you're convinced the defendant's **guilty beyond a reasonable doubt**, that you'll indeed return verdicts of guilty?

11 AA 2696. The State mentions the guilt phase:

> 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**?

11 AA 2821. Another 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**?

2 RA 262. The last 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 AA 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 Johnson 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.

Johnson 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, Johnson 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, Johnson's counselors cannot be deemed ineffective because Johnson 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.

9. The District Court Did Not Err When Finding that Appellate Counsel was Not Ineffective for Failing to Raise Certain Evidence Presented at Trial

Johnson 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. AOB at 71. The District Court did not abuse its discretion in denying this claim as Johnson did not prove either prong under Strickland. 42 AA 8194. Johnson begins this argument by laying out the case law and statutory rules for evidence of other crimes or acts. Thereafter, Johnson points to several places in the trial when the State asked witnesses if Johnson sold them cocaine and whether he would put the cocaine in a Black and Mild cigar box when he sold it to them. Then, Johnson attempts to claim that the State elicited this information solely to demonstrate that Johnson was a person of poor character. AOB at 73-74.

Johnson's instant contention that this information was improperly admitted by the State to show Johnson 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 Johnson's fingerprints. Thus, the cigar box was substantially incriminating evidence that placed Johnson at the scene of the quadruple homicide. In an attempt to explain away Johnson'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 AA 1895 (emphasis added).

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.

13 AA 3213.

Johnson's appellate counsel was not objectively unreasonable for failing to argue on direct appeal that evidence regarding Johnson's drug transactions was improperly admitted by the State. Had Johnson's appellate counsel made this argument it would have been summarily rejected as laughable. Johnson'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.

Johnson's appellate counsel would have been estopped from challenging this evidence on appeal simply 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).

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

10. The District Court Did Not Abuse its Discretion in Finding that Appellate Counsel was Not Ineffective for Failing to Raise Various Claims Regarding the State's Closing Argument

Johnson contends that his appellate counsel was ineffective for failing to raise three claims regarding the State's closing argument. AOB at 74. The District Court appropriately found that the claims regarding State's closing argument had no merit. 42 AA 8194.

a. Johnson contends the State improperly vouched for witnesses

Johnson cites to the State's closing argument and contends that it was improper witness vouching.[8] AOB at 74-75. After detailing all the evidence that incriminated Johnson, 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 Johnson committed the crimes. The State then argued that in order to find Johnson not guilty the jury would have to find that Charla Severs, Tod Armstrong, Bryan Johnson, and LaShawnya Wright must have been lying. 13 AA 3196.

The prosecutor's argument – that for the jurors to believe Johnson 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 - -

[8] Johnson also briefly mentions comments by the prosecutor in opening statement regarding Charla Severs knowledge of perjury penalties. AOB at 75-76. It is unclear how this is relevant to the argument. Johnson does not expand on this claim regarding the deficiency or prejudice, thus the State asserts it is a bare and naked allegation and must be dismissed.

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, Johnson 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, Johnson 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 Johnson's guilt and the minimal prejudicial impact of a statement that was immediately objected to and sustained.

b. Johnson 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 AA 3181 – 3182. Johnson 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. AOB at 76-77. However, what Johnson 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 and the prosecutor restated. 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. Johnson cannot show that his appellate counsel was objectively unreasonable for failing to raise an issue that the trial court correctly ruled in Johnson's favor. Johnson cannot show how his appellate counsel could have succeeded with an argument on appeal because Johnson succeeded with this argument at trial. Lastly, even if this court finds appellate counsel in error for failing to raise this issue, Johnson suffered no prejudice because the result of his appeal would not have been likely to be any different considering the overwhelming evidence of Johnson's guilt.

c. Johnson contends the State referred to facts that were not adduced at trial

Johnson contends that appellate counsel was ineffective for failing to raise the argument that the State referred to facts not in evidence during closing argument. AOB at 78. 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.

13 AA 3193.

Trial counsel objected to this statement as speculation and the district court overruled the objection. Johnson has not provided any basis for which his appellate counsel could have alleged that the trial court abused its discretion in this instance. Johnson 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. 13 AA 3110, 3112-13. Thus, it is completely reasonable to infer that the one of the victims' puffed on the cigarette before Donte took his life. Johnson 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. See 10 AA 2547. Moreover, Johnson cannot demonstrate that had his appellate counsel alleged that this was an error that his appeal would have had a different outcome. Johnson's

claims of counselors' ineffectiveness regarding the State's closing argument must be denied.

11. The District Court Did Not Abuse its Discretion When Finding that Appellate Counsel Was Not Ineffective for Failing to Raise that the District Court Improperly Admitted Autopsy Photos

Johnson asserts that his appellate counsel was ineffective for failing to raise the district court's admission of autopsy photos. AOB at 79. The District Court did not abuse its discretion in finding that Johnson did not meet his burden under Strickland regarding this claim. 42 AA 8194.

On November 23, 1999, Johnson filed a Motion to Exclude Autopsy Photographs that was denied on March 2, 2000. 5 AA 1098-1101. During the testimony of Dr. Robert Bucklin, the forensic pathologist that conducted the autopsies on Johnson's victims, the State questioned Dr. Bucklin about several aspects of the autopsies. 10 AA 2387-427. Dr. Bucklin indicated that the photographs would assist him in describing his findings during the autopsy. Id. at 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. Id. at 2397-427. 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.

Id. at 2400-01, 2408-09, 2413-14, 2421-23. 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 wound that was still bleeding upon death without any healing. Id. at 2417-21. The blunt laceration on Peter's scalp helped corroborate the story Johnson told others about how he kicked/pistol whipped Peter before killing him. Id.

Johnson'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. Johnson 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). Johnson 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, Johnson cannot show that he

suffered any prejudice from his appellate counsel's actions because Johnson cannot show that this issue would have likely altered the outcome of the appeal.

12. The District Court Did Not Err When Finding that Trial Counsel was Not Ineffective for Failing to Object to Unrecorded Bench Conferences

Johnson 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. AOB at 80. The District Court was correct in determining this claim has no merit. 42 AA 8194.

"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); See also Preciado v. State, 130 Nev. Adv. Op. 6, 318 P.3d 176, 178 (2014). However, "failure to make a record of an unrecorded sidebar warrants reversal only if the appellant shows that the record's missing portions are so significant that their absence precludes the court from conducting a meaningful review of the alleged errors that the appellant identified and the prejudicial effect of any error." Id., 318 P.3d at 178 (*citing* Daniel, 119 Nev. at 508, 78 P.3d at 897). In fact, in both Daniel and Preciado, the Nevada Supreme Court

declined to grant relief and ruled that each appellant failed to demonstrate that the trial court's failure to make a record of unrecorded bench conferences prejudiced his appeal. Id., 318 P.3d at 178; Daniel, 119 Nev. at 508, 78 P.3d at 897.

As Johnson 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. Johnson 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. AOB at 81. Thus, Johnson cannot meet the either prong of Strickland and his claim must be dismissed.

13. The District Court Did Not Abuse its Discretion When Finding that Appellate Counsel was Not Ineffective for Failing to Argue Regarding Instruction 5, 36, 37 and for Failing to Offer a Jury Instruction on Malice

Johnson indicates that "[t]hese issues are presented here because this Court may reconsider its previous decisions and because this issue must be presented to preserve it for appeal." AOB at 85-86. The District Court did not abuse its discretion in dismissing all claims regarding the jury instructions. 42 AA 8194.

a. Premeditation and Deliberation Instruction.

Johnson'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." AOB at 86. Johnson 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 AA 2577 – 2578.

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

b. The Reasonable Doubt Instruction No. 5

Johnson's second complaint is that the trial court's reasonable doubt instruction is improper. AOB at 88, 10 AA 2543. Johnson 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 Johnson'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. Jury Instruction No. 12

Johnson's contends appellate counsel was ineffective for failing to raise an issue regarding Jury Instruction No. 12. AOB at 89. The District Court was correct in denying this claim. 42 AA 8194. Johnson complains that he was convicted of kidnappings which were all specific intent crimes; yet, Jury Instruction No. 12 failed to inform the jury that "defendant cannot be convicted under conspiracy to specific intent crimes unless Johnson had the specific intent to commit those crimes." Id. at 90; 10 AA 2552.

The basis of Johnson'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 Johnson 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. 13 ROA 3148. There is no indication of the basis for which defense counsel found Jury Instruction No. 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 Johnson was charged and his jury convicted him of the crime of Conspiracy to Commit Robbery and/or Kidnapping and/or Murder. 10 ROA 2595. Thus, to a certain extent Johnson's jury did find that Johnson conspired to commit the specific intent crime of Kidnapping.

Third, the State contends that Jury Instruction No. 17 likely cured any possible defect from Instruction No. 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 AA 2557.

Additionally, Jury Instruction No. 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 AAA 2559.

Fourth, Johnson'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 Johnson guilty of First-Degree Kidnapping only under an aiding and abetting theory of liability that the jury did not find that Johnson had the specific intent to kidnap. Clearly, if the jury found Johnson 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, Johnson and his co-conspirators arrived at the scene of the crime with a bag containing the duct tape used to confine the victims. Johnson, 118 Nev. at 792, 59 P.3d at 454.

Lastly, Johnson's jury did not need to convict Johnson of kidnapping under an aiding and abetting theory. Johnson was the person that took Peter into the back room because he was not taking Johnson's demands seriously and would not cooperate with him. Id. at 791, 59 P.3d at 453. When Johnson transported Peter into the back room he hit him in the back of the head and then put a bullet through his skull. Id. After killing Peter, Johnson returned to the room where the other three boys were being confined by duct tape and proceeded to execute them. Id. at 791-92, 59 P.3d at 453-54. Thus, it is hardly believable that Johnson's jury had any doubt as to Johnson's specific intent to engage in kidnapping, or that he was the one that kidnapped the boys.

Johnson's counsel was not deficient for failing to raise this claim because the instruction Johnson received on June 9, 2000 was still an accurate statement Nevada law. Sharma v. State, 118 Nev. 648, 56 P.3d 868 (Nev. 2002) the case Johnson currently cites as evidence of the new law, was ordered on October 31, 2002. Johnson's counsel should also not be deemed deficient for focusing his efforts on attempting and succeeding to overturn Johnson's death sentences rather than a lesser crime and sentence that Johnson would never end up serving. In the event this Court finds appellate counsel deficient, any error did not prejudice Johnson for the reasons detailed above.

d. Trial and Appellate Counsel were Not Ineffective for Failing to Offer and Instruction Regarding Malice

Johnson complains that his trial counsel was ineffective for failing to offer a jury instruction that defined malice. AOB at 91. Johnson also contends that his appellate counsel was ineffective for failing to raise this issue. Id. Notably, Johnson cites to no case authority, nor does he elaborate on why failure to define malice prejudiced him in anyway. The District Court did not abuse its discretion in determining that neither trial nor appellate counsel were ineffective regarding the failure to offer an instruction regarding malice. 42 AA 8194.

First, Johnson 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 Johnson deliberately intended to take these four boys' lives when he put a gun to the back of their heads and pulled the trigger. Johnson 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 Johnson guilty of a degree of murder rather than voluntary manslaughter. 10 AA 2584-85.

Additionally, ample evidence was adduced at trial that Johnson killed all four 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, 118 Nev. at 791, 59 P.3d at 453.

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

III. THE DISTRICT COURT WAS CORRECT IN FINDING THAT JOHNSON'S CONTENTIONS REGADING INEFFECTIVE ASSISTANCE OF COUNSEL IN THE THIRD PENALTY PHASE HAVE NO MERIT

Upon remand for a new capital penalty hearing, the district court appointed the Special Public Defender to represent Johnson. In April 2005, a jury was impaneled and heard the bifurcated penalty phase. The State agrees that all claims regarding this third bifurcated penalty hearing are timely raised, and addresses these claims on the merits.

A. The District Court Did Not Err in Finding that Trial Counsel Was Not Deficient in Failing to Present Mitigating Factors to the Third Penalty Phase Jury

Johnson contends that trial counsel was not effective for failing to argue all 23 mitigating factors found by the first jury. Johnson further contends that trial counsel should have filed a "pretrial motion for the court to consider whether a jury

had already determined that these mitigators exist." AOB at 84. Defendant includes the 23 mitigators that were found by the jury during the first penalty hearing on June 15, 2000. Id. at 83-84. Additionally, Defendant makes the argument that his counsel was ineffective for not arguing to the jury that "the evidence was not clear who was responsible for the actual shooting" as "no eyewitness to the identity of the shooter" was a handwritten mitigator from the first jury. Id. at 84. The District Court correctly found that the failure to list all mitigators "is not ineffective given that those matters were argued in any event and the jurors could consider them in evaluating the penalty." 42 AA 8194.

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. AOB at 84-85. The first jury did not find a mitigator which cast doubt on who the actual shooter was; rather, the mitigator stated, according to Johnson's Opening Brief: "No eyewitness to identify of shooter." 33 AA 7424. 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. at 7423. Notably, the jury failed to find that this mitigating circumstance existed. Id.

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. 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 mitigators 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).

B. The District Court Did Not Err When Finding that Trial Counsel Was Not Ineffective Regarding Investigation in the Third Penalty Hearing

Johnson contends trial counsel was not effective in the investigation regarding the third penalty phase. AOB at 92. The District Court was correct in determining Johnson did not show that counsel was ineffective in investigation. 42 AA 8194.

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.

1. The District Court Did Not Abuse its Discretion When Finding that Trial Counsel Was Not Ineffective in Presenting Mitigation Evidence Regarding Fetal Alcohol Syndrome

Johnson claims that his counsel was ineffective for failing to present or investigate the prospect that he suffered from Fetal Alcohol Spectrum Disorders (hereinafter "FASD"), including that he failed to "obtain or conduct testing." AOB at 94. In support of the possibility that Johnson may have suffered from FASD, Johnson cites to his mother's testimony that she consumed alcohol while she was pregnant with Johnson and that Johnson is of "small stature." Id. Johnson 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 Johnson suffered from "poor reasoning and judgment skills as displayed by the record." Id.

Johnson 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 Johnson's mitigation efforts clearly demonstrated that any further inquiry into FASD would have been fruitless.

Johnson's extremely qualified mitigation expert, Thomas F. Kinsora, Ph.D., believed that there was no sign that Johnson 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." 29 AA 6817. Additionally, Dr. Kinsora testified that he formed his opinion regarding Johnson and Johnson's psychosocial history based, in part, on defense specialist Tina Francis' mitigation report which was compiled in 2000, in preparation for Johnson's initial penalty hearing. Id. at 6811-12. The mitigation report prepared in 2000 by Tina Francis stated that there was nothing to suggest that Johnson's mother used drugs or alcohol during her pregnancy. 29 AA 6887.

It is true that Johnson's mother, Eunice Cain, testified that she drank alcohol while pregnant with Johnson. 24 AA 5800. 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.

24 AA 5812.

Accordingly, there is conflicting testimony presented from Johnson's mother as to whether she consumed alcohol during her pregnancy with Johnson. Moreover, Johnson'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 Johnson is considered short, genetics likely had a bigger role to play in Johnson's height than the possibility that he suffered from FASD. Especially considering the fact that Johnson's maternal grandmother, Jane Edwards, testified that Johnson's father was short, and that Johnson got his height from his short father. 26 AA 6138.

Inasmuch as Johnson 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 Johnson was "a really bright individual" that progressed well in his schooling and received good grades in school. 29 AA 6817, 6896. Accordingly, Johnson'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 Johnson 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.[9] The four broad areas of clinical features that constitute a diagnosis of FASD have remained unchanged since 1973. Id. The Guidelines clearly state,

[9] See Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis, Centers for Disease Control and Prevention, Nat'l Center on Birth Defects and Developmental Disabilities (hereinafter "Guidelines", (July 2004), p. 2-3, available at http://www.cdc.gov/ncbddd/fasd/documents/FAS_guidelines_accessible.pdf

"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.

Johnson 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 Johnson's mitigation experts saw no reason to conduct a further inquiry into FASD. Johnson'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).

Johnson cites testimony from Special Public Defender Jackson, who represented him at his third penalty hearing, that she now feels presentation of FASD

would have been beneficial to Johnson. AOB at 95. Jackson also testified that her knowledge of FASD came to fruition six to seven years after Johnson's third penalty hearing. 42 AA 8236. The Strickland standard is not perfect hindsight. Further, Jackson testified that she recalled her expert testifying that there were not significant levels of FASD in Johnson. 42 AA 8239-40. Thus counsel's decision not to investigate beyond hiring a medical expert who made a finding was reasonable.

Additionally, even assuming that this court feels that Johnson's counsel should have conducted further investigation and evaluation of FASD, Johnson's claim must fail because he cannot meet the second prong of Strickland. As in 2000 and 2005, the fact remains that Johnson still cannot be diagnosed with FASD. Johnson 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.

2. The District Court Did Not Abuse its Discretion When Finding that Trial Counsel was Not Ineffective for Failing to Obtain a Positron Emission Tomography Scan

Johnson claims that his counsel was ineffective for failing to obtain a Positron Emission Tomography Scan (hereinafter "PET Scan"). AOB at 95. The District Court found that "failure to obtain and present a PET scan was not unreasonable given the Mr. Johnson was noted to be bright, the conflicting testimony about whether her mother had been drinking during her pregnancy with him, and the fact that it was not general practice to do one at the time." 42 AA 8194. Additionally,

the District Court found that there is no evidence the PET scan would have been helpful in the presentation of mitigation evidence to the jury. Id.

Johnson's counsel cannot be deemed ineffective for failing to obtain a PET Scan to analyze Johnson's brain. In fact, counsel testified at a post-conviction evidentiary hearing that she "wanted to transport him out of the detention center to have testing done on his brain." 42 AA 8222. However, she was unable to do a brain scan because the judge refused to transport Johnson. Id. Counsel was not ineffective because she did attempt to have testing done.

Notably, Johnson does not claim that he suffers from internal difficulties within the brain or that a PET Scan would possibly result in any findings that Johnson's brain activity is deficient. Thus, Johnson 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. at 192, 87 P.3d at 538. In order for Johnson 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.

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 [Johnson] organically." 29 AA 6896-97.

Dr. Kinsora also testified regarding Johnson'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.

29 AA 101.

Thus, on several occasions, Johnson's mitigation expert, a psychologist and clinical neuropsychologist, testified that Johnson did not have an organic brain disorder and that Johnson was very smart.

Even assuming that this Court somehow finds Johnson's counsel deficient for failing to conduct a PET Scan, Johnson's claim must still fail because he cannot meet

the second prong of Strickland. Johnson has not even attempted to demonstrate that a PET Scan could have possibly led to a more favorable outcome during his penalty hearing.

3. The District Court Did Not Abuse its Discretion When Finding that Counsel was Not Ineffective Regarding the Presentation of Co-Defendant's Sentences

Johnson claims that his counsel was ineffective for failing to properly argue proportionality as an issue in mitigation. AOB at 96. Johnson asserts that his counsel was ineffective for failing to investigate and present evidence that neither Sikia Smith nor Terrell Young received death sentences. The District Court did not abuse its discretion in finding that the decision not to present this information was a strategic one that does not rise to the level of ineffective assistance; nor was it prejudicial. 42 AA 8194.

Johnson's counsel *did* try to argue proportionality as a mitigator. Johnson'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.

25 AA 5917-18. Thereafter, the State objected to this line of argument and the objection was sustained; however, Johnson's counsel was still able to get out his argument that the co-defendant's received life sentences not death. Id.

Inasmuch as Johnson 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 Johnson. 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 Johnson's proceedings. The evidence presented against Johnson differed from that presented against either Sikia Smith or Terrell Young. Notably, the most important evidentiary difference and sentencing consideration among Johnson, Smith, and Young was that Johnson 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, Johnson was not at all prejudiced by his counsel's actions. In fact, defense counsel's actions likely inured to Johnson'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 Johnson's motion. However, Johnson'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, Johnson'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 Johnson more than it helped him. Johnson's counsel testified at a post-conviction evidentiary hearing that she could see how the State could have put that information to use. 42 AA 8246. 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 Johnson'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. 4 AA 964-66.

Accordingly, Johnson's counsel cannot be deemed ineffective because (1) the irrelevant evidence would have likely been excluded; (2) Johnson 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) Johnson cannot demonstrate that he was prejudiced by his counsel's failure to further argue and admit this evidence because Johnson cannot show that had this evidence been introduced there was a reasonable probability that the penalty hearing would have been different.

Lastly, Johnson concludes this argument with the bare allegation that: "appellate counsel was also ineffective for failure to raise this issue on appeal." AOB at 97. The State is confused regarding exactly what issue appellate counsel should have raised on direct appeal. Johnson'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 Johnson is arguing that his appellate counsel should have argued that the trial court abused its discretion in denying Johnson's attempt to introduce his co-defendants' sentences, Johnson 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).

The District Court was correct in finding that Johnson cannot show that either his trial or appellate counsel were ineffective.

4. The District Court Did Not Abuse its Discretion in Finding that Counsel was Not Ineffective for Failing to Offer Mitigators Found by Johnson's First Jury

Johnson 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. AOB at 97-98. Johnson 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."[10] Id. The District Court correctly found that the failure to list all mitigators "is not ineffective given that those matters were argued in any event and the jurors could consider them in evaluating the penalty." 42 AA 8194. The District Court further determined prejudice was not shown. Id.

[10] See *supra* III(A) for further discussion on Johnson's other arguments regarding mitigating factors.

Johnson's argument is unclear as to the action he believes counsel should have taken, other than to quote the State's closing from the first penalty hearing, and asserting that counsel did not interview the hold out from the first hung jury. Id. at 98. He simply states that counsel was ineffective "for the failure to offer all of the mitigating factors found by the first jury." Id. at 98. Johnson's argument fails for two reasons: (1) Johnson'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 Johnson's guilt.

Johnson'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. Johnson's counsel in 2005 enumerated 11 specific mitigating circumstances in the instructions that were provided to the jury. 25 AA 5868-69. Johnson's 2005 jury found the existence of seven mitigating circumstances: Johnson'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. 25 AA 5897-98. 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 Johnson's son and sister loving testified about how much they cared for Johnson and how much he means to them. In the years between the initial penalty hearing in 2000 and the 2005 penalty hearing Johnson'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 Johnson'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 Johnson's victims. 25 AA 5903-02. 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 listing 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 Johnson complained about above. Counsel argued, "we don't know what happened in that house." 25 AA 5905. He argued that we know Johnson 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 Johnson'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 Johnson. 25 AA 5907.

Defense counsel then argued extensively regarding the planning and setting up of the robbery that led to this devastating outcome, and how Johnson was not fully to blame. 25 AA 5913-17. Counsel argued about Tod Armstrong's heavy involvement and manipulation of Johnson 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 Johnson 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 Johnson's case. 25 AA 5919- 31. 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 Johnson's past. 1 RA 6-13. The State was forced to only offer evidence regarding the single aggravating factor, which the jury was already aware existed – Johnson 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 Johnson shooting Derrick Simpson in the face and spine, and Simpson's resulting death from the shooting; Johnson's armed robbery as a juvenile; Johnson's involvement with the attempted murder of Oscar Irias; and Johnson's extensive gang involvement. 1 RA 12-13.

Had defense counsel complied with what seems to be Johnson's instant contention— that all mitigators found by the first jury be listed and argued —the result would have been devastating to Johnson's strategic advantage to have the penalty hearing bifurcated. For example, had Johnson'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." 33 AA 7424.

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

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

5. The District Court Did Not Abuse its Discretion in Finding that Counsel was Not Ineffective in Presenting Mitigation Evidence Regarding Johnson's Father

Johnson claims that his counsel was ineffective for failing to call Johnson's father as a witness to testify that Johnson was neglected and abused. AOB at 99. The District Court was correct in determining this claim has no merit. 42 AA 8194. Johnson admits that his counsel presented substantial evidence that Johnson was abused by his father and observed his father's abuse of his mother. However, Johnson 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. AOB at 99.

Johnson does not offer a reason why calling Johnson's father as a witness, especially if he denied the alleged abuse, would have benefited Johnson's case. Moreover, there is no indication that Johnson's father could have been located. Notably, counsel testified at a post-conviction evidentiary hearing that while she attempted to locate Johnson's father, she was unable to find him. 42 AA 8226. Inasmuch as Johnson argues that his counsel was ineffective for failing to offer this mitigation evidence that Johnson'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 Johnson and his mother suffered at the hands of Johnson's father. Johnson's mother, sister, and grandmother all testified regarding the abuse and neglect from Johnson's father.

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). Johnson's counsel cannot be deemed ineffective for failing to call a witness that would have likely been hostile and could have hurt Johnson'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 Johnson's counsel was deficient in some way for not presenting a witness that would have provided nothing more than duplicative testimony, Johnson cannot show that he was prejudiced. The mitigation evidence was provided to the jury through multiple sources; thus, Johnson 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.

C. The District Court Did Not Err When Finding that Trial and Appellate Counsel Were Not Ineffective for Failing to Preclude the Introduction of Johnson's Prior Bad Act

Johnson asserts several claims of ineffective assistance of counsel for not attempting to exclude the bad act evidence regarding Johnson's August 17, 1998, encounter with Officer Robert Honea. AOB at 100. The District Court did not abuse its discretion when rejecting this claim as failing under both prongs of Strickland. 42 AA 8194.

The specific facts surrounding this incident are as follows: On August 13, 1998, Johnson, 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. Johnson, 122 Nev. at 1459, 148 P.3d at 771. The conspirators drove a white Ford vehicle to the scene of the crime. On August 17, 1998, four days after Johnson murdered the four boys, Johnson was driving the white four-door Ford. Id. The vehicle was pulled over pursuant to a routine traffic stop for speeding and the driver (Johnson) identified himself as "Donte Fletch." Id. Terrell Young was also inside the vehicle. Id. When Officer Honea attempted to place Johnson 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 Johnson and Young fled from the vehicle. There was a brief foot pursuit; however, Johnson and Young were not apprehended. Id. Sergeant Honea

performed a search of the car and located a short barreled shotgun with twenty rounds in the clip, as well as an additional clip. 27 AA 6332-34. This short barreled shotgun was the Universal Enforcer .30 caliber rifle that was used to execute the robbery four days earlier. Id.

Johnson makes several claims of ineffective assistance of counsel with regard to this bad act: (1) Johnson claims it was ineffective assistance of trial counsel and appellate counsel for permitting the introduction of this evidence into Johnson's 2000 trial; (2) Johnson 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. AOB at 102-03.

1. Trial and Direct Appellate Counsel Were Not Ineffective for Permitting the Introduction of this Evidence in the Trial

The State contends that inasmuch as this claim relates to Johnson's initial trial and direct appeal it is procedurally barred and Johnson 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 Johnson could have shown good cause for his delay in filing, his claims would still fail for lack of a showing of prejudice.

First, Johnson's counsel cannot be deemed ineffective for failing to attempt to preclude this evidence because on October 19, 1999, Johnson filed a Motion and Notice of Motion in Limine to Preclude Evidence of Other Guns, Weapons, and

Ammunition, not Used in the Crime. 3 AA 743- 49. Johnson's Motion in Limine concerned the exact incident that Johnson contends his counsel should have attempted to preclude. Additionally, Johnson's counsel filed a Reply to the State's Opposition to Defendant's Motion on November 15, 1999, wherein Johnson re-asserts the reasons such evidence should be excluded. 4 AA 950-55.

Thereafter, on June 1, 2000, the district court conducted a second hearing regarding Johnson's Motion in Limine to Preclude Evidence of Other Guns and Ammunition Not Used in the Crime.[11] 7 AA 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 Johnson 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, Johnson'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 Johnson twice filed motions to exclude such evidence and vigorously argued for its exclusion during the hearing regarding these motions. Johnson's claim

[11] Pages 1813 and 1815 are blank, but the remainder of the transcript is present.

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, Johnson's appellate counsel cannot be deemed ineffective for failing to raise this issue on direct appeal from the first trial because Johnson'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, 118 Nev. at 796, 59 P.3d at 456 (emphasis added).

Accordingly, Johnson'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.

2. Trial Counsel from 2005 Was Not Ineffective Regarding this Evidence

Johnson'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. 23 AA 5600-05. 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, Johnson's counsel did attempt to preclude the evidence from the penalty phase and was partially successful. Thus, Johnson'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 Johnson 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 Johnson. Johnson 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 Johnson'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, Johnson 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, Johnson cannot show that his counsel was deficient in anyway because his counsel made the exact argument which Johnson contends he should have. Moreover, Johnson suffered no prejudice; rather he was advantaged, by his counsel's oral objection as opposed to a pre-trial motion.

3. Appellate Counsel from 2005 was Not Ineffective Regarding this Evidence

Johnson'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 Johnson feels his counsel was ineffective for failing to argue on direct appeal because he provides no elaboration on his bare allegation on ineffectiveness. AOB at 103. 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 Johnson 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.

Within this argument for relief, Johnson details and argues this evidence should have been excluded under NRS 48.045(2). However, Johnson'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 Johnson 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 Johnson ever asserted that this encounter with Sergeant Honea did not occur. Rather, Johnson'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). Johnson 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 Johnson's claims regarding ineffective assistance of counsel stemming from the evidence surrounding his August 17, 1998 encounter with Sergeant Honea are without merit. Johnson 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

D. The District Court Did Not Abuse its Discretion in Finding that Trial Counsel was Not Ineffective for Providing the State a Mitigation Report from Tina Francis

1. Trial Counsel Was Not Ineffective

Johnson 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, Johnson's mitigation expert. AOB 103-104. The District Court is correct in determining that there was no merit to this claim. 42 AA 8194.

The State is slightly confused regarding the exact nature of Johnson's argument as his counsel did not voluntarily provide the State with the report. Rather, the State was provided Tina Francis' mitigation report from defense counsel at the direction of the district court. 29 AA 6792. Johnson further contends that trial counsel was ineffective for allowing such a report to be prepared, and "for the State to be permitted to use evidence in the report against defendant's expert." AOB at 105.

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. 29 AA 6781-800. 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 Johnson 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 families.
> 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.

29 AA 6792-93.

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. at 6792; 42 AA 8018.

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. 29 AA 6792. Thus, the State is unsure exactly what Johnson contends was ineffective about his counsel's performance; unless, Johnson feels that his counsel should have refused to comply with the district court's order. However, if Johnson feels that his counsel was ineffective for failing to refuse to comply with the court's declaration that the mitigation report be turned over, Johnson has failed to illustrate under what grounds defense counsel would have been justified in refusing to comply.

It appears that Johnson'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 Johnson felt his counsel should have refused to comply with the court's order. However, Johnson'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.

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, Johnson's attorney would have had no basis to refuse the court's instruction to turn of the mitigation report. Further, Johnson does not explain how he counsel should have 1) stopped Tina Francis from making any report, or 2) how to keep Dr. Kinsora out of a situation "where he was cross-examined regarding facts in the mitigation experts report." AOB at 105. Because Johnson'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.

2. Appellate Counsel Was Not Ineffective

The District Court did not err in determining that Johnson's argument that his appellate counsel was ineffective for failing to raise this issue was without merit. 42 AA 8194. 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." 29 AA 6887. Dr. Kinsora responded, "I relied on partly, yes." Id. Thereafter, the State proceeded to cross-examine Dr. Kinsora regarding aspects of the mitigation report. Id. at 112-32. 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. Johnson 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 Johnson'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. 29 AA 6885-907. However, there came a point during cross-examination when the State asked Dr. Kinsora if Johnson provided Tina Francis with certain information. 29 AA 6901-07. 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 Johnson 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, Johnson cannot

show that he was prejudiced because the district court limited the State's cross-examination upon appropriate objection.

E. The District Court Did Not Abuse its Discretion When Finding that Trial Counsel Was Not Ineffective for Allegedly Disagreeing in Front of the Jury

Johnson asserts that during closing argument, "defense counsel argued in contradiction to each other." AOB at 106. The District Court was correct in finding that this claim fails under both prongs of Strickland. 42 AA 8194.

Johnson 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. Johnson 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 Johnson has failed to demonstrate the true intent and motive behind the arguments presented by his counsel.

Mr. Bret Whipple was Johnson's first counselor to give a closing statement in support of Johnson's case for mitigation. 29 AA 7013-30 AA 7038. Mr. Whipple cleverly began his argument by recounting Mr. Jim Esten's testimony concerning the life Johnson 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 Johnson is already suffering a bad fate. Mr. Whipple illustrated that Johnson is already being punished

and being held accountable for his crimes: Johnson spends 23 of 24 hours a day in a miniature cell; Johnson 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 Johnson 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 Johnson'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 your 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.

29 AA 7020-21.

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 Johnson committed his horrific crimes while under the influence of mind-altering drugs that he would no longer have access to. Mr. Whipple also demonstrated Johnson and the victims were youthful and under the influence of drugs: a deadly combination. While Mr. Whipple clearly expressed that Mr. Esten testified that there were no drugs in prison, that was clearly not the primary purpose for which Mr. Esten testified. The primary purpose was to show that Johnson 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) Johnson was already suffering a horrible fate and (2) society is protected because Johnson 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[12] people from this earth needs to have some justification for why they should

[12] The State's reference to Johnson taking five lives includes the four victims in this case and Derrick Simpson. The State was precluded by the district court from

continue to let a man such as Johnson 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 Johnson remains a dangerous threat to society. Defense counsel could do nothing to dispute that Johnson has taken the lives of five individuals. However, defense counsel had to find a way to dispute the State's powerful argument that Johnson was a threat while alive and in prison.

The State introduced powerful evidence that prison guard, Officer Gonzalez, watched Johnson 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 Johnson 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

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introducing evidence (that was admitted at the 2000 penalty hearing) regarding Johnson's involvement in the homicide of a sixth individual.

Johnson was not a danger to future lives while he is in prison. Accordingly, Ms. Jackson made the only rebuttal argument she 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 beg 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**.

30 AA 7046-47.

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 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 supposed 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.

29 AA 7046-53.

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 Johnson 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 Johnson posed a future threat to human life; thus, the jury should make sure he never harms another person by giving him the death sentence. Additionally, Jackson testified at a post-conviction evidentiary hearing that she could see how the statements were not necessarily inconsistent, but rather that Mr. Whipple stated that generally drugs are not allowed in prison, and she was simply following up that they might come in illegally. 42 AA 8263.

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 Johnson's counsel was unreasonable for the word choice during closing argument, Johnson 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 Johnson'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, Johnson 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. AOB at 108; 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 Johnson 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). Johnson cannot show that his counsel was deficient for failing to raise a claim that is typically not appropriate on appeal. Also, Johnson 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.

F. The District Court Did Not Abuse its Discretion When Finding that Trial Counsel was Not Ineffective for Referring to Victim's as "Kids"

Johnson contends that his counsel was ineffective for referring to the victims as "kids." AOB at 108. The District Court did not abuse its discretion in rejecting this claim as not meeting the standard under Strickland. 42 AA 8194.

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." Johnson, 122 Nev. at 1356, n. 23. 148 P.3d at 776, n. 23. 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 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 Johnson 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.

29 AA 7026-30 AA 7028.

Johnson 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. Johnson 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, Johnson cannot show that he was prejudiced by his counsel's word choice. Regardless of the word choice used to characterize the four people Johnson 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 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 Johnson 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, 122 Nev. at 1356, 148 P.3d at 776 (emphasis added). Johnson cannot now show prejudice from his counsel's word choice and his claim must fail.

G. The District Court Did Not Abuse its Discretion When Finding that Trial Counsel Was Not Ineffective for Successfully Motioning the Court for a Bifurcated Penalty Hearing and Appellate Counsel was Not Ineffective for Failing to Argue this on Appeal

Johnson alleges that his counsel was ineffective for successfully bifurcating his penalty hearing. AOB at 109-10. The District Court was correct in denying this claim as Johnson failed to prove both deficiency and prejudice. 42 AA 8194. The fact that Johnson contends that he was "severely prejudiced" by his counsel's petition to bifurcate his trial is utterly disingenuous considering the substantial benefits Johnson received by his counsel's repeated efforts to petition the trial court to allow Johnson a bifurcated hearing.

On April 27, 2004, Johnson filed a Motion to Bifurcate Penalty Phase; however, the trial court denied the motion on May 3, 2004. 1 RA 1-5. Thereafter, on April 12, 2005, defense counsel filed a Motion to Reconsider Request to Bifurcate Penalty Phase. 1 RA 6-10. On April 18, 2005, the district court granted Johnson's Motion to Bifurcate. 1 RA 12-13. The reasons underlying defense counsel's desire to bifurcate Johnson'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.

1 RA 3.

The basis for Johnson'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 Johnson had killed. Jackson testified that this was a strategic decision. 42 AA 8263. Understandably, Johnson 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 Johnson the possibility that

his penalty phase would end before the jury heard that while in prison Johnson and another inmate thrown Oscar Irias off a prison balcony. Also, Johnson was able to have the 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 Johnson's penalty hearing was nothing short of fantastic. It should also be noted that Johnson argued on direct appeal from his 2000 penalty phase that the district court improperly denied his request to bifurcate. Johnson, 118 Nev. at 806, 59 P.3d at 462.

Defense counsel's petition to bifurcate Johnson'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, 562 U.S. 86, 89 (2011) (*citing* Bell v. Cone, 535 U.S. 685, 702 (2002). Moreover, "an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for remote possibilities." Id.

Even assuming this Court finds that defense counsel's petition to bifurcate Johnson's penalty hearing fell below an objective standard of reasonableness,

Johnson must still demonstrate prejudice under Strickland, which asks whether it is "reasonably likely" the verdict would have been different, "*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, 562 U. S at 90.

Johnson cannot demonstrate that absent the bifurcation there is a substantial likelihood of a different result. First, Johnson'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. AOB at 111. 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, Johnson's confrontation claim was unaffected by the bifurcation of his penalty hearing.

Next, Johnson 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. AOB at 112. Notably, Johnson 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 Johnson will receive. Therefore,

Johnson's bare and unsubstantiated claim regarding reasonable doubt and bifurcation must be dismissed.

Also, Johnson 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. Johnson cannot meet either prong of Strickland with regard to this assertion.

Lastly, Johnson 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." AOB at 11. Defense counsel cannot be deemed ineffective for bifurcating the penalty hearing because there may be a situation where 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. 25 AA 5933-94.

Johnson 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, Johnson 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, the jury was not influence.

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

H. The District Court Did Not Err When Finding that Counsel Was not Ineffective for Failing to Offer a Mitigation Instruction

Johnson 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. AOB at 114. The District Court is correct in determining that this claim is without merit. 42 AA 8194.

Johnson 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.

25 AA 5863-54.

The basis of Johnson'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, Johnson 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). Johnson 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.

Johnson cannot demonstrate that he was prejudiced by his counsel's failure to challenge an instruction that was an accurate statement of the law. Johnson 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, Johnson'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.

25 AA 5931. For all the reasons described above, Johnson's claim must fail.

I. The District Court Did Not Err When Finding that Appellate Counsel Was Not Ineffective for Failing to Argue that the Prosecution Improperly Impeached a Defense Witness

Johnson claims that his appellate counsel was ineffective for failing to raise the issue of the State's improper impeachment of a defense witness. AOB at 116. The District Court did not abuse its discretion in rejecting this claim. 42 AA 8194.

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. 27 AA 6420- 35. On direct, Zamora stated that his experience growing up was similar to Johnson's except he was a "Crip" and Johnson was a "Blood." Id. Also, Zamora testified about a time when the police arrested him because he assaulted a female. Id. at 6431-32. 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. 27 AA 6436-37. 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. at 6437-38.

Firstly, the State submits that Johnson's claim fails as 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 Johnson did not even have a felony conviction. Thus, Zamora and Johnson'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 Johnson would have

been more credible. Thus Johnson's arguments regarding impeachment are irrelevant.

Additionally, if this Court chooses to view this line of questioning as an attempt at impeachment, as a review of the record shows, the district court did not commit any error. Johnson's Opening Brief details the standards for proper impeachment pursuant to NRS 50.095. AOB at 117. Johnson correctly asserts that the State may not impeach a witness with a misdemeanor conviction. However, what Johnson fails to realize is the district court appropriately applied NRS 50.095, sustained the objection, and offered an immediate admonishment. 27 AA 6437.

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 Johnson 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, Johnson 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 Johnson 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. Accordingly, Johnson'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.

J. The District Court Did Not Abuse its Discretion in Finding that the Death Penalty is Constitutional

Johnson asserts various challenges to the constitutionality of the death penalty and Nevada's capital punishment scheme. AOB at 118. The District Court was correct in denying this claim, though they did so in a blanket statement regarding the Strickland prongs. 42 AA 8194. The State agrees with the result, but submits that Johnson'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.[13] NRS 34.810 provides in pertinent part:

> 1. The court *shall* dismiss a petition if the court determines that:
> …

[13] See supra II for authority regarding affirming the District Courts result through a different rationale.

> (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, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) "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.".

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

1. Johnson Claim that Nevada's Death Penalty Scheme Does Not Narrow the Class of Persons Eligible for the Death Penalty is Without Merit

In Johnson'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. AOB at 119-20. Johnson 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.

2. Johnson's Claim That the Death Penalty is Cruel and Unusual Punishment is Without Merit

Johnson asserts that the death penalty is cruel and unusual punishment. AOB at 120-24. 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. Johnson's claim must fail.

3. Johnson's Claim Regarding Executive Clemency is Without Merit

Johnson asserts that his sentence must be vacated because Nevada's death penalty scheme is unconstitutional "because Nevada has no real mechanism to provide for clemency in capital cases." AOB at 124.

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) cert. denied, 518 U.S. 1035, 117 S.Ct. 1 (1996) ("It is well-established that prisoners have no constitutional or fundamental right to clemency."),

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, Johnson's argument lacks a logical step. Johnson'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. Johnson has cited an effect, and

has assumed a specific cause, but has failed to show a causal connection. Johnson's claim must fail.

K. The District Court Did Not Abuse its Discretion in Finding Johnson's Sentence was Not Invalid

Johnson'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 and is similarly without merit. AOB at 125-31. 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 Johnson 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. Johnson's claim must fail.

Additionally, when considering Johnson'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).

L. The Proceedings Against Johnson Did Not Violate International Law

Johnson claims that his conviction and death sentences are invalid because the proceedings against him violated international law. AOB at 132-33.

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). Johnson 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.

M. Any Alleged Error is Not Cumulative

Johnson claims that he is entitled to reversal of his conviction and death sentence based upon cumulative error. AOB at 133-35.

The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated; it is the State's position that they cannot. However, even if they could be, it would be of no moment as there was no single instance of ineffective assistance in Defendant's case, as argued supra. See United

States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

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 Johnson 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, Johnson received a fair trial.

Johnson raised this cumulative error argument on his direct appeal and the Nevada Supreme Court determined that Johnson's trial was fair. Johnson v. State, 122 Nev. 1344, 1359, 148 P.3d 767, 778 (2006). Inasmuch as Johnson 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 Johnson now raises, there is no cumulative error for this court to now consider.

CONCLUSION

Based on the foregoing, the State requests that this Court AFFIRM the lower court's judgment.

Dated this 6th day of May, 2015.

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this capital brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this capital brief complies with the type-volume limitations of NRAP 32(a)(7)(B)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 36,676 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 6th day of May, 2015.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on May 6, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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