IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * *

| | |
|---|---|
| SIAOSI VANISI,<br><br>Appellant,<br><br>vs.<br><br>RENEE BAKER, WARDEN, and CATHERINE CORTEZ MASTO, ATTORNEY GENERAL FOR THE STATE OF NEVADA,<br><br>Respondents. | No. 65774<br><br>Volume 24 of 26 |



# APPELLANT'S APPENDIX

Appeal from Order Denying Petition
for Writ of Habeas Corpus (Post-Conviction)

Second Judicial District Court, Washoe County

RENE L. VALLADARES
Federal Public Defender

TIFFANI D. HURST
Assistant Federal Public Defender
Nevada State Bar No. 11027C
411 E. Bonneville, Suite 250
Las Vegas, Nevada 89101
(702) 388-6577
danielle_hurst@fd.org

Attorneys for Appellant

# INDEX

## CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7th day of January, 2015. Electronic Service of the foregoing Appellant's Appendix shall be made in accordance with the Master Service List as follows:

Terrence P. McCarthy
Washoe County District Attorney
tmccarth@da.washoecounty.us

Felicia Darensbourg
An employee of the Federal Public Defender's Office

The instant petition was filed more than seven years after the direct appeal was completely resolved, and more than five years after this court dismissed appellant's appeal from the denial of his first petition for post-conviction relief. Appellant has not specifically demonstrated that the delay in raising the issues in this petition was not his fault, nor can he demonstrate prejudice with respect to any of his claims. Finally, appellant has made no attempt to demonstrate that the state has not been prejudiced in its ability to respond to this petition and in its ability to retry petitioner. Thus, appellant's entire petition is properly procedurally barred. We consider this procedural bar to be an independent basis for affirming in its entirety the dismissal of appellant's petition. Nevertheless, out of an abundance of caution, we will address the specific issues raised in appellant's petition to demonstrate that each issue is specifically procedurally barred.

In his petition below, appellant contended that his guilty plea was invalid because it was involuntarily entered. In support of this contention, appellant argued that he should have been informed that he could not be convicted of first degree murder on a felony murder theory if he formed the intent to rob the victims only after he committed the murders. In our order denying appellant's first petition for post-conviction relief, we determined that appellant's plea was voluntarily entered after an appropriate plea canvass. Moran v. Warden, Docket No. 19161 (Order Dismissing Appeal, March 15, 1989). That determination is the law of this case. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975) (the law of the first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same). Nevertheless, appellant argues that this court did not decide the precise issue raised in this contention when it determined that appellant's plea was voluntarily entered. Thus, appellant asserts

that our prior decision is not the law of this case with respect to the narrow issue presented. We disagree. "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799.

Even if we were to consider this a new issue raised for the first time in this proceeding, appellant cannot avoid the procedural bar that applies to new issues that could have been, but were not, raised in a previous appeal or post-conviction proceeding. NRS 34.810(2)&(3) (petitioner must demonstrate good cause and prejudice for raising a new issue in a successive post-conviction petition). As cause for not having raised this issue in his prior petition, appellant asserts only that he is a layman at law and that he did not waive his right to have prior counsel raise every conceivable issue on his behalf. That appellant is a layman is not cause, Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988), and appellant has no right to have counsel raise every conceivable issue, Jones v. Barnes, 463 U.S. 745 (1983).

Even assuming appellant had some right to have counsel raise this issue in the first post-conviction proceeding, appellant cannot demonstrate cause for his failure to have raised the issue in a proceeding filed after his first petition was finally resolved, but before more than five additional years had elapsed. Pursuit of habeas corpus relief in federal court does not constitute good cause for delay in filing a state court petition for post-conviction relief. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989).[3] Finally, as discussed more fully

---

[3]We recognize that appellant was represented by the same attorney during the entire period he was pursuing his federal remedies. Nevertheless, the record reveals that other counsel also represented appellant during this period, and we are unwilling to conclude that a defendant can neglect to raise issues (continued...)

below, appellant cannot demonstrate prejudice with respect to this claim, because the claim lacks merit.

In support of the argument that appellant could not have been properly convicted of first degree murder, appellant asserts that his guilty plea was based entirely on a theory of felony murder, i.e., that the murders were committed while appellant was engaged in the commission of a robbery. NRS 200.033(4). Appellant asserts further that the record demonstrates that he did not form the intent to rob the victims until after the victims were dead. Appellant argues that the sentencing panel removed the only basis for the conviction of first degree murder when it failed to find as an aggravating circumstance that the murders were committed during the commission of a robbery, and found that the murders were random and motiveless. Appellant asserts that the sentencing panel in essence acquitted him of having committed the murders during the commission of a robbery. We disagree.

First, evidence in this case clearly exists to support a finding that the saloon murders were deliberate and premeditated. Appellant agreed to plead guilty without any negotiations, and without specifying any basis for the finding of first degree murder. In canvassing appellant, however, the district court seemed to rely solely on the felony murder theory for accepting appellant's guilty plea. Thus, it may fairly be argued that appellant's plea rests on a theory that he committed the murders while engaged in the commission of a robbery.

We note, however, that appellant admitted at the plea canvass that he committed the murders while engaged in the

---

[1](...continued)
for such a long period of time simply because he or she is represented by counsel who allegedly has a conflict of interest. Other defendants have petitioned for relief in proper person even when represented by counsel, and the prejudice to the state is substantial when a delay of many years occurs before issues are raised. We conclude that appellant cannot demonstrate cause for the unreasonable delay in this case.

commission of a robbery. Evidence in the record did not establish when appellant formed his intent to rob the victims. Appellant asserted to one police officer that he formed the intent after the murders were committed. However, during his tape recorded confession, he asserted that he formed the intent to rob before committing the murders. The question of guilt was not before the sentencing panel when it determined not to rely on the pleaded aggravating factor that the murders were committed during the commission of a robbery. In fact, the record reveals that the sentencing court was concerned whether both aggravating factors, that the crime was committed during the commission of a robbery and that the murders were random and motiveless, could be found in the same case. Thus, the panel elected to find the random and motiveless factor, and not to find the factor that the crime was committed during the commission of a robbery. In so doing, the panel noted that appellant indicated that he did not know why he killed his victims, and that he had not formed the intent to rob when he entered the saloon. The panel did not suggest that appellant did not form the intent to rob the victims before killing them, nor did the panel find that appellant did not commit the murders during the course of a robbery. Indeed, appellant pleaded guilty to and was sentenced for the robbery. The panel simply declined to find and weigh as an aggravating factor that the crime was committed during the commission of a robbery. The panel was not obligated to find all proposed aggravating circumstances, even if these factors would have been supported by the evidence. Finally, the sentencing panel expressed no opinion regarding, and its decision had no effect upon, the determination that appellant was guilty of first degree murder, as he solemnly declared at the time of entry of his guilty plea. Thus, even if appellant could establish cause for having raised this claim in

such a tardy fashion, appellant cannot demonstrate error or prejudice sufficient to excuse his procedural default.

Appellant next contended that the three judge panel was unconstitutional because appellant had no opportunity to voir dire the panel members, because the Nevada Constitution does not provide for a three judge district court, the panels are unfairly biased in favor of returning a death penalty and there are no safeguards for ensuring that the panels are impartial. This claim could have been presented in appellant's direct appeal. Appellant has not established cause for not having raised this issue in his direct appeal. Further, this court has rejected similar challenges to three judge panels. See Paine v. State, 110 Nev. 609, 877 P.2d 1025 (1994) (and cases cited therein). Although Moran's arguments are not exactly the same as the arguments previously rejected, they are closely related and rely on the same basic legal analysis. In any event, we are persuaded that Moran cannot demonstrate prejudice sufficient to overcome his procedural default.

Appellant next contended that the aggravating factor that the killings were committed at random and without apparent motive is unconstitutionally vague and irrational, impermissibly shifted the burden of proof, and was not supported by substantial evidence. Appellant also contended that the aggravating factor that the murders were committed by a person who knowingly created a great risk of death to more than one person is unconstitutionally vague and irrational, could not be applied to the facts of this case, and was not supported by substantial evidence. Although appellant has somewhat expanded his attacks on the validity of the aggravating and mitigating factors, we note that we expressly considered the validity of these factors to the facts of this case, and found both to be constitutional and well supported by the record. Moran v. State, 103 Nev. 138, 734 P.2d

712 (1987). Our prior determination is the law of this case, and appellant has not demonstrated any basis for our not applying that doctrine to the specific facts of this case. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

Appellant further contended that the sentencing panel erred in refusing to consider as a mitigating factor petitioner's history of drug and alcohol abuse and his state of cocaine intoxication at the time of the murders. Appellant asserts that a sentencing panel must find as a mitigating circumstance any matter that is presented in mitigation. This issue was raised in appellant's direct appeal, but was not directly addressed by this court in the Opinion resolving that appeal. Nevertheless, we noted in that Opinion that we had considered all of appellant's remaining contentions, and that we found them to be without merit. Thus, our rejection of this claim is the law of this case. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

Further, the record demonstrates that appellant's assertion that the panel did not consider the mitigating evidence is false; the panel considered the evidence of appellant's intoxication and history of drug abuse, but did not find it to be mitigating in this case. Although the sentencing panel was required to consider all mitigating evidence presented, nothing in state or federal law required the sentencing panel to find the evidence to be a mitigating circumstance. See Parker v. Dugger, 498 U.S. 308 (1991) (death penalty upheld where record demonstrated that the sentencer had considered and weighed proffered mitigating evidence); cf. Wilson v. State, 103 Nev. 110, 771 P.2d 581 (1989) (a sentencer cannot refuse to consider relevant mitigating evidence). Indeed, in a case closely analogous to this case, this court specifically rejected the argument that a sentencer must find all presented mitigating evidence to be a mitigating circumstance. Farmer v. State, 101

Nev. 419, 708 P.2d 149 (1985) (sentencing panel was not required to find defendant's mental impairment a mitigating circumstance where the record demonstrated that the panel had considered the evidence and was aware of the law). Thus, appellant cannot demonstrate prejudice sufficient to overcome the doctrine of law of the case.

Appellant next contended that the district court and the prosecution had a duty to present evidence of mitigation on appellant's behalf despite appellant's steadfast refusal to present such evidence on his own behalf. Appellant asserts that more evidence concerning his family history of alcoholism and his history of drug abuse was known to the prosecution, and should have been presented to justify a sentence less than death. Again, this issue could have been presented in appellant's direct appeal, but was not. Further, the panel was aware of appellant's history and of his intoxication; counsel's assertion that had more emphasis been placed on these facts the penalty would not have been imposed is speculation, and is not supported by the record in this case. Appellant steadfastly, knowingly and voluntarily waived his right to present mitigating evidence. He therefore cannot demonstrate prejudice resulting from any supposed obligation of the state to present evidence on his behalf against his expressed will.

Appellant contended that the Nevada Supreme Court had a duty to conduct "an adequate and rational appellate review of the conviction and sentence." Appellant asserts that this court did not conduct such a review, because we did not address in our opinion every issue raised in appellant's direct appeal. Appellant also asserts that this court did not afford sufficient weight to the mitigating evidence when we reviewed the sentence for excessiveness and disproportionality. Appellant asserts that this court has a duty to state reasons for its conclusion that the

sentence was not affected by passion, prejudice or other arbitrary factors, and that it must inform defendants of the method by which it conducts its review. Appellant concludes that the statute requiring proportionality review is unconstitutionally vague.

These bald assertions, which are based on counsel's belief that we reached the wrong decision with regard to the validity of appellant's sentence, are simply false. This court carefully considers all of the evidence presented in the cases before it, especially in death cases. There is no indication in the record that this court did not properly fulfill its constitutional duties in ruling on appellant's direct appeal. The former statute which required proportionality review was not unconstitutionally vague because it did not require this court to inform defendants of the method it employs in reviewing cases.

Further, assuming some basis for counsel's assertions did exist, appellant could have pursued these claims in his prior petition for post-conviction relief or, at the very least, could have asserted these claims in a petition filed in a more timely fashion than the petition filed below.

Petitioner contended that the issues raised in his prior petition for post-conviction relief were wrongly decided by this court. Petitioner incorporated his prior petition into this petition. Our determination that the prior petition lacked merit is the law of this case. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). Petitioner cannot overcome the doctrine of law of the case by simply asserting that prior counsel did not explain the issues clearly enough for this court to understand their merit. We decline to revisit the claims raised in appellant's prior petition.

Appellant contended the death penalty is per se unconstitutional because it constitutes cruel and unusual

punishment. We decline counsel's invitation to engage in a discussion of policies regarding the death penalty.

Finally, appellant contended that his counsel on his direct appeal and in his first petition for post-conviction relief was ineffective for failing to raise all of the issues contained in this petition. Appellant asserts that counsel's ineffectiveness should constitute cause for his failure to have raised these claims before. Appellant notes that he had the same attorney for his direct appeal and for his first post-conviction petition. Appellant asserts that counsel had a conflict of interests because he could not properly raise the claim that he had been ineffective in the direct appeal. Appellant asserts that this conflict of interests amounts to per se ineffective assistance of counsel, and should result in this court's remanding this petition to the district court for a review of the merits of all of appellant's claims.

Initially, we note that most of the issues raised above could and should have been raised in appellant's direct appeal. At the time of appellant's direct appeal, counsel had no conflict of interests. Appellant argues, however, that he was precluded from discovering these issues and raising them in his first post-conviction petition because of counsel's conflict of interests, which appellant asserts was not disclosed. We note that the public defender was originally appointed by the district court to represent appellant in his direct appeal. Without order from this court or any indication of a conflict, private counsel substituted into the appeal, and the same counsel continued to represent appellant throughout his first state and his federal collateral challenges to his judgments of conviction. It appears, therefore, that appellant selected his counsel, was apparently satisfied with his representation, and therefore waived his right to challenge that representation at this late stage of these proceedings.

More importantly, however, to state a claim of ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they caused actual prejudice to the defendant's case. See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984), cert. denied, 471 U.S. 1004 (1985). As has been demonstrated above, appellant cannot demonstrate any prejudice arising from any act or failure to act of his counsel on direct appeal or in his first post-conviction proceeding. Further, appellant cannot justify his failure following the dismissal of his first petition to assert these claims for more than five years. Thus, the conflict alleged by appellant is not sufficient to justify ignoring appellant's procedural defaults.

We conclude that the district court did not err in dismissing petitioner's petition as procedurally barred. Accordingly, we dismiss this appeal. We direct the clerk of this court to issue the remittitur in this case forthwith.

It is so ORDERED.[4]

Steffen, C.J.

Young, J.

Shearing, J.

Rose, J.

---

[4]The Honorable Charles E. Springer, Justice, was unavoidably unavailable, and did not participate in the decision of this appeal.

cc: Hon. Robert J. Miller, Governor
Hon. Myron E. Leavitt, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Stewart L. Bell, District Attorney
James J. Jackson, State Public Defender
E.K. McDaniel, Warden, Ely State Prison
Robert Bayer, Director, Department of Prisons
Loretta Bowman, Clerk

# Exhibit 116

# Exhibit 116

IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMY NEUSCHAFER,

Appellant,

vs.

WARDEN, NEVADA STATE PRISON,

Respondent.

No. 18371

FILED

AUG 19 1987

JUDITH FOUNTAIN
CLERK, SUPREME COURT

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus.

On August 27, 1985, this court affirmed appellant's judgment of conviction and sentence of death for murder in the first degree. See Neuschafer v. State, 101 Nev. 331, 705 P.2d 609 (1985). Thereafter, on October 22, 1985, appellant filed a proper person petition for a writ of habeas corpus in the district court. Appellant requested that the district court stay execution of his sentence pending review of his petition and appoint counsel to represent him in the post-conviction proceedings. The district court denied appellant's request for a stay, declined to hold an evidentiary hearing and dismissed the petition without prejudice. The district court later appointed counsel to assist appellant with pursuing his state post-conviction remedies. This court subsequently affirmed the order dismissing appellant's proper person petition, "without prejudice to counsel filing an amended petition for post-conviction relief and/or habeas corpus with the district court. . . ." See Order Dismissing Appeal No. 16815, filed November 1, 1985.

Nonetheless, rather than pursue any available state post-conviction remedies, appellant elected to file a petition for a writ of habeas corpus in the federal district court with

the assistance of a federal public defender. In the federal habeas corpus proceedings, appellant asserted the same claims which he had raised in his direct appeal to this court. Appellant was eventually denied federal habeas relief. See Neuschafer v. Whitley, 656 F. Supp. 891 (D. Nev. 1987); Neuschafer v. Whitley, 816 F.2d 1390 (9th Cir. 1987) (recounting the protracted history of the federal proceedings). Notably, the Court of Appeals vacated a stay of execution of appellant's sentence when appellant's counsel informed the court that his conscientious review of the record revealed that a writ of certiorari would not be granted by the United States Supreme Court.

Thereafter, on July 21, 1987, respondent filed an application in the Nevada district court requesting the issuance of a warrant of execution. At the district court hearing on this request on August 4, 1987, appellant requested the court to release all of his previous attorneys, including the Nevada State Public Defender, from any further responsibilities in this matter. The district court canvassed appellant, and all counsel who were present at the hearing, and then discharged all previous counsel. The court then scheduled the execution of appellant's sentence for August 20, 1987.

On August 5, 1987, the following day, appellant, acting in proper person, filed the post-conviction petition that is the subject of this appeal. Appellant further requested that an attorney be appointed to represent him in these proceedings. On that same day, the district court entered an order again appointing the State Public Defender to represent appellant in all further proceedings. The public defender then moved the district court to stay execution of appellant's sentence.

On August 10, 1987, respondent requested that the district court dismiss appellant's petition. On August 17, 1987, at the beginning of the hearing on respondent's motion, State Public Defender Terri Roesser informed the court that a possible conflict of interest existed respecting her office's representation of appellant. Specifically, Roesser noted that appellant's petition challenged the effectiveness of his counsel during his trial and his direct appeal, and that her office had initially represented appellant at his trial. Further, Roesser indicated that her office had represented a primary witness against appellant on at least three prior occasions and that investigators in her office had been involved in prior unrelated criminal proceedings involving appellant. Appellant then indicated that Roesser had explained these possible conflicts to him and that he wanted the public defender to withdraw from the case. Deputy Public Defender Michael Powell also noted for the record that he questioned appellant's capacity to make an "intelligent and knowing waiver at this particular time to be represented by counsel." Nonetheless, the district court concluded that appellant had knowingly and understandingly released the State Public Defender from the case. After hearing respondent's arguments on the motion to dismiss, the district court granted the motion and dismissed the petition. This appeal followed.

Preliminarily, we note that the State Public Defender has filed this appeal on appellant's behalf. Respondent contends that the public defender's office is not authorized to pursue this appeal because the district court previously relieved that office of its responsibility in this matter. The affidavit of attorney Powell, which accompanies the notice of appeal, however, asserts that appellant's competency to waive counsel is in question. Further, Powell asserts that pursuant

to NRS 180.060(3)(b), the public defender's office is authorized to prosecute any appeals it considers to be in the interest of justice. Although we have serious doubts concerning the authority of the State Public Defender to pursue this appeal, we nevertheless elect not to decide that issue and to treat the appeal as one properly invoking our jurisdiction given the gravity of appellant's sentence.

In dismissing appellant's petition for post-conviction relief, the district court concluded that the several claims asserted by appellant were conclusory, did not warrant an evidentiary hearing, and did not entitle him to habeas relief. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984) (a defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations that are either unsupported or repelled by the record). Having reviewed the record on appeal, for the reasons expressed below, we have determined that appellant cannot demonstrate error on appeal, that the district court properly denied appellant relief, and that briefing and oral argument are unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).

First, appellant contended below that his conviction is infirm because the district judge that presided over his trial did not recuse himself. Specifically, appellant alleged that the trial judge was formerly the district attorney and was in charge of prosecuting appellant in a previous murder trial. Appellant contended that the district judge was biased or prejudiced against appellant as a result of the judge's supervisory role in prosecuting appellant for the prior murders. Appellant's counsel also added that the judge's secretary worked previously at the district attorney's office, that this secretary's husband testified against appellant

during the penalty phase, that the judge's former deputy district attorney and law associate also testified at the penalty phase, and that the judge's law clerk, who was eventually in charge of the jury, also testified at the penalty phase. We note, however, that none of these facts is relevant to the question of whether the judge was personally biased against appellant. More importantly, we note that the record of appellant's trial in this case belies appellant's allegations of prejudice because in response to the judge's inquiries, appellant personally informed the district judge that he had no objection to the judge presiding over the trial in this case. Moreover, the trial judge expressly denied any bias, and appellant has not identified a single instance where he was unfairly treated or prejudiced by the trial court's rulings. We therefore conclude that appellant was not entitled to an evidentiary hearing on this claim for relief. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984); Doggett v. State, 91 Nev. 768, 542 P.2d 1066 (1975).

Second, appellant argued that the district court erred by dismissing appellant's previous state post-conviction petition without first appointing counsel and conducting an evidentiary hearing. We agree with the district court, however, that these claims are not appropriate grounds for habeas relief. They do not challenge the constitutionality of appellant's conviction or sentence, or otherwise state a cognizable claim for relief under NRS 34.370(4). Moreover, because appellant's previous petition was dismissed without prejudice, appellant obviously was not aggrieved by the lower court's rulings in this regard.

Appellant next contended that the jury instructions at the trial misstated the law and did not include an instruction on lesser included offenses. Appellant, however, failed to

identify which jury instructions incorrectly stated the law. Further, appellant failed to specify any prejudice resulting from the allegedly improper jury instructions. Moreover, the record of appellant's trial reveals that the jury was properly instructed on the elements of first degree murder and the lesser included offense of second degree murder. We therefore conclude that the district court did not err when it refused to conduct an evidentiary hearing on this claim for relief. See Doggett v. State, 91 Nev. 768, 542 P.2d 1066 (1975).

Appellant also complained that his counsel failed to request a change of venue prior to his trial. Appellant emphasized that he was convicted of two previous murders in the same county as the instant offense. Again, however, appellant stated this claim for relief in only vague and conclusory terms; he failed to set forth any specific facts to show that news coverage or other pretrial publicity tainted the jury or otherwise deprived him of a fair trial. See Dobbert v. Florida, 432 U.S. 282 (1977); Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985). Accordingly, the district court properly denied appellant's request for an evidentiary hearing on this claim for relief. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).[1]

Next, appellant contended that the district court improperly failed to excuse a juror during the penalty phase of his trial after it was discovered that a juror knew of appellant's prior murders.[2] As the district court noted, however, appellant did not identify the juror to whom he was

---

[1]We reject counsel's arguments that appellant could not substantiate this claim because he was incarcerated and did not have access to newspaper articles and clippings pertaining to his case.

[2]Specifically, appellant claimed that "one juror had been advised of my prior murders by a citizen of the community but was left on the jury panel."

referring, did not state exactly what facts the juror knew, or state how this alleged error prejudiced him. Appellant's appointed counsel later identified the juror as Ms. Martin and argued that this contention should not be summarily rejected because appellant did not have access to his trial transcript to substantiate his claim. Counsel also stated that this particular juror worked with and was good friends with the mother of one of the teenagers that appellant previously murdered. In a separate proceeding during the penalty phase, the juror testified to her realization, after the guilt phase of the trial had concluded, that she recalled the mother's anguished state regarding her daughter's disappearance and murder. Yet, counsel added, appellant's trial counsel failed to object to the juror remaining on the panel because appellant had already been found guilty and only the penalty phase remained. Arguing that the penalty phase is a critical stage of the proceedings, counsel suggested that the district court should have, sua sponte, excused this juror because she could not have remained impartial or indifferent in light of this personal knowledge.

Our review of the record of appellant's trial indicates that juror Martin was specifically questioned by the trial court. She acknowledged the above facts, and testified that she could fairly weigh the aggravating and mitigating factors presented in the penalty phase. She also noted that she was unaware of the specifics of appellant's prior crimes, the existence of which were properly revealed to all jurors during the penalty phase of the trial. Thus, it appears that appellant was not prejudiced by the continued participation of this juror. We conclude, therefore, that the record repels appellant's claim of error in this regard, and that appellant

was not entitled to an evidentiary hearing on this issue. See Doggett v. State, 91 Nev. 768, 542 P.2d 1066 (1975).

Next, appellant contended that his counsel failed to present any evidence of mitigating factors at the penalty phase of his trial other than the testimony of his attorney. We note, however, that appellant's petition did not specify the particular mitigating factors he felt could have been presented or state how he was prejudiced by counsel's failure. Significantly, the jury relied upon three aggravating circumstances in imposing the death sentence in this case: 1) commission of the murder by a person under sentence of imprisonment; 2) commission of a murder by a person previously convicted of another murder; and 3) commission of a murder involving torture, depravity of mind or mutilation of the victim. See Neuschafer v. State, 101 Nev. 331, 705 P.2d 609 (1985); Neuschafer v. Whitley, 816 F.2d 1390 (9th Cir. 1987). Thus, even assuming the existence of some mitigating factors, we conclude that their admission would not have effected appellant's sentence. See Neuschafer v. Whitley, supra.

Appellant also contended that his conviction is infirm because he was not permitted to call two witnesses from out of state in his own defense. As the district court noted, however, appellant's petition failed to identify the witnesses, the supposed substance of their testimony, or whether their testimony would have changed the result of appellant's trial -- a proposition of the slightest weight given the overwhelming evidence of appellant's guilt. Thus, this claim for relief consisted of mere naked allegations, unsupported by any factual matter, and the district court, therefore, properly refused to conduct an evidentiary hearing on this issue.

Appellant also contended below that his conviction is infirm because the trial court failed to suppress an allegedly

involuntary confession made by appellant. We note, however, that appellant raised this claim in his direct appeal and in prior federal habeas corpus proceedings. The denial of this claim in those previous proceedings is the law of the case for purposes of this appeal, and appellant was therefore precluded from again litigating this claim below. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). Thus, the district court did not err when it refused to hold an evidentiary hearing on this claim for relief.

Finally, appellant contended below that he was denied effective assistance of counsel at his trial and in his direct appeal. Specifically, appellant contended that his counsel was ineffective for "failure to investigate, failure to object to jury instructions, failure to disqualify judge, failure to move for change of venue and failure to present mitigating factors at penalty phase." Appellant further contended that after counsel was appointed, he would be better able to answer. Appellant failed to set forth any facts which would support any of the particulars of his claim of ineffective assistance of counsel. As noted above, appellant failed to specify the nature of the investigation that counsel should have performed, failed to identify any errors in the jury instructions and failed to identify any mitigating circumstances that counsel could have presented to the jury that would have altered the sentence that appellant ultimately received. Further, appellant failed to assert that any of his counsel's alleged deficiencies deprived appellant of a trial in which the result was reliable. Accordingly, we conclude that appellant failed to state a claim of ineffective assistance of counsel entitling him to an evidentiary hearing. See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d

504 (1984), cert. denied, 471 U.S. 1004 (1985); Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

As we previously noted in our opinion affirming appellant's judgment of conviction and death sentence, the evidence of appellant's guilt in this case was overwhelming and the verdict was free from doubt. See Neuschafer v. State, 101 Nev. at 336, 705 P.2d at 612. For the reasons expressed above, we hereby dismiss this appeal and deny appellant's request for a stay of execution. See Chap. 176, 1987 Nev. Stat. ch 539, § 22, at 1220-1221.

It is so ORDERED.

_____, C. J.

_____, J.

_____, J.

cc: Hon. Michael E. Fondi, District Judge
Hon. Brian McKay, Attorney General
Terri Steik Roesar, State Public Defender
Alan Glover, Clerk

# Exhibit 117

# Exhibit 117

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS NEVIUS,

Petitioner,

vs.

GEORGE SUMNER, Director, State of Nevada, Department of Prisons,

Respondent.

No. 17059

THOMAS NEVIUS,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR THE COUNTY OF CLARK, STATE OF NEVADA, and the HONORABLE JOSEPH PALLIKOWSKI, District Judge thereof,

Respondents,

THE STATE OF NEVADA,

Real Party In Interest.

No. 17060

FILED

OCT 31 1986

LUCITH FOUNTAIN
CLERK, SUPREME COURT

ORDER DISMISSING APPEAL NO. 17059
AND DENYING PETITION NO. 17060

In Docket No. 17059, Nevius appeals from two orders of the district court denying his petition for post-conviction relief and his post-conviction petition for a writ of habeas corpus. In both petitions, Nevius alleged that several of his constitutional rights were violated at his trial by the prosecutor's allegedly discriminatory use of his peremptory challenges during the voir dire of the jury panel. The district court denied both of Nevius' petitions, without holding an evidentiary hearing. The district court noted that this court had already concluded that Nevius' constitutional rights were not violated in this regard, when we affirmed Nevius' judgment of conviction in Nevius v. State, 101 Nev. 238, 699 P.2d 1053 (1985). In Docket

EXHIBIT "A"

No. 17060, Nev... filed a petition for a writ of ...mus, seeking to compel ... district court to hold an evi... tiary hearing on the merits of his petitions.

Finally, Nevius seeks a stay of execution of his death sentence, currently scheduled to be carried out on Friday, February 21, 1986, pending the United States Supreme Court's decision in Batson v. Kentucky, cert. granted, 105 S. Ct. 2111 (1985). Nevius asserts that the Court in Batson may render an opinion departing from its previous approach to peremptory challenge issues set forth in Swain v. Alabama, 380 U.S. 202 (1965), which we applied in our opinion affirming Nevius' judgment of conviction. See Nevius v. State, supra.

Although Nevius has not yet transmitted the full record on appeal to the clerk of this court, our review of the documents Nevius has provided us reveals that Nevius will not be able to demonstrate error on appeal and that further briefing and oral argument in this matter are not necessary. See generally Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976). Specifically, we note that this court fully considered and rejected Nevius' contention that his constitutional rights were violated by the prosecutor's use of his peremptory challenges, when we affirmed Nevius' direct appeal from his judgment of conviction. Nevius v. State, supra. While it is true that this court followed the traditional approach set forth in Swain v. Alabama, supra, we also noted in footnote 3 of our opinion that we were satisfied on the record that Nevius would not be able to demonstrate a constitutional violation even under the more liberal approach to peremptory challenge issues, as set forth in such cases as Weatherly v. Morris, 708 F.2d 1487 (9th Cir. 1983), cert. denied, 104 S. Ct. 719 (1984). See Nevius



AA05775

v. State, supra. Accordingly, even if the United St Supreme Court did decide Batson to deviate from the more tr tional approach of Swain in favor of the type of analysis set forth in Weatherby, Nevius would still not be able to demonstrate a constitutional violation. In short, we conclude that this issue has already been laid to rest, and we will not permit Nevius to raise the issue once again. See generally Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

Further, we note that the district court did not act arbitrarily or capriciously by denying Nevius' request for an evidentiary hearing on the merits of his post-conviction petitions. Nevius asserts that the evidentiary hearing was necessary to provide the prosecutor the opportunity to place his reasons on the record for exercising his peremptory challenges. However, as we noted in our opinion in Nevius v. State, supra, the prosecutor did in fact voluntarily place his reasons for exercising his peremptory challenges on the record at Nevius' trial, and again this court has already concluded that Nevius would not be able to demonstrate a constitutional violation in the face of this record. Therefore, an evidentiary hearing would have served no useful purpose.

In light of the above, we conclude that Nevius will not be able to demonstrate that the district court erred by denying his post-conviction petitions without an evidentiary hearing. Accordingly, we hereby dismiss Nevius' appeals in Docket No. 17019, and we further deny Nevius' petition for a writ of

---

[1] We reiterated this conclusion to Nevius in our order denying his petition for rehearing in the above matter, issued on December 23, 1983.

mandamus in Docket 17060. Finally, in light of t[illegible]ve, we deny Nevius' motion for a stay of execution of h[illegible] death sentence.

It is so ORDERED.

Gunderson, J.

Young, J.

cc: Hon. Joseph Pavlikowski, District Judge
Hon. Brian McKay, Attorney General
Hon. Robert J. Miller, District Attorney
Lovell, Potter & Pilkey
Greaves, Leavitt, Cauley & Koch
Hon. Richard Bryan, Governor
George Sumner, Warden
Loretta Bowman, Clerk

# Exhibit 118

# Exhibit 118

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS NEVIUS,

Petitioner,

vs.

WARDEN, NEVADA STATE PRISON, E.K. MCDANIEL; AND ATTORNEY GENERAL OF NEVADA, FRANKIE SUE DEL PAPA,

Respondents.

No. 29027

FILED

OCT 09 1996

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

THOMAS NEVIUS,

Appellant,

vs.

WARDEN, NEVADA STATE PRISON,

Respondent.

No. 29028

ORDER DISMISSING APPEAL AND DENYING PETITION FOR WRIT OF HABEAS CORPUS

Docket No. 29027 is an original petition for a writ of habeas corpus. Docket No. 29028 is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. For purposes of clarity, we will refer to petitioner/appellant Thomas Nevius as appellant, and to respondents as the state.

On November 12, 1982, appellant was convicted, pursuant to a jury verdict, of one count each of murder in the first degree, attempted sexual assault, robbery, and burglary, all with the use of a deadly weapon. The jury imposed the sentence of death with respect to the murder. Appellant's judgment of conviction and sentence were affirmed by this court on direct appeal. Nevius v. State, 101 Nev. 238, 699 P.2d 1053 (1985).

On February 11, 1986, appellant filed in the Eighth Judicial District Court a post-conviction petition for a writ of habeas corpus. On February 13, 1986, the district court summarily

denied appellant's petition on the merits and because it was filed in the wrong venue. On February 14, 1986, appellant filed in the Eighth Judicial District Court a petition for post-conviction relief.[1] On February 18, 1986, the district court summarily denied the petition "on the merits."

Appellant appealed to this court from the denial of his two post-conviction petitions. Appellant also filed in this court a motion for a stay of execution pending appeal, and a petition for a writ of mandamus. These documents were docketed in this court as Docket Nos. 17059 (both appeals) & 17060 (mandamus). On February 19, 1986, this court dismissed the appeals and denied the petition for a writ of mandamus.

Also on February 19, 1986, appellant filed in federal district court a post-conviction petition for a writ of habeas corpus. Appellant filed a supplemental petition on March 6, 1986. On November 1, 1986, the federal district court dismissed appellant's petition for a writ of habeas corpus without an evidentiary hearing. Appellant appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit issued its decision affirming the denial of habeas relief on July 28, 1988. Nevius v. Sumner, 852 F.2d 463 (9th Cir. 1988), cert. denied, 490 U.S. 1059 (1989).

On June 7, 1989, appellant filed in the First Judicial District Court a post-conviction petition for a writ of habeas corpus. Although ordered by the district court to file an answer to appellant's petition, the state did not file an answer, and took no action with respect to the petition for almost five years. Then, without offering any explanation whatsoever for the delay,

---

[1]This petition was essentially identical to the petition for a writ of habeas corpus that had been denied on February 13, 1986. The reason for the separate filing was to correct the jurisdictional defect in the original petition.

the state moved to dismiss appellant's petition on April 11, 1994.[2] Without conducting an evidentiary hearing,[3] the district court denied appellant's petition on July 18, 1996. This appeal (Docket No. 29078) followed.

On August 23, 1996, appellant filed in this court an original petition for a writ of habeas corpus (Docket No 29027). Because appellant's appeal and his original petition both involve the same facts and similar issues, we have consolidated them for purposes of disposition. NRAP 3(b).

Initially we note that this is at least appellant's third post-conviction petition challenging the validity of his judgment and sentence.[4] Based on our complete review of the record and the pleadings that have been submitted, we conclude, as explained below, that the district court properly dismissed appellant's petition as procedurally barred without resolving the merits of any of his claims. We also dispose of appellant's claims on procedural grounds; our discussion of the merits of appellant's claims in this order is strictly for the purpose of

---

[2]We are concerned about the almost five year delay in this case, and surprised that the state offered no explanation for its lack of diligence. Appellant had an obligation, as petitioner, to prosecute his petition to resolution, and should have notified the district court within a reasonable time of the state's dereliction. We note, however, that appellant was apparently not represented by counsel during this period of delay, because his motion for the appointment of counsel had not been ruled on by the district court. In any event, we have conscientiously reviewed the record in this case, and we do not believe the delay prejudiced appellant or denied him due process.

[3]The district court did conduct a hearing, and allowed the parties to call witnesses. However, the issue at the hearing was whether appellant would be afforded a complete evidentiary hearing. The district court denied appellant's motion for an evidentiary hearing.

[4]Under the circumstances of this case, appellant's first two petitions in the Eighth Judicial District Court might fairly be characterized as one petition for purposes of applying applicable procedural bars.

demonstrating that appellant cannot overcome his procedural defaults by a showing of actual prejudice.

In 1989, when the instant petition for a writ of habeas corpus was filed, NRS 34.810 provided in relevant part:

> 1. The court shall dismiss a petition if the court determines that:
>
> . . . .
>
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> (1) Presented to the trial court;
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief; or
> (3) Raised in any other proceeding that the petitioner has taken to secure relief from his conviction and sentence,
> unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.
>
> 2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Under NRS 34.810(1)(b) above, the district court had discretion to dismiss appellant's petition of June 7, 1989, if it raised new issues that could have been raised in a prior proceeding challenging the judgment of conviction, and appellant did not show cause and prejudice. Most of the issues raised in appellant's 1989 petition are arguably new issues, because they relate to the effectiveness of appellant's trial and appellate counsel, and no issues regarding the effectiveness of appellant's counsel were raised in any of the prior proceedings.[2] Further,

---

[2]The state argues that the issue of effectiveness of counsel was raised at every level of the prior proceedings. This argument is supported by a very selective and out of context reading of each of the previous petitions to find language that could be construed as a claim that counsel was ineffective. Based on our (continued...)

there is no reason why any of appellant's claims could not have been raised in a prior proceeding. Thus, appellant has the burden of demonstrating cause and prejudice in order to overcome this procedural default.

Under NRS 34.810(2) above, the district court had an obligation to dismiss appellant's successive petition if the petition raised issues that were previously raised and were decided on their merits against petitioner, or if the petition raised new issues, and the district court found that the failure to raise the issues previously was an abuse of the writ. As noted above, most of the issues are arguably new issues. Thus, the district court properly dismissed the petition if the failure of appellant to raise these issues previously constitutes an abuse of the writ.

If appellant can show cause and prejudice for not raising these issues prior to this 1989 petition sufficient to satisfy the procedural requirement of NRS 34.810(1)(b) above, then it cannot be said that this petition is an abuse of the writ. If petitioner cannot show cause and prejudice, then this petition is an abuse of the writ. Thus, under the circumstances of this case, the relevant focus is cause and prejudice. Cf. Bonin v. Calderon, 77 F.3d 1155, 1158-59 (9th Cir. 1996), cert. denied, ___ U.S. ___, 116 S.Ct. 980 (February 23, 1996) (the analysis of a miscarriage of justice is the same whether the proposed bar to review is procedural or an abuse of the writ).[6]

---

[5](...continued)
review of the record, we conclude that, even with the most liberal reading of the prior petitions, the claim of ineffective assistance of trial or appellate counsel cannot be found.

[6]Not all of appellant's claims and arguments in his petition below included allegations of ineffective assistance of counsel. Some of appellant's arguments are simply reargument of issues already resolved against appellant, albeit in a more focused fashion. To the extent that appellant's petition could be (continued...)

As cause for his procedural default, appellant claims that he was represented by the same attorneys at trial, on direct appeal, in his original state court post-conviction proceedings and in all of his federal proceedings. The first time appellant was represented by independant counsel was in the filing of the instant petition below. Appellant argues that his prior counsel's conflict of interest precluded him from raising claims regarding the effectiveness of trial and appellate counsel. Appellant argues further that this conflict of interest is an impediment, external to the defense, that prevented him from raising in his prior post-conviction proceedings his claims of ineffective assistance of trial and appellate counsel. See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). Alternatively, appellant argues that his counsel in his first post-conviction proceedings were ineffective for failing to raise the claims he now raises, and that counsel's ineffectiveness is cause for his procedural defaults.

This court has held that under circumstances amounting to a denial of the Sixth Amendment right to counsel, a valid claim of ineffective assistance of counsel may be sufficient cause to overcome a procedural default, assuming a showing of actual prejudice can be made. Mazzan v. Warden, 112 Nev. ___, ___ P.2d ___ (Adv. Op. No. 110, July 22, 1996); Bertgen v. State, 110 Nev. 554, 560, 875 P.2d 361, 364 (1994). Further, an attorney's conflict of interest might, under some circumstances, be sufficient cause to excuse a procedural default. Without

---

[6](...continued)
construed as raising again old issues, our consideration of the merits of these old claims is barred by NRS 34.810(2), and by the doctrine of the law of the case. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799.

suggesting that counsel acted inappropriately or deciding the issue of whether appellant was entitled to effective assistance of counsel in his first post-conviction challenge to his judgment of conviction, we have determined under the unusual circumstances of this case that it is arguable that appellant can show sufficient cause to overcome his procedural defaults. Thus, we have considered the merits of the issues raised by appellant in his petition below in order to determine whether appellant can show sufficient actual prejudice to overcome his procedural defaults. We conclude that he cannot.

The most significant issue raised by appellant in his petition below concerns whether the prosecutor at his trial had improper motives for excluding all potential minority jurors by use of his peremptory challenges. Appellant's trial counsel has made serious allegations against the prosecutor, including the claim that the prosecutor referred to the challenged African-American jurors as "niggers" shortly after trial. Appellant's specific claim in this appeal is that counsel was ineffective for not having brought the prosecutor's alleged prejudicial statements to the attention of the courts in a timely fashion.

If counsel's allegations are true, they are very disturbing. Nevertheless, we have reviewed the record, and we conclude that counsel's accusations are not credible,[7] and in any event would not afford appellant a basis for relief in the context

---

[7]Although the focus of all of appellant's post-trial challenges to his judgment of conviction has always been the prosecutor's motives in striking the minority jurors, appellant's trial counsel did not accuse the prosecutor of improper comments in the trial court, on direct appeal, in his first two state post-conviction proceedings or in his first post-conviction proceeding in federal court. Counsel made this startling accusation, almost as an afterthought, for the first time at the end of a hearing in federal court in response to the federal district judge's inquiry whether counsel was aware of any other basis for granting appellant an evidentiary hearing. Under the circumstances that the accusation was made, years after the comments were allegedly uttered, the accusation seems incredible.

of this case. We note that the prosecutor executed an affidavit in which he denied the substance of appellant's accusations and averred that he did not exercise his peremptory challenges for any improper reason. At the time of appellant's trial, the motives of the prosecutor in exercising peremptory challenges could not be examined. See Swain v. Alabama, 380 U. S. 202 (1965).[8] Nevertheless, the prosecutor in this case voluntarily placed in the record his reasons for excluding the African-American venire persons from the jury. This court, the federal district court and the Ninth Circuit Court of Appeals all concluded that the prosecutor's reasons were proper. Indeed, the reasons cited by the prosecutor for excluding the minority jurors would likely have influenced any prosecutor to peremptorily challenge the prospective jurors, regardless of race.[9] Thus, even if trial counsel had made a timely record of the prosecutor's alleged comments, this court would not have reversed on appeal appellant's judgment of conviction on this basis.

An evidentiary hearing at this point in time on this issue would serve no purpose because the record contains all of the evidence that such a hearing might produce. We have closely reviewed the record, and we are of the opinion that appellant cannot show any prejudice sufficient to establish a claim of ineffective assistance of counsel with regard to these alleged comments, because the record repels appellant's claim that the prosecutor exercised his peremptory challenges for any improper

---

[8]Swain was overruled by Batson v. Kentucky, 476 U.S. 79 (1986). Batson is not retroactive. Allen v. Hardy, 478 U.S. 255, 260-61 (1986).

[9]The prosecutor's stated reason for challenging one prospective alternate juror may not have been as strong as his reasons for challenging the other minority jurors. However, as noted by the Ninth Circuit, no alternate juror deliberated in appellant's case, so appellant cannot demonstrate any prejudice based on the exclusion of the alternate juror.

reason. See Strickland v. Washington, 466 U.S. 668 (1984) (prejudice prong of claim of ineffective assistance of counsel is established if a defendant can show that an error of counsel was so severe that the result of the proceeding would likely have been different absent the error).

Appellant contended in his petition below that his appellate attorneys were ineffective because they did not petition the United States Supreme Court for a writ of certiorari after this court dismissed appellant's direct appeal. At that time, Batson[10] was pending before the United States Supreme Court. Appellant argues that if his attorneys had petitioned the United States Supreme Court for a writ of certiorari, his case would not have been final when Batson was decided, and Batson could have been applied to appellant's case.[11]

This argument is idle speculation. Counsel had no obligation to pursue a discretionary appeal on the chance that the law might change in a non-retroactive manner in the interim. Indeed, counsel expressly considered petitioning the Supreme Court for a writ of certiorari and elected for tactical reasons not to file such a petition. Tactical decisions of counsel are virtually unchallengeable absent extraordinary circumstances. Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990). In any event, we are persuaded that the prosecutor's exercise of his peremptory challenges would have satisfied the Batson standard. Thus, appellant cannot demonstrate either that counsel's performance was deficient or that he was prejudiced.

Appellant alleged in his petition below that his trial and his appellate counsel were ineffective for failing to

---

[10]Batson v. Kentucky, 476 U.S. 79 (1986).

[11]Batson is not retroactive. Allen v. Hardy, 478 U.S. 255, 260-61 (1986).

demonstrate that appellant's sentence of death violates the Eighth and Fourteenth Amendments because it was the product of racial bias. As noted above, appellant's death sentence was not the product of racial bias. Thus, this contention lacks merit.

In addition to the claims discussed above, appellant raised the following claims in his petition below: (1) Trial counsel were ineffective for failing to develop evidence to support a claim of systematic exclusion of minorities by the prosecutor; (2) trial counsel were ineffective for failing to request a jury instruction on the necessity of corroboration of accomplice testimony; (3) trial counsel were ineffective for failing to suppress the in-court identification of appellant as the killer because that identification was the product of improper pretrial identification procedures; (4) trial counsel were ineffective for failing to object to the prosecutor's inappropriate arguments, thus failing to preserve the issue of prosecutorial misconduct for appeal.

We have carefully reviewed each of these claims of ineffective assistance of counsel, and we conclude under the standard of Strickland v. Washington, 466 U.S. 668 (1984), that the claims lack merit.

In a supplemental memorandum in support of his petition below, appellant argued that jury instruction 10 at the penalty phase of the trial shifted the burden of proof regarding mitigating circumstances, and that the anti-sympathy instruction violated appellant's constitutional rights. This court determined in appellant's direct appeal that the anti-sympathy instruction was proper. Maxium, 101 Nev. at 251, 699 P.2d at 1061. Our ruling on this issue is the law of the case. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). The suggestion that jury instruction 10 shifted the burden of proof lacks merit. Nothing

in that instruction could be construed as shifting the burden of proof.

In any event, both of these claims are procedurally barred under NRS 34.810, and appellant made no attempt whatsoever to demonstrate that these claims are not barred. Appellant did not allege that counsel was ineffective for not raising these claims, and even if he had, a claim of ineffective assistance of counsel regarding these claims would have been without merit.

No other claims are properly before this court in appellant's appeal from the denial of his post-conviction petition for a writ of habeas corpus (Docket No. 29028). We conclude, therefore, that even if appellant could show cause for his procedural defaults, he cannot show prejudice. Therefore, the district court properly denied appellant's petition as procedurally barred. We dismiss appellant's appeal in Docket No. 29028.[12]

Docket No. 29027 is an original petition for a writ of habeas corpus. Appellant seeks a review by this court of his judgment of conviction and death sentence. Generally, a petition for a writ of habeas corpus must be brought in the first instance in the appropriate district court. NRAP 22; NRS 34.738. Nevertheless, in this case the issues raised by appellant are clearly without merit. Thus, in order to avoid a remand to the district court and another round of unnecessary litigation, we have elected to address the merits of this petition.

In the petition, appellant raises four "substantive issues:" (1) Appellant's judgment of conviction and sentence are invalid due to the practice of systematically excluding minority prospective jurors from criminal juries in cases involving

---

[12]We lift the stay of execution of appellant's death sentence, which was imposed by this court's order of September 3, 1996.

criminal defendants; (2) the discriminatory exclusion of minority jurors from appellant's jury renders his conviction constitutionally invalid; (3) appellant's trial and appellate counsel were ineffective;[13] and (4) the jury instruction on reasonable doubt given at appellant's trial was unconstitutional.

Of course, all of these claims are procedurally barred pursuant to NRS 34.810 and the doctrine of law of the case. The first three were raised before in the petition which resulted in the appeal also discussed in this order. The last issue is a new issue. Appellant cannot conceivably show cause and prejudice for raising the first three claims again, or for not raising the fourth claim previously, and this petition is clearly an abuse of the writ.

With respect to the new claim, that the jury instruction on reasonable doubt is unconstitutional, we have previously upheld the instruction against constitutional challenge. See Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991). We emphatically reject appellant's claim that the jury instruction given in this case would not satisfy the constitutional standard applied in Victor v. Nebraska, 511 U.S. 1, (1991).

Appellant also raises four "procedural issues" in his petition: (1) The state should be estopped from invoking procedural default as a basis for dismissal of this petition; (2) the first collateral proceedings cannot be considered a procedural default because appellant did not knowingly authorize counsel to waive any potential claims on his behalf or to fail to raise any conceivable claim that might be available to him, and counsel's conflict of interest destroyed the principal-agent relationship

---

[13]Under this heading, appellant makes all of the arguments regarding the effectiveness of counsel that were raised in appellant's prior petition and appeal, discussed previously in this order.

between appellant and his attorneys; (3) appellant has shown sufficient cause to overcome any procedural default; and (4) this court cannot apply procedural bars against appellant because this court has not consistently applied such bars in the past.

We have reviewed each of these contentions, and we conclude that they lack merit. Accordingly, we deny the petition in Docket No. 29027.[14]

It is so ORDERED.[15]

Steffen, C.J.

Young, J.

Springer, J.

Rose, J.

cc: Hon. Robert J. Miller, Governor
Hon. Michael R. Griffin, District Judge
Hon. Joseph S. Pavlikowski, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Stewart L. Bell, District Attorney
Robert Bayer, Director, Department of Prisons
E.K. McDaniel, Warden, Ely State Prison
John Ignacio, Warden, Nevada State Prison
Terri Steik Roesar
Michael Pescetta, Asst. Federal Public Defender
Alan Glover, Clark
Loretta Bowman, Clark

---

[14]We deny as moot petitioner's motion for a stay of execution pending our resolution of this petition. We grant the state's motion for leave to file a response to appellant's original petition in this court and motion for a stay of execution (Docket No. 29027), and we direct the clerk of this court to file the state's response, which was received by this court on August 29, 1996.

[15]The Honorable Miriam Shearing, Justice, did not participate in the decision of these cases.

# Exhibit 119

# Exhibit 119

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS NEVIUS,

Petitioner,

vs.

WARDEN, NEVADA STATE PRISON, E.K. MCDANIEL; AND ATTORNEY GENERAL OF NEVADA, FRANKIE SUE DEL PAPA,

Respondents.

No. 29027

FILED

JUL 17 1998

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

THOMAS NEVIUS,

Appellant,

vs.

WARDEN, NEVADA STATE PRISON,

Respondent.

No. 29028

ORDER DENYING REHEARING

This is a petition for rehearing of this court's order of October 9, 1996, dismissing Thomas Nevius's petition for an original writ of habeas corpus (Docket No. 29027) and his appeal from an order of the district court denying postconviction habeas relief (Docket No. 29028). Nevius also has moved for leave to present oral argument, and on February 7, 1997, he submitted a Supplemental Petition for Original Writ of Habeas Corpus.

Nevius maintains that his supplemental habeas petition is proper because it asserts a claim which arose only after he filed his original habeas petition in August 1996. Nevius does not consider that he submitted his supplemental petition after this court had already denied his original habeas petition and was considering his instant petition for rehearing. NRAP 40(c)(1) provides that "no point may be raised for the first time on rehearing," and the state has moved us to transfer the supplemental petition to district court pursuant to NRAP 22.

However, in the interest of judicial economy, we deny the state's motion, order that the supplemental petition (and Exhibit No. 57 to the habeas petition) be filed, and address the merits of Nevius's latest claim.

Nevius claims in his supplemental petition that he has been subjected to cruel and unusual punishment due to the issuances of death warrants and stays of execution in this case. Nevius contends that the state sought the death warrants simply to inflict psychological torture upon him and asks this court to overturn his death sentence as a consequence. Nevius does not argue that the length of his confinement on death row constitutes cruel and unusual punishment.

We conclude that the state in seeking the death warrants and the district court in issuing them acted within their statutory authority. See NRS 176.491(2). We also conclude that staying an execution six days before it could be carried out in no way amounts to a "mock execution," as Nevius contends. We have reviewed the authorities cited by Nevius, and none of them stand for the proposition that the issuances of the death warrants and stays of execution he experienced constituted cruel and unusual punishment. We conclude that this claim has no merit.

In his petition for rehearing, Nevius informs this court that his former counsel first referred to alleged improper statements by the prosecutor in a motion for discovery filed in March 1986, following the filing of his federal habeas petition. In our order, we stated that counsel first made his accusation at the end of a hearing in federal court. This hearing was in August 1986. Although we overlooked counsel's earlier reference, made six months before the hearing, this oversight was not material and does not constitute grounds for rehearing. NRAP 40(c)(2). Nor has Nevius shown that rehearing is warranted on any other grounds. We therefore deny his motion for leave to

present oral argument and his petition for rehearing, and we lift the stay of execution of Nevius's death sentence, imposed January 7, 1997.

It is so ORDERED.

Rose, J.

Young, J.

Maupin, J.

cc: Hon. Michael R. Griffin, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Stewart L. Bell, District Attorney
Terri Steik Roesser
Michael Pescetta, Assistant Federal Public Defender
Loretta Bowman, Clerk

SPRINGER, C.J., dissenting:

I would grant rehearing for the reasons stated in my dissent in this matter, filed June 24, 1998. There is credible evidence in the record to support Nevius' complaint that his prosecutor admitted to saying, "You don't think I want all those niggers on my jury do you?" I can think of no plainer admission that the prosecutor deliberately stacked the jury in a manner that would exclude black jurors. For this reason, and for the reasons stated in my dissent in Nevius v. Warden, 114 Nev. ___, ___ P.2d ___ (Adv. Op. No. 76, June 24, 1998), I dissent.

Springer, C.J.

# Exhibit 120

# Exhibit 120

FRANKIE SUE DEL PAPA
Attorney General
DOROTHY NASH HOLMES
Deputy Attorney General
Nevada Bar No. 2057
Criminal Justice Division
100 North Carson Street
Carson City, Nevada 89701-4717
Telephone: (702) 687-3533

Attorney for Respondents.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

THOMAS NEVIUS,

Petitioner,

vs.

E. K. McDANIEL, et al.,

Respondents.

Case No. CV-N-96-785-HDM(RAM)
(DEATH PENALTY CASE)

**RESPONSE TO NEVIUS' SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AMENDED SECOND SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS**

Respondents, through FRANKIE SUE DEL PAPA, Attorney General of Nevada, by DOROTHY NASH HOLMES, Deputy Attorney General in the Criminal Justice Division, hereby respond to the supplemental memorandum filed by Petitioner THOMAS NEVIUS with permission of this district court, following a two year delay of proceedings to allow for the completion of other proceedings initiated by Nevius in the Ninth Circuit Court of Appeals and the Nevada Supreme Court. This response is based upon the entire file in this case, and the following Points and Authorities.

## POINTS AND AUTHORITIES

Nevius has filed a memorandum of points and authorities and additional exhibits O through T-6. He also filed a motion seeking permission to conduct discovery on his new claim 5 in his second successive petition. (Respondents have filed a separate response to that motion.) Respondents understood the district court's order permitting a supplemental filing as providing the opportunity for

the parties to address any issues pertinent to the current matter, which may have been raised by federal appellate and Nevada Supreme Court litigation for which this matter had been stayed. Inst with one exception (the exhaustion discussion of claim 5 at pp. 2-3), Petitioner Nevius has me reargued the issues previously discussed in his amended petition and traverse, filing what is, in esse a reply to our Reply to Traverse. Mostly, however, Nevius cites a whole slew of new second authorities and treaties and treatises (some to which the United States is not even a party) to make argument that it is torture or a "mock execution" for Respondents' counsel or the Clark Cou prosecutor to have sought an execution warrant.

He provides additional exhibits, allegedly in support of both his new P's and A's and discovery motion, however, none were generated in the litigation in the appellate court or the Neva Supreme Court (or the United States Supreme Court), which occasioned the delay in this case. provides a new declaration authored by a Deputy Federal Public Defender in August, 1999, to bolst his "mock execution/psychological torture" claim 5. (Exh. O). He provides a new report by psychologist, dated June 25, 1999, apparently prepared after an April, 1999 evaluation of Nevius, t bolster his claim 5. (Exh. Q). He provides old prison mental health reports to bolster his claim 5 (Exh. R). He provides copies of pleadings from 1996 in Clark County to bolster his claim 5. H doesn't explain why none of such exhibits were produced earlier, nor why he should be entitled t continue to build on his petition *ad infinitum*. Clearly, Nevius is "taking another bite of the apple" in attempting to yet again argue the merits of his petition. More clear is the inference that Nevius used two years' worth of Ninth Circuit and Nevada Supreme Court litigation (and appeals of that to the United States Supreme Court) merely to "buy time" and to postpone this matter while he acquired new evidence to offer. Respondents urge this court to reject Nevius' efforts and deny him that "second bite of the apple", both by striking his P's and A's and denying him use of the supplemental exhibits. Nevius should not be permitted to manipulate the court's order in this way, nor should he be permitted to prolong this litigation indefinitely with additional argument and exhibits.

The only update Nevius did provide this court was in his brief discussion of the exhaustion of claim 5 by the Nevada Supreme Court, found at pp. 2-3 of his supplement. While Nevius made no other legal gains in his two-years of delaying tactics as all rehearings, reconsiderations, appeals and

petitions for certiorari were denied by the Nevada Supreme Court, the Ninth Circuit and the Ui States Supreme Court (*see* Third Supplemental Index of Exhibits[1] filed herewith by Respondents) did manage to frustrate the Nevada Supreme Court into considering what should have bee procedurally barred claim (claim 5 in this case), thus exhausting the same. In its Order Deny Rehearing (Exh 180), the Nevada Supreme Court noted that Nevius did not properly raise that a Eighth Amendment claim (which he submitted to them in his Supplemental Petition for Writ (E 174)) pursuant to NRAP 40(c)(1) because it was raised for the first time on rehearing[2], but it did procedurally default the claim. Instead, "in the interests of judicial economy" and, more than likely, of its utter frustration with the litigious Mr. Nevius and to get the matter out of the Nevada Supre Court once and for all, the court addressed the claim on its merits, saying:

> "Nevius claims in his supplemental petition that he has been subjected to cruel and unusual punishment due to the issuances of death warrants and stays of execution in this case. Nevius contends that the state sought the death warrants simply to inflict psychological torture upon him and asks this court to overturn his death sentence as a consequence. Nevius does not argue that the length of his confinement on death row constitutes cruel and unusual punishment.
>
> We conclude that the state in seeking the death warrants and the district court in issuing them acted within their statutory authority. See NRS 176.491(2). We also conclude that staying an execution six days before it could be carried out in no way amounts to a "mock execution," as Nevius contends. We have reviewed the authorities cited by Nevius, and none of them stand for the proposition that the issuances of the death warrants and stays of execution he experienced constituted cruel and unusual punishment. We conclude that this claim has no merit."

Thus, Respondents now withdraw its statement (from our Answer) that the Eighth Amendment claim in the instant petition is unexhausted. While it was unexhausted when Respondent answered the petition, it no longer is.

The ruling on the merits by the Nevada Supreme Court is entitled to complete deference in this case and is conclusive as to all issues of fact or law, because it did not involve an unreasonable

---

[1] In various status reports to this court, Respondents or petitioner provided copies of the orders of the other courts nevertheless, Respondents have compiled them together into a Third Supplemental Index of Exhibits so they are properly included as part of the record in this case, rather than just informational material to update this court. Respondents also have included one other exhibit submitted to the Nevada Supreme Court by Nevius in support of his Original Writ Petition and Supplemental Petition, which was inadvertently omitted in our Second Supplemental Index of Exhibits.

[2] It also noted that Nevius could not supplement a petition that had already been denied.

Attorney G... Al's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

application of clearly established federal law as determined by the United States Supreme Court an not involve an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(1) and (2) and (e Nevada's highest court resolved the issue based upon Nevada statute and rejected all the articles treaties and treatises Nevius proffered to support his "mock execution" claim. State court findings entitled to the presumption of correctness. *Bressette v. N. Y. Division*, 2 F.Supp. 383, 386 ( ), ci *Nevius v. Sumner (Nevius I)*, 852 F.2d 463, 469 (1989). This court therefore has no basis on whic grant relief on claim 5 of the instant petition.

While the Ninth Circuit in its clarifying order, *Nevius v. McDaniel (Nevius III)*, 104 F.3d 1 (1997), decided that Nevius could file a second successive "application" that includes more than just one "reasonable doubt instruction" claim for which it found a sufficient prima facie showin Respondents nevertheless assert that said position is an erroneous one and continue to object to filing of other claims. "Post AEDPA, no other circuit has considered the Ninth Circuit's position" [d once it approves a second successive petition on one claim, other claims may be filed by petitione *Atkins v. Tessmer*, No. 97-71492 (1999 US LEXIS 8641) (E.D. Mich. 1999). The Sixth Circuit h ruled that the new petition is limited only to the claim approved. *See U.S. v. Moore*, 131 F.3d 55 (1997) and *U.S. v. Campbell*, 168 F.3d 263 (1999). Respondents state that claims 1, 2, 3 and 5 therefo constitute an abuse of the writ and do not qualify for review by this court pursuant to 28 U.S.C. § 2244

Nor is Nevius authorized to assert his claim 5 based upon the ruling in *Stewart v. Martinez Villareal*, 523 U.S. 1618, 118 S.Ct. 1618 (1998). That opinion only authorized a successive *Ford* v *Wainwright*, 477 U.S. 399 (1986) claim of "incompetence to be executed." The United States Suprem Court held that a claim of "incompetence to be executed" could not be raised until the petitioner wa actually experiencing that level of mental incompetence and that did not occur until after tha petitioner's previous habeas petitions were litigated, therefore that could be raised later. While the Federal Public Defender persists in interpreting *Martinez-Villareal* as authorizing a host of successive claims that have nothing to do with "incompetence to be executed," that was not the ruling in *Martinez-*

...

---

[1] For a decision discussing more recent precedents and rejecting the Ninth Circuit's reasoning regarding *Cage* retroactivity, and declining to follow *Nevius v. Sumner*, 105 F.3d 453 (9th Cir. 1996), *see Rodriguez v. Superintendent, Bay State Correctional Center*, 139 F.3d 270 (1st Cir. 1998).

Attorney G... Public Defender's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

*Villareal* and the case cannot properly be read to extend beyond *Ford v. Wainwright* claims. Cla
cannot now be raised.

Unlike Nevius, Respondents will not reiterate our arguments presented in our Answer or R
to Traverse, but will simply update them based upon the passage of two years and subseq
authorities cited by Nevius in his supplemental P's and A's.

Nevius' old and new arguments justifying claim 4, his "reasonable doubt instruction" claim,
defeated by the subsequent ruling of the Ninth Circuit Court of Appeals in *Ramirez v. Hatcher*,
F.3d 1209 (9th Cir. 1998). Furthermore, the United States Supreme Court denied certiorari, 119 S.
415 (1998), so there is no potential reversal looming out there by which Nevius can urge this court
disregard *Ramirez*. Claim 4 must be dismissed.

Nevius argued previously that AEDPA abolished procedural bars and argued that Respondent
argument that claims 1-4 were procedurally barred must fail. Subsequently, the Ninth Circuit Court
Appeals addressed that issue in *Ortiz v. Stewart*, 149 F.3d 923 (1998), and specifically stated th
"[C]ontrary to what Ortiz argues, Chapter 154 does not in any way suggest that in passing AEDP
Congress intended to abolish pre-AEDPA procedural default law or affect its applicability with rega
to states not governed by Chapter 154." *Ortiz* at p. 931. The United States Supreme Court also denie
certiorari on that case, too, (119 S.Ct. 1777 (1998)) so again, there is no potential reversal looming o
there to diminish the value of this precedent. Respondents' procedural default arguments shoul
prevail.

Interestingly, in that same *Ortiz* case, the appellate court also cited *Nevius II. Nevius v. Sumner*
105 F.3d 453, 460 (9th Cir. 1996) to reject the identical argument Nevius tries to make yet again in hi
second and successive petition—ineffective assistance of counsel due to inherent conflict of interes
(claim 3 in this petition).

Previously, Nevius argued that *Nevius II* could not be "law of the case" because he had
petition for rehearing and request to recall the mandate pending. The rehearing was denied and the
mandate was not recalled and has been set upon the record. (Exhs. 180 and 187) and certiorari has beer
denied on Nevius' effort to get U.S. Supreme Court review. (Exhs. 182 and 186). Therefore, law of the
case does apply and Nevius cannot now re-assert the same "inherent conflict-agency claim" which ha

Attorney G... ...l's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

already been considered and rejected by the district court and the Ninth Circuit Court of Ap
Claim 3 must fail.

*Nevius II* also determined that any successive petition was not to be treated as Nevius'
petition so law of the case governs that argument, too, and Nevius' reassertion that this shoul
treated as a first petition must be rejected as well.

Likewise, claims 1 and 2 in the instant petition are also governed by law of the case. In Ne
first appeal to the Ninth Circuit, that court found that *Batson v. Kentucky*, 476 U.S. 79 (1986), was
retroactive and that the *Swain v. Alabama*, 380 U.S. 202 (1965), claim was not established. It
accepted the findings and conclusions of the Nevada Supreme Court, which also rejected the "ra
exclusion of jurors" claim. Recently, the Ninth Circuit reviewed another *Batson* claim case, *Tolbe*
*Page*, No. 97-55004 (June 28, 1999) and decided that the lower court's determination on whether or
a *Batson* claim is made is to be given deference and the statutory presumption of correction. Thus,
instant claims 1 and 2 cannot again be raised as they were rejected both by the Nevada Supreme Co
and the Ninth Circuit Court of Appeals in *Nevius I, supra*. Nevius has re-asserted them in this case w
additional supporting data, but he simply does not get to keep repeating the process until he gets it rig
As in *Malone v. Vasquez*, 138 F.3d 711 (8th Circuit 1998), Nevius' redesigned arguments and ne
statistical claims do not support a *Swain* claim and Nevius has failed to rebut the prosecutor's reaso
for striking certain jurors. The prior courts (state and federal) have all found that these claims must fa
and nothing new changes that position. Claims 1 and 2 are not entitled to review or relief.

Finally, while referencing a barrage of additional secondary authorities to try to make the fac
of this case fit some theory of "mock execution" or "psychological torture" in claim 5, Nevius fails t
provide any persuasive Ninth Circuit or U.S. Supreme Court decision that supports his claim. He als
has failed to refute Respondents' citation to *Woratzeck v. Stewart*, 118 F.3d 648 (9th Circuit 1997
wherein the Ninth Circuit said "If Woratzeck's death sentence does not violate the Eighth Amendment
then neither does the scheduling of his execution." As with the other cases cited by Respondents, o
this case, too, certiorari was denied (520 U.S. 1173, 117 S.Ct. 1443 (1997) and a rehearing was als
denied. 520 U.S. 1260, 117 S.Ct. 2427 (1997). The Nevada Supreme Court has found that the facts in
...

Attorney at's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

this case do not amount to a "mock execution" nor do they constitute "psychological torture" and is no basis for this court to disregard or ignore that finding. Claim 5 must also fail.

Based upon the foregoing, and the reasons stated in Respondents' previously filed Answe Reply to Traverse, Nevius is not entitled to further review of his instant claims and he is not entitl relief on any of the claims, either.

RESPECTFULLY SUBMITTED this 18th day of October, 1999.

FRANKIE SUE DEL PAPA
Attorney General

By: Dorothy Nash Holmes
Dorothy Nash Holmes
Deputy Attorney General
Criminal Justice Division

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General of the State Nevada, and on this 18th day of October, 1999, I served a copy of the foregoing RESPONSE T NEVIUS' SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPOF OF AMENDED SECOND SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS, by mailir a copy thereof to:

MICHAEL PESCETTA
Assistant Federal Public Defender
330 South Third Street, #700
Las Vegas, Nevada 89101

Traci R Doty

# Exhibit 121

# Exhibit 121

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER SOUND O'NEILL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39143

FILED

DEC 18 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On May 5, 1996, the district court convicted appellant, pursuant to a jury verdict, of robbery with the use of a deadly weapon. The district court adjudicated appellant a habitual criminal and sentenced him to a term of life with the possibility of parole. This court dismissed appellant's untimely appeal from his judgment of conviction for lack of jurisdiction.[1]

On March 12, 1996, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On March 26, 1996, the district court summarily denied appellant's petition, incorrectly stating that the district court did not have jurisdiction over appellant's petition because his direct appeal was still pending in this court. Appellant then filed a "notice of error" regarding the order

[1]See O'Neill v. State, Docket No. 27987 (Order Dismissing Appeal, February 23, 1996).

dismissing appellant's petition in the district court. The district court reconsidered appellant's petition and on April 19, 1996 entered its findings of facts and conclusions of law denying the petition. This court subsequently dismissed appellant's appeal because we concluded that he filed an untimely notice of appeal.[2]

On December 19, 2001, appellant filed his second proper person post-conviction petition for a writ of habeas corpus in the district court. The district court denied appellant's petition as successive. This appeal followed.

Appellant filed his petition more than six years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.[3] Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.[4] Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.[5]

To establish good cause to excuse a procedural default, a petitioner must demonstrate that some impediment external to the defense prevented him from complying with the state procedural default

---

[2]See O'Neill v. State, Docket No. 31754 (Order Dismissing Appeal, February 24, 1998).

[3]See NRS 34.726; see also Dickerson v. State, 114 Nev. 1084, 967 P.2d 1132 (1998).

[4]See NRS 34.810(1)(b), (2).

[5]See NRS 34.726; NRS 34.810(1)(b), (3).

rules.[6] In an attempt to excuse the procedural defaults, appellant contends that the district court incorrectly dismissed his first petition in which he claimed, among other things, that he was denied the effective assistance of counsel because his trial counsel refused to file a notice of appeal on his behalf. He also claims that this court incorrectly dismissed as untimely his appeal from the district court's dismissal of his first petition. We agree that appellant can successfully demonstrate good cause and prejudice to excuse the procedural defaults.[7]

In appellant's first timely petition, he claimed, among other claims, that his counsel was ineffective for refusing to file a direct appeal on appellant's behalf. The district court failed to conduct an evidentiary hearing and denied appellant's petition. This court has held that an appellant is entitled to an evidentiary hearing if he raises claims, which if true, would entitle him to relief and if his claims are not belied by the

---

[6]See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

[7]We note that appellant also attempts to demonstrate good cause by claiming that he was denied the appointment of post-conviction counsel, he is uneducated in the law, and he was in lock-down which prevented him access to the law library. These claims do not establish good cause to excuse the procedural bars. See NRS 34.750 (the district court may appoint post-conviction counsel for indigent petitioners.); cf. NRS 34.820(1)(a) (if petitioner has been sentenced to death and it is his first post-conviction petition, the district court shall appoint counsel to represent petitioner); see also Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988); Lozada, 110 Nev. 349, 871 P.2d 944.

record.[8] Here, appellant's claim that his counsel refused to file a direct appeal on his behalf does not appear to be belied by the record and, if true, would entitle him to relief.[9] Thus, the district court erred in failing to conduct an evidentiary hearing on appellant's appeal deprivation claim.

Approximately two years later, appellant appealed the district court's dismissal of his petition. This court subsequently denied appellant's appeal as untimely. Appellant, however, was never served by the clerk of the district court with notice of entry of order.[10] This court has held that "under NRS 34.575(1) and NRS 34.830, the time to file a notice of appeal from an order denying a post-conviction habeas petition does not commence to run until notice of entry of an order denying the petition has been separately served by the district court on both the petitioner and the petitioner's counsel."[11] Here, the district court clerk properly served notice of entry of the district court's April 19, 1996 order on appellant's counsel,

---

[8]See Harrrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[9]See Lozada, 110 Nev. 349, 871 P.2d 944; Davis v. State, 115 Nev 17, 974 P.2d 658 (1999) (if the client expresses a desire to appeal, counsel is obligated to file a notice of appeal on the client's behalf); Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999) (counsel is obligated to advise appellant of the right to a direct appeal and to perfect a direct appeal on appellant's behalf if a direct appeal claim exists that has a reasonable likelihood of success).

[10]See NRS 34.830(2), (3).

[11]See Klein v. Warden, 118 Nev. ___, ___, 43 P.3d 1029, 1032 (2002) (citing Lemmond v. State, 114 Nev. 219, 954 P.2d 1179 (1998)).

but did not separately serve appellant. Because appellant was never served with notice of entry of order, the thirty-day appeal period provided by NRS 34.575(1) never commenced to run.[12] Therefore, appellant's notice of appeal from the April 19, 1996 dismissal of his first petition was timely filed, and this court incorrectly denied it as untimely.

We conclude that the district court's failure to recognize that appellant had presented a timely, cognizable claim based on the ineffective assistance of counsel in his first petition and this court's erroneous denial of appellant's appeal from the dismissal of his first petition constitute impediments external to the defense, and thus good cause to excuse the filing of his present successive and untimely petition where he again raised the claim that his counsel was ineffective for refusing to file a direct appeal on his behalf.[13] Moreover, prejudice is presumed for such a deprivation of counsel.[14]

We remand this case to the district court to conduct an evidentiary hearing to determine whether appellant's trial counsel deprived him of the right to file a direct appeal.[15] If the district court determines that appellant was deprived of a direct appeal without his

---

[12]See id.

[13]See Lozada, 110 Nev. at 357-58, 871 P.2d at 949.

[14]See id. at 356, 871 P.2d at 948.

[15]See Davis, 115 Nev. 17, 974 P.2d 658; Thomas, 115 Nev. 148, 979 P.2d 222. The district court may exercise its discretion and appoint appellant counsel for the evidentiary hearing. See NRS 34.750.

consent, the district court shall appoint counsel to represent appellant and shall permit appellant to file a petition for a writ of habeas corpus raising issues appropriate for direct appeal.[16] If the district court denies appellant relief, he may then file an appeal from that denial in this court.[17] Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

Shearing, J.

Leavitt, J.

Becker, J.

cc: Hon. Steven P. Elliott, District Judge
Attorney General/Carson City
Washoe County District Attorney
Nathalie Huynh
Washoe District Court Clerk

---

[16]See Lozada, 110 Nev. at 359, 871 P.2d at 950.

[17]In light of this court's determination that an evidentiary hearing is necessary, we decline to reach the merits of any of the claims that appellant raises in his petition.

# Exhibit 122

# Exhibit 122

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAWRENCE EUGENE RIDER,

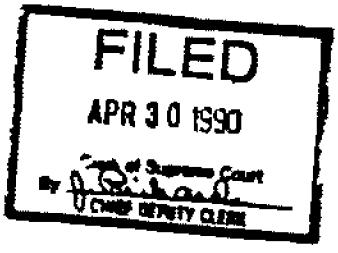
Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 20925




O R D E R

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.

On November 5, 1984, appellant was convicted, pursuant to a guilty plea, of one count of sexual assault and sentenced to serve a life term with the possibility of parole in the Nevada State Prison. Appellant did not file a direct appeal challenging his conviction. In 1986, however, appellant filed in the district court a post-conviction petition for a writ of habeas corpus. The district court denied that petition, and this court affirmed the decision of the district court. See Rider v. Director, Order Dismissing Appeal, Docket No. 18138, filed June 25, 1987. In 1989, appellant filed in the district court a second post-conviction petition for a writ of habeas corpus. The district court denied that petition, and this court again affirmed the decision of the district court. See Rider v. Warden, Order Dismissing Appeal, Docket No. 19360, filed December 6, 1989. On December 14, 1989, appellant filed in the district court the instant post-conviction petition for a writ of habeas corpus. The state opposed the petition and on January 23, 1990, the district court denied the petition. This appeal followed.

Our preliminary review of the record on appeal reveals that the district court may have erred when it denied

appellant's petition. Specifically, we note that the state's opposition to appellant's petition correctly noted that NRS 34.725 requires a prisoner to prosecute a petition for post-conviction relief pursuant to NRS 177.315 prior to filing a post-conviction petition for a writ of habeas corpus. The state noted that appellant never prosecuted a petition for post-conviction relief, and thus requested that appellant's petition be dismissed. See Passanisi v. Director, 105 Nev. ___, 769 P.2d 72 (1989).

Because the district court did not enter findings of fact and conclusions of law supporting its decision, it appears that appellant's petition was denied pursuant to NRS 34.725. We note, however, that appellant was convicted in 1984, and that NRS 34.725 was not enacted until 1987. A petition for post-conviction relief must be filed within one year after the entry of a judgment of conviction. See NRS 177.315(3). Therefore, it is apparent that the procedural default created by NRS 34.725 did not come into existence until well after the expiration of the time within which appellant could overcome that default. Under these circumstances, dismissal under NRS 34.725 may have been unwarranted.

We also note that appellant's latest petition contained grounds for relief challenging the constitutionality of NRS 200.375, which requires a board to certify that persons convicted of sexual assault do not present a menace to society before such persons may be released on parole. These claims for relief did not arise until after the expiration of the time within which appellant would have been required to file a petition for post-conviction relief. See NRS 177.315(3). Further, it would have been inappropriate for appellant to raise these claims in a post-conviction proceeding brought pursuant to NRS Chapter 177. See NRS 177.315(1) (post-

conviction available to challenge only the constitutionality of a judgment of conviction or sentence).

Because it appears that the district court may have erred by not considering the merits of appellant's petition, respondent shall have twenty (20) days from the date of this order within which to show cause why this appeal should not be remanded to the district court for a proper consideration of appellant's petition.

It is so ORDERED.

Young, C. J.

cc: Hon. Brian McKay, Attorney General
Hon. Rex Bell, District Attorney
Lawrence Eugene Rider

# Exhibit 123

# Exhibit 123

IN THE SUPREME COURT OF THE STATE OF NEVADA

BILLY RAY RILEY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 33750

FILED

NOV 19 1999

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [illegible]
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a district court order dismissing a second post-conviction petition for a writ of habeas corpus in a death penalty case. We conclude that all the claims appellant Billy Ray Riley raised in the instant petition are procedurally barred because he failed to prove cause and prejudice or demonstrate a fundamental miscarriage of justice to overcome Nevada's procedural default rules.

On October 1, 1989, the victim was killed by a single gunshot wound to the chest. Riley was convicted of one count each of robbery with the use of a deadly weapon and first degree murder with the use of a deadly weapon and was sentenced to death. This court affirmed Riley's conviction and death sentence on direct appeal. Riley v. State, 107 Nev. 205, 808 P.2d 551 (1991).

Riley subsequently filed his first post-conviction petition, which the district court denied on June 29, 1992. This court affirmed the district court's order. Riley v. State, 110 Nev. 638, 878 P.2d 272 (1994), cert. denied, 514 U.S. 1052 (1995).

On August 26, 1998, Riley filed in proper person a post-conviction petition for a writ of habeas corpus. On

99-11302

November 16, 1998, through counsel, Riley refiled the petition. On January 29, 1999, the district court dismissed the petition as procedurally defaulted. This appeal follows.

First, Riley contends that the district court erred by dismissing his petition without conducting an evidentiary hearing. This contention is without merit because Riley must first overcome procedural default before he is entitled to have the court reach the merits of the substantive claims in his petition. Cf. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Second, Riley contends that he sufficiently proved cause and prejudice to overcome the procedural default in NRS 34.810 for each of the claims he raised in the instant petition. Some of these claims had previously been raised in either his direct appeal or in his first post-conviction petition. His remaining claims have never been raised.

Riley argues that the reason he failed to raise certain claims in previous proceedings was ineffective assistance of his first post-conviction counsel. Riley cites Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997), for the proposition that he was entitled to counsel for his first post-conviction proceedings. Therefore, he argues that he is entitled to the concomitant right to effective assistance of that counsel. See id. Riley's argument has no merit.

In his appellate opening brief, Riley informs this court that his first post-conviction counsel was appointed to represent him on April 20, 1993. In 1991, the Nevada Legislature amended NRS 34.820(1) to mandate appointment of counsel for a first post-conviction proceeding in a death penalty case, effective for petitions filed on or after January

1, 1993. 1991 Nev. Stat. ch. 44, §§ 20, 32, at 87, 92. Thus, according to Crump, a petitioner has a right to effective assistance of that appointed counsel, and ineffective assistance could constitute good cause for failure to raise claims in that proceeding. Crump, 113 Nev. at 303-04, 934 P.2d at 253.

However, the record in this case reveals that April 20, 1993 was the date counsel was appointed for the appeal from the first post-conviction proceeding. The post-conviction petition was filed in proper person on July 22, 1991, and a supplemental petition was filed through counsel on September 23, 1991.[1] During that time, NRS 34.820 did not provide for appointment of counsel, and NRS 177.345(1) provided the district court with the discretion, not a mandate, to appoint counsel. Accordingly, Riley clearly did not have the right to effective assistance of his first post-conviction counsel. See McKague v. Warden, 112 Nev. 159, 163-64, 912 P.2d 255, 257-58 (1996). Accordingly, Riley has failed to satisfy his burden of proving cause to overcome the procedural default in NRS 34.810(3) for successive petitions.

Additionally, Riley fails to allege cause for raising the same claims he previously raised in his direct appeal and first post-conviction proceeding. Accordingly, those claims are procedurally barred by the doctrine of law of the case, see Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975), as well as by NRS 34.810.

---

[1]We note that in the instant petition presented below, Riley correctly indicated that first post-conviction counsel was appointed on or before September 23, 1991. We are unclear as to why Riley's current counsel on appeal misinformed this court as to the date prior counsel was appointed, a date that is crucial to the disposition of this appeal.

Riley next argues that in dismissing his current petition, the district court erroneously failed to review the merits of his case under the "fundamental miscarriage of justice" exception to procedural default. See NRS 34.800(1)(b); Schlup v. Delo, 513 U.S. 298, 314-15 (1995). The district court incorrectly concluded that Nevada does not recognize such an exception, citing Sanchez v. Warden, 89 Nev. 273, 275, 510 P.2d 1362, 1363 (1973). Nevertheless, we conclude that Riley failed to demonstrate a fundamental miscarriage of justice and has therefore failed to overcome procedural default. Accordingly, we

ORDER this appeal dismissed.

Young, J.

Agosti, J.

Leavitt, J.

cc: Hon. Ronald D. Parraguirre, District Judge
Attorney General
Clark County District Attorney
David J. Pancoast
Clark County Clerk

# Exhibit 124

# Exhibit 124

JUN 14 1993

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK JAMES ROGERS,

Appellant,

vs.

WARDEN, NEVADA DEPARTMENT OF PRISONS,

Respondent.

No. 22858

RECEIVED
MAY 28 1993
Attorney General's Office

FILED
MAY 28 1993

LINDETTE M. BLOOM
CLERK OF SUPREME COURT
BY: [illegible]
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.

Appellant was convicted of three counts of first degree murder and one count each of attempted murder and grand larceny. He was sentenced to receive the death penalty. On direct appeal, this court affirmed appellant's conviction and sentence. Rogers v. State, 101 Nev. 487, 705 P.2d 664 (1985), cert. denied, 476 U.S. 1130 (1986).

Subsequently, appellant filed in the district court a petition for post-conviction relief. The district court appointed counsel to represent appellant and appointed a physician to determine appellant's competency. After conducting an evidentiary hearing, the district court dismissed the subsequent appeal. Rogers v. State, Docket No. 17719 (Order Dismissing Appeal, June 29, 1987).

Appellant then filed a petition for a writ of habeas corpus in federal district court. The federal court stayed the proceeding. Rogers v. Whitley, 717 F. Supp. 704 (D. Nev. 1989).

On October 17, 1990, appellant filed a post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent appellant. Without granting an evidentiary hearing, the

district court denied appellant's petition on December 24, 1991. This appeal followed.

Appellant raised two claims in his petition: (1) that the M'Naughtan test for criminal insanity should not have been used at his trial, and (2) appellant was deprived of due process at trial because he had been required to affirmatively prove his insanity defense.

Both of these claims were raised and rejected by this court in appellant's direct appeal. Rogers, 101 Nev. at 464, 705 P.2d at 669. This court's prior decision is the law of this case. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). Thus, the district court did not err in denying the petition. Our resolution of this issue makes it unnecessary to consider the merits of appellant's remaining arguments.

Appellant's contentions lacking merit, we

ORDER this appeal dismissed.

Rose, C.J.

Steffen, J.

Young, J.

Springer, J.

Shearing, J.

cc: Hon. Michael R. Griffin, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Claassen & Olsen
Mary Sue Johnson, Clerk

JUN 14 893

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK JAMES ROGERS,

Appellant,

vs.

WARDEN, NEVADA DEPARTMENT OF PRISONS,

Respondent.

No. 22858

RECEIVED

JUN - 4 1993

FILED

JUN 04 1993

ORDER DISMISSING APPEAL[1]

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.

Appellant was convicted of three counts of first degree murder and one count each of attempted murder and grand larceny. He was sentenced to receive the death penalty. On direct appeal, this court affirmed appellant's conviction and sentence. Rogers v. State, 101 Nev. 457, 705 P.2d 664 (1985), cert. denied, 476 U.S. 1130 (1986).

Subsequently, appellant filed in the district court a petition for post-conviction relief. The district court appointed counsel to represent appellant and appointed a physician to determine appellant's competency. After conducting an evidentiary hearing, the district court denied the petition. This court dismissed the subsequent appeal. Rogers v. State, Docket No. 17719 (Order Dismissing Appeal, June 29, 1987).

Appellant then filed a petition for a writ of habeas corpus in federal district court. The federal court stayed the proceeding. Rogers v. Whitley, 717 F. Supp. 706 (D. Nev. 1989).

On October 17, 1990, appellant filed a post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent appellant. Without granting an evidentiary hearing, the

[1]This order is issued in place of our order dismissing appeal entered on May 28, 1993.

AA05824

district court denied appellant's petition on December 24, 1991. This appeal followed.

Appellant raised two claims in his petition: (1) that the M'Naughten test for criminal insanity should not have been used at his trial, and (2) appellant was deprived of due process at trial because he had been required to affirmatively prove his insanity defense.

Both of these claims were raised and rejected by this court in appellant's direct appeal. Rogers, 101 Nev. at 464, 705 P.2d at 669. This court's prior decision is the law of this case. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). Thus, the district court did not err in denying the petition. Our resolution of this issue makes it unnecessary to consider the merits of appellant's remaining arguments.

Appellant's contentions lacking merit, we

ORDER this appeal dismissed.

Rose, C.J.

Steffen, J.

Young, J.

Springer, J.

Shearing, J.

cc: Hon. Michael R. Griffin, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Claassen & Olson
Mary Sue Johnson, Clerk

# Exhibit 125

# Exhibit 125

COPY

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK ROGERS A/K/A MARK JOSEPH HEYDUK A/K/A TEEPEE FOX,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K. MCDANIEL AND DIRECTOR, NEVADA DEPARTMENT OF PRISONS, ROBERT BAYER,
Respondents.

No. 36137

FILED
MAY 13 2002
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. In 1981 appellant Mark Rogers was convicted of three counts of first-degree murder and two other felonies and sentenced to death.[1]

In February 1986, Rogers in proper person filed his first state petition for post-conviction relief, under NRS Chapter 177. As mandated by former NRS 177.345(1),[2] the district court appointed counsel for Rogers, and counsel filed a supplemental petition. After an evidentiary hearing on the petitions, the court denied them. Rogers appealed, and this court dismissed the appeal in June 1987.

---

[1]Rogers v. State, 101 Nev. 457, 705 P.2d 664 (1985).

[2]In 1986, NRS 177.345(1) provided that an indigent petitioner for post-conviction relief was entitled to appointed counsel. Crump v. Warden, 113 Nev. 293, 297 n.2, 934 P.2d 247, 249 n.2 (1997).

SUPREME COURT
OF
NEVADA

(O) 1947A

AA05827

In October 1987, Rogers filed a federal petition for a writ of habeas corpus. Almost two years later the federal court granted Rogers's motion to stay proceedings to give him an opportunity to exhaust his unexhausted claims in state court. In October 1990, Rogers filed his second state post-conviction petition, seeking a writ of habeas corpus. Appointed counsel filed a supplement to the petition. The district court denied the petition. Rogers appealed, and in June 1993, this court dismissed the appeal.

In December 1993, Rogers filed his second federal habeas petition. The petition was amended and supplemented the next year. In 1997, he voluntarily dismissed the petition to return to state court, again to exhaust unexhausted claims. Rogers then filed his third state post-conviction petition, initiating the instant habeas proceedings. In July 1999, the district court entered an order dismissing the majority of Rogers's claims. After further briefing, the court entered an order dismissing the remaining claims in April 2000. We agree with the district court that Rogers's claims are untimely and procedurally barred.

Rogers's habeas petition was filed more than one year after this court issued its remittitur on direct appeal. Therefore, absent a showing of good cause for this delay, the entire petition is untimely.[3] In regard to any new claims he raises, Rogers must show cause for not raising them in earlier proceedings.[4] However, Rogers does not seriously address the issue of untimeliness and procedural default. On occasion he asserts that his earlier counsel were ineffective in failing to raise issues,

---

[3]See NRS 34.726(1).

[4]NRS 34.810(2).

apparently assuming that this constitutes cause for his untimely filing, for raising new claims, and even for reraising claims presented earlier. This assumption is incorrect.

Ineffective assistance of counsel can in some cases constitute cause to overcome procedural default.[5] However, in post-conviction proceedings there is no right to effective assistance of counsel under either the Sixth Amendment or the Nevada Constitution.[6] A post-conviction petitioner has a right to effective assistance of counsel only when a statute requires appointment of counsel for the petitioner.[7] When appointment of counsel is discretionary, the petitioner has no right to effective assistance by that counsel.[8]

Rogers was entitled to effective assistance of counsel in his first post-conviction petition in 1986 because at that time NRS 177.345(1) required the appointment of counsel for indigent petitioners for post-conviction relief.[9] But he was not entitled to effective assistance of counsel for his second post-conviction petition filed in 1990. Although he was represented by the State Public Defender, no statute required the appointment of counsel. Rather, such appointment was discretionary

---

[5]See Crump, 113 Nev. at 304, 934 P.2d at 253 (citing Coleman v. Thompson, 501 U.S. 722, 753-54 (1991)).

[6]McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 257-58 (1996).

[7]Id. at 165 n.5, 912 P.2d at 258 n.5; Crump, 113 Nev. at 303, 934 P.2d at 253.

[8]Bejarano v. Warden, 112 Nev. 1466, 1470 & n.1, 929 P.2d 922, 925 & n.1 (1996).

[9]See Crump, 113 Nev. at 297 n.2, 934 P.2d at 249 n.2.

under NRS 34.750(1), which provides that a court "may appoint counsel" for an indigent habeas petitioner.[10] Because this is Rogers's third post-conviction petition, he must show cause for not raising any new claims in his second post-conviction petition as well as for not timely filing the third petition.[11] Any claims that counsel were ineffective during his trial, direct appeal, or first post-conviction proceeding should have been raised in his second post-conviction petition. Any claim that his second post-conviction counsel was ineffective does not constitute cause because Rogers was not entitled to effective assistance by that counsel, who was a discretionary appointment.

Additionally, Rogers demonstrates no cause for reraising claims already decided by this court in earlier proceedings. Under the doctrines of abuse of the writ and the law of the case, we will not reconsider such claims.[12]

Absent a showing of good cause to overcome procedural default, this court will consider claims only if the petitioner demonstrates that failure to consider them will result in a fundamental miscarriage of

---

[10]Rogers is sentenced to death, but appointment of counsel for a habeas petitioner sentenced to death is mandatory under NRS 34.820(1)(a) only if "the petition is the first one challenging the validity of the petitioner's conviction or sentence."

[11]In referring to Rogers's second and third post-conviction petitions, we do not include his federal petitions.

[12]See NRS 34.810(2); Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

justice.[13] Although Rogers does not raise this issue, we have considered his petition in light of this standard. We conclude that none of his claims establishes a fundamental miscarriage of justice. Thus, we conclude that all of the claims presented in Rogers's petition are procedurally barred, and we affirm the district court's order on this independent ground.[14]

Two claims warrant some additional discussion, however. First, Rogers contends that the district court did not allow his trial counsel to ask prospective jurors whether they would automatically impose the death penalty on someone convicted of first-degree murder and that five jurors who were ultimately empaneled believed that conviction for first-degree murder called for mandatory imposition of death. The record belies this claim.

Rogers is correct that a district court should excuse for cause any prospective juror who would always impose a sentence of death on a defendant convicted of first-degree murder.[15] Here, the district court expressly granted defense counsel's request to question jurors on this topic, and during voir dire of the five jurors in question, defense counsel explored this topic and passed all five for cause. Neither the district court nor the State recognized that the facts belied this claim. Nevertheless,

---

[13]See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); see also Pellegrini v. State, 117 Nev. ___, ___, 34 P.3d 519, 537 (2001).

[14]See Harris v. Reed, 489 U.S. 255, 261-62 (1989) (discussing necessity of a plain statement indicating that the state court actually relied on a procedural bar as an independent basis for disposition of the case).

[15]See Morgan v. Illinois, 504 U.S. 719 (1992).

this court will affirm the district court if it reached the correct result for different reasons.[16]

Second, Rogers challenges the sufficiency of the evidence for the aggravating circumstance that he had been previously convicted of a felony involving the use or threat of violence to another person. At trial, the prosecution argued that Rogers had two prior felony convictions in Ohio for aggravated assault, and on direct appeal this court referred to his prior felony "convictions."[17] Rogers claims that this was erroneous because he had only one prior conviction for aggravated assault occurring in 1976. Although he was also charged with two counts of felonious assault in 1977 and pled guilty to one count of aggravated assault, he later failed to appear and was never sentenced on the reduced charge. Thus he contends that no conviction ever resulted because a valid conviction requires that a sentence be imposed. He cites NRS 176.105, which requires that a judgment of conviction set forth among other things the sentence. The district court concluded that only the 1976 conviction had been entered but that evidence of the 1977 offense was nevertheless admissible, so trial counsel's failure to challenge the evidence was of no consequence. Also, the 1976 conviction alone was sufficient basis for the aggravator. We agree with the district court's reasoning, but there is a more basic reason why Rogers's claim has no merit.

Imposition of a sentence is not required for a conviction under NRS 200.033(2). Neither the district court nor the parties addressed this statute, which provides that "a person shall be deemed to have been

---

[16]Rosenstein v. Steele, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987).

[17]Rogers, 101 Nev. at 466, 470, 705 P.2d at 670, 673.

convicted at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury." We conclude that the trial court makes a pronouncement of guilt once it accepts a defendant's guilty plea as valid. This is the point in the proceedings which is equivalent to a jury's rendering of a guilty verdict. Thus, under NRS 200.033(2) a valid conviction existed for Rogers's 1977 offense. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Young J.

Agosti J.

Leavitt J.

cc: Hon. Michael P. Gibbons, District Judge
Mary Beth Gardner
Attorney General/Carson City
Pershing County District Attorney
Pershing County Clerk

# Exhibit 126

# Exhibit 126

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKY DAVID SECHREST,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 29170

FILED

NOV 20 1997

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court dismissing a second post-conviction petition for writ of habeas corpus.

Appellant Ricky David Sechrest was convicted, pursuant to a jury verdict, of two counts of murder and two counts of kidnapping. He was sentenced to death on each of the murder convictions and to life without the possibility of parole for each of the kidnapping convictions. He appealed to this court, and we affirmed the judgment below. See Sechrest v. State, 101 Nev. 360, 705 P.2d 626 (1985).

Subsequently, Sechrest filed a petition for post-conviction relief, which the district court denied. Sechrest again appealed to this court. We concluded no error existed and affirmed the district court's order. See Sechrest v. State, 108 Nev. 158, 826 P.2d 564 (1992).

On October 27, 1995, Sechrest filed a petition for a writ of habeas corpus in the United States District Court for the District of Nevada, alleging a multitude of claims. In the federal petition, Sechrest alleged some errors that he had previously raised in prior state proceedings, as well as errors that he had never brought in state court. On July 27, 1996, the federal court dismissed the petition on the ground that Sechrest failed to exhaust his state remedies. Accordingly, on August 28, 1996, Sechrest filed a petition for a writ of habeas corpus

in state district cou. incorporating by reference all claims from the federal petition.

To determine whether the petition should be dismissed as procedurally barred pursuant to NRS 34.810, on September 3, 1996, the state district court conducted an in-chambers hearing. This hearing provided Sechrest's counsel an opportunity to allege sufficient cause and prejudice to prevent a procedural default. Counsel informed the court that he utilized a strategic decision in not bringing the new claims in the prior state court petition. He concluded that this was a mistake and that he should have brought all his claims earlier.[1]

On September 4, 1996, the district court issued its order determining that Sechrest failed to demonstrate cause and prejudice pursuant to NRS 34.810 and dismissed the petition as procedurally barred. Sechrest now appeals.

In the instant petition, Sechrest reasserts many claims that have already been decided by this court in previous proceedings.[2] As these issues have already been decided, they are the law of the case. Pertgen v. State, 110 Nev. 554, 557-58, 875 P.2d 361, 363 (1994); Bejarano v. State, 106 Nev. 840, 841, 801 P.2d 1388, 1389 (1990); see also NRS 34.810(2). Therefore, we conclude that the district court properly

---

[1]We note that it is not error for counsel to decide not to raise meritless claims on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996).

[2]These claims include: (1) whether the prosecutor committed misconduct by commenting on a jury instruction regarding the Pardons Board, see Sechrest v. State, 101 Nev. 360, 368, 705 P.2d 626, 632 (1985); (2) whether it was an abuse of discretion to deny Sechrest's request for additional counsel, see id. at 367-68, 705 P.2d at 631-32; (3) whether Sechrest's confession was properly admitted, see id. at 363-67, 705 P.2d at 629-31; (4) whether the testimony of Dr. Lynn Gerow, Sechrest's psychiatrist, violated Sechrest's Fifth Amendment right not to incriminate himself, see Sechrest v. State, 108 Nev. 158, 160-61, 826 P.2d 564, 565-66 (1992); and (5) whether trial counsel provided ineffective assistance for failure to investigate and interview Dr. Gerow, see id. at 161-63, 826 P.2d at 566-67.

dismissed the repetitive claims.

With respect to the issues not asserted in prior proceedings, we conclude the district court properly applied the procedural bar in NRS 34.810, which provides that the court shall dismiss a petition if the court determines that the grounds for the petition could have been raised in an earlier proceeding unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

Good cause has been defined by this court as "any impediment external to the defense" which prevents the petitioner from bringing the claim earlier. Passanisi v. Director, Dep't Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989). Additionally, "prejudice" requires the petitioner to show "'not merely that the errors of trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)).

Here, Sechrest's counsel admitted that the reason he did not put forth the new issues in the prior petition was purely a tactical decision. This cannot constitute good cause as it is not "external to the defense," nor has Sechrest demonstrated that the claims have merit and that failure to raise them prejudiced him. Therefore, because Sechrest has failed to allege good cause or actual prejudice for not bringing these claims earlier, we conclude he is procedurally barred from bringing them in this second petition.

Sechrest further argues that he was not provided an "informative hearing" when he brought his first petition, as required by NRS 34.820(4). In 1985, when Sechrest brought his first petition, this provision (then codified as NRS 34.820(3)) instructed the district court to personally address the

petitioner to inform him that he must raise all issues in single petition or else any new claims in a subsequent petition will not be considered.

After a thorough review of the record, we conclude that Sechrest was not prejudiced by this error. Therefore, he is not entitled to any relief. Accordingly, we conclude that the district court did not err in dismissing the instant petition based on procedural default.[1] We

ORDER this appeal dismissed.

Shearing, C.J.

Springer, J.

Rose, J.

Young, J.

Maupin, J.

cc: Hon. Charles M. McGee, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Richard A. Gammick, District Attorney
Robert Bruce Lindsay
Judi Bailey, Clerk

---

[1]Sechrest further contends that this court applies procedural default rules inconsistently. We conclude that this argument has no merit. See Valerio v. State, 112 Nev. 383, 389-90, 915 P.2d 874, 878 (1996). Additionally, in his reply brief, Sechrest raised for the first time the issue of ineffective assistance of counsel during his first post-conviction petition proceedings. We conclude that this issue is inappropriately raised, and therefore, we need not consider it. See NRAP 28(c) (issues in the reply brief shall be limited to responding to new matters brought in the opposing brief); Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52-53, 625 P.2d 981, 983-84 (1981) (this court need not consider issues not raised below). Accordingly, we deny as moot both the state's motion to strike Sechrest's reply brief and Sechrest's motion to file an untimely opposition to the state's motion.

TOTAL P.05

# Exhibit 127

# Exhibit 127

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY FRANK SMITH,

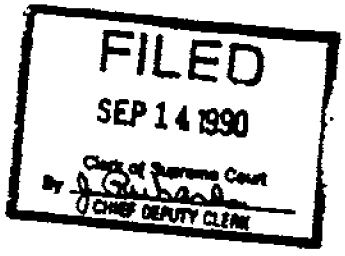
Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 20959




ORDER OF REMAND

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.

Appellant was charged by way of indictment with nine counts of sexual assault upon a minor under the age of 14. NRS 200.364, 200.366. Pursuant to a jury trial, a judgment of conviction was entered for all nine counts on August 25, 1983. Appellant was sentenced to nine life terms with the possibility of parole, with the first two terms to run consecutively and the other seven terms to run concurrently with the second term. On August 23, 1983, appellant filed a notice of appeal. This court affirmed appellant's conviction. State v. Smith, 100 Nev. 570, 688 P.2d 326 (1984). Appellant did not file a petition for post-conviction relief.

On November 1, 1989, appellant filed the instant petition for a writ of habeas corpus. The state opposed the petition and on January 2, 1990, the district court filed findings of fact, conclusions of law and an order denying appellant's petition. This appeal followed.

Our preliminary review of the record indicated that the district court may have erred in dismissing appellant's petition for a writ of habeas corpus. Accordingly, we ordered the state to show cause why this matter should not be remanded to the district court for proper consideration of appellant's

petition. Smith v. State, Docket No. 20959 (Order, July 17, 1990). In that order, we noted that the district court relied on NRS 34.725 in dismissing appellant's petition. NRS 34.725 requires a petitioner to seek post-conviction relief pursuant to NRS 177.315 before filing a post-conviction petition for a writ of habeas corpus. We noted that, while appellant was convicted in 1983, NRS 34.725 was not enacted until 1987. Because a petition for post-conviction relief must be filed within one year after the entry of a judgment of conviction or after the final decision on appeal, the procedural default created by NRS 34.725 did not come into existence until well after the expiration of the time within which appellant could overcome that default. See NRS 177.315(3).

In response to our order to show cause, the state does not dispute that the district court's reliance on the procedural default of NRS 34.725 was erroneous. The state urges, however, that this court may still affirm the district court's order on the basis of laches. This contention is without merit.

Dismissal for laches is controlled by NRS 34.800. That statute indicates that "the State of Nevada must specifically plead laches. The petitioner must be given an opportunity to respond to the allegations in the pleading before a ruling on the motion is made." NRS 34.800(2). A review of the record on appeal reveals that the state did not plead laches in the district court. Accordingly, we vacate the order of the district court denying appellant's petition for a writ of habeas corpus and remand this case to the district court for proper consideration of appellant's petition. On remand, the state shall be permitted to file a supplemental motion to dismiss in which laches may be specifically pleaded.

Appellant shall be afforded an opportunity to respond to that motion pursuant to NRS 34.800.

It is so ORDERED.

Young, C.J.

Steffen, J.

Springer, J.

Mowbray, J.

Rose, J.

cc: Hon. Donald M. Mosley, District Judge
Hon. Brian McKay, Attorney General
Hon. Rex Bell, District Attorney
Jerry Frank Smith
Loretta Bowman, Clerk

# Exhibit 128

# Exhibit 128

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEWAYNE DEREK STEVENS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 24138

FILED
JUL 08 1994

ORDER OF REVERSAL

This is an appeal from an order of the district court denying appellant's petition for post-conviction relief in a death penalty case.

On April 24, 1984, Dewayne Derek Stevens was convicted, pursuant to a jury verdict, of one count each of first-degree murder, robbery with the use of a deadly weapon, possession of a stolen credit card and grand larceny auto. Stevens was sentenced by the jury to death by lethal injection on the first-degree murder charge. He also was sentenced by the district court to fifteen years for the robbery conviction, a consecutive fifteen years for use of a deadly weapon, a consecutive six years on the possession of a stolen credit card conviction, and a consecutive ten years for the grand larceny auto conviction.

Stevens proceeded in proper person throughout both the guilt and penalty phase of his trial. While the public defender characterized Stevens as a "jailhouse attorney" to the district court in presenting Stevens' motion to proceed in proper person, Stevens actually was twenty years old at the time of his trial and had only completed the sixth grade. The State and Stevens both requested the appointment of standby counsel. The public defender, however, objected to serving as standby counsel, and the district court denied the State's and Stevens' request.

Stevens appealed his conviction with the assistance of court-appointed counsel. This court dismissed Stevens' appeal.

Stevens v. State, Docket No. 17590 (Order Dismissing Appeal, October 31, 1988).

On May 10, 1989, Stevens filed a proper person petition for post-conviction relief (the "first petition") in the district court pursuant to NRS 177.315 - NRS 177.385.[1] Included among Stevens' claims for post-conviction relief was an allegation of ineffective assistance of appellate counsel. Accordingly, Stevens requested the appointment of counsel other than his appellate counsel to assist him in the prosecution of his post-conviction claims. The district court failed to address Stevens' request for appointed counsel (despite NRS 177.345's dictate to assess the need to appoint counsel within ten days after the filing of a petition for post-conviction relief). In addition, the State filed no response in opposition to Stevens' first petition (in contravention of NRS 177.355 which required the State to respond within fifty days after the filing of the petition).

Stevens' first petition then lay dormant for almost six months (a violation of NRS 177.380(4) which required the district court to "make all reasonable efforts to expedite" petitions for post-conviction relief). At that point, out of frustration with the inactivity on his first petition, Stevens moved to withdraw his petition so that he could pursue federal habeas corpus relief. The district court allowed Stevens to withdraw his first petition. In doing so, the district court did not canvass Stevens regarding his request for the appointment of new counsel.

Stevens thereafter pursued federal relief, but was required to return to state court to exhaust the issues raised in his first petition. Thus, on September 3, 1991, almost three years after his direct appeal had been dismissed, Stevens filed

[1]These sections were repealed effective January 1, 1993.

a second proper person petition for post-conviction relief (the "second petition"). The district judge denied Stevens' second petition on the ground that Stevens had not shown "good cause" for failing to file the petition within one year after the dismissal of his direct appeal as required by NRS 177.315(3).[1] This appeal followed.

Stevens claims that the district court erred in finding no good cause existed for his failing to file timely the second petition. We agree under the extremely unusual circumstances presented in this case and conclude that good cause did exist for Stevens' failure to file his second petition within one year after the dismissal of his direct appeal. The error in this case dates back to Stevens' withdrawal of his first petition and the district court's failure to address Stevens' request for new counsel. In short, the district court erred in allowing Stevens' to withdraw the first petition without first appointing Stevens independent counsel to advise him with respect to the first petition.

Stevens was entitled to counsel in this case. Although Stevens' did not have the automatic right to counsel, see NRS 177.345,[2] it would have been an abuse of discretion for

---

[1]NRS 177.315(3) provided:

> Unless there is good cause shown for delay, a proceeding under NRS 177.315 to 177.385, inclusive, must be filed within 1 year after the entry of judgment of conviction or, if an appeal has been taken from such judgment, within 1 year after the final decision upon or pursuant to the appeal.

[2]NRS 177.345(1) provided:

> 1. The petition may allege that the petitioner is unable to pay the costs of the proceeding or to employ counsel. If the court is satisfied that the allegation of indigency is true, the court may appoint counsel for him [or her] within 10 days after the filing of the petition. In making its determination, the court may consider whether:

(continued...)

the court to have [illegible]d Stevens counsel given that Stevens was under a penalty of death and had alleged an arguably colorable ineffective assistance of counsel claim in his first petition.

Moreover, it was very apparent that Stevens needed independent advice with respect to his first petition. The record demonstrates that at the time Stevens dismissed his first petition, he was laboring under mistaken impressions of law which were clearly disclosed to the district court. Specifically, Stevens informed the district court that he believed state post-conviction proceedings were undertaken for the sole purpose of making a record, which he felt he had done, and that he believed he could not get a fair proceeding in state court because he and his co-defendant had a conflict and thus he would "go through Federal Court and allow (his co-defendant) to do the post-conviction." No one disabused him of these mistaken impressions, and no one informed him that consideration of his post-conviction claims by a federal court was in fact dependant upon those claims being considered initially by the state court. Instead, the district court merely advised Stevens that he would "probably give[] up" the ability to pursue state post-conviction relief if he withdrew his petition. While laboring under mistaken impressions of law does not of itself constitute good cause for filing a late petition, had counsel been appointed as it should have been, counsel would have had the obligation to explain to Stevens the ramifications of dismissing his first petition, and Stevens would either have pursued the first petition or knowingly waived pursuit of the first petition. In light of the foregoing, we conclude that the district court

---

[3](...continued)

(a) The issues presented by the petition are difficult;

(b) The petitioner is unable to comprehend the proceedings; or

(c) Counsel is necessary in order to proceed with discovery.

erred in finding no good cause existed for [illegible]'s failure to file timely the second petition for post-conviction relief.[4]

Our interest in this matter, however, does not end here. Given the extremely unique circumstances of this case, we are compelled to conclude that Stevens did not receive a fair trial, and thus, rather than remanding this case to the district court for further post-conviction proceedings, we remand to the district court for a new trial.

There are several irregularities in this case that give us reason to conclude that Stevens has not received due process. We need only address one in this order: One of the claims Stevens makes in his second petition for post-conviction relief is that the hearing at which the trial judge allowed Stevens to dismiss counsel and represent himself was inadequate to determine whether or not Stevens was making a knowing and intelligent waiver of counsel.[5] We have reviewed the record with respect to this issue and agree with Stevens.

While a criminal defendant has a Sixth Amendment right to represent him- or herself and thus may waive his or her right to counsel, the waiver of that right to counsel must be knowing and intelligent. Faretta v. California, 422 U.S. 806 (1975).

---

[4]For the reasons described above, this case is also distinguishable from our holding in Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989).

[5]Stevens' appellate counsel failed to raise this issue on direct appeal. Stevens argues that the "cause and prejudice" standard of NRS 177.375(2) is satisfied by virtue of the ineffective assistance of appellate counsel under which he labored. It is well-established that ineffective assistance of counsel which rises to the level of a constitutional violation establishes the "cause and prejudice" sufficient to overcome a waiver. See, e.g., Murray v. Carrier, 477 U.S. 478, 488-89 (1986); Entzminger v. Iowa, 386 U.S. 748, 751 (1967); Grimaga v. Warden, 94 Nev. 320, 321 (1978); Stewart v. Warden, 92 Nev. 586, 589 (1976). In this instance, we agree that Stevens' appellate counsel was ineffective in failing to raise the issue of the knowingness and intelligence of Stevens' waiver of his Sixth Amendment right to counsel. Accordingly, Stevens has established the requisite cause and prejudice to overcome the apparent waiver of this issue.

The standard for testing the validity of a waiver of the right to counsel in Nevada was originally set forth in Garnick v. Miller, 81 Nev. 372, 374, 403 P.2d 850, 851 (1965):

> "To discharge (the duty of determining whether a waiver is knowing and intelligent) in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered."

(quoting Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948) (plurality) (emphasis added)); accord Reynolds v. Warden, 86 Nev. 941, 944, 478 P.2d 574, 576 (1970) ("In each case the 'intelligent waiver' must be tested in light of the particular circumstances surrounding the case, including the background, experience, and conduct of the accused."); Anderson v. State, 98 Nev. 539, 654 P.2d 1026 (1982); Cohen v. State, 97 Nev. 166, 625 P.2d 1170 (1981); Sundrant v. Fogliani, 81 Nev. 388, 419 P.2d 292 (1966).

Having reviewed the district court's canvass of Stevens with respect to Stevens' professed desire to proceed in proper person, we conclude it was inadequate to determine whether Stevens' waiver of his Sixth Amendment right to counsel was knowing and intelligent given that this is a death penalty case and Stevens was a twenty-year-old, seventh grade drop-out at the time of the trial court's canvass. The court's canvass of Stevens fell far short of a "penetrating and comprehensive

examination" (indeed, the trial court did not even elicit any information regarding Stevens' age or education) and we cannot assert with any confidence that Stevens' waiver of his right to counsel was valid. Accordingly, Stevens' conviction must be reversed.

For the foregoing reasons, we reverse the judgment of conviction against Stevens and remand this case to the district court for a new trial.

It is so ORDERED.

Rose, C.J.

Steffen, J.

Young, J.

Springer, J.

Shearing, J.

cc: Hon. Gerard Bongiovanni, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Mager, Atcheson & Mausert
Rex Bell, District Attorney, Clark County
Loretta Bowman, Clerk

# Exhibit 129

# Exhibit 129

IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY FRANK WADE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37467

FILED

OCT 11 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus.

On August 23, 1996, appellant was convicted of one count of conspiracy to sell a controlled substance and one count of trafficking in a controlled substance. The district court sentenced appellant to life in prison with the possibility of parole after ten years. Appellant filed a direct appeal, and this court affirmed appellant's judgment of conviction.[1] Thereafter, appellant filed a petition for rehearing, which was also denied.[2] The remittitur issued on October 27, 1999.

On October 4, 2000, appellant filed a post-conviction petition for a writ of habeas corpus, arguing that his counsel was ineffective. The district court ordered the State to file a response. In its response, the State argued that appellant's petition should be dismissed, in part, because it was not verified as required by NRS 34.730.

In an attempt to cure this procedural deficiency, on December 12, 2000, appellant filed a first amended post-conviction petition for a writ of habeas corpus containing a verification from counsel. The State filed a motion to strike appellant's first amended petition, arguing that it was procedurally improper. The district court granted the State's motion to strike. Appellant then filed a motion to amend his post-conviction petition for a writ of habeas corpus. The district court denied appellant's motion to

[1]Wade v. State, 114 Nev. 914, 966 P.2d 160 (1998).

[2]Wade v. State, 115 Nev. 290, 986 P.2d 438 (1999) (denying rehearing and modifying prior opinion).

01-17147

amend. Additionally, the district court denied appellant's post-conviction petition for a writ of habeas corpus, finding that it was not cognizable because it was unverified. Appellant filed the instant appeal.

First, appellant argues that the district court erred in denying his petition because counsel's signature under NRCP 11 satisfied the verification requirement contained in NRS 34.730. We disagree. The district court did not err in dismissing appellant's petition because an unverified petition is not cognizable.[2] An attorney's signature pursuant to NRCP 11 is not equivalent to a verification under NRS 34.730 because the latter requires counsel to verify that "the petitioner personally authorized him to commence the action."[4] NRCP 11 contains no such requirement. Further, this court applies the rules of civil procedure only when statutes governing habeas corpus do not address the matter at issue.[5] Here, because a statute governing habeas corpus, particularly NRS 34.730, addresses the verification requirement at issue, this statute is dispositive.

Second, appellant argues that the district court "waived" the verification requirement by ordering the State to respond to his petition. We conclude that this contention lacks merit because counsel's verification is a statutory requirement that cannot be waived by counsel or the court.[6]

Third, appellant argues that the district court erred in striking his first amended petition. We disagree. The district court did not err in striking the first amended petition because appellant was prohibited, by statute, from filing an amended petition. Indeed, NRS 34.750 authorizes a supplemental petition only where the district court has determined that counsel shall be appointed to represent a petitioner acting in proper person, or where a supplemental petition is ordered by

---

[2]See NRS 34.730(1) ("A petition must be verified by petitioner or his counsel."); see also Sheriff v. Scalia, 96 Nev. 776, 616 P.2d 402 (1980); Sheriff v. Chumphol, 95 Nev. 818, 603 P.2d 690 (1979); Sheriff v. Arvey, 93 Nev. 72, 560 P.2d 153 (1977).

[4]NRS 34.730(1).

[5]See Hesta v. State, 110 Nev. 339, 871 P.2d 357 (1994); Mazzan v. State, 109 Nev. 1067, 863 P.2d 1035 (1993).

[6]See NRS 34.730.

the court." Here, the district court neither appointed counsel to represent appellant acting in proper person nor authorized an amended petition. Accordingly, the district court did not err in striking appellant's first amended petition because appellant had no statutory right to amend.

Finally, appellant argues that the district court abused its discretion in denying appellant's motion for leave to amend his post-conviction petition because: (1) the amendment would have been timely since it related back to his original petition; (2) the lack of verification was corrected as soon as it was brought to petitioner's attention; and (3) there is United States Supreme Court precedent holding that cases should be decided on their merits, rather than dismissed based on "mere technicalities." We conclude that the district court acted within its discretion in denying appellant's motion to amend because appellant was not entitled to amend his post-conviction petition as a matter of right.

In affirming the district court's order, we address sua sponte another issue of great importance. The record reveals that appellant's counsel represented him at trial, on appeal, and on post-conviction, resulting in an actual conflict of interest. In fact, in the original unverified post-conviction petition, counsel for appellant argued his own ineffectiveness.

Trial counsel may not represent appellant in a post-conviction proceeding where appellant claims ineffective assistance of counsel because the ethical code of conduct prohibits an attorney from representing a client in a matter where he is likely to be a witness.[2] Although a petitioner may waive this existing actual conflict, in so doing, a petitioner would be limiting his potential claims because his trial counsel may not present a claim of his own ineffectiveness. Accordingly, prior to allowing trial counsel to represent a particular petitioner in a post-conviction proceeding, the district court should, on the record, explain the nature of the conflict, the disabilities this would place on potential claims,

---

[1]NRS 34.750(3)(b) provides, "After appointment by the court, counsel for the petitioner may file and serve supplemental pleadings . . . within 30 days after . . . the date of his appointment." NRS 34.750(5) provides, "No further pleadings may be filed except as ordered by the court."

[2]See SCR 178 ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness").

and the nature of any potential claims that the petitioner would be waiving.[9] Prior to affirmatively waiving this actual conflict on the record, the district court should inform the petitioner that he would giving up his right to raise the issue of ineffective assistance of counsel.

In the instant case, there is no indication that appellant was advised, on the record, about the nature and consequences of retaining counsel with an actual conflict and no indication that appellant waived this conflict. Further, the record reveals that appellant's counsel's inability to argue his own ineffectiveness actually prejudiced appellant and contributed to counsel's failure to verify the post-conviction petition. Accordingly, in affirming the order of the district court, we emphasize that appellant has good cause and actual prejudice for the filing of a successive, untimely petition, and we instruct the district court to allow appellant to file such a petition for consideration on the merits.[10] Should appellant continue to retain trial counsel in future post-conviction proceedings, the district court should elicit, on the record, appellant's affirmative and informed waiver of this actual conflict.

Having considered appellant's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Young J.

Agosti J.

Leavitt J.

---

[9]See Hayes v. State, 106 Nev. 543, 556-57, 797 P.2d 962, 970 (1990).

[10]See NRS 34.810(3) (providing that the district court will consider a second or successive petition if appellant shows good cause for failure to present the claim and actual prejudice).

cc: Hon. Steven P. Elliott, District Judge
Attorney General
Washoe County District Attorney
John B. Routsis
William J. Routsis, II
Washoe County Clerk

# Exhibit 130

# Exhibit 130

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARY WALLACE WILLIAMS,

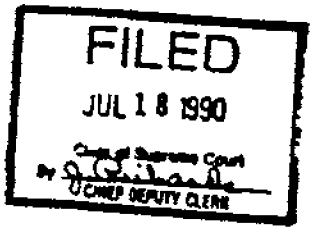
Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 20732




ORDER DISMISSING APPEAL

This is an appeal from an order of the district court denying appellant's petition for post-conviction relief.

Appellant was convicted, pursuant to a guilty plea, of murder in the first degree. A three judge panel sentenced appellant to death. Appellant unsuccessfully pursued post-conviction relief. In a consolidated opinion, this court affirmed his judgment of conviction, sentence of death, and the denial of his post-conviction petition. See Williams v. State, 103 Nev. 227, 737 P.2d 508 (1987).

Appellant subsequently filed a petition for a writ of habeas corpus in the federal district court. On May 25, 1988, the federal district court dismissed the petition without prejudice based on appellant's representation that his state post-conviction remedies had not been exhausted. On July 6, 1988, appellant filed a second petition for post-conviction relief pursuant to NRS Chapter 177 in the Second Judicial District Court and requested a stay of execution of his sentence pending the court's review of that petition. On July 8, 1988, the district court denied appellant's motion for a stay, concluding that all of the issues presented had been previously raised and resolved against him or should have been raised in his direct appeal and previous post-conviction proceeding. Appellant filed a notice of appeal from this order on July 8, 1988.

Also, on July 8, 1988, appellant filed a post-conviction petition for a writ of habeas corpus in the First Judicial District Court pursuant to NRS Chapter 34, and requested a stay of execution of his death sentence. On July 11, 1988, the district court denied appellant's motion for a stay, concluding that each of the issues raised in this petition had been previously resolved against appellant by this court. On July 12, 1988, appellant filed a notice of appeal from the district court's order. We combined the appeals from the first and second district courts under a single docket number, and ordered those appeals dismissed. Williams v. State, Docket No. 19172 (Order Dismissing Appeal, July 12, 1988).

Appellant filed his third petition for post-conviction relief on July 17, 1989. In that petition, appellant alleged that his guilty plea was involuntary. Specifically, appellant alleged that a potential codefendant, Harvey Young, had made false statements to the police which inculpated appellant. Appellant alleged that he pleaded guilty because he feared that Young would provide inculpatory testimony at appellant's trial consistent with Young's statements to the police. Appellant provided affidavits showing that Young has, after telling numerous versions of his story, recanted his claim that appellant killed the victim in this case. Appellant's petition was denied by the district court without a hearing in an order filed December 29, 1989. This appeal followed.

Appellant contends that the district court erred in denying his petition without a hearing. Specifically, appellant argues that Young's recantation of his claim that appellant was the killer demonstrates that appellant's guilty plea was involuntary.

This contention is without merit. This court has already determined that appellant's plea was voluntary. Williams v. State, 103 Nev. 227, 737 P.2d 508 (1987). That holding is now the law of the case. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). Young has made up a number of versions of his story, and we are not inclined to reconsider our holding based on the latest fabrication from a man who, by his own admission, has no regard for the truth. As the district court correctly noted, appellant confessed to killing the victim in this case. At his penalty hearing, at a time when Young's statements had been excluded and appellant had nothing to fear from Young, appellant testified that he killed the victim. At his plea canvass, appellant clearly indicated that his plea was voluntary and free from coercion. Accordingly, we conclude that the record clearly refutes appellant's post-conviction claims.

Appellant's contentions lacking merit, we

ORDER this appeal dismissed.

Young, C.J.

Steffen, J.

Springer, J.

Mowbray, J.

Rose, J.

cc: Hon. Robert L. Schouweiler, District Judge
Hon. Brian McKay, Attorney General
Hon. Mills Lane, District Attorney
Mara Picker
Judi Bailey, Clerk

# Exhibit 131

# Exhibit 131

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARY WALLACE WILLIAMS,

Appellant,

vs.

WARDEN, ELY STATE PRISON, SHERMAN HATCHER,

Respondent.

No. 29084

FILED

AUG 29 1997

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from an order dismissing a petition for writ of habeas corpus.

The facts of this case are set out in Williams v. State, 103 Nev. 227, 737 P.2d 508 (1987). In August 1983, appellant Cary Wallace Williams ("Williams") confessed to murdering Katherine Carlson and her unborn child and to burglarizing the Carlson home. Williams was charged with murder, manslaughter and burglary, and he pled guilty to all three charges. Following a penalty hearing, a three-judge panel sentenced Williams to death and to two consecutive ten-year terms. Williams appealed his conviction and sentences and petitioned the district court for post-conviction relief, which was denied. This court consolidated Williams' direct appeal and appeal from the denial of post-conviction relief. On May 29, 1987, this court affirmed Williams' conviction and sentences. Id.

In December 1992, Williams filed the underlying petition for writ of habeas corpus in the Seventh Judicial District Court in White Pine County ("habeas court"). Williams filed an amended petition in July 1993.

After an evidentiary hearing, the habeas court issued an order dismissing Williams' petition. The habeas court stated that the issue of ineffective assistance of counsel had been

finally resolved by this court; therefore, the habeas court was bound by the doctrine of the law of the case as to seven of the claims. Pursuant to NRS 34.810(1)(a), the district court dismissed the remaining claims, which addressed issues other than those permitted in habeas corpus petitions. Williams now appeals.

Williams argues that the lower court erred in summarily dismissing his original and amended petitions on the grounds that this court had already decided the issues. The State argues that the habeas court properly applied a procedural bar to Williams' petition and that the instant petition is an abuse of the writ.

"The law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975); accord Marzan v. Warden, 112 Nev. 838, 842-43, 921 P.2d 920, 922 (1996). In Hall, this court stated, "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." 91 Nev. at 316, 535 P.2d at 799.

In Williams, Williams contended that he received ineffective assistance of counsel at trial because his trial counsel failed to request an independant hearing to assess the voluntariness of his confession, and allowed him to plead guilty without first securing the State's promise not to seek the death penalty. 103 Nev. at 229, 737 P.2d at 510. This court held that Williams received effective assistance of counsel. Id. at 230, 737 P.2d at 510. This court further held that Williams failed to demonstrate prejudice resulting from ineffective assistance of counsel. Id. Additionally, this court determined that the district court did not err in accepting Williams' pleas

of guilty. Id. at 230, 737 P.2d at 510-11.

Given this court's conclusions in Williams, we now hold that the law of the case precludes Williams' present claims that he lacked effective assistance of counsel at trial and at the penalty hearing. In addition, a post-conviction petition following a plea of guilty must be based upon an allegation that the plea was involuntarily or unknowingly entered, or entered without effective assistance of counsel. NRS 34.810(1)(a). Thus, the habeas court properly dismissed claims which were unrelated to these two issues.

Williams argues that the present petition contains new and different grounds for relief. We conclude that Williams has not met his burden of proving that "good cause exists for his failure to raise any grounds in an earlier petition and that he will suffer actual prejudice if the grounds are not considered." Crump v. Warden, 113 Nev. ___, ___, 934 P.2d 247, 252 (1997) (quoting Phelps v. Director, Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988)); see NRS 34.810(2).

Finally, absent good cause, a court may hear the merits of successive claims if failure to do so would result in a miscarriage of justice. Sawyer v. Whitley, 505 U.S. 333, 339 (1991). This exception for "actual innocence" has a narrow scope. Id. at 340. A showing of "actual innocence" must focus on the elements that make the petitioner eligible for death, and cannot include additional mitigating evidence that was not introduced because of claimed constitutional errors. Id. at 347; see Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993), cert. denied, ___ U.S. ___, 117 S.Ct. 334 (1996). Thus, Williams' claims that trial counsel failed to present mitigating evidence are not relevant.

Williams claims that his trial counsel failed to rebut aggravating evidence. Specifically, Williams contends that his counsel failed to rebut testimony that the murder involved

torture and was similar to a gang slaying.

Williams confessed to murdering Mrs. Carlson, and this court has previously held that this confession was knowing and voluntary. Furthermore, in addition to torture, the three-judge panel found three other aggravating circumstances, but only one mitigating circumstance. Given these facts, we conclude that Williams has failed to prove actual innocence.

We conclude that the lower court properly dismissed Williams' petition based upon the doctrine of the law of the case. In light of Williams' confession and the three-judge panel's finding of four aggravating circumstances, failure to address any purportedly new grounds of error on their merits did not result in a miscarriage of justice. Accordingly, we

ORDER this appeal dismissed.

Shearing, C.J.

Sprigger, J.

Rose, J.

Young, J.

Maupin, J.

cc: Hon. Merlyn H. Hoyt, Judge
Hon. Frankie Sue Del Papa, Attorney General
Marc P. Picker
Donna Bath, Clerk

# Exhibit 132

# Exhibit 132

IN THE [illegible]HE COURT OF THE STATE OF NE[illegible]

ROBERT YBARRA,

Appellant,

vs.

DIRECTOR, NEVADA STATE PRISON,

Respondent.

No. 19705

FILED

JUN 29 1989

CLERK OF SUPREME COURT
By
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus.

On July 13, 1981, appellant was convicted, pursuant to a jury verdict, of several felony offenses, including first-degree murder, arising out of the death of Nancy Griffith in September of 1979. Appellant was sentenced to death.

This court affirmed appellant's conviction and sentence. See Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984). Appellant subsequently filed in the Seventh Judicial District Court a petition for post-conviction relief pursuant to NRS 177.315. On July 9, 1986, however, the district court denied appellant's petition. Again, this court affirmed the judgment of the district court. See Ybarra v. State, 103 Nev. 8, 731 P.2d 353 (1987).

On March 16, 1987, appellant filed in the federal district court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On September 9, 1987, the federal district judge entered a minute order which noted that the first count in appellant's habeas petition alleged that the M'Naghten test for sanity should not have been used in appellant's trial. The federal judge observed that appellant had raised this same issue in his direct appeal, and also noted that Nevada's choice of the M'Naghten test for sanity did not

implicate a federal question. The federal court concluded that appellant's argument regarding the M'Naghten test failed to state a claim upon which relief could be granted. The court went on to note, nevertheless, that appellant never argued in any of his prior state proceedings that the M'Naghten test violates the federal constitution. Therefore, the federal court determined that appellant had not yet exhausted his state remedies regarding this issue, and dismissed appellant's petition without prejudice to allow him to pursue the issue in state court.

On March 10, 1988, appellant filed in the First Judicial District Court the instant post-conviction petition for a writ of habeas corpus. The only argument presented in that petition concerned the constitutionality of the M'Naghten test for sanity. The state opposed appellant's petition, and also filed a motion to dismiss that petition. On December 30, 1988, the district court entered an order dismissing appellant's habeas corpus petition. This appeal followed.

In its order dismissing appellant's petition, the district court determined, among other things, that the use of the M'Naghten test for sanity during the guilt phase of appellant's trial did not violate appellant's rights under the United States Constitution. We agree. The United States Supreme Court has held that the use of the M'Naghten test does not violate the constitutional rights of a criminal defendant. See Leland v. Oregon, 343 U.S. 790 (1952). This court has long adhered to the M'Naghten test for sanity, see, e.g., Kuk v. State, 80 Nev. 291, 299, 392 P.2d 630, 634 (1964); State v. Lewis, 20 Nev. 333, 351, 22 P. 241, 247 (1889), and we decline to depart from the M'Naghten test at this time.

The district court also determined that the use of the M'Naghten test at appellant's penalty hearing did not violate

appellant's constitutional rights. We disagree. Initially, we note that appellant has failed to cite any authority to this court which demonstrates that the use of the M'Naghten test at his penalty hearing was improper in any way. We need not consider arguments that are not supported by relevant legal authority. See Cunningham v. State, 94 Nev. 128, 575 P.2d 938 (1978). Moreover, appellant has wholly failed to demonstrate that the use of the M'Naghten test during the penalty phase of his trial deprived him of an individualized assessment of his mental state in that proceeding. Thus, the M'Naghten test was used properly in appellant's penalty hearing.

In light of the above, we conclude that the district court did not err when it denied appellant's habeas corpus petition. Accordingly, we

ORDER this appeal dismissed.

Young, C.J.

Steffen, J.

Springer, J.

Mowbray, J.

Rose, J.

cc: Hon. Michael E. Fondi, District Judge
Hon. Brian McKay, Attorney General
Cravell, Susich, Owen & Tackes
Alan Glover, Clerk

# Exhibit 133

# Exhibit 133

IN THE SUPREME [illegible] OF NEVADA

ROBERT YBARRA, JR.,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K. MCDANIEL,
Respondent.

No. 43981



ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge.

On July 23, 1981, the district court convicted appellant Robert Ybarra, Jr., pursuant to a jury verdict, of first-degree murder, first-degree kidnapping with substantial bodily harm, battery with the intent to commit sexual assault with substantial bodily harm, and sexual assault with substantial bodily harm. Ybarra was sentenced to death for first-degree murder. The district court also sentenced him to three consecutive terms of life in prison without the possibility of parole on the remaining counts. This court dismissed Ybarra's direct appeal.[1] The remittitur issued on March 4, 1985.

Subsequently, Ybarra filed a petition for post-conviction relief, pursuant to former NRS Chapter 177, which the district court denied after

[1]Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984).

an evidentiary hearing on July 11, 1986. This court dismissed Ybarra's appeal on January 21, 1987.[2] On March 10, 1988, Ybarra filed a post-conviction petition for habeas relief, which the district court dismissed on December 30, 1988. This court dismissed Ybarra's appeal on June 29, 1989.[3] On April 26, 1993, Ybarra filed a second post-conviction habeas petition. The district court granted the State's motion to dismiss the petition on June 29, 1998. This court dismissed Ybarra's appeal on July 6, 1999.[4]

On March 6, 2003, Ybarra filed the instant habeas petition, his fourth state post-conviction petition. The district court granted the State's motion to dismiss the petition on July 20, 2004, concluding that it was procedurally barred. This appeal followed.

Ybarra filed his petition approximately 18 years after this court issued the remittitur from his direct appeal. Thus, Ybarra's petition was untimely filed.[5] Moreover, his petition was successive because he had previously filed three post-conviction petitions in the district court.[6] Ybarra's petition was procedurally barred absent a demonstration of good

---

[2]Ybarra v. State, 103 Nev. 8, 731 P.2d 353 (1987).

[3]Ybarra v. Director, Docket No. 19705 (Order Dismissing Appeal, June 29, 1989).

[4]Ybarra v. State, Docket No. 32762 (Order Dismissing Appeal, July 6, 1999).

[5]See NRS 34.726(1).

[6]See NRS 34.810(1)(b), (2).

cause and prejudice.[7] Further, because the State specifically pleaded laches, Ybarra was required to overcome the presumption of prejudice to the State.[8] Ybarra argues that the district court erred in several ways in concluding that his habeas petition was procedurally barred. We conclude that the district court properly dismissed the petition except in regard to one issue.

Ybarra initially claims that this court treats the application of procedural default rules as discretionary and has inconsistently applied them. He lists a host of this court's published and unpublished decisions to support his contention. Ybarra asserts that based on this alleged inconsistent application of procedural bar rules, this court must reverse the district court's order dismissing his petition and remand the matter for a hearing on his substantive claims. However, we considered and rejected a similar claim in State v. Dist. Ct. (Riker).[9] We are not persuaded by Ybarra's argument to abandon the mandatory procedural bar rules. Accordingly, we conclude that the district court did not err in denying his petition on this basis.

Second, Ybarra argues that he is "innocent" of aggravating circumstances found at trial and that refusing consideration of his claims would result in manifest injustice. The jury found as aggravating

---

[7]See NRS 34.726(1); NRS 34.810(1)(b), (3).

[8]See NRS 34.800(2).

[9]121 Nev. ___, ___, 112 P.3d 1070, 1076-82 (2005); see Pellegrini v. State, 117 Nev. 860, 879-80, 34 P.3d 519, 532 (2001).

circumstances that Ybarra murdered his teenage victim during the commission of a sexual assault and a kidnapping. Ybarra contends that these two aggravators must be vacated as violative of double jeopardy principles because he was convicted of sexual assault and kidnapping and had punishment imposed "before the same offenses were re-prosecuted as aggravating factors and additional punishment was imposed because of them." We disagree. The death penalty is a permissible punishment if one or more aggravating circumstances, including those at issue in this case, are found and not outweighed by any mitigating circumstances.[10] Double jeopardy concerns are not implicated in this instance.[11]

Ybarra also argues that these aggravating circumstances implicate the reasoning in McConnell v. State.[12] He acknowledges that McConnell does not expressly apply here, as the State did not seek the first-degree murder conviction on a felony-murder theory. But he explains that the sexual assault and kidnapping aggravators are nonetheless improper because he received punishment for these offenses and that basing death eligibility on these offenses affronts the spirit of McConnell. However, we specifically stated in McConnell that our decision had no effect in cases where the State relies solely on a theory of deliberate,

---

[10]See NRS 200.030(4)(a).

[11]See McKenna v. State, 114 Nev. 1044, 1058-59, 968 P.2d 739, 748-49 (1998).

[12]120 Nev. ___, 102 P.3d 606 (2004).

premeditated murder to secure a first-degree murder conviction.[13] We are not persuaded by Ybarra's attempted analogy to McConnell. Therefore, we conclude that the district court did not err in concluding that Ybarra failed to demonstrate good cause to excuse his procedural bars on this basis.

Third, Ybarra asserts that the previous-conviction aggravating circumstance is factually and legally insufficient. He contends that the district court erred in admitting a California order of probation as proof of a prior conviction for a felony involving the use or threat of violence to the person of another. This court previously concluded that this evidence was proper proof of an aggravating circumstance.[14] The doctrine of the law of the case bars further consideration of this claim, and Ybarra cannot avoid this doctrine by raising a "more detailed and precisely focused argument."[15] To the extent that Ybarra's instant claim might be considered distinct from his earlier one, he has not provided good cause for his failure to raise it previously.

Based on the foregoing discussion and the record presented, we conclude that Ybarra has not demonstrated good cause to overcome the procedural bars to his habeas petition and therefore the district court did

---

[13]Id. at ___, 102 P.3d. at 624.

[14]See Ybarra, 100 Nev. at 177, 679 P.2d at 803. Specifically, Ybarra contended that the California probation order was inadmissible because it did not reflect on its face that counsel had represented him.

[15]Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

not err in denying his petition on this basis. Moreover, as we explain, we largely affirm the district court's order on a number of other bases, including that Ybarra has failed to demonstrate actual prejudice pursuant to NRS 34.810(3).

Ybarra raises, among others, the following claims in his appeal: jury misconduct requires reversal of his conviction and sentence; the conviction and sentence are invalid because a juror refused to consider all sentencing options provided by law; the district court erred in refusing to excuse a juror for cause; the jury was not impartial; the district court erred in failing to conduct a competency hearing; Ybarra was improperly sentenced to consecutive terms for sexual assault and battery with the intent to commit sexual assault; the prosecutor committed a pattern of misconduct, rendering Ybarra's trial fundamentally unfair; the district court improperly instructed the jury on the defense of insanity; the statutorily mandated reasonable doubt instruction improperly minimized the State's burden of proof; his death sentence is invalid because of the reduced standard of reliability for admission of evidence at the penalty phase; his death sentence constitutes cruel and unusual punishment; execution by lethal injection constitutes cruel and unusual punishment; and the cumulative effect of the errors alleged mandate reversal of his conviction and sentence. However, these claims could have been raised on direct appeal.[16] Nothing in Ybarra's submissions demonstrates good cause

[16]See NRS 34.810(1)(b)(2) (providing that the court shall dismiss a post-conviction petition for a writ of habeas corpus when the petitioner's

*continued on next page . . .*

for failing to raise these claims earlier or actual prejudice from the district court's refusal to consider them.

Ybarra also argues that his death sentence must be reversed because the jury was not instructed that to impose death it had to find beyond a reasonable doubt that the aggravating circumstances were not outweighed by the mitigating circumstances. This claim also could have been raised on direct appeal. Although Ybarra cites recent decisions by the Supreme Court[17] and this court[18] to support this claim, the claim could also have been raised at the time of his trial.[19] Moreover, Ybarra failed to include in his appendix the instructions provided to the jury during the penalty phase. Thus, he failed to include critical documentation supporting his claim despite his submission of several thousand pages of documentation in his appendix. Therefore, Ybarra has not demonstrated good cause for failing to raise the claim earlier, nor does he show that he suffered actual prejudice.

---

. . . *continued*
conviction was the result of a trial and the claims could have been raised on direct appeal).

[17]Ring v. Arizona, 536 U.S. 584 (2002).

[18]Johnson v. State, 118 Nev. 787, 800-03, 59 P.3d 450, 460-61 (2002) (applying Ring, 536 U.S. 584, to Nevada statutory law).

[19]See NRS 200.030(4); Witter v. State, 112 Nev. 908, 923, 921 P.2d 886, 896 (1996); 1977 Nev. Stat., ch. 585, § 1, at 1542, and § 13, at 1546. Further, even if Ring, 536 U.S. 584, created the basis for this claim, Ring does not apply retroactively. See Colwell v. State, 118 Nev. 807, 821-22, 59 P.3d 463, 472-73 (2002).

Ybarra also re-raises the following claims: counsel was ineffective for failing to object to and in some instances inviting prosecutorial misconduct;[20] counsel was ineffective for failing to investigate and object to the admission of the victim's statements about the attack;[21] counsel was ineffective for failing to question the jurors regarding their opinions on an insanity defense;[22] and the district court erred in denying his motion for a change of venue.[23] As we have previously considered and rejected these claims, they warrant no further consideration.[24]

Ybarra also claims that his counsel was ineffective for failing to investigate and develop facts respecting his mental state and mitigation and that psychotropic medication rendered him incompetent throughout the trial and prejudicially altered his demeanor. He raised these claims in his third habeas petition, which the district court denied as procedurally barred. On appeal, we concluded that the district court did not err in denying Ybarra's petition. Based on the record we conclude that Ybarra has not demonstrated actual prejudice in this regard.

---

[20]See Ybarra, 103 Nev. at 14-16, 731 P.2d at 357-58.

[21]See id. at 13-14, 731 P.2d at 357.

[22]See id. at 14, 731 P.2d at 357.

[23]See Ybarra v. State, Docket No. 12624 (Order Dismissing Appeal, October 10, 1980).

[24]See Hall, 91 Nev. at 316, 535 P.2d at 799.

Ybarra also argues that the jury and the district court were not impartial due to the district court's comment, "Ladies and gentlemen, unfortunately with respect to all of the counts read to you in open court, the defendant has pled not guilty and not guilty by reason of insanity." However, this claim was appropriate for direct appeal.[26] Moreover, Ybarra previously raised this matter in his third habeas petition, which the district court denied as procedurally barred. Finally, Ybarra has neglected to include relevant portions of the trial transcript in his voluminous appendix. Thus, even if we deemed it appropriate to consider the merits of this claim, Ybarra has failed to substantiate it. Therefore, we conclude that he failed to show actual prejudice in this regard.

Ybarra further claims that his conviction and sentence must be reversed because his trial and direct appeal were "conducted before judicial officers whose tenure in office was not during good behavior but whose tenure is dependent on popular election." However, he wholly fails to substantiate this claim with any specific factual allegations demonstrating actual prejudice.

Ybarra next asserts that his death sentence must be reversed due to cruel and unusual punishment suffered during his incarceration. However, he has not substantiated this claim with sufficient factual allegations demonstrating that the conditions of his confinement are so severe as to warrant reversal of his death sentence.

---

[26]See NRS 34.810(1)(b)(2).

Ybarra also argues that this court failed to conduct a fair and adequate appellate review because this court's opinion respecting his direct appeal failed to explain how the mandatory review pursuant to NRS 177.055(2) was conducted in his case. However, this court conducted the mandatory review of Ybarra's death sentence in accordance with the law,[26] and he has failed to show that it was inadequate. Therefore, we conclude that he has not demonstrated actual prejudice on this basis.

Ybarra next asserts that his counsel failed to provide effective assistance on direct appeal. Specifically, he alleges that his counsel was remiss in failing to adequately frame certain direct appeal claims as federal constitutional issues. Ybarra speculates that he would have secured a more favorable outcome had counsel "federalized his claims." However, this speculation fails to demonstrate actual prejudice.

Ybarra also claims that he is incompetent to be executed. We conclude that the record before us belies this claim. He also asserts that he cannot be executed because he is mentally retarded. It appears that this issue has never been decided. The Supreme Court has held that the Eighth Amendment prohibits the execution of mentally retarded criminals.[27] And NRS 176.554(5) provides that a person sentenced to death may move to set his sentence aside on the grounds that he is mentally retarded if the matter has not been previously determined. The statute further provides that upon such a motion, the district court shall

---

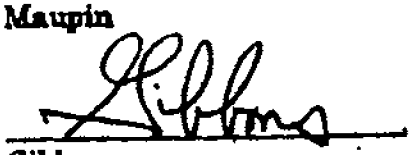
[26]See Ybarra, 100 Nev. at 176, 679 P.2d at 802-03.

[27]Atkins v. Virginia, 536 U.S. 304 (2002).

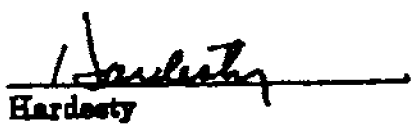
conduct a hearing pursuant to NRS 174.098 to determine the matter. Given this law, we conclude that this issue is not procedurally barred and remand to the district court for appropriate proceedings. In all other respects, we conclude that the district court properly dismissed Ybarra's petition.[26] Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

J.
Maupin



J.
Gibbons



J.
Hardesty

cc: Hon. Steve L. Dobrescu, District Judge
Federal Public Defender/Las Vegas
Attorney General George Chanos/Carson City
Attorney General George Chanos/Reno
White Pine County District Attorney
White Pine County Clerk

---

[26]Ybarra also claims that the district court erred in striking exhibits supporting his petition. In light of our order, we conclude that no relief is warranted on this claim.

# Exhibit 134

# Exhibit 134

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT YBARRA, JR.,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K. MCDANIEL,
Respondent.

No. 43981

FILED

FEB 02 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DENYING REHEARING

This is a petition for rehearing of this court's decision in Ybarra v. Warden.[1]

A rehearing may be warranted when the court has overlooked or misapprehended a material fact or question of law or has overlooked, misapplied, or failed to consider controlling authority.[2] However, a petitioner may neither reargue matters that have been presented in previous briefs nor raise points for the first time.[3]

Ybarra argues that rehearing is warranted for several reasons. First, he contends that this court overlooked or misapprehended his claim that his mental disability precluded his execution. This contention lacks merit. This court considered Ybarra's assertion and rejected it, concluding that the record belied his claim. Here, Ybarra

[1]Docket No. 43981 (Order Affirming in Part, Reversing in Part and Remanding, November 28, 2005).

[2]See NRAP 40(c)(2).

[3]See NRAP 40(c)(1).

SUPREME COURT
OF
NEVADA

(O) 1947A

06-02401

merely reargues this matter and offers no basis for this court's further consideration of it. Therefore, we conclude that rehearing is not warranted on this claim.

Ybarra next argues that this court overlooked controlling federal constitutional authority cited in his opening brief in rejecting his claim that judges who preside over capital cases cannot be impartial because they are subject to removal for unpopular decisions. The only federal case to which Ybarra cited was Tumey v. Ohio.[4] However, Tumey is inapposite here. And he has not proffered any evidence of partiality by any judges due to their election by popular vote. Therefore, we reject this claim as a basis for rehearing.

Ybarra further asserts that this court erred in rejecting his claims in part because he submitted an inadequate appendix on appeal. Although Ybarra's failure to provide pertinent records was not central to our rejection of his claims as procedurally barred, we will address his argument, which is two-fold. First, he contends that NRAP 10(a)(1) recognizes that this court has access to district court records and that NRAP 30(g)(2) contemplates that we will order supplementation of the appendix or will review the original record if justice requires. He argues that no rule exists placing counsel on notice that rejection of a claim could be based on an inadequate record and, thus, he had no opportunity to be heard respecting the new rule this court applied in his case.

Contrary to Ybarra's assertion, we did not institute a new rule in his case. Although NRAP 10(a)(1) and NRAP 30(g)(2) may contemplate

---

[4]273 U.S. 510 (1927).

in exceptional cases this court's intervention in securing an adequate record with which to review claims on appeal, this court has long held that the appellant bears the responsibility of providing the materials necessary for this court's review.[5] Moreover, NRAP 30(a) and (b) plainly require an appellant to provide this court with an appendix that includes a number of enumerated items "and any other portions of the record essential to determination of issues raised in appellant's appeal."[6] The rules upon which Ybarra relies in no way abrogate his obligation in this regard.

Second, Ybarra's counsel contends that this court has been vague and contradictory respecting his obligations under the rules relating to the content of appendices. Specifically, he points to this court's opinion in State v. Haberstroh wherein this court admonished counsel for submitting a lengthy appendix and only relying on a few pages to support his claims.[7] We concluded that the several thousands of irrelevant pages submitted in that case violated NRAP 30(b) and cautioned counsel against engaging in similar conduct in the future.[8]

Our guidance in Haberstroh is clear—only documentation cited and relied upon in appellant's opening brief should be included in the

---

[5]See Thomas v. State, 120 Nev. 37, 43 n.4, 83 P.3d 818, 822 n.4 (2004); see also Byford v. State, 116 Nev. 215, 238, 994 P.2d 700, 715 (2000).

[6]NRAP 30(b)(3).

[7]119 Nev. 173, 69 P.3d 676 (2003).

[8]Id. at 179, 69 P.3d at 680-81.

appendix. Additionally, NRAP 30(b) places counsel on notice of what materials are not appropriate for the appendix.[9]

Here, Ybarra complained in his habeas petition that the district court committed an instructional error and made improper comments to the jury. However, despite submitting more than 5,000 pages in his appendix, he failed to include a copy of the challenged instruction or the relevant portion of the transcript so that this court could verify the challenged comments and place them in context. Furthermore, counsel's arguments and actions in seeking rehearing do not even speak to the actual merit of these claims. Were there such merit, this court would expect that counsel would have requested leave on rehearing to supplement the record and proffered the missing documents to substantiate the claims. No rehearing is warranted on these claims.

Finally, Ybarra complains that this court misapprehended his argument respecting the application of procedural default rules. Specifically, he argues that this court overlooked controlling due process and equal protection authority, alleged flaws in this court's analysis in State v. Dist. Ct. (Riker),[10] and cases which he claims demonstrate that

---

[9] NRAP 30(b) provides:

> Except as otherwise required by this Rule, all matters not essential to the decision of issues presented by the appeal shall be omitted. Brevity is required; the court may impose costs upon parties or attorneys who unnecessarily enlarge the appendix.

[10] 121 Nev. ___, 112 P.3d 1070 (2005).

this court continues to apply procedural default rules inconsistently and at our discretion. However, this court considered and simply rejected Ybarra's contention that alleged inconsistencies in this court's application of procedural default rules were routine and warranted abandonment of the rules entirely. Moreover, in Riker we explained that "any prior inconsistent application of statutory default rules would not provide a basis for this court to ignore the rules, which are mandatory."[11] Accordingly, we conclude that rehearing is not warranted on this claim.

For the above reasons, we deny the petition for rehearing.

It is so ORDERED.

Maupin J.

Gibbons J.

Hardesty J.

cc: Hon. Steve L. Dobrescu, District Judge
Federal Public Defender/Las Vegas
Attorney General George Chanos/Reno
White Pine County District Attorney
White Pine County Clerk

[11]Id. at ___, 112 P.3d at 1077.

CODE #3880
RICHARD A. GAMMICK
#001510
P. O. Box 30083
Reno, Nevada 89520-3083
(775)328-3200
Attorney for Respondent

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

SIAOSI VANISI,

Petitioner,

v.

Case No. CR98P0516

Dept. No. 4

E.K. McDANIEL, WARDEN and CATHERINE CORTEZ MASTO, ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents.

_____/

RESPONSE TO OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

The opposition to the State's motion to dismiss adds nothing to the debate. Much of the opposition describes evidence of Vanisi's mental state years before the instant crime. That is relevant only as it is relevant to his mental state at the time of the crime, or of the trial, but Vanisi's mental state at relevant times has been thoroughly explored.

The balance of the opposition consists of asserts that prior post-conviction counsel failed to raise various issues. The proper question is whether there was some external impediment that prevented Siaosi Vanisi from raising the claims in his initial petition. *See* NRS 34.810. As there is no explanation in the petition, the claim that counsel was ineffective in failing to do what Vanisi could have done means nothing.

The petition also has a discussion of a Ninth Circuit case, *Polk v. Sandoval*, in which the 9th Circuit undertakes to discern Nevada law concerning the elements of first-degree murder. The Ninth circuit incorrectly interpreted state law. *Nika v. State*, 124 Nev. 1272, 1285-86, 198 P.3d 839, 848-49 (2008). The correct statement of state law is in *Nika* and the final arbiter of Nevada law has ruled on the subject and determined that the instructions to the jury in the instant case were supported by the law as it existed at the time of the trial.

The opposition also suggests that this court has the authority to ignore the Law Of the Case and to overrule the Supreme Court. The Supreme Court has ruled that the Supreme Court has the authority to overrule its own decisions but the Supreme Court has never ruled that the district court may assert appellate authority over the Supreme Court. *See Bejarano v. State*, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006).

The claim of actual innocence to overcome the procedural bars is based solely on the existence of new mitigating evidence. The State notes that in a capital case, all evidence is potentially mitigating and so there will always be new mitigating evidence. That is why no court in the nation has adopted the theory that a claim of new mitigating evidence is a claim of actual innocence that will overcome a procedural bar. On the contrary, courts generally rule that the innocence exception applies only where the petitioner can show that there are zero aggravating circumstances. *See Sawyer v. Whitley*, 505 U.S. 332, 344-45, 112 S.Ct. 2514, 2521-22 (1992)(rejecting notion that existence of additional mitigating evidence makes one "innocent" of the death penalty). Although there are several stages of the jury's analysis, the existence of one or more aggravators is the last part that is susceptible of objective proof. Hence, in Nevada, eligibility is a function of the existence of aggravating circumstances alone. Thus, the claim of additional mitigating evidence is not a claim that will overcome the procedural bars.

As indicated earlier, the claim regarding lethal injection is not a claim that attacks the conviction, and so it must be brought in a separate civil action seeking injunctive relief. The

State has not asserted that the claim is not cognizable in state court, but it is not cognizable in a post-conviction habeas corpus action. *McConnell v. State*, 125 Nev. ____, 212 P.3d 307, 311 (2009).

The opposition to the motion to dismiss is voluminous, but ultimately adds nothing to the debate. The petition is untimely, abusive and successive and should be dismissed.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: October 7, 2011.

RICHARD A. GAMMICK
District Attorney

By /s/ TERRENCE P. McCARTHY
TERRENCE P. McCARTHY
Appellate Deputy

**CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Second Judicial District Court on October 7, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

C. Benjamin Scroggins, Assistant Federal Public Defender
Tiffani D. Hurst, Assistant Federal Public Defender
Counsel for Siaosi Vanisi

/s/ SHELLY MUCKEL
SHELLY MUCKEL

Code No. 4185

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE CONNIE STEINHEIMER, CHIEF DISTRICT JUDGE

-oOo-

| | |
|---|---|
| SIAOSI VANISI, Petitioner, vs. STATE OF NEVADA, Respondent. | Case No. CR98P0516<br>Dept. No. 4 |

TRANSCRIPT OF PROCEEDINGS

HEARING - ORAL ARGUMENTS

FEBRUARY 23, 2012

RENO, NEVADA

Reported By: BECKY VAN AUKEN, CCR No. 418, RPR, RMR

APPEARANCES:

For the Petitioner: TIFFANI D. HURST
Assistant Federal Defender

For the Respondent: TERRY MCCARTHY
Deputy District Attorney
Appellate Division

RENO, NEVADA, THURSDAY, FEBRUARY 23, 2012, 2:10 A.M.

-oOo-

THE COURT: This is the time set for a hearing on the motion to dismiss.

Counsel, make your appearances for the record, please.

MS. HURST: Good afternoon, Your Honor. My name is Tiffani Hurst, and I represent Mr. Vanisi in connection with the Federal Public Defender's Office. And Mr. Vanisi has requested that this Court waive his appearance and is therefore not here today.

THE COURT: Okay. Thank you.

MR. MCCARTHY: Terry McCarthy for the State.

THE COURT: The Court is aware of Mr. Vanisi's request and did approve it, so the Court is aware of that.

This is your motion to dismiss, Mr. McCarthy. You may proceed.

MR. MCCARTHY: Thank you, Your Honor.

The petition before the Court is undoubtedly untimely, abusive, and successive. The only remaining question is whether that can be overcome.

The Court is aware from the Riker case that the procedural bars are mandatory and there's no discretion involved. So we get to the question of whether the petitioner has pleaded cause to overcome the procedural bars.

And I notice much of the opposition to the motion is devoted to the notion that prior counsel didn't plead all the available claims. That's the wrong question. The question is why didn't Vanisi plead them. He is the one who was supposed to bring all of his claims in one timely petition, and there are just no allegations that he could not bring all of his claims.

The petition when discussing the notion that Tom Qualls and Scott Edwards were ineffective in the last go-round is fairly -- is general. It just says, well, here's additional claims, and therefore they were ineffective.

That's not how you plead the ineffectiveness of Qualls and Edwards. We're supposed to be very specific on the subject. I notice it gets more specific in the opposition to the motion, but that's the wrong time to plead it.

The opposition to the motion, for instance, alleges Qualls and Edwards were simply ignorant and they

didn't know that you're allowed to go beyond the record on a post-conviction action. If that sort of scandalous accusation had been made in a verified petition, it might be grounds to allege sufficient grounds to overcome the procedural bar, but not later, and not in an unsworn pleading either. If you're going to say something like that, that those two lawyers just don't even know they can go outside the record, say it in a verified petition.

Furthermore, any claim that those two lawyers were unaware of their ability to go outside the record is repelled by showing that they did. The last hearing that we had included all sorts of things that were outside the record. It was abbreviated, it was a short hearing, but it still includes things that were beyond the record, many claims that were beyond the record.

The other proposed justification is a claim of actual innocence, and that can overcome a procedural bar if it's properly pleaded and ultimately proved.

In this case the only claim -- the claim of factual innocence relating to the guilt phase is an opinion supposedly that Vanisi was unable to form the intent to kill. But when you actually read the opinion, it says he did have the intent to kill. It was a psychotic intent to kill, but it was an intent to kill

nonetheless. So that, if considered by a jury, would not have changed the outcome.

And as to the notion that one can be innocent of the death penalty and thereby excuse the procedural bars, the only claim there that is not barred by the law of the case is the claim of additional mitigating evidence. The proper way to claim that form of innocence is to show not additional mitigating evidence but that there are no aggravating circumstances.

I noticed a recent decision of Nunnery, whose name I always liked -- he's a killer of my acquaintance down in Las Vegas -- the Court said that the existence of the aggravating circumstances is the last factual determination. Everything else in the analysis of the sentencing procedure is just a matter of discretion.

So having more mitigating evidence does not make one eligible or ineligible; it is the existence of aggravating circumstances that makes one eligible. And the only claim about lack of aggravating circumstances are those that have already been rejected by our Supreme Court in this case.

There is also a suggestion that the standard of pleading is something that is -- let me see if I can get it right -- well, a suggestion that I have misstated the

standard of pleading, that in fact there is only -- they only need to allege some in general terms, the claim.

That is not correct, Your Honor. The Nevada Supreme Court recently reaffirmed in Nika that the standard that I have been espousing in this case is the cornerstone of post-conviction jurisprudence in this case. So one must allege very specific facts.

This petition has no specific facts on the allegation that Qualls and Edwards were ineffective and no reason why Vanisi could not have pleaded all his claims in one timely petition. Therefore, it ought to be dismissed.

THE COURT: Okay. Thank you.

Counsel? You're welcome to use the lectern if you'd prefer.

MS. HURST: No, thank you, Your Honor.

THE COURT: Okay.

MS. HURST: I guess I'll start by expressing my confusion over counsel's allegation that in our petition we allege that attorneys Qualls and Edwards did not know that they can go beyond the record.

In fact, what we pled was that post-conviction counsel spent all of their time prior to submitting their initial -- or their amended petition litigating Mr. Vanisi's competence, or lack thereof, and once the

Court entered a ruling finding Mr. Vanisi to be competent, they then informed the Court that they needed time to conduct a full investigation in order to file an effective petition.

They were not given additional time. It's my understanding that they had perhaps a week, perhaps two weeks to file a petition for which they had conducted no investigation whatsoever, and we attached a declaration from post-conviction counsel to that effect. We also attached a declaration from post-conviction counsel indicating that they should have conducted an investigation. They had every intention of conducting an investigation, and they simply believed that they did not need to begin that investigation until the issue of competency had been resolved.

It is quite arguable, and in fact we allege, that that position was unreasonable and ineffective. They should have begun their investigation at the same time that they were litigating the issue of competency.

Their investigation would have been severely hampered by an inability to interact in a meaningful way with Mr. Vanisi. However, they should have done whatever they could, including interviewing family members, interviewing previous employers, obtaining records,

contacting the consulate, the Tongan Consulate. Any number of things could have been done without Mr. Vanisi's assistance, and they should have begun that while they were litigating the issue of competency.

THE COURT: At the hearings prior to the actual writ hearing Mr. McCarthy argues in his pleading that in fact counsel said they could supplement the petition in the amount of time that was given. You're arguing that the Court heard them say that they couldn't do it and ordered them to do it in a week.

So where is that transcript? Where is that in the transcript? I'd like to see it.

MS. HURST: Well --

THE COURT: Just point me to where it is and --

MS. HURST: I do not have that in front of me. If I could perhaps supplement my argument today with a letter pointing to anything that supports that in the transcript --

THE COURT: Do you believe there is a transcript entry like that, or are you relying on the affidavit of habeas counsel?

MS. HURST: I'm relying on the affidavit of habeas counsel.

THE COURT: So you haven't independently

confirmed that that -- the reason I'm asking is, as you know, Mr. McCarthy's opposition to your reply -- to your opposition says, oh, no, contraire; that's not what happened. So I'm trying to figure out --

MS. HURST: And, actually, Your Honor, it's my position that when there's such a dispute of fact, as appears to be in the instant case, that requires an evidentiary hearing. We need counsel, post-conviction counsel, to testify and to clarify.

THE COURT: If the Court made a determination -- because what you're arguing is that somehow the Court knew of the position of counsel and ordered them to do it in a week. Well, it doesn't really matter what counsel testifies to. I want to see what I was told at the time.

MS. HURST: It's my recollection that there was an assertion made -- and I have to admit that I've read many transcripts in between reading this one and making this assertion to you. My recollection is that they indicated that they needed more time, and the Court indicated that they had had plenty of time and that they needed to be ready to file in accordance with what may have been a pre-existing deadline, although, once again, I need to refer back to the records that I originally reviewed for confirmation. And hopefully if I can -- if

you will allow me to supplement or to present that after this hearing, I would like to do so.

And it was definitely the recollection during the interview with post-conviction counsel that they did not believe that they would be able to file a petition without another extension of time. That was ineffective, and that is what they've put in a declaration, which we've attached -- or that's what was put in a declaration, which we attached.

THE COURT: And the evidence that they would have added is what you've added to your petition?

MS. HURST: That's correct, Your Honor. We were informed that they would have attempted to take a trip to Tonga to learn about -- to interview family members there -- they've signed a declaration that's been attached to that effect -- that they would have taken the time to interview family members, to interact with members of the church, interact with all of the different sources of information that could have verified different -- the different allegations contained in our petition.

THE COURT: But that still doesn't address Mr. McCarthy's argument that all that does is go to mitigation and that there was a valid aggravating factor. How can you argue that a little bit more mitigation, even

if you found it, which we don't have any evidence that you have it --

MS. HURST: Actually, it goes to two separate arguments, because that is the actual innocence argument that counsel is referring to. But separate and apart from the actual innocence argument, we have the argument that post-conviction counsels' ineffective assistance establishes the cause and prejudice to excuse the procedural bars and to enable this Court to reach these issues and rule upon these issues on the merits.

So because Mr. Vanisi filed his successive petition alleging that first post-conviction counsel was ineffective in a timely fashion less than a year from the conclusion of post-conviction -- or first post-conviction proceedings less than eight months from appointment of current counsel, he, at this point, has a timely argument before you that post-conviction counsel's failure to effectively investigate this mitigation evidence, as well as evidence that Mr. Vanisi lacked the necessary intent to commit the crime that he committed, these allegations can excuse the bars that otherwise would be applied. And I probably didn't say that in the most effective way possible, but let me just --

THE COURT: No, I think I understand. You're

arguing that if counsel had been effective, they would have raised the issues of mitigation that you've raised, that could have been investigated, and they would have raised the issue of the mental capacity at the time of the intent based on the delusion at the time of the murder.

MS. HURST: Yes, Your Honor. And so if -- so, really, I would suggest that the issue before this Court is whether you believe that Mr. Vanisi was prejudiced by the failure of prior counsel, post-conviction counsel, to present the information that is contained in the instant petition, because if he was prejudiced by this failure, we certainly would be entitled to a hearing.

If we established a prima facie case that he was prejudiced by this failure, then we'd be entitled to a hearing to more fully develop and demonstrate to you that but for this failure, the result of the proceedings may have been different. There may have been one juror who, hearing just how insane Mr. Vanisi was, might have decided that this is not the worst-of-the-worst cases, this is not the worst-of-the-worst defendants.

The facts of the case are pretty significant, but the defendant and his mental state, I would suggest, would have made a juror think twice about whether he was the worst-of-the-worst defendant that the death penalty is

supposed to be reserved for. Those defendants are the ones who have a capacity to rationally, coolly, calmly deliberate and commit their crime. And had this information been before the jury, there could have been a juror who would have decided this person didn't have the ability to rationally, coolly, calmly contemplate anything because he was out of his mind.

And that, I believe, is really the -- what the issue ultimately is in connection with this case at this stage in the proceedings in connection with his ineffective assistance of counsel -- of post-conviction counsel allegation.

THE COURT: But your argument really goes to additional mitigation. There was evidence at the trial that he was not in his right mind, he wasn't calm and cool and collected, he wasn't acting or speaking rationally. That evidence was admitted.

MS. HURST: There was a very limited amount of evidence that was easily discredited. Most of the evidence was that he was a very nice, church-going, caring family member who helped people. It was positive stuff that he did 10 years prior to the crime.

There was also evidence -- the only person who testified that there was some mental health concerns -- my

recollection -- is that his ex-wife was put on the stand, and she gave some testimony saying: He was doing some really strange things, and they concerned me enough to eventually leave him.

But that's wholly different from the type of evidence that we've uncovered. We've uncovered evidence that he was having mental health issues prior -- back when he was being a helpful person. He was acting strangely, he was having bipolar issues, he was displaying bizarre behavior. But when he was in the confined environment within his family, that was controlled to some degree. However, when he left his household and reached a certain age, which is the age for the onset of schizophrenic illnesses, that's when his behavior started to significantly change.

We have experts who are prepared to testify in support of these allegations, not to mention an overwhelmingly large number of lay witnesses who simply weren't put on to testify about anything other than a very strange experience at a wedding.

So different family members got up and testified that, oh, he behaved very strangely at a wedding. That just wasn't anything like -- the very minor case that was put on by trial counsel bears no resemblance to the

mitigation case that we have presented in the instant petition, and so --

THE COURT: But the threshold is whether or not I believe that that mitigation -- failure to provide that mitigation would have prejudiced Mr. Vanisi and that a different result would have occurred.

MS. HURST: That is true, Your Honor. And it is our position that that ultimately is what that particular allegation turns on, whether you believe, number one, we've established a prima facie case. Because if you believe we've established a prima facie case, then at that point it's our position that we're entitled to an evidentiary hearing so that we can fully present witness testimony and give you the complete picture of what this mitigating evidence would have looked like had it been presented. So that's in connection with the ineffective assistance of counsel claim.

In connection with the actual innocence claim, we have two sections. One is that he was incapable of forming the necessary elements of first degree murder. We have experts who we would like to present to Your Honor, testimony regarding why it's their position that that is the case considering his schizoaffective disorder.

We have made an allegation in connection with a

potential insanity defense. However, we don't have to go that far. Really the question is whether the evidence that we've uncovered negates the elements of first degree murder. Because if it does, then he would not have been eligible for the death penalty and, thus, would be actually innocent of the offense of which -- for which he was convicted. So that's the first half of our argument.

The second half of our argument has to do with what you asked me about initially, which was innocence of the death penalty. And counsel and I disagree about what the legal standard is for that.

It's our belief that in the state of Nevada, the legal standard for that is not simply whether there are no aggravating circumstances, although we have alleged that the mutilation aggravating circumstance is unconstitutional as it's been written and applied. But in fact Sawyer talks about the fact that in a jurisdiction -- I believe it was Louisiana -- where the only thing that has to be proven to make a person death-eligible is the existence of one aggravating circumstance, then in that type of situation you have to remove all aggravating circumstances in order for the person to be actually innocent of the death penalty.

However, in a jurisdiction such as our own,

that's not the standard for making someone death-eligible. That's only the first part of the test. First you have to establish that there's an aggravating circumstance, but then the jury has to establish -- has to weigh that aggravating circumstance against the mitigating circumstances and determine, after weighing, whether the person is death-eligible.

So there's a weighing that necessarily has to be conducted, which our position is such that because you have to conduct this weighing, the failure to consider this wealth of mitigating circumstances during that weighing process makes Mr. Vanisi actually innocent of the death penalty. You can't just disregard the fact that during the weighing portion of the process, which is part of what makes someone death-eligible, you can't just say, well, it doesn't matter that they didn't hear all these mitigating circumstances -- these mitigating circumstances during the weighing process; there's an aggravator, and so that fulfills death eligibility, and under Sawyer we're done.

That's not what Sawyer says. You have to consider -- you have to weigh the aggravators against the mitigating circumstances. And if you find out that there's a ton of mitigating circumstances that the jury

was -- that members of the jury were unable to weigh, then that goes to our actual innocence argument of the death penalty.

Thank you.

THE COURT: Thank you.

Mr. McCarthy?

MR. MCCARTHY: If I misunderstood someone's position, I apologize, although I thought it was pretty clear.

If the notion is -- if the excuse that a reason to overcome a procedural bar is that this Court erred by not giving sufficient time to prepare a supplemental petition, I have a couple comments about that. One, that should have been raised on direct appeal, not on an appeal from the last order denying the petition.

Two, it's not required. There is no court in this country that has said that there is a constitutional requirement for a certain amount of time to prepare a supplemental petition. Our own legislature has said it's 30 days. You may recall, Your Honor, that Qualls and Edwards had some years in which to prepare the supplement.

Now -- and I checked just now, and I didn't cite to the record when I said that those fellows told you beforehand that they would be prepared, but I believe that

there is a transcript of that before we had the hearing that they were cautioned. They were asked: Will you be prepared to file the supplement if he's found to be competent? And they said yes.

Now, it's entirely possible that my recollection is wrong there, although I don't think so.

THE COURT: That could have been an administrative hearing that was reported but was before the actual hearing in the courtroom.

MR. MCCARTHY: Oh, it may well have been an in-camera conference. My recollection is that all of those were recorded.

THE COURT: Everything was reported.

MR. MCCARTHY: Yeah. So -- and I'm certain it wasn't just me and Scotty hanging out in the hallway either, although we have done that from time to time.

But, anyway, the extent to which a state allows post-conviction procedures is purely a matter of state law. The constitution does not require a state to allow post-conviction procedures at all. In fact, in a criminal case the State is required to allow a trial and then one direct appeal, although there's actually some question about that, too, whether there even has to be an appeal. All states do. But there's some question whether it's

absolutely required, but we'll assume that it is. But nothing beyond that. No discretionary reviews; no post-conviction procedures at all.

If the State elects to do that, then the extent to which a state elects to allow post-conviction procedures is determined by state law. Our state law says you get 30 days to do a supplement. The constitution does not demand more.

If the claim was that it could have been raised on the last appeal and that this Court erred in directing counsel to have their supplement ready, it would not have been error because nothing requires more.

Now, I suggest that it is not error and that the actual record shows that these fellows had plenty of time. And when it looks like they made a strategic decision to put all of their eggs in the incompetency basket, that, too, would require a hearing. And I'm not saying that's true. I'm just saying that the allegation here that counsel is ineffective is not adequate.

And, by the way, the suggestion that the petitioner hasn't claimed that Qualls and Edwards were ignorant of their right to go outside the record is repelled on page 5 of the opposition, page 4 and 5, very clearly saying these fellows just didn't know any better.

THE COURT: Is there an obligation for counsel in a habeas corpus litigation that is appointed by the State to be effective?

MR. MCCARTHY: In capital cases, yes. Right.

THE COURT: So at what point is that ineffective -- effective requirement terminated? At what point?

MR. MCCARTHY: When the appointment of counsel becomes optional.

THE COURT: So in this case --

MR. MCCARTHY: It's optional.

THE COURT: For a habeas action --

MR. MCCARTHY: Yes.

THE COURT: -- it was optional to appoint Mr. Edwards and Mr. Qualls?

MR. MCCARTHY: No, no, no. Vanisi was entitled -- he was entitled to the effective assistance of Qualls and Edwards.

THE COURT: So the argument is that they were ineffective --

MR. MCCARTHY: Right.

THE COURT: -- in their assistance, and that ineffectiveness was not raised -- or was raised on appeal, but not these grounds.

MR. MCCARTHY: Right. The -- and I'm suggesting that that claim, if properly pleaded and ultimately proved could overcome the procedural bar, could then allow inquiry into the merits of the claims raised in the newest petition, but it's not properly pleaded. It is pleaded in the petition in the most general terms saying things like: Here is another claim. We have found more mitigating evidence.

The way you plead a claim of ineffective assistance is to be more specific: What decision fell below what objective standard of reasonableness?

So you could say Scott Edwards didn't understand that you're not limited to the record in post-conviction cases, and that would be an allegation of fact that would be false, but it would be an allegation of fact that, if true, would demonstrate that his decisions were unreasonable, fell below an objective standard of reasonableness.

But that's not what's pleaded in the supplement in the petition in this case. Instead, what's pleaded is the results: Here is more mitigating evidence. Therefore, these lawyers were ineffective.

That's not the way you do it. That's a generic pleading.

THE COURT: So --

MR. MCCARTHY: I also suggest you don't necessarily get a year. When a new claim arises, a claim that wasn't factually or legally available, such as ineffective assistance of post-conviction counsel, that must be brought in a reasonable time.

We have to go back to the Pellegrini decision for this. That kind of thing must be brought within a reasonable time after it arises. That's a year at the outside, not at the minimum, and this was very close to a year of doing nothing. So I also suggest that it's a little bit late too.

But it's not -- the claims of ineffective assistance of Qualls and Edwards are not pleaded with the degree of particularity required by Hargrove. It's pleaded completely in terms of results, not in terms of the process. That's how you claim ineffective assistance of counsel. You describe the process; the decisions that someone made and why they were wrong.

THE COURT: So your position, if I understand it correctly, is that Mr. Vanisi was entitled to effective post-conviction counsel, that counsel was appointed and they had to be effective.

MR. MCCARTHY: Yes.

THE COURT: If the claim is made now that they were ineffective counsel in the habeas proceedings, they could raise that as a successive petition if they pled it with particularity.

MR. MCCARTHY: If it were pleaded with particularity, then we end up with multiple hearings. First, instead of an oral argument today, we have a hearing.

THE COURT: Which we've done on numerous occasions. Not in this case, but in lots of habeas cases.

MR. MCCARTHY: Way too many times.

But that wouldn't be a hearing about trial counsel; that would first be a hearing about Qualls and Edwards.

THE COURT: Correct.

MR. MCCARTHY: And then the Court would say: All right, I find Qualls and Edwards are -- I was going to say something impolite -- but they fell below the objective standard. Therefore, the gate is open. We may now consider the petition, the claims in the petition. So now we may consider the underlying claim that trial counsel was ineffective.

But I'm saying we don't even get that first hearing because it's not pleaded with sufficient

particularity. It's pleaded in very general terms.

THE COURT: Now, you indicated that you believe current post-conviction counsel may have been more particular in their opposition to your motion to dismiss.

MR. MCCARTHY: Right.

THE COURT: So if that is in fact true, what would stop current counsel, if I were to grant your motion to dismiss, from turning around and pleading in a successive petition ineffective assistance of counsel with the particularity that is stated in the opposition?

MR. MCCARTHY: Nothing. They can do that, except that it would be untimely.

THE COURT: That's based on Pellegrini?

MR. MCCARTHY: Right. Yeah. But it's also been way beyond the one year at the outside that's announced in Pellegrini, and it also assumes that Vanisi is entitled to the effective assistance of his current counsel, which he is not, because we're one step too far removed for that.

THE COURT: Okay.

MR. MCCARTHY: So the other claim --

THE COURT: I have another question for you. Do you agree with habeas counsel that it's a threshold determination by the Court if the failure to investigate mitigation and present the delusion claim in the first

habeas were prejudicial?

MR. MCCARTHY: Your Honor, I've never heard it phrased that way: a threshold determination. I can suggest to you that a court can dismiss, if the new facts pleaded -- if you can determine that these new pleaded facts would have been insufficient to alter the outcome; that is, we don't have to inquire into why those new facts were not presented if they were not sufficient to alter the outcome. And they weren't likely to alter the outcome.

So I don't -- I've never heard it described as a threshold question, but I suppose that that's not completely out of line to describe it that way. But that's a question of whether the pleadings are sufficient. And I know you've seen that plenty of times, a motion to dismiss for lack of specificity in the pleadings or -- I'll try to give an example. I'll try to get out of the capital cases to routine cases.

A fellow says my lawyer is ineffective in failing to show at my sentencing hearing that my mom still loves me. Moms always love people, their sons. And you, if you had that claim, you could say that doesn't warrant an inquiry because it's not likely to have affected the outcome of the sentencing hearing. But that's seeing it

as the Court as a sentencing body.

And when a jury is a sentencing body, I think the question is different. We have to ask what would have affected a reasonable jury; what would have changed the outcome. And we have very few examples of that.

But one of them is the Higgins -- *Wiggins v. Smith*, I believe, U.S. Supreme Court. It's a capital case. It arose in Maryland. And there's a finding there that the type of elements at issue -- it was one of those miserable childhood-type cases -- is this type of evidence at issue has been recognized by courts as reducing the moral culpability of the killer.

I think that's a threshold to describe evidence that jurists generally would conclude reduces the moral culpability of the killer. And then we have -- then there's also the question of whether or not it's ineffective in failing to gather.

Now, what was interesting in that case, the court noted that it was the custom in Maryland in capital cases at that time to hire the type of expert that would have led to that evidence. And I think that's a pretty fair description of the burden if we ultimately get to a hearing on the question of ineffective assistance of trial counsel at sentencing to show that it was the custom at

the time to engage in a certain type of investigation and that the investigation would have yielded evidence generally recognized as reducing the moral culpability of the murderer, so -- but I think we're -- we're still a long ways from getting to such a hearing.

And I've been rambling. Did I answer your question?

THE COURT: You did. I think you had more things you wanted to say before I asked you a question.

MR. MCCARTHY: I did.

The other justification to excuse the procedural bars to the claim of innocence -- and I suggest to you, one, that the opinion at page 97 of the petition, 96 and 97, is not a claim of innocence. In *Schlup v. Delo*, the U.S. Supreme Court described the type of evidence necessary to overcome the procedural bar by a claim of innocence.

And a claim -- and, also, the Supreme Court has said that we have to consider the jury would be following its instructions. As no instruction would allow the jury to acquit based on the opinion presented on page 97 of the petition, we may ignore that. It's not a claim of evidence -- excuse me, it's not evidence of innocence.

In fact, I say that's an indictment. If this

doctor was of the opinion that Vanisi killed because of his psychotically driven belief that killing a police officer would restore his life to a normal keel, that's evidence of guilt. That's evidence of a motive. He purposely killed somebody in order to feel better. There is no instruction that would have allowed a jury to acquit based on that evidence. Therefore, it's not evidence of innocence.

As to the suggestion that new mitigating evidence is evidence that one is not eligible for the death penalty, I would remind the Court all evidence is mitigating.

My partner and I were joking about that earlier. If someone were to argue that he has evidence that he killed three other people, well, that's mitigating because he didn't kill four people. All evidence is mitigating exactly to the extent that someone finds it to be mitigating.

Because of that, a claim of new mitigating evidence is not a claim that one is not eligible for the death penalty. Instead, one becomes eligible upon proof of at least one aggravating circumstance. According to Nunnery, that is the very last factual decision. Everything after that is discretionary.

The weight of aggravation and mitigation is not subject to proof. How do you prove that some bit of mitigation is more important than some bit of aggravation? It's not susceptible to proof. A reviewing court can't say the evidence of the weight is insufficient because there is no evidence of weight.

So in Nevada it would seem that one becomes eligible by having at least one aggravating circumstance. And so the claim of innocence to overcome the procedural bar on the death penalty case must be a claim of ineligibility by having no aggravating circumstances. The Supreme Court in this case has reviewed the aggravating circumstances and found that they are fine. So that is not a claim of innocence.

So -- I should probably stop talking pretty soon. I will.

Very basically, if ineffective assistance of Qualls and Edwards is alleged to overcome the procedural bar, it's not properly alleged. It's alleged in conclusory terms. The claims of actual innocence are not claims of actual innocence. Therefore, they do not overcome the bar, and therefore the petition should be dismissed.

THE COURT: Okay. I'm going to ask that,

Ms. Hurst, at this point, point to your petition, if you can, and tell me where you think you did claim ineffective assistance of counsel with enough particularity to satisfy the Hargrove decision.

You didn't think I'd do that.

MS. HURST: I didn't.

THE COURT: Really where we're at here -- and I will tell you, I don't think the claim of actual innocence is sufficient to overcome the procedural bar as you've alleged it. So what we're really talking about this is -- the only way you're going to overcome the procedural bar is if you in fact pled it with sufficient particularity for it to go forward just for the hearing about whether or not it was ineffective assistance just to get the hearing on that issue. But that's the only thing you've got here, in the Court's opinion, that would at least get you into another hearing and not subject you to dismissal.

So I would like you to point to me -- we've talked in general terms. Mr. McCarthy has argued eloquently, as I've heard him on numerous occasions tell me, that it wasn't pled with particularity. And so I want to give you an opportunity to tell me how you pled it with particularity.

MS. HURST: Just to begin with, it's an

interesting position to be in to have to argue why we -- or to answer an argument that we haven't pled that counsel was deficient with particularity, because I think -- I don't think that counsel could possibly say that we haven't made allegations that Mr. Vanisi was prejudiced with particularity, because it's the opposite.

The overwhelming majority of Claim 1, which is almost 100 pages, is about prejudice. It's demonstrating what would -- what an effective investigation would have accomplished.

Our allegation that post-conviction counsel was deficient mostly centers around the fact that they failed to conduct an investigation. And there's an abundance of case law that indicates that before counsel can make a strategic decision about how to proceed, they have to conduct an efficient -- an effective investigation.

We have an affidavit indicating that counsel did not conduct an investigation at all, but I do acknowledge that that affidavit was attached to an exhibit -- as an exhibit to our opposition.

However, I would point out that you can't just look at the petition in an isolated manner. The whole reason that the State is given an opportunity to respond is they raise issues that they believe we did not

sufficiently develop, and then we have an opportunity to respond to their arguments and to present this Court with additional information.

But that being said, I would suggest that our -- on page 1 of Claim 1 we say that Mr. Vanisi's attorneys failed to investigate obvious and readily available evidence of Mr. Vanisi's sharply declining mental health. Instead, they focused their investigation on and presented testimony regarding good events.

So that was trial counsel's deficiency. And then we --

THE COURT: What I'm suggesting is you have to talk about Qualls and Edwards.

MS. HURST: Yes.

THE COURT: I don't think you'll get to them until around page -- looks like you might start getting there about 8, 9, 10.

MS. HURST: Yeah, we start out by because if trial counsel was effective, then there really isn't -- and that's kind of the end of our claim, because our allegation is that post-conviction counsel was ineffective in their investigation of whether trial counsel was effective.

THE COURT: But that isn't really the issue here.

The issue we're talking about now is whether or not you've pled with sufficient particularity exactly what Qualls and Edwards did wrong.

And that's the argument as I understand it. Is that correct, Mr. McCarthy?

MR. MCCARTHY: Geez, I hope so, Judge.

THE COURT: I thought that was your argument.

MR. MCCARTHY: I'm pretty sure it is.

THE COURT: Okay. So -- and I'm giving you an opportunity to explain to me how on page 11 or maybe 10 you've alleged it with enough particularity.

MS. HURST: Well, once again, we say that first post-conviction counsel was ineffective for failing to investigate, develop, and present the evidence contained in Claims 1 and 2, and that has to do with Mr. Vanisi's life history, his neurological issues, his psychiatric deficits, and that this failure to investigate was deficient.

And, Your Honor, I would suggest that there's an abundance of case law that indicates that if -- you can't make a strategic decision if you haven't conducted an investigation. It's simply -- and where you haven't conducted an investigation, none of your decisions are entitled to deference.

And so simply by alleging that they failed to investigate, develop, and present evidence, that's what we're saying was deficient, and I really am not sure how we could allege it in a way that is more specific. The failure to investigate was deficient. Counsel -- post-conviction counsel is required to investigate.

And then we go to a whole -- there's an entire section in here about what post-conviction counsel is required to do to be effective. It has -- we cite to the AB- --

THE COURT: That's the legal issues that you've raised. But where do you allege in the petition what they would have found -- maybe you have -- but what they would have found if they had investigated?

MS. HURST: Oh, Your Honor, everything in Claim 1 is what -- and Claim 2 -- is what they would have found had they conducted an effective investigation. That's what we -- that's the essence of what we have alleged. That's the essence of those claims. The claims are --

THE COURT: Claim 1, though, says that he received ineffective assistance of counsel during the penalty phase. That's what your Claim 1 says on page 20.

MS. HURST: Yes. But it also says that post-conviction counsel was ineffective for failing to

investigate the fact that he received ineffective assistance of counsel during the penalty phase, and that had they conducted the investigation, they would have discovered the evidence contained in Claims 1 and 2.

So you really cannot separate the ineffective assistance of trial counsel and the ineffective assistance of post-conviction counsel, because post-conviction counsel, in their petition, made some very generalized allegations that trial counsel was ineffective, but they didn't present evidence of what would have been discovered had trial counsel conducted an effective investigation. And the reason post-conviction counsel was unable to meet the prejudice prong is because they themselves failed to conduct an investigation.

And I would suggest that -- I mean, you found it on page 11 already, and I'm pretty sure there's other indications in here that we are saying the failure to -- it was their failure to investigate that was deficient. They didn't investigate at all. And that's just -- that is deficient, and it prejudiced Mr. Vanisi.

I'm not really -- I mean, I suppose we could have doubled the length of the petition by putting before every --

THE COURT: Please. Help me.

MS. HURST: -- by putting before every paragraph something along the lines of "post-conviction counsel, had they conducted an effective investigation, would have discovered" this paragraph or that paragraph, but we didn't do it that way because we didn't consider that to be necessary.

THE COURT: You feel that the petition incorporates the failure to investigate with particularity as to the investigation that you secured yourselves when you investigated?

MS. HURST: That's correct, Your Honor. And I believe that you found a good example of our attempt to present that with particularity on page 11. And it's a little challenging to look through all 100 pages and find other instances --

THE COURT: Welcome to my world.

MS. HURST: -- but I'm sure there are other instances where we used the same type of language. And, once again, we cite to Claims 1 and 2 as containing the evidence that they would have discovered had they conducted any investigation, which they did not do.

THE COURT: Okay.

Mr. McCarthy, you have the burden here, and I've given petitioner's counsel an opportunity to sort of talk

about this particularity issue because, in my mind, that's the issue that is, at this point, in question.

What does it mean to really to have been particular? I understand what it means when you argue it, I understand what the cases say, but what does it mean when you look at a document and what is actually in that document?

MR. MCCARTHY: Well, trying to opine and discuss a general rule in specific terms is challenging, but here's what I've seen before: A lawyer confronted with these circumstances, a lawyer who talks to his client and learns fact A would then be inspired to direct his investigation to a specific place where he would have uncovered fact B. That's generally what's missing. Or the other way, which is much more common, is what's not in the petition but in the opposition, and that is to -- the opposition to the motion to dismiss, and that is to say your decisions were based on ignorance, to claim they didn't know.

You know, I -- it seems to me -- and the last time we were in court in this same case there was an allegation, for instance, that Mike Specchio didn't know he had the ability to call the Tongan Consulate. That's a good claim. It was false, but it's a good claim. His

decision or his omission was based in ignorance, so we had a hearing, and it turns out that it was untrue. He said, yes, I do know that I can call anybody I want, and I did, and I called the Tongan Consulate. But that's how you plead a claim.

What's wrong, not with the results --

THE COURT: They do say that they failed to investigate.

MR. MCCARTHY: Why would someone have embarked on a specific type of investigation? What would have inspired it? That's what you talk about, you know, and --

THE COURT: You mean what inspired them to investigate?

MR. MCCARTHY: Or to not, or, you know -- to say after the fact whatever happened before should have led to this point is not sufficient. You must describe what it is that happened before and say "and should have led to this point."

THE COURT: Well, I understand than in abstract terms, but I also understand the petition says they should have investigated his family. They say that --

MR. MCCARTHY: Right. But why? What is different --

THE COURT: So your argument is that -- if I

understand it correctly -- that petitioner's argument is really that failure to investigate is just per se ineffective and that they have to allege why.

MR. MCCARTHY: The scope of your investigation must be reasonable. We go back to Strickland itself. It describes how you decide where to investigate. And most often, according Strickland, it's based on what your client tells you. And I'm not saying that's what's governing in this case. But you see how they do it, Your Honor? They were able to -- the Supreme Court, they said your decision on what to investigate and what not to investigate, where to devote your resources, is based on what your client tells you.

What's the basis here? Why would someone do this? Why would someone undertake this specific form of investigation? And you know what? When this is all done we're going to know more about the life and times of Saiosi Vanisi. We will not know everything there is to know. And no one ever will. There will always be more.

But the mere fact that there is more doesn't mean counsel is ineffective in failing to gather more. There must be something that would have inspired someone to devote their energy, their resources, their intellect to this evolution. And that's what's missing.

THE COURT: Other than a presumption that any lawyer worth knowing how to do post-conviction in a death penalty case would know to look for. Isn't that kind of presumed in the pleadings?

MR. MCCARTHY: No. it's presumed that they found it.

THE COURT: Well, this counsel found it. But it's sort of presumed that if you are going to represent somebody in a death penalty case, you should investigate, and that's a presumption.

MR. MCCARTHY: And I suppose, Your Honor, that you could say that there is a standard. Whatever the first step was that ultimately led current counsel to develop all this new evidence, whatever that first step is, is required. The objective standard of reasonableness requires counsel to take that first step, but I still don't know what it is, that first step. And it's not alleged. And that's the problem.

Now, it wouldn't be hard to -- and prisoners manage to do it all the time. They just do it instinctively. And it's not adding a line to the beginning of every paragraph that says "counsel was ineffective in failing to investigate," colon, and then repeat the rest of the paragraph; it's to explain what was

it that required Qualls and Edwards to take specific steps at a specific time to devote their resources to a specific issue.

And all we have is the results. That's not the way it works. We do have -- later there is a claim that it was based on ignorance, but that's not in the petition.

THE COURT: Or that it was based on judicial error not giving them the time.

MR. MCCARTHY: Yeah, well, that's not error. And you gave enough time. They had years.

So if there had been a claim that these two fellows didn't know and that's why they didn't investigate, we could have a hearing on that subject: Did they know.

But there is no such claim. Instead what you have is hundreds of pages of the results. That's not how you plead it.

THE COURT: Naturally, in a motion to dismiss we have the allegation that they did know they hadn't been given time to do it or they made a strategic decision that was wrong.

MR. MCCARTHY: Well, certainly when the Court said your supplement is due next week, they had points. But my recollection is, without knowing -- without looking

through the transcripts, my recollection is that sometime before that the Court had been assured that they will be prepared to file the supplement as soon as the hearing on the competency is done.

Now, I would suggest, if we were in a hearing on the subject, that putting all your eggs in the competency basket is not a bad choice at all at the time, but -- anyway, I don't think that's necessary here because, one, if you had only given a week, no law requires more, and, two, they indicated before that hearing that they would be ready.

MS. HURST: Your Honor, may I just quickly --

THE COURT: Yes. Go ahead.

MS. HURST: -- respond?

THE COURT: I'm letting you guys go back and forth quite a bit.

MR. MCCARTHY: You'd think we were in Judge Polaha's court.

MS. HURST: Thank you, Your Honor.

The one thing that I want to emphasize is that what constitutes -- what determines whether counsels' performance is deficient are the prevailing norms at the time. The case law is very clear on that.

We did plead with specificity what the prevailing

norms were at the time, and we indicated that those prevailing norms, whether they be the reference to the ABA guidelines or to Nevada's ADKT guidelines or to the case law across the board, the professional norms say that death penalty attorneys must conduct an investigation into their client's background. It's very clear.

So the very fact that they failed to do that in and of itself is deficient performance, which is specifically pled in the petition. And that's where you begin. That's how you know where to begin. That's where capital counsel knows where to begin, by looking at the prevailing norms.

THE COURT: But you don't allege that in your petition. You allege that in your opposition to the motion to dismiss. That's when you get more clear.

MS. HURST: Actually, that's because it's our office's understanding that you're only supposed to plead, that you're not supposed to get -- you're not supposed to plead law because that's what the rules indicate in terms of petitions. So we don't plead the law. We don't present the law in our petitions. We present the law in our oppositions or in our responses to the State's answer.

THE COURT: I believe that there has to be some end to litigation, all litigation, whether it's death

penalty litigation or not. So I understand the need for closure, finality, end of litigation, and we can't keep on going back and back and back.

I am not convinced, as you stand here today, that you did plead the ineffective assistance of counsel claim sufficient to get you over the motion to dismiss based on the particularity argument.

I am convinced, however, that the motion to dismiss should be granted in all other respects based on arguments presented by the State.

When I say I'm not convinced, the particularity concept is very troubling to me, because I am concerned that it's a hypertechnical argument at this point because of the nature of the investigation that was not conducted.

Therefore, I am going to have a hearing on the ineffective assistance of counsel claim as to whether or not it's been pled with sufficiency and you can show it's sufficient to overcome the procedural time bar. That's the only hearing that I'm going to allow on the issues presented in the motion to dismiss or the petition at this stage. And it's because I am concerned with whether or not this argument of whether or not it was pled with sufficient particularity has been shown.

It's tough given the length of your document and

the arguments with regard to the ineffective assistance of post-conviction counsel for investigating. However, I think this is going to be -- may be still a hearing that results in the dismissal being granted. I'm not convinced that you've shown it with sufficiency to get over the time bar requirements.

Does that make sense, Mr. McCarthy? At least my ruling?

MR. MCCARTHY: It will eventually. I'm sure -- we'll be fine, Your Honor.

THE COURT: What I'd like you to do is prepare a decision comporting with this granting as it relates to all other allegations for the motion to dismiss except as to your claim that it wasn't pled with particularity on the ineffective assistance of counsel claim and granting petitioner a hearing on the ineffective assistance of post-conviction counsel.

MR. MCCARTHY: Okay. And that would be with an eye toward another supplement once it's fleshed out?

THE COURT: Right. Right. I'm not sure -- the procedural bar that is a standard that the petitioner must get over and the alleging ineffective assistance of post-conviction counsel without particularity would, in effect, cause this petition to be dismissed, and I'm just

at this point not convinced that an appellate court reviewing this would say it wasn't with sufficient particularity.

I'm not sure it was, but I think it's a close enough call that I want to go to the next step and have a hearing to see if the ineffective assistance of post-conviction counsel can establish -- can be established sufficiently to overcome the procedural bar.

MR. MCCARTHY: Okay.

THE COURT: So an evidentiary hearing on that issue only.

MR. MCCARTHY: Right.

THE COURT: I'm not talking about a hearing on all the evidence that you discovered.

MR. MCCARTHY: No, I understand. I mean, I would envision that a hearing with Qualls and Edwards --

THE COURT: Correct.

MR. MCCARTHY: -- as witnesses and maybe Mr. Vanisi, if he wanted to testify, but I can't imagine anybody else.

If I understand the Court's ruling -- you know, I don't, because I'm not sure what would happen after that.

THE COURT: It's my understanding and my belief that if the ineffective assistance of post-conviction

counsel has not been pled with sufficient particularity or established to the Court's satisfaction that is sufficient to overcome a procedural bar, the motion to dismiss would be granted.

MR. MCCARTHY: So now -- okay. For the moment it's alleged to at least inquire into the effectiveness of Qualls and Edwards, and then we'll decide -- then you can decide what's going to happen after that.

THE COURT: Correct.

MR. MCCARTHY: Got it. More or less.

THE COURT: I think it's kind of a bifurcated process, but it is one that I think is the most appropriate way, especially in light of the litigation that we know will follow. So let's flesh these issues out.

MR. MCCARTHY: Okay. And I assume nobody's in a great hurry on this.

THE COURT: I don't think Mr. Vanisi will complain about any delays.

MS. HURST: I can represent that he does not have any concerns about --

MR. MCCARTHY: All right. I'll try to -- getting five lawyers in a room all at one place, that's always difficult, but I'm going to do what I can.

THE COURT: Okay. And I understand that you'll be conversing with counsel, and when you prepare the short order that allows for this hearing, you'll provide it to her and let her review it.

MR. MCCARTHY: Sure.

THE COURT: And I do want to let everyone know that I am prepared to grant the motion to dismiss in all other aspects for the arguments presented by the State.

MS. HURST: Thank you.

THE COURT: Thank you.

Court's in recess.

(Proceedings concluded.)

-oOo-

STATE OF NEVADA,. )
)
COUNTY OF WASHOE. )

I, BECKY VAN AUKEN, Certified Shorthand Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify:

That I was present in Department No. 4 of the above-entitled Court and took stenotype notes of the proceedings entitled herein, and thereafter transcribed the same into typewriting as herein appears;

That the foregoing transcript is a full, true and correct transcription of my stenotype notes of said proceedings.

DATED: At Reno, Nevada, 02/24/2012.

/s/Becky Van Auken
BECKY VAN AUKEN, CCR No. 418, RPR, RMR

FILED
Electronically
03-21-2012:12:52:39 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 2839353

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

SIAOSI VANISI,

Petitioner,

v.

Case No. CR98P0516

Dept. No. 4

E.K. McDANIEL, WARDEN and CATHERINE CORTEZ MASTO, ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents.

ORDER

Petitioner Vanisi has filed a second petition for writ of habeas corpus. The State moved to dismiss, asserting various procedural bars. The court finds that the claims of innocence are not sufficient to overcome the procedural bars. However, petitioner has also alleged that the failure to present all his claims in his first petition was due to the ineffective assistance of his first post-conviction lawyers in failing to properly investigate and plead the ineffective assistance of his trial lawyers. The State asserted that the claim of ineffective assistance of post-conviction counsel is pleaded in conclusory terms, and not with the specificity required by *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984).

On February 23, 2012, this court heard oral arguments. The court has determined that the issue of whether the petition was pleaded with sufficient particularity is close enough to

proceed to the next step of holding an evidentiary hearing to determine whether the ineffective assistance of post-conviction counsel can be established sufficiently to overcome the procedural bars. Accordingly, the court directs a further hearing in which the court may hear testimony on the subject of the ineffective assistance of post-conviction counsel with the goal of clarifying those claims.

Counsel shall contact the administrative assistant of this department within 10 days of this order to schedule a hearing relating to the motion to dismiss.

DATED this 20 day of March, 2012.

Connie J. Steinheimer
DISTRICT JUDGE

## CERTIFICATE OF SERVICE

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 21st day of March, 2012, I filed the attached Order with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

_____ **Personal delivery to the following: [NONE]**

__X__ **I electronically filed with the Clerk of the Court, using the ECF which sends an immediate notice of the electronic filing to the following registered e-filers for their review of the document in the ECF system:**

Terrence McCarthy, Esq.
Deputy District Attorney

Tiffani Hurst, Esq.
Assistant Federal Public Defender

_____ **Deposited in the Washoe County mailing system in a sealed envelope for postage and mailing with the United States Postal Service in Reno, Nevada: [NONE]**

_____ **Placing a true copy thereof in a sealed envelope for service via:**

_____ Reno/Carson Messenger Service – **[NONE]**

_____ Federal Express or other overnight delivery service **[NONE]**

DATED this 21st day of March, 2012.

Marie Stone

Code No. 4185

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE CONNIE STEINHEIMER, DISTRICT JUDGE

-oOo-

| | | |
|---|---|---|
| STATE OF NEVADA, Plaintiff, | ) | Case No. CR98-0516 |
| vs. | ) | Dept. No. 4 |
| SIAOSI VANISI, Defendant. | ) | |

TRANSCRIPT OF PROCEEDINGS

PETITION FOR POST CONVICTION

DAY ONE

THURSDAY, DECEMBER 5, 2013

RENO, NEVADA

Reported By: STEPHANI L. LODER, CCR No. 862

APPEARANCES:

For the Plaintiff:

TERRENCE MCCARTHY
Deputy District Attorney
P.O. Box 30083
Reno, Nevada 89520
Tmccarthy@mail.co.washoe.nv.us

For the Defendant:

GARY ALLEN TAYLOR
Deputy Federal Public Defender
411 East Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101
Gary_taylor@fd.org

TIFFANI D. HURST
Deputy Federal Public Defender
411 East Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101
Danielle_hurst@fd.org

# INDEX

**DEFENSE WITNESSES:** **PAGE:**



*****

## EXHIBITS

# I N D E X
(Continued)



*****

RENO, NEVADA, THURSDAY, DECEMBER 5, 2013, 1:40 P.M.

-oOo-

THE COURT: Thank you. Please be seated. Go ahead and make you appearances for the record.

MR. McCARTHY: Terry McCarthy for the State, Your Honor.

THE COURT: Thank you.

MS. HURST: Tiffani Hurst on behalf of the defendant.

MR. TAYLOR: Gary Taylor, Your Honor, from the FPD as well.

THE COURT. Okay. And you all have waived Mr. Vanisi's appearance?

MR. TAYLOR: Yes.

THE COURT: And nothing has changed in that?

MR. TAYLOR: No, ma'am.

THE COURT: All right. Are you ready to proceed?

MR. TAYLOR: Yes, ma'am.

MR. McCARTHY: We are.

THE COURT: Okay. Then let's go forward. Did you want to present any oral arguments before you begin your evidentiary presentation?

MR. TAYLOR: No, Your Honor.

THE COURT: Okay. Then you may proceed.

MR. TAYLOR: Judge, at this point, for the purposes of this hearing alone, which, as I understand is essentially a *Crump* or *Martinez* hearing, we would move to admit the exhibits at least through 200, which are attachments to our petition, understanding that should the Court allow us past this procedural issue, then Mr. McCarthy may want to present evidence on those issues at later date.

But for the purposes of this hearing, we'll assume the proof and all that kind of thing.

MR. McCARTHY: Gosh, Judge, I wasn't prepared for a wholesale offering like that. We did have an agreement there'll be lots of stuff that will be admissible, just not for the truth, but --

MR. TAYLOR: Well, we're just assuming it was there and available to counsel to find, and I'll be asking him questions along that line.

MR. McCARTHY: That's too broad for me to wholesale --

MR. TAYLOR: Okay.

THE COURT: Okay. You want to do it as you go.

MR. McCARTHY: Yeah.

MR. TAYLOR: Can we admit them just on -- what

basis would you agree to?

MR. McCARTHY: Oh, I'd think everything here is authentic.

THE COURT: When you want to -- let's say you want to admit Exhibit 42 that you have marked.

MR. TAYLOR: Sure.

THE COURT: When you're ready to admit, just say move to --

MR. TAYLOR: Just move it.

THE COURT: And if Mr. McCarthy wants more of a foundation or more of a showing, he can ask for it or not.

MR. McCARTHY: Thanks, Your Honor. And I notice the stuff I found on the table here begins with Exhibit 42.

THE COURT: That's what I show.

MR. TAYLOR: Can I explain, Your Honor?

THE COURT: Yes.

MR. TAYLOR: What these are, and after conferring with the court clerk, there are a number of exhibits to our petition that we wanted to use during this hearing, so they retain the same number that they had as an exhibit to the petition so that we don't mess up or confuse anybody.

THE COURT: Okay.

MR. TAYLOR: Past 199, which the exhibits had 199

exhibits, we just started then sequentially with anything new.

THE COURT: And you have marked exhibits today. It starts on Exhibit 42. It isn't sequential, but it's Exhibit 42, and then the last exhibit you have marked is Exhibit 222.

MR. TAYLOR: Yes, ma'am. What I was -- and I apologize if I wasn't clear.

The petition contained 199 exhibits. We used the same exhibit numbers for anything that was attached to the petition. For any new evidence or new exhibits, we just started at 200 and went forward.

THE COURT: All right. I understand.

MR. TAYLOR: I would ask the Court to take judicial notice of all previous proceedings and the record in this case.

THE COURT: The Court will.

MR. TAYLOR: Thank you. We'd call Thomas Qualls, Your Honor.

THE COURT: All right.

///

///

///

///

THOMAS QUALLS,

called as a witness by the defense,

having been first duly sworn, was examined

and testified as follows:

## DIRECT EXAMINATION

BY MR. TAYLOR:

Q State your name, please.

A Thomas Qualls.

Q And your occupation?

A I'm an attorney.

Q Okay. And how long have you been an attorney?

A About ten years, since 2003.

Q And do you know Siaosi Vanisi?

A I do.

Q And how do you know him?

A I represented him in a state post-conviction habeas proceedings.

Q Okay. Were you appointed by the Court?

A Yes, I was.

Q Did you have a role in the case prior to the formal appointment as an attorney in his case?

A I did. My memory is that Mr. Edwards moved to have me appointed as kind of an assistant, legal research,

paralegal stuff, and the judge granted that. So I was working on the case briefly before I became licensed, at which point Mr. Edwards moved to have me appointed as co-counsel.

Q Okay. And were you an attorney but not licensed in Nevada prior to your appointment or at the time you were appointed as paralegal?

A I wasn't a licensed attorney, no. I gradated from law school in '95, but I wasn't practicing law at that time.

Q Okay. Had you worked on other capital cases?

A I had.

Q And approximately how many? What was your experience?

A I'd say in one form or another, I had worked on approximately 10 to 12 death penalty cases prior to Vanisi.

Q Okay. Including habeas cases?

A Including habeas cases.

Q And obviously, since then, you have had quite a bit more experience as an attorney.

A Yes.

Q Do you remember when your appointment was?

A In this case?

Q Yes.

A I don't remember exactly. It was shortly after I was sworn in, which was October of -- either September or October of 2003, but I don't remember the -- sorry, I don't remember the date of the appointment.

MR. TAYLOR: Does he have the witness exhibits up there?

THE COURT: Yes. The binders are to your right there.

THE WITNESS: Both of these?

THE COURT: Yes.

BY MR. TAYLOR:

Q Would you, Mr. Qualls, take a look at Exhibit 203.

A Okay.

Q And looking at -- I'm sorry. I promise I'm much more organized.

213. I apologize. Do you recognize that exhibit?

A Yes, I do.

Q And would you explain what that exhibit is.

A It appears to be the order appointing me as co-counsel in this case. The file stamp is December 23rd, 2003.

Q And that was after you had passed the Nevada bar; is that correct?

A That's correct.

Q Now, if you would, turn to Exhibit 201.

MR. TAYLOR: Judge, we would offer 213.

MR. McCARTHY: It's part of the record. I have no objection.

THE COURT: Okay. Exhibit 213, I think it's probably cleaner if I just take judicial notice of Exhibit 213 rather than admit it.

MR. TAYLOR: That's fine. Thank you.

THE WITNESS: I apologize, what was the -- 201? Is that the one you wanted me to look at?

BY MR. TAYLOR:

Q I'm bouncing around here. 201. Do you recognize those exhibits?

A Yeah. Appears to be bills that I submitted for work on the case.

Q And that is related to this, Mr. Vanisi's representation or your representation of Mr. Vanisi?

A That is what it appears to be, yes.

Q And would those bills truly and accurately reflect the work that you did on behalf of Mr. Vanisi?

A Yes, it should. I mean, there may be things that

I did that weren't recorded or something, but that should be an accurate reflection.

MR. TAYLOR: Thank you. Judge, we'd offer Exhibit 201.

THE COURT: Objection?

MR. McCARTHY: No, Your Honor.

THE COURT: 201 is admitted.

(Exhibit No. 201 admitted.)

BY MR. TAYLOR:

Q Okay. If you would, how soon after your appointment did you meet with Mr. Vanisi?

A I would have to refer to something. I don't have any independent recollection of that.

Q Okay. Did you meet with him?

A Sure. I met with him on a number of occasions.

Q Do you have a recollection of how he appeared, any concerns you may have had from that meeting?

A Sure. In a couple of our meetings, Mr. Vanisi's behavior was consistent with some of the reports that we had before. He was erratic, manic. He did not track conversations well, if at all.

In short, it was very difficult to communicate with Mr. Vanisi.

Q Okay. Did you suspect a mental illness?

A Yes.

Q Is that relevant in your mind to the responsibilities you had pursuant to that Court order?

A Is it relevant?

Q Yes.

A Yes.

Q Can you explain to the Court how?

A Sure. There's a requirement that the client had to be able to assist counsel in order for you to be able to move forward just from a fundamental legal perspective.

Q Okay. And did you actually take some sort of action or file some pleading with regard to Mr. Vanisi's mental illness?

A Yes, we did. At the time, there was a case out of the Ninth Circuit called *Rohan*, and the essence of that was that if you're on an unopposed conviction habeas, if the client is not able to assist counsel, then the proceedings need to be stayed until he has that requisite level of competency.

And so we filed a motion on Mr. Vanisi's behalf based upon *Rohan* to, number one, stay the proceedings and, number two, have him evaluated pursuant to the standard in that case.

Q In your opinion, did Mr. Vanisi have a rational

and factual understanding of the proceedings in which he was engaged?

MR. McCARTHY: I suppose I should object.

THE COURT: Maybe.

MR. McCARTHY: I don't know if this witness is qualified to render an opinion.

THE COURT: I'm going to sustain the objection.

BY MR. TAYLOR:

Q Did you have a concern whether or not this witness had a rational and factual understanding of the proceedings to which he was engaged?

A Yes. As I testified, that was part of our concern and that was the reason for the *Rohan* proceedings.

Q In addition, did you have a concern that Mr. Vanisi was unable to rationally communicate with you?

A Well, I mean, I think I can answer that. We were concerned, and we also had difficulty with rational communication.

Q Can you describe the difficulties you encountered?

A Could I describe the difficulties? Was that your question?

Q Yes.

A I apologize. Yes. Again, when we asked him

questions, whether it be about his social history or the case or anything, when he tried to engage in dialogue with us, as I noted, he didn't track very well. He would spontaneously break out in song. He would get up and move around the room. He would take off part of his clothes. He would talk about wanting to be Dr. Pepper.

You know, I mean, he would sit down and maybe have two sentences with us and then move on to his next antic.

He was able to communicate what food and beverages he wanted, but beyond that, there was not a lot of rational communication.

Q And based on this concern, you filed your *Rohan* motion?

A Correct.

Q Okay. Now, you've mentioned that when you attempted to discuss his social history with him, that you encountered these issues. Can you first tell us what -- when you mean social history, to what are you referring?

A Well, I don't know that I have an independent recollection. I don't have an independent recollection of what exact questions we would have asked him. Part of the standard procedure in a death penalty case, and especially in a post, is to try to do a comprehensive -- compile some

sort of comprehensive social history so you know something about your client, number one, but it also gives you clues about who to talk to and where to find more information.

Q So it would form -- and I'm just clarifying, make sure I understand it. It would form a basis for your further investigation of the case?

A Sure. That's definitely one of the things it can do.

Q If you would, turn to Exhibit 214, and we're going to look at 214, 215, and 216 very quickly.

A (Witness complies.)

Okay.

Q Can you tell us generally what those exhibits are?

A They appear to be kind of rough draft, you know, maybe memos to a file regarding the case, regarding Vanisi and witnesses and, you know, basic facts about date of birth, where he grew up, those kinds of things.

Q Going back to -- let me ask you this first. Initially, before you were appointed to this case, was there another attorney appointed?

A Yes. I believe -- well, the record shows it was Marc Picker, and that's what my memory is. Marc Picker and Scott Edwards were on the case before I got involved.

Q And Mr. Edwards was co-counsel or second chair initially, and he was elevated to lead counsel?

A I believe that's true.

Q And then upon your passing the bar, you were named second chair.

A Correct.

Q And if you look at Exhibit 214, does it reflect who this memo is from? The first page of 214.

A First page? Oh, sure. It says from MP, which I assume is Marc Picker.

Q And if I represented to you this memo was found within the state post-conviction counsel's file, either yours or Mr. Edwards, do you have any reason to dispute that?

A No.

Q The content that is within this memo, does it generally fit what you were talking about regarding social history?

A Some of it does, yes.

Q Are there a number of blanks?

A What's that?

Q Are there a number of blanks, not only in 214, but 215, which was found at the same place? Does it appear to be the same printer or whatever?

A Yes, there's a number of blanks. As I said, it appears to be sort of a first draft or a rough of this information.

Q Okay. Social history information?

A Yes, there's some of that.

Q Do you know where y'all or Mr. Picker may have gotten these forms for doing this investigation?

A I don't know. Based upon the dates, that probably would have been before I got involved. I see 214 is dated March 22nd, 2002.

Q Okay.

A I don't know where Mr. Picker got this information.

Q Okay. But it does have some of the social history information that you were talking about was important to you.

A Yes.

Q 214, 215, and 216.

A Yes.

Q Okay. Then if you would, turn to -- I'm trying to make sure I keep these marked so we can...

217. This appears to be some sort of manual. Or the index to a manual.

A Yes.

Q Okay. If I represent to you that this was found within those same state post-conviction attorney files, do you have any reason to dispute that?

A No. This type of kind of form or checklist is familiar to me.

Q Okay. 218? Again, with the representation that it was in the files that you and Mr. Edwards maintained, do you have any reason to dispute that?

A No.

Q Does it appear to be something similar?

A Yes. It appears to be a bibliography of resources for defense counsel in death penalty cases.

Q Kind of a how-to type place to go, ideas.

A Yes, resources.

Q Okay. Let's turn to 219. 219, on the second page, actually has an e-mail that is written; is that correct?

A That's what it appears to be, yes.

Q Do you know who that e-mail was written to?

A From the face of the document, it says it's to someone named Scharlette.

Q Do you know Scharlette Holdman?

A I know the name, yes. She's a -- she was a mitigation specialist.

Q Works for the Center For Capital Assistance?
A I'll take your word for that.
Q Is it the same e-mail or the same name spelled -- kind of a unique spelling, is it not?
A Yes.
Q And if you look at the first page of the exhibit, is it spelled the same way as the e-mail on the second page?
A Yes.
Q Okay. Now, on the first page as well, it lists a place called the Habeas Corpus Resource Center. Are you familiar with that organization?
A Yes.
Q Their contact person is an attorney named Michael Laurence?
A That's what it says, yes.
Q Okay. The last page of that exhibit contains an e-mail as well?
A Yes.
Q Okay. And who is that e-mail from?
A Appears to be another e-mail from Marc Picker.
Q And who is it to?
A Says Michael. The two column is mdl@cris.com, which is -- appears to be consistent with being Michael at

the Habeas Corpus Resource Center that you referenced.

Q On the first page?

A Yes.

Q Okay. And the content of these e-mails, do you know what they are?

A They both appear to be requesting assistance with the death penalty habeas case. Doesn't appear to reference Vanisi specifically, but it's asking about a, quote, nasty death penalty state habeas.

Q Okay. And it was sent by Mr. Picker; is that correct?

A Correct.

Q Okay. We do know that it was after the 2002 version of Microsoft was released. Would you agree with that?

A That's what the copyright at the bottom of the page says.

Q Okay. Let's turn to Exhibit 220. And actually, I'll ask you to turn to the second page of that exhibit. That's another e-mail?

A That's what it appears to be, yes.

Q And who is that e-mail from?

A It says it's from Scharlette Holdman.

Q That's the mitigation guru we were talking about

a while ago?

A Yes.

Q Who is the e-mail to and who were copies sent to?

MR. McCARTHY: Your Honor, I haven't objected, but at this point, this witness has no knowledge of these things. He's just asking him: Does this look like what it looks like?

And so my objection is undue waste of time.

MR. TAYLOR: Your Honor, these came from this attorney's file. So he is deemed to have knowledge of them. It was in his files that we received.

MR. McCARTHY: He just testified that he -- all he said is this is what it looks like.

THE COURT: Right. I think you better -- on each document, you have to ask him if it came from his file.

MR. TAYLOR: Okay.

BY MR. TAYLOR:

Q Do you have any independent memory of this document?

A I'm sorry, I don't.

Q Would you have received copies of any information from Marc Picker after he was released or withdrew from this case?

A I believe I reviewed all of the files that were

in Mr. Edwards' office at the time, which would have included whatever Mr. Picker had.

Q And I would assume that you and Mr. Edwards shared information as well.

A Well, we were working on the case together, yeah.

Q Well, I mean, you did work together?

A Yes.

Q Okay. And do you dispute that these letters were located within your file?

A I'm sorry, I don't know how to answer that question.

If you tell me they were found in my file, I don't have any reason to disagree with that. But again, I can't tell you that I have an independent recollection of them.

Q Do you know who Roseann Schaye is?

A Yes. Roseann Schaye was another mitigation expert, and I believe that she was a mitigation expert that Mr. Edwards and I planned on using.

Q Okay. And was she recommended -- is it your understanding she was recommended by Ms. Holdman?

A That's my understanding from reading these e-mails, and I have some memory that Ms. Holdman wasn't available.

Q Okay.

MR. TAYLOR: For the purpose of this hearing only, Your Honor, I offer 214 through 220, inclusive.

THE COURT: Any objection?

MR. McCARTHY: No.

THE COURT: Exhibit 2 -- did you say no? Or were you groaning?

MR. McCARTHY: I'm groaning. I really don't -- I mean, I don't doubt that these were things obtained from somebody's file at some time, but --

MR. TAYLOR: Perhaps I can make a representation to the Court. I don't know if it will ease Mr. McCarthy's feelings.

MR. McCARTHY: Probably.

MR. TAYLOR: These matters were obtained by my office from post-conviction counsel's files. I believe the majority were from Mr. Qualls's file, but it may have been Mr. Edwards'. I don't want to misrepresent. I know it came from those files.

I also know that I can establish this either by bringing someone up from Las Vegas to testify to that or by subpoenaing Mr. Picker. If Counsel -- you know, I'm trying to get past the particular bar -- he doesn't necessarily want me to go there, but if we need to, to

establish that, I'm --

THE COURT: You're making an offer of proof that these were secured by your investigator --

MR. TAYLOR: They were secured by one of our paralegals or investigators. Could I confer one minute?

THE COURT: Yes.

(Discussion off the record between defense counsel.)

MR. TAYLOR: Your Honor, I would make this offer of proof. My co-counsel reviewed Mr. Qualls's files, and she pulled those documents from that file.

THE COURT: Okay. Any objection?

MR. McCARTHY: I don't doubt that for a minute. So no, I have no objection.

THE COURT: For purposes of today's hearing, 214 through 220 are admitted.

(Exhibit Nos. 214 through 220 admitted.)

MR. TAYLOR: We'll switch gears for a minute, Judge.

BY MR. TAYLOR:

Q Let's go back to just some general things, and then we'll start to key in on some other exhibits if that's okay, Mr. Qualls.

For the most part, have you had the opportunity

to review the exhibits which we had prepared for today?

A I reviewed a number of exhibits with you in my office yesterday. Was that your question?

Q Yes.

A Yes.

Q Nothing -- I mean, anything that I had, I offered you, and we did actually go through quite a number yesterday, did we not?

A Yes. I can represent that we spent the better part of three hours looking at declarations and other exhibits yesterday.

Q Okay. After -- in addition -- or you filed your *Rohan* motion.

A Correct.

Q And obviously, one of the allegations within your motion, you alleged that it was difficult to communicate rationally with Mr. Vanisi.

A Okay.

Q Is that fair?

A That's fair.

Q And you were going to use the information -- or how did you intend to use the information that you obtained from Mr. Vanisi?

A Well, we -- the goal is to obtain and present as

full a picture of Mr. Vanisi as possible. And also, in the context of comparing what's out there with what was either found and/or presented by trial counsel.

Number of different issues in his case, including mental health issues as well as, you know, a fairly complicated litigation case, I believe.

Q Would it be a fair statement to say that you viewed your responsibility as one to discover constitutional error, if it existed, in Mr. Vanisi's trial?

A Well, absolutely. Habeas work, post-conviction habeas work, especially death penalty work, is complicated because it's a little bit of a minefield. I'll try to condense what I'm trying to say here.

When you're doing something, a direct appeal on something that's not death-penalty related especially, what you want to do is pick a few strong horses and ride them to the Supreme Court.

When you're doing habeas work, and especially capital work, you want to try to dot every I and cross every T for purposes of exhaustion should the matter end up in Federal Court, and because cumulative error is oftentimes an issue. So the adage that it may not be a wall, but if you can find enough bricks, hopefully you can

create a wall.

Did I answer your question?

Q Yeah. Let me see if I can just make sure we got the record clear.

When you say pick a few horses with a non-cap, you're talking about pick your best issues.

A Correct.

Q Or best points of error. With habeas, with capital habeas, you're saying that you want to try to identify all the constitutional error?

A I guess where I was going with that is, yes, you want to identify and raise all the constitutional error. And by that -- and what I hear is a key -- kind of linchpin issues. There may be any number of other issues that don't maybe rise to the level of a due process or constitutional error alone, but together, with other errors, they may.

Does that make sense?

Q Sure. And obviously, if you have them identified, you can make an educated decision about what to raise.

A Sure.

Q So you're concerned with identifying the issues first.

A Sure. And I don't -- I don't want to jump the gun on your questions.

Q How do you do that? How do you identify issues?

A Legal issues?

Q Yeah. How do you discover error, just generally?

A Well --

Q I'm not trying to be too obsequious, but I'm trying not to lead the witness.

A Well, the most obvious way is that you have to read the record. So you read what happened in the pre-trial hearings. You look at pre-trial motions. You look at orders. And then obviously you look at the voir dire and you look at the trial and you look at the penalty.

Q So you obtained all those records, or someone did, in Mr. Vanisi's case.

A Right. So that's the first step, is you have to pour over the record generally more than once. And then the second step is you'd want to look at previous counsel's files, you want to look at notes, you want to look at police reports and things that aren't immediately in the record.

And then the second or third thing is you have to do investigation of things that don't appear in the

record. And that's, again, a key difference between a direct appeal and a habeas proceeding, is that you then have to start uncovering, marshaling evidence that doesn't appear in the record.

Q And that's that second or third step. I guess your second step was you get some records that are not within the trial record that might be prior counsel's files?

A Yes.

Q Educational records, medical records, prior psychiatric history, things like that?

A Sure.

Q And review those?

A Yes. That would be the goal.

Q And would it be fair to characterize the third step in your description as one of investigation?

A Yes.

Q Okay. And so based upon I guess four things, because you also identified the fact that you attempted to talk to Mr. Vanisi.

A Correct.

Q So based upon the interview, plus the record, plus whatever records you were able to collect, then you investigate?

A Well, the -- yeah. Okay.

Q That's a general process.

A Right.

Q Okay. Did you get all the way through that procedure in this case?

A No, we did not.

Q Okay. Where was the stopping point?

A Well, the stopping point was we were -- we didn't ever complete a thorough investigation.

Q Okay. Looking real quickly -- 178. Do you recognize that exhibit?

A I do.

Q Is that a declaration you provided which was attached to the petition in this case?

A Yes.

Q And I'm assuming inasmuch as you swore to the truth of the matter, that it is true and correct.

A Yes.

MR. TAYLOR: Okay. Judge, we offer Exhibit 178.

THE COURT: Any objection?

MR. McCARTHY: Well, prior statement of the witness? That sounds like hearsay to me.

THE COURT: This was the declaration that was attached to the habeas?

MR. TAYLOR: Petition.

THE COURT: Petition?

MR. TAYLOR: Yes, Your Honor.

THE COURT: So I can take judicial notice of it, whether we admit it or not.

MR. McCARTHY: And it's been authenticated, but I think if we want to know something from this witness, we ought to ask him instead of asking what he wrote before.

THE COURT: Okay. I will take judicial notice of the document. I think there may be some relevance to what he said then to what he said now.

BY MR. TAYLOR:

Q You said you didn't get the opportunity to complete an adequate investigation. Is that a fair statement?

A In complete fairness, I think the most accurate way I can say that is that we did not complete our investigation.

Q Okay. Can you tell us, did you retain an investigator?

A I don't -- I don't remember that. You know, that probably would have been Mr. Edwards' purview as lead counsel. And I don't know if there was an investigator -- I can't remember if there was an investigator engaged when

Mr. Picker and Mr. Edwards had the case or not.

I know that Mr. Edwards and I had a number of discussions about future investigation. I don't recall --

Q Did you ever talk to an investigator?

A I don't recall talking to an investigator in this case. And I'm trying to be as accurate as possible, but this was ten years ago, and there's been a lot of cases since then. And some of these DP cases bleed together.

So I can't remember specifically talking to an investigator in this case.

Q Let me ask, do you remember talking to Ms. Schaeffer, the young woman or the name that we talked about a while ago that was recommended by Scharlette Holdman about the investigation in this case?

A No, I don't remember talking to her.

Q Would you -- if you had retained an investigator, would you have sought court approval to expend those funds?

A Yes.

Q Likewise, you -- there were two experts who -- two expert psychiatrists, I believe, who saw Mr. Vanisi; is that correct?

A Not entirely. One was a psychiatrist, Dr. Bittker, and one was a psychologist, Dr. Amezaga. And

those were appointed by the Court pursuant to our *Rohan* motion.

Q Okay. And they were reimbursed by virtue of your motion; is that correct? The motion of you or Mr. Edwards in your billing records.

A I don't have an independent recollection of that, but I am sure that's what happened. That's standard procedure.

Q And if the billing records reflect payments to Dr. Bittker and payments to Dr. Amezaga, that would have been the process that you would have gone through as well if you had had an investigator?

A Yes. And again, I don't remember if I submitted those bills or Mr. Edwards did, but that's standard.

Q Would it be fair to say, Mr. Qualls, that if your billing records or Mr. Edwards' billing records do not reflect any request to reimburse or pay any investigator, you probably hadn't gotten one appointed yet?

A That's true. If an investigator was working on the case, we would have submitted bills on that investigator's behalf.

Q So for my purposes, let's assume, since we don't have any billing records and you don't remember talking to an investigator, at least as far as you're concerned,

there was additional investigation to do.

A Yeah. There was certainly investigation to do. There's no mistake about that.

Q You have answered a while ago that you and Mr. Edwards had discussed future investigation; is that true?

A Yes.

Q Okay. And do you remember the kind of things that you wanted to do?

A Well, again, there's -- in any capital case, there's the developing the things that we have spoken about a couple times today, social histories and whatnot.

Mr. Vanisi's case was unique in that he was Tongan and obviously had a very rich cultural history that we thought was relevant.

Q Okay. So an investigator could have assisted in the cultural or at least the cultural issues that surround Mr. Vanisi and his social history?

A Correct.

Q Could you turn to Exhibit 205, please.

A (Witness complies.)

Okay.

Q Do you recognize the handwriting in that exhibit?

A Yes, I do.

Q Okay. And do you know what this exhibit is?

A Appears to be my handwritten -- some of my handwritten notes from the file.

Q Related to Mr. Vanisi's case?

A Yes.

Q On the first page, under No. 19, does it reflect the need to do mitigation investigation?

A Yes.

Q Does it reflect the need to get some assistance in cultural matters?

A Yes.

Q Second page, under number two, same thing. The social history mitigation issues reflect that at least you wanted some evidence along that line.

A Yes.

Q On the third page, were there -- does this identify some concerns you had regarding mitigation investigation or possible potential mitigation?

A Yes.

Q What were those areas of concern?

A Based upon what's reflected on this page three? Is that your question?

Q Sure. Or the whole exhibit. Does this help refresh your memory as to what the investigation you

wanted to conduct was?

A Well, yes. Again, there's reference to a mitigation expert. There's reference to a Tongan expert. There's reference to what was presented at trial in mitigation and what was available that could have been.

Q Need for cultural assistance or assistance with the Tongan culture?

A Right.

MR. TAYLOR: Judge, I'd offer 205.

MR. McCARTHY: No objection.

THE COURT: Exhibit 205 is admitted.

(Exhibit No. 205 admitted.)

BY MR. TAYLOR:

Q Okay. So ultimately, I mean, we're kind of to the point to where you -- and I'll let you take this, but we're at the point to where you believe that there's a need for investigation, it sounds like. You have encountered some difficulties in communication and have filed a *Rohan* motion.

What occurs next in this representation of Mr. Vanisi?

A Well, as we discussed, the Court appointed two mental health experts, and then we had a hearing pursuant to *Rohan* in which the Court reviewed the evaluations from

both experts and heard testimony from both Dr. Bittker and the psychologist, Amezaga. And then the Court ruled on *the Rohan* motion.

Q So basically, you were in the midst of litigating your *Rohan* situation, *Rohan* motion.

A That's correct.

Q Was any investigation, to your knowledge, ever accomplished in the midst of this *Rohan* litigation?

A No, it was not. We were taking it step by step, and our first step or first priority was the *Rohan* matter. And based upon the circumstances, obviously, we were overconfident, but we believed that there would be some stay in place based upon *Rohan*. Specifically --

Q You had faith in your motion.

A What's that?

Q You had faith in the motion you brought.

A Sure. And we had faith in -- Dr. Bittker's recommendation was that due to the medication that Vanisi was on, which was at the time Depakote and Haldol, that he recommended that he be taken off those medications. I believe he recommended placement at Lake's Crossing or someplace like that for -- that's my memory, for approximately 90 days kind of for him to clean out, and then he wanted to evaluate him again, again, for purposes

of another *Rohan* evaluation.

So we were, in our minds, certain that we would at least have that amount of time.

Q You were kind of banking on the Court accepting Dr. Bittker's recommendation.

A Yes. As it turns out, perhaps foolishly, we banked upon that too much.

Q Okay. What occurred -- as I understand, just for purposes of the record, the Court heard the witnesses on separate days, Dr. Amezaga and Dr. Bittker.

A If you tell me that -- I don't recall that but if they were separate days --

Q You remember that ultimately the Court denied your motion?

A Yes.

Q Okay. Then what occurred?

A And then there was an order in fairly short order to file the supplement.

Q And by short order, what do you mean? Approximately?

A I don't want to misrepresent. My memory is that it was either a Thursday or a Friday hearing, and we had to file the supplement by the next Tuesday.

Q So four or five days?

A That's my memory.

Q And no investigation had been accomplished at that point.

A Nothing other than our review of the file.

Q Was any attempted over that four- or five-day period?

A No. I think all of our time was spent in putting together the -- I mean, we had --

Q You did file a supplement.

A We did file a supplement. And we had -- going back to your question about the constitutional errors, we had what we believed and I still believe are very good legal issues.

We had a structural error based upon the fact that the defense lawyers basically sat on their hands during the trial. My memory is no opening, no closing. I think they asked a few cross-examination questions of the one witness. So we had structural error.

The *Finger* case had come down since the trial, I believe. We had a possible *Faretta* issue. Mr. Edwards had developed an issue based upon a consular matter that I believe was up at the U.S. Supreme Court at the time.

We had a number of strong legal issues already at least roughed out in the petition that we believed were

reversible, and so we took those. We took other standard death penalty issues that we have worked on over the years and put it all together and filed the petition with what we had.

If I had it to do over again, I probably would have filed some notation or some motion requesting additional time or making a note that we wanted to add additional issues. I didn't -- I didn't have the experience at the time to do that.

Q To be fair, I mean, you have raised a number of legal issues, correct?

A Yes, again, and I still think they're very strong legal issues.

Q But would you agree with me that there was no rational or strategical reason that you did not conduct an investigation into Mr. Vanisi's circumstances?

A Did we intentionally not investigate before we filed the petition? Is that the question?

Q Essentially.

A No. There was no intention to file the supplement without any further investigation.

Q So you, at least up until the day that the Court ruled over your *Rohan* motion, contemplated that an investigation would be conducted?

A Yes. We contemplated additional claims. We contemplated putting together a more comprehensive picture of mitigation. We -- you know, you don't -- purely speculative to identify what might come out of investigation, but certainly, that was part of our plan. Again, it was a stepped-out plan, and our first priority was *Rohan*.

Again, you know, have to -- the real world comes into play here. This is not our only case. We both are very busy lawyers at the time. And we erroneously thought we had a winner in this *Rohan* issue, and we thought it was particularly appropriate and relevant to Mr. Vanisi's case.

Q Would it also be true, Mr. Qualls, that perhaps your investigation would have been more focused had you -- had Mr. Vanisi the ability to communicate with you?

A Well, there's --

Q Would that have assisted you in your investigation?

A Well, sure, but could he have communicated, there wouldn't have been legitimate grounds for the *Rohan* issue. So it's kind of a Catch-22.

Q Dr. Bittker, and to some extent Dr. Amezaga, and additionally there was a number of other doctors

previously that had seen Mr. Vanisi. Do you remember Theinhaus, Dr. Lynn during the trial?

A I do remember that there were, I believe, a couple of evaluations regarding competency or mental health at the trial level.

Q Do you remember what diagnoses they came to?

A I'm sorry, I did not review that coming in here today. I can't, with specificity, remember what the diagnoses were.

Q If I were to represent to you that at least Dr. Bittker and others was concerned with ruling out a bipolar disorder, would you have any reason to disagree with me?

A No. I remember that bipolar was an issue, amongst others.

Q In fact, a while ago you talked about certain medications that Dr. Bittker recommended. Do you remember what those were?

A I remember -- I don't remember him recommending new medications. I remember that he opined that the Haldol and Depakote that he was on were potentially a cause for his incompetence to proceed, and that they were also endangering his health and safety.

Q Okay. Are you aware of the symptoms for

manifestations of bipolar disorder? Have you encountered that elsewhere?

A Certainly I've encountered diagnoses of bipolar disorder throughout my career.

Q I'm not asking you to render any expert opinion or diagnose someone with bipolar disorder, but there are certain things, red flags, that would cause you to seek expert assistance; is that true?

A Sure, yeah.

Q Related to not only bipolar disorder, but I take it you have also had clients that were -- or been around schizophrenia?

A Yes.

Q Are symptoms of schizophrenia things that you might look for in any case?

A Yes.

Q Psychotic behavior?

A Yes.

Q It's another thing that you trained yourself to look for?

A Yes. Or at least I'm familiar with it from bumping into it in other cases.

Q If I could, I'd like to ask you some just general questions about different issues that you might or might

not encounter in the investigation of a capital case and find out if that would be important to you. Okay?

Evidence of family dynamics, how the family lived together, who was in charge, who kind of held the power, is that important to you?

A It's important from a social history, I suppose.

Q Would allow the Court or jury to fully understand or at least assist in understanding the defendant's actions, childhood and life?

A Sure.

Q What about instances of domestic violence or abuse in the home? Are those things which interest you in the investigation of a capital case?

A Those are relevant.

Q And what would you do with that kind of evidence?

A Well, depends on -- it could be -- a lot of this stuff, a lot of the mental health issues, a lot of the family dynamic issues are a little bit of a double-edged sword. They help to explain behavior, but they also tend to scare people.

Q Sure.

A And so the primary reason that you want that information is so that you can make informed choices, I suppose.

Q But you still want to investigate and learn it so you can decide what to do with it.

A Correct.

Q Okay. What about evidence that persons close, either family members or very close friends, close to your clients died, somewhat close to this behavior of the charged offense?

A Certainly in a number of my cases, the death of a parent or a sibling or someone close to the defendant is important and relevant.

Q In helping explain behavior at times?

A At times.

Q Doesn't excuse it but can explain it.

A Sure. At least explains the mental state.

Q What about with a client that is from outside this country's cultural information?

A Yes. As I have indicated and as the notes indicate, we believed that the Tongan cultural issue was important.

Q Are there certain waypoints in a client's life that you kind of look at and obtain the evidence regarding? Like their childhood or their birth, schooling and --

A I suppose it would depend on the client. It's

impossible to predict what the events are that are traumatic or shape an individual, so --

Q So you kind of want to look at it all?

A I suppose.

Q In particular, would you also might focus on evidence or behaviors within a reasonable time before the charged offense?

A Anything that is relevantly contemporaneous with the charged offense is important.

Q Sounds kind of silly, but if you encountered evidence of your client having sleep issues before the charged offense, would that be relevant?

A Sometimes it's, in my experience, sometimes relevant to mental health issues.

Q So that would tell you to look for more. Is that a fair statement?

A Yeah. It could be a red flag.

Q Drug use, whether legal or illegal.

A Obviously drug use is a huge factor.

Q The fact that your client was expressing different personalities at different times.

A That would be extremely relevant, important.

Q What about reports that the client's speech pattern changed? Rapid speech, distorted thoughts, loose

thoughts that someone described as mouth working faster than his brain?

A I would think that could be indicative of either some kind of extreme mental illness, like schizophrenia, or maybe my first thought would be some sort of speed, methamphetamine or cocaine or something.

Q And we both, in discussing this, we're not saying that any of these are diagnosis of a mental illness, right?

A No. Again, just things you --

Q Just red flags that tell you to look further.

A Yeah, rocks you want to turn over.

Q What about the fact you got a client that -- I guess the catch word is grandiose or grandiosity.

A You mean like Dr. Pepper?

Q You tell me. I mean, it's got to be your opinion. Is that something you look for, things that are out of proportion?

A Sure. And Vanisi definitely displayed that on occasion.

Q I'm a movie star?

A Right.

Q Paranoia, would that evidence be interesting to you?

A Sure.

Q Hypervigilance?

A Yeah. That's pretty important.

Q What about hallucinations, delusions, talking to himself or talking to animals?

A All of those are important. That goes on the same scale as multiple personalities because you're talking more along the lines of competence and whether or not he might -- whether or not there might be a legitimate mental health issue as to his ability to form the requisite mental state at the time of the offense.

When you get into the really bizarre behaviors, dissociative disorder, extreme psychotic behavior, schizophrenia, multiple personalities -- did I say that?

Q Yeah.

A Those are indicators that you might have the rarity of he was not of the mental state during the offense to form the requisite intent.

Q So for sure you want to turn those rocks over.

A Yeah. That's why I said earlier that those are very important.

Q In fact, the next thing I was going to ask you is whether documentation of bizarre, strange behavior in the time period leading up to the offense, is that important?

A Yeah, that would be. All of it is important, but certainly stuff within a reasonable time frame around the event is more important.

Q What about that your client had an imaginary friend that he talked to and referred to?

A Again, that goes into what I said. That's like the multiple personalities.

Q Evidence that your client changed his appearance or hygiene recently before the charged offense.

A That could be indicative of a number of things, but it's important.

Q It's a rock to turn over?

A (Nods head).

Q Do you want to know about your client's work habits, employment history?

A Yes.

Q If there was some behaviors, some action of the client which caused him to be singled out or brought shame on his family and he was singled out, is that evidence you'd want?

A Sure, and especially if there's a strong cultural impact of that.

Q And recognizing that in some cultures, the shame is maybe greater?

A That's what I meant, yes.

Q How about issues of abandonment during your client's childhood? Is that information --

A That's often important, yes.

Q Another rock that you would turn over?

A Yes.

Q How about previous problems with police officers?

A Well, any previous legal issues are important.

Q In particular in a case where a police officer was the alleged victim.

A Well, sure, yeah.

Q What about experiencing situations involving racial prejudice?

A You mean the client is being prejudiced?

Q For or against. Either people prejudiced against him or prejudices that his family holds towards others.

A Yeah.

Q Either one could be important?

A Sure.

Q Medical issues, head injuries, things like that, do you want to turn those rocks over, too?

A Absolutely. Any kind of brain injury, whether it's caused by trauma or existing at birth, is important to mental health issues.

Q Would it be fair to say that you would at least like some general understanding of his childhood, young adult years?

A I think you'd probably want more than a general, but yes.

Q So you would want to investigate that?

A Yes.

Q Okay. When you have a situation such as this to where you believe your client is mentally ill and he's from another country and another culture, is it ever important to look at the way mental illness is viewed in that other culture?

A Yeah. I think that falls into the need for a cultural expert.

Q Now, you will agree with me that if you had encountered any of this -- these type of issues in your review of the trial record or in trial counsel's files, that's a rock you would have turned over, or at least you would have identified it by that point?

A Hopefully, yes.

Q Okay. And you contemplated or intended to look for that type of evidence anyway.

A Yes.

Q Okay. Is it safe to say that you never got that

far?

A No, we didn't. And I am sure that I didn't go back and look at -- you know, over that four- or five-day period, I'm sure I didn't -- between the denial of the *Rohan* and the filing of the supplement, I'm sure I didn't go back and look at Picker's notes or the social history.

Our focus at that point was the linchpin legal issues.

Q And to be fair, I mean, you had that four days or whatever. Did you also try extraordinary writ?

A I saw a reference to that in one of the transcripts. I don't have any independent memory of that.

Q But you had plenty to do, I guess, is what you're telling us in that four-day period.

A That's my memory.

Q Are you aware of Mr. Vanisi's religious preference or previous religious affiliation?

A I was aware that there was a history of Mormonism in his past.

Q That his family had joined or were Mormons, joined the LDS church?

A Yes, I was aware --

Q Were you aware or did you discover through investigation that he had actually been excommunicated

from the church?

A I don't have an independent recollection of that except for our recent discussions. I may have known that ten years ago, but I don't remember.

Q Is that another one of those rocks that you would turn over to kind of find out the effect on him after that occurred?

A Sure. That's something I would have liked to ask Vanisi about, the impact of that on him.

Q Especially if it occurred within the year or so previous to the charged offense?

A If it was close in time to the offense, yes.

Q Let's look at real quick, if you would, at Exhibit 42, if I could.

A Exhibit 42?

Q Yes. I believe this is the findings of fact that we talked about a little earlier. The very first exhibit.

A Okay.

Q Are you familiar with that document?

A It's been some time, but yes.

Q Okay. And is this the order in which the judge finds that -- or denies relief to Mr. Vanisi, in which the Court denied relief?

A Hang on a minute. It appears to go through the