IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM WITTER, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 73431

RESPONDENT'S APPENDIX
Volume 1

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 30, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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BY */s/ E. Davis*
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TP/Skyler Sullivan/ed

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THE STATE OF NEVADA

FILED
JAN 21 10 24 AM '94
CLERK

I.A. 1-25-94
10:00 A.M.
PD

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
WILLIAM LESTER WITTER,
#1204227
Defendant.

CASE NO. C117513
DEPT. NO. IX
DOCKET NO. W

INFORMATION

STATE OF NEVADA)
)ss:
COUNTY OF CLARK)

REX BELL, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That WILLIAM LESTER WITTER, the Defendant, having committed the crimes of **MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165); ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 193.330, 200.010, 200.030, 193.165); ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Felony - NRS 193.330, 200.364, 200.366, 193.165); and BURGLARY (Felony - NRS 205.060)**, on or about the 14th day of November, 1993, at and within the County of Clark, State of Nevada, contrary to the form, force and effect

of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

COUNT I - MURDER WITH USE OF A DEADLY WEAPON

did then and there wilfully, feloniously, without authority of law, with malice aforethought and premeditation and/or while in the commission of a burglary and/or while in the commission of the attempt sexual assault of KATHRYN TERRY COX, kill JAMES HAROLD COX, a human being, by stabbing at and into the body of the said JAMES HAROLD COX with a deadly weapon, to-wit: a knife.

COUNT II - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

did then and there, without authority of law and with malice aforethought, wilfully and feloniously attempt to kill KATHRYN TERRY COX, a human being, by stabbing at and into the body of the said KATHRYN TERRY COX, with a deadly weapon, to-wit: a knife.

COUNT III - ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously attempt to sexually assault and subject KATHRYN TERRY COX, a female person, to sexual penetration, to-wit: by telling KATHRYN TERRY COX that he was going to rape her, by instructing her to suck his penis, by cutting and tearing her outer garments, by pulling her pants and pantyhose down around her ankles and by fondling her body, against her will, said defendant using a deadly weapon, to-wit: a knife, during the commission of said crime.

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COUNT IV - BURGLARY

did then and there wilfully, unlawfully, and feloniously enter, with intent to commit sexual assault and/or murder, that certain 1988 Mercury, bearing Nevada License No. 303 CRL, owned by JAMES HAROLD COX and/or KATHRYN TERRY COX.

REX BELL
DISTRICT ATTORNEY
Nevada Bar #001799

BY _____
MELVYN T. HARMON
Chief Deputy District Attorney
Nevada Bar #000862

The names of witnesses known to the District Attorney's Office at the time of filing this Information are as follows:

ALLRED, MARILYN R.N.
UNIVERSITY MEDICAL CENTER
LAS VEGAS, NV

AOKI, MINORU
LVMPD #1592
CRIME LAB

AUTREY, J.
LVMPD #4367
CRIME LAB

AVERY, J.
LVMPD #4367
CRIME LAB

BAYER, K.
MERCY MEDIC
LAS VEGAS, NV

BOTELLO, JERRIE
3977 HAMILTON AVE #2
SAN JOSE, CA 95148

CALDWELL, JUAN
2362 GREEN VALLEY PKWY
HENDERSON, NV 89014

CANDIANO, B.
LVMPD #4412
SWAC

CARLSTON, TERESA
CCDC - R.N.
LAS VEGAS, NV

CARROLL, M.
1704 PINTO LN - CORONER
LAS VEGAS, NV

CHASEY, T.
LVMPD #1789
G/A

COOK, TERRY
LVMPD #2545
CRIME LAB

COVELL, WILLIAM
16135 BARBATE RD.
LA MIRADA, CA

COX, KATHRYN
3771 PONDEROSA
LAS VEGAS, NV

CUSTODIAN OF RECORDS
UNIVERSITY MEDICAL CENTER
LAS VEGAS, NV

DALE, D.
LVMPD #4091
SWAC

DAVIS, R.K.
DAVIS MORTUARY
LAS VEGAS, NV

DIXON, JON
2701 N. RAINBOW #2089
LAS VEGAS, NV

DONAHUE, JOHN
LVMPD #3203
CCDC

DUBOSE, CHARLES
4909 RONAN
LAS VEGAS, NV

FALVEY, D.
LVMPD #3176
HOMICIDE

FARRELL, J.
LVMPD #3539
SWAC

FASS, LESLIE
LVMPD #3051
CCDC

GAGINIER, D.
CCFD
LAS VEGAS, NV

GALVAN, P.
LVMPD #2216
SWAC

GRIFFIN, DINAH
LVMPD #1744
CCDC

GOLDSMITH, B.
LVMPD #4599
CRIME LAB

HEMINGTON, R.
LVMPD #715
G/A

HICKMAN, RAYMOND
LUXOR - SECURITY
LAS VEGAS, NV

HORN, DAVID
LVMPD #1928
CRIME LAB

JOLLEY, G.
LVMPD #475
HOMICIDE

JORDAN, ROBERT
1704 PINTO LN - CORONER
LAS VEGAS, NV

KEETON, W.
LVMPD #505
HOMICIDE

KNUDSEN, A.
LVMPD #329
G/A

KRAMER, S.
MERCY MEDIC
LAS VEGAS, NV

LEE, S. DR.
UNIVERSITY MEDICAL CENTER
LAS VEGAS, NV

LEMASTER, DAVID
LVMPD #4243
CRIME LAB

MCCARTHY, M.
LVMPD #4431
SWAC

MCCRACKEN, D.
LVMPD #2542
CRIME LAB

MCKINNON, THOMAS
2200 N. TORREY PINES #1010
LAS VEGAS, NV

MESINAR, DAVID
LVMPD #842
HOMICIDE

MILBRANDT, LORI
1704 PINTO LN - CORONER
LAS VEGAS, NV

OZOBIA, N. DR.
UNIVERSITY MEDICAL CENTER
LAS VEGAS, NV

PETERSON, DANIEL
LVMPD #4034
CRIME LAB

PUMMILL, THOMAS
EXCALIBER HOTEL
LAS VEGAS, NV

RAMSEY, D.
DAVIS MORTUARY
LAS VEGAS, NV

REDLIN, DONALD
EXCALIBER HOTEL
LAS VEGAS, NV

REED, GARY
LVMPD #3731
CRIME LAB

REYES, D.
1704 PINTO LN - CORONER
LAS VEGAS, NV

RILEY, THOMAS
EXCALIBER - SECURITY
LAS VEGAS, NV

RUFFINO, DAVID
LVMPD #1502
CRIME LAB

SCHROEDER, TIM
2809 WILLOW WIND
LAS VEGAS, NV

SNODIE, SONYA
LVMPD #4270
CRIME LAB

SWEENEY, B.
CCFD
LAS VEGAS, NV

TERRY, DONALD
ADDRESS UNKNOWN
LAS VEGAS, NV

THOWSEN, T.
LVMPD #1467
HOMICIDE

WARREN, D.
LVMPD #425
SWAC

WEBB, WILLIAM
LVMPD #4094
UFSD

WEBB, W.
LVMPD #4094
SWAC

WELTE, J.
LVMPD #4091
SWAC

WRIGHT, ROBERT
LVMPD #3066
CCDC

WILLIAMS, RICHARD
LUXOR - SECURITY
LAS VEGAS, NV

DA#93F08940X/kjh
LVMPD DR#9311141809
MURDER W/WPN;ATT MURDER W/WPN;
ATT SEX ASSLT W/WPN;BURG - F
(TK2)

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REX BELL
DISTRICT ATTORNEY
Nevada Bar #001799
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff
THE STATE OF NEVADA

FILED

JAN 25 1 10 PM '94

Loretta Lowman
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- WILLIAM LESTER WITTER, #1204227 Defendant.	CASE NO. C117513 DEPT. NO. IX DOCKET NO. W

NOTICE OF INTENT

TO SEEK DEATH PENALTY

COMES NOW the State of Nevada, through REX BELL, Clark County District Attorney, by and through MELVYN T. HARMON, Chief Deputy District Attorney, pursuant to NRS 175.552 and NRS 200.033 and declares its intention to seek the death penalty at a penalty hearing. Furthermore, the State of Nevada discloses that it will present evidence of the following aggravating circumstances:

1. The murder was committed by a person under sentence of imprisonment. [See NRS 200.033(1)] The evidence of this aggravating circumstance will consist of documentary proof and/or

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testimony concerning prior convictions.

2. The murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another. [See NRS 200.033(2)] The evidence of this aggravating circumstance will consist of documentary proof and/or testimony concerning prior convictions.

3. The murder was committed while the person was engaged in the commission of or an attempt to commit any Burglary. [NRS 200.033(4)] The evidence of this aggravating circumstance will consist of testimony and physical evidence arising out of the aggravated nature of the offense itself.

4. The murder was committed while the person was engaged in the commission of or an attempt to commit a Sexual Assault. [NRS 200.033(4)] The evidence of this aggravating circumstance will consist of testimony and physical evidence arising out of the aggravated nature of the offense itself.

5. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody. [NRS 200.033(5)] The evidence of this aggravating circumstance will consist of testimony and physical evidence arising out of the aggravated nature of the offense itself.

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6. The murder involved torture, depravity of mind or the mutilation of the victim. [See NRS 200.033(8)] The evidence of this aggravating circumstance will consist of testimony and physical evidence arising out of the aggravated nature of the offense itself.

DATED this 24th day of January, 1994.

REX BELL
DISTRICT ATTORNEY
Nevada Bar #001799

By _____
MELVYN T. HARMON
Chief Deputy District Attorney
Nevada Bar #000862

RECEIPT OF COPY

RECEIPT OF A COPY of the above and foregoing NOTICE OF INTENT TO SEEK DEATH PENALTY is hereby acknowledged this 25 day of January, 1994.

PUBLIC DEFENDER'S OFFICE

By _____
309 S. Third Street #226
Las Vegas, Nevada 89101

kjh

MORGAN D. HARRIS
PUBLIC DEFENDER
Nevada Bar #1879
309 South Third Street, #226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

FILED
Aug 31 9 59 AM '95
Loretta Bowman
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
WILLIAM LESTER WITTER,
Defendant.

Case No. C117513
Dept. No. IX
NOTICE OF APPEAL

TO: THE STATE OF NEVADA

STEWART BELL, DISTRICT ATTORNEY, CLARK COUNTY, NEVADA and DEPARTMENT IX OF THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

NOTICE is hereby given that WILLIAM LESTER WITTER, presently incarcerated in the Nevada State Prison, appeals to the Supreme Court of the State of Nevada from the judgment entered against said Defendant on the 3rd day of August, 1995, whereby he was convicted of count I - murder of the first degree with use of a deadly weapon and sentenced to death by lethal injection; count II - attempt murder with use of a deadly weapon and sentenced to twenty (20) years in the Nevada State Prison on the attempt murder charge plus a consecutive twenty (20) years for use of a deadly weapon; count III - attempt sexual assault with use of a deadly weapon and sentenced to twenty (20) years on the attempt sexual assault plus a consecutive twenty (20) years for use of a deadly weapon to run consecutive to count II; count IV - burglary and sentenced to ten (10) years to run consecutively to count III;

credit for time served in the amount of 627 days.

DATED this 31st day of August, 1995.

MORGAN D. HARRIS
CLARK COUNTY PUBLIC DEFENDER

By _____
ROBERT L. MILLER
NEVADA BAR #1060
DEPUTY PUBLIC DEFENDER

RECEIPT OF A COPY of the foregoing Notice of Appeal is hereby acknowledged this 31st day of August, 1995.

STEWART L. BELL
CLARK COUNTY DISTRICT ATTORNEY

By M. L. Eglinski

FILED

Jan 8 8 07 AM '97

C117513
EX
W

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Janette M. Bloom, the duly appointed and qualified Clerk of the Supreme Court of said State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in the matter of WILLIAM LESTER WITTER vs. THE STATE OF NEVADA, Case No. 27539.

JUDGMENT

The Court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, to the effect: "Affirmed."

Judgment, as quoted above, entered this 22nd day of July, 19 96.

JUDGMENT

The Court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, to the effect: "Rehearing denied."

Judgment, as quoted above, entered this 13th day of December, 19 96.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Supreme Court, at my office in Carson City, Nevada, this 23rd day of December, 19 96.

JANETTE M. BLOOM
Clerk of Supreme Court of the State of Nevada

CE31

By L Carrillo
Chief Deputy Clerk

sp

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 27539

FILED

DEC 13 1996

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

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Steffen, C.J.

Young, J.

Springer, J.

Shearing, J.

Rose, J.

cc: Hon. Stephen L. Huffaker, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Stewart L. Bell, District Attorney
Morgan D. Harris, Public Defender
Loretta Bowman, Clerk

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IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 27539

FILED

JUL 22 1996

Appeal from a judgment of conviction pursuant to a jury verdict on one count of first-degree murder with use of a deadly weapon and from sentence of death, attempted murder with use of a deadly weapon, attempted sexual assault with use of a deadly weapon, and burglary. Eighth Judicial District Court, Clark County; Stephen L. Huffaker, Judge.

Affirmed.

Morgan D. Harris, Public Defender, Robert L. Miller, Deputy Public Defender, Philip Kohn, Deputy Public Defender, Clark County,
for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Stewart L. Bell, District Attorney, James Tufteland, Chief Deputy District Attorney, Gary Guymon, Deputy District Attorney, Clark County,
for Respondent.

O P I N I O N

PER CURIAM:

On June 28, 1995, a jury found William Witter guilty of murder with use of a deadly weapon, attempted sexual assault with use of a deadly weapon, and burglary. A penalty hearing was held on July 10, 1995, through July 13, 1995, after which, by way of special verdict, the jury sentenced Witter to death by lethal injection. The district court entered an amended judgment of conviction on August 2, 1995, based on the jury's sentence of death for the first-degree murder charge and imposing a twenty-year sentence for attempted murder (plus a

twenty-year sentence enhancement for use of a deadly weapon), a twenty-year sentence for attempted sexual assault (plus a twenty-year sentence enhancement for use of a deadly weapon), and a ten-year sentence for burglary. All sentences are to run consecutively. Witter raises numerous issues on appeal. Although we conclude that the State has failed to prove the prevention of lawful arrest statutory aggravator beyond a reasonable doubt, we conclude that the remaining aggravators outweigh the mitigating evidence presented by Witter. Since Witter's remaining arguments are without merit, we affirm the district court's judgment of conviction and sentence of death.

FACTS

On November 14, 1993, Kathryn Cox (Kathryn) was working as a retail clerk for the Park Avenue Gift Shop located in the Luxor Hotel in Las Vegas, Nevada. James Cox (James), Kathryn's husband, drove a taxicab in the Las Vegas area. At about 10:25 p.m., Kathryn called James and informed him that she was having trouble with her car and needed assistance. James told her that he would be over to pick her up in about twenty-five to thirty minutes. Kathryn returned to her car, got in, locked her door, and began to read a book.

About five to ten minutes later, the passenger side door opened, and William Witter got into the car. Witter demanded that Kathryn drive him out of the lot. When Kathryn informed him that she could not, Witter stabbed her just above her left breast. Witter pulled Kathryn closer to him and told her that he was going to kill her. After stabbing Kathryn several more times, Witter became quiet, unzipped his pants and ordered Kathryn to perform oral sex. Kathryn attempted to comply with his demands, but because she had a punctured lung, she kept passing out. Witter pulled Kathryn into a sitting position and told her, "You're probably already dead." Kathryn

managed to open her door and attempted to run away, but was only able to get about ten or fifteen feet before Witter caught her. Witter forced Kathryn back into the car and forced her to kiss him. He then used his knife to cut away Kathryn's pants and began to fondle her vaginal area with his finger.

Kathryn observed her husband's cab pull up next to the driver's side of her car. Witter, not knowing that James was Kathryn's husband, held Kathryn close and stated, "Don't say anything. I'm going to tell him that you're having a bad cocaine trip." James opened the driver's side door of Kathryn's car and told Witter to get out. Witter got out of the car, walked over to James, and stabbed him numerous times. James fell backwards and into Kathryn, who had gotten out of the car, knocking her to the ground. Kathryn got up and ran for a bus stop. Once again, Witter caught Kathryn and carried her back to her car. After pulling the rest of Kathryn's clothes off, Witter attempted to stuff James' body underneath James' cab. Kathryn then heard hotel security approaching her vehicle.

A security officer in charge of patrolling the Excalibur Hotel's employee parking lot approached Kathryn's car and confronted Witter. After a short standoff, the security officer's backup arrived, and Witter was subdued. Paramedics arrived a short time later, and Kathryn was taken to the hospital where she eventually recovered from her injuries. James was already dead when the paramedics arrived.

DISCUSSION

Guilt Phase

Jury voir dire.

The scope of jury voir dire is within the sound discretion of the trial court and will be given considerable deference by this court. Cunningham v. State, 94 Nev. 128, 575 P.2d 936 (1978). The critical concern of jury voir dire is to

discover whether a juror "will consider and decide the facts impartially and conscientiously apply the law as charged by the court." Adams v. Texas, 448 U.S. 38, 45 (1980).

1. Question regarding impact of prior violent felony conviction.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), the United States Supreme Court held that the prosecution could properly ask a potential juror whether the juror would automatically vote against the death penalty regardless of the facts of the case. Likewise, in Morgan v. Illinois, 504 U.S. 719 (1992), the Court held that the defense was entitled to ask a potential juror whether the juror would automatically vote for death regardless of the facts of the case.

At trial, the district court denied Witter's request to ask potential jurors the following: "If there was evidence that Defendant had a prior felony conviction involving the use or threat of violence, would you still consider all three sentencing alternatives in your deliberations?" The district court found that the question violated EJDCR 7.70.[1] Witter contends that the question merely attempts to death qualify the jury through the use of a Morgan type question, and if the question violates EJDCR 7.70, then EJDCR 7.70 violates due process concerns.

Incorporated within Witter's question is the statutory aggravator listed in NRS 200.033(2) (prior felony conviction

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[1]EJDCR 7.70 states, in pertinent part:

> The following areas of inquiry are not properly within the scope of voir dire examination by counsel:
>
> . . . .
>
> (b) Questions touching on anticipated instructions on the law.
>
> (c) Questions touching on the verdict a juror would return when based upon hypothetical facts.

involving the use or threat of violence). If Witter were allowed to ask such a question, he would be able to read how a potential juror would vote during the penalty phase of the trial. This goes well beyond determining whether a potential juror would be able to apply the law to the facts of the case. We do not read either the Morgan or the Witherspoon decisions to allow for one side to gain such an unfair advantage. Moreover, the record shows that other questions asked during voir dire properly death qualified the jury. Since the question touches on an anticipated instruction of law during the penalty phase, and inquires into the verdict a juror would return based on hypothetical facts, we conclude that the district court properly found that the questions violated EJDCR 7.70. We also conclude that the restrictions of EJDCR 7.70 are consistent with the holdings in Morgan and Witherspoon and that the rule does not offend due process concerns. For these reasons, we conclude that the district court did not abuse its discretion when it precluded Witter's counsel from asking his proposed question of prospective jurors.

2. Newspaper article.

On one of the days during jury voir dire, a Las Vegas newspaper published a letter to the editor authored by Deputy Attorney General Victor H. Schulze, II. The article stated, among other things, that criminals should take responsibility for their crimes. The article did not mention, nor did it allude to, Witter's case. The district court refused to allow Witter to question the jury about the article. Witter now argues that the district court abused its discretion. We disagree.

We have recognized that, in an effort to protect the defendant's right to a fair trial, procedural safeguards should be employed by the trial judge to insure that potentially

prejudicial news accounts of the proceedings do not prejudice the defendant. Crowe v. State, 84 Nev. 358, 441 P.2d 90 (1968). "The trial judge has large discretion in ruling on the issue of possible prejudice resulting from news articles concerning a defendant on trial and each case must turn on its special facts." Id. at 363, 441 P.2d at 93 (citation omitted).

While we recognize that the trial court failed to utilize any procedural protections to insure that the jury was not tainted by Schulze's article, we also recognize that the article did not specifically refer to Witter's case. We believe that the district court would have run a greater risk of contamination if it were to have allowed Witter's counsel to question the jurors about the article. Under the circumstances, we conclude that Witter was not prejudiced by the district court's refusal to allow his counsel to question the jury about Schulze's article.

Exclusion of witnesses.

At the beginning of trial, Witter made a motion to exclude all witnesses pursuant to NRS 50.155(1),[2] the witness exclusion rule, including those who would be testifying at a penalty hearing. The district court invoked the rule as to the guilt phase of the trial, but refused to invoke it with regard to the penalty phase. Witter now argues that the district court abused its discretion. We disagree.

NRS 47.020 states that the rules of evidence under NRS Title 4 are to govern the proceedings of the courts of the State of Nevada, but are not to apply to sentencing proceedings. Witter argues that NRS 47.020 should be disregarded in capital

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[2]NRS 50.155(1) states that "[e]xcept as otherwise provided in subsections 2 and 3, at the request of a party the judge shall order witnesses excluded so they cannot hear the testimony of other witnesses, and he may make the order of his own motion."

cases because of the severity of the punishment. See Griffin v. Illinois, 351 U.S. 12 (1956)(those charged with capital offenses are to be granted special considerations). We conclude that this argument is without merit. Had the legislature intended to exempt death cases from the exclusion of NRS 47.020, we believe it would have expressly provided for such an exemption. Moreover, we conclude that the district court properly found that the witness exclusion rule did not need to be invoked against penalty phase witnesses in this case. "The purpose of sequestration of witnesses is to prevent particular witnesses from shaping their testimony, and to detect falsehood by exposing inconsistencies." Givens v. State, 99 Nev. 50, 55, 657 P.2d 97, 100 (1983)(citations omitted), overruled on other grounds, Talancon v. State, 102 Nev. 294, 721 P.2d 764 (1986). Kathryn Cox was the only witness to testify at both the guilt phase and the penalty phase, and her presence at both proceedings is specifically provided for in NRS 50.155(2)(d). For these reasons, we conclude that the district court did not err when it refused to invoke the witness exclusion rule against penalty-phase witnesses.

Jury instructions.

With regard to his first-degree murder conviction, Witter argues that the instructions given to the jury failed to distinguish adequately the elements of malice and premeditation, and that the district court erred when it refused his proposed jury instruction which attempted to define deliberation.[3]

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[3] Jury Instruction No. 7 stated:

> Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.
> Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an

(continued...)

We have previously held that the premeditation instruction challenged here provides the jury with an accurate definition of premeditation and deliberation. See Powell v. State, 108 Nev. 700, 708, 838 P.2d 921, 926 (1992), vacated on other grounds, 511 U.S. 79 (1994). We conclude that this court's reasoning in Powell remains sound. Furthermore, in Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992), cert. denied, 507 U.S. 1009 (1993), this court held that the very same malice jury instruction accurately informed the jury of the distinction between express malice and implied malice. See NRS 200.020. We conclude that the jury instructions actually submitted to the jury were proper, and that the district court did not err when it refused Witter's instruction defining deliberation.

Supreme Court Rule 250.

Part III, section B of SCR 250 states, in relevant part:

> After close of the evidence, the court shall confer with the prosecuting attorney and defense counsel. The conference shall be reported.

---

[3](...continued)
abandoned and malignant heart.

Jury Instruction No. 9 stated:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

Witter's proposed instruction stated: "Deliberate means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed cause of action."

> The following matters shall be concluded during the conference after close of the evidence:
>
> 1. Proposed written instructions shall be presented to the court for rulings. The defendant need not be present when the instructions are settled.
>
> 2. The court shall make a final ruling on any issue properly raised as to which a tentative ruling or no ruling was made during presentation of the evidence.

Toward the end of both the guilt and penalty phases of the trial, counsel for both the prosecution and defense met with the district court judge in chambers to discuss jury instructions. After each meeting, when the proceedings were back on the record, the court asked Witter's counsel if he had any objections. Witter's counsel objected to the procedure used by the court, arguing that under SCR 250 the entire discussion should have been on the record. The court found the procedure to be proper. Witter now argues that he was deprived of a fair trial.

We conclude that the procedures followed by the district court were sufficient to guarantee that any legitimate objections Witter may have had about the jury instructions were considered by the district court and were preserved in the record. Accordingly, we conclude that the procedures used by the district court satisfy the provisions of SCR 250.

Penalty phase

Motion for continuance.

On June 28, 1995, the jury returned a verdict of guilty on all counts, and the district court scheduled the penalty hearing to begin on July 10, 1995, with discovery to occur on July 6, 1995. In the course of the penalty hearing, the State introduced evidence of Witter's gang affiliation, and evidence that a shank (knife) was found in his jail cell while he was awaiting trial. At the penalty hearing, Witter made a motion for continuance, arguing that he planned to have an expert testify about gang violence and that he needed more time

to secure such an expert. The district court concluded that Witter had adequate time to prepare for the penalty hearing and, accordingly, denied Witter's motion. Witter now argues that the district court abused its discretion for the following reasons: 1) a shank was found in Witter's jail cell on August 5, 1994, yet the State did not inform him of its intention to use the evidence at the penalty hearing until July 5, 1995; 2) he only had four days from the date of discovery until the date of the penalty hearing in which to secure expert testimony regarding gang violence; and 3) the district court unfairly denied his motion to continue the penalty phase because he was unable to secure expert witness testimony during the guilt phase.

The granting of a motion to continue is within the sound discretion of the trial court. Doleman v. State, 107 Nev. 409, 812 P.2d 1287 (1991). In Rogers v. State, 101 Nev. 457, 705 P.2d 664 (1985), cert. denied, 476 U.S. 1130 (1986), we held that one week's notice of the prosecution's intent to present evidence of prior convictions involving violence was sufficient. In that case, we concluded that the defendant was not prejudiced because he had actual knowledge of the aggravating circumstance and had sufficient time to prepare a challenge. See also Browning v. State, 104 Nev. 269, 757 P.2d 351 (1988)(six-day notice of the State's intent to use an aggravating circumstance found to be sufficient).

In the present case, on June 20, 1995, almost a full year before the penalty hearing, the State notified Witter's counsel that it was investigating an alleged discipline problem (possession of a shank) involving Witter. In addition, Witter's body displays a number of tatoos that are consistent with those worn by members of street gangs in San Jose, California, Witter's hometown. From these facts, we conclude that Witter's counsel had, or should have had, actual notice of Witter's possession of a shank while incarcerated, and his involvement with street gangs. We also conclude that even if Witter were

able to secure expert testimony regarding gang violence in prisons, such testimony would have done little to mitigate his involvement. We therefore conclude that Witter was not prejudiced by the district court's decision to allow only four days between discovery and the penalty hearing. Accordingly, we conclude that the district court did not abuse its discretion when it refused to grant Witter's motion for continuance.

Penalty phase evidence.

Witter argues that the district court erred in admitting evidence of his possession of a shank, since his possession was an unadjudicated offense and he was not allowed representation at the disciplinary hearing which he contends was a violation of the Sixth Amendment to the United States Constitution.

Under NRS 175.552,[4] the trial court is given broad discretion on questions concerning the admissibility of evidence at a penalty hearing. Guy, 108 Nev. 770, 839 P.2d 578. In Robins v. State, 106 Nev. 611, 798 P.2d 558 (1990), cert. denied, 499 U.S. 970 (1991), this court held that evidence of uncharged crimes is admissible at a penalty hearing once any aggravating circumstance has been proven beyond a reasonable doubt.

In this case, the State proved beyond a reasonable doubt that Witter had a previous felony conviction involving violence to the person of another, that Witter murdered James in

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[4]NRS 175.552(3) states, in part:

> 3. In the [penalty] hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible. . . . No evidence which was secured in violation of the Constitution of the United States or the constitution of the State of Nevada may be introduced. . . .

the commission of or an attempt to commit a burglary, and that Witter murdered James while engaged in the commission of or attempt to commit a sexual assault. We therefore conclude that the district court properly admitted evidence of his possession of a shank while he was incarcerated.

Furthermore, we conclude that Witter did not have a Sixth Amendment right to counsel at his disciplinary hearing. While a prisoner may have a Sixth Amendment right to counsel at a disciplinary hearing when the charge involves conduct that is punishable under state law, see Wolff v. McDonnell, 418 U.S. 539 (1974); Gagnon v. Scarpelli, 411 U.S. 778 (1973), Witter's possession of the shank is not a punishable offense under the laws of Nevada.

Witter also contends that the district court erred in admitting evidence showing that he is a member of a street gang. According to Witter, the evidence lacked any probative value and was offered only to inflame the passions of the jury.

NRS 48.035(1) states that "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, or confusion of the issues or of misleading the jury." While this court has cautioned that the introduction of gang membership during a penalty hearing may be unfairly prejudicial, see Young v. State, 103 Nev. 233, 737 P.2d 512 (1987); Lay v. State, 110 Nev. 1189, 886 P.2d 448 (1994); see also Dawson v. Delaware, 503 U.S. 159 (1992), this court has held that "[f]rom Dawson, we derive the following rule: Evidence of a constitutionally protected activity is admissible only if it is used for something more than general character evidence." Flanagan v. State, 109 Nev. 50, 53, 846 P.2d 1053, 1056 (1993). In Dawson, the United States Supreme Court reasoned that "[a] defendant's membership in an organization that endorses the killing of any identifiable group, for example, might be relevant to a jury's

inquiry into whether the defendant will be dangerous in the future." 503 U.S. at 166.

In this case, the State presented testimony from the arresting officers indicating that Witter told them that he could heighten his reputation if he were to kill police officers, and from a second officer who stated that from the clothing Witter was wearing and from the tatoos on his arm, he believed that Witter was a member of a violent California gang known as the "Nortenos." We conclude that this evidence tends to show that Witter posed a threat of future violence to the community. Moreover, we conclude that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, or confusion of the issues or of misleading the jury. Accordingly, we conclude that the district court properly admitted evidence of Witter's affiliation with a street gang.

Motion for mistrial.

At the penalty hearing, Kathryn Cox read a prepared statement to the jury in which she demanded that the jury show no mercy to the defendant, and in which she informed the jury that she intended to do everything in her power to see that Witter received no mercy. Witter made a motion for mistrial, arguing that Kathryn's statements went beyond the scope of what is acceptable as a victim-impact statement since the statements unduly inflamed the passions of the jury and that they amounted to a plea for the return of a death penalty sentence. The district court denied Witter's motion. Witter now argues that he was deprived of a fair trial and that the district court abused its discretion when it denied his motion for mistrial.

In Payne v. Tennessee, 501 U.S. 808, 827 (1991), the Supreme Court overruled prior precedent and held that if a State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment

erects no per se bar. In Homick v. State, 108 Nev. 127, 825 P.2d 600 (1992), we applauded the decision reached in Payne and concluded that the decision comports with the principles of the Nevada Constitution. NRS 175.552(3) states, in part, that "[i]n the [penalty] hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible." However, while a victim may address the impact that the crime has had on the victim and the victim's family, a victim can only express an opinion regarding the defendant's sentence in non capital cases. Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993).

We conclude that in asking the jury to "show no mercy," Kathryn was not expressing her opinion as to what sentence Witter should receive. Rather, we believe that Kathryn was only asking that the jury return the most severe verdict that it deemed appropriate under the facts and circumstances of this case. Kathryn's statements also emphasize the devastating effect this crime has had on her and her family's life. Such sentiments are admissible victim-impact statements NRS 175.552(3). We therefore conclude that Witter was not deprived of a fair trial and that the district court properly denied Witter's motion for mistrial.

Witter's motion to argue last.

Witter contends that NRS 200.030(4)[5] shifts the burden of proof to the defendant to prove that mitigating circumstances outweigh aggravating circumstances. Witter cites Griffin v. Illinois, 351 U.S. 12 (1956), and argues that the district court

[5]NRS 200.030(4) states, in part, that "[a] person convicted of murder of the first degree is guilty of a category A felony and shall be punished: (a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances."

should have allowed him to argue last during closing arguments. We disagree.

First, we read NRS 200.030(4) as stating that the death penalty is an available punishment only if the state can prove beyond a reasonable doubt at least one aggravating circumstance exists, and that the aggravating circumstance or circumstances outweigh the mitigating evidence offered by the defendant. The statute does not shift the burden of proof to the defendant. Second, unless the case is submitted to the jury by one or both sides without argument, NRS 175.141[6] mandates that the district attorney, or other counsel for the state, open and conclude argument. Under NRS 175.141, the district court does not have the authority to grant Witter's request. Moreover, such a concession would unfairly disadvantage the prosecution. Accordingly, we conclude that the district court did not err when it denied Witter's request to argue last during the penalty phase.

Prosecutorial misconduct.

The trial court has a duty to ensure that an accused receives a fair trial, and to this end the court must exercise its discretionary power to control obvious prosecutorial misconduct sua sponte. Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985), cert. denied, 486 U.S. 1036 (1988). In reviewing a prosecutor's comments, the relevant inquiry is whether the comments were so unfair that they deprived the defendant of due process. Darden v. Wainwright, 477 U.S. 168 (1986). However,

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[6]NRS 175.141 states, in pertinent part:

> The jury having been impaneled and sworn, the trial shall proceed in the following order:
>
> . . . .
>
> 5. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the district attorney, or other counsel for the state, must open and must conclude the argument.

comments that are harmless beyond a reasonable doubt do not warrant reversal. Witherow v. State, 104 Nev. 721, 765 P.2d 1153 (1988).

1. Community standards.

During the penalty phase closing argument, the prosecutor commented:

> When we talk about the death penalty, there are two schools of thought as to why society might have it. One school of thought is that of deterrence. Deterrence is achieved through severity of punishment. It is important for the image of the criminal justice system to have the death penalty. It is important to send a message to people in the community and to would[-]be murderers that there are lines that you do not cross in Nevada; that there is some conduct that simply will not be tolerated and will be met with a very, very severe penalty.
>
> The other school of thought is one of punishment. It is an expression of society's sense of moral outrage. Society has a right to feel that outrage when confronted with these crimes and to respond to it. It flows from the concept that consequences follow actions; that there are penalties for crimes; that punishment should fit the crime; the worse the act, the worse the penalty.

The prosecutor also commented that anything less than the death penalty would be disrespectful to the dead and irresponsible to the living. Witter argues that these statements amount to an impermissible comment on community standards. We disagree.

In Collier, we held that a prosecutor's statement that if the jury was not angry with the defendant then "we are not a moral community," improperly inflamed the jury and amounted to prosecutorial misconduct. 101 Nev. at 479, 705 P.2d at 1129. Nevertheless, the prosecutor may go beyond the evidence to discuss general theories of penology such as the merits of punishment, deterrence and the death penalty. Id. at 478, 705 P.2d at 1129.

We conclude that the comments cited above were an attempt to educate the jury about some of the theories

supporting our criminal justice system, and why the death penalty is an available option. Since these are proper areas for prosecutorial comment, we conclude that the prosecutor did not engage in misconduct.

2. Duty to society at large.

During the penalty phase closing argument, the prosecutor commented:

> What message does this punishment send today? Will we tell would[-]be murders, will we tell this community, that you can kill a man, thrust a knife into his skull 16 times, one time through his skull, 16 times into his body, that you can perpetrate unspeakable, despicable deeds upon his wife in her own car and that you, the husband, can drive upon that crime scene and witness your wife bleeding to death, struggling for your life, what message does it send to say the man that perpetrates those crimes can live his life in prison, can write his family, see his family, speak to his family?

Witter argues that these statements amount to an improper plea to a duty to society at large. See Haberstroh v. State, 105 Nev. 739, 782 P.2d 1343 (1989)(prosecutor committed misconduct by referring to the jury as "the conscience of the community"); Collier, 101 Nev. 473, 705 P.2d 1126; Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988), vacated on other grounds sub nom., Flanagan v. Nevada, 503 U.S. 931 (1992) (prosecutor's remark, "[i]f we don't punish, then society is going to laugh at us" found to be improper). We disagree.

We conclude that these statements properly focus on what would be an appropriate punishment under the facts and circumstances of this case, as well as what would be necessary to deter others from committing such a brutal act. These are entirely proper areas for comment. Accordingly, we conclude that these statements did not constitute an improper plea to a duty to society at large.

3. Reference to matters outside the record.

The following exchange took place during the prosecution's closing argument during the penalty phase:

> MR. OWENS: And it's very subtle, and you may not have noticed it, but in any penalty hearing what the defense and every witness that the defense calls wants you to do is forget about --
>
> MR. KOHN: I object, Your Honor.
>
> THE COURT: Overruled.
>
> MR. OWENS: What the defense has done in this case, ladies and gentlemen, is to try to make you forget about Kathryn Cox and James Cox. The whole case gets turned upside down and they twist things around until they can portray the vic -- the defendant, William Witter, as if he is the victim.

Witter argues that in stating "in any penalty hearing what the defense and every witness that the defense calls wants you [the jury] to do is to forget about [the victims]," the prosecution improperly referred to matters outside the record on appeal. See State v. Kassabian, 69 Nev. 146, 243 P.2d 264 (1952). Witter also argues that these statements improperly disparage a legitimate defense tactic. See Williams v. State, 103 Nev. 106, 734 P.2d 700 (1987); Pickworth v. State, 95 Nev. 547, 598 P.2d 626 (1979).

We conclude that both of Witter's arguments lack merit. After the objection, the prosecutor modified his statement to conform to the facts of this case. As such, the statement did not refer to matters outside of the record. Moreover, the statement did not disparage a legitimate defense tactic. Rather, the statement merely attempted to keep the jury's focus on the actual victims of Witter's crime. We therefore conclude that the prosecutor's statements were proper.

4. Comments about possible future crimes.

The prosecutor made the following comments during the penalty phase closing argument:

Don't let him go back where he can murder again, and perhaps this time a corrections officer, because that is exactly what he has threatened to do. He told the police officers that "[t]ake these handcuffs off of me so I can kill a police officer. That's all I need to do to raise my reputation higher."

Don't give him the chance. Don't let it happen because it wouldn't be fair; it wouldn't be justice.

. . . .

But we are going to place William Witter -- at least if we do what the defense wants you to do, we are going to place him in prison, where he can heighten his reputation and perpetrate unspeakable crimes on perhaps unsuspecting guards.

And certainly guards are trained individuals; they are trained to protect themselves, but they don't have eyes in the back of their heads, and they don't know when a William Witter will wrap a shank that he made in a towel and become angry and thrust that into the life of a corrections officer and bring about another tragedy.

. . . .

History repeats itself.

What unsuspecting prisoner might William Witter's life cross and what might happen to that prisoner? Oh, certainly, that's just a prisoner and he's a wrongdoer and maybe he gets what he deserves.

. . . .

Interestingly enough, the defense didn't ask their witness perhaps the most important question for you people:

Doctor, let's talk about the future dangerousness of this man. Can anybody in your profession predict future dangerousness?

. . . .

So I took the doctor through a history of violence and asked: Does history repeat itself? Are the acts of the defendant indicators of his future dangerousness?

Because you people need to know what kind of danger rests in the future of lives of other individuals that come in contact with Dr. Etcoff.

Now that's a question that they didn't ask. It's a question I wanted you to know; and the answer was clear: History repeats itself.

. . . .

Knowing the future dangerousness, it would be disrespectful to the dead and

> irresponsible to the living to let this man have his life of prison, to let him create another personal jungle for himself like the jungle that he created in the parking lot on November 14, 1993.

In Collier, we held that a prosecutor's remarks which sought to promote a conclusion that a defendant's rehabilitation was improbable, that he might well kill again while in prison, and that he should therefore be put to death were highly inappropriate. 101 Nev. at 478, 705 P.2d at 1129. In Riley v. State, 107 Nev. 205, 219, 808 P.2d 551, 560 (1991), cert. denied, ___ U.S. ___ 115 S. Ct. 1431 (1995), we modified our holding in Collier to allow a prosecutor to ask a jury to draw an inference of future dangerousness when there is evidence of a defendant's past conduct that would support a reasonable inference that even incarceration would not deter the defendant from endangering others' lives. Finally, in Redmen v. State, 108 Nev. 227, 828 P.2d 395 (1992), cert. denied, 506 U.S. 880 (1992), overruled on other grounds, Alford v. State, 111 Nev. 1409, 906 P.2d 714 (1995), we expanded our holding in Riley to allow prosecutors to argue the future dangerousness of a defendant even when there is no evidence of violence independent of the murder in question.

Witter contends that the prosecutor's statements were improper under Collier. We disagree. In accordance with our holding in Redmen, the prosecutor was allowed to argue that Witter posed a threat of future dangerousness based solely on his murder of James. Moreover, in Haberstroh, 105 Nev. 739, 782 P.2d 1343, we held that a defendant's past conduct in jail justifies a prosecutor's comment that defendant could pose a continuing threat to others. In this case, the record clearly shows that a shank was found in Witter's cell while he was awaiting trial. We therefore conclude that the prosecutor's statements emphasized the potential future threat Witter posed to society. As such, we conclude that those statements were proper.

5. "Golden Rule" plea.

During the penalty phase closing argument, the prosecutor commented:

> Do I make these statements to excite you or to remind you of the violence that encompasses the defendant? For a moment, we recreate that crime because this punishment has to fit that crime.
>
> But how aggravating is it to sit there and this man get in your car, the vehicle that you own, and begin to perpetrate these crimes on you?

It is improper for a prosecutor to make a plea to return a death penalty verdict on behalf of victims. Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990). It is equally unacceptable for a prosecutor to ask the jury to stand in the shoes of the victim (the Golden Rule argument). Id.; McGuire v. State, 100 Nev. 153, 677 P.2d 1060 (1984). Witter argues that the language cited above, along with the prosecutor's comment that anything less than the death penalty would be disrespectful to the dead and irresponsible to the living, amounts to an improper "Golden Rule" plea as well as a plea to the jury to return a death penalty verdict on behalf of the victim in this case. We disagree.

In commenting that anything less than the death sentence would be disrespectful to the dead, we conclude that the prosecutor was merely pointing out to the jury that our society values human life, and in order to respect the value of human life, one who takes a human life in the manner that Witter did should have to pay for his crime with his own life. Furthermore, the prosecutor's statements painted a vivid picture for the jury, and any reference to "you" appears to be merely rhetorical. For these reasons, we conclude that the prosecutor's statements were proper.

Preventing lawful arrest statutory aggravator.

The State included the prevention of lawful arrest statutory aggravator listed in NRS 200.033(5)[1] as one of the aggravating circumstances in its notice of intent to seek the death penalty. Witter made a motion to strike that aggravator, arguing that the evidence adduced at trial shows that he killed James in an attempt to continue his sexual assault on Kathryn, not to avoid arrest. The district court denied Witter's motion. Witter now contends that the district court abused its discretion.

In Cavanaugh v. State, 102 Nev. 478, 729 P.2d 481 (1986), this court held that for purposes of NRS 200.033(5), the arrest does not need to be imminent, and the victim does not have to be involved in some way with effectuating the arrest. More recently, in Canape v. State, 109 Nev. 864, 859 P.2d 1023 (1993), cert. denied, ___ U.S. ___, 115 S. Ct. 176 (1994), the evidence adduced at trial showed that Canape robbed his victim then walked him away from the freeway before shooting him in the back. We held that based on the evidence of the case, a jury could reasonably infer that the murder was committed to avoid lawful arrest. Id. at 874-75, 859 P.2d at 1030.

In this case, Witter attacked James only after James told Witter that Kathryn was his wife and ordered Witter to exit the vehicle. Once Witter killed James, Witter grabbed Kathryn and forced her back into the vehicle. Rather than fleeing, or killing Kathryn to make sure no one could identify him, Witter hid James' body under his cab and resumed his sexual assault on Kathryn. The natural inference drawn from these facts is that Witter killed James so that he could continue his assault on Kathryn, not to avoid arrest. Clearly, the prosecution has not met its burden of proving this aggravator beyond a reasonable

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[1]NRS 200.033(5) states that "[t]he murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody."

doubt. We therefore conclude that the jury could not have reasonably found that the murder was committed to avoid lawful arrest and that the district court erred when it denied Witter's motion to strike the aggravator.

In McKenna v. McDaniel, 65 F.3d 1483 (9th Cir. 1995), the Ninth Circuit Court of Appeals was faced with a situation similar to the case at bar in which one of the aggravating circumstances used to sentence McKenna to death was found invalid. In commenting on Nevada's death penalty statute, the court stated:

> Even in a weighing state, however, invalidation of one of several aggravating factors may make no difference if there were no mitigating circumstances against which the state court could balance the remaining aggravating factors. See Neuschafer v. Whitley, 816 F.2d 1390, 1393 (9th Cir. 1987). But where some mitigating factors exist, there must either be a new sentencing hearing before a jury or the state appellate court must reweigh or conduct harmless error review in order to give the defendant the individualized considerations required by the Constitution. Clemons [v. Mississippi], 494 U.S. [738] at 746, 752, 110 S.Ct. [1441] at 1447, 1450.

Id. at 1489-90. Even though we conclude that the prevention of lawful arrest aggravator should have been stricken, there remain four aggravators that the State has proven beyond a reasonable doubt. In mitigation, Witter offered the testimony of several members of his family and the testimony of a clinical psychologist, all of whom testified that Witter grew up in a very abusive and dysfunctional family. We conclude that the remaining four aggravators clearly outweigh the mitigating evidence presented by Witter. Moreover, for the same reason, we conclude that the district court's failure to strike the prevention of lawful arrest aggravator amounts to harmless error. See Chapman v. California, 386 U.S. 18 (1966). We therefore conclude that even though the district court erred in allowing the prevention of lawful arrest aggravator to be considered by the jury, Witter's sentence of death is still proper.

Mandatory statutory review.

Finally, we conclude, pursuant to NRS 177.055, that (1) the evidence fully supports the finding of ~~three~~ four valid aggravating circumstances, (2) the sentence of death was not imposed under the influence of passion, prejudice or any arbitrary factor, and (3) the sentence is not excessive, considering both the crime and the defendant.

CONCLUSION

For the reasons stated above, we conclude that except for Witter's challenge to the prevention of lawful arrest statutory aggravator, all of Witter's arguments are without merit. Accordingly, we affirm Witter's judgment of conviction. With regard to the prevention of lawful arrest statutory aggravator, we conclude that the State has failed to prove the aggravator beyond a reasonable doubt. Nevertheless, because we conclude that the remaining four aggravators clearly outweigh the mitigating evidence presented by Witter, we affirm Witter's sentence of death.

Steffen, C.J.

Young, J.

Springer, J.

Shearing, J.

Rose, J.

IN THE SUPREME COURT OF THE STATE OF NEVADA

REMITTITUR

DATE: December 23, 1996

TO: Honorable Loretta Bowman, Clerk

RE: WILLIAM LESTER WITTER vs. THE STATE OF NEVADA

NO. 27539 DIST. CT. NO. C117513

Pursuant to NRAP Rule 41, enclosed is (are) the following:

..... Certified copy of Judgment and copy of Order.

.....X. Certified copy of Judgment and copy of Opinion.

..... Certified copy of Judgment and Opinion.

.....X. Receipt for Remittitur. (County Clerk please sign below and return. Retain the attached copy for your records.)

..... Record on Appeal. Volumes.....

..... Exhibits.....

.....

.....

..... Deposition(s) of.....

..... Memorandum of Costs and Disbursements.

..... Other.....

cc: Hon. Stephen L. Huffaker, District Judge
Morgan D. Harris, Public Defender
Hon. Frankie Sue Del Papa, Attorney General
Hon. Stewart Bell, District Attorney

Issued by: F. Castello
Chief Deputy Supreme Court Clerk

sp

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on (date) JAN 3 1997

LORETTA BOWMAN
County Clerk

ORIGINAL

24

FILED

OCT 27 1 45 PM '97

Loretta Bowman

CLERK

0014
DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
302 E. Carson, #600
Las Vegas, NV 89101
702-382-1844
Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

WILLIAM LESTER WITTER, Petitioner, vs. E.K. McDANIEL, WARDEN OF ELY STATE PRISON, Respondent.	CASE NO. C 117513 DEPT. NO. VI DOCKET NO. B

PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

DATE OF HEARING: 11-12-97
TIME OF HEARING: 8:30 AM

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Ely State Prison

2. Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District Court, Las Vegas, Clark County, Nevada

3. Date of judgement of conviction: August 2, 1995

4. Case number: C 117513

5. (a) Length of sentence: Death

(b) If sentence is death, state any date upon which execution is scheduled: Sentence stayed pending appeal

6. Are you presently serving a sentence for a conviction

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

CMC

CE19

CE11

other than the conviction under attack in this motion?

Yes _____ No XX

If "yes", list crime, case number and sentence being served at this time: N/A

7. Nature of offense involved in conviction being challenged: First Degree Murder with Use, Attempt Murder with Use, Attempt Sexual Assault with Use, and Burglary

8. What was your plea? (Check one)

(a) Not guilty XX

(b) Guilty __

(c) Guilty but mentally ill _____

(d) Nolo contendere _____

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury XX

(b) Judge without a jury _____

11. Did you testify at the trial? Yes _____ No XX

12. Did you appeal from the judgement of conviction?

Yes XX No _____

13. If you did appeal, answer the following:

(a) Name of court: Nevada Supreme Court

(b) Case number or citation: 27539

(c) Result: Affirmed

(d) Date of result: Decision issued July 22, 1996; Petition for Rehearing denied December 13, 1996; and Writ of Certiorari denied May 12, 1997.

(A COPY OF THE DECISION OF THE NEVADA SUPREME COURT IS ATTACHED)

14. If you did not appeal, explain briefly why you did not: N/A

15. Other than a direct appeal from the judgement of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgement in any court, state or federal? Yes _____ No XX

16. If your answer to No. 15 was "yes," give the following information: N/A

(a)(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? _____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(b) as to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? _____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion?

Yes _____ No ____

Citation or date of decision: _____

(2) Second petition, application or motion?

Yes _____ No ____

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions? Yes _____ No ____

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not

exceed five handwritten or typewritten pages in length.)

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17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? If so, identify: No.

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) Allegations of ineffective assistance of trial counsel aren't properly raised on direct appeal. Any issues not raised on appeal that could have been raised were the result of ineffective appellate counsel.

19. Are you filing this petition more than 1 year following the filing of the judgement of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) No. The decision was not final until the Writ of Certiorari was denied.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgement under attack? Yes ____ No XX

If yes, state what court and the case number: ____

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Trial: Philip Kohn, Esq. and Kedric Bassett, Esq. Direct appeal: Robert L. Miller, Esq.

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgement under attack?

Yes ____ No XX

If yes, specify where and when it is to be served, if you know: N/A

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground one: Petitioner Was Denied His Rights under the Sixth and Fourteenth Amendments to Effective Assistance of Trial Counsel and Due Process of Law Due to the Failure of Trial Counsel. The Specific Failures of Trial Counsel as Currently Known Are:

1. Failure to Investigate and Present Evidence at the Trial Portion of the Case
2. Failure to Investigate and Present Evidence at the Penalty Hearing
3. Conceding Guilt Denied Petitioner of an Adversary

Proceeding

4. Such Other and Further Errors Revealed by a Full and Complete Review of the Record by Newly Appointed Counsel

(b) Ground two: Petitioner Was Denied His Rights under the Sixth and Fourteenth Amendments to Effective Assistance of Appellate Counsel and Due Process of Law. The Specific Failures of Appellate Counsel Were:

1. Failure to Raise Issues of Arguable Merit on the Direct Appeal

2. Failure to Petition the Court for Rehearing on Clear Errors Contained in the Supreme Court's Opinion

3. Such Other and Further Errors Revealed by a Full and Complete Review of the Record by Newly Appointed Counsel

WHEREFORE, Petitioner prays that the court set a briefing schedule and conduct an evidentiary hearing on the issues raised herein and thereafter grant him the relief to which he is entitled.

SIGNED at ELY STATE PRISON, ELY, NEVADA.

DATED: October 22, 1997

William Witter
WILLIAM LESTER WINTER
PETITIONER

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the Petitioner named in the foregoing petition and knows the

contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

William Witter

WILLIAM LESTER WITTER
PETITIONER

SUBMITTED BY:

David Schieck

DAVID M. SCHIECK, ESQ.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 27539

FILED

JUL 22 1996

Appeal from a judgment of conviction pursuant to a jury verdict on one count of first-degree murder with use of a deadly weapon and from sentence of death, attempted murder with use of a deadly weapon, attempted sexual assault with use of a deadly weapon, and burglary. Eighth Judicial District Court, Clark County; Stephen L. Huffaker, Judge.

Affirmed.

Morgan D. Harris, Public Defender, Robert L. Miller, Deputy Public Defender, Philip Kohn, Deputy Public Defender, Clark County,
for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Stewart L. Bell, District Attorney, James Tufteland, Chief Deputy District Attorney, Gary Guymon, Deputy District Attorney, Clark County,
for Respondent.

O P I N I O N

PER CURIAM:

On June 28, 1995, a jury found William Witter guilty of murder with use of a deadly weapon, attempted sexual assault with use of a deadly weapon, and burglary. A penalty hearing was held on July 10, 1995, through July 13, 1995, after which, by way of special verdict, the jury sentenced Witter to death by lethal injection. The district court entered an amended judgment of conviction on August 2, 1995, based on the jury's sentence of death for the first-degree murder charge and imposing a twenty-year sentence for attempted murder (plus a

twenty-year sentence enhancement for use of a deadly weapon), a twenty-year sentence for attempted sexual assault (plus a twenty-year sentence enhancement for use of a deadly weapon), and a ten-year sentence for burglary. All sentences are to run consecutively. Witter raises numerous issues on appeal. Although we conclude that the State has failed to prove the prevention of lawful arrest statutory aggravator beyond a reasonable doubt, we conclude that the remaining aggravators outweigh the mitigating evidence presented by Witter. Since Witter's remaining arguments are without merit, we affirm the district court's judgment of conviction and sentence of death.

FACTS

On November 14, 1993, Kathryn Cox (Kathryn) was working as a retail clerk for the Park Avenue Gift Shop located in the Luxor Hotel in Las Vegas, Nevada. James Cox (James), Kathryn's husband, drove a taxicab in the Las Vegas area. At about 10:25 p.m., Kathryn called James and informed him that she was having trouble with her car and needed assistance. James told her that he would be over to pick her up in about twenty-five to thirty minutes. Kathryn returned to her car, got in, locked her door, and began to read a book.

About five to ten minutes later, the passenger side door opened, and William Witter got into the car. Witter demanded that Kathryn drive him out of the lot. When Kathryn informed him that she could not, Witter stabbed her just above her left breast. Witter pulled Kathryn closer to him and told her that he was going to kill her. After stabbing Kathryn several more times, Witter became quiet, unzipped his pants and ordered Kathryn to perform oral sex. Kathryn attempted to comply with his demands, but because she had a punctured lung, she kept passing out. Witter pulled Kathryn into a sitting position and told her, "You're probably already dead." Kathryn

managed to open her door and attempted to run away, but was only able to get about ten or fifteen feet before Witter caught her. Witter forced Kathryn back into the car and forced her to kiss him. He then used his knife to cut away Kathryn's pants and began to fondle her vaginal area with his finger.

Kathryn observed her husband's cab pull up next to the driver's side of her car. Witter, not knowing that James was Kathryn's husband, held Kathryn close and stated, "Don't say anything. I'm going to tell him that you're having a bad cocaine trip." James opened the driver's side door of Kathryn's car and told Witter to get out. Witter got out of the car, walked over to James, and stabbed him numerous times. James fell backwards and into Kathryn, who had gotten out of the car, knocking her to the ground. Kathryn got up and ran for a bus stop. Once again, Witter caught Kathryn and carried her back to her car. After pulling the rest of Kathryn's clothes off, Witter attempted to stuff James' body underneath James' cab. Kathryn then heard hotel security approaching her vehicle.

A security officer in charge of patrolling the Excalibur Hotel's employee parking lot approached Kathryn's car and confronted Witter. After a short standoff, the security officer's backup arrived, and Witter was subdued. Paramedics arrived a short time later, and Kathryn was taken to the hospital where she eventually recovered from her injuries. James was already dead when the paramedics arrived.

DISCUSSION

Guilt Phase

Jury voir dire.

The scope of jury voir dire is within the sound discretion of the trial court and will be given considerable deference by this court. Cunningham v. State, 94 Nev. 128, 575 P.2d 936 (1978). The critical concern of jury voir dire is to

discover whether a juror "will consider and decide the facts impartially and conscientiously apply the law as charged by the court." Adams v. Texas, 448 U.S. 38, 45 (1980).

1. Question regarding impact of prior violent felony conviction.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), the United States Supreme Court held that the prosecution could properly ask a potential juror whether the juror would automatically vote against the death penalty regardless of the facts of the case. Likewise, in Morgan v. Illinois, 504 U.S. 719 (1992), the Court held that the defense was entitled to ask a potential juror whether the juror would automatically vote for death regardless of the facts of the case.

At trial, the district court denied Witter's request to ask potential jurors the following: "If there was evidence that Defendant had a prior felony conviction involving the use or threat of violence, would you still consider all three sentencing alternatives in your deliberations?" The district court found that the question violated EJDCR 7.70.[1] Witter contends that the question merely attempts to death qualify the jury through the use of a Morgan type question, and if the question violates EJDCR 7.70, then EJDCR 7.70 violates due process concerns.

Incorporated within Witter's question is the statutory aggravator listed in NRS 200.033(2) (prior felony conviction

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[1]EJDCR 7.70 states, in pertinent part:

> The following areas of inquiry are not properly within the scope of voir dire examination by counsel:
>
> . . . .
>
> (b) Questions touching on anticipated instructions on the law.
>
> (c) Questions touching on the verdict a juror would return when based upon hypothetical facts.

involving the use or threat of violence). If Witter were allowed to ask such a question, he would be able to read how a potential juror would vote during the penalty phase of the trial. This goes well beyond determining whether a potential juror would be able to apply the law to the facts of the case. We do not read either the Morgan or the Witherspoon decisions to allow for one side to gain such an unfair advantage. Moreover, the record shows that other questions asked during voir dire properly death qualified the jury. Since the question touches on an anticipated instruction of law during the penalty phase, and inquires into the verdict a juror would return based on hypothetical facts, we conclude that the district court properly found that the questions violated EJDCR 7.70. We also conclude that the restrictions of EJDCR 7.70 are consistent with the holdings in Morgan and Witherspoon and that the rule does not offend due process concerns. For these reasons, we conclude that the district court did not abuse its discretion when it precluded Witter's counsel from asking his proposed question of prospective jurors.

2. Newspaper article.

On one of the days during jury voir dire, a Las Vegas newspaper published a letter to the editor authored by Deputy Attorney General Victor H. Schulze, II. The article stated, among other things, that criminals should take responsibility for their crimes. The article did not mention, nor did it allude to, Witter's case. The district court refused to allow Witter to question the jury about the article. Witter now argues that the district court abused its discretion. We disagree.

We have recognized that, in an effort to protect the defendant's right to a fair trial, procedural safeguards should be employed by the trial judge to insure that potentially

prejudicial news accounts of the proceedings do not prejudice the defendant. Crowe v. State, 84 Nev. 358, 441 P.2d 90 (1968). "The trial judge has large discretion in ruling on the issue of possible prejudice resulting from news articles concerning a defendant on trial and each case must turn on its special facts." Id. at 363, 441 P.2d at 93 (citation omitted).

While we recognize that the trial court failed to utilize any procedural protections to insure that the jury was not tainted by Schulze's article, we also recognize that the article did not specifically refer to Witter's case. We believe that the district court would have run a greater risk of contamination if it were to have allowed Witter's counsel to question the jurors about the article. Under the circumstances, we conclude that Witter was not prejudiced by the district court's refusal to allow his counsel to question the jury about Schulze's article.

Exclusion of witnesses.

At the beginning of trial, Witter made a motion to exclude all witnesses pursuant to NRS 50.155(1),[2] the witness exclusion rule, including those who would be testifying at a penalty hearing. The district court invoked the rule as to the guilt phase of the trial, but refused to invoke it with regard to the penalty phase. Witter now argues that the district court abused its discretion. We disagree.

NRS 47.020 states that the rules of evidence under NRS Title 4 are to govern the proceedings of the courts of the State of Nevada, but are not to apply to sentencing proceedings. Witter argues that NRS 47.020 should be disregarded in capital

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[2]NRS 50.155(1) states that "[e]xcept as otherwise provided in subsections 2 and 3, at the request of a party the judge shall order witnesses excluded so they cannot hear the testimony of other witnesses, and he may make the order of his own motion."

cases because of the severity of the punishment. See Griffin v. Illinois, 351 U.S. 12 (1956)(those charged with capital offenses are to be granted special considerations). We conclude that this argument is without merit. Had the legislature intended to exempt death cases from the exclusion of NRS 47.020, we believe it would have expressly provided for such an exemption. Moreover, we conclude that the district court properly found that the witness exclusion rule did not need to be invoked against penalty phase witnesses in this case. "The purpose of sequestration of witnesses is to prevent particular witnesses from shaping their testimony, and to detect falsehood by exposing inconsistencies." Givens v. State, 99 Nev. 50, 55, 657 P.2d 97, 100 (1983)(citations omitted), overruled on other grounds, Talancon v. State, 102 Nev. 294, 721 P.2d 764 (1986). Kathryn Cox was the only witness to testify at both the guilt phase and the penalty phase, and her presence at both proceedings is specifically provided for in NRS 50.155(2)(d). For these reasons, we conclude that the district court did not err when it refused to invoke the witness exclusion rule against penalty-phase witnesses.

Jury instructions.

With regard to his first-degree murder conviction, Witter argues that the instructions given to the jury failed to distinguish adequately the elements of malice and premeditation, and that the district court erred when it refused his proposed jury instruction which attempted to define deliberation.[3]

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[3] Jury Instruction No. 7 stated:

> Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.
>
> Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an

(continued...)

We have previously held that the premeditation instruction challenged here provides the jury with an accurate definition of premeditation and deliberation. See Powell v. State, 108 Nev. 700, 708, 838 P.2d 921, 926 (1992), vacated on other grounds, 511 U.S. 79 (1994). We conclude that this court's reasoning in Powell remains sound. Furthermore, in Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992), cert. denied, 507 U.S. 1009 (1993), this court held that the very same malice jury instruction accurately informed the jury of the distinction between express malice and implied malice. See NRS 200.020. We conclude that the jury instructions actually submitted to the jury were proper, and that the district court did not err when it refused Witter's instruction defining deliberation.

Supreme Court Rule 250.

Part III, section B of SCR 250 states, in relevant part:

> After close of the evidence, the court shall confer with the prosecuting attorney and defense counsel. The conference shall be reported.

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[3](...continued)
abandoned and malignant heart.

Jury Instruction No. 9 stated:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

Witter's proposed instruction stated: "Deliberate means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed cause of action."

> The following matters shall be concluded during the conference after close of the evidence:
>
> 1. Proposed written instructions shall be presented to the court for rulings. The defendant need not be present when the instructions are settled.
>
> 2. The court shall make a final ruling on any issue properly raised as to which a tentative ruling or no ruling was made during presentation of the evidence.

Toward the end of both the guilt and penalty phases of the trial, counsel for both the prosecution and defense met with the district court judge in chambers to discuss jury instructions. After each meeting, when the proceedings were back on the record, the court asked Witter's counsel if he had any objections. Witter's counsel objected to the procedure used by the court, arguing that under SCR 250 the entire discussion should have been on the record. The court found the procedure to be proper. Witter now argues that he was deprived of a fair trial.

We conclude that the procedures followed by the district court were sufficient to guarantee that any legitimate objections Witter may have had about the jury instructions were considered by the district court and were preserved in the record. Accordingly, we conclude that the procedures used by the district court satisfy the provisions of SCR 250.

Penalty phase

Motion for continuance.

On June 28, 1995, the jury returned a verdict of guilty on all counts, and the district court scheduled the penalty hearing to begin on July 10, 1995, with discovery to occur on July 6, 1995. In the course of the penalty hearing, the State introduced evidence of Witter's gang affiliation, and evidence that a shank (knife) was found in his jail cell while he was awaiting trial. At the penalty hearing, Witter made a motion for continuance, arguing that he planned to have an expert testify about gang violence and that he needed more time

to secure such an expert. The district court concluded that Witter had adequate time to prepare for the penalty hearing and, accordingly, denied Witter's motion. Witter now argues that the district court abused its discretion for the following reasons: 1) a shank was found in Witter's jail cell on August 5, 1994, yet the State did not inform him of its intention to use the evidence at the penalty hearing until July 5, 1995; 2) he only had four days from the date of discovery until the date of the penalty hearing in which to secure expert testimony regarding gang violence; and 3) the district court unfairly denied his motion to continue the penalty phase because he was unable to secure expert witness testimony during the guilt phase.

The granting of a motion to continue is within the sound discretion of the trial court. Doleman v. State, 107 Nev. 409, 812 P.2d 1287 (1991). In Rogers v. State, 101 Nev. 457, 705 P.2d 664 (1985), cert. denied, 476 U.S. 1130 (1986), we held that one week's notice of the prosecution's intent to present evidence of prior convictions involving violence was sufficient. In that case, we concluded that the defendant was not prejudiced because he had actual knowledge of the aggravating circumstance and had sufficient time to prepare a challenge. See also Browning v. State, 104 Nev. 269, 757 P.2d 351 (1988)(six-day notice of the State's intent to use an aggravating circumstance found to be sufficient).

In the present case, on June 20, 1995, almost a full year before the penalty hearing, the State notified Witter's counsel that it was investigating an alleged discipline problem (possession of a shank) involving Witter. In addition, Witter's body displays a number of tatoos that are consistent with those worn by members of street gangs in San Jose, California, Witter's hometown. From these facts, we conclude that Witter's counsel had, or should have had, actual notice of Witter's possession of a shank while incarcerated, and his involvement with street gangs. We also conclude that even if Witter were

able to secure expert testimony regarding gang violence in prisons, such testimony would have done little to mitigate his involvement. We therefore conclude that Witter was not prejudiced by the district court's decision to allow only four days between discovery and the penalty hearing. Accordingly, we conclude that the district court did not abuse its discretion when it refused to grant Witter's motion for continuance.

Penalty phase evidence.

Witter argues that the district court erred in admitting evidence of his possession of a shank, since his possession was an unadjudicated offense and he was not allowed representation at the disciplinary hearing which he contends was a violation of the Sixth Amendment to the United States Constitution.

Under NRS 175.552,[1] the trial court is given broad discretion on questions concerning the admissibility of evidence at a penalty hearing. Guy, 108 Nev. 770, 839 P.2d 578. In Robins v. State, 106 Nev. 611, 798 P.2d 558 (1990), cert. denied, 499 U.S. 970 (1991), this court held that evidence of uncharged crimes is admissible at a penalty hearing once any aggravating circumstance has been proven beyond a reasonable doubt.

In this case, the State proved beyond a reasonable doubt that Witter had a previous felony conviction involving violence to the person of another, that Witter murdered James in

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[1]NRS 175.552(3) states, in part:

> 3. In the [penalty] hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible. . . . No evidence which was secured in violation of the Constitution of the United States or the constitution of the State of Nevada may be introduced. . . .

the commission of or an attempt to commit a burglary, and that Witter murdered James while engaged in the commission of or attempt to commit a sexual assault. We therefore conclude that the district court properly admitted evidence of his possession of a shank while he was incarcerated.

Furthermore, we conclude that Witter did not have a Sixth Amendment right to counsel at his disciplinary hearing. While a prisoner may have a Sixth Amendment right to counsel at a disciplinary hearing when the charge involves conduct that is punishable under state law, see Wolff v. McDonnell, 418 U.S. 539 (1974); Gagnon v. Scarpelli, 411 U.S. 778 (1973), Witter's possession of the shank is not a punishable offense under the laws of Nevada.

Witter also contends that the district court erred in admitting evidence showing that he is a member of a street gang. According to Witter, the evidence lacked any probative value and was offered only to inflame the passions of the jury.

NRS 48.035(1) states that "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, or confusion of the issues or of misleading the jury." While this court has cautioned that the introduction of gang membership during a penalty hearing may be unfairly prejudicial, see Young v. State, 103 Nev. 233, 737 P.2d 512 (1987); Lay v. State, 110 Nev. 1189, 886 P.2d 448 (1994); see also Dawson v. Delaware, 503 U.S. 159 (1992), this court has held that "[f]rom Dawson, we derive the following rule: Evidence of a constitutionally protected activity is admissible only if it is used for something more than general character evidence." Flanagan v. State, 109 Nev. 50, 53, 846 P.2d 1053, 1056 (1993). In Dawson, the United States Supreme Court reasoned that "[a] defendant's membership in an organization that endorses the killing of any identifiable group, for example, might be relevant to a jury's

inquiry into whether the defendant will be dangerous in the future." 503 U.S. at 166.

In this case, the State presented testimony from the arresting officers indicating that Witter told them that he could heighten his reputation if he were to kill police officers, and from a second officer who stated that from the clothing Witter was wearing and from the tatoos on his arm, he believed that Witter was a member of a violent California gang known as the "Nortenos." We conclude that this evidence tends to show that Witter posed a threat of future violence to the community. Moreover, we conclude that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, or confusion of the issues or of misleading the jury. Accordingly, we conclude that the district court properly admitted evidence of Witter's affiliation with a street gang.

Motion for mistrial.

At the penalty hearing, Kathryn Cox read a prepared statement to the jury in which she demanded that the jury show no mercy to the defendant, and in which she informed the jury that she intended to do everything in her power to see that Witter received no mercy. Witter made a motion for mistrial, arguing that Kathryn's statements went beyond the scope of what is acceptable as a victim-impact statement since the statements unduly inflamed the passions of the jury and that they amounted to a plea for the return of a death penalty sentence. The district court denied Witter's motion. Witter now argues that he was deprived of a fair trial and that the district court abused its discretion when it denied his motion for mistrial.

In Payne v. Tennessee, 501 U.S. 808, 827 (1991), the Supreme Court overruled prior precedent and held that if a State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment

erects no per se bar. In Homick v. State, 108 Nev. 127, 825 P.2d 600 (1992), we applauded the decision reached in Payne and concluded that the decision comports with the principles of the Nevada Constitution. NRS 175.552(3) states, in part, that "[i]n the [penalty] hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible." However, while a victim may address the impact that the crime has had on the victim and the victim's family, a victim can only express an opinion regarding the defendant's sentence in non capital cases. Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993).

We conclude that in asking the jury to "show no mercy," Kathryn was not expressing her opinion as to what sentence Witter should receive. Rather, we believe that Kathryn was only asking that the jury return the most severe verdict that it deemed appropriate under the facts and circumstances of this case. Kathryn's statements also emphasize the devastating effect this crime has had on her and her family's life. Such sentiments are admissible victim-impact statements NRS 175.552(3). We therefore conclude that Witter was not deprived of a fair trial and that the district court properly denied Witter's motion for mistrial.

Witter's motion to argue last.

Witter contends that NRS 200.030(4)[5] shifts the burden of proof to the defendant to prove that mitigating circumstances outweigh aggravating circumstances. Witter cites Griffin v. Illinois, 351 U.S. 12 (1956), and argues that the district court

[5]NRS 200.030(4) states, in part, that "[a] person convicted of murder of the first degree is guilty of a category A felony and shall be punished: (a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances."

should have allowed him to argue last during closing arguments. We disagree.

First, we read NRS 200.030(4) as stating that the death penalty is an available punishment only if the state can prove beyond a reasonable doubt at least one aggravating circumstance exists, and that the aggravating circumstance or circumstances outweigh the mitigating evidence offered by the defendant. The statute does not shift the burden of proof to the defendant. Second, unless the case is submitted to the jury by one or both sides without argument, NRS 175.141[6] mandates that the district attorney, or other counsel for the state, open and conclude argument. Under NRS 175.141, the district court does not have the authority to grant Witter's request. Moreover, such a concession would unfairly disadvantage the prosecution. Accordingly, we conclude that the district court did not err when it denied Witter's request to argue last during the penalty phase.

Prosecutorial misconduct.

The trial court has a duty to ensure that an accused receives a fair trial, and to this end the court must exercise its discretionary power to control obvious prosecutorial misconduct sua sponte. Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985), cert. denied, 486 U.S. 1036 (1988). In reviewing a prosecutor's comments, the relevant inquiry is whether the comments were so unfair that they deprived the defendant of due process. Darden v. Wainwright, 477 U.S. 168 (1986). However,

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[6]NRS 175.141 states, in pertinent part:

> The jury having been impaneled and sworn, the trial shall proceed in the following order:
>
> . . . .
>
> 5. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the district attorney, or other counsel for the state, must open and must conclude the argument.

comments that are harmless beyond a reasonable doubt do not warrant reversal. Witherow v. State, 104 Nev. 721, 765 P.2d 1153 (1988).

1. Community standards.

During the penalty phase closing argument, the prosecutor commented:

> When we talk about the death penalty, there are two schools of thought as to why society might have it. One school of thought is that of deterrence. Deterrence is achieved through severity of punishment. It is important for the image of the criminal justice system to have the death penalty. It is important to send a message to people in the community and to would[-]be murderers that there are lines that you do not cross in Nevada; that there is some conduct that simply will not be tolerated and will be met with a very, very severe penalty.
>
> The other school of thought is one of punishment. It is an expression of society's sense of moral outrage. Society has a right to feel that outrage when confronted with these crimes and to respond to it. It flows from the concept that consequences follow actions; that there are penalties for crimes; that punishment should fit the crime; the worse the act, the worse the penalty.

The prosecutor also commented that anything less than the death penalty would be disrespectful to the dead and irresponsible to the living. Witter argues that these statements amount to an impermissible comment on community standards. We disagree.

In Collier, we held that a prosecutor's statement that if the jury was not angry with the defendant then "we are not a moral community," improperly inflamed the jury and amounted to prosecutorial misconduct. 101 Nev. at 479, 705 P.2d at 1129. Nevertheless, the prosecutor may go beyond the evidence to discuss general theories of penology such as the merits of punishment, deterrence and the death penalty. Id. at 478, 705 P.2d at 1129.

We conclude that the comments cited above were an attempt to educate the jury about some of the theories

supporting our criminal justice system, and why the death penalty is an available option. Since these are proper areas for prosecutorial comment, we conclude that the prosecutor did not engage in misconduct.

2. Duty to society at large.

During the penalty phase closing argument, the prosecutor commented:

> What message does this punishment send today? Will we tell would[-]be murders, will we tell this community, that you can kill a man, thrust a knife into his skull 16 times, one time through his skull, 16 times into his body, that you can perpetrate unspeakable, despicable deeds upon his wife in her own car and that you, the husband, can drive upon that crime scene and witness your wife bleeding to death, struggling for your life, what message does it send to say the man that perpetrates those crimes can live his life in prison, can write his family, see his family, speak to his family?

Witter argues that these statements amount to an improper plea to a duty to society at large. See Haberstroh v. State, 105 Nev. 739, 782 P.2d 1343 (1989)(prosecutor committed misconduct by referring to the jury as "the conscience of the community"); Collier, 101 Nev. 473, 705 P.2d 1126; Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988), vacated on other grounds sub nom., Flanagan v. Nevada, 503 U.S. 931 (1992) (prosecutor's remark, "[i]f we don't punish, then society is going to laugh at us" found to be improper). We disagree.

We conclude that these statements properly focus on what would be an appropriate punishment under the facts and circumstances of this case, as well as what would be necessary to deter others from committing such a brutal act. These are entirely proper areas for comment. Accordingly, we conclude that these statements did not constitute an improper plea to a duty to society at large.

3. Reference to matters outside the record.

The following exchange took place during the prosecution's closing argument during the penalty phase:

> MR. OWENS: And it's very subtle, and you may not have noticed it, but in any penalty hearing what the defense and every witness that the defense calls wants you to do is forget about --
>
> MR. KOHN: I object, Your Honor.
>
> THE COURT: Overruled.
>
> MR. OWENS: What the defense has done in this case, ladies and gentlemen, is to try to make you forget about Kathryn Cox and James Cox. The whole case gets turned upside down and they twist things around until they can portray the vic -- the defendant, William Witter, as if he is the victim.

Witter argues that in stating "in any penalty hearing what the defense and every witness that the defense calls wants you [the jury] to do is to forget about [the victims]," the prosecution improperly referred to matters outside the record on appeal. See State v. Kassabian, 69 Nev. 146, 243 P.2d 264 (1952). Witter also argues that these statements improperly disparage a legitimate defense tactic. See Williams v. State, 103 Nev. 106, 734 P.2d 700 (1987); Pickworth v. State, 95 Nev. 547, 598 P.2d 626 (1979).

We conclude that both of Witter's arguments lack merit. After the objection, the prosecutor modified his statement to conform to the facts of this case. As such, the statement did not refer to matters outside of the record. Moreover, the statement did not disparage a legitimate defense tactic. Rather, the statement merely attempted to keep the jury's focus on the actual victims of Witter's crime. We therefore conclude that the prosecutor's statements were proper.

4. Comments about possible future crimes.

The prosecutor made the following comments during the penalty phase closing argument:

Don't let him go back where he can murder again, and perhaps this time a corrections officer, because that is exactly what he has threatened to do. He told the police officers that "[t]ake these handcuffs off of me so I can kill a police officer. That's all I need to do to raise my reputation higher."

Don't give him the chance. Don't let it happen because it wouldn't be fair; it wouldn't be justice.

. . . .

But we are going to place William Witter -- at least if we do what the defense wants you to do, we are going to place him in prison, where he can heighten his reputation and perpetrate unspeakable crimes on perhaps unsuspecting guards.

And certainly guards are trained individuals; they are trained to protect themselves, but they don't have eyes in the back of their heads, and they don't know when a William Witter will wrap a shank that he made in a towel and become angry and thrust that into the life of a corrections officer and bring about another tragedy.

. . . .

History repeats itself.

What unsuspecting prisoner might William Witter's life cross and what might happen to that prisoner? Oh, certainly, that's just a prisoner and he's a wrongdoer and maybe he gets what he deserves.

. . . .

Interestingly enough, the defense didn't ask their witness perhaps the most important question for you people:

Doctor, let's talk about the future dangerousness of this man. Can anybody in your profession predict future dangerousness?

. . . .

So I took the doctor through a history of violence and asked: Does history repeat itself? Are the acts of the defendant indicators of his future dangerousness?

Because you people need to know what kind of danger rests in the future of lives of other individuals that come in contact with Dr. Etcoff.

Now that's a question that they didn't ask. It's a question I wanted you to know; and the answer was clear: History repeats itself.

. . . .

Knowing the future dangerousness, it would be disrespectful to the dead and

> irresponsible to the living to let this man have his life of prison, to let him create another personal jungle for himself like the jungle that he created in the parking lot on November 14, 1993.

In Collier, we held that a prosecutor's remarks which sought to promote a conclusion that a defendant's rehabilitation was improbable, that he might well kill again while in prison, and that he should therefore be put to death were highly inappropriate. 101 Nev. at 478, 705 P.2d at 1129. In Riley v. State, 107 Nev. 205, 219, 808 P.2d 551, 560 (1991), cert. denied, ___ U.S. ___ 115 S. Ct. 1431 (1995), we modified our holding in Collier to allow a prosecutor to ask a jury to draw an inference of future dangerousness when there is evidence of a defendant's past conduct that would support a reasonable inference that even incarceration would not deter the defendant from endangering others' lives. Finally, in Redmen v. State, 108 Nev. 227, 828 P.2d 395 (1992), cert. denied, 506 U.S. 880 (1992), overruled on other grounds, Alford v. State, 111 Nev. 1409, 906 P.2d 714 (1995), we expanded our holding in Riley to allow prosecutors to argue the future dangerousness of a defendant even when there is no evidence of violence independent of the murder in question.

Witter contends that the prosecutor's statements were improper under Collier. We disagree. In accordance with our holding in Redmen, the prosecutor was allowed to argue that Witter posed a threat of future dangerousness based solely on his murder of James. Moreover, in Haberstroh, 105 Nev. 739, 782 P.2d 1343, we held that a defendant's past conduct in jail justifies a prosecutor's comment that defendant could pose a continuing threat to others. In this case, the record clearly shows that a shank was found in Witter's cell while he was awaiting trial. We therefore conclude that the prosecutor's statements emphasized the potential future threat Witter posed to society. As such, we conclude that those statements were proper.

5. "Golden Rule" plea.

During the penalty phase closing argument, the prosecutor commented:

> Do I make these statements to excite you or to remind you of the violence that encompasses the defendant? For a moment, we recreate that crime because this punishment has to fit that crime.
>
> But how aggravating is it to sit there and this man get in your car, the vehicle that you own, and begin to perpetrate these crimes on you?

It is improper for a prosecutor to make a plea to return a death penalty verdict on behalf of victims. Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990). It is equally unacceptable for a prosecutor to ask the jury to stand in the shoes of the victim (the Golden Rule argument). Id.; McGuire v. State, 100 Nev. 153, 677 P.2d 1060 (1984). Witter argues that the language cited above, along with the prosecutor's comment that anything less than the death penalty would be disrespectful to the dead and irresponsible to the living, amounts to an improper "Golden Rule" plea as well as a plea to the jury to return a death penalty verdict on behalf of the victim in this case. We disagree.

In commenting that anything less than the death sentence would be disrespectful to the dead, we conclude that the prosecutor was merely pointing out to the jury that our society values human life, and in order to respect the value of human life, one who takes a human life in the manner that Witter did should have to pay for his crime with his own life. Furthermore, the prosecutor's statements painted a vivid picture for the jury, and any reference to "you" appears to be merely rhetorical. For these reasons, we conclude that the prosecutor's statements were proper.

Preventing lawful arrest statutory aggravator.

The State included the prevention of lawful arrest statutory aggravator listed in NRS 200.033(5)[7] as one of the aggravating circumstances in its notice of intent to seek the death penalty. Witter made a motion to strike that aggravator, arguing that the evidence adduced at trial shows that he killed James in an attempt to continue his sexual assault on Kathryn, not to avoid arrest. The district court denied Witter's motion. Witter now contends that the district court abused its discretion.

In Cavanaugh v. State, 102 Nev. 478, 729 P.2d 481 (1986), this court held that for purposes of NRS 200.033(5), the arrest does not need to be imminent, and the victim does not have to be involved in some way with effectuating the arrest. More recently, in Canape v. State, 109 Nev. 864, 859 P.2d 1023 (1993), cert. denied, ___ U.S. ___, 115 S. Ct. 176 (1994), the evidence adduced at trial showed that Canape robbed his victim then walked him away from the freeway before shooting him in the back. We held that based on the evidence of the case, a jury could reasonably infer that the murder was committed to avoid lawful arrest. Id. at 874-75, 859 P.2d at 1030.

In this case, Witter attacked James only after James told Witter that Kathryn was his wife and ordered Witter to exit the vehicle. Once Witter killed James, Witter grabbed Kathryn and forced her back into the vehicle. Rather than fleeing, or killing Kathryn to make sure no one could identify him, Witter hid James' body under his cab and resumed his sexual assault on Kathryn. The natural inference drawn from these facts is that Witter killed James so that he could continue his assault on Kathryn, not to avoid arrest. Clearly, the prosecution has not met its burden of proving this aggravator beyond a reasonable

---

[7]NRS 200.033(5) states that "[t]he murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody."

doubt. We therefore conclude that the jury could not have reasonably found that the murder was committed to avoid lawful arrest and that the district court erred when it denied Witter's motion to strike the aggravator.

In McKenna v. McDaniel, 65 F.3d 1483 (9th Cir. 1995), the Ninth Circuit Court of Appeals was faced with a situation similar to the case at bar in which one of the aggravating circumstances used to sentence McKenna to death was found invalid. In commenting on Nevada's death penalty statute, the court stated:

> Even in a weighing state, however, invalidation of one of several aggravating factors may make no difference if there were no mitigating circumstances against which the state court could balance the remaining aggravating factors. See Neuschafer v. Whitley, 816 F.2d 1390, 1393 (9th Cir. 1987). But where some mitigating factors exist, there must either be a new sentencing hearing before a jury or the state appellate court must reweigh or conduct harmless error review in order to give the defendant the individualized considerations required by the Constitution. Clemons [v. Mississippi], 494 U.S. [738] at 746, 752, 110 S.Ct. [1441] at 1447, 1450.

Id. at 1489-90. Even though we conclude that the prevention of lawful arrest aggravator should have been stricken, there remain four aggravators that the State has proven beyond a reasonable doubt. In mitigation, Witter offered the testimony of several members of his family and the testimony of a clinical psychologist, all of whom testified that Witter grew up in a very abusive and dysfunctional family. We conclude that the remaining four aggravators clearly outweigh the mitigating evidence presented by Witter. Moreover, for the same reason, we conclude that the district court's failure to strike the prevention of lawful arrest aggravator amounts to harmless error. See Chapman v. California, 386 U.S. 18 (1966). We therefore conclude that even though the district court erred in allowing the prevention of lawful arrest aggravator to be considered by the jury, Witter's sentence of death is still proper.

Mandatory statutory review.

Finally, we conclude, pursuant to NRS 177.055, that (1) the evidence fully supports the finding of three valid aggravating circumstances, (2) the sentence of death was not imposed under the influence of passion, prejudice or any arbitrary factor, and (3) the sentence is not excessive, considering both the crime and the defendant.

CONCLUSION

For the reasons stated above, we conclude that except for Witter's challenge to the prevention of lawful arrest statutory aggravator, all of Witter's arguments are without merit. Accordingly, we affirm Witter's judgment of conviction. With regard to the prevention of lawful arrest statutory aggravator, we conclude that the State has failed to prove the aggravator beyond a reasonable doubt. Nevertheless, because we conclude that the remaining four aggravators clearly outweigh the mitigating evidence presented by Witter, we affirm Witter's sentence of death.

Steffen, C.J.

Young, J.

Springer, J.

Shearing, J.

Rose, J.

ORIGINAL

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FILED
Aug 11 3 19 PM '98
Shirley Lawrence
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

WILLIAM LESTER WITTER, Petitioner, vs. E.K. McDANIEL, WARDEN OF ELY STATE PRISON, Respondent.	CASE NO. C 117513 DEPT. NO. VI DOCKET NO. B

SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

DATE: N/A
TIME: N/A

COMES NOW, Petitioner WILLIAM L. WITTER, by and through his attorney DAVID M. SCHIECK, ESQ., and for his Supplemental Points and Authorities in support of Petition for Writ of Habeas Corpus (Post Conviction) states as follows:

STATEMENT OF THE CASE

WILLIAM LESTER WITTER (hereinafter referred to as WITTER) was charged in an Information filed on January 21, 1994 with Murder with use of a Deadly Weapon; Attempt Murder with use of a Deadly Weapon; Attempt Sexual Assault with use of a Deadly Weapon; and Burglary alleging that on or about the 14th day of November, 1993 WITTER willfully and with malice aforethought killed James Cox during the commission of burglary and attempt

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sexual assault of Kathryn Cox. The Information alleged this incident took place on the 14th day of November, 1993 within the County of Clark, State of Nevada.

The Preliminary Hearing was held on January 7, 1994 and WITTER was bound over on the charges of Murder With Use of a Deadly Weapon, Attempt Murder with Use of a Deadly Weapon, Attempt Sexual Assault and Burglary.

WITTER was initially arraigned in the Eighth Judicial District Court, Department IX on January 25, 1994. The arraignment was before the Honorable Stephen Huffaker. At the arraignment, WITTER entered pleas of not guilty to all the counts of the Information. WITTER waived his right to a trial within sixty days and a trial date was set. Also on January 25, 1994 the State filed its Notice of Intent to Seek the Death Penalty.

The trial lasted 8 days and the jury returned a verdict of Guilty on all counts. The penalty hearing lasted 4 days and the jury returned a verdict of death by lethal injection. The Judgment of Conviction was entered on August 4, 1995. In addition the Court imposed a twenty-year sentence for attempted murder (plus a twenty-year sentence enhancement for use of a deadly weapon), a twenty-year sentence for attempted sexual assault (plus a twenty-year sentence enhancement for use of a deadly weapon), and a ten-year sentence for burglary. All sentences were ordered to run consecutively. WITTER pursued an appeal and the Public Defender's Office was appointed. The Nevada Supreme Court issued its Opinion on July 22, 1996

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affirming the conviction and sentence. Rehearing was denied on December 13, 1996. WITTER'S Petition for Writ of Certiorari was denied by the United States Supreme Court on May 12, 1997.

On September 18, 1997 David M. Schieck, Esq. was appointed as counsel for WITTER on his post conviction relief proceedings and the Petition for Writ of Habeas Corpus (Post Conviction) was filed October 27, 1997.

ISSUES RAISED ON DIRECT APPEAL

On direct appeal counsel for WITTER raised the following issues: (the ruling of the Supreme Court with regard to each issue is listed in parenthesis after each issue)

1. The trial court committed prejudicial error by not allowing jury voir dire questioning concerning the potential impact of prior violent felony conviction evidence. *("Since the question touches on an anticipated instruction of law during the penalty phase, and inquires into the verdict a juror would return based on hypothetical facts, we conclude that the district court properly found that the question violated EJDCR 7.70.")*

2. The trial court committed prejudicial error by refusing to question prospective jurors concerning exposure to a prejudicial newspaper article published during jury selection. *("We believe that the district court would have run a greater risk of contamination if it were to have allowed Witter's counsel to question the jurors about the article. Under the circumstances, we conclude that Witter was not prejudiced by the district court's refusal to allow his counsel*

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to question the jury about Schulze's article.")

3. The trial court committed prejudicial error by failing to give jury instructions which adequately distinguished the elements of malice aforethought and premeditation/deliberation. *("We conclude that the jury instructions actually submitted to the jury were proper, and that the district court did not err when it refused Witter's instruction defining deliberation.")*

4. Prosecutorial misconduct in the penalty phase closing arguments deprived defendant of a fair trial:

a. Comments about community standards (*"We conclude that the comments cited above were an attempt to educate the jury about some of the theories supporting our criminal justice system, and why the death penalty is an available option. Since these are proper areas for prosecutorial comment, we conclude that the prosecutor did not engage in misconduct."*);

b. Comments professing a duty to society at large (*"We conclude that these statements properly focus on what would be an appropriate punishment under the facts and circumstances of this case, as well as what would be necessary to deter others from committing such a brutal act. These are entirely proper areas for comment."*);

c. Arguing matters outside the record (*"...the statement merely attempted to keep the jury's focus on the actual victims of Witter's crime. We therefore conclude that the prosecutor's statements were proper."*);

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d. Comments on possible future crimes (*We therefore conclude that the prosecutor's statements emphasized the potential future threat Witter posed to society. As such, we conclude that these statements were proper.*");

e. Plea for death verdict on behalf of victims and for the jury to place themselves in victims's position ("*...we conclude that the prosecutor was merely pointing out to the jury that our society values a human life, one who takes a human life in the manner that Witter did should have to pay for his crime with his own life. Furthermore, the prosecutor's statements painted a vivid picture for the jury, and any reference to `you' appears to be merely rhetorical. For these reasons, we conclude that the prosecutor's statements were proper.*").

5. The trial court committed prejudicial error in denying Defendant's motion for mistrial based on the victim's penalty hearing plea to the jury to "show no mercy" to defendant. (*'We conclude that in asking the jury to `show no mercy,' Kathryn was not expressing her opinion as to what sentence Witter should receive....We therefore conclude that WITTER was not deprived of a fair trial and that the district court properly denied Witter's motion for mistrial.*")

6. The trial court committed prejudicial error in denying Defendant's motion for continuance to adequately prepare for the penalty hearing.(*'From these facts, we conclude that Witter's counsel had, or should have had, actual notice of WITTER'S possession of a shank while incarcerated, and his*

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involvement with street gangs. We also conclude that even if Witter was able to secure expert testimony regarding gang violence in prisons, such testimony would have done little to mitigate his involvement. We therefore conclude that Witter was not prejudiced ...")

7. The trial court committed prejudicial error by refusing to exclude witnesses who would be called at the penalty phase of the trial. ("*Moreover, we conclude the district court properly found that the witness exclusion rule did not need to be invoked against penalty hearing witnesses in this case.*")

8. The trial court committed reversible error when it denied Defendant's motion to argue last during penalty hearing. ("*Under NRS 175.141, the district court does not have authority to grant Witter's request. Moreover, such a concession would unfairly disadvantage the prosecution. Accordingly, we conclude that the district court did not err when it denied Witter's request to argue last during the penalty phase.*")

9. The trial court committed prejudicial error by failing to follow the mandate of Supreme Court Rule 250 governing the settling of jury instructions. ("*We conclude that the procedures followed by the district court were sufficient to guarantee that any legitimate objections Witter may have had about the jury instructions were considered by the district court and were preserved in the record. Accordingly, we conclude that the procedures used by the district court satisfy the provisions of SCR 250.*")

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10. The trial court committed prejudicial error in denying Defendant's motion to strike the "Preventing Lawful Arrest" aggravating circumstance. ("*Clearly, the prosecution has not met its burden of proving this aggravator beyond a reasonable doubt. We therefore conclude that the jury could not have reasonably found that the murder was committed to avoid lawful arrest...*")

11. The trial court committed prejudicial error by allowing the introduction of penalty phase evidence that defendant possessed a weapon while in jail. ("*We therefore conclude that the district court properly admitted evidence of his possession of a shank while he was incarcerated.*")

12. The trial court committed prejudicial error by admitting penalty phase allegations that defendant was affiliated with a street gang. ("*We conclude that this evidence tends to show that Witter posed a threat of future violence to the community. Moreover, we conclude that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, or confusion of the issues or of misleading the jury.*")

STATEMENT OF FACTS

TRIAL PHASE

The Statement of Facts set forth herein is taken from the Opinion issued by this Court in Witter v. State, 112 Nev.Ad.Op. 119 (1996):

> "On November 14, 1993, Kathryn Cox (Kathryn) was working as a retail clerk for the Park Avenue gift Shop located in the Luxor Hotel in Las Vegas, Nevada. James Cox (James), Kathryn's husband, drove a taxicab

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in the Las Vegas area. At about 10:25 p.m., Kathryn called James and informed him that she was having trouble with her car and needed assistance. James told her that he would be over to pick her up in about twenty-five to thirty minutes. Kathryn returned to her car, got in, locked her door, and began to read a book.

About five to ten minutes later, the passenger side door opened, and William Witter got into the car. Witter demanded that Kathryn drive him out of the lot. When Kathryn informed him that she could not, Witter stabbed her just above her left breast. Witter pulled Kathryn closer to him and told her that he was going to kill her. After stabbing Kathryn several more times, Witter became quiet, unzipped his pants and ordered Kathryn to perform oral sex. Kathryn attempted to comply with his demands, but because she had a punctured lung, she kept passing out. Witter pulled Kathryn into a sitting position and told her, "You're probably already dead." Kathryn managed to open her door and attempted to run away, but was only able to get about ten to fifteen feet before Witter caught her. Witter forced Kathryn back into the car and forced her to kiss him. He then used his knife to cut away Kathryn's pants and began to fondle her vaginal area with his finger.

Kathryn observed her husband's cab pull up next to the driver's side of her car. Witter, not knowing that James was Kathryn's husband, held Kathryn close and stated, "Don't say anything. I'm going to tell him that you're having a bad cocaine trip." James opened the driver's side door of Kathryn's car and told Witter to get out. Witter got out of the car, walked over to James, and stabbed him numerous times. James fell backwards and into Kathryn, who had gotten out of the car, knocking her to the ground. Kathryn got up and ran for a bus stop. Once again, Witter caught Kathryn and carried her back to her car. After pulling the rest of Kathryn's clothes off, Witter attempted to stuff James' body underneath James' cab. Kathryn then heard hotel security approaching her vehicle.

A security officer in charge of patrolling the Excalibur Hotel's employee parking lot approached Kathryn's car and confronted Witter. After a short standoff, the security officer's backup arrived, and Witter was subdued. Paramedics arrived a short time later, and Kathryn was taken to the hospital where she eventually recovered from her injuries. James was already dead when the paramedics arrived."

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PENALTY PHASE

Evidence was received of a January 11, 1986 incident in San Jose, California that WITTER had gone to the home of a former girlfriend, Gina Martin, and stabbed David Rumsey, her date for that evening. Property damage had also been done, including tire slashing, breaking flower pots and pulling down drapes (5 ROA 1630-1633). When WITTER was arrested, he yelled "Sure, I stabbed him. I should have brought my gun." (5 ROA 1636) There was also evidence that at the time WITTER confronted Martin and Rumsey in the residence carport, WITTER stated, "Come on, you white punk. I'll kill you. What are you doing with my old lady?" (5 ROA 1638) David Rumsey described the incident as follows:

> "I heard some glass breaking out in the carport, so I went outside to find out what it was; and there was a guy out there yelling, screaming, breaking glass out of the car. He was screaming loudly...Well, he's kind of acting like he wanted to fight, and that's when I told him I didn't want to fight him; told him what my name was and stuck my hand out to shake his hand, and he struck me in the gut with a knife." (5 ROA 1645-1646)

Rumsey identified Defendant as the man who had stabbed him (5 ROA 1650 and 1653). The arresting officer noted that at the time he took Defendant into custody there was some odor of alcohol about his person, as well as slurred speech and glassy eyes (5 ROA 1661). Other testimony established that Defendant had a blood alcohol level of .21 percent (5 ROA 1676).

Linda Rose testified that she supervised Defendant on a California parole for assault with a deadly weapon arising out of the above-described incident (5 ROA 1663-1666). WITTER

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sustained parole suspensions or additional incarceration time for incidents of absconding, in-custody misconduct, reckless driving, use of alcohol and use of methamphetamine (5 ROA 1670-1674). An "institutional summary" indicated WITTER had sustained arrests for arson, resisting arrest, fighting, drunk driving, burglary, vandalism and drugs, as well as arrest at age fifteen for rape. The summary contained the comment that Witter is an alcohol abuser. (5 ROA 1679-1680) The parole officer described an incident where she was alone in her office with WITTER and had determined that he needed to be taken into custody. The office policy was that officers were never to arrest anybody alone, but were to always have backup. Ms. Rose explained the situation to WITTER, telling him that he had the option of assisting in his own arrest or walking out the door. WITTER agreed to the arrest and was cooperative throughout the handcuffing and search procedure (5 ROA 1682-1683).

Officer James Ford of the San Jose Police Department described a July 20, 1993 incident in which he removed from WITTER'S possession a dagger having sharpened edges on both sides of a five to six inch blade (5 ROA 1689-1695). WITTER was placed under arrest for possession of an illegal weapon and vandalism arising out of throwing rocks through the windows of an ex-girlfriend's apartment (5 ROA 1696-1698). On this occasion as well, WITTER had a strong odor of alcohol on his breath and bloodshot watering eyes (5 ROA 1699).

Officer Ford told the jury that he was an original member of the Violent Crime Enforcement Team, a unit organized to

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suppress growing gang violence in San Jose (5 ROA 1700). Ford explained that the major Hispanic rival street gangs in California are the Nortenos and Sorenos, located in northern and southern California, respectively (5 ROA 1701). Red is primarily worn by Nortenos and blue by Sorenos (5 ROA 1704). Based on photographs of tattoos, Ford concluded that WITTER was possibly a gang member (5 ROA 1708; 1712). The officer admitted that the arrest on July 20, 1993 had nothing to do with gang activity (5 ROA 1713).

Officer Timothy Jackson of the San Jose Police Department testified that he responded to an October 9, 1993 domestic violence call. Carmen Kedrick claimed that Defendant had beat her up, yet Officer Jackson did not notice any visible injury on her at all. There was property damage to both the residence and a vehicle (5 ROA 1734-1739). Regarding WITTER'S alleged comment in the case at bar that "All I need to do now is to kill an officer and my reputation will be higher.", the witness said that such a comment would be indicative of a gang member (5 ROA 1744). Jackson further testified that WITTER'S tattoos signified he was a gang member (5 ROA 1746).

Thomas Piptone, a corrections officer at the Clark County Detention Center testified that on August 4, 1994 he conducted a search of WITTER'S cell. In a stack of papers, the officer found a sharpened clip from a clipboard (5 ROA 1751). On cross-examination, Piptone acknowledged that WITTER denied that the item was his; and denied any involvement with it (9 ROA 1759).

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Ruth Fabela, Defendant's aunt, testified that her sister (WITTER'S mother) had a serious alcohol problem, having been raised by an alcoholic stepfather, and having drank since age fourteen or fifteen. The alcoholism progressed into drug abuse (6 ROA 1895).

WITTER'S sister, Tina Whitesell, described life with their mother as "awful". "She didn't care about anybody but herself and her drugs and alcohol and men...Lots and lots of parties, lots of people at our house; spoons, cotton, syringes, pills." (6 ROA 1909) As a child, she remembered seeing her mother in bed with other men. She recalled one of these men hitting WITTER with a cane (6 ROA 1911-1912). She remembered incidents of her mother chasing WITTER'S father, Louis Witter, with a knife; and of him hitting his wife while she was pregnant. The sister also explained that WITTER'S father wasn't around much because he was in state prison (6 ROA 1910-1911). When WITTER was nine, he and Tina went to live with their grandmother, who "spoiled William and pampered him and protected him from everything that he did that was wrong." (6 ROA 1913). Both grandparents drank heavily. She added that as they were growing up, WITTER got hit a lot (6 ROA 1919). Testimony also came out that the grandfather used to try to fondle Tina Whitesell, something she had never talked about before (6 ROA 1938).

Defendant's father, Louis Witter, told the jury that he had three felony convictions for robbery, firearms possession by an ex-felon, and rape. He also acknowledged having problems

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with alcohol, heroin, methamphetamine, barbiturates and "whatever I could get my hands on." (6 ROA 1943) He described WITTER'S mother as an alcoholic and heroin addict. (6 ROA 1945) Regarding the couple's relationship, Mr. Witter explained:

> "Well, we would drink to the point of excess, which was usually most of the time, and she used to have this habit or bringing up things that I had done in the past, to the point of I couldn't stand it anymore and I would start hitting her, kicking her...She was pretty tough. She would try to fight me back with her fists, but a lot of times, she'd run to the kitchen and grab a butcher knife and try to attack me." (6 ROA 1946)

The children, including WITTER, witnessed the fights. The witness admitted that when WITTER was older, the two of them would shoot up methamphetamine together. (6 ROA 1953)

Another of WITTER'S sisters testified that their grandfather was very strict with William, and would discipline him by punching him in the face. This sister had also been sexually abused by the grandfather. She also related that she got quite violent when she drank (6 ROA 1993 and 1994); adding that WITTER, also got violent when he drank (6 ROA 1996).

Psychologist, Dr. Louis Etcoff testified that he conducted a three hour interview with WITTER in August of 1994, after having reviewed arrest reports, discovery, voluntary statements and the preliminary hearing transcript. Subsequently, neuropsychological tests, an IQ test and two objective personality tests were administered to WITTER (6 ROA 2036). The resultant diagnoses were: attention deficit hyperactivity disorder, marijuana, alcohol and amphetamine abuse, and

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antisocial personality disorder (6 ROA 2042-2043). "He [WITTER] grew up in one of the most dysfunctional families that I can remember studying...For all intents and purposes, he would have been better off without parents than having the parents that he had." (6 ROA 2044 and 2045) In later testimony, the witness described WITTER'S background as "the quintessential environment that would produce someone who kills." (6 ROA 2060)

Dr. Etcoff told the jury that alcohol has a disinhibiting effect, lessening people's control of their behavior. "[A]lcohol disinhibits in the brain a person's ability to stop whatever is inside from coming out." (6 ROA 2052) Etcoff summarized that rage generated in WITTER as a result of having been beaten and of seeing his grandfather beat his grandmother. These factors, made WITTER a very violent person, especially under the influence of amphetamine-like substances and particularly alcohol. (6 ROA 2063)

WITTER also told Dr. Etcoff that his bout of drinking on the night of the incident was brought about by his girlfriend informing him that same night that she had aborted their baby (5 ROA 2058). This event generated a great amount of anger in Defendant.

Defendant did not testify at the penalty hearing.

ARGUMENT

I.

WITTER IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS PETITION

It has long been the holding of the Nevada Supreme Court

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that if a Petition for post conviction relief contains allegations, which, if true, would entitle the Petitioner to relief, an evidentiary hearing is required. Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983); Grandin v. State, 97 Nev. 454, 634 P.2d 456 (1981); Doggett v. State, 91 Nev. 768, 542 P.2d 1066 (1975).

It is anticipated that the State, as it usually does, will ask this Court to deny WITTER an evidentiary hearing and deny his Petition based on the perceived strength of the State's case at trial without considering the allegations of the Petition. In Drake v. State, 108 Nev. 523, 836 P.2d 52 (1992) the Court remanded the case for an evidentiary hearing over the State's objection where trial counsel had not adequately opposed a Motion in Limine filed by the State. The purpose of the hearing was to determine whether counsel had sufficient cause for the noted failure. Drake, 108 Nev. at 527-528.

In Hargrove v. State, 100 Nev. 398, 686 P.2d 222 (1984), the Nevada Supreme Court stated:

> "Appellant's motion consisted primarily of `bare' or `naked' claims for relief, unsupported by any specific factual allegations that would, if true, have entitled him to withdrawal of his plea. Specifically, appellant's claim that certain witnesses could establish his innocence of the bomb threat charge was not accompanied by the witness' names or descriptions of their intended testimony. As such, to the extent that it advanced merely `naked' allegations, the motion did not entitle appellant to an evidentiary hearing. See Vaillancourt v. Warden, 90 Nev. 431, 529 P.2d 204 (1974); Fine v. Warden, 90 Nev. 166, 521 P.2d 374 (1974); see also Wright v. State, 619 P.2d 155, 158 (Kan.Ct.App. 1980) (to entitle defendant to an evidentiary hearing, a post-conviction petition must set forth `a factual background, names of witnesses or other sources of evidence demonstrating . . .

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entitlement to relief')."

These Supplemental Points and Authorities contain specific instances of ineffective assistance of trial and appellate counsel for WITTER. As such the allegations are not "naked" and an evidentiary hearing should be conducted. It is not necessary nor reasonable that in asking for an evidentiary hearing a Petitioner prove his case, only that the allegations are sufficiently specific to detail the evidence to be presented

It is respectfully urged that this Court grant an evidentiary hearing to WITTER.

II.

WITTER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment guarantees that a person accused of a crime receive effective assistance of counsel for his defense. The right extends from the time the accused is charged up to and through his direct appeal and includes effective assistance for any arguable legal points. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The United State Supreme Court has consistently recognized that the right to counsel is necessary to protect the fundamental right to a fair trial, guaranteed under the Fourteenth Amendment's Due Process Clause. Powell v. Alabama, 287 U.S. 45, 53 S.Ct.55, 77 L.Ed. 158 (1932); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Mere presence of counsel does not fulfill the constitutional requirement: The right to counsel is the right to effective counsel, that is, "an attorney who plays the

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role necessary to ensure that the trial is fair." Strickland, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 657 (1984); McMann v. Richardson, 439 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d. 763 (1970).

Pre-trial investigation is a critical area in any criminal case and failure to accomplish same has been held to constitute ineffective assistance of counsel. The Nevada Supreme Court in Jackson v. Warden, 91 Nev. 430, 537 P.2d 473 (1975) stated:

> "It is still recognized that a primary requirement is that counsel . . . conduct careful factual and legal investigations and inquiries with a view toward developing matters of defense in order that he make informed decisions on his client's behalf both at the pleading stage . . . and at trial."

Jackson 91 Nev. at 433, 537 P.2d at 474. The Federal Courts are in accord that pre-trial investigation and preparation for trial are a key to effective representation of counsel. U.S. v. Tucker, 716 F.2d 576 (1983).

In U.S. v. Baynes, 687 F.2d 659 (1982) the Court, in language applicable to this case, stated:

> "Defense counsel, whether appointed or retained is obligated to inquire thoroughly into all potential exculpatory defenses and evidence, mere possibility that investigation might have produced nothing of consequences for the defense could not serve as justification for trial defense counsel's failure to perform such investigations in the first place. Fact that defense counsel may have performed impressively at trial would not have excused failure to investigate defense that might have led to complete exoneration of the Defendant."

In Warner v. State, 102 Nev. 635, 729 P.2d 1359 (1986) the Nevada Supreme Court found that trial counsel was ineffective where counsel failed to conduct adequate pre-trial investigation, failed to properly utilize the Public Defender's

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full time investigator, neglected to consult with other attorneys although urged to do so, and failed to prepare for the testimony of defense witnesses. See also, Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991).

A. Specific areas of deficient performance by trial counsel include the following as alleged in the Petition filed herein and as supplemented in these Points and Authorities:

1. Failure to Investigate and Present Evidence at the Trial Portion of the Case. Prior to the second day of jury selection trial counsel made the following admissions on the record concerning preparedness for trial:

> "MR. KOHN: ... Last Thursday, before calendar call, we met in chambers and the District Attorney and the Court and I talked about my client's previous motion to have me relieved as counsel, because he wanted someone to look at the FAS, in terms of a defense to his case.
>
> I think that's what was confusing yesterday on the record as to the 25th and all that. But in any case, I asked the Court for one more continuance; that I was satisfied that I did not have a defense to the trial phase; but in talking to experts in Seattle, Washington, it seemed there was a great deal that could be done in terms of the penalty phase.
>
> And I did not advise the Court that I had an expert on retainer, and I don't, and the Court pretty much said ....simply denied my motion to continue the case." (II, p.3)

The record shows that the case was first set for trial on October 14, 1994 and continued on defense motion over the objection of the State. The trial was reset for May 1, 1995 and again continued over the State's objection at the request of the defense. Both requests were to find an expert on fetal Alcohol Syndrome. After the State received another objection

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to the defense request for another continuance, the Court stated as follows:

> "THE COURT: The Court's recollection of that motion in chambers was very much as the State put it; and that is, I had granted a couple continuances in the past to give the defendant not only time to procure a witness, but in fairness to the defendant's case, I through it was important that the Court go the extra mile in giving you time to procure an expert witness as to the Fetal Alcohol Syndrome.
>
> And in the Court's memory, the Court has given them almost a year to do that. And counsel keeps telling me what progress he hasn't made and the problems involved in doing that, but has made very little progress in actually finding an expert who'll testify in this case.
>
> And counsel asked for maybe three more weeks to do that, and the Court didn't think it reasonable, Mr. Kohn, to put off the trial once again, right at the last minute, to give you three weeks for something you haven't been able to do in more than a year, and have no leads really on people who have agreed to come down and do it, and that's why the Court denied the continuance." (II, p. 4-5)

Kohn failed totally to present any evidenced from an alcohol expert during the trial portion of the case and instead attempted to use a LVMPD detective with no success when the State objected:

> "Q. Is it your experience that alcoholics can function better after consuming alcohol?
>
> MR. GUYMON: Your Honor, I'm going to object based on the notion that he's not an expert, and I believe it calls for speculation when you start talking about what an alcoholic is.
>
> THE COURT: You tended to use him as an expert also, and I would have sustained an objection. At this point, I am going to sustain it. You're going to far." (VI, p. 134)

The State called a criminalist to testify concerning the alcohol levels found in WITTER'S blood, and trial counsel

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failed to object to his opinion of the content 5 ½ hours earlier. (VI, p. 152) Trial counsel then asked no questions on cross-examination. (VI, p. 158)

Kohn had informed the Court that he had an expert, that he had never even talked to WITTER, and that he may or may not call him. IV, p. 259-260). The expert was not called to testify at trial.

The record is clear that defense counsel had totally failed to prepare this case for trial, and had abandoned any semblance of an effort to prevent a defense to First Degree Murder. Said lack of investigation and preparation denied WITTER his right to counsel as set forth in the Sixth Amendment and denied him Due Process of Law.

2. Failure to Investigate and Present Evidence at the Penalty Hearing. There were several areas where trial counsel failed to adequately prepare for the penalty hearing and WITTER was prejudiced thereby.

At the beginning of the penalty hearing trial counsel complained that he had not been provided discovery on WITTER'S involvement with gangs and that:

> "Your Honor, I've had Thursday and Friday. I've had no time to do anything about this whatsoever. I need to bring in experts to talk about gang violence; talk about violence in prisons, and why somebody would need to have a shank. Those experts exist. We were not noticed.
>
> Mr. Guymon indicates he was not part of this incident back in August, 1994. I have been Mr. Witter's attorney of record since November, 1993. The jail never advised me.
>
> I would have gone to that hearing. I would have done different things a year ago than I can possibly

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do right now. I would have fingerprints run. I would have had lists of people found from the jail at that time. I believe we are being blind-sided and I think it's unfair.

I would like to file a motion to continue, Your Honor, if I may approach." (IX, p. 18-19).

The Court did not grant the Motion to Continue and was specific in it's summary of the failure of trial counsel to adequately prepare for the proceedings:

> "Now counsel comes again, at this time, July 10th, at the time of the penalty hearing, and says, once again, they haven't had enough time to do whatever it is they need to do.
>
> And I have to inform counsel, again -- and I do it again on the record, generally these penalty hearings are held within two, three, four days after trial, and that's enough time to prepare.
>
> Counsel, at the time this trial started, said he wasn't ready. After a year and half of preparation in this case, he still said he didn't have his experts and couldn't get experts and wanted a continuance at that time, and the Court denied it, because the Court felt like they'd had enough time to prepare.
>
> Defense counsel has consistently said they wanted a continuance because they haven't had time to prepare.
>
> Even since last Thursday, that's been four days to prepare for this penalty hearing; and defense counsel has access to the defendant all during those days, and all during the 12 or so days we've had since the time of the trial, has had access to his client." (IX, p 21-22)

The record shows that no gang expert was called by the defense to explain away the graphic testimony about gangs and violence. Neither was any witness called, either expert or non-expert, to explain that possession of a shank in prison is more a matter of simple survival tan any indicia of violent character.

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With respect to presenting the mitigating factor that WITTER suffered from Fetal Alcohol Syndrome (FAS) the efforts of defense counsel were apparently non-existent and he was precluded from using such evidence at the penalty hearing when the State objected:

> "MR. GUYMON: ...It was previously presented to the Court and it was counsel's belief this picture at least helps document the Fetal Alcohol Syndrome.
>
> I have no problem with that picture being shown to the jury. However, if it is offered as evidence of Fetal Alcohol Syndrome, I object and here is why:
>
> There is not a single witness listed by the defense that Fetal Alcohol Syndrome would be admissible evidence in this case or that would be presented.
>
> In reliance of that, I have not got a rebuttal witness to this issue of Fetal Alcohol Syndrome. So I would ask counsel be precluded from using the term Fetal Alcohol Syndrome or testifying in his opening statement about Fetal Alcohol Syndrome.
>
> THE COURT: I'm not going to preclude him from using the statement Fetal Alcohol Syndrome. He doesn't have a witness listed to do that, so you're right about that, and that will be precluded. However if he wants to argue himself that that shows that, I'm not going to preclude him from that." (IX, p 29-30).

No testimony was presented from any witness to describe the characteristics and effects of an individual suffering from FAS.

3. Conceding Guilt Denied Petitioner of an Adversary Proceeding. During the Opening Statement of trial counsel Bassett the following statement was made to the jury:

> "Ladies and gentlemen of the jury, as you heard the State stand up today and describe to you what they are going to attempt to prove during this trial, you have heard the D.A. describe some terrible,

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horrible, disturbing facts.

> And I wish I could stand up here and say to you that those aren't the facts, but I can't. And the fact that we are here, you've been called as jurors, these are facts that for the next few weeks, probably, we are going to have to deal with, we are going to have to come to grips with.' (V, p. 33)

It became so obvious that trial counsel was conceding the guilt of their client that the State objected that trial counsel was arguing the penalty phase in the opening statement. (V, p. 35). The Court agreed and sustained the objection. (V, p. 35).

In United States v. Cronic, 466 U.S. 648, 656-57, 104 S.Ct. 2039 (1984) the Court stated that:

> "[T]he adversarial process protected by the Sixth Amendment requires that the accused have `counsel acting in the role of an advocate'. Anders v. California, 398 U.S. 730, 734 (1967). The right to effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted--even if defense counsel may have made demonstrable errors--the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated."

When defense counsel concedes the guilt of his client to the jury the Sixth Amendment is violated in two respects: (1) the prosecution in relieved of its duty to prove the defendant guilty beyond a reasonable doubt in violation of the due process clause (In re: Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970)); and (2) a conflict is created by the attorney abandoning loyalty to his client and sympathizing with the prosecution (Osborne v. Shillinger, 861 F.2d 612, 629 (10th Cir. 1988)).

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An evidentiary hearing is needed to allow trial counsel the opportunity to explain the failure to contest the guilt of WITTER. It is anticipated that trial counsel will assert that the actions at trial were designed to gain credibility with the jury and prevail at the penalty hearing. Counsel should have realized that the attempt at gaining credibility with the jury was only guaranteeing conviction a first degree murder conviction on a set of facts that would result in a death sentence if WITTER was convicted of first degree murder. The concession of guilt deprived WITTER of the reasonable assistance of counsel at trial and further acted to deny him of due process of law.

4. Trial counsel failed to object to improper argument during the opening statement of the prosecutor. During the opening statement the prosecutor made among others the following improper and prejudicial arguments which were not the subject of an objection by trial counsel:

> "...She will tell you she will never forget the look on the defendant's face as she looked into his eyes, and she'll describe the evilness she saw on the defendant's face that night" (V, p. 14)

> "And the defendant then begins to approach Thomas Pummil and he's coming at Thomas Pummil, and Thomas Pummil too, like Kathryn Cox, sees evilness in this man and realizes there's something wrong and this man is bent on doing heinous, heinous evil things" (V, 20)

> "The evidence will prove this was a senseless murder; that a loving husband's life was lost in an effort to save his wife; that his wife, Kathryn Cox was subjected to evilness that many of us can't even imagine, the perpetration of sexual acts, the repeated stabbing and the intrusion into her car that evening as she awaited her husband." (V P. 32)

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The duty of a prosecutor was expressed by the United States Supreme Court in Berger v. State, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed, 1314 and adopted by this Court in Garner v. State, 78 Nev. 366, 370, 374 P.2d 525 (1962):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The duty of the prosecutor at during the opening statement was also described by the Court in Garner, supra.

> "After the jury has been selected and sworn, every criminal trial has three general phases--the opening statement, the proof and the summation. In the case at bar, the prosecutor struck `foul blows' during each phase. The purpose of the opening statement is to acquaint the jury and the court with the nature of the case. It is proper for the prosecutor to outline his theory of the case and to propose those facts he intends to prove. State v. Olivieri, 49 Nev. 75, 236 P. 1100. However, it is his duty to state such facts fairly, and to refrain from stating facts which he will not be permitted to prove."

Garner, 78 Nev. at 370-371.

Federal Courts also face the problems that arise from improper prosecutorial statements. In United States v. Johnson, 767 F.2d 1259 (8th Cir. 1985) the Court was faced with a situation where the prosecutor called the defendant a car thief during his opening statement. In the absence of a timely

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objection, the Court had to review the issue on a plain error standard, and therefore did not reverse, but the warning to prosecutors was clear:

> "We are troubled by the prosecutor's conduct. That the comment here was made during an opening statement makes it more egregious than a similar remark would be during closing argument...The statement poisoned the minds of the jurors at the commencement of the trial and is thus improper. In a closer case it would result in reversal. Because this issue can be reviewed only on plain error grounds, however, Morgan's conviction must be upheld...Nonetheless, we admonish the district attorney that the opening statement serves the function of outlining the evidence to be introduced and that if it is used to impugn a defendant's character improperly as it was here, the risk of reversal is substantial."

Johnson, 767 F.2d at 1274-1275. See also U.S. v. Moreno, 991 F.2d 943 (1st Cir. 1993). (The argument, playing upon the jury's emotional reaction to neighborhood violence, was outside the bounds of legitimate argument and cannot be condoned.)

5. Trial counsel failed to object to the statement of victim impact evidence during the opening statement of the prosecutor and to the admission of a prejudicial photograph of the victim.

The prosecutor made the following statement during opening statement without any objection from trial counsel:

> "Kathryn Cox will testify to not only the physical scars that this crime has left on her, but the emotional scars. The crime scene she sees again and again in her mind, as she will tell you she will never forget the defendant and his face, the tone of his voice and his actions that night as he perpetrated these evil acts." (V, p. 27)

Not only was the argument improper victim impact evidence, the witness did not even so testify.

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Relevant evidence can be excluded on the grounds of prejudicial impact. NRS 48.035 provides in pertinent part as follows:

> "1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, or confusion of the issues or of misleading the jury."

In Kazalyn v. State, 108 Nev.67, 71, 825 P.2d 578, 581 (1992) this Court held that the decision to admit or exclude evidence is left to the trial court after balancing the prejudice to the defendant with the probative value. An emotional appeal to consider the victim's family is patently improper and prejudicial. Meara v. State, 83 Nev. 3, 422 P.2d 230 (1967).

The above quoted argument was made by the prosecutor during the Opening Statement at the trial portion of the case where victim impact is not admissible, even under the decision in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) which dealt exclusively with the admissibility of such evidence during the penalty or sentencing phase of a criminal proceeding. Likewise the Nevada Supreme Court's holding in Homick v. State, 108 Nev. 127, 136, 825 P.2d 600 (1992) dealt with error claimed to have occurred during the penalty hearing.

During the testimony of Kathryn Cox the prosecution marked and admitted a photograph of the victim taken three years previously in Hawaii at a class reunion (V, p.96-97).

There was no real probative value to the photograph. Identity of the deceased was not a question put at issue by WITTER and no component of the appearance, size or age of Mr.

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Cox was relevant in the case. There was absolutely no need t admit a class reunion photograph from Hawaii during the trial phase of the case. Admission of the photograph and the improper opening statement were violations of WITTER'S right to a fundamentally fair trial and due process of law and trial counsel was ineffective in not objecting to the admission of same.

6. Trial counsel failed to offer an instruction that informed the jury that character evidence could not be considered by the jury until after it had weighed the aggravating circumstances against the mitigating.

In Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) the Court described the procedure that must be followed by a sentencing jury under a statutory scheme similar to Nevada:

> "After a conviction of murder, a capital sentencing hearing may be held. The jury hears evidence and argument and is then instructed about statutory aggravating circumstances. The Court explained this instruction as follows:
>
> > The purpose of the statutory aggravating circumstance is to limit to a large degree, but not completely, the fact finder's discretion. Unless at least one of the ten statutory aggravating circumstances exist, the death penalty may not be imposed in any event. If there exists at least one statutory aggravating circumstance, the death penalty may be imposed but the fact finder has a discretion to decline to do so without giving any reason ...[citation omitted]. In making the decision as to the penalty, the fact finder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phase of the trial. The circumstances relate to both the offense and the defendant.
>
> [citation omitted]. The United States Supreme Court

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> upheld the constitutionality of structuring the sentencing jury's discretion in such a manner. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)."

Brooks, 762 F.2d at 1405.

The Nevada Supreme Court has rejected an instruction to this effect in Lisle v. State, 113 Nev. 679, 941 P.2d 459 (1997). Despite the rejection in Lisle of the instruction, the Nevada Supreme Court has included language in other opinions that support the position herein urged. Even in the opinion in WITTER'S direct appeal the Court state:

> "Under NRS 175.552, the trial court is given broad discretion on questions concerning the admissibility of evidence at a penalty hearing. *Guy*, 108 Nev. 770, 839 P.2d 578. In Robins v. State, 106 Nev. 611, 798 P.2d 558 (1990), *cert. denied*, 499 U.S. 970 (1991), this court held that evidence of uncharged crimes is admissible at a penalty hearing once any aggravating circumstance has been proven beyond a reasonable doubt."

Witter, 112 Nev. at 916.

Additionally in Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1995) the court in discussing the procedure in death penalty cases stated:

> "If the death penalty option survives the balancing of aggravating and mitigating circumstances, Nevada law permits consideration by the sentencing panel of other evidence relevant to sentence NRS 175.552. Whether such additional evidence will be admitted is a determination reposited in the sound discretion of the trial judge."

Gallego, at 791.

Trial counsel was ineffective in not offering an instruction in accord with the above cases and WITTER was prejudiced thereby.

B. Specific areas of deficient performance by appellate

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counsel include the following as alleged in the Petition filed herein and as supplemented in these Points and Authorities:

1. Appellate counsel failed to argue to the Nevada Supreme Court that WITTER'S Due Process Rights were violated by the State's exclusion of minorities from the jury panel. During the course of jury selection the State's first peremptory challenge was against an African-American. A proper objection was raised under Batson v. Kentucky. (IV, P. 117-118).

> "MR. KOHN: I believe his right to trial under the Fourteenth, Sixth and Seventh amendments is violated by them striking people of color. We are down to two black people, she's one of the two.
>
> THE COURT: First off, I should note the defendant isn't a person of color, so I think it's an unusual challenge, but I'll let the State put on their reasons.
>
> MR. GUYMON: Your Honor, I agree with your reading of the Batson case. My notes, I did not reflect anything about her race at all. My notes -- my statement as to 87 is absolutely blank, indifference as to race, other than the fact I put I did not believe she was capable of making a decision.
>
> THE COURT: I should note I didn't know she was Hispanic or anything either. Her name is Elois Kline Brown. It's not a -- you say she's black?
>
> MR. KOHN: She's black, your Honor.
>
> THE COURT: I wasn't aware of that either, counsel.
>
> I not that for the record and I overrule it in this matter, because I don't think it even applies in this instance." (IV, p. 118).

The issue was thereafter not raised on direct appeal.

It has long been the law that a defendant has the right to be tried by a jury whose members are selected pursuant to non-

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discriminatory criteria. Martin v. Texas, 200 U.S. 316, 321, 26 S.Ct. 338, 339 (1906); Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). The exercise of peremptory challenges by the government in a racially discriminatory manner violates a defendant's right to equal protection. A defendant may establish a prima facie case under Batson by showing that "he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." Batson, 476 U.S. at 96, 106 S.Ct. at 1723. Second, the defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Avery v. Georgia, 345 U.S. 559, 562, 73 S.Ct. 891, 892 (1953). Finally, the defendant must show facts sufficient to raise an inference of interest by the government to discriminate based on all of the relevant circumstances. Batson, 476 U.S. at 96, 106 S.Ct. at 1723.

If a defendant presents a prima facie case of discrimination, the burden shifts to the government to come forward with a racially neutral explanation for the use of its strikes. To satisfy this requirement, the proffered reasons must bear some relationship to the case at bar. If the government offers explanations that are facially neutral, a defendant may nevertheless show purposeful discrimination by proving the explanation pretextual. U.S. v. Joe, 928 F.2d 99, 102 (4th Cir. 1991).

Trial counsel made a valid Batson objection to the first

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strike exercised by the State -- a strike that removed 50% of the African-Americans that had been cleared for cause. Appellate counsel should have raised a constitutional challenge to the jury selection, both because the issue had merit and to preserve the issue for further review if necessary.

2. Failure to Petition the Court for Rehearing based on the irreconcilable differences within the Court's Opinion. Specifically the Court held that the request to argue last would be denied based on NRS 175.141 which defines the "Order of Trial", yet ruled that under NRS 47.020 the penalty phase was not part of the trial proceeding but rather was a "sentencing" and thus not subject to the rules for exclusion of witnesses at trial. The opinion was thus inconsistent in it's ruling of two separate issues. Appellate counsel should have petitioned for a rehearing on this discrepancy which indicated that the Court was going to rule against WITTER irrespective of having to be contradictory to do so.

3. Failure to Petition the Court for Rehearing on Clear Errors Contained in the Supreme Court's Opinion. In addressing the issue concerning the continuance of the penalty hearing to allow time to obtain a gang expert, the Nevada Supreme Court stated that:

> "In the present case, on June 20, 1995, almost a full year before the penalty hearing, the State notified Witter's counsel that it was investigating an alleged disciplinary problem (possession of a shank) involving Witter"

The record is clear that the penalty hearing occurred in July, 1995. The Supreme Court was operating under a false

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factual belief when it issued it's opinion affirming WITTER'S penalty. Appellate counsel was obligated to bring such a glaring error to the court's attention and attempt to obtain a rehearing on the issue.

The Supreme Court also erred in deciding that the failure to strike the aggravating circumstance was harmless error. The Court stated that

> "Even though we conclude that the prevention of lawful arrest aggravator should have been stricken, there remains four aggravators that the State has proven beyond a reasonable doubt."

Witter, at p. 23.

In fact there were only three remaining aggravation circumstances after the prevention of unlawful arrest was dismissed by the Nevada Supreme Court.

4. Failure to raise improper closing argument shifting the burden of proof. During the closing argument of the State at the trial phase of the proceedings the following occurred:

> "I submit to you that there has been no evidence of how alcohol affects a person's state of mind and their intent or their ability to form intent, or just what effect alcohol may or may not have to impair a person's state of mind or intent. Neither the State nor the defense called a witness to that effect. There is no evidence of mental impairment.
>
> MR. KOHN: Your Honor, I'd object. Counsel is commenting on what we did and we have no burden. I think that is improper.
>
> THE COURT: That's true. The jury knows that there is no burden. He's just saying what was and was not presented at the time of trial." (Vol. VIII, p. 66).

It is generally outside the bounds of proper argument to comment on a defendant's failure to call a witness. Colley v.

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State, 98 Nev. 14, 16, 639 P.2d 530, 532 (1982). This can be viewed as impermissibly shifting the burden of proof to the defense. Barren v. State, 105 Nev. 767, 778, 783 P.2d 444, 4561 (1989). Such shifting is improper because "[i]t suggests to the jury that it was the defendant's burden to produce proof by explaining the absence of witnesses or evidence. This implication is clearly inaccurate. Barron, 105 at 778. See also, Ross v. State, 106 Nev. 924, 803 P.2d 1104 (1990); In re Winship, 397 U.S. 358 (1970).

Appellate counsel was derelict in not raising the improper closing argument, especially where trial counsel had properly preserved an objection to the statements.

5. Failure to raise the denial of trial counsel's challenge for cause of juror Miller. During voir dire trial counsel challenged juror Miller for cause and same was denied by the Court:

> "MR. KOHN: Do you believe the way in which a defendant was raised in important to your decision as to penalty?
>
> MR. MILLER: No.
>
> MR. KOHN: Can you explain that?
>
> MR. MILLER: I think the individual should be accountable for his self. How he was raised -- I was raised in the coal country. It didn't bother me. I went to school. Everybody has the same opportunities. I think it's what you make of yourself.
>
> MR. KOHN: So if we put on evidence of a bad childhood, that's not something you would consider in mitigation stage; is that correct?
>
> MR. MILLER: Yes.
>
> MR. KOHN: You would not consider it, right?

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MR. MILLER: No, I would not consider it.

MR. KOHN: Your Honor, I would ask he be struck for cause." (IV pages 38-39).

After the Court inquired, juror Miller changed his testimony and stated that he would consider the evidence of childhood, but then when Mr. Kohn again asked him, Miller stated that he may not have to agree and that he really didn't think that childhood matter (IV, p.42). Kohn then renewed the challenge for cause and the Court again denied same (IV, 45). At the next break a full record was made concerning the challenge (IV, p.53-57).

At the end of the preempt process, KOHN was required to use his last preempt against Miller (IV, p. 126), and then noted that there was another jury that he would have preempted if he had not had to use his last one on Miller (IV, p. 141).

In Thompson v. State, 111 Nev. 439, 894 P.2d 375 (1995) the Nevada Supreme Court reversed a conviction of four counts of robbery with use of a deadly weapon based on the failure of the trial court to grant a challenge for cause as to one potential juror. In reversing the conviction the Court noted, and cited with approval, Bryant v. State, 72 Nev. 330, 305 P.2d 360 (1956) that:

> "It is not enough to be able to point to detached language which, alone considered, would seem to meet the statutory requirement, if, on construing the whole declaration together, it is apparent that the juror is not able to express an absolute belief that his opinion will not influence his verdict."

Bryant, 72 Nev. at 334-35.

The Thompson Court then went on to state that:

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"We also conclude that it was prejudicial error that prospective juror number eighty-nine was not excused for cause. At the conclusion of voir dire, the defense had exhausted all four of its peremptory challenges. Therefore, if the defense had used one of its peremptory challenges to excuse prospective juror number eighty-nine, then a juror that was unacceptable to the defense would have remained on the jury."

Thompson, 111 Nev. at 442-443. Kohn cited the Thompson case to the Court during his challenge to juror Miller. The matter was properly preserved and a valid issue and should have been raised on direct appeal.

6. Appellate counsel failed to raise the issue of tenuous and specious evidence to support the allegations of juvenile rape and force and violence in prison. During the course of the penalty hearing trial counsel objected to the WITTER'S parole officer reading into the record a history that was not supported by sufficient factual specificity or corroboration:

"MR. KOHN: Yes, Your Honor.

When the State placed in evidence yesterday the parol evidence, I approached the Bench and objected, and the Court -- I assume the Court meant I could put on the record later my objection.

THE COURT: Sure.

MR. KOHN: There were two considerations. One was about a rape. There's one line in the report that talks about a rape when he was 15; did some juvenile hall time.

Doesn't discuss if it's a misdemeanor, felony or even if there was an adjudication.

There was also a line that Miss Rose testified to, as to an incident of force and violence in the prison, but never tells what it was or what the allegation were. And my concern is that you have these bald allegations without any type of explanation.

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> And I was looking at the D'Agostino, cap D-a-g-o-s-t-i-n-o, versus State, 107 Nevada 1001, and I believe that is just the type of evidence that they meant to exclude. And I asked the Court to exclude it and the Court indicated it was going to allow that evidence anyway." (X, p.65).

The language and reasoning of the Court, in D'Agostino, has broad application to the admission of evidence of any prior crimes:

> "...but it should be remembered that in death cases the proof of other crimes is intended not to show the guilt of the accused but, rather, to display the character of the convict and to show culpability and just deserts on the party of the homicidal convict. Past criminal activity is one of the most critical factors in the process of assessing punishment, for whatever purpose punishment might be inflicted. Past misconduct relates to the criminal's blameworthiness for the charged homicide and relates, as well, to whether the jury deems it necessary for public safety to impose an irrevocable, permanent quarantine upon the murderer...Improperly admitted evidence of past criminal conduct is even more damaging in a penalty hearing than it is in a guilty-determining proceeding because the past conduct goes to substance of whether the murder should or should not be punished by death...."

D'Agostino, 107 Nev. at 1003-4.

Appellant counsel was ineffective in not raising this issue on direct appeal.

7. Appellate counsel failed to raise the issue concerning the admission of gruesome and prejudicial photographs which had been preserved for appeal by trial counsel. At numerous times during the proceedings, trial counsel objected to the use of unnecessarily bloody and gruesome photographs on the grounds that the probative value of the photographs was outweighed by their prejudicial impact. The objections were to photographs of the bloody interior and exterior of the cab (VI, p.11; 69),

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the bloody knife (VI, p. 6), and autopsy photographs. Appellant counsel failed to raise the issue on the direct appeal.

This Court has held that color photographs of a victim used by a doctor to explain the cause of death to a jury are properly admissible because they aid in the ascertainment of the truth. Allen v. State, 91 Nev. 78, 530 P.2d 1195 (1975). Under such circumstances the probative value of the photographs outweighs any prejudicial impact they might have on the jury. In the case at bar there was no probative value to the photographs as identity, cause of death, and even the events of the homicide were not being contested by trial counsel. It was deficient performance for appellate counsel to fail to raise this issue on WITTER'S direct appeal.

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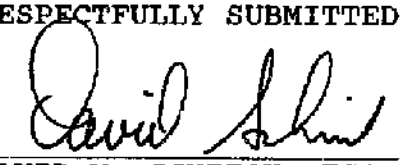
CONCLUSION

The performance of trial and appellate counsel was deficient. WITTER was prejudiced by the performance of his attorneys and should be granted relief from the judgement and a new trial.

DATED this 11 day of August, 1998.

RESPECTFULLY SUBMITTED:



DAVID M. SCHIECK, ESQ.

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the attorney for Petitioner named in the foregoing petition and knows the contents thereof; that he initially discuss the

issues to be raised with Petitioner who has requested him to file same on behalf of Petitioner. That when the undersigned attempted to see Petitioner to review the precise contents hereof, Petitioner refused to see the undersigned. The pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

DAVID M. SCHIECK, ESQ.
ATTORNEY FOR WITTER

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RECEIPT OF COPY

RECEIPT OF A COPY of the foregoing document is hereby acknowledged this 11 day of August, 1998..

DISTRICT ATTORNEYS OFFICE

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LAS VEGAS, NV 89155

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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM LESTER WITTER,
#1204227

Defendant.

Case No. C117513X
Dept. No. VI
Docket B

STATE'S OPPOSITION TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: 10-12-98
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through GARY L. GUYMON, Deputy District Attorney, and files this State's Opposition to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

This opposition is made and based upon all the papers and pleadings on file herein, the

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attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

DATED this 22 day of September, 1998.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
GARY L. GUYMON
Deputy District Attorney
Nevada Bar #003726

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On January 21, 1994, William Lester Witter, hereinafter "the defendant," was charged by way of Information with one count of Murder With Use of a Deadly Weapon (Felony -NRS 200.010, 200.030, 193.165) for the brutal slaying of James Harold Cox. The defendant was also charged with one count each of Attempt Murder With Use of a Deadly Weapon (Felony -NRS 193.330, 200.010, 200.030, 193.165), Attempt Sexual Assault With Use of a Deadly Weapon (Felony -NRS 193.330, 200.364, 200.366, 193.165), and Burglary (Felony -NRS 205.060) for the brutal stabbing and attack of Kathryn Terry Cox.

The defendant was adjudged by a jury to be guilty on all four counts. The jury subsequently determined that the defendant should be sentenced to death by lethal injection for the murder conviction. On August 3, 1995, the district court adjudged the defendant guilty and sentenced him to death for the Murder conviction to four (4) consecutive twenty year terms of imprisonment in the Nevada State Prison for the Attempt Murder and Attempt Sexual Assault convictions, and to a consecutive ten year term of imprisonment for the Burglary conviction. An Amended Judgment of Conviction was filed on August 11, 1995. The defendant filed a timely Notice of Appeal on August 31, 1995. An appeal was filed, and

the State responded. The Supreme Court of Nevada affirmed the convictions and issued a remittitur dated December 23, 1996. The defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction) on October 27, 1997, and filed the Supplemental Points and Authorities in Support of the Petition on August 11, 1998.

STATEMENT OF FACTS

I. GUILT PHASE

A. Introduction

On the evening of November 14, 1993, KATHRYN COX was savagely stabbed and beaten while in her car parked at the Luxor Hotel in Clark County, Nevada. JAMES COX, KATHRYN's husband, was senselessly murdered on that same evening while attempting to protect his wife. Defendant was the perpetrator of these brutal crimes. An overview of the basic facts of this tragic episode follows.

B. The Senseless Crimes

On November 14, 1993, KATHRYN COX was working as a retail clerk at the Park Avenue Gift Shop in the Luxor Hotel in Las Vegas, Clark County, Nevada (ROA 879-80). On that date, KATHRYN was forty-four (44) years old and had been married to her husband, JAMES COX, for approximately twelve (12) years (ROA 878-79). JAMES COX was a fifty-three (53) year-old taxi cab driver for the Yellow Checker Star cab company (ROA 880). KATHRYN had two (2) children from a previous marriage and JAMES had four (4) children, also from a previous marriage (ROA 879).

On the evening of November 14, 1993, KATHRYN finished her shift at 10:00 p.m. and boarded the shuttle bus that would take her to the parking lot where KATHRYN's Mercury Tracer was parked (ROA 884-885). When the shuttle bus arrived at the stop nearest KATHRYN's car, she got off and walked alone to her car (ROA 885). KATHRYN unlocked the driver's door, got inside, and tried to start the car (ROA 885-86). KATHRYN tried several times to start the car, but was unsuccessful (ROA 886). KATHRYN got out of the car and contacted a young man that she recognized as a fellow Luxor employee (ROA 886). This young man tried to jump start KATHRYN's car, but ultimately was unable to start the car (ROA

886-87). After concluding that the car was not going to start, KATHRYN accepted a ride from the young man back to the Luxor Hotel (ROA 887).

KATHRYN arrived back at the Luxor around 10:25 p.m. (ROA 887). KATHRYN immediately bought a roll of quarters and used one of the quarters to call her husband, JAMES (ROA 887-88). KATHRYN told JAMES that the car would not start and asked if JAMES could pick her up and give her a ride home (ROA 888). JAMES told KATHRYN that he was on his way to pick up a passenger and that it would be about 25 to 30 minutes before he could come and pick her up (ROA 888). KATHRYN then returned to her car on the shuttle bus in order to wait for JAMES to arrive (ROA 889).

When KATHRYN arrived at her car, she got inside, locked the driver's door and started to read a book titled "The Taming", written by Judy Deveraux (ROA 889). After about five (5) to ten (10) minutes, the passenger door suddenly opened and Defendant quickly got inside KATHRYN's car (ROA 891-92, 894-95). Defendant immediately stated to KATHRYN in a loud voice, "Don't look at me." (ROA 892-93). Defendant then instructed KATHRYN, "Drive this car out of the parking lot." (ROA 893). KATHRYN responded that she couldn't drive the car because it wouldn't start (ROA 893). Defendant then angrily stated, "You will drive this out of here, you bitch." (ROA 893). Following this statement, Defendant swung his right hand around and stabbed KATHRYN with a knife just above the left breast (ROA 893-94, 1180). Defendant again instructed KATHRYN, "You will drive this car out of here right now." (ROA 895). KATHRYN again told Defendant that she couldn't drive the car because the car would not start (ROA 895). Defendant then grabbed KATHRYN by her hair and pulled her towards him, leaving KATHRYN's hair over her face so she could not see (ROA 896). Defendant told KATHRYN, "I'm going to kill you, you bitch", and then with his right hand stabbed KATHRYN six (6) more times in the left side of her body, between KATHRYN's arm pit and left breast, and one (1) time in the back, near her shoulder blade (ROA 896-98, 1180-81, 1267-68). KATHRYN began screaming and Defendant repeatedly told her, "Shut up. I'm going to kill you, you bitch." (ROA 899). Defendant then asked KATHRYN if she knew Defendant was going to kill her and KATHRYN responded that she was aware Defendant would kill her (ROA 899-900). Defendant

also asked if KATHRYN was aware that Defendant was going to rape her and KATHRYN again responded that she was aware that Defendant would rape her (ROA 900). Following these questions, Defendant unzipped his pants and exposed his penis and told KATHRYN to "suck his cock like [she] would for [her] old man and make him feel better or good." (ROA 901). While Defendant was making this statement to KATHRYN, he placed KATHRYN's hand on his flaccid penis and pushed her head down towards his lap (ROA 901-02). KATHRYN was unable to meet Defendant's demands, however, because she kept passing out as a result of a collapsed lung that was caused by the stab wounds inflicted by Defendant (ROA 902). When Defendant realized KATHRYN was not able to comply with his demands, Defendant lifted KATHRYN's head back up and again told her that he was going to rape her and kill her (ROA 904). At that point, KATHRYN could feel the blood exuding from her multiple stab wounds (ROA 904). KATHRYN tried not to breathe very often or very deep in order to decrease her blood loss (ROA 905). KATHRYN also tried to keep Defendant calm so that he wouldn't rage again and inflict more stab wounds (ROA 905).

At one point, Defendant turned his head away from KATHRYN and she quickly jumped out of her car and ran away screaming (ROA 906). KATHRYN only ran about 10 to 15 feet when Defendant caught her, grabbing KATHRYN by the back of the neck and hair (ROA 907). Defendant dragged KATHRYN back to the car and pushed her into the driver's seat again (ROA 907). After Defendant got back inside the car he kissed KATHRYN at least one (1) time (ROA 909). KATHRYN could smell the odor of alcohol on Defendant's breath (ROA 909, 935). Defendant then tried to remove KATHRYN'S Levi pants by unbuttoning them, but was unable to because the pants fit tightly (ROA 910). Defendant became frustrated and slashed KATHRYN's pants with his knife, leaving four (4) or five (5) knife wounds on KATHRYN's right hip (ROA 911). After Defendant cut KATHRYN's pants, he pulled the clothing open, exposing KATHRYN's vaginal area (ROA 912). Defendant reached over with his hand and began rubbing KATHRYN's vaginal area with his hand and fingers (ROA 912). While Defendant was rubbing KATHRYN's vaginal area, he began kissing her again and reached underneath KATHRYN's shirt, undid her bra and began squeezing KATHRYN's breast (ROA

913).

While Defendant was attacking her, KATHRYN saw in the side-view mirror JAMES' taxi cab pull up along side the car (ROA 914). KATHRYN also noticed that the knife, which has a six-inch blade and four-inch handle, was lying on the dashboard of the car (ROA 916). Defendant, not knowing that the taxi driver was KATHRYN's husband, instructed KATHRYN to be quiet so he could tell the taxi driver that KATHRYN was having a bad cocaine trip and Defendant was just trying to help (ROA 915). JAMES opened the driver's door and asked, "What's going on here?" (ROA 916). Defendant told JAMES that KATHRYN was having a bad cocaine trip and Defendant was just trying to help (ROA 917). JAMES responded, "I don't think so. This is my wife and this is my car and get the hell out." (ROA 917). Defendant got out of the car through the passenger's door and confronted JAMES (ROA 917). KATHRYN noticed that the knife was no longer lying on the dashboard (ROA 917).

After Defendant got out of the car, KATHRYN could hear JAMES and Defendant yelling and scuffling (ROA 917). KATHRYN got out of the car and attempted to get inside the taxi cab in order to call for help (ROA 918). When KATHRYN was unable to get inside the taxi, she turned and saw Defendant stabbing JAMES in the left shoulder area (ROA 919). JAMES screamed in pain and Defendant continued to stab him repeatedly (ROA 920). JAMES eventually fell into KATHRYN and they both fell to the ground (ROA 920). KATHRYN began screaming and kicking and Defendant stabbed her in the calf area of her left leg, the knife blade passing completely through KATHRYN's leg (ROA 921, 1180, 1268). JAMES laid motionless in KATHRYN's arms (ROA 921-23).

KATHRYN told JAMES she loved him and she was going to get help and then got up and ran towards the bus stop (ROA 923-24). KATHRYN lost one shoe while she was running and then Defendant caught her again (ROA 924). Defendant grabbed KATHRYN by the hair and picked her up from the ground (ROA 925). Defendant took KATHRYN back to the car and stuffed her into the back seat area on the passenger's side floor (ROA 925). Defendant then completely removed KATHRYN's pantyhose and Levi's (ROA 926). Defendant left KATHRYN in the back seat and KATHRYN could hear Defendant attempting to move JAMES' body (ROA

927). Defendant returned and began touching KATHRYN's legs (ROA 927). Shortly thereafter, KATHRYN heard the voices of the hotel security and Defendant left her in the back seat of her car (ROA 927).

THOMAS D. MCKINNON was working as a shuttle bus driver at the Luxor Hotel on the night of November 14, 1993 (ROA 936-38). While driving his route, Mr. MCKINNON saw KATHRYN running from Defendant towards the bus stop (ROA 938-40, 947). Mr. MCKINNON watched Defendant grab KATHRYN by the hair and throw her to the ground (ROA 939-40, 947). Mr. MCKINNON immediately contacted THOMAS PUMMIL, a hotel security officer, and told them about what he had seen (ROA 939, 948). Mr. MCKINNON followed Officer PUMMIL back to KATHRYN's car and saw PUMMIL draw his weapon and aim it towards Defendant and saw Defendant take two steps towards PUMMIL (ROA 941, 948). Shortly thereafter, Mr. MCKINNON saw between five (5) and seven (7) additional security officers arrive (ROA 942).

Security Officer THOMAS PUMMIL was patrolling the Luxor/Excalibur employee parking lot on the evening of November 14, 1993 (ROA 949-50). At approximately 11:15 p.m., Mr. MCKINNON approached Officer PUMMIL and told him that he had just seen a female being chased by a male in the parking lot (ROA 952-53). Officer PUMMIL immediately went to the location of KATHRYN's car and saw Defendant standing between KATHRYN's car and JAMES' taxi cab (ROA 954). It appeared to Officer PUMMIL that Defendant was trying to stuff something in the back seat of KATHRYN's car (ROA 954-55). Officer PUMMIL got out of his truck and asked Defendant, "What is the problem?" (ROA 956). Defendant responded, "Nothing." (ROA 956). Defendant then turned and came towards Officer PUMMIL from between KATHRYN's car and JAMES' taxi cab (ROA 956). Defendant had blood covering the entire front of his legs and waist (ROA 976). Officer PUMMIL instructed Defendant to stop (ROA 972, 991). Defendant ignored the instructions and stated, "Fuck You", and took several steps towards PUMMIL (ROA 972, 975). Officer PUMMIL retreated several steps to keep a safe distance and again instructed Defendant to stop (ROA 972). Defendant again ignored the instructions and advanced towards Officer PUMMIL stating, "Kill me. Go ahead, shoot me.

Kill me, mother fucker." (ROA 972, 975-76, 1003). Defendant repeated these same words several times as he approached Officer PUMMIL (ROA 976). After Officer PUMMIL stepped back a second time, he drew his weapon and ordered Defendant to lie on the ground (ROA 973, 992-93). Officer PUMMIL also called for backup assistance at this time (ROA 973). Defendant again took steps towards Officer PUMMIL (ROA 974, 994). Approximately a minute and-a-half after Officer PUMMIL arrived, Officer SCHROEDER arrived, walked up behind Defendant and placed him in handcuffs (ROA 977-78, 995, 1007).

After Defendant was handcuffed, Officer SCHROEDER went over near JAMES' taxi cab and noticed JAMES' body lying on the ground partially underneath the taxi cab (ROA 1008). JAMES' face and upper torso were covered with a coat (ROA 1008). Officer SCHROEDER removed the coat and determined that JAMES was not breathing and did not have a noticeable pulse (ROA 1009). Officer SCHROEDER then heard KATHRYN's moans coming from the back seat of the car (ROA 928, 1009, 1012).

Officers SCHROEDER and REDLEIN went over to KATHRYN's car to offer KATHRYN assistance (ROA 1013, 1092-93). The officers found KATHRYN lying in the back seat with no clothes on from the waist down and several visible stab wounds (ROA 1013). KATHRYN told the officers that Defendant had stabbed her and tried to rape her (ROA 1093). Paramedics soon arrived and KATHRYN was transported to the hospital, where she remained for eight (8) days, leaving only to attend JAMES' funeral (ROA 929-31, 1014-17, 1034-35, 1040, 1093).

Officer BRYON CANDIANO of the Las Vegas Metropolitan Police Department (LVMPD) was one of the first police officers to arrive at the crime scene (ROA 1057-59). Officer CANDIANO took control of Defendant from the security officers (ROA 1059). While Officer CANDIANO was taking Defendant to his patrol car, Defendant stated several times that he hated all cops and was going "to kill all the fucking cops he could." (ROA 1061, 1083). Officer CANDIANO twice read Defendant his *Miranda* rights, once before placing him inside the patrol car and once after Defendant was inside the car (ROA 1061-63). Defendant acknowledged that he understood his constitutional rights (ROA 1064). Officer CANDIANO

noticed that Defendant's pants, shoes and hands were all covered in blood (ROA 1066). Defendant was taken to the police station and during questioning Defendant stated, "I can't believe I did it. I just can't believe I did it." (ROA 1072-74).

Officer DAN PETERSON, a crime scene analyst with the Las Vegas Metropolitan Police Department (LVMPD) recovered several items of evidence at the crime scene, including a buck knife with a black handle and a four and-one-half inch blade that was found on top of JAMES' taxi cab above the passenger side rear door (ROA 1129, 1141, 1156, 1158-59). Officer PETERSON also recovered Defendant's brown jacket that he placed on top of JAMES in an effort to conceal his body (ROA 1140).

Defendant was interviewed at the police station by Detective THOMAS D. THOWSEN (ROA 1184-86). Detective THOWSEN showed Defendant a *Miranda* card which Defendant read out loud and signed (ROA 1187-88). Subsequently, Defendant admitted being in the Luxor parking lot, approaching KATHRYN and becoming aggressive with her, stabbing JAMES with the hunting knife, and using his jacket to cover JAMES after the stabbing (ROA 1191-94, 1227).

ALAN GALASPY, a criminalist with the Las Vegas Metropolitan Police Department (LVMPD), conducted a scientific analysis of Defendant's blood that was drawn on the early morning of November 15, 1993 (ROA 1239, 1242-45). The results of this analysis demonstrated that Defendant had a .07 blood alcohol level (ROA 1244). Criminalist MINO AOKI signed an affidavit indicating that he found no controlled substances in Defendant's blood when it was tested (ROA 1258). Counsel stipulated to the following facts: (1) the blood found on Defendant's hunting knife could have been JAMES' blood, but not the blood of KATHRYN or Defendant; (2) the blood found on Defendant's clothing could have been JAMES' blood, but was not the blood of KATHRYN or Defendant; (3) the blood found on Defendant's hands matched JAMES' blood, but did not match the blood of KATHRYN or Defendant; (4) the blood found on the brown jacket could be JAMES' blood, but not the blood of KATHRYN or Defendant; and (5) the blood found on KATHRYN's clothes could be the blood of KATHRYN or Defendant, but not JAMES' blood (ROA 1285-86).

On November 15, 1993, Dr. ROBERT JORDAN, a Clark County medical examiner,

performed an autopsy on the body of JAMES COX (ROA 1291-92). The autopsy revealed a total of sixteen (16) stab wounds: one (1) wound in front of the left ear; three (3) wounds through the left ear; one (1) wound behind the left ear; and eleven (11) wounds to the left neck, shoulder and upper left arm (ROA 1294). The autopsy also revealed that one of the stab wounds extended through the shoulder muscles and lacerated JAMES' axillary artery, from which JAMES most likely bled to death (ROA 1297). The autopsy also revealed that one of the stab wounds penetrated JAMES' skull and extended a half inch into his brain (ROA 1297-98). Dr. JORDAN concluded that this injury would have caused fatal hemorrhaging, however, the stab wound which lacerated JAMES' axillary artery caused his death first (ROA 1297-98). Dr. JORDAN concluded that JAMES' injuries were inflicted by a knife and his death was the result of the injuries to his neck and head (ROA 1300, 1307). Dr. JORDAN also concluded that JAMES' death was the result of a homicide (ROA 1308-09).

C. The Defense Case

Defendant chose not to present any evidence or witnesses during the guilt phase of trial (ROA 1329).

D. The Verdict

At the conclusion of the guilt phase of the trial on June 28, 1995, the jury found Defendant guilty of the crimes of MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON, ATTEMPT MURDER WITH USE OF A DEADLY WEAPON, ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON, and BURGLARY (ROA 1491-92, 1549-52).

II. PENALTY PHASE

A. Introduction

The penalty phase of the trial commenced on July 10, 1995 (ROA 1570-74). Prior to trial, the State filed a Notice of Intent to Seek the Death Penalty alleging six (6) aggravating circumstances, including the following:

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

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

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

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

5. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody. NRS 200.033(5).
(This aggravator was struck down in the direct appeal by the Supreme Court of Nevada in Witter v. State, 112 Nev. Ad. Op. 119, 921 P.2d 886 (1996)).

6. The murder involved torture, depravity of mind or the mutilation of the victim. NRS 200.033(8) (ROA 068-70).

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

B. The Evidence Presented

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

DAVID S. RUMSEY testified that on January 11, 1986, Defendant stabbed DAVID in the stomach with a seven-inch butcher knife (ROA 1631, 1642). DAVID explained that on the evening of January 11, 1986, Defendant confronted DAVID and GINA MARTIN, Defendant's former girlfriend (ROA 1638, 1642-43, 1645-46). Defendant was enraged because DAVID had gone on a date with GINA (ROA 1635-37, 1654). DAVID attempted to resolve the matter by extending his hand to shake Defendant's hand and Defendant responded by plunging this seven-inch butcher knife into DAVID's stomach (ROA 1635, 1646). DAVID fled into GINA's house, leaving a trail of blood behind him (ROA 1632, 1635, 1647). Defendant followed, but not before slashing DAVID's tires, breaking out light bulbs, destroying several flower pots and ripping down the window drapes (ROA 1631-32, 1635, 1648). Ultimately, Defendant fled the scene, but was later apprehended and charged with attempt murder with use of a deadly weapon

and assault with a deadly weapon (ROA 1635-36, 1651, 1658). DAVID was hospitalized for approximately four (4) weeks recovering from Defendant's stabbing which severed DAVID's large and small intestines, cut ten (10) holes in DAVID's bowels, and extended into DAVID's rectum (ROA 1649). Defendant eventually pled guilty, pursuant to negotiations, to one (1) count of assault with a deadly weapon and was sentenced to five (5) years in the California State Prison (ROA 1651-52, 1665).

LINDA ROSE, a parole officer for the California Department of Corrections, testified that she supervised Defendant while he was on parole from the assault conviction (ROA 1662-63). Ms. ROSE indicated that Defendant served two (2) years and eight (8) months in prison and then was placed on parole (ROA 1668). Defendant violated the conditions of his parole on three (3) separate occasions and was returned to prison following each violation (ROA 1670-74). Defendant was discharged from parole on February 9, 1993 (ROA 1674).

JAMES FORD, a patrol officer with the San Jose, California Police Department, testified that on July 20, 1993 he responded to a call that Defendant was throwing rocks through the windows in SHANTA FRANCO's home (ROA 1688-92, 1698, 1728). Officer FORD found Defendant outside the house screaming and carrying a six-inch dagger in the back of his pants (ROA 1693-95, 1727). Ms. FRANCO told Officer FORD that Defendant came to her home looking for his ex-girlfriend, CARMEN KEDRICK (ROA 1697). Ms. KEDRICK, who was present at the home, told Officer FORD that she was pregnant with Defendant's child, but did not want to speak with him (ROA 1697-98). Defendant was arrested and charged with possession of an illegal weapon, vandalism of a residence, and public intoxication (ROA 1698). Officer FORD also testified that he was familiar with the signs of gang affiliation in California and that Defendant wore several tattoos and clothing that suggested Defendant's gang affiliation and that in several photographs taken after Defendant was arrested in the present case, Defendant was exhibiting "gang signs" (ROA 1699-1708, 1716).

Officer TIMOTHY JACKSON, a police officer with the San Jose, California Police Department testified that he responded to a call on October 9, 1993 that Defendant had beaten his girlfriend, CARMEN KEDRICK (ROA 1734-36). Ms. KEDRICK told Officer JACKSON

that she was pregnant with Defendant's child and that Defendant had beaten her (ROA 1735-36). Officer JACKSON also observed that Defendant had vandalized Ms. KEDRICK's house and car (ROA 1737-39). A bench warrant was issued for Defendant's arrest following this incident (ROA 1740). Officer JACKSON also testified that he was familiar with the signs of gang affiliation in California (ROA 1740-43). Officer JACKSON testified that Defendant wore several tattoos that indicated he was a member of a northern California gang called the "Nortenos" (ROA 1743-46).

THOMAS PIPITONE, a corrections officer with the Las Vegas Metropolitan Police Department (LVMPD), testified that on August 4, 1994, he searched Defendant's cell at the Clark County Detention Center (ROA 1748-52). During this search, Officer PIPITONE found a sharpened metal item that had been fashioned from a piece of a clipboard (ROA 1752-55).

JAMES RANDALL COX, the oldest son of JAMES COX, testified about the impact his father's death had on the COX family (ROA 1813-17). Mr. COX described his father as an honorable, caring, honest father, husband, and member of the Las Vegas community (ROA 1817-25). Mr. COX told how his father's death had impacted his father's other children (ROA 1825-31). Finally, Mr. COX read a letter written by his brother, MATTHEW COX, describing MATTHEW's sentiments regarding his father's death (ROA 1835-38).

PHILLIP COX, a brother of JAMES COX, also described JAMES' positive qualities and characteristics (ROA 1842-44). PHILLIP COX described JAMES' relationship with his parents, his relationship with his children, and his employment history (ROA 1843-49). PHILLIP COX also described the loss that had been experienced by himself and the other members of JAMES' family (ROA 1849-58).

The State's final witness during the penalty phase was KATHRYN COX (ROA 1861). KATHRYN told of her memories of her husband, JAMES (ROA 1862-64). KATHRYN read a statement she had previously prepared describing her feelings and emotions regarding Defendant's brutal attack and JAMES' senseless murder (ROA 1866-68).

The first witness called by the defense was RUTH FABELA, Defendant's maternal aunt (ROA 1892-93). Ms. FABELA testified that Defendant's mother had problems with alcohol and

drugs (ROA 1895-97). On cross-examination, Ms. FABELA testified that Defendant was essentially raised by his paternal grandparents, WILLIAM and MARTHA WITTER (ROA 1901-03).

TINA WHITESELL, Defendant's sister, testified that her mother was constantly involved in drugs, alcohol, and men (ROA 1908-09). Ms. WHITESELL testified that her parents frequently fought with each other, sometimes hitting each other and chasing each other with a knife (ROA 1910-11). Ms. WHITESELL also related how she and Defendant were raised by grandparents and that both the grandparents drank heavily (ROA 1913-14). Ms. WHITESELL also testified that neither she nor her two sisters had not been involved in criminal activity during their lives (ROA 1915, 1929). Ms. WHITESELL related how Defendant began drinking alcohol regularly and smoking marijuana in junior high school (ROA 1926).

The defense also called LOUIS WITTER, Defendant's father (ROA 1941). LOUIS WITTER testified that he had three prior felony convictions and had trouble with alcohol and drugs (ROA 1942-43). LOUIS WITTER also testified that Defendant's mother had trouble with alcohol and drugs (ROA 1945). Finally, LOUIS WITTER described how he and Defendant's mother constantly fought after drinking excessively (ROA 1946-47).

ELISA ARLENE ALOHALANI SANDERS, Defendant's sister, testified about the abusive environment in which Defendant and his siblings were raised (ROA 1989-91). Ms. SANDERS also testified about the abuse that occurred while Defendant and his siblings were being raised by their paternal grandparents (ROA 1992-93). Ms. SANDERS related how this upbringing had negatively impacted her own life (ROA 1994-96).

MICHAEL L. RITCHISON, Defendant's cousin, testified about the drug, alcohol, and physical abuse that was present in Defendant's home while he was growing up (ROA 2012-13, 2016). Mr. RITCHISON also testified about the alcohol and physical abuse that was present in his grandparent's home while Defendant was living there (ROA 2017-18).

The final witness called by the defense was Dr. LOUIS ETCOFF, a licensed psychologist in the state of Nevada (ROA 2029). Dr. ETCOFF testified that he had previously interviewed Defendant and conducted various psychological tests on Defendant (ROA 2034-36, 2039-40).

Dr. ETCOFF related the results of these tests and described how the results directly correlated with the information he had acquired regarding Defendant's life (ROA 2040-42). Dr. ETCOFF concluded that Defendant may have had attention deficit hyperactivity disorder, antisocial personality disorder, and developmental arithmetic disorder (ROA 2042-43).

C. The Jury's Verdict and Sentence

Following the conclusion of the presentation of evidence in the penalty phase, the jury returned a special verdict indicating that the following aggravating circumstances had been proven beyond a reasonable doubt: (1) the murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another; (2) the murder was committed while the person was engaged in the commission of or an attempt to commit burglary; (3) the murder was committed while the person was engaged in the commission of or an attempt to commit sexual assault; (4) the murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody (ROA 2199-2200). (The fourth aggravator was struck down on appeal). The jury also found that the aggravating circumstances outweighed any mitigating circumstances (ROA 2200). Finally, the jury concluded Defendant should be sentenced to death for the senseless murder of JAMES COX (ROA 2200).

ARGUMENT

THE DEFENDANT FAILS TO SUCCESSFULLY MAKE A CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL

The Supreme Court of Nevada in Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983), held that there should be a hearing on the allegation of ineffective assistance of counsel if the defendant 1) presents an affidavit, 2) which presents factual allegations of the attorney's misconduct, and 3) which is outside of the record and thus not reviewable by this Court on appeal. The defendant in this case has not presented any such affidavit. He merely presents bare allegations without any facts to back them up. This Court in Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), held that to the extent that a defendant advances merely "naked" allegations, he is not entitled to an evidentiary hearing. Also, everything the defendant has complained of regarding his counsel's ineffectiveness is in the record.

Of persuasive value is State v. Runningeagle, 859 P.2d 169 (Ariz. 1993), cited by the Supreme Court of Nevada in Browne v. State, 113 Nev. 305, ___, 933 P.2d 187, 190-91 (1997). Runningeagle stands for the proposition that a defendant is only entitled to an evidentiary hearing when he presents a colorable claim. 859 P.2d at 173. A colorable claim is one that, if the allegations are true, might have changed the outcome. Id. The defendant in the instant case does not present any colorable claims against either trial or appellate counsel. The defendant must show that his counsels' performances were deficient, and that the deficient performance prejudiced his defense. The State asserts that the defendant was represented by competent and effective trial and appellate counsel, as is demonstrated by the application of Nevada law to counsels' actions. The State will address each of the defendant's individual claims below in order to refute his claims of prejudice.

A. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

In Nevada, the appropriate vehicle for review of whether counsel was effective is a post-conviction relief proceeding. McKague v. Warden, 112 Nev. 159, 912 P.2d 255, 257, n.4 (1996). In order to assert a claim for ineffective assistance of counsel the Defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-687, 104 S.Ct. 2052, 2063-2064 (1984); see, State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the Defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. See, Strickland, 466 U.S. at 687-688 & 694, 104 S.Ct. at 2065 & 2068.

In considering whether trial counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information... pertinent to his client's case." Doleman v State, 112 Nev. Adv. Op. 111, 4 (July 22, 1996); citing, Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Once this decision is made, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. Adv. Op. 111 at 4; citing, Strickland, 466 U.S. at 690-691, 104

S.Ct. at 2066. Finally, counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. Adv. Op. 111 at 4; see also, Howard v State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066; State v. Meeker, 693 P.2d 911, 917 (Ariz. 1984).

Based on the above law, the court begins with the presumption of effectiveness and then must determine whether or not Defendant has demonstrated, by "strong and convincing proof," that counsel was ineffective. Homick v State, 112 Nev. Adv. Op. 43, 4 (April 3, 1996); citing Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981). The role of a court in considering allegations of ineffective assistance of counsel, is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978); citing, Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711; citing, Cooper, 551 F.2d at 1166. In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

1. Defense counsel did not fail to investigate and present evidence at trial.

The defendant argues that trial counsel failed to investigate and retain an expert in Fetal Alcohol Syndrome ("FAS") which prejudiced his defense. The defendant wants an evidentiary hearing on this issue, however, such a hearing is not necessary for two reasons. First, the defendant fails to present any affidavit from such an expert who would have testified on his behalf. Second, the trial attorney already stated on the record to the court that he was conducting investigations for such an expert, but he had been unable to find one who would testify on the defendant's behalf.

In September of 1994, the trial attorney, Mr. Philip Kohn ("Kohn"), made a Motion

to Continue Trial Date of October 14, 1994, which was granted over the objection of the State. Trial was re-set for May of 1995. Attached to the Motion to Continue was an Affidavit signed by Kohn in which he stated that he had flown to San Jose, California to conduct an extensive investigation of the defendant's case. After spending a week interviewing witnesses, he discovered information which he believed gave the defendant a viable defense, FAS. This defense would require expert testimony, and Mr. Kohn needed more time to secure such an expert. In April of 1995, another Motion to Continue Trial Date was made by the defense and granted again over State's objection. Trial was re-set for June 19, 1995. On June 20, 1995, Kohn stated for the record that he had asked for another continuance prior to calendar call which the court denied.

Kohn stated, on the record, that he did not have a FAS expert, but that he was trying to secure an expert for the penalty phase. The State objected. The court denied the Motion to Continue, noting that the first two continuances were granted to give the defendant time to procure an expert witness as to the FAS defense. The court doubted that another three (3) week continuance would make a difference when the defendant had not been able to secure an expert who would testify in his case in almost a year's time. (2 ROA 360-63)

Later in the trial, at the conclusion of the State's Case in Chief, another discussion regarding the FAS expert and another alcohol expert took place on the record outside the presence of the jury. (4 ROA 1320-1329) Kohn indicated that he was prepared to call a Dr. Michael Levy, head of addictions at Montevista Hospital, to testify not to FAS but to alcohol as an inhibitor which would go to the issue of specific intent. The State had contacted this doctor, and it became evident to Kohn that Dr. Levy was no longer willing to testify for the defendant. Kohn, being without an expert, asked for another continuance. The court properly denied a continuance because this had been an ongoing problem in this case. The court indicated that Kohn had been looking, unsuccessfully, for an expert for months and months and had been unable to come up with anything.

The court stated that it would not set the jury aside while Kohn looked for another expert when he had a long history of trying to find one and realizing that the one he had was now

unwilling to testify for him.

Kohn was able to secure a Dr. Etcoff to testify about the effects of alcohol on the defendant for the penalty phase. Dr. Etcoff is not an FAS expert, he is a licensed psychologist in the state of Nevada. Kohn's efforts to secure an FAS expert were extensive. Even now, the defendant does not present an affidavit that such an expert could be secured. Thus, it cannot be argued successfully that Kohn was ineffective in his investigation or presentation of evidence at trial because he cannot create a defense where one does not exist. Not every crime is defensible, and an attorney is not required to "do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may deserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 656 n.19, 104 S.Ct. 2039, 2046 n.19 (1983). Kohn had had Dr. Etcoff perform tests on the defendant as early as August of 1994, therefore, Kohn made a tactical decision during trial not to call Dr. Etcoff until the penalty phase of the trial. This court should rule that counsel's decision regarding which witnesses to call or not call was not ineffective assistance.

2. Defense counsel's did not fail to investigate and present evidence at the penalty hearing.

The defendant argues that Kohn was ineffective as he did not call a gang expert or a FAS expert to testify at the penalty hearing. The inability to retain a FAS expert has been discussed above. In addition, the decision to call or not call a gang expert was a tactical one. As aforementioned, trial counsel's strategy will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. Adv. Op. 111 at 4; see also, Howard, 106 Nev. at 722, 800 P.2d at 180; Strickland, 466 U.S. at 691, 104 S.Ct. at 2066; Meeker, 693 P.2d at 917. Kohn indicated to the court that he had not been provided with the discovery regarding the gang involvement and asked for a continuance which the court denied. The Supreme Court of Nevada in the direct appeal of this case found that the district court did not abuse its discretion in denying the continuance. Witter v. State, 112 Nev. Ad. Op. 119, 921 P.2d 886, 893 (1996). The Supreme Court also concluded that the defendant was not

prejudiced by the district court's decision to allow only four days between discovery and the penalty hearing because even if the defendant had been able to secure an expert to testify as to the gang violence in prisons and the need for a shank, "such testimony would have done little to mitigate his involvement." Id.

Thus, the Supreme Court of Nevada has already rendered an opinion on the prejudicial effect to the defendant by the failure of counsel to call a gang expert. This is the law of the case. In State v. Loveless, 62 Nev. 312, 150 P.2d 1015, 1017 (1944), the Supreme Court of Nevada held that "[t]he decision [on the first appeal] is the law of the case, not only binding on the parties and their privies, but on the court below and on this court itself." The Supreme Court already indicated that even if a gang expert would have been called, it would have not made a difference to the outcome of the case, thus, this principle or rule is the law of this case and "must be adhered to throughout its subsequent progress both in the lower court and upon subsequent appeal." LoBue v. State, 92 Nev. 529, 531, 554 P.2d 258, 260 (1976).

3. Defense counsel did not concede guilt in opening statement.

The defendant argues that because defense counsel, Bassett, agreed that the facts the prosecutor gave were "terrible, horrible, disturbing facts," that would have to be dealt with, that Bassett conceded the defendant's guilt and did not act as an advocate for the defendant and was thus ineffective. In State v. Olivieri, 49 Nev. 75, 236 P.1100, 1101 (1925), the Court stated that "[i]t is the duty of counsel making a statement to state the facts fairly, and to refrain from stating facts which he cannot, or will not, be permitted to prove." The opening statement of defense counsel was very broad. Bassett encouraged the jury to keep an open mind. There was not very much Bassett could say given the fact that the defendant was probably not going to testify and no expert on FAS had been retained. The defense was not planning on presenting very much, if any, evidence. The decision to not put on a defense is a tactical one and is not ineffective assistance of counsel.

4. Defense counsel was not ineffective when he refrained from objecting during the opening statement of the prosecutor.

The defendant argues that trial counsel failed to object to improper argument during

opening statement. The prosecutor, however, may outline his case and propose facts he intends to prove. Rice v. State, 113 Nev. 1300, ___, 949 P.2d 262, 270 (1997). Even if the prosecutor overstates what he is later able to prove, misconduct is not present unless he does so in bad faith. Id. In Browne, 113 Nev. at ___, 933 P.2d at 190-91, the Nevada Supreme Court held that reference to a defendant as a "selfish and cruel man" did not rise to the level requiring reversal. See People v. Benson, 802 P.2d 330, 353-54 (Cal. 1990) (holding prosecutor's comment "this crime is perhaps the most brutal, atrocious, heinous crime," was merely a comment on the nature of the offense and was permissible); see also Runningeagle, 859 P.2d at 173 (holding that prosecutor's use of the words "horror" and "evil" were merely a characterization of the evidence that should have been in closing argument instead of opening statement, but a new trial was not warranted).

In comparison, in the instant case, the prosecutor commented regarding the defendant in opening statement that "this man is bent on doing heinous, heinous evil things." These statements, while more appropriate for closing argument were harmless error. NRS 178.598 says that any error which does not affect substantial rights shall be disregarded. Error is harmless if it appears, beyond a reasonable doubt, that the error complained of did not contribute to the verdict obtained. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967). The question is whether the jury would have returned a verdict of guilty if it had not been exposed to the error. United States v. Hastings, 461 U.S. 499, 510-11, 103 S.Ct. 1974, 1981 (1983).

Here, if the defense counsel would have objected and the remarks of the prosecutor had been stricken, it would not have made any difference on the outcome of the trial. There was so much overwhelming evidence of guilt by way of the identification of the defendant by one of the victims (Kathryn Cox), three security guards, and the bus driver; physical evidence of the deceased victims blood found all over the defendant; and a confession by the defendant that he committed the killing, that the inclusion of this statement was merely harmless error. Therefore, if defense counsel did not act effectively in failing to object, such failure was harmless.

5. Defense counsel was not ineffective in failing to object to victim impact evidence and the admission of a photograph of the victim.

First, the admission of the photograph of the victim was properly admitted within the sound discretion of the trial court. Even had defense counsel objected to its admission, the court would have allowed it. The defendant argues that he did not put the identity of the deceased into question, however, this is still something that the State must prove. The trial court decided that there was probative value which outweighed the prejudice in admitting this photo. Similarly, in Greene v. State, 113 Nev. 157, 931 P.2d 54, 60 (1997), the trial court allowed a photo of a deceased victim to be admitted into evidence which depicted the victim when alive. On review, the Supreme Court of Nevada held that the decision to admit the photo was within the discretion of the trial court, and absent an abuse of this discretion, it would uphold the decision, which it did. Id. Thus, any failure to object was a tactical one presumably based on a familiarity with Nevada case law, and was not ineffective assistance.

Regarding the defendant's second contention that defense counsel failed to object to victim impact evidence in the prosecutor's opening statement such failure was harmless. The Supreme Court of the United States in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991), held that victim impact evidence is not categorically barred by the eighth amendment. While this case dealt with the admission of such evidence in the penalty phase, the trend is clearly towards the admission of such evidence. In addition, the evidence referred to was relevant because it went to the ability of the victim, Kathryn Cox, to remember what the defendant looked like. In light of the overwhelming amount of evidence against the defendant, this was harmless error, if any.

6. Defense counsel could not argue under Nevada law that character evidence could not be considered until after the jury had weighed the aggravators against the mitigators.

The defendant urges this court to find that defense counsel was ineffective because he did not propose a jury instruction followed by another jurisdiction despite Nevada's explicit rejection of this premise. This argument simply lacks reason. The defendant would

have this court believe that trial counsel erred in not requesting an instruction which informs the jury that it may not consider character evidence until after it had weighed the aggravating circumstances against the mitigating circumstances and cites a case from the Eleventh Circuit.

The Supreme Court of Nevada has rejected this premise in Lisle v. State, 113 Nev. 679, 941 P.2d 459, 475 (1997). There is no Nevada authority which supports the interpretation that character evidence cannot be considered until after the jury determines that a defendant is death eligible. Id. A defendant's character is relevant to the jury's determination of the appropriate sentence for a capital crime, it is not limited to only after the jury decides the defendant is death eligible. Id. (Citations omitted) Character evidence is relevant to determine the sentence. Id.

B. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S. 395, 397, 105 S.Ct. 830, 836-837 (1985); see also, Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The federal courts have held that in order to claim ineffective assistance of appellate counsel the defendant must satisfy the two-prong test of Strickland v. Washington by demonstrating that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there was a reasonable probability that the result of the proceedings would have been different. See, Strickland, 466 U.S. at 687-688 & 694, 104 S.Ct. at 2065 & 2068; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991). Further, there is a strong presumption that counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See, United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing, Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. The Nevada Supreme Court, although not yet affirming the decision of the federal courts, has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke v.

State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). Finally, in order to prove that appellate counsel's alleged error was prejudicial, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. See, Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

The defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). However, the defendant does not have a constitutional right to "compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. In reaching this conclusion the Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones, 463 U.S. at 751 -752, 103 S.Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying good arguments...in a verbal mound made up of strong and weak contentions." Jones, 463 U.S. at 753, 103 S.Ct. at 3313. The Court has therefore held that for "judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Jones, 463 U.S. at 754, 103 S.Ct. at 3314.

Similar to the standards of ineffective assistance regarding trial counsel, appellate counsel has the right and discretion to employ his professional knowledge and tactics in constructing a defendant's appeal. Unless the defendant can demonstrate that counsel did not provide "reasonably effective assistance" appellate counsel's professional conduct will be upheld as effective. See, Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; Love, 109 Nev. at 1138, 865 P.2d at 323.

Appellate counsel's overall effectiveness is best demonstrated by the issues counsel raised on appeal. In Appellant's Opening Brief, counsel raised the following twelve (12) issues: 1) the trial court committed prejudicial error by not allowing jury voir dire questioning concerning the potential impact of prior violent felony conviction evidence; 2) the trial court committed prejudicial error by refusing to question prospective jurors concerning exposure

to a prejudicial newspaper article published during jury selection; 3) the trial court committed prejudicial error by failing to give jury instructions which adequately distinguished the elements of malice aforethought and premeditation/deliberation; 4) prosecutorial misconduct, (listed five instances), in the penalty phase closing arguments deprived defendant of a fair trial; 5) the trial court committed prejudicial error in denying defendant's motion for mistrial based on the victim's penalty hearing plea to the jury to "show no mercy" to defendant; 6) the trial court committed prejudicial error in denying defendant's motion for continuance to adequately prepare for the penalty hearing; 7) the trial court committed prejudicial error by refusing to exclude witnesses who would be called at the penalty phase of trial; 8) the trial court committed reversible error when it denied appellant's motion to argue last during penalty phase; 9) the trial court committed prejudicial error by failing to follow the mandate of Supreme Court Rule 250 governing settling of jury instructions; 10) the trial court committed prejudicial error in denying defendant's motion to strike the "preventing lawful arrest" aggravating circumstance; 11) the trial court committed prejudicial error by allowing introduction of penalty phase evidence that defendant possessed a weapon while in jail; and 12) the trial court committed prejudicial error by admitting penalty phase allegations that defendant was affiliated with a street gang.

In his Supplement to his Petition, the defendant raises seven additional issues claiming that appellate counsel was ineffective for not raising these in the direct appeal. The State's position is that this was a tactical decision by the appellate counsel, so they would not bury the stronger claims. The merits of the additional issues will be addressed briefly below.

1. Appellate counsel was correct in the decision not to raise a Batson issue.

The defendant argues that appellate counsel should have raised a Batson issue on direct appeal. His argument is that the State exercised a peremptory challenge against one of only two African-Americans left on the jury panel. The defendant objected citing Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). Appellate counsel was not ineffective for deciding not to bring this issue on appeal because the State provided a race-neutral explanation for challenging the prospective juror.

Batson and its progeny set forth a three-step process for evaluating race-based objections to peremptory challenges. First, the opponent of the peremptory challenge must make a prima facie showing of racial discrimination. In order to do so, "the defendant must first show that he is a member of a cognizable racial group, . . . and that the prosecutor has exercised peremptory challenges from the venire members of the defendant's race." (Citations omitted). The defendant in this case appears to be Caucasian, however, he is of Hispanic/Hawaiian decent. The juror that was preempted was an African-American. Thus, it can be argued that the defendant and the juror are from two different racial groups, and the prosecutor did not use a peremptory challenge to remove a member of the defendant's race. However, the defendant does have a right to a cross-section of the community, which includes African-Americans, so the prima facie case is met.

Once a prima facie showing has been made, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation. Purkett v. Elem, 514 U.S. 765, 767-68, 115 S.Ct. 1769, 1770-71 (1995). If a race-neutral explanation is tendered, step three requires the trial court to decide whether the opponent of the strike has proved purposeful racial discrimination. Id. In Purkett, the Supreme Court of the United States held that the race-neutral explanation given by the proponent of the peremptory challenge need not be persuasive or even plausible. Id. The issue at this step of the inquiry is the facial validity of the prosecutor's explanation. Id. The explanation will be deemed race-neutral unless there is inherent discriminatory intent. Id.

The prosecutor in Purkett explained that he struck the juror in question under Batson because this particular male juror had long, unkempt hair, a moustache, and a beard. Id. at 769, 115 S.Ct. At 1771. The Court found that this was a nondiscriminatory reason for the strike. Id. The inquiry then proceeded to the third step in which the trial court properly determined that the prosecutor was not motivated by discriminatory intent. Id. In comparison, in the instant case, the prosecutor indicated to the trial court that he had nothing in his notes regarding the juror's race. (3 ROA 813, 816) The only notation the prosecutor had with regard to the juror was that he did not believe that she was capable of making a decision. This was a race-neutral

explanation.

The court then made the determination that the prosecutor was not motivated by discriminatory intent because the court itself was not aware that the juror was of African-American decent. (3 ROA 813) At the time of the peremptory challenges, the jurors were not present. Neither the prosecutor nor the court had noted that the juror was African-American because they were not aware that race was an issue in the case because the defendant appeared to be Caucasian. (3 ROA 815) The names of the defendant and his family do not suggest any particular race. The court properly found that the defendant had not proved purposeful discrimination on the part of the prosecutor. The Court in Purkett clearly stated that "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Id. Therefore, the appellate counsel made a tactical decision not to raise this specious argument.

2. & 3. Appellate counsel was not ineffective in deciding not to Petition the Court for Rehearing.

According to NRAP 40(c)(2) rehearing may only be considered by a court in the following circumstances: I) When it appears that the court has overlooked or misapprehended a material matter in the record or otherwise, or ii) In such other circumstances as will promote substantial justice. Whitehead v. Nevada Commission on Judicial Discipline, 110 Nev. 380, 388, 873 P.2d 946, 952 (1994). In Whitehead, the petition was not considered proper because it did not address any "material matter," it simply asked the court to withdraw or change "faulty assumptions, misstatements of fact and mischaracterizations of the legal arguments. . . ." Id. The court held that rehearings are not granted to review matter of no material consequence. Id.

In his Supplement to his Petition, the defendant argues 1) that there were irreconcilable differences within the court's opinion that the court had indicated it would maintain irrespective of the contradiction, 2) that there remained three, not four, aggravators after the court struck one down, and 3) that the court erred in a date. None of these claims are of any material consequence. With regard to the first claim, the court indicated that it was being contradictory, so it would not have changed its position on rehearing. With regard to the second claim, it is

of no consequence that the court made a clerical error or miscalculated the remaining aggravators because the finding of only one aggravator is enough to invoke the death penalty and three still remained. According to NRS 200.030(4)(a) "[a] person convicted of murder of the first degree is guilty of a category A felony and shall be punished: (a) By death, **only if one** or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found **do not outweigh** the aggravating circumstance or circumstances . . . ." (Emphasis added). Even with the clerical error or miscalculation, the defendant still concedes that three aggravators existed.

In addition, in the next paragraph of the Supreme Court's slip opinion in Witter, 112 Nev. Ad. Op. at p.24, the Court states that the "evidence fully supports the finding of **three** valid aggravating circumstances," (emphasis added) which is evidence that the Court merely made a clerical error when it said four aggravators remained in the paragraph above. The correct number of three is in the slip opinion 112 Nev. Ad. Op. at p.24, however, it is wrong in the same paragraph in the published opinion. (See attachments). Clearly, this was a clerical error.

The jury found four aggravating circumstances, as indicated in the attached copy of the special verdict form. The court struck down one aggravator. It then conducted a reweighing test citing Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441 (1990). After striking the aggravator, the court concluded that the aggravators still outweighed the mitigators. Even if the math is incorrect, the court knew which aggavators the jury found, knew which aggravator it was striking, and reweighed those remaining against the aggravators. The opinion merely contains a clerical error. It would have been improper to ask for a rehearing based on a clerical error.

Finally, the defendant contends that the court erred in a calculation of a date. When the defense asked for a continuation of the penalty hearing because it had not received the discovery indicating the defendant's gang involvement and did not have time to procure a gang expert for the penalty phase, the court incorrectly believed that the defense was notified "almost a full year before the penalty hearing." In fact, the defense was only notified of these facts a few days before the penalty hearing. It was not ineffective assistance of appellate counsel to fail to raise this, however, because as aforementioned, the court indicated that even if defense had time to

secure a gang expert and present testimony to this regard, it would have done little to mitigate the defendant's involvement. Id. at 11, 921 P.2d at 893.

4. The prosecution did not shift the burden to the defendant, so appellate counsel was not ineffective in failing to raise this issue.

The defendant argues that when the prosecutor stated that neither the State nor the defense had called an expert on how alcohol effects a person's state of mind, that shifted the burden to the defendant. Trial counsel objected. The court commented that the jury "knows that there is no burden. He's just saying what was and was not presented at the time of trial." The defendant argues that appellate counsel should have raised this issue on direct appeal.

First, it was a tactical decision of appellate counsel not to raise this issue. The trial court remedied the problem at the time by saying that the jury knows that the defendant has no burden. In addition, defendant cites Colley v. State, 98 Nev. 14, 16, 639 P.2d 530, 532 (1982), as standing for the proposition that generally it is improper argument to comment on the defendant's failure to call a witness. While that is the general proposition, in Colley, the court held that the defendant's argument that the burden was shifted when the prosecutor asked the defendant about a particular witness' failure to appear was without merit. Id. The defense also cites Barron v. State, 105, 767, 783 P.2d 444 (1989). In Barron, the Nevada Supreme Court holds that the test is "whether the prosecutor's language was 'manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to [respond].'" Id. at 779, 783 P.2d at 451.

In Lisle v. State, 113 Nev. 679, 941 P.2d 459, 476 (1997), the court held that the burden was not shifted to the defendant when the prosecutor made only a few general remarks about the lack of expert witnesses, not a specific witness during the penalty phase. Although in the instant case the comments were made during the closing argument of the trial phase, the reasoning of Lisle can still be applied. In fact, it seems that was what the trial judge was doing. The prosecutor merely made a general reference regarding what evidence was and was not presented. He did not name a particular witness. Even if he had, under Colley, that may not have even been enough to shift the burden, thus, appellate counsel was not ineffective in deciding not to

bring this meritless argument.

5. Appellate counsel was correct in not raising the issue of denial of trial counsel's challenge for cause of juror Miller.

In United States v. Claiborne, 765 F.2d 784, 800 (9th Cir. 1985), the court held that the court did not abuse its discretion in failing to dismiss jurors for cause and inviting counsel to use their peremptory challenges to excuse them from the panel. The court reasoned that "[f]ew aspects of a jury trial are more committed to a district court's discretion than the decision whether to excuse a prospective juror for actual bias. Moreover, trial courts possess a peculiar ability to determine whether a prospective juror's claimed ability to decide a case impartially is genuine." Id. (Citations omitted). In Claiborne, the district court determined that the prospective jurors in question on appeal would weigh the evidence impartially despite their initial preconceptions of the defendant's guilt or innocence. Id. The fact that the defendant used peremptory challenges to strike the two jurors, the court found to be "not a denial of justice" but a "proper utilization of the peremptory tool." Id. Likewise, in the instant case, the court found the jurors passed for cause. This was in the court's discretion, and had appellate counsel raised the issue on appeal, the court would have likely upheld the decision of the trial judge.

The defendant cites Thompson v. State, 111 Nev. 439, 894 P.2d 375 (1995), as standing for the proposition that the Supreme Court of Nevada will hold that some prospective jurors should have been excused for cause by the trial court. The juror in this case differs from the juror in Thompson because the juror in Thompson said that the defendant was guilty. Id. He had already formed an opinion, but he responded to a question to that effect that he had not formed an opinion when he clearly had. In contrast, the prospective juror Miller, in this case, had not formed an opinion about the defendant's guilt or innocence, but indicated that he would not consider the childhood of a defendant as a mitigating circumstance. Additionally, the court had previously instructed defense counsel not to use the term "mitigation" during voir dire, as the court could not conclude what would be allowed as mitigators at this point in the trial. (1 ROA 352-55)

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6. Appellate counsel was not ineffective in deciding not to address the reference to the defendant's acts of juvenile rape and violence in prison which came out in the penalty phase.

Linda Rose, a parole officer for the California Department of Corrections, testified that the Department of Corrections prepares an institutional summary that contains a criminal history section. During her testimony Ms. Rose read from a certified copy of the abovementioned report under the category "sex related offenses" that the defendant in "1978, [subject] was arrested at the age of 15 for rape while residing in Hawaii. He served juvenile hall." The defendant objected and a bench conference took place, and the following day, the defendant made a record of his objection to this information being admitted citing D'Agostino v. State, 107 Nev. 1001, 823 P.2d 283 (1991). The defendant now argues that appellate counsel should have raised this preserved issue on direct appeal. Appellate counsel made a tactical decision not to include this in the appeal. He was not ineffective in this decision.

D'Agostino can be distinguished from the case at bar because in D'Agostino a jail informant testified that the defendant, while in prison, had told him that he had killed "some old man in New York." Id. at 1003, 823 P.2d at 284. The informant did not specify the time, place, or identity of the man. Id. The Supreme Court of Nevada opined that absent these details, the defendant was prejudiced by such unverifiable accusations. Id. The Court was careful to point out, however, that "[p]ast criminal activity is one of the most critical factors in the process of assessing punishment." Id. at 1004, 823 P.2d at 285. The opinion addressed specifically the reliability of jail-house informants that are under pressure to cooperate with the State. Id.

In contrast, the information that came in regarding the defendant in the instant case was reliable. It was part of a certified copy of the record of the Department of Corrections that was read verbatim to the jury by a parole officer. Additionally, it gave the year, place, age of the defendant, and punishment imposed for the sex offense. Surely, this was not the kind of information that the Court was concerned about in D'Agostino.

The defendant also criticizes appellate counsel for failing to argue that it was improper for parole officer Rose to testify as to the defendant's misconduct by way of force and violence in prison. First, the defendant did not make an objection to this information at the time Ms.

Rose was testifying and in fact asked her follow up questions regarding this information on cross-examination. It was not until the next day that defense counsel put his objection to this information on the record. Second, this is again not the kind of information that the Court in D'Agostino meant to exclude. Again, the information came from a certified report, was testified to by a parole officer (not a jail-house informant), and indicated that the defendant was punished with additional jail time for the violent behavior. This evidence was in fact reliable, and appellate counsel was not ineffective in deciding not to make a faulty argument on appeal.

7. Appellate counsel did not err in deciding not to appeal the trial court's decision to admit photographs of the scene, the murder weapon, and the autopsy into evidence.

The admission of photographs of victims, crime scenes, and weapons is within the sound discretion of the trial court, and absent an abuse of this discretion, the decision will be upheld. See Greene v. State, 113 Nev. 157, 931 P.2d 54,60 (1997). In Wesley v. State, 112 Nev. 503, 916 P.2d 793, 800 (1996), the Supreme Court of Nevada held that a trial court was justified and did not abuse its discretion when it admitted autopsy photographs of the murder victims. The Court concluded that the probative value outweighed the prejudice because the photographs assisted the jury in understanding the "nature and quality" of the wounds inflicted by the stabbings. Id. The photos also were used to explain the findings of the autopsy. Id. Although the Court found the photographs to be "graphic and troubling to human sensibility," the trial court had not abused its discretion in allowing them.

Likewise, the trial judge did not abuse his discretion in allowing photos of the interior and exterior of the cab because this aided the jury in understanding the scene in which the crime took place. The judge did not abuse his discretion in allowing a picture of the knife, the murder weapon. Finally, the judge was proper in allowing the autopsy photos. The defendant properly states that such photos are admissible to aid in the ascertainment of the truth if the probative value outweighs their prejudicial impact. The defendant argues that there was no probative value because the defendant did not contest the identity of the victim, the cause of death, or the events of the murder. However, the defendant plead not guilty, and the State had a responsibility to present evidence to establish all the elements of the crimes. The trial judge

determined that the probative value did outweigh the prejudice. Appellate counsel was not ineffective in deciding to exclude this unpersuasive argument in light of the Nevada case law.

CONCLUSION

The performance of both trial and appellate counsel was effective. The decisions the attorneys made were tactical and in the best interest of their client. The light of the overwhelming evidence of guilt, the defendant was not prejudiced by any of the decisions of either trial or appellate counsel. Thus, the State respectfully requests that this Court deny the defendant's Supplemental Points and Authorities in Support of his Petition for Writ of Habeas Corpus (Post Conviction) and deny the defendant his request for an evidentiary hearing.

DATED this 22 day of September, 1998.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
GARY L. GUYMON
Deputy District Attorney
Nevada Bar #003726

doubt. We therefore conclude that the jury could not have reasonably found that the murder was committed to avoid lawful arrest and that the district court erred when it denied Witter's motion to strike the aggravator.

In McKenna v. McDaniel, 65 F.3d 1483 (9th Cir. 1995), the Ninth Circuit Court of Appeals was faced with a situation similar to the case at bar in which one of the aggravating circumstances used to sentence McKenna to death was found invalid. In commenting on Nevada's death penalty statute, the court stated:

> Even in a weighing state, however, invalidation of one of several aggravating factors may make no difference if there were no mitigating circumstances against which the state court could balance the remaining aggravating factors. See Neuschafer v. Whitley, 816 F.2d 1390, 1393 (9th Cir. 1987). But where some mitigating factors exist, there must either be a new sentencing hearing before a jury or the state appellate court must reweigh or conduct harmless error review in order to give the defendant the individualized considerations required by the Constitution. Clemons (v. Mississippi), 494 U.S. [738] at 746, 752, 110 S.Ct. [1441] at 1447, 1450.

Id. at 1489-90. Even though we conclude that the prevention of lawful arrest aggravator should have been stricken, there remain four aggravators that the State has proven beyond a reasonable doubt. In mitigation, Witter offered the testimony of several members of his family and the testimony of a clinical psychologist, all of whom testified that Witter grew up in a very abusive and dysfunctional family. We conclude that the remaining four aggravators clearly outweigh the mitigating evidence presented by Witter. Moreover, for the same reason, we conclude that the district court's failure to strike the prevention of lawful arrest aggravator amounts to harmless error. See Chapman v. California, 386 U.S. 18 (1966). We therefore conclude that even though the district court erred in allowing the prevention of lawful arrest aggravator to be considered by the jury, Witter's sentence of death is still proper.

Mandatory statutory review.

Finally, we conclude, pursuant to NRS 177.055, that (1) the evidence fully supports the finding of three valid aggravating circumstances, (2) the sentence of death was not imposed under the influence of passion, prejudice or any arbitrary factor, and (3) the sentence is not excessive, considering both the crime and the defendant.

CONCLUSION

For the reasons stated above, we conclude that except for Witter's challenge to the prevention of lawful arrest statutory aggravator, all of Witter's arguments are without merit. Accordingly, we affirm Witter's judgment of conviction. With regard to the prevention of lawful arrest statutory aggravator, we conclude that the State has failed to prove the aggravator beyond a reasonable doubt. Nevertheless, because we conclude that the remaining four aggravators clearly outweigh the mitigating evidence presented by Witter, we affirm Witter's sentence of death.

Steffen, C.J.

Young, J.

Springer, J.

Shearing, J.

Rose, J.

921 P.2d 886
112 Nev. 908
(Cite as: 921 P.2d 886)

William Lester WITTER, Appellant,
v.
The STATE of Nevada, Respondent.

No. 27539.

Supreme Court of Nevada.

July 22, 1996.

Rehearing Denied Dec. 13, 1996.

Defendant was convicted in the Eighth Judicial District Court, Clark County, Stephen L. Huffaker, J., of murder with use of a deadly weapon, attempted sexual assault with use of a deadly weapon, and burglary, and was sentenced to death. Defendant appealed. The Supreme Court held that: (1) defendant's question to prospective jurors regarding prior felony conviction violated rule prohibiting voir dire questions touching on anticipated instructions on the law and questions touching on verdict that juror would return when based upon hypothetical facts; (2) trial court did not abuse its discretion in refusing to allow defendant to question prospective jurors regarding letter to editor published in newspaper; (3) trial court did not abuse its discretion in denying defendant's motion to invoke witness exclusion rule with respect to penalty phase; (4) jury instruction defining "premeditation" was proper; (5) jury instruction defining "express malice" was proper; (6) defendant was not entitled to his proffered jury instruction defining "deliberation"; (7) trial court complied with rule requiring court to confer with attorneys after close of evidence concerning jury instructions and other matters, and requiring that conference be reported; (8) trial court did not abuse its discretion in denying defendant continuance of penalty phase; (9) evidence that defendant possessed knife in jail while awaiting trial was admissible during penalty phase; (10) evidence that defendant was member of street gang was admissible during penalty phase; (11) statement to jury that it should "show no mercy," made by wife of murder victim, was admissible victim-impact statement; (12) statute providing for punishment by death in certain circumstances did not shift to defendant burden to prove that mitigating circumstances outweighed aggravating circumstances; (13) trial court properly denied defendant's request to argue last during closing arguments; (14) prosecutor's statements during closing argument did not constitute misconduct; and (15) although trial court's failure to strike prevention of lawful arrest aggravator was error, such error was harmless.

Affirmed.

[1] CRIMINAL LAW ⇐1152(2)
110k1152(2)
Scope of jury voir dire is within sound discretion of trial court and will be given considerable deference by Supreme Court.

[1] JURY ⇐131(2)
230k131(2)
Scope of jury voir dire is within sound discretion of trial court and will be given considerable deference by Supreme Court.

[2] JURY ⇐131(1)
230k131(1)
The critical concern of jury voir dire is to discover whether juror will consider and decide facts impartially and conscientiously apply law as charged by court.

[3] JURY ⇐131(15.1)
230k131(15.1)
Defendant's question to prospective jurors in capital case, as to whether they would still consider all three sentencing alternatives in their deliberations if there was evidence that defendant had prior felony conviction involving use or threat of violence, violated rule prohibiting voir dire questions touching on anticipated instructions on the law and questions touching on verdict that juror would return when based upon hypothetical facts. District Court Rule 7.70.

[4] CONSTITUTIONAL LAW ⇐267
92k267
Due process concerns are not offended by rule prohibiting voir dire questions touching on anticipated instructions on the law and questions touching on verdict that juror would return when based upon hypothetical facts. U.S.C.A. Const.Amends. 5, 14; District Court Rule 7.70.

[5] JURY ⇐131(6)
230k131(6)

130 L.Ed.2d 112 (1994), the evidence adduced at trial showed that Canape robbed his victim then walked him away from the freeway before shooting him in the back. We held that based on the evidence of the case, a jury could reasonably infer that the murder was committed to avoid lawful arrest. Id. at 874-75, 859 P.2d at 1030.

In this case, Witter attacked James only after James told Witter that Kathryn was his wife and ordered Witter to exit the vehicle. Once Witter killed James, Witter grabbed Kathryn and forced her back into the vehicle. Rather than fleeing, or killing Kathryn to make sure no one could identify him, Witter hid James' body under his cab and resumed his sexual assault on Kathryn. The natural inference drawn from these facts is that Witter killed James so that he could continue his assault on Kathryn, not to avoid arrest. Clearly, the prosecution has not met its burden of proving this aggravator beyond a reasonable doubt. We therefore conclude that the jury could not have reasonably found that the murder was committed to avoid lawful arrest and that the district court erred when it denied Witter's motion to strike the aggravator.

[36] In McKenna v. McDaniel, 65 F.3d 1483 (9th Cir.1995), the Ninth Circuit Court of Appeals was faced with a situation similar to the case at bar in which one of the aggravating circumstances used to sentence McKenna to death was found invalid. In commenting on Nevada's death penalty statute, the court stated:

> Even in a weighing state, however, invalidation of one of several aggravating factors may make no difference if there were no mitigating circumstances against which the state court could balance the remaining aggravating factors. See Neuschafer v. Whitley, 816 F.2d 1390, 1393 (9th Cir.1987). But where some mitigating factors exist, there must either be a new sentencing hearing before a jury or the state appellate court must reweigh or conduct harmless error review in order to give the defendant the individualized considerations required by the Constitution. Clemons [v. Mississippi], 494 U.S. [738] at 746, 752, 110 S.Ct. [1441] at 1447, 1450 [108 L.Ed.2d 725 (1990)].

Id. at 1489-90. Even though we conclude that the prevention of lawful arrest aggravator should have been stricken, there remain four aggravators that the State has proven beyond a reasonable doubt. In mitigation, Witter offered the testimony of several members of his family and the testimony of a clinical psychologist, all of whom testified that Witter grew up in a very abusive and dysfunctional family. We conclude that the remaining four aggravators clearly outweigh the mitigating evidence presented by Witter. Moreover, for the same reason, we conclude that the district court's failure to strike the prevention of lawful arrest aggravator *901 amounts to harmless error. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). We therefore conclude that even though the district court erred in allowing the prevention of lawful arrest aggravator to be considered by the jury, Witter's sentence of death is still proper.

Mandatory statutory review.

Finally, we conclude, pursuant to NRS 177.055, that (1) the evidence fully supports the finding of four valid aggravating circumstances, (2) the sentence of death was not imposed under the influence of passion, prejudice or any arbitrary factor, and (3) the sentence is not excessive, considering both the crime and the defendant.

CONCLUSION

For the reasons stated above, we conclude that except for Witter's challenge to the prevention of lawful arrest statutory aggravator, all of Witter's arguments are without merit. Accordingly, we affirm Witter's judgment of conviction. With regard to the prevention of lawful arrest statutory aggravator, we conclude that the State has failed to prove the aggravator beyond a reasonable doubt. Nevertheless, because we conclude that the remaining four aggravators clearly outweigh the mitigating evidence presented by Witter, we affirm Witter's sentence of death.

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FILED IN OPEN COURT
JUL 13 1995
6:00 p.m.
LORETTA BOWMAN, Clerk
BY Bernice Stuckey, Deputy

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM LESTER WITTER,
#1204227

Defendant.

CASE NO. C117513

DEPT. NO. IX

DOCKET NO. W

SPECIAL VERDICT

We, the Jury in the above entitled case, having found the Defendant, WILLIAM LESTER WITTER, Guilty of COUNT I - MURDER OF THE FIRST DEGREE, designate that the aggravating circumstance or circumstances which have been checked below have been established beyond a reasonable doubt.

✓ The murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another.

✓ The murder was committed while the person was engaged in the commission of or an attempt to commit any Burglary.

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2225

✓ The murder was committed while the person was engaged in the commission of or an attempt to commit any Sexual Assault.

✓ The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

DATED at Las Vegas, Nevada, this 13 day of July, 1995

Robert A. Ellen
FOREPERSON

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing State's Opposition to Defendant's Petition for Writ of Habeas Corpus is hereby acknowledged this 22 day of September, 1998.

DAVID SCHIECK, Esq.
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM LESTER WITTER,
#1204227

Defendant.

Case No. C117513
Dept. No. XV
Docket L

STATE'S SUPPLEMENTAL OPPOSITION TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: 2-26-99
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through GARY L. GUYMON, Deputy District Attorney, and files this State's Opposition to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

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

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STATEMENT OF FACTS

As this is a supplemental brief, the State incorporates by reference the Statement of Facts from State's original Opposition to Defendant's Petition for Writ of Habeas Corpus.

ARGUMENT

THE DEFENDANT FAILS TO SUCCESSFULLY MAKE A CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL

As this is a supplemental brief, the State incorporates by reference its earlier argument and adds the following:

This Court granted the Defendant an evidentiary hearing based on his Petition for Writ of Habeas Corpus. At the evidentiary hearing, defendant was given the opportunity to present evidence to support the claims raised in his Petition, yet defendant failed to elicit any testimony that would support his claim of ineffective assistance of counsel. At the evidentiary hearing, Defendant presented testimony from two witnesses, Philip Kohn ("Kohn"), his trial counsel, and Robert Miller ("Miller"), his appellate counsel. Both witnesses testified that their decisions regarding Defendant's case were tactical decisions. The witnesses' testimony was consistent with the record. The defendant failed to present any evidence that would contradict the finding that both attorneys acted reasonably and were effective, therefore his claims were merely bare allegations without any facts to back them up. This Court in Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), held that to the extent that a defendant advances merely "naked" allegations, he is not entitled to relief. Accordingly, this Court should deny defendant's Petition.

A. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

1. Defense counsel did not fail to investigate and present evidence at trial.

The defendant argued that trial counsel failed to investigate and retain an expert in Fetal Alcohol Syndrome ("FAS") which prejudiced his defense. The defendant is not entitled to relief on this issue for two reasons. First, the defendant failed to present any testimony from a FAS expert who would have testified on his behalf. Second, Kohn testified that he did investigate a

FAS defense and sought to obtain a FAS expert, but he had been unable to find an expert who would testify on the defendant's behalf.

At the evidentiary hearing, defendant had the opportunity to present evidence to support his claim of ineffective assistance of counsel. While defendant has alleged that he was prejudiced by trial counsel's failure to investigate and retain an expert in FAS, he has not presented this Court with any evidence to support this allegation. Defendant has failed to provide any information that would indicate he did suffer from FAS. Additionally, even if defendant could have retained an expert to testify that he suffered from FAS, defendant is unable to state how the outcome of his case would have been affected by such testimony. In State v. Brett, 892 P.2d 29, 64 (Wash. 1995), the defendant claimed it was error for the trial court to exclude expert testimony that he was diagnosed with FAS. The court denied defendant's claims of error, explaining that a diagnosis of FAS "would place nothing more than a label on [defendant's] lower intelligence and behavioral problems, evidence which was already before the jury. With or without the diagnosis or label, the defense could argue that such evidence mitigated in favor of the lesser sentence." Id. Because FAS is not an affirmative defense, but merely helps explain a possible cause for an individual's low intelligence, defendant cannot show that the failure to present FAS testimony was prejudicial.

Second, at the evidentiary hearing, Kohn detailed his efforts to investigate a defense based on FAS and retain an expert on FAS. Kohn testified that he flew to San Jose, California to conduct an extensive investigation of the defendant's case. (TT 6). After spending a week interviewing witnesses, he discovered information which he believed gave the defendant a viable defense, FAS. (TT 6). To investigate FAS, Kohn read The Broken Chord by Michael Doris which explained the symptoms and effects of FAS. (TT 5). Kohn explained that due to the relative novelty of FAS, it was difficult to obtain information on the Syndrome. (TT 9).

Kohn attempted to retain an expert on FAS but after much effort, discovered that he could not find an expert who was willing to testify on defendant's behalf. (TT 37). Kohn did learn that to present a FAS defense, he would need to obtain a geneticist. (TT 13). Kohn called the University of Nevada Reno, University Medical Center, and University Medical Associates to

locate a geneticist, to no avail. (TT 13). Kohn then contacted Susan Doctor in Reno who was working on a Ph.D. in psychology whose field of expertise was FAS. (TT 14). Ms. Doctor refused to see the defendant unless he was first examined by a geneticist who would determine whether there was reason to believe he suffered from FAS. (TT 14). Kohn was eventually able to locate a geneticist, Dr. Colene Morris. Kohn called Dr. Morris at least ten times, but each time she refused to speak to him, claiming to have no interest in testifying for the defendant. (TT 12-13).

Having no luck in locating an expert in FAS, Kohn then contacted several defense attorneys with the hope that they could provide him with the name of a FAS expert. (TT 18). Kohn eventually spoke to an attorney with the California Appellate Project in San Francisco who provided him with the names of FAS experts. (TT 19). Kohn learned that these experts were not available to him. (TT 19). In 1995, Kohn realized that several FAS experts resided in Seattle. (TT 14). Before these experts would examine the defendant, they required one of their geneticists to fly to Las Vegas, visit with the defendant, and write a report. (TT 14-15). Based on this report, the experts would decide whether to examine defendant. (TT 15). Kohn did not retain these experts because they told him that this process would take some time. (TT 18). Kohn sought a continuance to allow the experts time to examine defendant, but because he was unable to provide the court with a time frame of when they could examine the defendant, the trial court denied the continuance. (TT 17-18).

In an effort to retain a local expert on FAS, Kohn spoke with Ann Coleman, Harry Hess, Dr. Masters, Dr. Etcoff and Dr. Pole. (TT 20). Kohn discovered that because FAS was a ground breaking field at that time, even these local experts who dealt with alcohol-related conditions on a daily basis were not qualified to testify about FAS. (TT 20). Kohn eventually retained Dr. Etcoff, a licensed psychologist, who testified that defendant may have had attention deficit hyperactivity disorder, antisocial personality disorder, and developmental arithmetic disorder. (ROA 2042-43).

The above efforts clearly refute defendant's claim that Kohn failed to investigate a FAS defense and failed to retain a FAS expert. Kohn clearly expended a great deal of effort to

investigate a FAS defense and retain a FAS expert. Kohn's efforts were ultimately unsuccessful through no fault of his own. Kohn testified that since the time of trial, he has learned a great deal about FAS. (TT 10). At the evidentiary hearing, Kohn opined that his newly acquired knowledge has strengthened his belief that defendant did suffer from FAS. (TT 11). However, this Court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. In 1994 and 1995, despite the fact that little was known about FAS, Kohn made numerous attempts to locate a FAS expert. Accordingly, Kohn's representation was reasonable and did not constitute ineffective assistance of counsel.

2. Defense counsel's did not fail to investigate and present evidence at the penalty hearing.

The defendant argued that Kohn was ineffective as he did not call a gang expert or a FAS expert to testify at the penalty hearing. The inability to retain a FAS expert has been discussed above. In addition, the decision to call or not call a gang expert was a tactical one. As aforementioned, trial counsel's strategy will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 847, 921 P.2d at 281; see also, Howard, 106 Nev. at 722, 800 P.2d at 180; Strickland, 466 U.S. at 691, 104 S.Ct. at 2066; Mecker, 693 P.2d at 917.

At the evidentiary hearing, Kohn testified that he had not been provided with the discovery regarding the gang involvement. (TT 21). Kohn testified that he had no notice that the defendant was involved in a gang except for the defendant's tattoos and an inference that he may have been in a gang at some time or another. (TT 22). Kohn stated that when he learned that State might present gang evidence, he asked for reports but was told there were none. (TT 22). When the State did present evidence from gang experts, Kohn immediately sought a continuance in order to retain his own gang expert. (TT 22-23). Kohn's failure to present a gang expert was not unreasonable under the circumstances, as he believed that gang evidence was only admissible if defendant had been a gang member at some point in his life. (TT 23). Defendant did not tell Kohn of his previous gang affiliation, therefore Kohn could not have

anticipated the need to retain a gang expert.

Furthermore, Kohn's failure to retain a gang expert was not unreasonable because as he stated, an expert was not necessary to refute many of the claims made by the State's gang experts. (TT 25). For example, one of the State's witnesses testified that defendant's 49er shoes were indicative of gang involvement. (TT 25). Mr. Kohn testified that he considered the testimony that defendant's shoes were indicative of gang involvement to be "ludicrous." (TT 25). As this Court aptly pointed out, a jury could have reached this same conclusion without the testimony of a gang expert. (TT 25). Thus, Kohn's conduct in failing to retain a gang expert was not deficient and did not prejudice defendant.

3. Defense counsel did not concede guilt in opening statement.

The defendant argued that because defense counsel, Bassett, agreed that the facts the prosecutor gave were "terrible, horrible, disturbing facts," that would have to be dealt with, that Bassett conceded the defendant's guilt and did not act as an advocate for the defendant and was thus ineffective. In State v. Olivieri, 49 Nev. 75, 236 P.1100, 1101 (1925), the Court stated that "[i]t is the duty of counsel making a statement to state the facts fairly, and to refrain from stating facts which he cannot, or will not, be permitted to prove."

At the evidentiary hearing, Kohn explained why it was necessary to make some concessions as to defendant's guilt. Kohn explained that because overwhelming evidence of defendant's guilt existed, it would have been virtually impossible not to concede some guilt. (TT 27). Defendant was facing the death sentence so Kohn knew that if defendant was convicted, there would be a penalty phase. Kohn felt it was prudent to not present a defense during the guilt phase that would have impaired Kohn's credibility so that during the penalty phase, the jury would listen to him. (TT 26). This tactic was identical to defense counsel's strategy in People v. Bolin, 956 P.2d 374, 400 (Cal. 1998), in which defense counsel conceded guilt in the closing argument in order to preserve his credibility for the penalty phase. The court found defense counsel was not ineffective, stating, "Conceding some measure of culpability was a valid tactical choice under these restrictive circumstances." Id. Given Kohn's motivation for not presenting

a defense, his decision to not put on a defense during the guilt phase was a well-rationed, effective tactical decision.

4. Defense counsel was not ineffective when he refrained from objecting during the opening statement of the prosecutor.

The defendant argued that trial counsel failed to object to improper argument during opening statement. The prosecutor, however, may outline his case and propose facts he intends to prove. Rice v. State, 113 Nev. 1300, 1312, 949 P.2d 262, 270 (1997). Even if the prosecutor overstates what he is later able to prove, misconduct is not present unless he does so in bad faith. Id. In Browne, 113 Nev. at 310, 933 P.2d at 190-91 (1997), the Nevada Supreme Court held that reference to a defendant as a "selfish and cruel man" did not rise to the level requiring reversal. See People v. Benson, 802 P.2d 330, 353-54 (Cal. 1990) (holding prosecutor's comment "this crime is perhaps the most brutal, atrocious, heinous crime," was merely a comment on the nature of the offense and was permissible); see also Runningeagle, 859 P.2d at 173 (holding that prosecutor's use of the words "horror" and "evil" were merely a characterization of the evidence that should have been in closing argument instead of opening statement, but a new trial was not warranted).

Kohn testified that his decision not to object to the State's opening argument was a tactical decision. Kohn explained that he was "trying to still curry favor with the jury" and unless something was truly objectionable, he would not object. (TT 29). Again, because there was overwhelming evidence of defendant's guilt, it was important for Kohn to maintain his credibility with the jury and objecting to the State's opening argument would likely have been more harmful than helpful. Because the Nevada Supreme Court is so quick to find improper opening statements to be harmless error, Kohn's tactical decision not to object cannot be said to be ineffective assistance of counsel.

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5. Defense counsel was not ineffective in failing to object to victim impact evidence.

Defendant argued that it was ineffective for counsel not to object to victim impact evidence in the admission of a photograph of the victim and the prosecutor's opening statement. At the evidentiary hearing, defendant failed to ask Kohn why he did not object to the admission of the photograph. Therefore, this contention is nothing more than a naked allegation with no factual support and must fail. With regard to prosecutor's opening statement, Kohn testified that his decision not to object to the victim impact testimony was a strategic point. (TT 31). "Experienced advocates might differ about when, or if, objections are called for since, as a matter of trial strategy, further objections from counsel may have succeeded in making the prosecutor's comments seem more significant to the jury." Sasser v. State, 993 S.W.2d 901, 910 (Ark. 1999). "Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the wide range or permissible legal conduct." Id. Kohn testified that his decision not to object was strategic and Defendant has failed to disprove this claim, therefore this Court must presume that Kohn acted effectively.

6. Defense counsel could not argue under Nevada law that character evidence could not be considered until after the jury had weighed the aggravators against the mitigators.

The defendant urges this Court to find that defense counsel was ineffective because he did not propose a jury instruction followed by another jurisdiction despite Nevada's explicit rejection of this premise. The Supreme Court of Nevada has rejected this premise in Lisle v. State, 113 Nev. 679, 941 P.2d 459, 475 (1997). There is no Nevada authority which supports the interpretation that character evidence cannot be considered until after the jury determines that a defendant is death eligible. Id. A defendant's character is relevant to the jury's determination of the appropriate sentence for a capital crime, it is not limited to only after the jury decides the defendant is death eligible. Id. (Citations omitted) Character evidence is relevant to determine the sentence. Id.

Kohn testified that he did not propose the jury instruction because he wanted to focus on the fact that because defendant had the final burden of proving mitigation. (TT 32). Kohn explained that at the time of defendant's trial, he believed this was true although later the Nevada Supreme Court declined to adopt this position. (TT 32). At the time of trial, Kohn's decision to focus on the defendant's burden of proving mitigating factors rather than on a proposed jury instruction was a proper trial strategy. This Court should "not use hindsight to second-guess a tactical decision made by trial counsel which does not fall below the objective standard of care." Solis v. State, 792 S.W.2d 95, 100 (Tex.Crim. App. 1990). Because Kohn's strategy was reasonable at the time, defendant has provided no support for this allegation of ineffective assistance of counsel.

B. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

1. Appellate counsel was correct in the decision not to raise a Batson issue.

The defendant argued that appellate counsel should have raised a Batson issue on direct appeal. His argument is that the State exercised a peremptory challenge against one of only two African-Americans left on the jury panel. The defendant objected citing Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). Appellate counsel was not ineffective for deciding not to bring this issue on appeal because the State provided a race-neutral explanation for challenging the prospective juror.

Batson and its progeny set forth a three-step process for evaluating race-based objections to peremptory challenges. First, the opponent of the peremptory challenge must make a prima facie showing of racial discrimination. Once a prima facie showing has been made, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation. Purkett v. Elem, 514 U.S. 765, 767-68, 115 S.Ct. 1769, 1770-71 (1995). If a race-neutral explanation is tendered, step three requires the trial court to decide whether the opponent of the strike has proved purposeful racial discrimination. Id.

Counsel on appeal, Miller, testified at the evidentiary hearing. (TT 42). When asked why he did not raise a Batson issue on appeal, Miller said he had two reasons. (TT 44). First, the

State provided a race-neutral explanation for excluding the juror. (TT 45). Second, it was unclear whether the juror was African-American. (TT 44). The record indicated that Kohn believed the juror was African-American, while others said they were unsure of the juror's race. (TT 45). The prosecutor indicated to the trial court that he had nothing in his notes regarding the juror's race. (3 ROA 813, 816). Miller stated that because of the unclarity of the juror's race, he decided this issue was unlikely to succeed on appeal and it was a tactical decision not to raise this issue. (TT 45).

Defendant has not proven what was the race of the juror in question and also was unable to show that the State's race-neutral explanation was invalid. The only notation the prosecutor had with regard to the juror was that he did not believe that she was capable of making a decision. This was a race-neutral explanation. The Court in Purkett clearly stated that "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Id. Defendant has failed to provide this Court with any evidence that the prosecutor was motivated by race when he sought to strike the juror. Therefore, Miller's decision not to raise this issue on appeal must be considered a proper tactical decision.

2/3. Appellate counsel was not ineffective in deciding not to Petition the Court for Rehearing.

According to NRAP 40(c)(2) rehearing may only be considered by a court in the following circumstances: I) When it appears that the court has overlooked or misapprehended a material matter in the record or otherwise, or ii) In such other circumstances as will promote substantial justice. Whitehead v. Nevada Commission on Judicial Discipline, 110 Nev. 380, 388, 873 P.2d 946, 952 (1994). In Whitehead, the petition was not considered proper because it did not address any "material matter," it simply asked the court to withdraw or change "faulty assumptions, misstatements of fact and mischaracterizations of the legal arguments. . . ." Id. The court held that rehearings are not granted to review matter of no material consequence. Id.

In his petition, the defendant contended that the court erred in a calculation of a date. At the evidentiary hearing, the defendant asked Miller if he had considered filing for a rehearing

based on this miscalculation. (TT 45). Miller admitted that his failure to point out to the Supreme Court that they had miscalculated this time was not a strategical decision but rather oversight. (TT 47). Despite Miller's oversight, his failure to seek a rehearing on this matter was not deficient because this issue was of no material consequence.

When the defense asked for a continuation of the penalty hearing because it had not received the discovery indicating the defendant's gang involvement, and therefore had no reason to procure a gang expert for the penalty phase, the court incorrectly believed that the defense was notified "almost a full year before the penalty hearing." In fact, the defense was only notified of these facts a few days before the penalty hearing. It was not ineffective assistance of appellate counsel to fail to raise this, however, because the Nevada Supreme Court indicated that even if defense had time to secure a gang expert and present testimony, it would have done little to mitigate the defendant's involvement. Id. at 11, 921 P.2d at 893.

4. The prosecution did not shift the burden to the defendant, so appellate counsel was not ineffective in failing to raise this issue.

The defendant argued that when the prosecutor stated that neither the State nor the defense had called an expert on how alcohol affects a person's state of mind, that shifted the burden to the defendant. Trial counsel objected. The court commented that the jury "knows that there is no burden. He's just saying what was and was not presented at the time of trial." The defendant argued that appellate counsel should have raised this issue on direct appeal.

At the evidentiary hearing, Miller explained that it was a tactical decision not to raise this issue on appeal. (TT 48). The trial court had remedied the problem at the time by saying that the jury knows that the defendant has no burden. (TT 48). Miller went on to testify that after the objection was sustained, defense counsel did not make a motion to strike or a motion for mistrial and that to the best of his recollection, that was probably the reason he did not appeal this issue. (TT 48).

Although Miller could have raised this issue on appeal, it likely would have failed because the trial court immediately remedied any harm caused by the prosecutor's comments.

In choosing not to raise this losing issue, Miller was effective because he recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones, 463 U.S. 745, 751 -752, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987 (1983). Because a "brief that raises every colorable issue runs the risk of burying good arguments...in a verbal mound made up of strong and weak contentions," had Miller raised this issue, the other issues that he did raise could have been compromised. Jones, 463 U.S. at 753, 103 S.Ct. at 3313. Accordingly, Miller acted effectively in not raising this unpersuasive issue on appeal.

5. Appellate counsel was correct in not raising the issue of denial of trial counsel's challenge for cause of juror Miller.

The defendant claimed that it was ineffective for counsel not to appeal the denial of trial counsel's challenge for cause of a juror. The prospective juror Miller, in this case, had not formed an opinion about the defendant's guilt or innocence, but indicated that he would not consider the childhood of a defendant as a mitigating circumstance. Additionally, the court had previously instructed defense counsel not to use the term "mitigation" during voir dire, as the court could not conclude what would be allowed as mitigators at this point in the trial. (1 ROA 352-55). When questioned why attorney Miller did not raise this issue on appeal, he stated he could not remember his reason but thought he probably reviewed it and was aware of it. (TT 49).

It is likely that when Miller reviewed this issue, he realized it would not succeed on appeal. "Few aspects of a jury trial are more committed to a district court's discretion than the decision whether to excuse a prospective juror for actual bias. Moreover, trial courts possess a peculiar ability to determine whether a prospective juror's claimed ability to decide a case impartially is genuine." United States v. Claiborne, 765 F.2d 784, 800 (9th Cir. 1985). In Claiborne, the district court determined that the prospective jurors in question on appeal would weigh the evidence impartially despite their initial preconceptions of the defendant's guilt or innocence. Id. The fact that the defendant used peremptory challenges to strike the two jurors,

the court found to be "not a denial of justice" but a "proper utilization of the peremptory tool." Id. Likewise, in the instant case, the court found the jurors passed for cause. This was in the court's discretion, and had Miller raised the issue on appeal, the court would have likely have upheld the decision of the trial judge. Thus, Miller was not ineffective for choosing not to appeal this losing issue.

6. Appellate counsel was not ineffective in deciding not to address the reference to the defendant's acts of juvenile rape and violence in prison which came out in the penalty phase.

Defendant argued it was ineffective for Miller not to appeal the admission of a certified copy of the defendant's prior bad acts. At the evidentiary hearing, Miller testified that he believed this evidence was admissible and so this issue would be unsuccessful on appeal. Miller was correct that the evidence was admissible and therefore he was not ineffective for failing to raise this issue.

At trial, the defendant objected to evidence of prior bad acts, a bench conference took place, and the following day, the defendant made a record of his objection to this information being admitted citing D'Agostino v. State, 107 Nev. 1001, 823 P.2d 283 (1991). Upon reading D'Agostino, it is distinguishable from the case at bar because in D'Agostino a jail informant testified that the defendant, while in prison, had told him that he had killed "some old man in New York." Id. at 1003, 823 P.2d at 284. The informant did not specify the time, place, or identity of the man. Id. The Supreme Court of Nevada opined that absent these details, the defendant was prejudiced by such unverifiable accusations. Id. The Court was careful to point out, however, that "[p]ast criminal activity is one of the most critical factors in the process of assessing punishment." Id. at 1004, 823 P.2d at 285. The opinion addressed specifically the reliability of jail-house informants that are under pressure to cooperate with the State. Id.

In contrast, the information that came in regarding the defendant in the instant case was reliable. It was part of a certified copy of the record of the Department of Corrections that was read verbatim to the jury by a parole officer. Additionally, it gave the year, place, age of the defendant, and punishment imposed for the sex offense. Surely, this was not the kind of

information that the Court was concerned about in D'Agostino. Because this evidence was in fact reliable, it was properly admitted by the trial court, and Miller was not ineffective in deciding not to make a faulty argument on appeal.

7. Appellate counsel did not err in deciding not to appeal the trial court's decision to admit photographs of the scene, the murder weapon, and the autopsy into evidence.

Miller testified that he did not appeal the admission of photographs of the victim because the chance of prevailing was almost nonexistent. (TT 50). Miller testified that it was a strategic decision not to appeal this issue because the Nevada Supreme Court is generally unwilling to find admission of photographs error. The admission of photographs of victims, crime scenes, and weapons is within the sound discretion of the trial court, and absent an abuse of this discretion, the decision will be upheld. See Greene v. State, 113 Nev. 157, 931 P.2d 54,60 (1997). In Wesley v. State, 112 Nev. 503, 916 P.2d 793, 800 (1996), the Supreme Court of Nevada held that a trial court was justified and did not abuse its discretion when it admitted autopsy photographs of the murder victims. The Court concluded that the probative value outweighed the prejudice because the photographs assisted the jury in understanding the "nature and quality" of the wounds inflicted by the stabbings. Id. The photos also were used to explain the findings of the autopsy. Id. Although the Court found the photographs to be "graphic and troubling to human sensibility," the trial court had not abused its discretion in allowing them.

In light of the Nevada Supreme Court's reluctance to find the admission of photographs to be abuse of discretion, Miller was not ineffective for choosing to appeal this issue. The pictures in question included the interior and exterior of the cab, the knife used to murder the victim, and autopsy photos. The defendant argued that there was no probative value because the defendant did not contest the identity of the victim, the cause of death, or the events of the murder. However, the defendant plead not guilty, and the State had a responsibility to present evidence to establish all the elements of the crimes. The trial judge determined that the probative value did outweigh the prejudice. Miller was not ineffective in deciding to exclude this unpersuasive argument in light of the Nevada case law.

CONCLUSION

The performance of both trial and appellate counsel was effective. The decisions the attorneys made were tactical and in the best interest of their client. In light of the overwhelming evidence of guilt, the defendant was not prejudiced by any of the decisions of either trial or appellate counsel. Thus, the State respectfully requests that this Court deny the defendant's Supplemental Points and Authorities in Support of his Petition for Writ of Habeas Corpus (Post Conviction).

DATED this 8 day of September, 2000.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
EDWARD R.J. KANE
Chief Deputy District Attorney
Nevada Bar #001438

RECEIPT OF COPY

RECEIPT OF A COPY of the above and foregoing STATE'S SUPPLEMENTAL OPPOSITION TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) is hereby acknowledged this 11 day of September, 2000.

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

THE STATE OF NEVADA, Plaintiff, vs. WILLIAM LESTER WITTER, Defendant.	CASE NO. C 117513 DEPARTMENT NO. XV DATE: 2-26-99 TIME: 9:00 a.m.

DEFENDANT'S POST HEARING BRIEF
IN SUPPORT OF PETITION
FOR WRIT OF HABEAS CORPUS

COMES NOW, Petitioner WILLIAM LESTER WITTER, by and through his attorney DAVID M. SCHIECK, ESQ., and submits the following Post Hearing Brief in support of the Petition for Writ of Habeas Corpus.

STATEMENT OF THE CASE

WILLIAM LESTER WITTER (hereinafter referred to as WITTER) was charged with Murder with use of a Deadly Weapon; Attempt Murder with use of a Deadly Weapon; Attempt Sexual Assault with use of a Deadly Weapon; and Burglary alleging that on or about the 14th day of November, 1993 WITTER willfully and with malice aforethought killed James Cox during the commission of burglary

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and attempt sexual assault of Kathryn Cox. The Preliminary Hearing was held on January 7, 1994 and WITTER was bound over on all charges.

WITTER arraigned in the Eighth Judicial District Court, Department IX on January 25, 1994, entered pleas of not guilty to all of the counts. Also on January 25, 1994 the State filed its Notice of Intent to Seek the Death Penalty.

WITTER'S trial commenced in June, 1995 and lasted 8 days, and the jury returned a verdict of Guilty on all counts. The penalty hearing lasted 4 days and the jury returned a verdict of death by lethal injection. The Judgment of Conviction was entered on August 4, 1995.

WITTER pursued an appeal and the Public Defender's Office was appointed. The Nevada Supreme Court issued its Opinion on July 22, 1996 affirming the conviction and sentence. Rehearing was denied on December 13, 1996. WITTER'S Petition for Writ of Certiorari was denied by the United States Supreme Court on May 12, 1997.

A Petition for Writ of Habeas Corpus (Post Conviction) was timely filed October 27, 1997, and an evidentiary hearing conducted on February 26, 1999.

For purposes of this Post Hearing Brief, WITTER incorporates by this reference the Statement of Facts and related information from his Supplemental Points and Authorities filed in Support of the Petition for Writ of Habeas Corpus.

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STATEMENT OF FACTS

On February 26, 1999 an evidentiary hearing was conducted with the following testimony elicited:

Philip Kohn had been a licensed attorney since 1978 in California and since 1985 in Nevada. (RT 3) He was employed by the Clark County Public Defender from November, 1992 through January, 1999 at which time he became the Clark County Special Public Defender. (RT 3) He became the head of the murder team in November 1994. (RT 4)

In November or December 1993 he was assigned to act as lead attorney for WITTER. (RT 4) Kedric Bassett served as second chair when the case proceeded to trial in June, 1995.

Kohn became aware of fetal alcohol syndrome (FAS) approximately during the summer of 1994 and undertook to investigate whether such a defense could be present in WITTER'S case. (RT 6-7). He, however, never hired an expert in FAS, which he admitted was a mistake. (RT 7) There was a picture of WITTER put into evidence when he was two or three years old in which his eyes look like they are right out of the book on FAS. (RT 9) In June 1995 when they went to trial Kohn had made contact with FAS experts but had not retained them nor met them in person. (RT 10)

The Court had denied Kohn's last request for continuance when he was working on FAS as a defense because he could shot that WITTER was retarded. (RT 10) WITTER'S adolescent behavior was also consistent with FAS in that he was well

behaved until he was 14 and first started to drink and that was when he started getting in trouble. (RT 11)

One problem that Kohn had was that the experts required a geneticist to examine WITTER and he could not find one. (RT 12-13) He could have made arrangements for a geneticist but he needed one more continuance from the Court and the request was denied. (RT 15) In chambers the trial judge told Kohn that if he had O.J.'s money he could do something like this, but did not believe Kohn could ever get it on. (RT 15) Kohn was unable to give the trial court a time from as to when the doctors would be able to come to Las Vegas and conduct the necessary examinations. (RT 17) Kohn was emphatic in chambers that a great deal could be done in the penalty phase. (RT 18)

At the penalty hearing Kohn laid the foundation for a FAS defense through witnesses about WITTER'S mother's alcohol problems. (RT 19)

The State presented evidence at the penalty hearing that WITTER was a member of a gang. (RT 20) Kohn had no notice that such evidence was going to be presented. (RT 21) When the State indicated that it would be calling experts on gangs from California, Kohn asked for a continuance, which was denied. (RT 22) If he had any idea what was coming he would have called a gang expert. (RT 23) He believed he could get a gang expert from California on short notice but not within the next four days between verdict and the scheduled start of the penalty hearing. (RT 24)

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Kohn had no plan of defense for the guilt portion of the trial, his only goal was to keep WITTER from receiving the death penalty. (RT 26) Kohn tried to keep as much credibility as possible in the guilt phase so the jury would listen to him in the penalty phase. (RT 26) WITTER was not happy about this as he wanted to win the case. (RT 27) Kohn was satisfied that was no defense to the murder charge and that to come up with some half-baked idea to give the jury would have turned them off. (RT 27) It was a strategic decision not to present a defense during the guilt phase. (RT 28) It was not his intent to waive objection to the presentation of the State's evidence. (RT 28)

Kohn testified concerning the failure to object to portions of the State's Opening Statement, which are discussed in the argument section below. (RT 28-31) Some of the failures to object were strategic and some were because he missed them. (RT 31)

Kohn did not submit a jury instruction at the penalty phase limited use of character evidence, but has since done so. (RT 32) He didn't argue it in WITTER'S case but should have done so. (RT 32) It was not a strategic decision. (RT 33)

Kohn tries cases differently now as a result of continued training, experience, and the evolution of issues. (RT 34-35) If he tried WITTER'S case over again he would get a much better trial this time and he would have done things differently. (RT 35)

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Robert Miller, a twenty year attorney with the Clark County Public Defender's Office prepared the direct appeal in WITTER'S case. (RT 43) Miller had not raised the Batson issue on direct appeal because he felt it wasn't a clean issue to present and that he did not have a chance to succeed based on the record. (RT 44-45) Miller felt it was incumbent upon him to raise all issues which he felt might have merit in both the federal or state system. (RT 45-46)

Miller failed to point out in his request for rehearing of the denial of the direct appeal that the Court had incorrectly stated that Kohn had a year's notice of a shank being found in WITTER'S cell. (RT 46-47) Miller simply missed the point. (RT 47)

Miller did not raise the burden shifting argument of the State in closing argument because the objection had been sustained and the jury admonished. (RT 48) Miller could not recall why he had raised the jury selection issue involving consideration of mitigation. (RT 49) The bad acts from the PSI was not raised because Miller did not believe it would succeed, but if he was doing it over would raise the issue. (RT 50) Finally, Miller did not raise the admission of gruesome photographs because he did not believe it would succeed in State court or turn the tide in federal court. (RT 51)

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ARGUMENT

I.

WITTER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment guarantees that a person accused of a crime receive effective assistance of counsel for his defense. The right extends from the time the accused is charged up to and through his direct appeal and includes effective assistance for any arguable legal points. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The United State Supreme Court has consistently recognized that the right to counsel is necessary to protect the fundamental right to a fair trial, guaranteed under the Fourteenth Amendment's Due Process Clause. Powell v. Alabama, 287 U.S. 45, 53 S.Ct.55, 77 L.Ed. 158 (1932); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Mere presence of counsel does not fulfill the constitutional requirement: The right to counsel is the right to effective counsel, that is, "an attorney who plays the role necessary to ensure that the trial is fair." Strickland, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 657 (1984); McMann v. Richardson, 439 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d. 763 (1970).

A. Specific areas of deficient performance by trial counsel include the following as alleged in the Petition filed herein and are supported by the evidentiary hearing:

1. Failure to Investigate and Present Evidence at the

Trial Portion of the Case on Fetal Alcohol Syndrome.

During the evidentiary hearing Kohn testified that he was aware of FAS as mitigation of sentence prior to the commencement of the trial. Despite being afforded a number of continuances to present the defense he failed to succeed in doing so and then was denied a final continuance. The record in this regard speaks for itself. Prior to the second day of jury selection Kohn admitted on the record that he was not fully prepared for trial:

> "MR. KOHN: ... Last Thursday, before calendar call, we met in chambers and the District Attorney and the Court and I talked about my client's previous motion to have me relieved as counsel, because he wanted someone to look at the FAS, in terms of a defense to his case.
>
> I think that's what was confusing yesterday on the record as to the 25th and all that. But in any case, I asked the Court for one more continuance; that I was satisfied that I did not have a defense to the trial phase; but in talking to experts in Seattle, Washington, it seemed there was a great deal that could be done in terms of the penalty phase.
>
> And I did not advise the Court that I had an expert on retainer, and I don't, and the Court pretty much said ....simply denied my motion to continue the case." (II, p.3)

The record shows that the case was first set for trial on October 14, 1994 and continued on defense motion over the objection of the State. The trial was reset for May 1, 1995 and again continued over the State's objection at the request of the defense. Both requests were to find an expert on fetal Alcohol Syndrome. The State objected to the final continuance and the Court sided with the State:

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"THE COURT: The Court's recollection of that motion in chambers was very much as the State put it; and that is, I had granted a couple continuances in the past to give the defendant not only time to procure a witness, but in fairness to the defendant's case, I through it was important that the Court go the extra mile in giving you time to procure an expert witness as to the Fetal Alcohol Syndrome.

And in the Court's memory, the Court has given them almost a year to do that. And counsel keeps telling me what progress he hasn't made and the problems involved in doing that, but has made very little progress in actually finding an expert who'll testify in this case.

And counsel asked for maybe three more weeks to do that, and the Court didn't think it reasonable, Mr. Kohn, to put off the trial once again, right at the last minute, to give you three weeks for something you haven't been able to do in more than a year, and have no leads really on people who have agreed to come down and do it, and that's why the Court denied the continuance." (II, p. 4-5)

Kohn presented no evidence of the effects of intoxication upon WITTER, choosing instead to simply concede that he was guilty of all of the charges in order to maintain his credibility with the jury. As evidenced by the record, WITTER wanted FAS presented as a defense to the charges and did not agree to the having his guilt conceded to the jury.

There is uncontradicted authority that trial counsel may never concede a defendant's guilt before a jury without the consent of the client. When counsel concedes guilty during the trial portion of the case in spite of the client's earlier plea of not guilty and without the defendant's consent, counsel provides ineffective assistance of counsel regardless of the weight of the evidence against the defendant or the wisdom of

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counsel's "honest approach" strategy. Francis v. Spraggins, 720 f.2d 1190 (11th Cir. 1983) (cert. denied, 470 U.S. 1059, 105 S.Ct. 1776 (1985)); Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981)(cert. denied 454 U.S. 1091, 102 S.Ct. 656 (1981); State v. Harbison, 337 S.E.2d 504 (N.C. 1985)(cert.denied, 476 U.S. 1123, 106 S.Ct. 1992 (1986)). The adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of the advocate. The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. U.S. V. Cronic, 466 U.S. 648, 656, 104 S.Ct. 2039, 2045 (1984).

It is respectfully asserted that WITTER was denied effective assistance of counsel under the Sixth Amendment when his trial attorney conceded his guilty at the trial portion without his consent.

2. Failure to Investigate and Present Evidence at the Penalty Hearing.

During the evidentiary hearing Kohn admitted that he could have obtained a gang expert from California to contest that State's gang experts, but indicated that he did not have sufficient time to get the expert. However, a closer look at Kohn's testimony showed that he was no notice and should have had the expert or board and ready to testify:

> "Q. Would it have been prudent, based on those tattoos, to perhaps investigate whether or not he had any gang ties and there was any information that

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might come up at the penalty hearing?

A. Mr. Witter and I discussed gang involvement. I knew that he had been in the California Youth Authority. I knew that he had been in the California Prison System.

I practice law in California for 14 years and I have been a prosecutor in California. I was certainly aware of prison gangs.

Would it have been prudent? Probably. I never saw it coming. His only -- the only way to get in gangs, to me, is -- when I am reading his file, is to show that at some point in his life he was a member of a gang that I would think would be so improper under the First Amendment. That never crossed my mind they would actually put on that evidence." (RT 23).

Thus it is clear that Kohn was not blind sided by the State but rather ignored the information in the hope that the State would not put it into evidence. The Court saw through this in denying the request to continue the penalty hearing:

"Now counsel comes again, at this time, July 10th, at the time of the penalty hearing, and says, once again, they haven't had enough time to do whatever it is they need to do.

And I have to inform counsel, again -- and I do it again on the record, generally these penalty hearings are held within two, three, four days after trial, and that's enough time to prepare.

Counsel, at the time this trial started, said he wasn't ready. After a year and half of preparation in this case, he still said he didn't have his experts and couldn't get experts and wanted a continuance at that time, and the Court denied it, because the Court felt like they'd had enough time to prepare.

Defense counsel has consistently said they wanted a continuance because they haven't had time to prepare.

Even since last Thursday, that's been four days

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to prepare for this penalty hearing; and defense counsel has access to the defendant all during those days, and all during the 12 or so days we've had since the time of the trial, has had access to his client." (IX, p 21-22)

The record shows that no gang expert was called by the defense to explain away the graphic testimony about gangs and violence. Neither was any witness called, either expert or non-expert, to explain that possession of a shank in prison is more a matter of simple survival than any indicia of violent character.

3. Trial counsel failed to object to improper argument during the opening statement of the prosecutor.

During the evidentiary hearing Kohn was questioned concerning his failure to object to the various claimed improper arguments. His explanation follows each quoted argument:

> "...She will tell you she will never forget the look on the defendant's face as she looked into his eyes, and she'll describe the evilness she saw on the defendant's face that night" (V, p. 14)

With respect to this argument Kohn stated:

> "I knew it was close, that was, at that point tactically I was trying to still curry favor with the jury, and my feeling was, unless it was something truly objectionable that would have been maybe reversible. So, yes, I recall that. I remember hearing it, and I remember, you know, the hair on the back of my neck bristling, but I didn't think this was worth the objection" (tr. 29).

The prosecutor further argued:

> "And the defendant then begins to approach Thomas Pummil and he's coming at Thomas Pummil, and Thomas Pummil too, like Kathryn Cox, sees evilness in

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this man and realizes there's something wrong and this man is bent on doing heinous, heinous evil things" (V, 20)

Kohn stated:

"I don't remember this one as well, but certainly that was my thinking at the time, it is not egregious, let it go" (tr. 29)

The prosecutor:

"The evidence will prove this was a senseless murder; that a loving husband's life was lost in an effort to save his wife; that his wife, Kathryn Cox was subjected to evilness that many of us can't even imagine, the perpetration of sexual acts, the repeated stabbing and the intrusion into her car that evening as she awaited her husband." (V P. 32)

Kohn's explanation:

"Again, same answers to evilness in terms of reference to that as being penalty phase. Victim impact in that didn't hit me. It hit me that paragraph was too argumentative. At the time it hit me, but I could tell he is winding down. It was argumentative and that goes to evilness, but I didn't think it was worth interjecting at the time" (tr. 30).

The prosecutor:

"Kathryn Cox will testify to not only the physical scars that this crime has left on her, but the emotional scars. The crime scene she sees again and again in her mind, as she will tell you she will never forget the defendant and his face, the tone of his voice and his actions that night as he perpetrated these evil acts." (V, p. 27)

Kohn's response:

"Probably goes outside the bounds of telling the jury what they will hear. That's not for me to decide....I missed it" (tr. 31)

It is respectfully urged that WITTER was denied his right to the effective assistance of counsel by the failure of his

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attorney to object and prevent improper and prejudicial arguments to the trial jury during the opening statement and that same denied WITTER to due process of law and a fundamentally fair trial.

4. Trial counsel failed to offer an instruction that informed the jury that character evidence could not be considered by the jury until after it had weighed the aggravating circumstances against the mitigating.

With respect to this claim Kohn admitted that he should have raised the issue and that it was not a strategic decision on his part (tr. 32-33). Subsequent to the evidentiary hearing in this case the Nevada Supreme Court has expressly indicated that the instruction should be given in capital cases. Specifically in Byford v. State, 116 Nev. Ad. Op 23 (2000) the Court approved of an instruction that told the jury in relevant part:

> "[o]ther arrests, conduct or bad acts, if any committed by ...[the defendant] are to be considered for character only and not as aggravating circumstances.
>
> Evidence of any uncharged crimes, bad acts or character evidence cannot be used or considered in determining the existence of the alleged aggravating circumstance or circumstances"

Trial counsel was ineffective in not offering an instruction in accord with the above cases and WITTER was prejudiced thereby.

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B. Specific areas of deficient performance by appellate counsel were included in the Petition and Supplement filed herein and the subject of testimony at the evidentiary hearing:

Just as with the testimony of trial counsel the evidentiary hearing testimony of appellate counsel is provided with respect to each allegation:

1. Appellate counsel failed to argue to the Nevada Supreme Court that WITTER'S Due Process Rights were violated by the State's exclusion of minorities from the jury panel.

With respect to this claim which is set forth in detail in the Supplemental Points and Authorities filed herein, appellate counsel explained his failure to raise the issue as follows:

> "I felt in reviewing the transcripts that issue had just become too -- waters had become too muddy on it. It wasn't a clean issue to present. For one thing, there was a dispute as to some people thought she was black, some people thought that she wasn't. This is just off the straight transcripts. That was unclear whether the juror was even black. There was also the contaminating effect, if you will, that the defendant was not black and the objection was going to the exclusion of a black juror, and also the fact that the State stated a race neutral reason for exercise of the peremptory challenge. Based on that I felt it got muddled enough. It was not a clean enough issue to raise. I didn't have a chance of succeeding" (tr. 45)

A proper objection had been raised by Kohn under Batson v. Kentucky. (IV, P. 117-118).

> "MR. KOHN: I believe his right to trial under the Fourteenth, Sixth and Seventh amendments is violated by them striking people of color. We are down to two black people, she's one of the two.
>
> THE COURT: First off, I should note the defendant isn't a person of color, so I think it's an

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unusual challenge, but I'll let the State put on their reasons.

MR. GUYMON: Your Honor, I agree with your reading of the Batson case. My notes, I did not reflect anything about her race at all. My notes -- my statement as to 87 is absolutely blank, indifference as to race, other than the fact I put I did not believe she was capable of making a decision.

THE COURT: I should note I didn't know she was Hispanic or anything either. Her name is Elois Kline Brown. It's not a -- you say she's black?

MR. KOHN: She's black, your Honor.

THE COURT: I wasn't aware of that either, counsel.

I not that for the record and I overrule it in this matter, because I don't think it even applies in this instance." (IV, p. 118).

It has long been the law that a defendant has the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria. Martin v. Texas, 200 U.S. 316, 321, 26 S.Ct. 338, 339 (1906); Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). The exercise of peremptory challenges by the government in a racially discriminatory manner violates a defendant's right to equal protection. A defendant may establish a prima facie case under Batson by showing that "he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." Batson, 476 U.S. at 96, 106 S.Ct. at 1723. Second, the defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are

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of a mind to discriminate." Avery v. Georgia, 345 U.S. 559, 562, 73 S.Ct. 891, 892 (1953). Finally, the defendant must show facts sufficient to raise an inference of interest by the government to discriminate based on all of the relevant circumstances. Batson, 476 U.S. at 96, 106 S.Ct. at 1723.

If a defendant presents a prima facie case of discrimination, the burden shifts to the government to come forward with a racially neutral explanation for the use of its strikes. To satisfy this requirement, the proffered reasons must bear some relationship to the case at bar. If the government offers explanations that are facially neutral, a defendant may nevertheless show purposeful discrimination by proving the explanation pretextual. U.S. v. Joe, 928 F.2d 99, 102 (4th Cir. 1991).

Trial counsel made a valid Batson objection to the first strike exercised by the State -- a strike that removed 50% of the African-Americans that had been cleared for cause. Appellate counsel should have raised a constitutional challenge to the jury selection, both because the issue had merit and to preserve the issue for further review if necessary. It was a violation of the Sixth Amendment to fail to raise the issue on appeal.

2. Failure to Petition the Court for Rehearing on Clear Errors Contained in the Supreme Court's Opinion.

In addressing the issue concerning the continuance of the penalty hearing to allow time to obtain a gang expert, the

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Nevada Supreme Court stated that:

> "In the present case, on June 20, 1995, almost a full year before the penalty hearing, the State notified Witter's counsel that it was investigating an alleged disciplinary problem (possession of a shank) involving Witter"

The record is clear that the penalty hearing occurred in July, 1995. The Supreme Court was operating under a false factual belief when it issued it's opinion affirming WITTER'S penalty. Appellate counsel was obligated to bring such a glaring error to the court's attention and attempt to obtain a rehearing on the issue. When asked why the issue was not raised to correct the glaring error, appellate counsel stated at the evidentiary hearing that "I think I just flat out missed that one." (tr. 47)

3. Failure to raise improper closing argument shifting the burden of proof. During the closing argument of the State at the trial phase of the proceedings the following occurred:

> "I submit to you that there has been no evidence of how alcohol affects a person's state of mind and their intent or their ability to form intent, or just what effect alcohol may or may not have to impair a person's state of mind or intent. Neither the State nor the defense called a witness to that effect. There is no evidence of mental impairment.
>
> MR. KOHN: Your Honor, I'd object. Counsel is commenting on what we did and we have no burden. I think that is improper.
>
> THE COURT: That's true. The jury knows that there is no burden. He's just saying what was and was not presented at the time of trial." (Vol. VIII, p. 66).

It is generally outside the bounds of proper argument to

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comment on a defendant's failure to call a witness. Colley v. State, 98 Nev. 14, 16, 639 P.2d 530, 532 (1982). This can be viewed as impermissibly shifting the burden of proof to the defense. Barren v. State, 105 Nev. 767, 778, 783 P.2d 444, 4561 (1989). Such shifting is improper because "[i]t suggests to the jury that it was the defendant's burden to produce proof by explaining the absence of witnesses or evidence. This implication is clearly inaccurate. Barron, 105 at 778. See also, Ross v. State, 106 Nev. 924, 803 P.2d 1104 (1990); In re Winship, 397 U.S. 358 (1970).

Appellate counsel gave the following reasoning for not raising the issue on direct appeal:

> "I think my thinking on that was that at that point the objection was made and basically the objection was sustained. Mr. Kohn made the objection. I think the Court's response was something like, that's right. The jury knows there is no shifting of the burden, the then the court went on to make some explanation as to how it interpreted the comment. Basically what you has was an objection and standing of the objection, and, no as far as I recall, no follow up after that with a motion to strike or with a motion for mistrial, and to the best of my recollection, that probably, the failure or the lack of those motions is the reason that I didn't follow up on it." (tr. 48).

4. Failure to raise the denial of trial counsel's challenge for cause of juror Miller. During voir dire trial counsel challenged juror Miller for cause and same was denied by the Court:

> "MR. KOHN: Do you believe the way in which a defendant was raised in important to your decision as to penalty?

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MR. MILLER: No.

MR. KOHN: Can you explain that?

MR. MILLER: I think the individual should be accountable for his self. How he was raised -- I was raised in the coal country. It didn't bother me. I went to school. Everybody has the same opportunities. I think it's what you make of yourself.

MR. KOHN: So if we put on evidence of a bad childhood, that's not something you would consider in mitigation stage; is that correct?

MR. MILLER: Yes.

MR. KOHN: You would not consider it, right?

MR. MILLER: No, I would not consider it.

MR. KOHN: Your Honor, I would ask he be struck for cause." (IV pages 38-39).

After the Court inquired, juror Miller changed his testimony and stated that he would consider the evidence of childhood, but then when Mr. Kohn again asked him, Miller stated that he may not have to agree and that he really didn't think that childhood mattered (IV, p.42). Kohn then renewed the challenge for cause and the Court again denied same (IV, 45). At the next break a full record was made concerning the challenge (IV, p.53-57).

At the end of the preempt process, KOHN was required to use his last preempt against Miller (IV, p. 126), and then noted that there was another jury that he would have preempted if he had not had to use his last one on Miller (IV, p. 141).

In Thompson v. State, 111 Nev. 439, 894 P.2d 375 (1995) the Nevada Supreme Court reversed a conviction of four counts

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of robbery with use of a deadly weapon based on the failure of the trial court to grant a challenge for cause as to one potential juror. In reversing the conviction the Court noted, and cited with approval, Bryant v. State, 72 Nev. 330, 305 P.2d 360 (1956) that:

> "It is not enough to be able to point to detached language which, alone considered, would seem to meet the statutory requirement, if, on construing the whole declaration together, it is apparent that the juror is not able to express an absolute belief that his opinion will not influence his verdict."

Bryant, 72 Nev. at 334-35.

The Thompson Court then went on to state that:

> "We also conclude that it was prejudicial error that prospective juror number eighty-nine was not excused for cause. At the conclusion of voir dire, the defense had exhausted all four of its peremptory challenges. Therefore, if the defense had used one of its peremptory challenges to excuse prospective juror number eighty-nine, then a juror that was unacceptable to the defense would have remained on the jury."

Thompson, 111 Nev. at 442-443. Kohn cited the Thompson case to the Court during his challenge to juror Miller. The matter was properly preserved and a valid issue and should have been raised on direct appeal. When asked to explain his reasoning in not raising the issue appellate counsel testified:

> "Q Why not?
>
> A I really don't recall why I didn't raise that on appeal.
>
> Q So it is possible you missed it or possible you didn't believe it had any merit?
>
> A I think I probably reviewed it and was aware of it, but as far as to what my specific reasoning on

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it was, I don't recall." (tr. 49)

5. Appellate counsel failed to raise the issue of tenuous and specious evidence to support the allegations of juvenile rape and force and violence in prison. During the course of the penalty hearing trial counsel objected to the WITTER'S parole officer reading into the record a history that was not supported by sufficient factual specificity or corroboration:

> "MR. KOHN: Yes, Your Honor.
>
> When the State placed in evidence yesterday the parol evidence, I approached the Bench and objected, and the Court -- I assume the Court meant I could put on the record later my objection.
>
> THE COURT: Sure.
>
> MR. KOHN: There were two considerations. One was about a rape. There's one line in the report that talks about a rape when he was 15; did some juvenile hall time.
>
> Doesn't discuss if it's a misdemeanor, felony or even if there was an adjudication.
>
> There was also a line that Miss Rose testified to, as to an incident of force and violence in the prison, but never tells what it was or what the allegation were. And my concern is that you have these bald allegations without any type of explanation.
>
> And I was looking at the D'Agostino, cap D-a-g-o-s-t-i-n-o, versus State, 107 Nevada 1001, and I believe that is just the type of evidence that they meant to exclude. And I asked the Court to exclude it and the Court indicated it was going to allow that evidence anyway." (X, p.65).

The language and reasoning of the Court, in D'Agostino, has broad application to the admission of evidence of any prior

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crimes:

> "...but it should be remembered that in death cases the proof of other crimes is intended not to show the guilt of the accused but, rather, to display the character of the convict and to show culpability and just deserts on the party of the homicidal convict. Past criminal activity is one of the most critical factors in the process of assessing punishment, for whatever purpose punishment might be inflicted. Past misconduct relates to the criminal's blameworthiness for the charged homicide and relates, as well, to whether the jury deems it necessary for public safety to impose an irrevocable, permanent quarantine upon the murderer...Improperly admitted evidence of past criminal conduct is even more damaging in a penalty hearing than it is in a guilty-determining proceeding because the past conduct goes to substance of whether the murder should or should not be punished by death...."

D'Agostino, 107 Nev. at 1003-4.

Appellant counsel was ineffective in not raising this issue on direct appeal. When questioned at the evidentiary hearing he explained:

> "I think my thinking at that time was probably that in light of the Crutch opinion that may well have been -- that the Crutch opinion may have closed that door. In retrospect, I am not so sure I make the same decision now. If I were writing that opinion, that appeal again today, I might well have included that." (Tr. 50).

6. Appellate counsel failed to raise the issue concerning the admission of gruesome and prejudicial photographs which had been preserved for appeal by trial counsel. At numerous times during the proceedings, trial counsel objected to the use of unnecessarily bloody and gruesome photographs on the grounds that the probative value of the photographs was outweighed by their prejudicial impact. The objections were to photographs

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of the bloody interior and exterior of the cab (VI, p.11; 69), the bloody knife (VI, p. 6), and autopsy photographs. Appellate counsel failed to raise the issue on the direct appeal and offered the following explanation:

> "That was a strategic decision in -- first of all, as to the chance of prevailing in the Nevada Supreme Court, the opinion seemed to be solely on what is so gruesome and so horrific that the court is willing to find error there. I have not seen one prevail, unless you have, again, a picture of a child with intestines laid out with the innards laid out, which is what we need to define.
>
> I didn't see it as something that would turn the tide in federal court, so it was based on those reasons. It was a strategic decision not to include those issues, this issue." (Tr. 51)

CONCLUSION

The performance of trial and appellate counsel was deficient. WITTER was prejudiced by the performance of his attorneys and should be granted relief from the judgement and a new trial.

DATED this 12 day of September, 2000.

RESPECTFULLY SUBMITTED:

DAVID M. SCHIECK, ESQ.

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RECEIPT OF A COPY

RECEIPT of a copy of the Defendant's Post Hearing Brief in Support of Petition for Writ of Habeas Corpus is hereby acknowledged this 12 day of Sept, 2000.

DISTRICT ATTORNEY'S OFFICE

BY _____
200 S. THIRD STREET
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM LESTER WITTER,
#1204227

Defendant.

Case No.. C117513
Dept. No. XV
Docket L

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 2-26-99
TIME OF HEARING: 8:30 A.M.

THIS CAUSE having come on for hearing before the Honorable Sally Loehrer, District Judge, on the 26th day of February, 1999, the Petitioner not being present, represented by DAVID M. SCHIECK, ESQ., the Respondent being represented by STEWART L. BELL, District Attorney, by and through EDWARD R.J. KANE, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1) On January 21, 1994, William Lester Witter, hereinafter "the defendant," was charged by way of Information with one count of Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.165) for the brutal slaying of James Harold Cox. The defendant

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was also charged with one count each of Attempt Murder With Use of a Deadly Weapon (Felony - NRS 193.330, 200.010, 200.030, 193.165), Attempt Sexual Assault With Use of a Deadly Weapon (Felony - NRS 193.330, 200.364, 200.366, 193.165), and Burglary (Felony - NRS 205.060) for the brutal stabbing and attack of Kathryn Terry Cox.

2) The defendant was adjudged by a jury to be guilty on all four counts. The jury subsequently determined that the defendant should be sentenced to death by lethal injection for the murder conviction. On August 3, 1995, the district court adjudged the defendant guilty and sentenced him to death for the Murder conviction to four (4) consecutive twenty year terms of imprisonment in the Nevada State Prison for the Attempt Murder and Attempt Sexual Assault convictions, and to a consecutive ten year term of imprisonment for the Burglary conviction. An Amended Judgment of Conviction was filed on August 11, 1995.

3) The defendant filed a timely Notice of Appeal on August 31, 1995. An appeal was filed, and the State responded. The Supreme Court of Nevada affirmed the convictions and issued a remittitur dated December 23, 1996. The defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction) on October 27, 1997, and filed the Supplemental Points and Authorities in Support of the Petition on August 11, 1998. An evidentiary hearing was granted and took place on February 26, 1999, during which defendant's trial counsel Philip Kohn and defendant's appellate counsel Robert Miller testified. The parties requested time to file written argument; defendant did on Sept 12, 2000; the State on Sept 11, 2000. SC

CONCLUSIONS OF LAW

4) The defendant failed to prove his claim of ineffective assistance of trial counsel. In order to assert a claim for ineffective assistance of counsel the defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-687, 104 S.Ct. 2052, 2063-2064 (1984); see, State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. See, Strickland, 466 U.S. at 687-688 & 694, 104 S.Ct. at 2065 & 2068.

TRIAL

5) Counsel was not ineffective for choosing not to present evidence at the trial portion of defendant's case. At the evidentiary hearing, counsel explained that he knew if defendant was convicted, there would be a penalty phase. Because of the overwhelming evidence of defendant's guilt, counsel felt it was prudent to not present a defense during the guilt phase so as not to impair his credibility at the penalty phase. Not every crime is defensible, and an attorney is not required to "do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 656 n.19, 104 S.Ct. 2039, 2046 n.19 (1983). The decision not to dispute defendant's guilt in order to preserve credibility for the penalty phase was a proper trial strategy. People v. Bolin, 956 P.2d 374, 400 (Cal. 1998). Counsel's strategy was a "tactical" decision that is "virtually unchallengeable absent extraordinary circumstances." Howard v State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

6) Trial counsel was effective because he did investigate a FAS defense. Counsel flew to San Jose, California where he researched defendant's family background and spent one week interviewing witnesses. Counsel also read The Broken Chord by Michael Doris, which detailed the symptoms and effects of FAS, which was a ground-breaking field in 1994 and 1995. At the time counsel was preparing for trial, little was known about FAS, yet counsel conducted extensive investigation into this possible defense. Counsel's efforts to investigate a FAS were reasonable. A court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

7) Trial counsel was effective because he did attempt to retain a FAS expert. Counsel learned that he would need a geneticist to support a claim of FAS. To locate a geneticist, counsel contacted three university medical facilities and eventually located a local geneticist, Dr. Colene Morris. Counsel contacted Dr. Morris on at least ten occasions, but each time she refused to speak with him. Counsel then contacted several defense attorneys in an effort to obtain the name of a FAS expert. Counsel eventually contacted FAS experts who resided in

Seattle, but they refused to meet with defendant until he was first examined by a geneticist. Counsel requested a continuance to allow time for such examination, which the trial court denied. Counsel then contacted five alcohol-related experts, none of whom were able to testify about FAS due to the newness of the field. At trial, defense counsel presented testimony from a licensed psychologist who testified that defendant may have had attention deficit disorder, antisocial personality disorder, and developmental arithmetic disorder. Based on counsel's conduct, there is no merit to defendant's claim.

8) Defendant cannot show that counsel was deficient for failing to retain a FAS expert because defendant failed to present any evidence that FAS would have been a valid defense in his case. At the evidentiary hearing, defendant presented no evidence as to what a FAS expert would have said had such expert been obtained. Under Hargrove v. State, 100 Nev. 498, 500, 686 P.2d 222, 225 (1984), defendant was required to present facts to support his allegations. Without such facts, defendant's claim is a naked allegation that does not entitled him to relief. Id.

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

10) Counsel was not deficient for failing to present a gang expert during the penalty hearing because he believed that gang evidence was only admissible if defendant had been a gang member at some point in his life. Defendant did not tell counsel of his previous gang affiliation, therefore counsel could not have anticipated the need to retain a gang expert. It was reasonable for counsel not to call a gang expert because at the time of trial, counsel could not have anticipated the need to call a gang expert. A court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

11) Counsel's failure to retain a gang expert was not deficient because an expert was not necessary to refute many of the claims made by the State's gang experts. As aforementioned, trial counsel's strategy will be "virtually unchallengeable absent extraordinary circumstances." Howard, 106 Nev. at 722, 800 P.2d at 180.

12) Defendant was not prejudiced by counsel's failure to call a gang expert. The Nevada Supreme Court, upon considering whether the defendant was prejudiced by the district court's refusal of a continuance that rendered it impossible for defendant to obtain a gang expert, concluded that even if the defendant had been able to secure an expert to testify as to the gang violence in prisons and the need for a shank, "such testimony would have done little to mitigate his involvement." Witter v. State, 112 Nev. 908, 920, 921 P.2d 886, 894 (1996).

13) Counsel was not ineffective for remarking, during opening statements, that the facts the prosecutor gave were "terrible, horrible, disturbing facts." Defendant claimed that this statement conceded defendant's guilt. This statement was not a concession of defendant's guilt, but rather was a concession that the facts of the crime were disturbing. Accordingly, counsel's opening statement was proper, as "[i]t is the duty of counsel making a statement to state the facts fairly, and to refrain from stating facts which he cannot, or will not, be permitted to prove." State v. Olivieri, 49 Nev. 75, 236 P.1100, 1101 (1925).

14) Trial counsel was effective for choosing not to object during the State's opening statement. In its opening argument, the prosecutor commented that the defendant was a man "bent on doing heinous, heinous evil things." Counsel decided not to object because he was "trying to curry favor with the jury" with the hope that the jury would be more willing to listen to him during the penalty phase. The decision not to object was part of trial counsel's strategy that is "virtually unchallengeable absent extraordinary circumstances." Howard, 106 Nev. at 722, 800 P.2d at 180.

15) Defendant was not prejudiced by counsel's failure to object to the State's opening statement because it was permissible under Nevada law. A prosecutor is allowed to outline his case and propose facts he intends to prove. Rice v. State, 113 Nev. 1300, 1308, 949 P.2d 262, 270 (1997). Prosecutor's are given great freedom in what they may say during opening

statement- even if the prosecutor overstates what he is later able to prove, misconduct is not present unless he does so in bad faith. Id. See People v. Benson, 802 P.2d 330, 353-54 (Cal. 1990) (holding prosecutor's comment "this crime is perhaps the most brutal, atrocious, heinous crime," was merely a comment on the nature of the offense and was permissible).

16) Defense counsel was not ineffective for choosing not to object to prosecutor's opening statement, which said that the victim has not only physical scars but also emotional scars. Defendant claims that such remarks were "improper victim impact evidence." Defense counsel stated that it was a strategic decision not to object to such remarks. Because victim impact evidence is not categorically barred by the eighth amendment under Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991), it was proper trial strategy not to object to the statement. "Experienced advocates might differ about when, or if, objections are called for since, as a matter of trial strategy, further objections from counsel may have succeeded in making the prosecutor's comments seem more significant to the jury." Sasser v. State, 993 S.W.2d 901, 910 (Ark. 1999).

17) Defendant was not prejudiced by counsel's failure to object to the State's opening statement because even if defense counsel would have objected and the remarks of the prosecutor had been stricken, it would not have made any difference on the outcome of the trial. There was so much overwhelming evidence of guilt by way of the identification of the defendant by one of the victims (Kathryn Cox), three security guards, and the bus driver; physical evidence of the deceased victims blood found all over the defendant; and a confession by the defendant that he committed the killing, that the inclusion of this statement was merely harmless error. See NRS 178.598; Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967); and United States v. Hastings, 461 U.S. 499, 510-11, 103 S.Ct. 1974, 1981 (1983).

18) Defense counsel was not deficient for failing to object to the admission of photographs of the victim. Defendant claimed he was prejudiced by the admission of a photograph of the victim attending a class reunion in Hawaii. It was not error for counsel not to object to these photographs, as under Nevada law, a trial court's decision to admit a photograph will be upheld absent an abuse of this discretion. See Greene v. State, 113 Nev.

157, 931 P.2d 54, 60 (1997) (upholding trial court's admission of a photograph of victim when he was alive). Counsel's failure to object was a tactical one presumably based on a familiarity with Nevada case law. As such, it is "virtually unchallengeable absent extraordinary circumstances." Howard, 106 Nev. at 722, 800 P.2d at 180.

19) Defense counsel was not ineffective for failing to offer an instruction that informed the jury that character evidence could not be considered by the jury until after it had weighed the aggravating circumstances against the mitigating circumstances. The Supreme Court of Nevada has rejected this premise in Lisle v. State, 113 Nev. 679, 941 P.2d 459, 475 (1997). There is no Nevada authority which supports the defendant's contention that character evidence cannot be considered until after the jury determines that a defendant is death eligible. Id. A defendant's character is relevant to the jury's determination of the appropriate sentence for a capital crime, it is not limited to only after the jury decides the defendant is death eligible. Id. (Citations omitted) Character evidence is relevant to determine the sentence. Id.

20) Defendant cannot meet the second prong of Strickland because even if counsel were ineffective, which he was not, defendant was not prejudiced by trial counsel's performance. Strickland is a two prong test: the defendant must show that counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. In this case, even if counsel were deficient in his performance, defendant was not prejudiced because no matter what counsel did at trial, no reasonable probability existed that Defendant would not be convicted. There was so much overwhelming evidence of guilt by way of the identification of the defendant by one of the victims (Kathryn Cox), three security guards, and the bus driver; physical evidence of the deceased victims blood found all over the defendant; and a confession by the defendant that he committed the killing, that defendant cannot show he was prejudiced by counsel's performance.

APPELLATE

The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S.

395, 397, 105 S.Ct. 830, 836-837 (1985); see also, Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The federal courts have held that in order to claim ineffective assistance of appellate counsel the defendant must satisfy the two-prong test of Strickland v. Washington.

The defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). However, the defendant does not have a constitutional right to "compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. In reaching this conclusion the Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones, 463 U.S. at 751 -752, 103 S.Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying good arguments...in a verbal mound made up of strong and weak contentions." Jones, 463 U.S. at 753, 103 S.Ct. at 3313. The Court has therefore held that for "judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Jones, 463 U.S. at 754, 103 S.Ct. at 3314.

21) Appellate counsel was not deficient for deciding not to raise a Batson issue on appeal. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), set forth a three-step process for evaluating race-based objections to peremptory challenges. First, the opponent of the peremptory challenge must make a prima facie showing of racial discrimination. In order to do so, "the defendant must first show that he is a member of a cognizable racial group, . . . and that the prosecutor has exercised peremptory challenges from the venire members of the defendant's race." Once a prima facie showing has been made, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation. Purkett v. Elem, 514 U.S. 765, 767-68, 115 S.Ct. 1769, 1770-71 (1995). If a race-neutral explanation is tendered, step three requires the trial court to decide whether the opponent of the strike has proved purposeful racial discrimination. Id.

22) Appellate counsel was not ineffective for not raising a Batson challenge because

defendant failed to show that the juror in question was a member of a cognizable racial group. At the time of the peremptory challenges, the jurors were not present. Neither the prosecutor nor the court had noted that the juror was African-American because they were not aware that race was an issue in the case because the defendant appeared to be Caucasian. The names of the defendant and his family do not suggest any particular race. Due to the uncertainty of the juror's race, appellate counsel chose not to raise this issue on appeal. Appellate counsel was not ineffective because he clearly chose to exclude this weak argument. The Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones, 463 U.S. at 751 -752, 103 S.Ct. at 3313

23) Appellate counsel was effective for not raising a Batson challenge because the State offered a race-neutral reason for exercising its peremptory challenge. The prosecutor indicated to the trial court that he had nothing in his notes regarding the juror's race. The only notation the prosecutor had with regard to the juror was that he did not believe that she was capable of making a decision. Because a race-neutral explanation was tendered, the defendant was required to prove purposeful discrimination. Purkett v. Elem, 514 U.S. 765, 767-68, 115 S.Ct. 1769, 1770-71 (1995). Defendant was unable to show that State's reason was not facially valid, therefore this issue would not have succeeded on appeal, because "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Id.

24) Appellate counsel was effective in deciding not to petition the Court for a rehearing. According to NRAP 40(c)(2) rehearing may only be considered by a court in the following circumstances: i) When it appears that the court has overlooked or misapprehended a material matter in the record or otherwise, or ii) In such other circumstances as will promote substantial justice. Whitehead v. Nevada Commission on Judicial Discipline, 110 Nev. 380, 388, 873 P.2d 946, 952 (1994). In Whitehead, the petition was not considered proper because it did not address any "material matter," it simply asked the court to withdraw or change "faulty assumptions, misstatements of fact and mischaracterizations of the legal arguments. . . ." Id.

The court held that rehearings are not granted to review matter of no material consequence. Id.

25) In his Supplement to his Petition, the defendant argued 1) that there were irreconcilable differences within the court's opinion that the court had indicated it would maintain irrespective of the contradiction, 2) that there remained three, not four, aggravators after the court struck one down, and 3) that the court erred in a date. None of these claims are of any material consequence. With regard to the first claim, the court indicated that it was being contradictory, so it would not have changed its position on rehearing. With regard to the second claim, it is of no consequence that the court made a clerical error or miscalculated the remaining aggravators because the finding of only one aggravator is enough to invoke the death penalty and three still remained. NRS 200.030(4)(a). With regard to the third claim, defendant was not prejudiced by counsel's failure to point out that the Court erred in calculating the time from when the shank was discovered in defendant's cell until defense counsel was notified of the shank, thereby giving counsel no time to retain a gang expert. The Court indicated that even if defense had time to secure a gang expert and present testimony to this regard, it would have done little to mitigate the defendant's involvement. Witter v. State, 112 Nev. at 919, 921 P.2d at 894.

26) The prosecution did not shift the burden to the defendant, so appellate counsel was not ineffective in choosing not to raise this issue. Defendant argued that when the prosecutor stated that neither the State nor the defense had called an expert on how alcohol affects a person's state of mind, that shifted the burden to the defendant. In Lisle v. State, 113 Nev. 679, 941 P.2d 459, 476 (1997), the court held that the burden was not shifted to the defendant when the prosecutor made only a few general remarks about the lack of expert witnesses, not a specific witness during the penalty phase. Because the burden was not shifted, appellate counsel was effective in deciding not to bring this meritless argument.

27) Defendant was not prejudiced by appellate counsel's decision not to argue that the state shifted the burden to the defendant by commenting on fact that neither the State nor the defense had called an expert on how alcohol effects a person's state of mind. Trial counsel objected to this statement, and the court responded that the jury "knows that there is no burden.

He's just saying what was and was not presented at the time of trial." Defendant was not prejudiced by appellate counsel's decision not to appeal this statement because any harm caused by the statement was remedied by the court's statement. Counsels decision not to appeal the statement was tactical decision based on his belief that this issue was unpersuasive. Because a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contention", counsel's decision was effective. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987 (1983).

28) Appellate counsel was correct in not raising the issue of denial of trial counsel's challenge for cause of juror Miller, who indicated that he would not consider the childhood of a defendant as a mitigating circumstance. This issue would have lost on appeal unless the defendant could prove the trial court had abused its discretion. "Few aspects of a jury trial are more committed to a district court's discretion than the decision whether to excuse a prospective juror for actual bias. Moreover, trial courts possess a peculiar ability to determine whether a prospective juror's claimed ability to decide a case impartially is genuine." In United States v. Claiborne, 765 F.2d 784, 800 (9th Cir. 1985) (holding that defendant's use of peremptory challenges to strike two jurors who admitted having preconceptions of defendant's guilt or innocence was "not a denial of justice" but rather was a "proper utilization of the peremptory tool.")

29) Appellate counsel was not ineffective in deciding not to address the reference to the defendant's acts of juvenile rape as this was reliable evidence that was admissible. Defendant claimed that this evidence was "tenuous and specious." However, this evidence was reliable, as it was introduced through a certified copy of a criminal report which stated that in "1978, [subject] was arrested at the age of 15 for rape while residing in Hawaii. He served in juvenile hall." It was part of a certified copy of the record of the Department of Corrections that was read verbatim to the jury by a parole officer. Additionally, it gave the year, place, age of the defendant, and punishment imposed for the sex offense. Thus, defendant would not have succeeded in appealing this evidence under D'Agostino v. State, 107 Nev. 1001, 823 P.2d 283 (1991), which found that the admission of testimony by a jail informant who testified that the

defendant, while in prison, had told him that he had killed "some old man in New York" was unreliable because informant did not specify the time, place, or identity of the man. Id. at 1003, 823 P.2d at 284.

30) Appellate counsel was not ineffective in deciding not to address the reference to force and violence in prison which came out in the penalty phase. Defendant claimed it was ineffective for appellate counsel to fail to argue that it was improper for parole officer Rose to testify as to the defendant's misconduct by way of force and violence in prison. Defendant did not make an objection to this information at the time Ms. Rose was testifying and in fact asked her follow up questions regarding this information on cross-examination. It was not until the next day that defense counsel put his objection to this information on the record. Second, this is again not the kind of information that the Court in D'Agostino meant to exclude. Again, the information came from a certified report, was testified to by a parole officer (not a jail-house informant), and indicated that the defendant was punished with additional jail time for the violent behavior. This evidence was in fact reliable, and appellate counsel was not ineffective in deciding not to make a faulty argument on appeal.

31) Appellate counsel did not err in deciding not to appeal the trial court's decision to admit photographs of the scene, the murder weapon, and the autopsy into evidence. Likewise, the trial judge did not abuse his discretion in allowing photos of the interior and exterior of the cab because this aided the jury in understanding the scene in which the crime took place. The judge did not abuse his discretion in allowing a picture of the knife, the murder weapon. Finally, the judge was proper in allowing the autopsy photos. The defendant properly states that such photos are admissible to aid in the ascertainment of the truth if the probative value outweighs their prejudicial impact. The admission of photographs of victims, crime scenes, and weapons is within the sound discretion of the trial court, and absent an abuse of this discretion, the decision will be upheld. Greene v. State, 113 Nev. 157, 931 P.2d 54,60 (1997). Appellate counsel was effective in deciding to exclude this unpersuasive argument in light of the Nevada case law.

///

ORDER

Based on the Findings of Fact and Conclusions of Law herein contained, it is hereby:

ORDERED, ADJUDGED, AND DECREED that Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) shall be, and it is, hereby denied.

DATED this 21 day of September, 2000.

DISTRICT JUDGE
SALLY LOEHRER

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
EDWARD R.J. KANE
Chief Deputy District Attorney
Nevada Bar #001438

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Attorney for WITTER

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

C117513

THE STATE OF NEVADA, Plaintiff, vs. WILLIAM LESTER WITTER, Defendant.	CASE NO. C ~~117523~~ DEPT. NO. XV NOTICE OF APPEAL DATE: N/A TIME: N/A

TO: THE STATE OF NEVADA, Plaintiff, herein;

TO: STEWART BELL, District Attorney, and

TO: DEPARTMENT XV OF THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK:

NOTICE IS HEREBY GIVEN that WILLIAM WITTER, by and through his attorney DAVID M. SCHIECK, ESQ., hereby appeals to the Supreme Court of the State of Nevada from the denial of his Petition for Writ of Habeas Corpus (Post Conviction).

Dated this 23 day of October, 2000.

SUBMITTED BY:

DAVID M. SCHIECK, ESQ.

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302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

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CERTIFICATE OF MAILING

The undersigned does hereby certify that on 10-23-00, 2000, I deposited in the United States Post Office at Las Vegas, Nevada, a copy of the Notice of Appeal, postage prepaid, addressed to the following:

William Witter, No. 47405
Ely State Prison
P.O. Box 1989
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District Attorney's Office
200 S. Third Street
Las Vegas NV 89155

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Carson City, NV 89710

Kathleen Fitzgerald
An employee of David M. Schieck, Esq.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent

Supreme Court No. 36927

District Court Case No. C117513

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CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Janette M. Bloom, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 10th day of August, 2001.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 5th day of September, 2001.

Janette M. Bloom, Supreme Court Clerk

By: J. Richards
Chief Deputy Clerk

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IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36927

FILED

AUG 10 2001

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. Appellant William Lester Witter claims that his trial and appellate counsel were ineffective in numerous ways. We conclude that none of his claims warrant relief.

On November 14, 1993, Witter stabbed Kathryn Cox numerous times, attempted to sexually assault her, and stabbed her husband to death when he came to her aid.[1] Witter was convicted of first-degree murder, attempted murder, and attempted sexual assault--all with use of a deadly weapon--and burglary. He received a death sentence for the murder. After this court affirmed Witter's conviction and sentence, he petitioned the district court for habeas relief. An evidentiary hearing was held, and Witter's trial and appellate counsel testified. The district court denied the petition.

Claims of ineffective assistance of counsel are properly presented in a timely, first post-conviction petition for a writ of habeas corpus because such claims are generally

[1]See Witter v. State, 112 Nev. 908, 913-14, 921 P.2d 886, 890-91 (1996), receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700, cert. denied, 121 S. Ct. 576 (2000).

01-13628

not appropriate for review on direct appeal.[2] A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review.[3] To establish ineffective assistance of counsel, a claimant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense.[4] To show prejudice, the claimant must show a reasonable probability that but for counsel's errors the result of the proceeding would have been different.[5] Judicial review of a lawyer's representation is highly deferential, and a claimant must overcome the presumption that a challenged action might be considered sound strategy.[6]

First, Witter asserts that his trial counsel was ineffective during the guilt phase in failing to present evidence that he had fetal alcohol syndrome (FAS). Though the record indicates that Witter's mother drank alcohol while pregnant with him, at the evidentiary hearing Witter failed to provide evidence demonstrating that he suffers from FAS or any similar ailment. Thus we conclude that Witter shows neither deficient performance by counsel nor prejudice. Even if we assumed that evidence of FAS could have been presented, Witter fails to show that it would have made any difference. He speculates that it could have provided "a defense to the requisite mens rea of premeditated murder." Whatever the merits of this speculation, the State also charged a theory of

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[2]See, e.g., Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

[3]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[4]Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

[5]Id. at 988, 923 P.2d at 1107.

[6]Strickland, 466 U.S. at 689.

first-degree felony murder and presented overwhelming evidence to support it.

Second, Witter maintains that his trial counsel was ineffective during the penalty phase because he did not call an expert witness "to explain away the graphic testimony about gangs and violence" and Witter's possession of a shank in prison. On direct appeal, this court rejected Witter's claim that the trial court abused its discretion when it did not grant a continuance to allow defense counsel time to respond to the State's evidence on these matters.[7] We conclude that counsel's failure to present evidence on these matters did not prejudice Witter: we already determined on direct appeal that such evidence had little mitigating value and its absence was not prejudicial.[8]

Third, Witter alleges that the prosecutor made four remarks in his opening statement referring to Witter's "evilness."[9] Witter contends that his trial counsel was ineffective because he failed to object to the remarks. At the evidentiary hearing, trial counsel testified that he did not consider the first three remarks worth objecting to at the risk of alienating the jury, and he missed the fourth remark. Witter cites no authority establishing that the remarks constituted misconduct. Even assuming the remarks were

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[7]Witter, 112 Nev. at 919-20, 921 P.2d at 894.

[8]Id. at 920, 921 P.2d at 894.

[9]Witter failed to include in his appendix the trial transcripts or other materials necessary to review several of his claims. We remind Witter's counsel that the appellant is responsible for providing the materials necessary for this court's review. See Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975). Reference to facts stated in appellant's briefs to this court or to the district court is not sufficient. See Sparks v. State, 96 Nev. 26, 29, 604 P.2d 802, 804 (1980); cf. NRAP 28(e). We have nevertheless accepted the facts as alleged by Witter where they are clearly

continued on next page . . .

improper, we conclude that counsel reasonably chose not to object to the first three and that none were so extreme that they prejudiced Witter.

Fourth, Witter claims that his trial counsel unreasonably failed to offer an instruction informing jurors that they could not consider character evidence until they had determined whether aggravating circumstances existed and had weighed any such circumstances against any mitigating circumstances. Witter is correct that jurors should not consider character evidence, i.e., "other matter" evidence admitted under NRS 175.552(3), until they have decided whether a defendant is death eligible.[10] The district court cited Lisle v. State[11] in concluding that a jury can consider such evidence before it has weighed aggravating circumstances against mitigating circumstances. This conclusion is incorrect, as explained in Middleton v. State.[12]

Though Witter was entitled to request such an instruction, he has not shown that not giving it violated any rule or law. Nor has he offered any reason, such as improper argument by the prosecutor, to believe that jurors relied on the "other matter" evidence in determining his death eligibility.[13] Therefore, he has failed to demonstrate either deficient performance by his counsel or prejudice.

. . . *continued*
and fully stated and the State has accepted them in its answering brief.

[10]See Evans v. State, 117 Nev. ___, ___ P.3d ___ (Adv. Op. No. 50, July 24, 2001); Byford, 116 Nev. at 239, 994 P.2d at 716.

[11]113 Nev. 679, 704, 941 P.2d 459, 475-76 (1997).

[12]114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998) (rejecting any language in Lisle that suggests that evidence admitted under NRS 175.552(3) can be used to determine death eligibility itself).

[13]Cf. Evans, 117 Nev. at ___, ___ P.3d at ___.

Fifth, Witter contends that his appellate counsel was ineffective in failing to argue that the State violated Batson v. Kentucky.[14] Trial counsel objected to the State's peremptory challenge striking an African-American member of the venire. The prosecutor stated that he had not even noted the race of the veniremember, only his belief that she was not capable of making a decision. Because Witter was not himself black, the trial court questioned whether Batson applied and ruled against him. At the evidentiary hearing, appellate counsel said that he had not raised the issue in part because the State had given a race-neutral reason for the challenge.

The trial court erred to the extent that it based its ruling on Witter's not being black. The due process rule against striking potential jurors simply because of their race also applies to cases where the defendant is not the same race as the excluded jurors.[15] Nevertheless, we conclude that appellate counsel reasonably decided not to raise the issue since the State gave a race-neutral reason for striking the veniremember. Nothing indicates that this reason was a pretext and that the actual motive was purposeful racial discrimination. Therefore, the issue would not have been successful on appeal.[16]

Sixth, Witter asserts that his appellate counsel should have petitioned for rehearing because this court misstated a fact in affirming his conviction. Our opinion stated that "on June 20, 1995, almost a full year before the penalty hearing," the State notified defense counsel it was investigating Witter's alleged possession of a shank in

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[14]476 U.S. 79 (1986).

[15]Powers v. Ohio, 499 U.S. 400, 402 (1991).

[16]Cf. Purkett v. Elem, 514 U.S. 765, 767-69 (1995).

prison.[17] Therefore, we concluded that "Witter was not prejudiced by the district court's decision to allow only four days between discovery and the penalty hearing."[18] The penalty hearing actually began on July 10, 1995, which gave counsel notice of twenty days, not almost a year. However, this error was not material and did not warrant rehearing under NRAP 40(c). In concluding that Witter had adequate time to prepare for the penalty hearing, we cited similar cases deeming one week's notice and six days' notice sufficient.[19] Therefore, twenty days' notice was sufficient as well.

Seventh, Witter contends that appellate counsel was ineffective in not arguing that the prosecutor improperly shifted the burden of proof to the defense. According to Witter, during closing argument at the guilt phase the prosecutor told the jury that neither party had presented evidence as to the effects of alcohol on a person's state of mind and that there was no evidence of mental impairment. The prosecutor's remarks may have been a fair response to arguments made by the defense,[20] but neither party provides the trial transcripts necessary to be sure about this. However, even assuming that the remarks improperly shifted the burden of proof, they were not egregious, and when defense counsel objected, the trial court agreed with counsel and reiterated to jurors that the defense had no burden of proof. We

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[17]Witter, 112 Nev. at 919, 921 P.2d at 894.

[18]Id. at 920, 921 P.2d at 894.

[19]Id. at 919, 921 P.2d at 894.

[20]Cf. Lisle v. State, 113 Nev. 679, 706-07, 941 P.2d 459, 477 (1997) (State did not improperly shift burden of proof when it made general remarks about lack of expert witnesses to point out that defendant failed to substantiate his claim of abuse as a mitigator).

conclude that appellate counsel reasonably declined to raise the issue because the remarks did not prejudice Witter.

Eighth, Witter contends that his appellate counsel was ineffective in failing to argue that the trial court erred when it denied defense counsel's challenge for cause of a potential juror. The juror told counsel that he would not consider possible mitigating evidence that Witter had a bad childhood. In response to questioning by the trial court, the juror said that he would consider such evidence. Despite defense counsel's protest that the potential juror was saying one thing to him and another to the court, the court denied a challenge for cause.

Witter cites no apposite authority for the proposition that the potential juror should have been struck for cause. However, the sentencer in a capital case cannot refuse to consider relevant mitigating evidence,[21] so we conclude that the juror should have been struck for cause if he was unable to consider evidence of Witter's childhood difficulties as a possible mitigator.

Witter cites Thompson v. State, where this court stated that detached language by a potential juror indicating impartiality cannot be considered alone: the juror's whole declaration must be considered and must show that he or she will not be influenced by partial opinions.[22] We have further stated that a trial court has broad discretion in ruling on challenges for cause, which involve factual findings of credibility.[23] If a potential juror's responses are equivocal

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[21]See Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982).

[22]111 Nev. 439, 442, 894 P.2d 375, 377 (1995).

[23]Walker v. State, 113 Nev. 853, 865, 944 P.2d 762, 770 (1997).

or conflicting, this court defers to the trial court's determination of the juror's state of mind.[24] We conclude that Witter was not prejudiced by appellate counsel's failure to raise this issue because the trial court acted within its discretion in finding that the potential juror's statements as a whole showed that he would fairly consider the evidence.

Ninth, Witter complains that his appellate counsel did not challenge the State's use of certain evidence which trial counsel objected to at the penalty hearing. Witter fails to provide the appropriate record, specific argument, or relevant authority necessary to support his claim.[25] The evidence at issue was apparently a California Department of Corrections document which referred to a prior crime and other misconduct by Witter. Witter does not include in the record the actual document. He claims that the evidence lacked sufficient specificity or corroboration, citing only D'Agostino v. State.[26] D'Agostino is not on point; it involved unspecific evidence of alleged admissions by the defendant that he had killed other people.[27] We conclude that Witter has failed to demonstrate that the evidence here was not properly admitted.

Finally, Witter contends that his appellate counsel should have challenged the admission of photographs as unfairly prejudicial. He claims that his trial counsel objected to the photographs numerous times, but he fails to cite the record to support this claim. He also describes the photographs of the crime scene, murder weapon, and autopsy as

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[24]Id.

[25]See Jones v. State, 113 Nev. 454, 468, 937 P.2d 55, 64 (1997); Jacobs, 91 Nev. at 158, 532 P.2d at 1036.

[26]107 Nev. 1001, 823 P.2d 283 (1991).

[27]See id.

"unnecessarily bloody and gruesome." Aside from this conclusory assertion, he provides no analysis and cites no authority for the proposition that the evidence was inadmissible. Thus, he again fails to support his claim with reference to the record, specific argument, or relevant authority. At the evidentiary hearing, appellate counsel testified that he made a strategic decision not to raise this issue because it had little chance of success. We conclude that Witter has not shown that this decision was unreasonable. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Young, J.

Leavitt, J.

Becker, J.

cc: Hon. Sally L. Loehrer, District Judge
Attorney General
Clark County District attorney
David M. Schieck
Clark County Clerk

CERTIFIED COPY
This document is a full, true and correct copy of the original on file and of record in my office.
DATE: September 5, 2001
Supreme Court Clerk, State of Nevada
By J. Richardson Chief Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 36927

District Court Case No. C117513

REMITTITUR

TO: Shirley Parraguirre, Clark County Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: September 5, 2001

Janette M. Bloom, Clerk of Court

By: J. Richards
Chief Deputy Clerk

cc: Hon. Sally L. Loehrer, District Judge
Attorney General
Clark County District Attorney
David M. Schieck

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on SEP. 1 4 2001.

DEPUTY NORRETA CALDWELL
County Clerk

01-13848