IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLO THOMAS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 77345

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This case is properly retained by the Supreme Court because it is a death penalty case. NRAP 17(a)(1).

STATEMENT OF THE ISSUE(S)

1. Whether all claims were untimely, successive, barred by laches, and lacked good cause.
2. Whether all guilt-phase claims were meritless.
3. Whether all penalty-phase claims were meritless.
4. Whether all remaining claims were meritless.

STATEMENT OF THE CASE

Appellant, Marlo Thomas, was convicted of two counts of First-Degree Murder and sentenced to death in 1997 for the early-morning robbery at the Lone Star Steakhouse and the stabbing deaths of two employees, Matthew Gianakis and

Carl Dixon, who were present during the robbery. Appellant's Appendix ("AA") Vol. 4, at 992–97. At the first penalty hearing, the jury found six aggravating circumstances and no mitigating circumstances and sentenced Appellant to death for both murder counts. 4 AA 890–98. This Court affirmed Appellant's convictions and sentences of death. Thomas v. State ("Thomas I"), 114 Nev. 1127, 967 P.2d 1111 (1998); see also 4–5 AA 991–1019. A Petition for Writ of Certiorari was denied on October 4, 1999. Thomas v. Nevada, 528 U.S. 830, 120 S. Ct. 85 (1999); see also 5 AA 1032–56. Remittitur issued on October 26, 1999. 24 AA 5982–83; see also Nevada Supreme Court Docket No. 31019.

Following post-conviction proceedings in 2000 ("First Petition"), at which trial counsel testified, this Court affirmed the convictions but reversed the death sentences due to counsel's ineffectiveness in failing to object to an incorrect penalty-phase instruction on commutation. Thomas v. State ("Thomas II"), 120 Nev. 37, 83 P.3d 818 (2004); see also 5 AA 1065–1142; 6 AA 1267–84; 24 AA 5984–85. In 2004, post-conviction counsel was re-appointed for a penalty retrial, at which the jury found the existence of four aggravating circumstances and again sentenced Appellant to death for both murder counts. 6 AA 1285–88. This Court affirmed the sentence on direct appeal. Thomas v. State ("Thomas III"), 122 Nev. 1361, 148 P.3d 727 (2006); see also 6 AA 1378–98. Remittitur issued on January 28, 2008. See Nevada Supreme Court Docket No. 46509.

On March 6, 2008, Appellant filed a second post-conviction habeas petition ("Second Petition"). 6 AA 1416–28. New post-conviction counsel filed supplements on July 12, 2010 and March 31, 2014. 6 AA 1430–48, 1450–60. The district court denied the petition on May 30, 2014. 6–7 AA 1499–1509. This Court affirmed that decision in an unpublished Order of Affirmance on July 22, 2016. Thomas v. State ("Thomas IV"), No. 65916, 2016 WL 4079643, at *1 (Nev. July 22, 2016); see also 7 AA 1532–39. Remittitur issued on October 20, 2016. 26 AA 6274–76; see also Nevada Supreme Court Docket No. 65916.

Appellant next proceeded to federal court, where he filed a federal habeas petition on February 14, 2017. 35 AA 8591. The federal public defender was appointed. 35 AA 8591.

In state court, the federal public defender filed the underlying third habeas petition on Appellant's behalf on October 20, 2017 ("Third Petition"). 3–4 AA 630–885. The State filed its Response on March 26, 2018. 30–31 AA 7460–528. Appellant filed a Reply on June 4, 2018. 31 AA 7532–630. The district court heard argument on August 8, 2018 and took the matter under advisement. 35 AA 8574–89. On September 25, 2018, the district court denied the Third Petition by written Decision and Order. 35 AA 8590–99. Appellant filed a Notice of Appeal on October 30, 2018. 35 AA 8611–16. Appellant's Opening Brief was filed June 14, 2019.

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ARGUMENT

I. SUMMARY, FRAMEWORK, AND STANDARD OF REVIEW

The underlying Third Petition was untimely, barred by laches, successive, and entirely lacking in good cause; thus, the district court properly denied it. In this appeal of the lower court's denial, Appellant has attempted to reconfigure claims that are procedurally barred and/or waived. Indeed, the vast majority of the claims raised in the Third Petition had already been or should have been raised on direct appeal or in a previous habeas petition. All claims of good cause are demonstrably meritless, because he cannot establish prior habeas counsel's ineffectiveness. Appellant has also failed to show that any of his other claims had a chance of success—and thus, he has failed to show that dismissing his Third Petition resulted in any prejudice.

In fact, this proceeding is a perfect illustration of this Court's observation that "petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984). Indeed, "without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless,

successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

This Responding Brief is organized in four additional sections. Section II discusses the application of the mandatory procedural bars and demonstrates that Appellant failed to establish good cause. Section III discusses guilt-phase claims and explains why denying these claims did not result in prejudice. Section IV discusses penalty-phase claims and explains why denying these claims did not result in prejudice. Finally, Section V discusses the remaining claims and explains why denying these claims did not result in prejudice.

This Court gives deference to a district court's factual findings in habeas matters but reviews the court's application of the law to those facts de novo. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013).

II. APPELLANT'S THIRD PETITION WAS PROCEDURALLY BARRED AND LACKED GOOD CAUSE

The district court denied Appellant's Third Petition as time-barred, barred by laches, and successive. 35 AA 8593–98. Because Appellant failed to demonstrate good cause for any of these claims, denial was proper.

A. Time-Bar

Under NRS 34.726(1), "a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or,

if an appeal has been taken from the judgment, within 1 year after the appellate court of competent jurisdiction . . . issues its remittitur," absent a showing of good cause for delay. This Court rejected a habeas petition that was filed just two days late, pursuant to the clear and unambiguous mandatory provisions of NRS 34.726. Gonzales v. State, 118 Nev. 590, 53 P.3d 901 (2002). The one year time bar in NRS 34.726 also applies to successive petitions. Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001).

This Court has noted that "the statutory rules regarding procedural default are mandatory and cannot be ignored when properly raised by the State." State v. Eighth Judicial Dist. Court (Riker), 21 Nev. 225, 233, 112 P.3d 1070, 1075 (2005).

Regarding guilt-phase claims, the Judgment of Conviction was filed on August 27, 1997. An Amended Judgment of Conviction was filed on September 16, 1997. This Court issued an Order affirming the judgment of the district court on November 25, 1998. Thomas I, 114 Nev. at 1127, 967 P.2d at 1111. Remittitur issued on October 26, 1999. Accordingly, Appellant had until October 26, 2000, to file a timely petition arguing guilt-phase claims. The Third Petition, however, was filed on October 20, 2017—almost eighteen (18) years after the one-year deadline had expired.

Regarding penalty-phase claims, the final Judgment of Conviction after Appellant's penalty retrial was filed on November 28, 2005. This Court issued an

Order affirming the judgment on December 28, 2006. Thomas III, 122 Nev. at 1361, 148 P.3d at 727. Remittitur issued on January 28, 2008. Nevada Supreme Court Docket No. 46509. Accordingly, Appellant had until January 28, 2009, to file a timely petition arguing penalty-phase claims. The Third Petition, however, was filed on October 20, 2017—almost nine (9) years after the one-year deadline had expired.

Such untimeliness can be excused if Appellant can establish good cause for the delay—that is, that the delay was not Appellant's fault, *and* that dismissal of the petition as untimely would unduly prejudice Appellant. NRS 34.726(1). However, as discussed *infra*, Appellant has failed to do so.

B. Laches

NRS 34.800(2) creates a rebuttable presumption of prejudice to the State if "[a] period exceeding 5 years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction." To invoke NRS 34.800(2)'s presumption of prejudice, the statute requires that the State specifically plead laches.

Regarding the Third Petition, the State affirmatively pleaded laches under NRS 34.800(2), and the district court found that laches applies. 35 AA 8593–94. The Third Petition was filed twenty (20) years after the original jury trial, eighteen (18) years after affirmance of the guilty verdict on direct appeal, twelve (12) years after

the penalty retrial, and eight (8) years after affirmance on the direct appeal of the penalty retrial. Because these time periods well-exceed the statutory five years, the State is entitled to a rebuttable presumption of prejudice. NRS 34.800(2). And indeed, the State is prejudiced in responding to the claims in this third round of habeas proceedings and in its ability to conduct a retrial of Appellant due to the long passages of time since both guilt-phase and penalty-phase of Appellant's trial.

To overcome the presumption of prejudice to the State, Appellant has the heavy burden of proving a fundamental miscarriage of justice. NRS 34.800(1); see also Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001). Appellant claims that the district court made no specific finding as to the application of laches and whether Appellant met his burden in overcoming the presumption of prejudice. AOB at 232–35. However, the district court explicitly noted that Appellant could only have overcome the presumption "by a showing that [the] petition is based upon grounds of which Appellant could not of [sic] had knowledge of by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred, or by a demonstrate that a fundamental miscarriage of justice had occurred." 35 AA 8594. Even a superficial reading of the district court's Decision and Order reveals that the district court did not find that Appellant made any such showing.

The examination the merits in this appeal also demonstrates that Appellant cannot meet his burden of overcoming the presumption of prejudice to the State.

First, Appellant's claim that "any delay in raising the facts and claims in the current petition is not attributable to him" but to "initial post-conviction counsel's ineffectiveness" misapplies the meaning of the phrase. AOB at 233. Indeed, any delay caused by defense counsel is, by nature, a delay that is not "external to the defense." See Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003). Further, Appellant fails to demonstrate a fundamental miscarriage of justice. See Section II(D)(2), *infra*. Accordingly, the district court properly dismissed the Third Petition pursuant to NRS 34.800(2).

C. Successive Petition

NRS 34.810(2) requires the district court to dismiss "[a] second or successive petition if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." As with NRS 34.726(1), the procedural bar described in NRS 34.810(2) is mandatory. See Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 507 (2001) ("[A] court *must* dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." (emphasis added)).

This Court has recognized that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). If the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991).

Appellant's Third Petition raised claims related to both guilt- and penalty-phases of his trial. The Third Petition was successive, though in different degrees as to the guilt-phase and penalty-phase. This is the third habeas petition to raise guilt-phase claims and the second habeas petition to raise penalty-phase claims. David Schieck, Esq., was appointed as first post-conviction counsel (after direct appeal from the guilt-phase), in which capacity he was responsible for raising guilt-phase claims—which he did in the First Petition (i.e. the petition that ultimately resulted in the reversal of Appellant's original death sentences). 5 AA 1065–1142. Mr. Schieck was also appointed as penalty-retrial and penalty-appeal counsel, in which capacity he was responsible for raising any penalty-phase claims appropriate for direct appeal. Because Appellant was statutorily entitled to appointment of post-conviction counsel, Mr. Schieck's ineffectiveness in raising any of the relevant claims may have constituted good cause for alleging them in a successive petition—but only if such ineffectiveness was timely raised. Bret Whipple, Esq. was appointed

as second post-conviction counsel (after direct appeal from the penalty-phase) and could have raised any claims related to Mr. Schieck's alleged ineffectiveness—which he did in the Second Petition. 6 AA 1416–28, 1430–48, 1450–60. To the extent Appellant articulates new and different grounds, Appellant's failure to assert those ground in a prior petition constitutes an abuse of the writ. Appellant's allegations of Mr. Whipple's ineffectiveness, as discussed *infra,* are insufficient to overcome the mandatory procedural bars.

D. Lack of Good Cause

Appellant claims he can overcome all procedural bars and that therefore the district court should not have dismissed his Third Petition. Appellant's Opening Brief ("AOB") at 19–63. On appeal, Appellant reasserts some of his former allegations of good cause, including that counsel was ineffective and that he is actually innocent of the death penalty. However, as the district court found below, none of these allegations of good cause have merit. 35 AA 8590–99. Because the district court did not abuse its discretion, this Court should not disturb the district court's finding that there is no good cause.

A petitioner has the burden of pleading and proving facts to demonstrate good cause to excuse the delay in filing a habeas petition. State v. Haberstroh, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003). To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate the following: (1) "[t]hat the delay is not

the fault of the petitioner." To meet the first requirement, "a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). This language contemplates that the delay in filing a petition must be caused by a circumstance not within the actual control of the defense team. "An impediment external to the defense may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable.'" Id. (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639 (1986)). To find good cause there must be a "substantial reason; one that affords a legal excuse." Id. (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). And "[a]ppellate courts will not disturb a trial court's discretion in determining the existence of good cause except for clear cases of abuse." Colley, 105 Nev. at 236, 773 P.2d at 1230.

A petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d

at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

1. ***Appellant's post-conviction counsel was not ineffective.***

As general good cause for raising both guilt- and penalty-phase claims in his Third Petition, Appellant alleges his counsel was ineffective. AOB at 19–52. Because Appellant was sentenced to death, he was entitled to effective assistance of his *first* post-conviction counsel. But unlike other death penalty cases, Appellant did not have one post-conviction counsel who challenged both "convictions *and* sentences." See AOB at 49 (*citing* Johnson v. State, 133 Nev. 571, 583, 402 P.3d 1266, 1278 (2017), reh'g denied (Jan. 19, 2018)). Because this Court affirmed the conviction itself on direct appeal, but remanded for a penalty retrial, Appellant's first post-conviction counsel regarding guilt-phase claims was Mr. Schieck. Appellant's first post-conviction counsel regarding penalty-phase claims was Mr. Whipple. Mr. Whipple raised Mr. Schieck's alleged ineffectiveness in the Second Petition—and all such arguments were rejected by the district court and this Court. Thus, at this stage, only the ineffectiveness of Mr. Whipple—and only as to penalty-phase claims, as post-conviction counsel after the direct appeal of the penalty-retrial—would suffice as good cause for the claims in the underlying Third Petition. Appellant cannot demonstrate Mr. Whipple's ineffectiveness.

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686–87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a 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. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

A court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

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). 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." Id. To be effective, the constitution "does not require that counsel 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, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (*citing* Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (*citing* Strickland, 466 U.S. at 687–89, 694, 104 S. Ct. at 2064–65, 2068).

A claim of ineffective assistance of appellate counsel must also satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). As to the first prong, there is a strong presumption that 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 professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751–52, 103 S. Ct. 3308, 3313 (1983). "It is a well-established principle that counsel decides which issues to pursue on appeal, [ ] and there is no duty to raise every possible claim. [ ] An exercise of professional judgment is required." Id. at 751, 103 S. Ct. at 3312. Indeed, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. "For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314. A claim of ineffective assistance of appellate counsel is more likely to succeed "only when ignored issues are clearly stronger than those presented[.]" Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986).

As to the second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. The United States Supreme Court has observed that it is "difficult" to prevail on a claim of ineffective appellate counsel based on counsel failing to raise a particular claim. Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 782 (2000).

This Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means, 120 Nev. at 1012, 103 P.3d at 33. Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[a petitioner] must allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

A claim of ineffective assistance of counsel may serve to excuse a procedural default. Hathaway, 119 Nev. at 252, 71 P.3d at 506. However, "in order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted." Id.; Riker, 121 Nev. at 235, 112 P.3d at 1077. Thus, a claim

of ineffective assistance of counsel that was reasonably available to the petitioner during the statutory time period does not constitute good cause to excuse the delay. Hathaway, 119 Nev. at 253, 71 P.3d at 506. "[A] claim of ineffective assistance of postconviction counsel has been raised within a reasonable time after it became available so long as the postconviction petition is filed within one year after entry of the district court's order disposing of the prior postconviction petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur." Rippo v. State, 132 Nev. 95, 111, 368 P.3d 729, 740 (2016), cert. granted, judgment vacated sub nom. Rippo v. Baker, 137 S. Ct. 905 (2017).

Appellant cites no authority for the proposition that instances of ineffective assistance of counsel are amenable to cumulative-error analysis. Nor can he, because this Court has not endorsed application of its direct appeal cumulative error standard to the post-conviction Strickland context. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009). Nor should cumulative error apply on post-conviction review. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134, 1275 S. Ct. 980 (2007) ("a habeas petitioner cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test.")

Some background as to the procedural history of this case will be helpful in understanding why Mr. Schieck's alleged ineffectiveness *cannot* constitute good

cause and why Mr. Whipple's alleged ineffectiveness *does not* constitute good cause.

Mr. Schieck represented Appellant from 1999 to 2008: during his First Petition, during the appeal therefrom, during the resultant penalty retrial,[1] and during the direct appeal therefrom. Remittitur issued from this Court's affirmance of the final imposition of the death penalty on January 28, 2008. Nevada Supreme Court Docket No. 46509. Mr. Whipple then represented Appellant from 2009 to 2016: during his Second Petition, and during the appeal therefrom. Remittitur issued from this Court's affirmance of the district court's denial of the Second Petition on October 20, 2016. 26 AA 6274–76. Thus, the underlying Third Petition is the second in which Appellant has had a chance to raise penalty-phase claims and the third habeas proceeding in which Appellant has had a chance to raise guilt-phase claims.

Appellant did in fact have a right to post-conviction counsel in his post-conviction capital proceedings. See NRS 34.820(1)(a). Concomitant with this right is the right to effective post-conviction counsel. McKague v. Warden, Nevada State Prison, 112 Nev. 159, 165 n.5, 912 P.2d 255, 258 n.5 (1996) ("As a matter of statutory interpretation, we note that where state law entitles one to the appointment of counsel to assist with an initial collateral attack after judgment and sentence, 'it

[1] Daniel Albregts, Esq., joined Mr. Schieck in the penalty retrial as second chair. AOB at ii, 87.

is axiomatic that the right to counsel includes the concomitant right to effective assistance of counsel.' [Commonwealth v. Albert, 561 A.2d 736, 738, 522 Pa. 331, 334 (1989)]. Thus, a petitioner may make an ineffectiveness of post-conviction counsel claim if that post-conviction counsel was appointed pursuant to NRS 34.820(1)(a)." (emphasis in original)); Crump v. Demosthenes, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997) ("We now hold that footnote 5 in McKague requires that a petitioner who has counsel appointed by statutory mandate is entitled to effective assistance of that counsel.").

However, only the alleged ineffectiveness of Appellant's first post-conviction counsel could establish good cause; and these claims may be procedurally defaulted. See Riker, 121 Nev. at 235, 112 P.3d at 1077 (explaining that "Crump does not stand for the proposition that claims of ineffective first post-conviction counsel are immune to other procedural default, e.g., untimeliness under NRS 34.726 or NRS 34.800"). Because this case comes to this Court in two procedural stages—with first post-conviction counsel as to the guilt-phase issues being Mr. Schieck, and first post-conviction counsel as to the penalty-phase issues being Mr. Whipple—it is imperative that this Court examine the two types of claims under the correct standard. This is particularly true when it seems Appellant is alleging that Mr. Whipple's alleged ineffectiveness serves as good cause for raising *all* claims, both guilt- and penalty-phase.

First, Mr. Whipple's alleged ineffectiveness cannot serve as good cause for raising, or re-raising, any guilt-phase claims. Only Mr. Schieck's alleged ineffectiveness could serve as good cause for any guilt-phase claims. See AOB at 27–43. But Appellant was required to assert any ineffective-assistance-of-counsel claims against Mr. Schieck by January 28, 2009—one year after this Court issued its remittitur in its decision affirming the judgment of conviction and death sentences associated with the penalty retrial. Nevada Supreme Court Docket No. 46509; Rippo, 132 Nev. at 111, 368 P.3d at 740. Appellant did exactly that in his Second Petition filed on March 6, 2008 and its supplements filed through Mr. Whipple on July 12, 2010 and March 31, 2014. 6 AA 1416–28, 1430–48, 1450–60. Claims against Mr. Schieck are no longer timely, raised in the underlying Third Petition many years later. Accordingly, Mr. Schieck's alleged ineffectiveness is not good cause for any guilt-phase claims raised at this point.

Nor can Mr. Whipple be called ineffective for failure to raise any claims that Mr. Schieck was ineffective as to guilt-phase-specific issues. AOB at 44–52. In affirming the district court's denial of Appellant's First Petition, which Mr. Schieck handled, this Court held "that the [district] court did not err in denying those claims implicating the validity of [Appellant's] conviction." Thomas II, 120 Nev. at 44, 83 P.3d at 823. That is, despite remanding the case to the district court for the penalty retrial, this Court has explicitly affirmed the validity of the guilt-phase at every turn,

including on direct appeal from the original judgment of conviction and on appeal from the denial of the First Petition. Mr. Whipple reasonably and strategically chose to attack Mr. Schieck's performance regarding penalty-phase issues—as those were the only claims that had a reasonable probability of success. Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

Second, Mr. Whipple's ineffectiveness does not serve as good cause for raising, or re-raising, any penalty-phase claims. AOB at 22–27. Overall, Mr. Whipple's performance was active and capable. Harrington v. Richter, 562 U.S. 86, 111, 131 S. Ct. 770, 781 (2011) (holding that "while in some instances even an isolated error can support an ineffective-assistance claim if it is sufficiently egregious and prejudicial, it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy.").

Appellant cannot establish that Mr. Whipple failed to raise any meritorious claims of Mr. Schieck's alleged ineffectiveness. In affirming the district court's denial of Appellant's Second Petition—which included Mr. Whipple's claims of Mr. Schieck's alleged ineffectiveness—this Court held that penalty-retrial counsel was not ineffective. Thomas IV, 2016 WL 4079643, at *1–4. As penalty-retrial counsel, Mr. Schieck had focused on mitigating evidence in the form of Appellant's "maturing the longer he stayed incarcerated" and his "mental deficits and upbringing." Id. at *2. This Court specifically found that Mr. Schieck's "newly-

offered evidence" of his "borderline intellectual disability as a mitigating circumstance" was "simply not enough to have changed the jury's calculus. . . [thus] the district court did not err" in denying the Second Petition. Id. at *2, 4.

Appellant's complaint that Mr. Whipple was ineffective for failure to probe more deeply into Appellant's "social history" as mitigation evidence is unpersuasive because he cannot establish that it, any more than Mr. Schieck's proffered mitigation evidence, would have changed the jury's calculus. First, "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up." Rompilla v. Beard, 545 U.S. 374, 383, 125 S. Ct. 2456, 2463 (2005). Thus, even if there are individual pieces of information Appellant alleges Mr. Whipple was deficient for failing to present, Appellant has utterly failed to show that there was any indication that Mr. Whipple should have made the relevant investigations.

Further, there was every reason for Mr. Whipple to focus on stronger claims in lieu of the general story of Appellant's terrible childhood. See, e.g., Barnes, 463 U.S. at 751–52, 103 S. Ct. at 3313. Indeed, Appellant's childhood is no more compelling than his alleged "borderline intellectual disability" and Fetal Alcohol Spectrum Disorder ("FASD"), which this Court has already held penalty retrial counsel was not ineffective for not presenting. Thomas IV, 2016 WL 4079643, at *2. Indeed, "[s]imilar evidence . . . was presented at the first penalty hearing," and this Court could "infer that counsel made a strategic decision to take a different

approach at the second penalty hearing because the record shows counsel knew of the testimony and evidence offered at the first penalty hearing." Id. This Court has found similar arguments—i.e. that penalty-phase counsel was ineffective for not presenting the full picture of a death-row inmate's abusive childhood—unpersuasive. See Johnson, 133 Nev. at 583, 402 P.3d at 1278.

Given that this Court has already observed that the new evidence Mr. Whipple presented during the Second Petition would not have been "enough to have changed the jury's calculus," Appellant cannot establish that his childhood story would have changed it. Id. at *3. In other words, just as with the mitigation evidence Mr. Whipple did investigate, the evidence about Appellant's childhood:

> is not so compelling that there is a reasonable probability that the proceedings would have ended differently had it been presented. Thomas committed two brutal murders and expressed displeasure that there was not a third. His criminal record was extensive and included numerous acts of violence, and he continued his violent actions while incarcerated, oftentimes targeting women.

Id. at *3. If evidence suggesting actual, organic brain damage was not enough to convince this Court that the jury would not have sentenced Appellant to death had they heard it, this Court should not be convinced that the jury would have changed its mind had it been presented with evidence of Appellant's terrible childhood. Id. at *2–3.

Further, Appellant has failed to explain how Mr. Whipple's alleged ineffectiveness in handling this mitigation aspect of the penalty retrial constitutes

good cause for any other claim except Claim 14—Appellant's claim of ineffective assistance of counsel at the penalty retrial. AOB at 26; see Section IV(H), *infra*. That is, Appellant's general complaint about the way Mr. Whipple strategically chose to attack Mr. Schieck's performance regarding mitigation at the penalty retrial does not explain how Mr. Whipple was ineffective with regard to any other aspect as first post-conviction counsel after the penalty retrial.[2] Thus, Mr. Whipple's alleged ineffectiveness could not serve as good cause for any other claim. Even if it somehow could, Appellant has not demonstrated that there are any penalty-phase claims that Mr. Whipple could have presented during the Second Petition that would have had any chance at succeeding. See Sections III, IV, and V, *infra*.

In light of Appellant's failure to make the required showing of good cause, it is clear that the district court did not abuse its discretion in finding that none of Appellant's allegations of good cause have merit. 35 AA 8596–97; Colley, 105 Nev. at 236, 773 P.2d at 1230. This Court should not disturb that finding. Id.

2. ***Appellant is not actually innocent of the death penalty.***

Appellant also alleges "a miscarriage of justice" as good cause. AOB at 52–64. In this argument, Appellant combines Claims 9, 25, and 27 from the Third

[2] Indeed, Appellant merely claims that this alleged ineffectiveness "is good cause to excuse any procedural default of Claim Fourteen, as well as the other claims in the current petition that should have been, but were not, raised in the penalty-retrial post-conviction proceeding"—without ever attempting to explain how. AOB at 27.

Petition. However, even combined, these claims do not demonstrate that Appellant is actually innocent of the death penalty.

Miscarriage of justice, in Nevada, is limited exclusively to claims of actual innocence and ineligibility for the death penalty. Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Nevada recognizes actual innocence as a "gateway" where applicable procedural bars may be excused when "the prejudice from a failure to consider [a] claim amounts to a 'fundamental miscarriage of justice.'" Id. (quoting Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996)). Where the petitioner has argued that the procedural default should be ignored because he is actually ineligible for the death penalty, he must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible. Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (*citing* Sawyer v. Whitely, 505 U.S. 333, 112 S. Ct. 2514 (1992)).

Appellant alleges he is actually innocent of the death penalty due to invalid aggravators and his categorical exemption from the penalty. However, as the district court found, any claim that the death penalty is unconstitutional as to Appellant is both procedurally barred and substantively meritless. 35 AA 8596; see also Thomas IV, 2016 WL 4079643, at *1–2. That is, Appellant fails to show that but for a constitutional error, no reasonable juror would have found him death eligible. Hogan, 109 Nev. at 960, 860 P.2d at 716.

i. Aggravators

Claim 25 of the Third Petition alleged that the aggravator of prior violent felonies is invalid. 4 AA 856–58. Claim 9 of the Third Petition alleged that the aggravator of avoiding lawful arrest is invalid. 3 AA 715–28. Appellant now alleges both claims serve as part of his actual innocence claim in that removing these aggravators would require a re-weighing of his death eligibility. AOB at 53–58. However, this claim is barred under NRS 34.810, which requires dismissal where a petition "fails to allege new or different grounds for relief and that the prior determination was on the merits." NRS 34.810(2). A defendant cannot avoid a prior determination on the merits by offering a more detailed and precisely focused argument in subsequent proceedings. See Hall v. State, 91 Nev. 314, 315–16, 535 P.2d 797, 798–99 (1975); see also Pertgen v. State, 110 Nev. 557, 557–58, 875 P.2d 316, 362 (1994).

This Court reviewed Appellant's death sentences, including the applicability of the aggravators, on direct appeal from the original judgement of conviction and on direct appeal from the penalty retrial, based on the mandatory death sentence review. NRS 177.055(2). In both instances, this Court found the death penalty to have been constitutionally imposed. Thomas I, 114 Nev. at 1148–49, 967 P.2d at 1125; Thomas III, 122 Nev. at 1374–75, 148 P.3d at 736–37. Thus, the

constitutionality of Appellant's most recently imposed death penalty has been determined on the merits. NRS 34.810(2).

Further, Claims 25 and 9 are substantively meritless. On its review of Appellant's death penalty following the penalty retrial, this Court specifically noted that Appellant had been convicted of attempted robbery in 1990 and battery with substantial bodily harm 1996, that both prior offenses were "proved by admission of the judgments of conviction," and that "each crime involved the use or threat of violence." Thomas III, 122 Nev. at 1375, 148 P.3d at 736. Thus, Appellant's allegation that the 1990 armed robbery conviction, alone, may have been insufficient for a failure to prove actual use of violence is irrelevant. AOB at 54–56. As for the "avoidance of lawful arrest" aggravator, this Court has previously upheld it against claims of constitutional vagueness, overbreadth, and failure to narrow. Cavanaugh v. State, 102 Nev. 478, 486, 729 P.2d 481, 486 (1986); Blake v. State, 121 Nev. 779, 794–95, 121 P.3d 567, 577 (2005). There is no reason to re-examine these aggravators.

ii. Categorical Exemptions

Claim 27 of the Third Petition alleged that Appellant is ineligible for the death penalty due to his youth at the time of the murders and his mental ability. 4 AA 871–74. Appellant now alleges this claim serves as part of his actual innocence claim. AOB at 58–61. However, this claim, too, is barred under NRS 34.810(2), as it

received a prior determination on the merits. Allegations that Appellant may be intellectually disabled and/or suffers from FASD and is therefore exempt from the death penalty were raised in Appellant's Second Petition; similar arguments were raised in the appeal from its denial. This Court declined to consider the substance of the intellectual disability argument as abandoned on appeal, and rejected Appellant's argument that counsel was ineffective for "failing to investigate and present evidence of his borderline intellectual disability as a mitigating circumstance." Thomas IV, 2016 WL 4079643, at *1. This Court found that the district court did not err in not holding an evidentiary hearing, and that penalty-retrial counsel was not ineffective because "[s]imilar evidence to that proffered in this proceeding was presented at the first penalty hearing," and counsel chose to use another strategy at the penalty retrial in order to attempt to avoid the death penalty. Id. at *1–3. Accordingly, this eligibility/mitigation-based argument is barred under NRS 34.810(2) and cannot serve as good cause necessary to overcome the procedural bars.

Appellant's argument that he is categorically exempt from the death penalty in any way—whether due to age or mental ability—is also substantively meritless. Juvenile exclusion from the death penalty does not extend beyond the age of eighteen. Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183 (2005) (holding that the Eighth Amendment's prohibition of cruel and unusual punishment precludes the

execution of offenders who were under eighteen years of age when their crimes were committed). Likewise, Appellant's "borderline intellectual functioning" does not render him ineligible for the death penalty. Exclusion from the death penalty due to intellectual disability (i.e. mental retardation) requires much more than mere borderline intellectual functioning. Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242 (2002); NRS 174.098; NRS 175.554. Intellectual disability is defined as "significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period." Id.

The Atkins Court left "'to the states[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" Id. at 317, 122 S. Ct. at 2250 (quoting Ford v. Wainwright, 477 U.S. 399, 416–17 (1986) (which left to the states ways to enforce the constitutional restriction upon insane persons)). Although the Court declined to mandate a definition of mental retardation, it noted that existing state definitions generally conformed to clinical definitions set forth by the American Association on Mental Retardation ("AAMR") and the American Psychiatric Association ("APA"). Id. at 308–09, 122 S. Ct. at 2245. The Court did not hold or suggest that such clinical definitions were to limit the states or the consideration of whether an individual is mentally retarded for the purposes of determining whether a person may receive the death penalty.

In response to Atkins, the Nevada Legislature enacted NRS 174.098 in 2003, setting forth a procedure for determining whether someone is "intellectually disabled" for death-penalty purposes. NRS 174.098(1) allows a defendant to file a motion to declare that he is intellectually disabled in cases where the death penalty is sought. NRS 174.098(2) provides that the Court "[s]tay the proceedings" and "[h]old a hearing … to determine whether the defendant is intellectually disabled." According to NRS 174.098(7), "'intellectually disabled' means significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period." Thus, in order to prove intellectual disability, NRS 174.098(7) requires that a defendant satisfy three elements: (1) that he has significant subaverage general intellectual functioning; (2) the concurrent existence of deficits in adaptive behavior; and (3) that these conditions were manifested during his developmental period. Pursuant to NRS 174.098(5)(b), the defendant bears the burden of proving these elements by a preponderance of the evidence

Even assuming Appellant really does suffer from borderline intellectual functioning, Atkins and NRS 174.098 do not support his position. The Atkins Court ruled only that it is cruel and unusual to execute mentally retarded / intellectual disabled defendants—not defendants with any mental illness. Appellant admits that his condition, assuming it exists, is "not as severe as an intellectual disability." AOB

at 58. Thus, Appellant has failed to prove by a preponderance of the evidence that he meets the requirements of NRS 174.098: that is, that he has significantly subaverage general intellectual functioning, which exists concurrently with deficits in adaptive behavior, and that these conditions were manifested during his developmental period.

Appellant is not ineligible for the death penalty due to age, mental ability, or these factors combined—a position for which Appellant can offer absolutely no authority. His actual innocence claim must fail.

*3. **Appellant's "borderline intellectual functioning" is irrelevant.***

For the reasons just discussed, Appellant was not exempt from the death penalty on any grounds, including "borderline intellectual functioning." AOB at 61–63; see Section II(D)(2), *supra*. Accordingly, this independent claim does not serve as good cause.

*4. **Appellant's "functional age" is irrelevant.***

Appellant raises his claim of "functional age below 18" for the first time in this appeal. AOB at 63–64; see 3 AA 630–4 AA 885 (Third Petition, lacking any reference to "functional age"). Accordingly, this Court cannot address this independent claim, which cannot serve as good cause. See, e.g., Thomas v. State, 93 Nev. 565, 566, 571 P.2d 113, 114 (1977); Allen v. State, 91 Nev. 78, 81–82, 530 P.2d 1195, 1197 (1975).

III. GUILT-PHASE CLAIMS

Claims 1, 4, 6A, 11, 12, 13, 15, 17, 19, and 28 of Appellant's Third Petition pertain to the guilt phase of trial, which occurred in 1997. As the district court found, all of these claims are untimely under NRS 34.726(1) and successive under NRS 34.810(2). 35 AA 8591–98; see also Section II, *supra*. As discussed, Appellant has failed to establish good cause to overcome the mandatory procedural bars to all of these guilt-phase claims, because only Mr. Schieck's alleged ineffectiveness could serve as good cause for these claims—and any such claims are, at this point, themselves procedurally barred. Id.

At this point, Appellant's substantive guilt-phase claims are waived under NRS 34.810(1)(b)(2), and several are barred under NRS 34.810(2) as having prior determinations on the merits and/or under NRS 34.726(1) as untimely: Claim 1's challenge under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986); Claims 4, 6, 11, and 15's allegations of judicial error; Claim 17's allegations of prosecutorial misconduct;[3] and Claim 28's allegation of juror misconduct. Two other claims are procedurally defaulted allegations of ineffective assistance of counsel: Claims 13's

[3] Appellant does not re-raise Claim 12 (sufficiency of the evidence, 3 AA 733–34) (though he briefly mentions it as part of his argument that certain claims are not procedurally barred, see AOB at 202), Claims 23 (unconstitutionality of the death penalty/lethal injection, 4 AA 830–53) or 24 (violation of international law, 4 AA 854–55) in this appeal. Therefore, the State does not address any of these three abandoned claims.

allegations of ineffective assistance of trial counsel; and Claim 19's allegations of ineffective assistance of appellate counsel.

A. Claims 1, 4, 6, 11, 15, 17, and 28 – Waived & Procedurally Defaulted

Several of Appellant's claims are barred under NRS 34.810(2), as they have received a prior determination on the merits. Appellant spends thirty pages of his Opening Brief discussing why these claims[4] are not, in fact, barred—claiming in general that they "contain new allegations substantially altering the claims previously presented." AOB at 202. However, as discussed, Appellant cannot avoid the procedural bars via this more detailed argument. See, e.g., Hall, 91 Nev. at 316, 535 P.2d at 798–99. To the extent portions of the substantive guilt-phase claims were not raised in prior proceedings, they have long since been waived by Appellant's failure to raise them on direct appeal. See NRS 34.724(2)(a); NRS 34.810(1)(b); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

Claim 1 alleges that the State exercised a peremptory challenge in violation of Batson, 476 U.S. at 79, 106 S. Ct. at 1712. AOB at 140–50; see also 3 AA 659–62. However, as the district court found below, this claim is barred under NRS

[4] In fact, Appellant only addresses claims 1, 4, 6, and 11 in this section. AOB at 202–32. Accordingly, he has not argued that claims 15 and 17 are not barred under NRS 34.810(2) as having received a prior determination on the merits.

34.810(2), as it received a prior determination on the merits. 35 AA 8594. Indeed, Appellant raised this exact Batson claim on direct appeal from the guilt-phase, and this Court ultimately rejected the claim, concluding that "the district court did not abuse its discretion and, therefore, did not err by permitting the peremptory challenge." Thomas I, 114 Nev. at 1137, 967 P.2d at 1118. Appellant attempts to use new case law, and counsel's alleged ineffectiveness in failure to correctly apply the law, to argue that this decision should be revisited. Williams v. State, 134 Nev. __, 429 P.3d 301 (2018). However, Appellant cannot avoid the procedural bars via this more detailed argument. See Hall, 91 Nev. at 316, 535 P.2d at 798–99.

Claim 4 alleges the guilt-phase jury instructions were erroneous. AOB at 203–15; see also 3 AA 678–89. However, as the district court found below, this claim is barred under NRS 34.810(2), as it received a prior determination on the merits. 35 AA 8594. Indeed, Appellant raised the exact same jury instruction arguments in his direct appeal. This Court found that "no plain or patently prejudicial errors exist." Thomas I, 114 Nev. at 1149, n. 5, 967 P.2d at 1125, n.5. Appellant provides absolutely no authority for his assertion that this claim should now be re-reviewed under a de novo standard. AOB at 204.

Claim 6 alleges a Confrontation Clause violation during the guilt-phase. AOB at 220–28. However, as the district court found below, this claim is barred under NRS 34.810(2), as it received a prior determination on the merits. 35 AA 8594.

Indeed, Appellant raised the same confrontation issue on direct appeal. This Court rejected the claim, concluding, "the district court did not err by admitting Hall's preliminary hearing testimony because Hall was 'unavailable.'" Thomas I, 114 Nev. at 1137, 967 P.2d at 1118.

Claim 11 alleges error in that Appellant was convicted by a death-qualified jury. AOB at 230–32; see also 3 AA 731–32. However, as the district court found below, this claim is barred under NRS 34.810(2), as it received a prior determination on the merits. 35 AA 8594. Indeed, Appellant raised these exact death-qualified-jury arguments on direct appeal. This Court rejected the claim, concluding, "no plain or patently prejudicial errors exist." Thomas I, 114 Nev. at 1149, n. 5, 967 P.2d at 1125, n.5. Appellant provides absolutely no authority for his assertion that this claim should now be re-reviewed under a de novo standard. AOB at 232.

Claim 15 alleges the district court erred in failing to declare a mistrial, in admitting "gruesome" photographs and an autopsy diagram, and in "signaling approval" of a State's witness. AOB at 183–87; see also 4 AA 805–07. However, as the district court found below, this claim is barred under NRS 34.810(2), as it received a prior determination on the merits. 35 AA 8596. Indeed, Appellant raised these claims of trial court error on direct appeal, and this Court ultimately rejected the arguments, concluding that "the district court did not err by admitting autopsy photographs of the victims, Gianakis and Dixon . . . by admitting an enlarged version

of a previously admitted diagram depicting Dixon's body . . .[or] by denying Thomas' motion for a mistrial after Nash inadvertently testified that Thomas had been to jail." Thomas I, 114 Nev. at 1140–42, 967 P.2d at 1120–21.

Claim 17 alleges prosecutorial misconduct during argument in the guilt-phase of trial. AOB at 175–81; see also 4 AA 810–12. However, as the district court found below, this claim is barred under NRS 34.810(2), as it received a prior determination on the merits. 35 AA 8596. Indeed, Appellant raised these claims of trial court error on direct appeal, and this Court found that "no plain or patently prejudicial errors exist." Id. at 1149, n. 5, 967 P.2d at 1125, n.5. Appellant does not even try to offer a more detailed argument on appeal—and even if he had, he cannot avoid the procedural bars via this more detailed argument. See Hall, 91 Nev. at 316, 535 P.2d at 798–99.

Appellant alleges some parts of these claims were not previously raised—for example, Claims 15(D), the trial court's "approval" of a state witness, and Claim 28, alleging juror Joseph Hannigan was dishonest during voir dire and that he and juror Sharyn Brown were biased against Appellant. AOB at 64–85, 185–86; see also 4 AA 875–82. To the extent this is true, Appellant has long-since waived any substantive claims by his failure to raise them on direct appeal. See NRS 34.810(1)(b)(2); Franklin, 110 Nev. at 752, 877 P.2d at 1059. As the district court found below, these claims are also procedurally barred. 35 AA 8595–96. Indeed, any claim that trial

counsel was ineffective for raising these claims could have been raised during the first habeas petition after the guilt phase. However, Appellant failed to raise these claims at either point.

Appellant seems to contend that there is good cause to excuse the waiver and procedural defaults for these claims in that Mr. Whipple was ineffective for not investigating and presenting them. However, as discussed *supra*, Mr. Whipple's alleged ineffectiveness cannot serve as good cause for any of the guilt-phase claims. It was for that reason that despite the additional documents Appellant attached to his Third Petition—including affidavits and declarations concerning Jurors Hannigan and Brown—the district court found it could not reach the merits of Claim 28, which is waived and procedurally barred. 29AA7140–53; 30 AA 7453–55; 35 AA 8595–98. As the district court did below, this Court should find that Appellant's claims of trial court error and juror misconduct and bias consists of allegations that are waived under NRS 34.810(2) and that any claims that guilt-phase and direct-appeal counsel were ineffective for failure to raise them are procedurally barred under NRS 34.726 and NRS 34.810(1).

Thus, this Court should find that all seven of these claims are procedurally barred and that any "new" arguments within these claims are both substantively waived and insufficient to overcome the procedural bars.

/ / /

B. Claims 13 and 19 – Procedurally Barred

Claim 13 alleges multiple instances of ineffective assistance of guilt-phase counsel. AOB at 82–86, 124–37; see also 3 AA 739–50, 4 AA 751–68. Claim 19 alleges ineffective assistance of direct-appeal counsel. AOB at 200–01; see also 4 AA 817–18.

All allegations of ineffective assistance of trial and direct-appeal counsel should have been raised in Appellant's First Petition—and indeed, Mr. Schieck did raise many such allegations in that prior petition.[5] 5 AA 1065–1142; see also Thomas II, 120 Nev. at 37, 83 P.3d at 818. As the district court found below, any claims of both trial and direct-appeal counsels' ineffectiveness are "procedurally time barred;" they "were available during the timeframe in which [Appellant's] first Writ of Habeas Corpus Petition was filed. Therefore [Appellant] should have raised these issues in [his] first Writ of Habeas Corpus. Because [Appellant] has not proven that good cause exists to overcome such waiver," the district court denied relief as to

[5] Any complaints about guilt-phase counsel in terms of their assistance during Appellant's first penalty trial are utterly irrelevant. See, e.g., AOB at 129–31. Appellant's death sentences resulting from that first penalty trial were overturned by this Court. Though Appellant seems to argue that some of guilt-phase counsel's alleged ineffectiveness "denied him a defense to first-degree murder," those allegations all relate to Appellant's mental health—and because Appellant has never argued that he could have pleaded not guilty by reason of insanity, or guilty but mentally ill, such information would have been irrelevant during the guilt-phase. AOB at 27–43, 131–37. Thus, Appellant could never demonstrate prejudice as to these claims.

both claims. 35 AA 8595–96. Appellant's attempt at forcing an inception-style re-examination of these claims (i.e. to the extent he alleges there is good cause to review this claim because Mr. Whipple was ineffective for raising Mr. Schieck's alleged ineffectiveness in not raising trial/-direct-appeal-counsel's ineffectiveness) is unavailing. This Court should find that these claims are procedurally barred.

IV. PENALTY-PHASE CLAIMS

Claims 2, 3, 5, 6, 7, 8, 9, 10, 14, 16, 18, 20, 25, and 26 of Appellant's Third Petition pertain to the penalty retrial, which occurred in 2004. As the district court found, these claims are untimely under NRS 34.726(1) and successive under NRS 34.810(2). 35 AA 8591–98; see also Section II, *supra*. As discussed, *supra*, Appellant fails to establish a miscarriage of justice sufficient to show good cause for raising penalty-phase claims. See Section II(D)(2).

To the extent Appellant alleges Mr. Whipple was ineffective for failure to raise any of these penalty-phase issues in the Second Petition, any such ineffective-assistance-of-counsel claims may be timely asserted. As discussed, Mr. Whipple is Appellant's first post-conviction counsel after the penalty retrial. And because this Court issued its remittitur in its decision affirming the district court's denial of the Second Petition on October 20, 2016, the Third petition, which was filed on October 20, 2017, contained timely ineffective-assistance-of-counsel claims against Mr. Whipple—at least insofar as that rule in Rippo remains. 26 AA 6274–76.

Nonetheless, Appellant has failed to establish that he received ineffective assistance of counsel from Mr. Whipple regarding these claims. Thus, because his other assertion of good cause—miscarriage of justice—is without merit, Appellant has necessarily failed to establish the good cause needed to overcome the procedural bars under NRS 34.726(1)(a), NRS 34.810(1)(b)(2), and NRS 34.810(2). An individual examination of each claim will reveal that Mr. Whipple was not deficient regarding these claims and that there was no prejudice.

A. Claim 2 – Security Measures

Claim 2 alleges "excessive security measures" during the penalty retrial, including shackling of himself and of witnesses. AOB at 164–72; see also 3 AA 663–67. As the district court found below, this claim is meritless for several reasons. 35 AA 8596. The substantive claim is waived under NRS 34.810(1)(b)(2). See Franklin, 110 Nev. at 752, 877 P.2d at 1059. These allegations could have been raised on direct appeal from the penalty retrial. The claim is also procedurally barred, as any claim that counsel was ineffective for challenging the measures could have been raised during the first habeas petition after the penalty retrial. However, Appellant failed to raise this claim at either point. Appellant fails to provide good cause for not bringing this claim at an earlier time. See Section II(D)(1), *supra*. Further, the claim is meritless. Thus, there was no prejudice in denying this claim.

As an initial matter, Mr. Whipple's ineffectiveness could never serve as good cause for this claim because he did, in fact, present this substantive claim (albeit not an allegation that Mr. Schieck was ineffective for not challenging the shackling issue) during the Second Petition; the district court denied the substance of the claim as waived and lacking good cause. 7 AA 1502–03.

Even if it could be examined again, on the merits, the claim is meritless. It is true that courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding. Deck v. Missouri, 544 U.S. 622, 633, 125 S. Ct. 2007, 2014 (2005). However, Appellant has failed to show that the restraints were visible to the jury. Appellant, originally, had chains on his hands, a belly chain, and a leg chain. 2 AA 415. The Court noted that someone who had already been convicted and sentenced to death had every reason to flee. Id. However, the district court noted that there was a screen in front of the table so the jury could not see the chains. Id. The district court allowed Appellant to cover the leg chain with his pants so the jury could not see them; further, parties in the courtroom noted that it was unlikely anyone from the jury box could see the leg chain. Id. The district court also allowed Appellant to remove his hand shackles *and* belly chain so the jury could not see them. Id. The district court clearly exercised discretion in balancing concerns of safety and Appellant's potential flight

with his constitutional concerns about being seen in chains. Regardless, any argument that the restraints were visible to the jury is mere speculation.

Appellant also argues that his witnesses should not have been shackled in front of the jury and that there was a "parade of correctional officers" during the selection phase of the penalty retrial. AOB 168–71. Appellant can cite only to Deck and Wilson v. McCarthy, 770 F.2d 1482 (9th Cir. 1985) to support his contention that witnesses should not have been shackled. But Appellant's reliance on Wilson is misplaced. First, Wilson discusses the shackling of defense witnesses in a guilt phase trial, not the selection phase of a penalty hearing. Id. Secondly, the Court stated:

> Powell was a prisoner in a high security institution who had previously been convicted of murder, robbery, and burglary. Although prisoner status, standing alone, may not warrant shackling, it may justify the trial judge's concern for security. The seriousness of Powell's prior convictions and the fact that the case involved a prison gang also suggest that the trial judge's concern for security was warranted.

Id. at 1485 (internal citations omitted). Thus, the Ninth Circuit affirmed the district court's decision to shackle the defense witness. Id.

Moreover, the Wilson Court acknowledged that this was an issue of first impression. Id. at 1482. The Court explained, "[n]o federal court has held that shackling a defense witness violates the constitution." Id. To date, no other federal court has extended the unconstitutionality of shackling beyond defendants.

Further, Nevada is not bound by the Ninth Circuit. Blanton v. North Las Vegas Mun. Court, 103 Nev. 623, 748 P.2d 494 (1987). This Court has stated:

> We note initially that the decisions of the federal district court and panels of the federal circuit court of appeal are not binding upon this court. United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075–76 (7th Cir.1970), cert. denied, 402 U.S. 983, 91 S. Ct. 1658 (1971). Even an en banc decision of a federal circuit court would not bind Nevada to restructure the court system of this state. Our state constitution binds the courts of the State of Nevada to the United States Constitution as interpreted by the United States Supreme Court. Nev. Const. art. I, § 2. See Bargas v. Warden, 87 Nev. 30, 482 P.2d 317, cert. denied, 403 U.S. 935, 91 S. Ct. 2267 (1971).

Id.

Regardless, this claim is bare and naked and should be rejected on that basis, alone. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Appellant does not even allege which or how many witnesses were shackled or which security officers were present and allegedly should not have been. Id.

NRAP 28 provides, in pertinent part:

> **(10)** the argument, which *must* contain:
>
> **(A)** appellant's contentions and the reasons for them, *with citations to the authorities and parts of the record on which the appellant relies*.

NRAP 28 (emphasis added). This Court previously ruled that it is an appellant's responsibility to provide relevant authority and cogent argument, and when appellant fails to adequately brief the issue, it will not be addressed by this court. Maresca v. State, 103 Nev. 669, 672–73, 748 P.2d 3, 6 (1987). The appellate court *cannot*

consider matters not properly appearing in the record on appeal. Tabish v. State, 119 Nev. 293, 296, 72 P.3d 584, 586 (2003). See also Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that this court need not consider claims that are not cogently argued or supported by relevant authority); Byford v. State, 116 Nev. 215, 225, 994 P.2d 700, 707 (2000) (issue unsupported by cogent argument warrants no relief); Campos v. Hernandez, No. 69163, 2017 Nev. Unpub. LEXIS 298, at *5 (Apr. 26, 2017).

This Court lacks the necessary information to examine this claim. The very fact that Appellant does not even name—let alone offer a record citation of—any witnesses who were allegedly shackled precludes consideration. Indeed, Appellant's only factual allegation to support this claim is that one juror's declaration, thirteen years after the fact, say, "inmates were in shackles, would have been more believable if they were not shackled for testimony." 28 AA 6779–85. Appellant's only factual allegation to support the claim that there were too many corrections officers is another juror's declaration, also thirteen years after the fact. 26 AA 6422–26. Thus, Appellant relies solely upon juror declarations to argue the effect of the witnesses' shackles and/or corrections officers and their influenced on the verdict. However, NRS 50.062(2) forbids juror affidavits from being used for such purposes. See Section IV(n), *infra*.

Because this claim is meritless, Appellant cannot demonstrate that Mr. Whipple was ineffective with regard to it. Thus, there is no good cause to overcome the procedural bars.

B. Claim 3 – Juvenile Record

Claim 3 states that penalty-retrial counsel was ineffective for, and the trial court erred in, permitting the use of Appellant's juvenile prior bad acts during the penalty retrial. AOB at 117–20, 150–54; see also 3 AA 668–77. As the district court found below, this claim is meritless for several reasons. 35 AA 8596–97. The substantive claim is waived under NRS 34.810(1)(b)(2). See Franklin, 110 Nev. at 752, 877 P.2d at 1059. These allegations could have been raised on direct appeal from the penalty retrial. The claim is also procedurally barred, as any claim that counsel was ineffective for not challenging the records could have been raised during the first habeas petition after the penalty retrial. However, Appellant failed to raise this claim at either point. Appellant fails to provide good cause for not bringing this claim at an earlier time. Further, the claim is meritless. Thus, there was no prejudice in denying this claim.

Appellant's first allegation is that penalty-retrial counsel was ineffective for failing to move to exclude his juvenile history from the penalty retrial. AOB at 117–20. This claim consists exclusively of allegations of ineffective assistance of counsel that are themselves procedurally barred. See Riker, 121 Nev. at 235, 112 P.3d at

1077. As discussed, any claims of ineffective assistance of penalty-retrial counsel, Mr. Schieck, are procedurally defaulted, and Appellant fails to demonstrate that Mr. Whipple's alleged ineffectiveness provides good cause for these defaulted claims. See Section II(D)(1), *supra*.

Further, Appellant has failed to meet his burden under Strickland because even if Mr. Whipple were deficient, there is no prejudice—because Appellant's second allegation, that there was any error in the admission of the juvenile records, is barred under NRS 34.810(2), as it received a prior determination on the merits. Indeed, Appellant raised this issue in his direct appeal from the penalty retrial. In affirming the Amended Judgment of Conviction, this Court noted that the State produced the court order certifying Appellant as an adult for his 1990 robbery charge and asked his mother about statements she made. Thomas III, 122 Nev. at 1368, 148 P.3d at 733. Further, this Court found that "the State's conduct here was unobjectionable." Id. While the Court did find that other questions by the State were improper as they were not true rebuttal, "the error was minimal and did not affect his substantial rights. Id. at 1369, 148 P.3d at 733. Therefore, because this Court has already found that there was no prejudice with regard to the juvenile convictions, this substantive claim is barred under NRS 34.810(2). Appellant does not even try to address this claim in his argument that the prior determination on the merits does not apply. See AOB at 202–32.

Further, Appellant's reliance on Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183 (2005) for any portion of a capital penalty hearing is misplaced. Johnson v. State, 122 Nev. 1344, 1353–54, 148 P.3d 767 (2006). This Court has already found that Roper does not prohibit the admission of juvenile records during a death penalty hearing. Indeed, in Johnson, the defendant "was not a juvenile when he committed the murders," and thus, "his reliance upon Roper [wa]s misplaced." Id. This Court further stated:

> The decision to admit particular evidence during the penalty phase is within the sound discretion of the district court and will not be disturbed absent an abuse of that discretion. Evidence of character is admissible during a penalty hearing so long as it is relevant and the danger of unfair prejudice does not substantially outweigh its probative value.
>
> Here, the evidence of Johnson's juvenile history primarily consisted of records and testimony regarding his participation in and conviction for the armed bank robbery in California in 1993 as a 15-year-old gang member and his subsequent successes and failures in the CYA program for juvenile offenders. This evidence also concerned his subsequent absconding from that program's parole a few years later.
>
> Johnson's juvenile record was relevant to his character, revealing a pattern of escalating violent criminal behavior that began with his participation in an armed bank robbery and culminated in the quadruple murder he committed in this case. Although this evidence was prejudicial, it was not unfairly so. And it had significant probative value, showing not only his propensity for violence and gang involvement but also his amenability to rehabilitation--all relevant considerations in the determination of his sentence. Because this evidence was admitted only during the selection phase of his hearing, there are no concerns that it may have improperly influenced the jury's weighing of aggravating and mitigating circumstances. We conclude that the district court did not abuse its discretion in admitting

> these records, and Johnson's contention in this respect is without merit.

Id.

Accordingly, Appellant's reliance on Roper to allege error in the admission of his juvenile record during his penalty retrial is also misplaced. AOB at 117–19. Counsel's failure to move to exclude Appellant's juvenile records had no impact because it would have been unsuccessful.

Because this claim is meritless, Appellant cannot demonstrate that Mr. Whipple was ineffective with regard to it. Thus, there is no good cause to overcome the procedural bars.

C. Claim 5 – Penalty-Phase Jury Instructions

Claim 5 alleges the district court gave erroneous instructions during the penalty retrial. AOB at 215–20; see also 3 AA 690–93. As the district court found below, this claim is meritless for several reasons. 35 AA 8594. First, the lack of premeditated intent jury instruction claim was raised on direct appeal from the penalty retrial; this Court found that "the district court did not err." Thomas III, 122 Nev. at 1371–72, 148 P.3d at 734–35. Thus, it is barred under NRS 34.810(2), as it received a prior determination on the merits.

The other substantive aspects of this claim are waived under NRS 34.810(1)(b)(2). See Franklin, 110 Nev. at 752, 877 P.2d at 1059. These allegations could have been raised on direct appeal from the penalty retrial. The claim is also

procedurally barred, as any claim that counsel was ineffective for not challenging the instructions could have been raised during the first habeas petition after the penalty retrial. However, Appellant failed to raise this claim at either point. Appellant fails to provide good cause for not bringing this claim at an earlier time. See Section II(D)(1), *supra*. Further, the claims of error in the other instructions is meritless. Thus, there was no prejudice in denying this claim.

In Jeremias v. State, 134 Nev. 46, 57, 412 P.3d 43, 53, cert, denied, —– U.S. ——–, 139 S. Ct. 415 (2018) the defendant argued that the instruction regarding the "weighing of aggravating and mitigating circumstances is unconstitutional because it did not specify that the aggravating circumstances had to outweigh the mitigating circumstances beyond a reasonable doubt." The defendant asserted that Hurst v. Florida, 577 U.S., 136 S. Ct. 616 (2016), "held for the first time that, where the weighing of facts in aggravation and mitigation is a condition of death eligibility, it constitutes a factual finding which must be proven beyond a reasonable doubt. And, seizing on language from some of this court's prior cases describing the weighing determination as (in part) a factual finding, he asserts that Hurst effectively overruled Nunnery v. State, 127 Nev. 749, 772, 263 P.3d 235, 250 (2011)." 134 Nev. at 58, 412 P.3d at 53. However, this Court disagreed with that interpretation of Hurst and of Nevada's death penalty procedures. Id.

Rather, this Court found that Hurst "made no new law relevant to Nevada." Id. Indeed, Hurst:

> does not transform the weighing component into a factual determination. Even if it did, we agree with the Court that it would be pointless to instruct that the jury must, or even that it could, make that determination beyond a reasonable doubt. We thereby reject the argument that the instruction in this case was unconstitutional.

Id. at 21. As Appellant admits, this Court recently reaffirmed this holding in Castillo v. State, 135 Nev. __, 2019 WL 2306412 (2019). AOB at 217.

Because this claim is meritless, Appellant cannot demonstrate that Mr. Whipple was ineffective with regard to it. Thus, there is no good cause to overcome the procedural bars.

D. Claim 6 – Confrontation Clause

In addition to its guilt-phase issues discussed in Section III(B), *supra*, Claim 6 also alleges a Confrontation Clause violation during the penalty retrial. AOB at 220–28; see also 3 AA 693–703. As the district court found below, this claim is meritless for several reasons. 35 AA 8594. First, Confrontation Clause issues were raised in Appellant's direct appeal from the penalty retrial and rejected by this Court, which found that "that Crawford [v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004)] and the Confrontation Clause do not apply during a capital penalty hearing." Thomas III, 122 Nev. at 1367–68, 148 P.3d at 732. In fact, Appellant himself "recognizes this Court in Summers v. State, [122 Nev. 1326, 1327, 148 P.3d 778,

779 (2006)] held Crawford does not apply to evidence admitted during a capital penalty trial." AOB at 222–23. Thus, all of Appellant's arguments in this appeal as to Claim 6 are barred under NRS 34.810(2), as it received a prior determination on the merits.

Any other substantive aspects of this claim are waived under NRS 34.810(1(b)(2). See Franklin, 110 Nev. at 752, 877 P.2d at 1059. These allegations could have been raised on direct appeal from the penalty retrial. The claim is also procedurally barred, as any allegation that counsel was ineffective for failure to challenge the Confrontation Clause issues could have been raised during the first habeas petition after the penalty retrial. However, Appellant failed to raise this claim at either point. Appellant fails to provide good cause for not bringing this claim at an earlier time. See Section II(D)(1), *supra*. Further, the claim is meritless. Thus, there was no prejudice in denying this claim.

Appellant cannot establish that even if this claim was raised, there is a reasonable probability that he would not have been sentenced to death. In affirming the district court's denial of his Second Petition, this Court explicitly noted that Appellant "committed two brutal murders and expressed displeasure that there was not a third. His criminal record was extensive and included numerous acts of violence, and he continued his violent actions while incarcerated, oftentimes targeting women." Thomas IV, 2016 WL 4079643, at *3. Accordingly, even if these

claims were raised and happened to be successful, Appellant cannot establish that there is a reasonable likelihood it would have changed the jury's calculus in rendering the death penalty.

Because this claim is meritless, Appellant cannot demonstrate that Mr. Whipple was ineffective with regard to it. Thus, there is no good cause to overcome the procedural bars.

E. Claim 7 – Notice to Seek Death Penalty

Claim 7 alleges the State violated Supreme Court Rule ("SCR") 250. AOB at 172–75; see also 3 AA 704–11. As the district court found below, this claim is meritless for several reasons. 35 AA 8596. The substantive aspects of this claim are waived under NRS 34.810(1)(b)(2). See Franklin, 110 Nev. at 752, 877 P.2d at 1059. These allegations could have been raised on direct appeal from the penalty retrial. The claim is also procedurally barred, as any claim that counsel was ineffective for failure to challenge the notice could have been raised during the first habeas petition after the penalty retrial. However, Appellant failed to raise this claim at either point. Appellant fails to provide good cause for not bringing this claim at an earlier time. See Section II(D)(1), *supra*. Further, the claim is meritless. Thus, there was no prejudice in denying this claim.

The notice of intent required under SCR 250 puts the defendant on notice that the State will seek the death penalty. Nunnery v. State, 127 Nev. 749, 764, 263 P.3d

235, 246 (2011). "The purpose of SCR 250(4)(d) is to protect a capital defendant's due process rights to fair and adequate notice of aggravating circumstances, safeguard against any abuse of the system, and insert some predictability and timeliness into the process." Bennett v. District Court, 121 Nev. 802, 810, 121 P.3d 605, 610 (2005).

Because Appellant was originally sentenced to death, and this Court specifically remanded his case "to the district court for a new penalty hearing," Appellant was on notice that the State continued to seek the death penalty. Thomas II, 120 Nev. at 50, 83 P.3d at 827. Appellant does not provide any authority supporting his contention that the State must start anew to provide notice. Even if that were the case, the State filed a Notice on September 23, 2005, alerting Appellant that the State would present evidence and witnesses consistent with the first hearing, as well as prison reports and disciplinary events. 28 AA 6966–68. Appellant received all the notice to which he was entitled.

Because this claim is meritless, Appellant cannot demonstrate that Mr. Whipple was ineffective with regard to it. Thus, there is no good cause to overcome the procedural bars.

F. Claim 8 – Evidence Admitted at Penalty Retrial

Claim 8 alleges cumulative and improper evidence was admitted at the penalty retrial. AOB at 228–30; see also 3 AA 712–14. As the district court found below,

this claim is meritless for several reasons. 35 AA 8596. First, this claim is barred under NRS 34.810(2), as it received a prior determination on the merits. Appellant raised these issues in his direct appeal from the penalty retrial. Regarding Claim 8(A), this Court held:

> [T]he evidence was not excessively cumulative . . . [t]he jury was entitled to learn that Thomas had a lengthy prison disciplinary record and criminal history, and each incident presented revealed Thomas's capacity for threatening and potentially dangerous behavior . . .the district court did not abuse its discretion in allowing this evidence.

Thomas III, 122 Nev. at 1370–71, 148 P.3d at 734. Regarding Claim 8(B), this Court stated:

> "[w]hile the statement was improper, it does not require reversal. The court properly admonished Mr. Dixon. Presumably the jury expected that the victims' families abhorred Thomas. Further, Mr. Dixon did not express his views about sentencing, which is forbidden.

Id. Accordingly, these claims have already been considered by this Court and are thus barred under NRS 34.810(2). Appellant provides absolutely no authority for his assertion that this claim can be reexamined, let alone that "must" be part of any "cumulative" analysis. AOB at 230.

Any other substantive aspects of this claim are waived under NRS 34.810(1)(b)(2). See Franklin, 110 Nev. at 752, 877 P.2d at 1059. These allegations could have been raised on direct appeal from the penalty retrial. The claim is also procedurally barred, as any claim that counsel was ineffective for failing to challenge the evidence could have been raised during the first habeas petition after the penalty

retrial. However, Appellant failed to raise this claim at either point. Appellant fails to provide good cause for not bringing this claim at an earlier time. See Section II(D)(1), *supra*. Further, as this Court has already found, the claim is meritless. Thomas III, 122 Nev. at 1370–71, 148 P.3d at 734. Thus, there was no prejudice in denying this claim.

Because this claim is meritless, Appellant cannot demonstrate that Mr. Whipple was ineffective with regard to it. Thus, there is no good cause to overcome the procedural bars.

G. Claim 10 – Penalty-Phase Jury Pool

Claim 10 alleges Appellant's penalty-phase jury pool did not represent a fair cross-section of the community. AOB at 191–96; see also 3 AA 729–30. As the district court found below, this claim is meritless for several reasons. 35 AA 8596. The claim is waived under NRS 34.810(1)(b)(2). See Franklin, 110 Nev. at 752, 877 P.2d at 1059. These allegations could have been raised on direct appeal from the penalty retrial. The claim is also procedurally barred, as it could have been raised during the first habeas petition after the penalty retrial. However, Appellant failed to raise this claim at either point. Appellant fails to provide good cause for not bringing this claim at an earlier time. See Section II(D)(1), *supra*. Further, the claim is meritless. Thus, there was no prejudice in denying this claim.

"[I]t is settled that a grand jury must be drawn from a cross-section of the community, and there must be no systematic and purposeful exclusion of an identifiable class of persons." Adler v. State, 95 Nev. 339, 347, 594 P.2d 725, 731 (1979) (emphasis added). "[A] prima facie violation of the fair-cross-section requirements" is demonstrated by showing:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Williams v. State, 121 Nev. 934, 940, 125 P.3d 627, 631 (2005) (internal quotation marks and emphasis omitted).

Regardless of whether distinctive groups were underrepresented on the jury, Appellant was also required to show a systematic exclusion. Id. "[A]s long as the jury selection process is designed to select jurors from a fair cross section of the community, then random variations that produce venires without a specific class of persons or with an abundance of that class are permissible." Id. Appellant has not established that the two-to-three black jurors in his penalty-retrial jury pool—as opposed to the five that would have represented "nine percent of the population of Clark County"—represented anything other than these "random variations."

Because this claim is meritless, Appellant cannot demonstrate that Mr. Whipple was ineffective with regard to it. Thus, there is no good cause to overcome the procedural bars.

H. Claims 14 and 20 – Ineffective Assistance of Penalty Retrial and Penalty Appeal Counsel

Claim 14 alleges multiple instances of ineffective assistance of penalty-retrial counsel, Mr. Schieck. AOB at 86–116, 120–24, 138–39; see also 4 AA 769–804. Appellant alleges counsel was ineffective for deficient mitigation investigation and presentation, in failing to object to Appellant and some of his selection-phase witnesses appearing shackled in front of the jury, in failing to object and move for a mistrial after alleged prosecutorial misconduct, and in failing to make an opening statement at the start of the selection phase. Id. Further, Claim 20 alleges Mr. Schieck was ineffective for failure to raise multiple issues during the direct appeal from the penalty retrial. AOB at 201–02; see also 4 AA 819–20.

Any claim of penalty-retrial / penalty-appeal counsels' ineffectiveness must be rejected. As discussed at length, *supra*, all such allegations are procedurally defaulted. See Riker, 121 Nev. at 235, 112 P.3d at 1077. And Appellant has not met his burden of showing good cause for any such claims, because each of the specific arguments are couched exclusively in terms of Mr. Schieck's, not Mr. Whipple's, alleged ineffectiveness. See AOB at 86–89, 121 ("ineffective assistance at the penalty retiral. [Appellant] was represented there by David Schieck . . . It was

Schieck's responsibility to . . . trial counsel's ineffectiveness . . . If penalty-retrial counsel had performed effectively . . ."); AOB at 201 ("Appellate counsel was ineffective for failing to raise . . ."). But only allegations of ineffectiveness on Mr. Whipple's part can serve as good cause for raising these procedurally-barred, penalty-phase issues.

As the district court found below, Appellant has failed to meet his burden under Strickland to demonstrate that Mr. Whipple was ineffective. 35 AA 8595–97. As this Court has noted, "Strickland dictates that [the Court's] evaluation begin[] with the 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Means, 120 Nev. at 1011, 1003 P.3d at 25 (quoting Strickland, 466 U.S. at 689, 104 S. Ct. at 2065). Given the presumption of professional competence, it would be very difficult for Appellant to establish that Mr. Whipple was ineffective for not raising these specific claims of Mr. Schieck's alleged ineffectiveness, regardless—and particularly when he cannot show that any of these claims would have had a reasonable probability of success. Robbins, 528 U.S. at 288, 120 S. Ct. at 782; Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

As discussed in Section II(D)(1), *supra*, Appellant has failed to establish that Mr. Whipple was ineffective in general; nor does this claim successful argue that Mr. Whipple was ineffective specifically for failure to adequately develop the ineffective-assistance-of-counsel claims against Mr. Schieck for this performance

during the penalty retrial and the resulting appeal. Indeed, entirely absent from the dozens of pages that address Claim 14's allegations impugning Mr. Schieck's effectiveness as counsel, and the page-and-a-half allegation that he was ineffective on appeal from the penalty retrial, is any meaningful analysis as to how Mr. Whipple was deficient for not elaborating (any more than he already did in his supplemental petitions) on Mr. Schieck's alleged ineffectiveness.

Indeed, Mr. Whipple raised the arguments Appellant now makes in support of the Third Petition's Claim 14, specifically Claim 14(A) and (B): that penalty-retrial counsel was ineffective with regard to mitigation and with regard to the issue of shackling. In denying the Second Petition, the district court found the shackling issue to have been waived. 7 AA 1502–03. And this Court, in its July 22, 2016, Order of Affirmance, denied the mitigation arguments, ultimately concluding that penalty-retrial counsel was not deficient and that Appellant failed to demonstrate prejudice. Thomas IV, 2016 WL 4079643, at *1–4. Below, the district court found that any additional argument about witnesses appearing in shackles was procedurally barred. 35 AA 8596. Thus, Appellant cannot establish that Mr. Whipple was objectively unreasonable with regard to these claims.

Appellant's attempt to establish prejudice on the basis of any alleged deficiencies on the part of Mr. Whipple fares no better. Although Mr. Whipple did not raise claim 14(C) and 14(D), with regard to the State's allegedly inflammatory

closing and counsel's declining to make an opening statement during the selection phase, they would not have been successful. Thus, Appellant has failed to meet his burden under Strickland. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065. Accordingly, as the district court found below, Appellant has not established that Mr. Whipple was ineffective for failing to raise Mr. Schieck's alleged ineffectiveness in failing to raise these claims. 35 AA 8596–97.

Further, to the extent penalty-appeal counsel did not raise each and every claim/allegation/argument that Appellant now makes, Appellant has failed to overcome the presumption that appellate counsel's actions were reasonable and, thus, Mr. Whipple cannot be deemed ineffective for failing to attack appellate counsel's strategic decisions. As discussed, it is "difficult" to prevail on a claim of ineffective appellate counsel based on counsel failing to raise a particular claim. Robbins, 528 U.S. at 288, 120 S. Ct. at 782; see also Section II(D)(1), *supra*.

As penalty-appeal counsel, Mr. Schieck filed a 51-page Opening Brief, raising five (5) issues, several of which were broken down into sub-issues. 6 AA 1289–347. The issues presented were the strongest issues—i.e., those most likely to be resolved in Appellant's favor. None of the "new" claims, allegations, or arguments that Appellant now raises were stronger than those actually presented. Accordingly, Appellant's penalty-appeal counsel was not deficient. Thus, Appellant has failed to

establish deficiency on the part of Mr. Whipple, who would have been responsible for raising such ineffective-assistance-of-counsel claims in the Second Petition.

Based on the foregoing, the Court should deny Appellant's claim that penalty-retrial / penalty-appeal counsel was ineffective because all the allegations upon which this claim is predicated are themselves procedurally defaulted, and Appellant has failed to sufficiently plead good cause to excuse this default.

I. Claim 16 – Penalty-Phase Trial Court Error

Claim 16 alleges trial court error during the penalty retrial in limiting a defense theory.[6] AOB at 187–89; see also 4 AA 808–09. However, this claim is barred under NRS 34.810(2), as it received a prior determination on the merits. Appellant raised the issues of the limited defense theory in his direct appeal from the penalty retrial. This Court held that "[t]his claim warrants no relief" and that Appellant failed "to show how evidence that Love was not charged was relevant to his sentence or that admission of such evidence was required by the Constitution . . . [and] it lacks merit." Thomas III, 122 Nev. at 1372–73, 148 P.3d at 735. Appellant does not even try to address this claim in his argument that the prior determination on the merits does not apply. See AOB at 202–32. Therefore, this Court should find that these allegations are barred under NRS 34.810(2) and should be denied.

[6] Again, Appellant has not re-asserted all subsections of Claim 16 on appeal—only Claim 16(A). Accordingly, the State will not address the rest of Claim 16 as it was presented to the district court.

J. Claim 18 – Penalty-Phase Prosecutorial Misconduct

Claim 18 alleges prosecutorial misconduct during the penalty retrial. AOB at 178–83; see also 4 AA 813–16. As the district court found below, this claim is meritless for several reasons. 35 AA 8595–98. The claim is waived under NRS 34.810(1)(b)(2). See Franklin, 110 Nev. at 752, 877 P.2d at 1059. These allegations could have been raised on direct appeal from the penalty retrial. The claim is also procedurally barred, as it could have been raised during the first habeas petition after the penalty retrial. However, Appellant failed to raise this claim at either point. Appellant fails to provide good cause for not bringing this claim at an earlier time. See Section II(D)(1), *supra*. Further, the claim is meritless. Thus, there was no prejudice in denying this claim.

Claim 18(A) and (B) are barred under NRS 34.810(2), as they received a prior determination on the merits. Appellant raised the issues of character evidence during the eligibility phase and of closing arguments in his direct appeal from the penalty retrial. As to Claim 18(A), this Court held that although some statements "were not proper at the eligibility phase . . . the error was minimal and did not affect his substantial rights." Thomas III, 122 Nev. at 1369, 148 P.3d at 733. As to Claim 18(B), this Court held that "the impropriety was not prejudicial," and the jury was properly instructed on the law. Id. at 1369–70, 148 P.3d at 733. Regardless of any "new allegations" Appellant alleges should be considered "cumulatively" with this

Court's prior findings, and any allegation that the district court itself erred in "failing to ameliorate the State's prejudicial closing presentation," Appellant cannot avoid NRS 34.810(2) via this more detailed argument. AOB at 181–83, 190–91; see Hall, 91 Nev. at 316, 535 P.2d at 798–99. Therefore, this Court should find that these allegations are procedurally barred and should be denied.[7]

K. Claim 26 – Penalty-Phase Juror Bias and Misconduct

Claim 26 alleges that several jurors on his penalty retrial panel were biased and engaged in juror misconduct. AOB at 8–19, 154–63; see also 4 AA 859–70. As the district court found below, this claim is meritless for several reasons. 35 AA 8597–98. The substantive claim is waived under NRS 34.810(1)(b)(2). See Franklin, 110 Nev. at 752, 877 P.2d at 1059. These allegations could have been raised on direct appeal from the penalty retrial. However, Appellant failed to raise them. The claim is also procedurally barred, as any claim that penalty-retrial / penalty-appeal counsel was ineffective for failing to raise it could have been raised during the first habeas petition after the penalty retrial. Appellant failed to provide good cause for not bringing this claim at an earlier time. See Section II(D)(1), supra. Further, the claim is meritless because the affidavits upon which Appellant relied in bringing the claim are inadmissible. Thus, there was no prejudice in denying this claim.

[7] Appellant does not appear to assert his arguments as to Claim 18(C) in this appeal. Accordingly, the State does not address them.

In this appeal, Appellant continues to rely on a number of juror declarations. As the district court found, this is impermissible and may not be considered. NRS 50.065(2) states in pertinent part:

> Upon an inquiry into the validity of a verdict or indictment:
>
> (a) A juror shall not testify concerning the effect of *anything* upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.
>
> (b) The affidavit or evidence of any statement by a juror indicating an effect of this kind *is inadmissible for any purpose*.

(emphases added).

This Court has previously examined a very similar issue. Echavarria v. State, 108 Nev. 734, 839 P.2d 589 (1992). In a post-trial interview, a juror revealed to the defense "that she only voted for the death penalty because she thought the verdict would be overturned on appeal due to juror misconduct." Id. at 7141, 839 P.2d at 594. "At the evidentiary hearing, the court excluded [the juror's] statements regarding her reason for voting for the death penalty as violative of NRS 50.065(2), which prohibits consideration of affidavits or testimony of jurors concerning their mental processes or state of mind in reaching the verdict." Id. (*citing* Riebel v. State, 106 Nev. 258, 263, 790 P.2d 1004, 1008 (1990)). This Court affirmed the district court's decision. Id.

Appellant attempts to distinguish Echavarria, claiming that it did not involve extraneous information presented to the jury and that NRS 50.065 does not prevent a juror from testifying about such information. However, the language of the statue is plain: "A juror shall not testify concerning the effect of *anything*" that influenced their minds, emotions, or mental processes in rendering a verdict. NRS 50.065(2) (emphasis added). This Court has only made an exception for "extraneous" information. Meyer v. State, 119 Nev. 554, 563, 80 P.3d 447, 453 (2003) (finding the exception to NRS 50.065 only for "extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.").

Here, none of the jurors' declarations say they learned of Appellant's prior death sentences from an external source or extrinsic influence; rather, they claim they learned it during the trial itself. See, e.g., 16 AA 3768–72; 28 AA 28 AA 6779–85; 28 AA 6836–38 (stating that the information was learned from one the attorneys in opening/closing statements or from the judge's instructions). The other juror declarations Appellant relies upon all fall squarely under NRS 50.065, as they concern the jurors' thought processes during the trial and communications with each other. AOB 155–63; see Meyer, 119 Nev. at 562, 80 P.3d at 454 (nothing that as opposed to "extrinsic" information that may be admissible as juror testimony, other information includes "intra-jury or intrinsic influences involve improper discussions

among jurors (such as considering a defendant's failure to testify), intimidation or harassment of one juror by another, or other similar situations that are generally not admissible to impeach a verdict"). Accordingly, the juror declarations Appellant relies on to support these claims are inadmissible for any purpose.

Appellant cannot demonstrate that Mr. Whipple was ineffective with regard to it. First, Appellant cannot demonstrate counsel was objectively unreasonable in failing to interview the penalty-retrial jurors, as Appellant can points to nothing in the record that should have suggested that such interviews were necessary. Rompilla, 545 U.S. at 383, 125 S. Ct. at 2463 (noting that "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up"). Second, even if it could be said that Mr. Whipple was deficient for failing to present this claim, there was no prejudice because the claim is meritless and would have had no chance of success. Thus, this waived, procedurally-barred claim cannot be considered.

V. REMAINING CLAIMS

A. Claim 21 – Cumulative Error

Claim 21 alleges—briefly, and with no detail in this appeal—that this Court must review all of these claims for cumulative error. AOB at 202–03; see also 4 AA 821–22. Though the district court did not specifically address cumulative error below, this Court has already addressed and rejected a cumulative error claim,

concluding that Appellant's final "penalty hearing, while not free from error, was fair. We conclude that none of the arguments on appeal establish reversible error." Thomas III, 122 Nev. at 1376, 148 P.3d at 737. This determination should not be reconsidered by this Court as barred under NRS 34.810(2), given the prior determination on the merits.

To the extent Appellant argues cumulative error as good cause to excuse any of his procedurally defaulted claims, the Court should reject such an attempt to establish good cause for the very same reason—that is, because of this Court's previous determinations that there was no prejudicial error. This Court rejected a similar claim that "cumulative error" constituted good cause to overcome the procedural bars in Rippo, 368 P.3d at 750. This Court found that the assertion of "cumulative error" as good cause, "ignore[d] [the] prior determination that there was no error with respect to the claims that previously were rejected on appeal on their merits." Id. Similarly, this Court should reject Appellant's attempt to argue cumulative error as good cause.

To the extent Appellant seeks to include the new ineffective-assistance-of-counsel errors he raises, this Court has yet to endorse application of its direct appeal cumulative error standard to the post-conviction Strickland context. McConnell, 125 Nev. at 259, 212 P.3d at 318. Nevertheless, even where available, a cumulative error finding in the context of a Strickland claim is extraordinarily rare and requires an

extensive aggregation of errors. See e.g., Harris By and through Ramseyer, 64 F.3d at 1438. In fact, logic dictates that there can be no cumulative error where the defendant fails to demonstrate any single violation of Strickland. See Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007) ("[W]here individual allegations of error are not of constitutional stature or are not errors, there is 'nothing to cumulate.'") (quoting Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993)); Hughes v. Epps, 694 F. Supp. 2d 533, 563 (N.D. Miss. 2010) (*citing* Leal v. Dretke, 428 F.3d 543, 552–53 (5th Cir. 2005)). Because Appellant previously has not demonstrated, and again fails to demonstrate, that any claim warrants relief under Strickland, there is nothing to cumulate. Therefore, Appellant's cumulative error claim should be denied.

Assuming *arguendo* this Court addressed cumulative error in this appeal, Appellant fails to demonstrate cumulative error sufficient to warrant reversal. In addressing a claim of cumulative error, the relevant factors are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854–55 (2000).

This Court has already commented on the "overwhelming" evidence of guilt in this case. Thomas I, 114 Nev. at 1142, 967 P.2d at 1121. As to the quantity and character of the errors now alleged, Appellant has failed to establish that the errors, even when aggregated, deprived him of a reasonable likelihood of a better outcome

at trial. Even if the third factor does weigh in Appellant's favor, there is no reasonable probability that Appellant would have received a better result but for the alleged deficiencies.

B. Claim 22 – Biased Judges

Claim 22 alleges Appellant's guilt- and penalty-retrial judges were biased because they are elected. AOB at 196–200; see also 4 AA 823–29. However, this Court has rejected this exact claim in other cases. See, e.g., McConnell, 125 Nev. at 256, 212 P.3d at 316. In McConnell, the petitioner raised "an ineffective-assistance claim based on appellate counsel's failure to argue that it was prejudicial to have elected judges and justices preside over his trial and appellate review because elected judges are beholden to the electorate and therefore cannot be impartial." Id at 256, 212 P.3d at 316. This Court denied the petitioner's claim on two grounds. First, the Court explained that the petitioner "failed to substantiate this claim with any specific factual allegations demonstrating actual judicial bias." Id. Further, the "argument is unpersuasive and would not have had a reasonable probability of success." Id. As it did in McConnell, this Court should reject any generalized argument that an elected judiciary cannot be fair.

Appellant specifically alleges that Justice Becker, who was on this Court when it reviewed Appellant's direct appeal from his penalty retrial, was biased because she lost her re-election and planned to work at the Clark County District

Attorney's Office. However, this is nothing more than mere speculation. Indeed, this Court has examined the merits of this exact claim when it denied a motion for extension of time to file a petition for rehearing in another death penalty case. See Supreme Court Docket No. 45456, Order Denying Motion, filed June 29, 2007. There, this Court explicitly found that "the result would have remained the same regardless of [Justice Becker's] participation," because although "all seven justices of this court were in agreement" in affirming the death sentence. Id. at 2. Likewise, here, Justice Hardesty wrote the majority opinion, joined by Justices Becker, Gibbons, and Parraguirre, and the concurring opinion filed by Justice Rose was joined by Justices Maupin and Douglas. Thomas III, 122 Nev. at 1361, 148 P.3d at 727. In other words, just as in other cases this Court has examined, the result would have remained the same whether or not Justice Becker participated, because all seven justices of this Court were in agreement in affirming Appellant's death sentence.

Accordingly, this claim is meritless. Mr. Whipple was therefore not ineffective in failing to raise it. Thus, there is no good cause to overcome the procedural bars. This claim must be denied.

CONCLUSION

The district court properly applied the mandatory procedural bars. There is no good cause sufficient to overcome them, because Appellant cannot establish he

received ineffective assistance of counsel in any respect. Therefore, this Court should affirm the district court's denial of Appellant's Petition for Writ of Habeas Corpus in its entirety.

Dated this 23rd day of September, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this capital brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this capital brief complies with the page and type-volume limitations of NRAP 32(a)(7)(B)(i)&(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 17,664 words and does not exceed 80 pages..
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 23rd day of September, 2019.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 23, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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