Case No. 83796

Supreme Court of Nevada

Donte Johnson,

Appellant,

vs.

State of Nevada, *et al.*,

Appellee.

Death Penalty Case

Appeal from the Clark County District Court
Eighth Judicial District
The Honorable Jacqueline Bluth District Judge
District Court Case No. A–19789336–W

Appellant's Opening Brief

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in Nev. R. App. P. 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Joseph Sciscento and Dayvid Figler represented Mr. Johnson during his first trial.

2. Lee-Elizabeth McMahon represented Mr. Johnson in his first direct appeal.

3. Alzora Jackson and Brett Whipple represented Mr. Johnson in his penalty retrial.

4. Lee-Elizabeth McMahon represented Mr. Johnson in his second direct appeal.

5. Christopher Oram represented Mr. Johnson in his initial post-conviction proceedings and subsequent appeal.

6. The Federal Public Defender, District of Nevada, represented Mr. Johnson during all subsequent proceedings.

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JURISDICTIONAL STATEMENT

This appeal is from the district court's final judgment denying Donte Johnson's petition for post-conviction relief. 49AA12352–57. This Court has jurisdiction under NRS 34.575(1), 34.830, 177.015(1)(b), and 177.015(3). The district court entered a Notice of Entry and Order on October 11, 2021, denying relief. *See* 49–50AA12358–64. Johnson filed a Notice of Appeal on November 10, 2021. 50AA12366–68.

ROUTING STATEMENT

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

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the district court erred by denying Johnson's petition on the basis of procedural default, notwithstanding that post-conviction counsel failed to investigate and present meritorious legal claims.

STATEMENT OF THE CASE

This appeal arises from the denial of Johnson's petition for writ of habeas corpus, filed on February 13, 2019, challenging his convictions and death sentences. 24–25AA5752–6129. In June 2000, a jury found Johnson guilty of burglary, conspiracy, four counts of robbery, four

counts of kidnapping, and four counts of murder. 33AA8175–8181. A penalty phase followed, but the jury hung, so a three-judge panel was formed. *See* 11AA2557–59. Johnson petitioned this Court, challenging the three-judge panel's constitutionality. See *Kohn ex rel. Johnson v. Eighth Jud. Dist. Ct. (State)*, (Case No. 36461). This Court denied relief.

The three-judge panel found, for each of the four victims, two aggravating circumstances: (1) the murder was committed in the perpetration of robbery, arson, burglary, or kidnapping; and (2) the defendant was convicted of multiple murders in the immediate proceeding. *See* 12AA2853–69. On appeal, this Court reversed Johnson's death sentences, ruling the three-judge panel unconstitutional. *Johnson v. State*, 118 Nev. 787, 802–03, 59 P.3d 450, 460–61 (2002) (*Johnson I*), *overruled on other grounds by Nunnery v. State*, 127 Nev. 749, 771, 263 P.3d 235, 250 (2011).

Following the subsequent penalty phase, the jury found one aggravating circumstance as to all four victims—that Johnson had been convicted of multiple homicides in the immediate proceeding—and determined that the mitigating circumstances did not outweigh the aggravating circumstances. *See* 38AA9533–44. The jury imposed death.

38AA9545–49. Johnson appealed; this Court denied relief. *Johnson v. State*, 122 Nev. 1344, 148 P.3d 767 (2006) (*Johnson II*).

In 2008, Johnson filed a petition for post-conviction relief. 26AA6333–43, 6373–441; 26AA6442–95. After an evidentiary hearing in which trial counsel testified, the district court denied relief. 28AA6786–93. Johnson appealed; this Court denied relief. *Johnson v. State*, 133 Nev. 571, 402 P.3d 1266 (2017) (*Johnson III*). Remittitur issued on February 13, 2018.

On February 13, 2019, Johnson filed the petition at issue in this case. *See* 24–25AA5752–6129. The district court denied relief without an evidentiary hearing. 49–50AA12358–64.

STATEMENT OF THE FACTS

In September 1998, when he was 21-years old, Donte Johnson was indicted for a number of general "and/or" specific intent crimes relying on overlapping, sometimes double-counted, sometimes inconsistent, theories of primary "and/or" vicarious liability. 29AA7139–49; 30AA7270–84. The superseding indictment alleged that Johnson committed these crimes with Terrell Young "and/or" Sikia Smith. *See, e.g.*, 30AA7271–84. He did them as a principal, or as an aider or abetter,

or as a conspirator. 30AA7271–84. The burglary charge was predicated on "intent to commit larceny and/or robbery and/or murder." 30AA7272. Four kidnapping charges had murder as one of their predicates; the four murder charges, in turn, had "kidnapping and/or robbery" as their predicates. 30AA7275–82. As for the four robbery charges, the indictment charged the defendants of taking money from each victim and/or "other persons in [each victim's] presence or company." 30AA7273–75.

The eventual jury instructions did not clarify these theories. The jury was not instructed about specific intent as it related to co-conspirator liability and the specific intent crimes of burglary, kidnapping, and murder. 34AA8430–96. Nor was the jury instructed that it needed to find specific intent as a prerequisite for aiding and abetting liability. 34AA8430–96. The jury was also given incorrect instructions about presumptions: the court instructed that felony-murder "carries with it conclusive evidence of premeditation," and that the jury could presume intent for burglary, without the statutorily mandated presumption instruction. 34AA8483, 8450; *see* NRS 47.230(3). The jury instructions did not require the jury to find that

movement or restraint under kidnapping had to be substantial, nor did the instructions tell the jury it could not both use murder as a predicate for kidnapping and kidnapping as a predicate for felony murder. Finally, the instructions did not explain that each victim of robbery needed to have a possessory interest in the property taken. 34AA8483.

The State's theory of the case did not help. During closing arguments, the State repeatedly stated they did not have to prove what any one of the codefendants did because they were all culpable for their codefendants' acts. For example, with regard to conspiracy, the State emphasized "[t]he act of one is the act of all":

> In other words, it doesn't matter who taped up the victims. In the eyes of the law, they all taped the victims. And it doesn't matter who stole the VCR, or the Play Station or the pager, in the eyes of the law, in a conspiracy, each of them stole the VCR and the Play Station and the pager. And it doesn't matter who pulled the trigger that killed those four boys, in the eyes of the law they all pulled the trigger.

7AA1709–10. Later, the State explained, "there's no evidence, it's true, that Donte Johnson held any of these three guns when he walked into the Terra Linda household, but let me remind you, in the eyes of the law the act of one is the act of all." 7AA1712. And the State further

confused matters by relying on the "instruction that tells you that you do not have to agree on the theory under which you find Donte Johnson guilty of murder":

> In other words, some of you might conclude that he's guilty under the conspiracy theory, others might conclude that he [sic] guilty under the felony murder rule, and still others might find that he's guilty under the premeditative theory. So long as each of you agrees that he's guilty under one or all of those theories, you still must find him guilty.

7AA1715.

This confusion was exacerbated by the State's theories of liability. The indictment charged that money was taken from each victim, 30AA7270–84, but the State did not argue that money was taken; the State argued that a pager was taken from Peter Talamentez, but then equivocated on whose VCR or PlayStation was taken from whom and by whom. 7AA1712–13. These equivocal robberies nonetheless supported the kidnapping theories, which themselves supported the murder theories. 7AA1714, 1717–18. And the murder theories supported the kidnapping theories, while themselves being supported by the robbery theories. 7AA1714, 1717–18.

This cacophony of legal theories was necessary because the State's case relied on unreliable witnesses, witnesses who themselves were alternate suspects and whose statements changed and evolved throughout the pretrial proceedings. These witnesses, all particularly vulnerable, were subjected to the Reid method of interrogation, which is infamous for producing unreliable statements. 42AA10386–435. There were other problems with the State's theories. For example, the State argued that a VCR was taken from the Terra Linda house, 7AA1709; but photos show that a VCR was still there the following day. 38AA3900–01. The State argued that a PlayStation was taken from the house; but one witness referred to it as a Nintendo 64, and one of the prosecutors referred to it as a Nintendo PlayStation. 5AA1085–87; 4AA968.[1]

This confusion correlates with constitutional defects. Trial counsel were ineffective for failing to develop and present evidence of witness coercion and blood spatter, both of which undercut the reliability of

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[1] Sony—not Nintendo—manufactured the PlayStation. *See Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596, 598 (9th Cir. 2000).

Johnson's guilt. The jury instructions were wrong, affecting every theory of liability for Johnson; these instructions also failed to require the State to prove its case beyond a reasonable doubt. And these individual guilt-phase errors exacerbate a penalty-phase error: a death penalty based on felony murder requires an intent to kill or proof the defendant was a major participant and had "reckless indifference to human life." *Tison v. Arizona*, 481 U.S. 137, 157–58 (1987). No jury made these findings, and because the State relied on overly broad, overlapping, confusing, and contradictory theories of liability, this error was not harmless.

These claims are not procedurally defaulted because post-conviction counsel was deficient for failing to raise them, and counsel's deficient performance was prejudicial. *See Crump v. Warden*, 113 Nev. 293, 934 P.2d 247 (1997). As will be discussed in more detail below, post-conviction counsel had an obligation to investigate Johnson's case, and to assert claims on Johnson's behalf. They failed to do so.

SUMMARY OF THE ARGUMENT

"It is commonly stated that a crime consists of both a physical part and a mental part . . . ." Wayne R. LaFave, 1 Subst. Crim. L. § 5.1

(3d ed.); *see also Martinez-Guzman v. Second Jud. D. Ct.*, 137 Nev. ___, 496 P.3d 572, 576 (2021) ("The difference between a crime's *actus reus* and *mens rea* is centuries-old."). Here, however, neither the State's theory nor the jury instructions required a unanimous finding as to a "physical part" or a "mental part." The jury instructions failed to require the jury to find some elements, incorrectly mandated the jury find other elements, and misstated presumptions. The State took advantage of these errors in its summation. Additionally, trial counsel, who could have challenged the statements of witnesses and the forensic evidence, failed to do so. As a result, unreliable witnesses testified, and forensic evidence—at best equivocal—was presented. Separate from the issues of guilt, these errors implicate the findings required to make Johnson eligible for death under the Eighth Amendment.

Other errors infected Johnson's trial. Johnson's jury was unconstitutionally assembled, and the unconstitutionally assembled jurors engaged in misconduct. The State failed to meet all of its disclosure requirements. Trial counsel were ineffective during the penalty phase. Johnson's youth and borderline intellectual functioning render him ineligible for the death penalty. And the cumulative effect of

all the errors in this case rendered Johnson's trial fundamentally unfair.

Post-conviction counsel were ineffective in failing to raise these meritorious claims, in addition to many others. The district court erred by failing to grant an evidentiary hearing or discovery before ruling on Johnson's petition.

ARGUMENT

I. Trial counsel were ineffective during the guilt phase, and post-conviction counsel were ineffective in failing to properly raise this claim (Claim Three(A)–(C)).

Johnson in Claim Three raised new claims of trial counsel ineffectiveness, based on trial counsel's failure to consult with experts, *see Hinton v. Alabama*, 571 U.S. 263, 273–75 (2014), adequately respond to the State's expert witnesses, *see Richey v. Bradshaw*, 498 F.3d 344, 362–63 (6th Cir. 2007); *Fisher v. Gibson*, 282 F.3d 1283, 1298–99 (10th Cir. 2002), and adequately impeach the State's fact witnesses, *see Reynoso v. Giurbino*, 462 F.3d 1099, 1110–18 (9th Cir. 2006). 24AA5812–52. Each of these errors prejudiced Johnson's case during the guilt phase. But, because of post-conviction counsel's ineffectiveness, none of the claims were previously raised.

The district court denied relief, concluding the claims were untimely under NRS 34.726, successive under NRS 34.810, and barred by laches under NRS 34.800. 28AA6788–90. But in capital cases, ineffective assistance from initial state post-conviction counsel constitutes good cause and prejudice to overcome those same procedural bars. *Rippo v. State*, 134 Nev. 411, 416, 423 P.3d 1084, 1093, *amended on denial of reh'g*, 432 P.3d 167 (Nev. 2018); *Crump*, 113 Nev. at 304–05, 934 P.2d at 254. "The petitioner must demonstrate (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense." *Rippo*, 134 Nev. at 423, 423 P.3d at 1098. Johnson has made these showings.

A. Johnson can overcome procedural bars because post-conviction counsel was ineffective.

By the time of Johnson's initial state post-conviction proceedings, there were well-established standards for post-conviction counsel representing capital clients. In 1989, the American Bar Association (ABA) released its first set of standards for post-conviction counsel, explaining they should "consider conducting a full investigation of the case relating to both the guilt/innocence and sentencing phases" and

"seek to present to the appropriate court or courts all arguably meritorious issues." American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989) [hereinafter 1989 ABA Guidelines], Guidelines 11.9.3(B), (C). In 2003, the ABA released updated standards, elaborating on the duties of post-conviction counsel concerning investigation, litigation, client contact, and preservation of issues for later review. American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. 2003), *reprinted in* 31 Hofstra L. Rev. 913 (2003) [hereinafter 2003 ABA Guidelines], 10.15.1(c) (2003). This Court adopted similar standards in 2008. Nevada Indigent Defense Standards, 2-19(c), (e). Though the Nevada Standards of Performance "are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction," the standards may "be relevant in such judicial evaluation." Nev. Def. Standard 1(d). And "[e]very attorney who defends persons accused of crime shall be familiar with" the standards. Nev. Def. Standard 1(c).

Contrary to these professional norms, post-conviction counsel treated Johnson's supplement to his initial post-conviction petition as nothing more than another review of the record created at trial. Counsel did only minimal extra-record investigation. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); *see also Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524–25 (2003); *Douglas v. Woodford*, 316 F.3d 1079, 1085–86 (9th Cir. 2003). And counsel failed to consult with any experts—at the same time criticizing prior counsel for identical failures. 26AA6404; *see Blake v. Baker*, 745 F.3d 977, 982–84 (9th Cir. 2014). Instead, counsel raised primarily record-based claims, which, without support from outside investigation and experts, he pled in a deficient, conclusory manner. *See generally* 26AA6374–95 (supplements to post-conviction petition raising primarily record-based claims).

Counsel's approach to Johnson's initial post-conviction proceedings was antithetical to counsel's duties in a capital post-conviction proceeding, which require counsel to investigate

constitutional violations that the cold record does not reveal. *See Martinez v. Ryan*, 566 U.S. 1, 13 (2012) ("Ineffective-assistance claims often depend on evidence outside the trial record."); *United States v. Benford*, 574 F.3d 1228, 1231 (9th Cir. 2009); *Hoffman v. Arave*, 236 F.3d 523, 535 (9th Cir. 2001). Indeed, "winning collateral relief in capital cases will require changing the picture that has previously been presented. The old facts and legal arguments are unlikely to motivate a collateral court." *Nash v. Ryan*, 581 F.3d 1048, 1054 n.9 (9th Cir. 2009) (cleaned up), *abrogated on other grounds by Ryan v. Gonzales*, 568 U.S. 57 (2013).

Post-conviction counsel's deficient performance prejudiced Johnson. To establish prejudice to overcome procedural bars under *Crump*, a petitioner must show "that counsel's deficient performance prevented the petitioner from establishing 'that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State.'" *Rippo*, 134 Nev. at 424, 423 P.3d at 1098–99 (quoting NRS 34.724(1)). Here, instead of raising meritorious claims concerning trial counsel's ineffectiveness, post-conviction counsel focused on a handful of

record-based claims, easily rejected by this Court. *See Johnson III*, 133 Nev. 571, 402 P.3d 1266. Because this argument relies on the merits of Johnson's underlying ineffectiveness claims, Johnson more fully explains why he was prejudiced in the following sections.

B. Defense counsel were ineffective for failing to present expert testimony (Claim Three(A)).

"Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." *Hinton*, 571 U.S. at 273 (quoting *Harrington v. Richter*, 562 U.S. 86, 106 (2011)). This was one of those cases, where testimony from experts in police coercion and crime scene reconstruction was crucial to undermining the State's theory of the offense. Counsel's failure to investigate and present this testimony was deficient. *See Duncan v. Ornoski*, 528 F.3d 1222, 1235 (9th Cir. 2008) (criticizing failure to consult with expert).

1. Police coercion (Claim Three(A)(1))

The State during trial introduced damaging evidence against Johnson from purported witnesses, who gave multiple "voluntary statements" to law enforcement, along with testifying in pretrial

proceedings. 4–5AA952–1109; 5–6AA1118–1291; 29AA7092–7138, 7150–7269; 30AA7285–7358; 43–44AA10786–10911. What the jury did not hear, however, was expert testimony casting doubt on the validity of these statements. Had defense counsel hired an expert in police coercion and coerced statements, that expert could have tied the witness statements to improper, coercive conduct by law enforcement.

a) Deficient performance

Defense counsel performs deficiently by failing to consult with experts to address obvious problems with the State's case. *See Rompilla*, 545 U.S. at 383–90, 392; *Jones v. Shinn*, 943 F.3d 1211, 1229 (9th Cir. 2019), *reversed on other grounds by Shinn v. Ramirez*, ___ S. Ct. ___, 2022 WL 1611786 (U.S. May 23, 2022); *Thomas v. Clements*, 789 F.3d 760, 768–71 (7th Cir. 2015). Problems with the witness statements here would have been obvious to effective counsel—law enforcement obtained many of the statements from vulnerable subjects during custodial interviews, using techniques widely criticized for inducing false confessions. 42AA10388–10418.

First, law enforcement likely used the "Reid method," which was widely used at the time of Johnson's arrest. 42AA10388–90. The Reid

method is "very effective at inducing a person to comply with the demands of the interrogator, but if the person is innocent this compliance can result in false statements or confessions." 42AA10389–90. In fact, this tendency to induce false confessions and information has led at least one professional training organization to announce that it will no longer train the Reid method. 42AA10388.

The record reveals several techniques common with the Reid method. The police lied during interrogations, telling Young that his fingerprints were at multiple crime scenes, Severs that Johnson had blamed her for the killings, and Armstrong that Hart had implicated him in the murders. 42AA10392–93, 10421; 44AA10908–99; 29AA7192–94, 7203–03; 43AA10857; 30AA7308–09. And police persuaded suspects to confess to minimize the consequences. 42AA10393–97. For example, when police asked Severs and Young what they thought "should happen to somebody that would kill four people," they were using a tactic designed to convince Severs and Young to confess—whether or not they were guilty. 43AA10851–53; 44AA10897–901; 42AA10393–97. Similarly, when police asked Young and Severs to "explain" the offenses, it was done in a way suggesting that "the 'explanations' can

affect consequences in a positive way that will be unavailable once the interrogation is over." 42AA10394–97; 43AA10852, 10854, 10856; 44AA10903; 29AA7152. And when police told Armstrong that others were exposed to the death penalty for the underlying crimes, that "might lead Armstrong to think he might be vulnerable as well." 42AA10422; 30AA7308. Other tactics include statements of desire to help, statements lessening the severity of the crime or the interview subject's involvement in the crime, and statements maximizing the consequences of failing to confess. 42AA10369–71; *see* 30AA7308; 29AA7150–205; 44AA10896–97, 10899, 10908. And suggestive questions appeared throughout the interrogations, including direct suggestions, closed-ended questions, leading questions, repeated questions, recounting what others said, disclosure of other evidence, selective reinforcement, invited speculation, and stereotype induction. 42AA10413–14; *see generally* 29AA7092–7138, 29AA7150–269, 30AA7285–7358, 32AA7959–80, 43AA10786–44AA10911.

Second, the interrogation subjects all had specific vulnerabilities that increased the likelihood of false statements—particularly when interrogated using the Reid method. 42AA10400–09. Armstrong was 20

years old, had a prior criminal record, was implicated in the offense, and was using crack cocaine regularly.[2] 42AA10420; 30AA7339. Smith, in addition to being charged in this case, has borderline intellectual functioning, a history of trauma and drug abuse, and was only 18 when interrogated. 42AA10397–98, 10426. Young, Hart, and Bryan Johnson were 19 years old. 42AA10423, 10425, 10432. Young was a codefendant; Bryan Johnson was vulnerable to coercion because of his perceived involvement, his drug addiction, and his association with the defendants. 42AA10423–25, 10432–33. "Thus, as with other witnesses he would likely feel that he would be suspected and not likely to be believed." 42AA10432. And, like the other witnesses, the transcript reflects that he had developed his story with police before the tape began recording. 42AA10432 (noting that the tape begins by referencing

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[2] Even the interview subjects who were not suspected of involvement in the homicides likely were interrogated using those same techniques, especially if "they appear[ed] reluctant or dishonest." 42AA10386, 10417. And the interviews with these subjects involved an additional factor that could have led to false statements: "A wealth of research has demonstrated that people are more easily led to change their opinions, to conform to or comply with others, and to have their memories altered by suggestion when they are less certain or knowledgeable about the facts." 42AA10403.

earlier unrecorded discussions). Finally, Severs, like the rest of the witnesses, was involved with the defendants, and she was young—20 years old—with a criminal history. 42AA10427–28. "These facts suggest that Severs would not expect to be believed (i.e., that her credibility would be very low), and that she would expect that she was vulnerable to criminal charges herself." 42AA10428–29.

Third, there is ample evidence law enforcement's coercive techniques worked here—the witness statements changed significantly over time, with witnesses conflicting with other witnesses and their own earlier accounts. Young confessed under pressure from law enforcement to involvement in the robberies and murders. 29AA7150. "Given his extreme lack of cooperation and hostility during his first interview, it is clear that much persuasion, and likely communication of incentives for confessing took place between this and the earlier interrogation." 42AA10424–25. Young also "used the word 'remorse' in describing his feelings about the murders, which, given his background was likely a word detectives had used in the interrogation before going on tape." 42AA10424. Similarly, because Smith initially denied involvement then, after a break in the recording, admitted involvement, "it is highly

likely that Smith was interrogated between his two interviews" and also "highly likely" that the interrogators used coercive techniques. 42AA10427. In addition, the statement where Severs for the first time accused Johnson of being the triggerman in all four deaths occurred in September 1999, more than one year after the homicides, while Severs was in jail as a "material witness," and State officials had unlimited access to her (including Pete Baldanado, who was later arrested for coercing witnesses). 35AA8668–98; 42AA10428. When Severs finally told the police and district attorney what they wanted to hear, they released her from jail and agreed not to prosecute her for possessing a stolen vehicle. 5AA10204–07, 1223–25, 1231–38, 1257–48; 2AA414–15 2AA260–73; 42AA10429.

In addition, counsel performed deficiently by failing to consult with an expert about unrecorded portions of witness interviews. When police fail to record entire interviews, "two crucial aspects of the interrogations themselves tend[] to be mostly hidden: the nature and magnitude of the pressures exerted to lead the suspect to confess, and the way in which the confessions were contaminated by suggestion and the feeding of crucial case facts to the suspects." 42AA10409–10.

Instead of hearing directly from an audiotape or videotape such things as the demeanor of the interrogators and implied or explicit threats and promises, the failure to record leaves all responsibility for recollection with the interrogators. 42AA10409–10. Similarly, because *Miranda* warnings went unrecorded for the suspects, it is impossible to assess what those warnings entailed. 42AA10433.

Finally, counsel ignored the opportunity to explain to the jurors that witnesses' memories for conversations are "highly unlikely to be accurate," and witnesses "can be led to doubt their own memories." 42AA10433. And an expert could have explained to the jurors the potential that extensive media coverage had contaminated witness testimony. 42AA10433. At least some of this contamination appears in the interview transcripts—Armstrong told police that the victims were tied up by duct tape, but he later admitted to hearing that on the news. 42AA10433.

For all these reasons, an expert could have cast doubt on the validity of the witness statements. *See* 42AA10385–435; *State v. Smith*, 85 So.3d 1063, 1079–81 (Ala. Crim. App. 2010); *Carew v. State*, 817 N.E.2d 281, 285 (Ind. Ct. App. 2004); *see also United States v.*

Ganadonegro, 805 F. Supp. 2d 1188, 1213–18 (D.N.M. 2011) (allowing expert testimony concerning voluntariness of confession); *People v. Lucas*, No. C057593, 2009 WL 2049984, at *3–6 (Cal. Ct. App. July 15, 2009), *as modified on denial of reh'g* (Aug. 4, 2009) (unpublished) (explaining that "phenomenon of false confessions and the factors tending to produce such confessions is an area that is beyond the common experience of the ordinary person"). Counsel's failure to present this expert testimony was deficient. *See Hardy v. Chappell*, 849 F.3d 803, 818–24 (9th Cir. 2016) (defense counsel provided ineffective assistance by failing to investigate and present evidence that the state's key witness was the actual killer); *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999) (because counsel failed to investigate, "the jury was left to decide, without benefit of supporting or corroborative evidence," the credibility of trial testimony); *Williamson v. Ward*, 110 F.3d 1508, 1514 (10th Cir. 1997) ("[I]n a capital case, counsel's duty to investigate all reasonable lines of defense is strictly observed.").

b) Prejudice

Had counsel performed effectively, they would have presented compelling expert testimony undermining the witness statements as

the product of police coercion and influence. Because those witness statements formed the centerpiece of the State's case, Johnson was prejudiced by counsel's deficient performance. *See Fisher v. State*, 788 S.E.2d 757, 763–65 (Ga. 2016); *People v. Ackley*, 870 N.W.2d 858, 864–67 (Mich. 2015).

The State used the witness statements here to establish a crucial aspect of its case—that Johnson personally shot each of the four victims. During his opening statement, the prosecutor focused heavily on the witness statements, using them to summarize critical aspects of the case, including the witnesses' accusations that Johnson was the triggerman. *See* 4AA856–60 (summarizing Severs's expected testimony that Johnson admitted killing each of the four victims); 4AA860–63 (similar for Armstrong); 4AA863–66 (similar for LaShawnya Wright); 4AA866 ("He's giving a confession that he, in fact, was the killer, having told Bryan Johnson that he shot these boys, having told Ace Hart he shot these boys, having told Tod Armstrong he shot these boys and having told LaShawnya Wright he shot these boys and, yes, Charla Severs."); *see generally* 4AA855–67, 873. Each of the witnesses testified consistently with this theory, with the defense doing little to adequately

impeach the testimony. 4–5AA952–1109; 5–6AA1118–1291. And the prosecutor again emphasized the witnesses' accounts during closing argument. 7AA1707, 1716–30; 8AA1756–67.

In sum, the witnesses provided unimpeached, crucial testimony that Johnson planned the offense, then bragged about personally murdering each of the victims. Without this testimony, little remained putting the weapon in Johnson's hands.[3] Thus, had counsel introduced expert testimony undermining this testimony, there is a reasonable probability of a different outcome at trial. *See Buck v. Davis*, 137 S. Ct. 759, 776–77 (2017); *Browning v. Baker*, 875 F.3d 444, 474–76 (9th Cir. 2017).

2. Blood spatter and crime scene reconstruction (Claim Three(A)(2))

In addition to the questionable witness testimony, the State relied heavily on bloodstained pants found in Johnson's residence. A blood spatter and crime scene reconstruction expert would have testified that the evidence in this case shows something completely different than the

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[3] Indeed, before hanging at the penalty phase, the first jury found as a mitigating circumstance that there was no eyewitness to the identity of the shooter. 34AA8504–06.

State theorized—the blood was not deposited on the pants while the wearer was in the position of "an active shooter." 42AA10472.

a) Deficient performance

Faced with the State's allegation Johnson had personally shot four victims, along with forensic evidence purportedly supporting that theory, defense counsel to perform effectively needed to consult with their own forensic expert. *See Hinton*, 571 U.S. at 273; *Browning*, 875 F.3d at 472–74. Had they done so, the expert would have informed them that the forensic evidence conflicted with the State's theory of the offense, showing the blood was likely transferred to the pants, not spattered on the pants when the victim was shot.

Several facts support this conclusion. First, the stains are located on the back of the jeans. 42AA10469–72; *see Rompilla*, 545 U.S. at 387 (explaining counsel has a duty to investigate "red flags" in the record); *Douglas*, 316 F.3d at 1085 (similar). The absence of stains on the front of the pants suggests that the wearer was not in the position of "an active shooter" during a possible spatter producing event. 42AA10472. Second, the distribution of the stains is not typical of spatter from a gunshot. 42AA10472. Third, the stains had a "crusty" appearance.

42AA10472; *see* 42AA10367–68. "Stains that are created by freshly shed blood caused by a gunshot would not have a 'crusty' appearance. Instead, a 'crusty' appearance would suggest a bloodstain that had undergone physiological changes such as clotting prior to deposition." 42AA10472. And, for clotting to occur, time must pass "from initial onset of bleeding until a clot begins to form." 42AA10472. Fourth, Criminalist Thomas Wahl described each of the stains as a "surface stain." 42AA10472; 42AA10367–68. "Although this term is not included in any recognized standard terminology, they are suggestive of transfer stains and are not indicative of the physical characteristics of the stains created by an impact such as a gunshot." 42AA10472.

b) Prejudice

The prejudice from counsel's deficient performance is clear—presenting expert testimony in blood spatter and crime scene reconstruction would have undermined the State's argument that Johnson was the triggerman. The prosecutor made this connection during his closing argument:

> [A]pparently somehow the victims' blood just turned up on Donte Johnson's pants. Somebody—the true killer apparently wore Donte Johnson's pants to the crime scene and then returned those

> pants to Donte Johnson's bedroom before the police showed up.
>
> . . .
>
> Thomas Wahl tells you that he did conclusive testing, that not only is this blood, but it is human blood. He tells you that not only is it human blood, but that it is Tracey Gorringe's blood on those pants. Is it reasonable to believe that Tracey Gorringe bled from the injury he sustained. You saw those blood photographs of Tracey Gorringe and the other boys as they laid there taped up. Is it reasonable to believe that Tracey Gorringe bled, and more importantly, is it reasonable to believe that scientific evidence in this case proves, beyond any doubt, that Tracey Gorringe cannot be excluded as the person who bled on this pair of pants.

7AA1728; 8AA1755–56. The jury was consequently left with the uncorrected perception that the blood on the jeans was spatter—implying that the blood got on the jeans as a result of the shooting. *See* 6AA1463. In fact, that is exactly the argument Johnson's codefendant made in his trial—that the blood on the pants is "very consistent with [Johnson] being the shooter because he is standing right next to the boys. He shoots and it splashes back on his pants." 41AA10295.

Had defense counsel presented testimony from an expert in blood spatter and crime scene reconstruction, the expert would have offered the jurors an alternative explanation for the deposition of stains on the pants—a transfer from a bloodied surface or the victim *after* the shooting. 42AA10463–72. And the expert would have also undermined the work by law enforcement in this case, explaining "[p]hotographic documentation of the stains on the jeans was inadequate. Mr. Wahl stated during testimony that he did not photograph the pants before he began analysis. Instead, he began photographic documentation only after the analysis had begun and the stains were altered or consumed." 42AA10471 (citing 7AA1621–22); *see also* 41AA10122–36. Thus, "[t]he only person able to view the stains on the back of the leg of the black jeans was Criminalist II Thomas Wahl." 42AA10472. This testimony would have undermined the State's theory that Johnson personally killed the four victims. Counsel's failure to present this information prejudiced Johnson's defense.

C. Defense counsel were ineffective for failing to adequately cross-examine the State's expert witnesses (Claim Three(B)).

The State presented testimony from four experts at Johnson's trial, in fingerprints, firearms, forensic pathology, and DNA. Defense counsel performed ineffectively by failing to adequately cross-examine these witnesses, leaving overstated expert conclusions undisturbed. *See Richey*, 498 F.3d at 361–64.

1. Fingerprints (Claim Three(B)(1))

One of the few pieces of physical evidence presented at Johnson's trial was a fingerprint left on a Black and Mild box found at the Terra Linda residence. 7AA1534–39. The State presented testimony from Edward Guenther, who was designated as an expert in fingerprint examination, that the fingerprint was left by Johnson. 7AA1516–38. Given that this fingerprint was one of the few pieces of evidence alleged to have tied Johnson to the Terra Linda residence, it was imperative for trial counsel to conduct an effective cross-examination. They did not, despite ample opportunity to do so.

When asked about the fingerprint comparison process, Guenther testified that when an examiner has "found a sufficient number of

corresponding points between [a] latent fingerprint and the inked fingerprint, they're able to make an identification and make a positive statement about that latent print as it relates to that particular standard." 7AA1521–22. Following this testimony, Guenther added that a fingerprint establishes a person's identity with "100 percent" accuracy. 7AA1522. Guenther then said he was "100 percent" positive that it was Johnson's fingerprint on the Black and Mild box. 7AA1537. He made the same statement with regard to Smith's print on the VCR. 7AA1532.

Since 1973 it has been well established that there is no valid basis for using "points" in order to make a fingerprint identification. 42AA10489–90. Subsequent studies in 1995 and 1996 reaffirmed this position. 42AA10490. Guenther testified that he had worked in the field for 25 years—thus he would have been well aware of this information. 7AA1515–16.

An effective cross-examination would have informed the jury that there was no scientific basis for Guenther's point requirement. Trial counsel, however, did not ask a single question about Guenther's methods. *See* 7AA1539–49. Thus, the jury was deprived of information

that would have called into question Guenther's qualification as an expert in the field of fingerprint analysis.

Compounding the problems with this testimony was Guenther's claim that he could ascertain identity from a fingerprint with "100 percent" accuracy. Guenther was never challenged on this—and this statement is simply not true. 42AA10491–93. This claim misled the jury into believing that Guenther's identification was infallible and thus could not be questioned. This was important to the State's theory because it was one of the few things allegedly putting Johnson at the crime scene. The jury convicted Johnson believing his connection to the Black and Mild box was "100 percent" accurate.

In addition, the State relied heavily on this evidence, both to connect Johnson to the crime scene and to bolster its problematic witness testimony. 7AA1705–06, 1711, 1719–20, 1723, 1726, 1729, 8AA1757–58; *see* 7AA1726 ("Corroboration, scientific evidence that the witnesses who testified are telling the truth."); 8AA1757 ("There is no reasonable doubt that this is anyone's fingerprint other than Donte Johnson. After all Ed Guenther told you that he is absolutely certain that it is Donte Johnson's fingerprint…."). Thus, had trial counsel

performed effectively, there is a reasonable probability that the jury would not have found Johnson guilty.[4] Johnson is entitled to relief.

2. Firearms (Claim Three(B)(2))

On the last day of the guilt phase, an employee of the police laboratory, Richard Good, testified about his examination of cartridge cases and bullet fragments collected in this case. 7AA1557–72. Good testified that the marks on the cartridge cases—chambering marks, extractor marks, ejector marks, and breech base marks—are unique to a single specific firearm. 7AA1567; *see* 41AA10341–43. The identification based on those marks, Good continued, "is as positive as a fingerprint would be to an individual." 7AA1566. When the State asked Good how "certain" he was, Good responded, "I'm positive." 7AA1567. Neither Good's testimony nor his report documented how Good reached his conclusion or whether his work was peer reviewed. Yet defense counsel confined the "real quick" cross-examination to questions about

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[4] The State also presented Guenther's fingerprint comparison at the 2005 penalty retrial. 16AA3971–73. Trial counsel for the 2005 penalty phase hearing had a duty to challenge this information, but they neglected to do so, prejudicing Johnson's defense.

the absence in evidence of the gun that fired the bullets in this case. 7AA1570–71. There was no redirect.

Defense counsel were ineffective for not impeaching Good's testimony. *See Hinton*, 571 U.S. at 273–74 (concluding counsel performed deficiently in defending against State's toolmark comparison). Comparing cartridges for matches "is a challenging task," which "involve[s] subjective qualitative judgments by examiners." 41AA10338. Examiners look for "sufficient agreement" between two sets of marks. 41AA10338; *see* 7AA1565–66. But the accuracy in those judgments "is highly dependent on [the examiner's] skill and training." 41AA10338. For this reason, the National Academy of Sciences (NAS) in 2009 was critical of matches made by firearms examiners to the exclusion of all other firearms: "Because not enough is known about the variabilities among individual tools and guns, we are not able to specify how many points of similarity are necessary for a given level of confidence in the result." 41AA10339–40. And "[s]ufficient studies have not been done to understand the reliability and repeatability of the methods." 41AA10339–40.

The NAS also observed that, "[t]he validity of the fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks has not yet been fully demonstrated." 41AA10339. The first study noted that "'one can find similar marks on bullets and cartridge cases from the same gun,' but it cautioned that, '[a] significant amount of research would be needed to scientifically determine the degree to which firearms-related toolmarks are unique or even to quantitatively characterize the probability of uniqueness.'" 41AA10339.

Because of these issues with ballistics evidence, courts often limit the scope of opinion testimony given by firearms examiners. *See, e.g.*, *United States v. Willock*, 696 F. Supp. 2d 536, 539–82 (D. Md. 2010), *aff'd sub nom. United States v. Mouzone*, 687 F.3d 207 (4th Cir. 2012); *United States v. Taylor*, 663 F. Supp. 2d 1170, 1174–80 (D.N.M. 2009); *United States v. Glynn*, 578 F. Supp. 2d 567, 569–75 (S.D.N.Y. 2008); *United States v. Monteiro*, 407 F. Supp. 2d 351, 374–75 (D. Mass. 2006). Along with criticizing the exactness of the science, these cases point out separate problems that also undermine Good's conclusion: the failure to support conclusions with detailed notes or a second opinion, and overstated testimony that he was "positive" about the match.

But counsel here failed to request the trial court limit Good's testimony and failed to adequately impeach Good with science undermining his conclusions. Counsel's performance was deficient. *See Gabaree v. Steele*, 792 F.3d 991, 997–99 (8th Cir. 2015); *Elmore v. Ozmint*, 661 F.3d 783, 853–66 (4th Cir. 2011), *as amended* (Dec. 12, 2012).

Counsel's deficient performance prejudiced Johnson's defense. The State used the firearms testimony to support its theory that Johnson killed each of the victims with the same gun. The State elicited during Good's direct examination that he could "compare cartridge cases to determine if they were fired from the same weapon[.]" 7AA1565–67. And during closing argument, the State said multiple times that Johnson used a single gun to kill the victims. 7AA1713–19. Specifically referencing Good's testimony, the State argued, "what do we know from Richard Good, the firearms expert, all four cartridge cases came from the same gun, at least a suggestion that the same person shot all four victims." 7AA1719. The science does not support this conclusion. Thus, but for counsel's deficient performance, there is a reasonable probability

of a different outcome in the guilt phase. *See Gabaree*, 792 F.3d at 999–1000; *Elmore*, 661 F.3d at 866–72.

3. Forensic Pathology (Claim Three(B)(3))

A forensic pathologist, Dr. Robert Bucklin, testified during the guilt phase about the four deaths. 6AA1372–433. Defense counsel could have undermined several parts of his testimony, but they failed to do so.

Dr. Bucklin first described Biddle's autopsy, testifying there was "some charring of [the wound's] border" but no "sooting." 6AA1379–90. Dr. Bucklin concluded that this showed "a fairly close gunshot wound," with the gun "an inch or so from the skin surface." 6AA1386. Dr. Bucklin similarly testified about his conclusions from Gorringe's autopsy—according to Dr. Bucklin, there was charring at the borders of the wound, without soot, powder, or stippling. 6AA1392–93. Dr. Bucklin estimated the gun was one or two inches away from the skin. 6AA1393–94. And Dr. Bucklin guessed from hemorrhages in the eyes that Gorringe was alive for about ten minutes after the gunshot (though possibly unconscious). 6AA1394, 1418. As for Mowen's autopsy, Dr. Bucklin testified there was "[d]istinct black charring at the borders, with some discoloration of the surrounding skin." 6AA1398–99. Dr.

Bucklin testified that this meant "[a] very close wound, not touching, within an inch or so of the body." 6AA1399. Dr. Bucklin lastly testified about Talamantez's autopsy, describing what he called a "laceration of the scalp" and opining that the gunshot wound was "a close injury, a matter of an inch or two from gun to skin." 6AA1402–06.

On redirect, Dr. Bucklin testified about the blood on the victims' shirts:

> I would expect that gravity would take over immediately and that the blood would follow the laws of gravity and come out of the body. And depending on the position of the body it would go to wherever gravity would take it. That would account for the blood on the back of the shirt, or any pools of blood which may have been at the scene.
>
> . . .
>
> [T]hey're very large injuries . . . and they didn't, by my own examination, strike an arterial blood vessel which was close to their—to their trajectory. If they had, conceivably there might have been some blood issuing out under pressure. But I believe the blood which was lost, that which appears on the shirt and what was at the scene, which I didn't see, was simply a result of blood pouring out of the body from gravity, nothing stopped it, it just poured out because it was in the body and it came out when they died.

6AA1430–31.

Defense counsel failed to point out that this testimony conflicted with testimony from a different forensic pathologist at the trial of one of Johnson's codefendants. Dr. Giles Green testified for the State at Smith's trial that the wound on Biddle was "moderately close to close range," which he defined as "somewhere around two, two and a half feet." 31AA7645–46. Similarly, Dr. Green placed the gun "three feet or more" from Gorringe and not "close" to Mowen (though Dr. Green later equivocated about Mowen's injury). 31AA7652–53. And Dr. Green testified that all the deaths would have been instantaneous, then clarified on redirect that Gorringe's heart still could have been beating, causing the hemorrhages, even if his brain was dead. 31AA7665, 7671–73. Instead of pointing out this conflict, defense counsel *emphasized* Dr. Bucklin's testimony about the closeness of the gun. 6AA1412–16.

This testimony was crucial for the State's theory of the offense—that Johnson singlehandedly shot all four victims at close range. 7AA1713–14 ("I'm certain that they were in fear as Donte placed the barrel of the gun two inches from the skull of each boy."); 7AA1715 ("You recall the evidence, what the physical evidence suggests, that the gun placed two inches, no more than two inches from the skull of each

one of these boys as he fired a fatal shot."); 8AA1759 ("Donte Johnson would have to stand over as he puts that gun within two inches and shots and kills him."); 8AA1761 ("How many coincidences is it going to take until each of you individually says I believe, beyond a reasonable doubt, that Donte Johnson shot and killed, in cold blood, murdered four boys, as they lost their lives in an execution style murder."); 8AA1761 ("[T]he pulling of a trigger, a deliberate act, but within inches from each boy."). Had counsel effectively undermined Dr. Bucklin's testimony, there is a reasonable probability of a different result.

4. DNA (Claim Three(B)(4))

Lastly, trial counsel failed to properly impeach the State's expert on DNA analysis, Thomas Wahl. Wahl testified about two sources of DNA, on a cigarette butt collected at the crime scene and on black pants collected from Johnson's residence. 7AA1618–48. Like Guenther and Good, Wahl made repeated statements of absolute certainty when it came to his findings. 7AA1611–12, 1614, 1625, 1630, 1634, 1637, 1645. Not only was this testimony highly improper, it misled the jury into believing the results were not to be questioned. Trial counsel did not challenge Wahl on these comments. *See* 7AA1649–73.

The State relied heavily on this DNA evidence in closing argument. 7AA1706–06, 1724–25, 1728–29; 8AA1759–60, 1763–65. According to the prosecution, the DNA evidence provided "[s]cientific proof" not only that Johnson was at the crime scene, but that the witnesses putting the gun in his hand could be believed. 7AA1724–25. And the State further used the testimony to speculate that "Johnson allow[ed] the victim to take one last drag of that cigarette before he put a bullet in the back of his head[.]" 7AA1725. The State concluded its rebuttal argument by again insisting the DNA evidence provided "proof positive evidence" supporting the witness statements: "I submit to you that this blood is hard evidence, and that semen on those pants is hard evidence, it's proof positive evidence. It's a [sic] scientific evidence. You can't argue about crackheads when it comes to DNA evidence." 8AA1763–64. Had trial counsel performed effectively, there is a reasonable probability of a different outcome at trial.

D. Defense counsel were ineffective for failing to adequately impeach the State's fact witnesses (Claim Three(C)).

In addition to presenting expert testimony undermining statements from the State's witnesses, effective counsel would have

impeached the State's witnesses with the unreliable aspects of their statements. *See Peoples v. Lafler*, 734 F.3d 503, 512–14 (6th Cir. 2013); *Higgins v. Renico*, 470 F.3d 624, 632 (6th Cir. 2006); *Stanley v. Bartley*, 465 F.3d 810, 811–14 (7th Cir. 2006); *Reynoso*, 462 F.3d at 1110–15.

1. Internal inconsistencies

a) Charla Severs

Charla Severs gave at least six statements in this case before Johnson's trial in June 2000. The statements contain several significant discrepancies. In her first statement, a few days after the bodies were discovered, Severs told police the VCR belonged to Armstrong's girlfriend, and she did not know anything about the homicides. 43–44AA10840–63. During her grand jury testimony two weeks later, she placed the blame for the robbery on Armstrong. 1AA162–94. She then gave a new statement to police, still accusing Armstrong, but adding several new details, including her statement for the first time accusing Johnson of killing one—but not all four—of the victims. 29AA7206–39. She added two weeks later that she saw the killings on the news the morning of August 14, 1998, then again accused Johnson of killing one of the victims, denying knowing of the others. 30AA7270–84.

More than a year passed before Severs's next statement, and by that time she was in custody. 32AA7959–80. Severs again added to her account of the offense, saying Johnson told her, "You have to go to sleep after you kill somebody." 32AA7962. And Severs for the first time accused Johnson of ridiculing one of the victims and killing all four. 32AA7965–66. But when Severs testified at a deposition in order to secure her release from jail, she returned to her previous account—that Johnson shot one victim but did not say who shot the other three victims. 33AA8051–60 (Under Seal).

Finally, at trial two years after the homicides, Severs providing damaging testimony placing the gun in Johnson's hands for all four killings. 5AA1118–249.

b) Bryan Johnson

Just like Charla Severs, Bryan Johnson made several internally inconsistent statements. Three days after the homicides, Bryan Johnson denied knowing what the defendants took from the house and which defendant shot the victims. 43–44AA10840–63. To the grand jury Bryan Johnson said he did not know who shot three of the four victims. 1AA194–214. Then, at trial, Bryan Johnson said Donte Johnson shot

one of the victims who was "talking back." 5AA1249–6AA1292. Around the same time Bryan Johnson made some of these contradictory statements, he was also getting in trouble with the law. 45AA11351–53.

c) Tod Armstrong

Tod Armstrong, a person once believed by law enforcement to be the architect of the crimes, became one of the central witnesses at Johnson's trial.[5] Armstrong's path from key suspect to star witness is important. It began with a statement to the police on August 17, 1998—three days after the bodies were discovered at Terra Linda. 43AA10786–820. It is unclear how Armstrong came to speak with police officers. Armstrong initially said that his involvement came about when police called Bryan Johnson. After this, Armstrong said he called the detectives. 1AA72. Armstrong's August 17 statement provided very few details. But, importantly, Armstrong told police officers that neither Johnson nor Young told him what items were brought back from Terra Linda. 43AA10786–820. A few weeks later, Armstrong was asked again

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[5] In addition to not prosecuting Armstrong for his involvement in the crimes, the Clark County District Attorney's Office cleared a warrant for juvenile conduct in April 1999. 41–42AA10344–66.

about any items that were taken from Terra Linda. This time he added that they recovered "some money." 1AA66.

Armstrong enhanced his statements as time went on—sometimes contradicting himself on very basic details. A little over a month after the homicides, Armstrong admitted going to the Terra Linda residence before the incident, something he had denied earlier in the same interview. 30AA7298; 30AA7319. And at trial, Armstrong said for the first time that Young had a PlayStation after he returned, and that the first person shot was taken to a back room. 4–5AA952–1068.

2. External inconsistencies

a) The statements are inconsistent with each other

With several important details, the witnesses' statements contradict each other: (1) the people involved in the conversation at the Everman residence after the shootings; (2) what was taken from the victims; (3) who shot the victims; (4) whom the VCR at the Everman residence belonged to; (5) who orchestrated the crimes; (6) whether there was a third participant in the offenses; (7) how the witnesses learned about the crimes; and (8) why and how the witnesses decided to

go to the police. *See* 4–5AA952–1109; 5–6AA1118–1291; 29AA7092–7138, 7150–7269; 30AA7285–7358; 43–44AA10786–10911.

b) The statements are inconsistent with other evidence

The witness statements also conflicted with other evidence. Several of the statements mentioned that the defendants took a VCR from the victims' house. But a VCR was clearly visible in a crime scene photograph from the victims' house on August 14, 1998, 38AA3900–01, and a crime-scene report noted a VCR at the scene that same day, 38AA9491–99. The timeline in the statements also made little sense. Not only did the statements provide insufficient time to commit the offenses, but news reports and other witness statements placed people at the home during the day on August 14, 1998. 36AA9037; 46AA11506–17. Finally, Severs's statement that she saw the story on the news the next morning cannot possibly be true—the media could not have been aware of the deaths until after the bodies were discovered at 6:00 p.m.

II. The trial court provided unconstitutional jury instructions during the guilt-phase (Claim Four).

In Claim Four, Johnson claimed his constitutional rights were violated by the jury instructions during the guilt phase. 24AA5858–73. Johnson raised both new challenges and reraised previously raised challenges. Good cause and prejudice for each subclaim is discussed below.

A. Previously unraised challenges

In Claim Four (D), (F)–(J), Johnson raises a number of challenges to the guilt phase jury instructions that were not previously raised. Insofar as these claims are barred by procedural default, Johnson can establish good cause and prejudice because post-conviction counsel was ineffective. *Crump*, 113 Nev. at 304–05, 934 P.2d at 254; *see Chappell v. State*, 137 Nev. ___, 501 P.3d 935, 949 (2021).

Post-conviction counsel performed deficiently because he had a duty to assert meritorious claims on Johnson's behalf. The Nevada Indigent Defense Standards of Performance recognize that "[c]ounsel at every stage of the case" should "consider all legal claims potentially available," "thoroughly investigate the basis for each potential claim"

and, in considering which claims to raise, consider "the unique circumstances of death penalty law and practice" and "the near certainty that all available avenues of post-conviction relief will be pursued." Nev. Defense Standard 2-10. Post-conviction counsel, specifically, has an obligation to "seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to competent capital defense representation, including challenges to any overly restrictive procedural rules." Nev. Defense Standards, 2-19(c), (e). And "[c]ounsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review." *Id.*[6] Post-conviction counsel had an obligation to raise these claims, but failed to.[7] Thus, counsel was deficient. Post-conviction counsel's deficient performance was prejudicial because, had post-conviction counsel raised these claims, the

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[6] National standards for competent capital representation parallel these obligations. *See* 2003 ABA Guidelines 10.8, 10.15.1.

[7] The district court denied Johnson's request for an evidentiary hearing; thus, Johnson was not given an opportunity to present post-conviction counsel's testimony. 49AA12231–41; *see also* 49AA12264–66.

result of Johnson's post-conviction proceedings would have been different—Johnson would have received post-conviction relief.

Additionally, trial and appellate counsel had an obligation to raise challenges to these instructions. *See* Nev. Def. Standard 2-10 (noting obligation for counsel at all stages to consider all legal claims and to "thoroughly investigate" the claim before reaching a conclusion about it); *see also* Nev. Def. Standard 2-19. Thus, they, too, were deficient in failing to raise these challenges.

Many courts have found ineffective assistance of counsel based on a failure to request or object to a jury instruction. *See* John M. Burkoff & Nancy M. Burkoff, *Ineffective Assistance of Counsel* § 7:48 (Aug. 2021 Update) (collecting state and federal cases). In *Crace v. Herzog*, the Ninth Circuit concluded counsel performed deficiently for not requesting a lesser-included-offense instruction. 798 F.3d 840, 852 (9th Cir. 2015). Because there was a reasonable probability that a properly instructed jury would have convicted the defendant of the lesser included offense, the court reasoned, the deficient performance was prejudicial. *Id.* at 851. Similarly, in *State v. Eyre*, the Supreme Court of Utah held that trial counsel was deficient for failing to object to a jury

instruction. 179 P.3d 792, 798 (Utah 2008). The jury instruction did not instruct that "tax deficiency" was an element of tax evasion, the offense charged, thus "counsel's failure to object to a jury instruction that did not alert the jury to every element of the crime with which his client was charged amounted to a deficient performance." *Id.* And, because a properly instructed jury "could have made a determination regarding the State's proof of a tax deficiency and the plausibility of Eyre's defense," counsel's deficient performance was prejudicial. *Id.* These cases show that, where counsel fails to request or object to an instruction, and but for that failure there is a reasonable probability of a different result, counsel was ineffective.

The ineffective assistance of trial and appellate counsel is important for two reasons. First, their ineffective assistance are meritorious independent claims for relief. Second, insofar as procedural default prevented these claims from being heard during Johnson's trial, direct appeal, and post-conviction proceedings, the ineffective assistance of trial and appellate counsel provides good cause and prejudice to excuse those defaults. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) ("A claim of ineffective assistance of counsel may

also excuse procedural default if counsel was so ineffective as to violate the Sixth Amendment."); *see also Edwards v. Carpenter*, 529 U.S. 446, 452 (2000).

Thus, the claims below assert errors of law; the failure to raise these claims by prior counsel was ineffective; and the ineffectiveness of prior counsel excuses any procedural default that applies to these claims.

One other preliminary point requires emphasis: During the first penalty phase, the jury found as a mitigating circumstance that there was no eyewitness to identify the actual shooter. *See* 34AA8504–06. Thus, the jury clearly believed there were issues with Johnson's liability as a principal offender, and so the issues related to the other theories of liability are more important.

1. Felony murder (Claim Four(F))

Claim Four(F) challenges the felony murder instruction. In describing felony murder, the district court instructed the jury: "There is a kind of murder which carries with it conclusive evidence of premeditation and malice aforethought," namely felony murder. 34AA8483. This is an inaccurate statement of law because it suggests

that felony murder presents conclusive evidence of "premeditation." The instruction confuses three legal concepts: (1) felony-murder, (2) premeditation, and (3) malice aforethought.

Under the felony-murder doctrine, "a murder that is committed in the perpetration or attempted perpetration of certain enumerated crimes" is first-degree murder. *State v. Contreras*, 118 Nev. 332, 334, 46 P.3d 661, 662 (2002); *see also* NRS 200.030(1)(b). "The felonious intent involved in the underlying felony is deemed, by law, to supply the malicious intent necessary to characterize the killing as a murder . . . ." *Contreras*, 118 Nev. at 334, 46 P.3d at 662. Because, by law, felony murder is murder of the first-degree, "no proof of the traditional factors of willfulness, premeditation, or deliberation is required for a first-degree murder conviction." *Id.*

Premeditation *is* required, however, for a first-degree murder that is willful, deliberate, and premeditated. *See* NRS 200.030(1)(a); *see Nika v. State*, 124 Nev. 1272, 1279–85, 198 P.3d 839, 844–48 (2008) (describing history of these elements). So too is the separate element of malice aforethought. *See Collman v. State*, 116 Nev. 687, 714, 7 P.3d 426, 443 (2000) ("[M]alice is not subsumed by willfulness, deliberation,

and premeditation."); *Hern v. State*, 97 Nev. 529, 532, 635 P.2d 278, 280 (1981) ("Malice is not synonymous with either deliberation or premeditation.").

Malice aforethought is a term of art originating from the common law. *See* Wayne R. LaFave, et al., 2 *Substantive Crim. L.* § 14.1(a) (explaining concept of "malice" under common law). This Court has explained that "Nevada expressly recognizes three . . . malicious states of mind in its statutes and case law," namely intent-to-kill murder, depraved-heart murder, and felony-murder. *Collman*, 116 Nev. at 712–13, 7 P.3d at 442. This Court cited favorably language from the California Supreme Court explaining that "a killing cannot become murder in the absence of malice aforethought." *Id.* at 715–16, 7 P.3d at 444 (quoting *People v. Mattison,* 481 P.2d 193, 196 (1971)). Although "murder may be committed without express malice, i.e., without a specific intent to take a human life;" for murder without express malice, "unless the felony-murder rule is applicable, 'the defendant must intend to commit acts that are likely to cause death and show a conscious disregard for human life.'" *Id.* at 715–16, 7 P.3d at 444 (internal citations omitted).

In *Ford v. State*, 99 Nev. 209, 214, 660 P.2d 992, 995 (1983), this Court approved an instruction similar to the one here. That instruction, begins, "There are certain kinds of murder which carry with them conclusive evidence of malice aforethought," before explaining felony murder. *Id.* But the instruction approved in *Ford* does not include the word "premeditation." *Compare id.*, *with* 34AA8483. This makes sense: under Nevada law, felony-murder does not provide conclusive evidence of premeditation. *See Contreras*, 118 Nev. at 334, 46 P.3d at 662. Indeed, the purpose of the felony-murder doctrine is to criminalize murder where premeditation is *not* present. *See id.* [8]

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[8] Most of this Court's cases referencing the "*Ford* instruction," like *Ford* itself, do not include the word "premeditation." *See Coleman v. State*, 130 Nev. 229, 244, 321 P.3d 901, 911 (2014); *Wegner v. State*, 116 Nev. 1149, 1155, 14 P.3d 25, 29 (2000), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006); *Collman*, 116 Nev. at 711, 7 P.3d at 441; *Ruland v. State*, 102 Nev. 529, 533, 728 P.2d 818, 820 (1986), *overruled on other grounds by Rosas*, 122 Nev. 1258, 147 P.3d 1101; *Palmer v. State*, No. 67565, 2018 WL 679541, at *2 (Nev. Jan. 25, 2018). Of the remaining cases that do include "premeditation" in the instruction, this Court has not explicitly addressed whether the presumption of premeditation violates Nevada law. *See Crawford v. State*, 121 Nev. 744, 749, 121 P.3d 582, 585 (2005); *Redman v. State*, 108 Nev. 227, 232 n.5, 828 P.2d 395, 398 n.5 (1992), *overruled on other grounds by Alford v. State*, 111 Nev. 1409, 1415 n.4 , 906 P.2d 714, 718

Thus, the instruction given in Johnson's case reduced the State's burden of proof for willful, deliberate, and premeditated murder. By instructing that felony-murder "carries with it conclusive evidence of premeditation," this instruction told the jury that the State had proven an essential element of willful, deliberate, and premediated murder by proving that the killing was committed in the perpetration of a felony. *See* 34AA8483. This violation of state law independently warrants relief.

In addition to violating state law, this instruction also violated Johnson's federal constitutional rights. A criminal defendant has "a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). Here, in improperly instructing the jury, the trial court violated Johnson's

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n.4 (1995); *Love v. State*, No. 70876, 2017 WL 3222037, at *1 n.1 (Nev. July 27, 2017); *Arthur v. State*, No. 52046, 2010 WL 3908950, at *9 (Nev. Oct. 4, 2010)

Fourteenth Amendment due process rights. Additionally, the improper instruction allowed the State to secure a conviction without proof beyond a reasonable doubt of each element of the charged offenses. *See In re Winship*, 397 U.S. 358, 364 (1970); NRS 200.030. The presumption of premeditation was therefore unconstitutional. *See Sandstrom v. Montana*, 442 U.S. 510, 521–24 (1979); *see also Thompson v. State*, 108 Nev. 749, 754, 838 P.2d 452, 455 (1992) ("[T]he high court held [in *Sandstrom*] that mandatory presumptions violate the due process clause of the Fourteenth Amendment, which requires a state to prove every element of the charged crime.").

2. Burglary (Claim Four(G))

Claim Four(G) challenges the burglary instruction. The Court instructed the jury:

> The person who unlawfully enters . . . may reasonably be inferred to have entered with intent to commit larceny, assault or battery, or any felony, unless the unlawful entry is explained by evidence satisfactory to the jury to have been made without criminal intent.

34AA8450. This instruction improperly created a presumption that an element existed—namely the specific intent to commit larceny, assault

or battery, or any felony—without requiring the State to prove that element beyond a reasonable doubt. This violates *Sandstrom*, 442 U.S. at 510. Moreover this instruction improperly places the burden of proof on Johnson. *See Mullaney v. Willbur*, 421 U.S. 684 (1975).[9]

Additionally, the instruction violates NRS 47.230(3), which requires a judge to instruct the jury that it is not required to find the presumed fact and that all elements of an offense must be proven beyond a reasonable doubt. This instruction was not given. This, too, reduced the State's burden of proving each element beyond a reasonable doubt, violating *Sandstrom*.

The violation of the statute itself requires reversal of Johnson's conviction. Moreover, the violation of this statute violates Johnson's right to due process. *See Hicks*, 447 U.S. at 346. As this Court recognized in *Hollis v. State*, "violations of NRS 47.230 will not be deemed harmless where the erroneous instruction concerns an essential

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[9] Though This Court has rejected this burden-shifting argument, Johnson urges this Court to reconsider. *See Redeford v. State*, 93 Nev. 649, 653–54, 572 P.2d 219, 221–22 (1977).

element of the offense charged." 96 Nev. 207, 209, 606 P.2d 534, 536 (1980). Thus, this error was not harmless.

Collman, 116 Nev. 687, 7 P.3d 426, does not require a separate harmless error analysis for this error. In *Collman*, this Court held that "where . . . a jury-instruction error is not 'structural' in form and effect, this court will henceforth review for harmless error improper instructions omitting, misdescribing, or presuming an element of an offense." *Id.* at 722, 7 P.3d at 449. Here, however, under *Hollis*, this error is "structural" in form and effect. *See Hollis*, 96 Nev. at 209, 606 P.2d at 536.[10] Thus, *Collman* does not apply. Nonetheless, assuming *Collman* does govern, this error cannot be harmless. Unlike the error in *Collman*, in which there were alternative theories of liability, the

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[10] The failure to comply with NRS 47.230(3) is a qualitatively different error than the error addressed in *Collman*. In *Collman*, the trial court improperly instructed the jury that murder by means of child abuse conclusively established malice aforethought, but numerous other theories of malice aforethought were presented and properly instructed. *See Collman*, 116 Nev. at 711, 723–24, 7 P.3d at 441, 449–50. In contrast, the failure to comply with NRS 47.230(3) here fundamentally fails to put the State to its burden of proof. An error with respect to the burden of proof is structural in nature. *See Sullivan v. Louisiana*, 508 U.S. 275, 279–80 (1993).

presumption affects all of the theories of liability for the burglary charge. Additionally, the State did not present evidence that Johnson specifically possessed the requisite intent, instead relying on theories of vicarious liability. *See* 7AA1712.

3. Kidnapping and murder (Claim Four(H))

Claim Four(H) challenges the instructions because the jury could rely on murder as a predicate for kidnapping while relying on kidnapping as a predicate for murder. 30AA7275–78. One of the kidnapping theories for each of the victims was that the kidnapping was "for the purpose of committing . . . murder." 30AA7275–78. One of the first-degree murder theories, in turn, was that Johnson committed the murder in perpetration of a kidnapping. 30AA7278–81.

Because these theories are inconsistent or circular, the failure to instruct the jury that it could not simultaneously rely on both theories was error. Specifically, if the purpose of kidnapping was to commit murder, the murder could not have occurred in perpetration of kidnapping. Similarly, if the murder was committed in perpetration of kidnapping, then the purpose of the kidnapping could not be to commit murder. That is, kidnapping and murder cannot both serve as the

others' predicate offense. An offense cannot be both a predicate offense and a subject offense for the same conduct.

The history of the felony murder rule supports this understanding. The purpose of the doctrine is to "deter dangerous conduct by punishing as first degree murder a homicide resulting from the dangerous conduct in the perpetration of a felony, even if the defendant did not intend to kill." *Nay v. State*, 123 Nev. 326, 332, 167 P.3d 430, 434 (2007) (quoting *State v. Allen*, 875 A.2d 724, 729–30 (Md. 2005)). Thus, the felony-murder rule supplants the required showing of actual malice by substituting the intent to commit the underlying felony. *Id.* at 332, 167 P.3d at 434. In the case of kidnapping predicated on murder, however, the intent to commit first-degree kidnapping requires an intent to commit murder. NRS 200.310(1). And so the purposes of the felony murder rule are not present because the first-degree kidnapping itself requires proof of actual malice (i.e., intent to kill). That is, the requirement of malice is undermined by the fact that the kidnapping refers to murder for intent, while the murder refers back to the kidnapping for intent.

Thus, the trial court should have instructed the jury that if kidnapping was predicated on murder, the jury could not rely on kidnapping to support felony murder; similarly, the trial court should have instructed that if the felony murder verdict relied on kidnapping, then the kidnapping could not be predicated on murder. In failing to do so, the court reduced the State's burden of proving each element beyond a reasonable doubt because, in effect, the jury could have found both first-degree kidnapping and first-degree murder without finding each offense's specific intent. *See Sandstrom*, 442 U.S. 510; *see also Hicks*, 447 U.S. 346. This is error, and this error was not harmless beyond a reasonable doubt.

4. Elements of kidnapping (Claim Four(I))

In Claim Four(I), Johnson argued that the trial court failed to instruct on all elements of kidnapping. 24AA5868–69. In *Wright v. State*, this Court held that a defendant cannot be convicted of kidnapping if any movement or restraint is "incidental" to a robbery, unless the movement or restraint "*substantially* increase[s] the risk of harm over and above that necessarily present in the crime of robbery itself." 94 Nev. 415, 417–18, 581 P.2d 442, 443–44 (1978) (emphasis

added). Then, in *Mendoza v. State*, this Court offered a model instruction. 122 Nev. 267, 275–76, 130 P.3d 176, 181 (2006).

The model instruction was not given in this case.[11] The trial court instead instructed that, "When associated with a charge of robbery, kidnapping does not occur if the movement is incidental to the robbery and does not increase the harm over and above that necessarily present in the commission of such offense." 34AA8468. This instruction failed to instruct that the movement or restraint needed to be "substantial." The failure to instruct the jury that movement or restraint had to be substantial, in accordance with the *Mendoza* instruction, violated Johnson's constitutional rights because it reduced the State's burden of proving each element of the offense beyond a reasonable doubt and it violated Johnson's due process rights to have his conviction conform to

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[11] Though *Mendoza* post-dates Johnson's trial, it was decided before his conviction became final. *Compare Mendoza*, 122 Nev. 267, 130 P.3d 176 (Mar. 16, 2006), *with Johnson II*, 122 Nev. 1344, 148 P.3d 767 (Dec. 28, 2006). Effective appellate counsel would have recognized the applicability of *Mendoza* and sought to supplement the briefing with this claim.

the requirements of state law. *See Sandstrom*, 442 U.S. 510; *see also Hicks*, 447 U.S. 346.[12]

5. Robbery[13]

This Court has held that, to support a robbery conviction, "the State must show that the victim had possession of or a possessory interest in the property taken." *Valentine v. State*, 135 Nev. 463, 468, 454 P.3d 709, 715–16 (2019) (citing *Phillips v. State*, 99 Nev. 693, 695–96, 669 P.2d 706, 707 (1983)). The jury was not instructed about this element. *See* 34AA8463. This violated Johnson's constitutional rights because it reduced the State's burden of proving each element of the

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[12] Alternatively, trial counsel were ineffective in failing to move to dismiss the kidnapping counts. In *Wright*, this Court held that the movement—nearly identical to the facts presented here—was incidental to the robbery, and thus, dismissed the kidnapping charges. *See Wright*, 94 Nev. at 418, 581 P.2d at 444. Appellate counsel were ineffective for not raising this issue on appeal.

[13] This claim was not raised as an individual claim below. Nonetheless, this Court should consider it because it was implicitly raised as Johnson's cumulative challenge to the guilt-phase jury instructions. *See* 24AA5869–73. Additionally, in addressing harmless error of any other instructional error, this Court necessarily will consider whether sufficient evidence supported alternative theories of liability; any of those theories that rely on robbery must be discounted because of the defect in the robbery instructions.

offense beyond a reasonable doubt and it violated Johnson's due process rights to have his conviction conform to the requirements of state law. *See Sandstrom*, 442 U.S. 510; *see also Hicks*, 447 U.S. 346.

This error is not harmless beyond a reasonable doubt. The State presented almost no evidence of a property interest. During closing, the State emphasized three items: a VCR, a Playstation, and a pager. *See* 7AA1712–13. But each item poses a problem. As discussed above, there was still a VCR in the Terra Linda home. *See* § I.D.2.b above. And the testimony showed that Johnson *bought* the VCR from one of the other codefendants. 5AA1086. Thus, the evidence affirmatively contradicted that Johnson himself took this property.[14]

The PlayStation was the subject of contradictory testimony. One of the witnesses referred to the item as a Nintendo. *See* 5AA1085–87. This error was exacerbated by the fact that the State referred to the

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[14] As discussed below, the State's theories of vicarious liability also are problematic, thus the defect in Johnson's liability as a principal is important. *See* §§ II.A.6, II.B.3 below.

item as a "Nintendo Playstation," and that the Everman home did, at least historically, have a PlayStation. 4AA968, 5AA1027, 1048.[15]

Thus, the evidence was not clear that a VCR or a PlayStation was actually taken from the Terra Linda home. By not requiring the jury to find a possessory interest, the jury was not required to consider these defects in the State's case. Moreover, only one of the victims had an arguable possessory interest in both of these items, and only one of the victims had a possessory interest in the pager. Thus, at most two robbery charges—not four—were supported by the evidence. So the failure to instruct on the element of possession was not harmless.[16] Additionally, the harmfulness of this failure was exacerbated by a peculiarity of the verdict form: for the kidnapping and murder charges,

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[15] Armstrong, in an earlier statement, told officers that the Playstation in the home was his. 30AA7310–11.

[16] The indictment did not charge that the property taken from the victims was the PlayStation, VCR, or pager; rather, the indictment charged only money was taken from the victims. 30AA7274–75. The State presented no evidence showing which victims had a possessory interest in the money, and the State did not rely on the money for its robbery charges during closing argument. 7AA1712–13.

the form listed each victim. 34AA8500–03. For robbery, however, the individual victims are not identified. 34AA8499–500.

6. Aiding and abetting (Claim Four(D))

Claim Four(D) challenges the instructions for aiding and abetting liability. 24AA5862.[17] The aiding and abetting instruction in this case told the jury that a person who aids or abets is guilty as a principal. 34AA8459. The jury was not instructed that, for a specific intent crime, an aider or abettor must have the same specific intent as the principal. *Sharma v. State*, 118 Nev. 648, 656, 56 P.3d 868, 872–73 (2002). Burglary, kidnapping, and murder are all specific intent crimes. *See Walker v. State*, 116 Nev. 442, 447, 997 P.2d 803, 807 (2000) (willful, deliberate, premeditated killing); *Wilson v. State*, 127 Nev. 740, 745, 267 P.3d 58, 61 (2011) (felony murder); *Bolden v. State*, 121 Nev. 908, 921, 124 P.3d 191, 200 (2005) (kidnapping), *overruled on other*

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[17] Johnson's petition asserted that this claim was raised during Johnson's post-conviction proceedings. *See* 24AA5781. However, post-conviction counsel's challenge based on *Sharma v. State* was as to the conspiracy instruction, not the aiding and abetting instructions. 28AA6926. Insofar as this Court views this claim as being previously presented, Johnson requests that the subclaim be considered as part of the cumulative instructional error.

grounds Cortinas v. State, 124 Nev. 1013, 1026–27, 195 P.3d 315, 324 (2008). This error was not harmless beyond a reasonable doubt because the State charged aiding and abetting liability for each count of burglary, kidnapping, and murder.

Additionally, trial counsel were ineffective in failing to request this instruction, and appellate counsel was ineffective in failing to raise this error on appeal.

B. Previously raised challenges

Johnson reraised claims related to his guilt-phase jury instructions previously raised on direct appeal and in his initial state post-conviction petition. This Court should consider the claims now because they show that the newly raised claims are not harmless, and the cumulative effect of these errors is itself a constitutional violation. These errors are discussed individually in this section. Harmless error and cumulative effect are discussed in § C below.

1. Reasonable doubt (Claim Four(A))

Claim Four(A) raises a challenge to the reasonable doubt instruction. 24AA5858. There are two defects in this instruction that inflated the constitutional standard for acquittal. First, the instruction

provides that reasonable doubt "is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life." 34AA8445. This inappropriately characterizes the degree of certainty required. Second, the instruction requires "[d]oubt to be reasonable" and "actual," "not mere possibility or speculation," 34AA8445, elevating the threshold for quantifying reasonable doubt. *See Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (holding instruction was unconstitutional when it required "doubt as would give rise to a grave uncertainty").

This Court has rejected this challenge on a number of occasions, including in Johnson's first direct appeal. *Johnson I*, 118 Nev. at 806, 59 P.3d at 462 n.47 (collecting cases). Johnson urges this Court to reconsider its precedent. Alternatively, the prejudice from the instruction must be considered with the jury instruction issues that have been newly raised that concern the State's burden of proof.

2. Premeditation and deliberation (Claim Four(B))

Claim Four(B) challenges the premeditation and deliberation instruction. 24AA5860. The court instructed the jury that

premeditation "may be as instantaneous as successive thoughts of the mind." 34AA8480. By approving the concept of instantaneous premeditation, the instruction is does not distinguish between first- and second-degree murder. Thus, the instruction reduces the State's burden of proving each element of the offense beyond a reasonable doubt. *See Sandstrom*, 442 U.S. 510; *see also Hicks*, 447 U.S. 346.

This Court has previously approved this instruction, including in Johnson's post-conviction appeal. *Johnson III*, 133 Nev. at 582, 402 P.3d at 1277; *see also Byford v. State*, 116 Nev. 215, 237, 994 P.2d 700, 714 (2000). Johnson urges this Court to reconsider this instruction as the Court has never considered the vagueness issue caused by the instructions as given. *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983).

3. Conspiracy (Claim Four(C))

Claim Four(C) alleges error in the conspiracy instructions. 24AA5860–62. Over the objection of trial counsel, the court gave conspiracy instruction explaining vicarious co-conspirator liability. 34AA8453–5. But the instruction failed to explain that, for specific intent crimes, the defendant must himself possess the specific intent. *Bolden*, 121 Nev. at 921, 124 P.3d at 200.

Here, the superseding indictment charged "conspiracy to commit robbery and/or kidnapping and/or murder," and alleged that those crimes were committed in furtherance of the conspiracy. 30AA7272. Kidnapping and murder are both specific intent crimes. *See Walker*, 116 Nev. at 447, 997 P.2d at 807; *Wilson*, 127 Nev. at 745, 267 P.3d at 61; *Bolden*, 121 Nev. at 923, 124 P.3d at 201. Additionally, though not alleged in the indictment, the State argued co-conspirator liability for burglary, explicitly telling the jury the State did not have to prove Johnson himself had specific intent required for burglary. *See* 7AA1711. These errors reduced the State's burden of proving each element beyond a reasonable doubt, and also failed to give Johnson the due process he is entitled to under state law. *See Sandstrom*, 442 U.S. 510; *see also Hicks*, 447 U.S. 346.

Post-conviction counsel raised this claim during Johnson's initial post-conviction proceedings. 28AA6925. This Court rejected the argument on two bases. First, this Court reasoned that Johnson "was charged with first-degree kidnapping as a principal or an aider and abettor, not as a coconspirator." *Johnson III*, 133 Nev. at 582, 402 P.3d at 1277. But the jury, per Instruction 12, could have found Johnson

guilty of kidnapping (and murder) based on his codefendants' specific intent. Moreover, this Court ignored that the instructional error affected the other specific intent crimes. The State explicitly argued conspiracy liability for murder and burglary. *See* 7AA1714 ("Now, we already know he's guilty under a conspiracy theory of murder, we discussed that fact."); 30AA7279 (including conspiracy theory for murder); *see also* 7AA1711.

Second, this Court denied relief because Johnson did "not explain why an objectively reasonable appellate attorney would have forgone some of his other appellate issues to challenge the kidnapping convictions under these circumstances." *Id.* This conclusion assumed appellate counsel in a death penalty case needed to forgo other issues in order to raise this meritorious issue. The opposite is true: appellate counsel had an obligation to raise *all* meritorious issues. *See* Nev. Def. Standards 2-10, 2-19(c); 2003 ABA Standard 10.8, 10.15.1.

Thus, this Court's prior holding was clearly erroneous. Additionally, because this claim is meritorious, continued adherence to this Court's prior ruling would work a manifest injustice. This Court should excuse this claim from the law-of-the-case doctrine. *See Hsu v.*

County of Clark, 123 Nev. 625, 631–35, 173 P.3d 724, 729 (2007). Insofar as prior counsel could have, but failed to, present this claim more effectively, their deficient performance establishes good cause to excuse any default.

4. Malice aforethought (Claim Four(E))

Claim Four(E) challenges Johnson's murder convictions because the jury was not instructed on the element of malice aforethought. 24AA5862–63. *See* NRS 200.010, 200.020; *see also Washington v. State*, 132 Nev. 655, 662, 376 P.3d 802 (2016) (discussing malice aforethought requirement). That is: the jury was neither instructed that malice aforethought is an element of first-degree murder, nor was the jury instructed about what findings it needed to reach to find this element proved. *See* 34AA8474–90 (murder instructions). This Court rejected this claim during Johnson's previous post-conviction appeal. *Johnson III*, 133 Nev. at 582, 402 P.3d at 1277–78. This was error; this error was not harmless beyond a reasonable doubt. And this error was especially harmful because of the error in the felony murder instruction (described above), which incorrectly created a presumption of express malice.

C. Cumulative error (Claim Four(J))

Claim Four(J) argues that the cumulative effect of the jury instructional errors violated Johnson's constitutional rights. 24AA5869–73. The jury heard multiple theories of principal and vicarious liability, for both general and specific intent crimes, with multiple possible actors. They were provided with, and returned, a general verdict. 34AA8497–503. Even with accurate instructions, the overall constitutionality of these sometimes overlapping, sometimes contradictory theories of liability would, at best, be suspect.

However, these instructions were not accurate. If each error individually is harmless, the cumulative effect of these errors is not harmless beyond a reasonable doubt and is its own constitutional violation. *See Gunera-Pastrana v. State*, 137 Nev. ___, 490 P.3d 1262, 1271 (2021).

In addressing cumulative error, this Court considers three factors: (1) whether the issue of guilt is close; (2) the quantity and character of the error, and (3) the gravity of the crime charged. *Id.* at 1270. Here,

because this is a death penalty case, there can be no question that the crime charged is grave.[18]

The issue of guilt is close because the plethora of error prevents any theory of liability from being established. Johnson was charged with first-degree murder based three theories of liability: (1) willful, deliberate, and premeditated murder; (2) felony-murder based on kidnapping; and (3) felony-murder based on robbery. For each of these theories, Johnson was charged with three different theories of personal liability: (1) principal liability; (2) aiding and abetting liability; and (3) co-conspirator liability. Combining the theories of liability for each victim, there were nine possible routes to a guilty verdict for capital murder.

Possible theories of liability for each victim	
Willful, deliberate, and premeditated murder	Principal Aiding and abetting Co-conspirator
Felony-murder kidnapping	Principal Aiding and abetting Co-conspirator
Felony-murder robbery	Principal Aiding and abetting Co-conspirator

[18] Johnson addresses cumulative error for all his claims below. *See* § IX below.

As discussed above, the court failed to instruct on the specific intent requirement for both aiding and abetting liability and co-conspirator liability. Thus, these theories must be eliminated for all the murder theories because all murder is a specific intent crime. Additionally, the felony murder instruction incorrectly told the jury to find premeditation on the basis of felony murder. Thus, the sole remaining theory of principal liability for willful, deliberate, and premeditated murder, must also be eliminated. Finally, the failure to instruct the jury it could not find kidnapping based on murder while simultaneously finding felony-murder based on kidnapping, eliminates that theory.

The sole remaining theory is felony-murder robbery, with Johnson as a principal. But the robbery instructions failed to require the jury to find that the victims had a possessory interest in the items. *See* § II.A.5 above. Thus, the error in the robbery instructions allowed the jury to improperly rely on robbery as a predicate for felony-murder,

invalidating the theory.[19] So for first-degree murder, no valid theory remains. These errors were exacerbated by the State's heavy emphasis on theories of vicarious liability and absence of a requirement to prove principal liability for any offense. *See* 7AA1709–12. During the penalty phase, the jury found as a mitigating circumstance that there was no eyewitness to identify the actual shooter. *See* 34AA8504–06. Thus, the jury clearly believed there were issues with Johnson's liability as a principal offender.

Additionally, the State emphasized that the jury did not need to agree on the theory of liability. 7AA1715–16. Here, with the State's explicit argument—supported by the instructions—that the jury need not find Johnson himself performed any specific act or himself possess any of the required mens rea, these errors cannot be harmless. Rather the errors "vitiate[] all the jury's findings" and "produce[] consequences that are necessarily unquantifiable and indeterminate." *Cortinas*, 124 Nev. at 1025, 195 P.3d at 323. Thus, this Court should treat the

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[19] The instructional error is in addition to the evidentiary and notice issues related to the "property" taken for the robbery charges, as discussed above. *See* § II.A.5 above.

collective instructional error as structural and reverse Johnson's conviction. In *Cortinas* this Court held that "an erroneous instruction that makes available an invalid alternative theory of liability, as occurred here, does not vitiate the jury's findings" because the Court can evaluate "whether the jury would have reached the same verdict had the invalid theory not been available." *Id.* Here, however, there is no valid theory. Even applying harmless error review, however, this Court cannot find that these errors are harmless because they affect every possible theory for first-degree murder for each of the victims.

III. Johnson's guilt-phase jury was unconstitutional.

A. The jury selection process was unconstitutional (Claim One).

In Claim One Johnson challenged the guilt-phase jury as unconstitutionally selected. 24AA5787. This claim was raised, in part, as a claim of ineffective assistance of appellate counsel during Johnson's initial post-conviction proceedings. *Johnson III*, 133 Nev. at 577–578, 402 P.3d at 1274–75. Good cause and prejudice exist to raise and re-raise these claims as addressed below.

1. The State improperly struck an African American venireperson for racial reasons (Claim One(A)).

In Claim One(A), Johnson argued the State violated *Batson* by exercising a peremptory challenge in a racially biased manner, and trial and appellate counsel were ineffective in failing to properly raise this claim. 24AA5787–91. Initial post-conviction counsel raised only the ineffective-assistance portions of this claim. *Johnson III*, 133 Nev. at 577–78, 402 P.3d at 1274–75. Insofar as procedural default applies, it should be excused because jury selection claims are structural and underpin the fairness of the proceeding. Failure to excuse procedural default will result in manifest injustice.

a) The State violated *Batson v. Kentucky* by striking an African American member of the venire.

During jury selection the State violated Johnson's constitutional rights by eliminating Barbara Fuller, one of three African Americans in the jury venire. The following day, outside the presence of the venire, trial counsel raised a challenge under *Batson v. Kentucky*, 479 U.S 79 (1986). 4AA815–16. At that hearing, the State proffered five reasons for its peremptory strike of Fuller: (1) she purportedly stated during voir

dire "it would be, quote, 'difficult to pass judgement on the defendant'"; (2) she purportedly said she had no comment on "holding people accountable for their actions or their choices"; (3) Fuller had not answered Question 33 on the juror questionnaire; (4) Fuller's step-son was in jail; and (5) Fuller's body language and responses showed "disdain." 4AA816, 817. Each of these reasons was pretextual.

First, Fuller never said it would be difficult to pass judgment on Johnson, rather she agreed to the State's leading questions that it would be difficult. 5AA1028–29. In context, it is clear that Fuller's "difficulty" was not an inability to stand in judgement, but thoughtfulness and attentiveness required by the seriousness of the crime. Fuller was clear that she had no issue rendering a verdict, nor did the seriousness of the case impact her ability to be fair.

The second reason was also untrue; though Fuller said "No" in response to the question, "Do you have any thoughts about holding people responsible for their criminal activity, for their criminal conduct," Fuller elaborated that she believed the criminal justice system generally holds people accountable. 5AA1029.

Third, although Fuller omitted an answer to Question 33, she fully answered the same question during voir dire, telling the court she could fairly consider all forms of punishment. 3AA650–52.

As for the fourth reason, the incarceration of Fuller's step-son, comparative juror analysis reveals this reason was pretextual. *See, e.g.*, *Miller-El v. Dretke*, 545 U.S. 231, 241 (2003) (engaging in comparative juror analysis). Timothy Lockinger, a White venireperson, stated his brother had been incarcerated for bank robbery. 3AA732. Both Fuller and Lockinger stated their family contacts with the criminal justice system would have no effect on their ability to be fair and impartial. 3AA732–33. Lockinger was seated on Johnson's jury. *See generally* 10AA2426–41 (Lockinger summoned to chambers during penalty deliberations).

Finally, the State's fifth reason has multiple problems. Of particular concern is that the trial court itself raised this final issue before the State did. *See* 4AA816 ("And you also articulated at the bench your own personal belief, based on your trial experience, in her body language that she wasn't responsive to you, Mr. Guymon, and that was an additional reason."). Trial counsel properly objected noting that

no other member of the jury venire was subject to the same level of "nitpicking." 4AA816. In addition, courts commonly reject similar reasons as improper. *See Williams v. State*, 134 Nev. 687, 694, 429 P.3d 301, 308–09 (2018) (rejecting demeanor argument by State).

An analysis under *Batson* proceeds in three steps. *Id.* at 689–90, 429 P.3d at 306. First, the defendant must establish a prima facie case based on facts from which discriminatory intent can be inferred. *Id.* at 690, 429 P.3d at 306. Second, the State may offer "permissible, race neutral" justifications for striking minority jurors. *Id.* at 691, 429 P.3d at 307. Third, the defendant must establish purposeful discrimination by a preponderance of the evidence. *Id.* To satisfy the evidentiary standard, the defendant need not prove that every reason proffered by the State is pretextual, merely that race was a "substantial and motivating factor." *Currie v. McDowell*, 825, F.3d 603, 605 (9th Cir. 2015); *see Snyder v. Louisiana*, 553 U.S. 472, 485 (2008).

In *Currie*, the Ninth Circuit found a *Batson* violation based on similar facts. *Currie*, 825 F.3d at 611–612. There, the prosecutor struck Jones, a Black member of the venire, relying on their admission of family drug use. *Id*. at 606. However, that reason was undermined by

the fact that another venireperson admitted to extensive drug use *himself*, including marijuana, cocaine, and methamphetamine, the drug at the heart of the case. *Id.* at 611. That venireperson expressed "empathy" for drug users and was still seated on the jury. *Currie*, 825 F.3d at 611–612. The court noted that multiple other members of the jury venire were seated, despite also having admitted to having family members who used drugs. Applying comparative juror analysis, the Ninth Circuit found that the purported race neutral reason for striking Jones applied just as well to other, non-black members of the jury venire. *Id.*; *see also Miller-El*, 545 U.S. at 241. Finally, the Ninth Circuit pointed to the prosecutor's failure to meaningfully examine Jones over his concern that she did not understand the case. *Currie*, 825 F.3d at 613. The fact that the prosecutor relied on his concern that Jones failed to grasp the case as a race neutral reason to peremptorily strike her, yet never inquired during voir dire, was evidence that the reason was pretextual. *Currie*, 825 F.3d at 613 (citing *Miller-El v. Dretke*, 545 U.S at 246).

Currie provides a blueprint for this case. The State relied on Fuller's purported reservations about sitting in judgement of another

person, and that she had "no comment" on the role of the criminal justice system in holding defendants accountable. 4AA815–16. Both of these arguments are false. 4AA1027–31. Fuller gave full and complete answers that she had no reservations about sitting in judgement, and told the prosecutor she thought that the criminal justice system was effective at holding offenders accountable. 4AA1027–31. The prosecution's recitation to the trial court was incorrect. Neither basis constituted a race neutral reason to strike Fuller.

Fuller's statement on her jury questionnaire that she had a relative who had been in jail is by far the most egregious of the pretextual reasons supplied by the State. Lockinger, who had a closer relative in federal prison for a violent felony, was permitted to remain on the jury. *See Miller-El,* 545 U.S. at 241. Finally, the State's claim that Fuller's body language showed "disdain" is unfounded. As in *Currie*, the State did not meaningfully examine Fuller. If the prosecutor had been in close proximity, as he claimed, and had sensed "disdain," he had every opportunity to investigate by inquiring as to Fuller's views. Without meaningful inquiry on the part of the State, this Court should find such reasoning pretextual. *See Currie*, 825 F.3d at 613; *Flowers v.*

Mississippi, 139 S. Ct. 2228, 2249 (2019) ("A 'State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.'" (quoting *Miller-El*, 545 U.S. at 246)).

Johnson need only show that race was a "substantial or motivating factor." *Currie* 825 F.3d at 606. Here, three of the five reasons given by the State were taken out of context and reveal no grounds for a strike whatsoever. The remaining two reasons fail the test articulated in *Miller-El* and *Currie* and are pretextual covers for racial discrimination.

b) Appellate and trial counsel were ineffective for failing to raise the *Batson* claim.

The constitutional right to effective assistance of counsel extends to appellate counsel. *Kirksey v. State*, 112 Nev. 980, 998 923 P.2d 1102, 1113–14 (1996). Appellate counsel performance is reviewed under the same standard as trial counsel, applying *Strickland*. To establish ineffective assistance of appellate counsel the defendant must show that a claim omitted by appellate counsel would have had a reasonable probability of success had it been raised. *Id* at 998, 923 P.2d at 1114. To

determine whether a claim would have had a reasonable probability of success had it been raised on appeal, the reviewing court must assess the merits of the claim. *Id*.

On direct appeal, appellate counsel failed to raise the *Batson* issue, despite the fact that trial counsel had preserved the issue for appeal. 4AA816–18. This was ineffective. First post-conviction counsel raised this omission, but this Court denied relief. *Johnson III*, 133 Nev. at 578, 402 P.3d at 1275. This Court held that while Johnson's post-conviction petition argued that the State's proffered reasons to justify the peremptory strike of a black juror were pretextual, those reasons were not put forth by trial counsel, making them unavailable to appellate counsel. *Id*. This deficit in the record created a failure to "traverse an ostensibly race neutral explanation for a peremptory challenge . . . stymies meaningful appellate review." *Id.* (quoting *Hawkins v. State* 127 Nev. 575, 578, 256 P.3d 965, 967 (2011)).[20]

Here, however, the record is sufficient to allow meaningful appellate review because it affords a comparison between the State's

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[20] Thus, this Court never reached the *Batson* claim on its merits.

proffered reasons and the jurors' responses. Moreover, if necessary, appellate counsel could have supplemented the record with the juror questionnaires. *See Phillips v. State*, 105 Nev. 631, 634, 782 P.2d 381, 383 (1989); *see also Jamerson v. Runnels*, 713 F.3d 1218, 1226 (9th Cir. 2013).

However, assuming this Court's prior ruling—that trial counsel "did not make" arguments against the prosecutor's "race-neutral reasons for the peremptory challenge"—then it follows that trial counsel were ineffective. *See Johnson III*, 133 Nev. at 578, 402 P.3d at 1275. If appellate counsel was precluded from raising this because trial counsel failed to make an adequate record, then trial counsel were ineffective; if trial counsel made an adequate record, then appellate counsel were ineffective. Either way: Johnson is entitled to relief on basis of ineffective counsel.

Additionally, the ineffective assistance of trial or appellate counsel establishes good cause and prejudice to excuse any of the procedural default that would have applied to Johnson's *Batson* claim during his initial state post-conviction proceedings. *See Hathaway*, 119 Nev. at 252, 71 P.3d at 506 ("A claim of ineffective assistance of counsel may

also excuse procedural default if counsel was so ineffective as to violate the Sixth Amendment.").[21]

c) Johnson's *Batson* claim is not procedurally defaulted

In Johnson's first post-conviction petition, counsel argued that Johnson's appellate counsel was ineffective. *See Johnson III*, 133 Nev. at 578, 402 P.3d at 1275. But post-conviction counsel failed to plead the *Batson* error as an independent claim. Rather, counsel couched the analysis within a claim of ineffective appellate counsel, a distinct claim. Counsel was deficient for not raising the *Batson* claim independently of the ineffective assistance of counsel claim. Had counsel raised the *Batson* claim independently of the ineffectiveness claim, he would have been able to overcome the procedural default under NRS 34.810 because appellate counsel was ineffective. Additionally, post-conviction counsel failed to raise the ineffective assistance of trial counsel for not making

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[21] *Hathaway* further holds that, "in order to constitute cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted." *Id.* As explained in the next section, the ineffective assistance of trial and appellate counsel are not procedurally defaulted because of the ineffective assistance of post-conviction counsel.

an adequate record of the *Batson* violation. Because he failed to properly develop the claim, post-conviction counsel was ineffective. Thus, procedural default should not bar this claim.

Finally, Johnson's *Batson* claim is not subject to procedural default because it has not been addressed on the merits. In *Boatwright v. Director, Dep't of Prisons*, 109 Nev. 318, 321, 849 P.2d 274, 275 (1993), this Court held that a successive petition is not barred when the substantive claim is not decided. In the instant case, this Court never decided the *Batson* claim on the merits, because it was couched within an ineffectiveness claim. The ineffectiveness claim was denied for purely legal reasons. *Johnson III*, 133 Nev. at 577–578, 402 P.3d at 1274–75. Therefore, the *Batson* claim has never been considered on the merits.

2. The jury venire violated the Sixth and Fourteenth Amendments because it was not a fair cross section of the community.

In Claim One(B) Johnson argues his venire did not represent a fair cross section. 24AA5792. This claim was presented in Johnson's first post-conviction petition. *Johnson III*, 133 Nev. at 577, 402 P.3d at 1274–75. Procedural default is addressed below. *See* § III.C below.

On June 6, 2000, defense counsel objected to the composition of the jury venire. 4AA819 Specifically, that in a venire of over eighty potential jurors, only three were African Americans. At the time, the population of Clark County was approximately 9.1% African American. *See generally Williams v. State*, 121 Nev. 934, 938 n.2, 125 P.3d 627, 630 n.2 (2005). Following argument on the *Batson* issue, trial counsel noted that, at most, there were only three minority jurors. 4AA818–19. That is: three African American jurors out of "over 80," or 3.75%. This is drastically lower than 9.1%. By comparison, in *Williams*, this Court addressed the proportion of African Americans in a jury venire of 40, finding that three to four would represent an approximation of the population in the jurisdiction, roughly 7.5% to 10%. *Williams*, 121 Nev. at 938 n.2, 125 P.3d at 630 n.2 (2005). In Johnson's case, a reasonable number would have been six to eight minority venire members.

The Sixth Amendment right to a jury trial necessarily requires that the jury be drawn from a fair cross section of the community. *Taylor v. Lousiana*, 419 U.S. 522, 530 (1975). Excluding identifiable groups from jury service undermines a fair and impartial jury trial. *Id.* at 530. To establish a violation of the fair cross section requirement, a

defendant must show (1) a "distinctive" group in the community; (2) the group's representation in the venire is not fair and reasonable compared to the community population; and (3) the underrepresentation is due to systematic exclusion. *Williams*, 121 Nev. at 940, 125 P.3d at 631 (citing *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). In *Williams*, this Court calculated the "absolute" and "comparative" disparity of jurors in the jury venire relative to the size of the group in the community. The absolute disparity calculates the difference between the percentage of African Americans in the community and the percentage in the jury venire. *Id.* The comparative disparity is the proportion of the difference relative to the percentage in the community. Comparative disparities greater than 50% indicate representation in the jury venire is neither fair nor reasonable. *Id.; Evans v. State*, 112 Nev. 1172, 1187, 926 P.2d 265, 275 (1996).

In the instant case there is no doubt that African Americans are a distinct group. Applying the calculus of *Williams* and *Evans*, the absolute disparity is 5.35%. The comparative disparity is 58.7%. The third prong under *Williams/Duren* remains undeveloped because no evidentiary hearing was granted. *See Valentine*, 135 Nev. at 465–66,

454 P.3d at 714–15. Errors based on jury composition are structural error not subject to harmless error analysis. *United States v. Rodriguez-Lara*, 421 F.3d 932, 940 (9th Cir. 2005) (citing *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986)). This Court should reverse for an evidentiary hearing as to the mechanisms of jury selection at the time in Clark County to determine whether systemic exclusion of African Americans existed.

3. Johnson was forced to use excess peremptory strikes because for cause challenges were improperly denied.

In Claim One(C) Johnson argues that the trial court improperly failed to grant for-cause challenges. 24AA5793. This claim was previously raised in Johnson's first post-conviction petition. *Johnson III*, 133 Nev. at 578, 402 P.3d at 1275. Procedure default is addressed below. § III.C.

During jury selection, Johnson was forced to exercise peremptory challenges against jurors who should have been removed for cause. Prospective Juror Shink espoused a view that prison populations could be reduced by randomly selecting inmates to be executed, even for relatively minor crimes such as "car theft." 3AA620–23. Prospective

Juror Fink stated that he had a strongly held belief that the death penalty should be applied in all premeditated murder cases, without regard for youth, upbringing, or any other kind of mitigating evidence. 3AA567–70. Prospective Juror Baker stated during voir dire that it was "not probable" that he would vote for a sentence of life with the possibility of parole, and that the only appropriate sentence for someone convicted of premeditated murder is death. 3AA582–86. In all three instances, Johnson moved to strike the jurors for cause; in all three instances the court denied the request, and Johnson ultimately used peremptory challenges. 3AA630–32; 706, 741. This was error.

These were biased jurors because they refused to impartially consider the four modes of punishment, and because they were unable to follow the trial court's instructions. *See Adams v. Texas*, 448 U.S. 38, 50 (1980); *see also Wainwright v. Witt*, 469 U.S. 412, 424(1985). The trial court's repeated denial of for cause challenges is structural error. Courts are obligated to ensure the rights of the defendant during jury selection. *Dennis v. United States*, 339 U.S. 162, 168 (1985). Whether the use of peremptory strikes to correct a denial of a for cause challenge is a matter of degree. In *United States v. Martinez-Salazar*, 528 U.S.

304, 305 (2000), the Supreme Court held that a single peremptory strike, out of eleven possible, to correct an erroneous denial of a for cause challenge did not violate the right to an impartial jury. However, in *Ross v. Oklahoma*, 487 U.S. 81, 91 (1988), four dissenting justices made clear that limits on the forced use of peremptories exist. *Id.* at 93 (Marshall, J., dissenting) ("[D]efense might have used the extra peremptory to remove another juror and because the loss of a peremptory might have affected the defense's strategic use of its remaining peremptories."). The situation described in the dissent in *Ross* exists here: Johnson had to use a larger number of peremptories to correct the trial court's error, and was deprived of their strategic use. This is structural error because it fundamentally skews the composition of the jury. This violation also compounds the cumulative error of an already flawed jury selection process.

B. Juror misconduct violated Johnson's constitutional rights.

In Claim Two, Johnson argues that jurors engaged in misconduct during the guilt. 24AA5803–11. This claim was previously raised in Johnson's first direct appeal. *Johnson I*, 118 Nev. at 796, 59 P.3d at

456. However, because of the seriousness of this error, as discussed below, this Court should reconsider its prior decision. *See* § III.C below.

During the pendency of Johnson's guilt phase trial, two jurors injected improper and harmful bias into the jury deliberations. Juror Kathleen Bruce stated that she had a pervasive fear of young black men and told trial counsel that she had viewed reports of the trial in the news. 10AA2449–53. Juror John Young, a Ph.D and professor at the University of Nevada, Las Vegas, and jury foreperson, substituted his commentary for testimonial evidence that was never adduced at trial. 44AA10916–18

Following deliberations, on June 16, 2000, Juror Bruce sent a note to the court explaining that on June 7, 2000, she had been frightened by an African American man while entering the courthouse from the parking garage. 10AA2449–53. When the elevator arrived, she noticed the African American man in the elevator, and became frightened because he had a bag that she thought may contain guns. It was not until another juror, Timothy Lockinger, arrived that she boarded the elevator. *Id.* Lockinger, Bruce, and the unidentified African American man rode the elevator together. When they arrived at the third floor,

Bruce disembarked, but thought it strange that Lockinger lingered in the elevator, allowing the doors to shut, then open again, before disembarking. *Id*.

The facts suggest bias in two ways. First, Juror Bruce sat in judgement of Johnson, a young, African American man, for the duration of his guilt-phase trial harboring feelings of fear and anxiety towards young, African American men. *See* 34AA8507–09. Second, according to other jurors, Bruce shared this information during jury deliberations. When Lockinger changed his vote, the jury began to believe that the African American man in the elevator had given Lockinger the bag, presumably with money inside, to change his vote from death to life in prison. 44AA10912–15; 46AA11372–75; 40AA9958–61.

In addition to sharing the elevator episode with the jury, Bruce was also consulting outside sources and the news media to inform herself about the case during deliberations. On June 16, 2000, Bruce approached public defender Kristina Wildeveld to ask if media reports about a "hold out" juror were about Bruce. 34AA8507–09.

The trial court, upon hearing Bruce's admission on June 16, 2000, took no action. This was error. Juror Bruce suffered bias, and allowing

her to sit on the jury violated Johnson's right to an impartial jury. *See United States v. Gonzalez*, 214 F.3d 1109, 1111–1112 (9th Cir. 2000) (citing instances where a juror's personal experience prevents them from being impartial as satisfying "actual bias").

But this was not the only instance of juror misconduct. As the jury was questioning how semen was found on Johnsons' jeans, and how it pertained to the timing of the killing, Young informed the jury, without further explanation, that Johnson would have been sexually aroused after the killing, and then returned home to have sex with his girlfriend. 44AA10916–18. This explanation was not based on evidence adduced at trial, and despite being entirely speculative tended to reinforce a theory of guilt. Indeed, because Young had a Ph.D. and was a professor, and the jury foreperson, his opinion likely carried great weight with the other jurors.

Errors based on juror bias are structural and subject to harmless error analysis. *Estrada v. Scribner*, 512 F.3d 1227, 1240 (9th Cir. 2008).

C. Because these errors individually or cumulatively are structural error, this Court should excuse any applicable procedural default.

Johnson asks this Court to hold that this Court's prior failure to remedy structural error was an impediment external to the defense that resulted in a manifest injustice, warranting excusing any procedural default. *See Doyle v. State*, No. 62807, 2015 WL 5604472, at *6 (Sept. 22, 2015) (Cherry, J., joined by Saitta, J., dissenting).[22] In *Doyle*, dissenting Justices Cherry and Saitta urged the Court to adopt a rule that this "Court's failure to remedy a structural error . . . was an impediment external to the defense that resulted in manifest injustice." *Id.*; *see also Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

This Court should adopt this rule here because jury errors go to the heart of a death penalty case, implicating not only guilt or innocence, but also whether a sentence of death is fairly imposed. As the *Doyle* dissent notes, "structural defect, such as the one which

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[22] Justice Cherry's dissenting opinion is not cited as authority, *see* NRAP 36(c)(3), but only to articulate Johnson's argument for overcoming procedural default.

occurred in this case, affects the framework within which the trial proceeds and, without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Doyle*, 2015 WL 5604472, at *7.

IV. The State violated its constitutional disclosure requirements.

Claim Seven alleges that the State failed to meet a number of disclosure requirements. *See* 24AA5906–10. This claim has not been raised before, but Johnson can overcome any procedural default both because the State's failure to meet its obligations establishes good cause and prejudice and because post-conviction counsel's failure to raise this claim was ineffective.

A. The State violated *Brady* and, in failing to meet disclosure requirements, prevented the defense from timely receiving forensic evidence (Claim Seven(A)–(D)).

In Claim Seven(A) Johnson argues Tod Armstrong received undisclosed benefits for his testimony, evidenced by the fact that he was never charged despite sources alleging his involvement. 24AA5906–07. Armstrong in fact testified without invoking his right to remain silent.

9AA7150–7269, 7285–7358; 5AA1050. Additionally, Ace Hart, Charla Severs, and Bryan Johnson all had been arrested for various crimes without being charged. 45AA11351–53; 41–42AA10344–66. However, the State did not disclose any evidence of benefits, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).[23]

In Claim Seven(B) Johnson argues the State failed to disclose exculpatory evidence related to the Clark County District Attorney investigator Peter Baldonado. 24AA5907–08. In September 1999, Baldonado interviewed key prosecution witness Charla Severs. 32AA7960. The transcription of this interview does not provide important details: there is no notation where the interview took place, how Baldonado came to be in contact with Severs, or even what year the interview took place. Indeed, the State filed a motion listing every interaction between Severs and law enforcement, but excluded this September 1999 interview. 32AA7985.

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[23] Johnson sought, and was denied, leave to conduct discovery on this claim. *See* 49AA12187–96.

While Johnson's case was pending, Baldonado was charged with raping a witness based on allegations that he told her he needed to visit her home; the witness was so uncomfortable she went to her bedroom to try to find a tape recorder, only to have Baldonado force himself on her. 35AA8689–90. More inappropriate behavior then came to light. *See* 35AA8694 ("Baldonado has admitted he solicited sex from as many as 30 women, according to police reports, and said he succeeded on fewer than 10 occasions."); *see also* 35AA8704 (witness in a different capital case stating that Baldonado propositioned her).

Here, too, there is an apparent allegation of sexual violence. Severs left a letter for the deputy district attorney, writing: "I did exactly what B-lodeuce told me even though it tore me apart . . . . Wish I would of never did that shit. I should of let him fuck me off!" 49AA12113.[24] And even setting aside Severs's letter, Baldonado's improprieties with witnesses was favorable evidence undermining the

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[24] Severs later testified that "B-lo" did not refer to an actual person. *See* 5AA1195. Nonetheless, Baldonado's known transgressions, unusual interview of Severs, and the similarity between "B-lodeuce" and Baldonado, support at least the need for discovery on these matters. *Cf. Wellons v. Hall*, 558 U.S. 220, 223–24 (2010).

integrity of the State's investigation and supporting a defense theory that Severs's statement was coerced.

The State suppressed this evidence by failing to disclose it to defense counsel. The Clark County District Attorney learned of this impropriety no later than 2001. 48AA11867.[25] Johnson's conviction was not yet final at that time, and Johnson's penalty retrial did not take place until 2005, when Severs's 2000 testimony was read into the record. *See* 17AA4131. The State emphasized the importance of Severs's testimony during closing argument. 7AA1718–19. Thus, Baldonado's conduct—which could have undermined Severs's testimony—was material. *See* NRS 51.069(1). And the failure to disclose this information violated *Brady*.

Claim Seven(C) and (D) allege that the State failed to provide discovery in a manner that would have allowed Johnson to submit the evidence for forensic examination by his experts. 24AA5908–10. Specifically, beginning in April 1999, defense counsel began attempting

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[25] Additionally, the district attorney knew of earlier workplace sexual harassment allegations. 48–49AA11868–12111.

to get materials to Forensic Analytical, but was delayed. 40–41AA10061–118. Then, in June 2000, just before trial, Forensic Analytical contacted the State to give them the blood spatter analysis; this analysis was not turned over to the defense until the trial had already started. *See* 41AA10122–36. Had the State met its disclosure obligations, the defense would have had its forensic evidence before trial.

B. Procedural default of Claim Seven should be excused because the State suppressed evidence and post-conviction counsel was ineffective in failing to raise this claim.

The State's violation of *Brady* establishes cause and prejudice to overcome any procedural default. *State v. Huebler*, 128 Nev. 192, 198, 275 P.3d 91, 95–96 (2012). "When a *Brady* claim is raised in an untimely or successive petition, the cause-and-prejudice showing can be met based on the second and third prongs required to establish a *Brady* violation." *Rippo*, 134 Nev. at 431, 423 P.3d at 1103. Thus, for the reasons described above, the State's failure to disclose witness benefits and Baldonado's conduct establish good cause; that the evidence is material establishes prejudice. Insofar as the evidentiary record is too

speculative to establish good cause and prejudice, the district court erred by denying both an evidentiary hearing and discovery on these claims. *See* § XI below.

Additionally, post-conviction counsel was deficient for failing to raise these claims. *See Crump*, 113 Nev. at 304–05, 934 P.2d at 254. Counsel had an obligation to "consider all legal claims potentially available" and to "thoroughly investigate the basis for each potential claim." Nev. Def. Standard 2-10; *see also* Nev. Def. Standard 2-19(c) (duty to litigate all issues), Nev. Def. Standard 2-19(e) (ongoing duty to "continue aggressive investigation of all aspects of the case"). Thus, Johnson establishes good cause. And, because Claim Seven is meritorious, the failure to raise this claim was prejudicial.

V. Post-conviction counsel failed to raise a number of meritorious claims.

Post-conviction counsel performed deficiently because he failed to satisfy his duty to raise all potentially meritorious claims on Johnson's behalf. *See Crump*, 113 Nev. at 304–05, 934 P.2d at 254. For capital cases, the standards emphasize counsel's obligation to raise "*all* legal claims potentially available," "thoroughly investigate the basis for each

potential claim" and, consider "the unique circumstances of death penalty law and practice" in determining which claims to raise, including weighing "the near certainty that all available avenues of post-conviction relief will be pursued." Nevada Def. Standard 2-10; 2003 ABA Guideline 10.8. "Because of the possibility that the client will be sentenced to death, counsel must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case." Commentary to 2003 ABA Guideline 10.8. For post-conviction counsel, this means "litigating "all issues, whether or not previously presented, that are arguably meritorious" Nev. Def. Standard 2-19(c); 2003 ABA Guideline 10.15.1(C). This is not only to ensure the Court consider meritorious claims, but to "preserve" issues "for subsequent review." Nev. Def. Standard 2-19(c); 2003 ABA Guideline 10.15.1(C); *see also* 2003 ABA Guidelines 10.8, 10.15.1. Thus, as the 2003 ABA Guidelines instruct, "'Winnowing' issues in a capital appeal can have fatal consequences," and, "it is of critical importance that counsel on direct appeal proceed, like all post-conviction counsel, in a manner that maximizes the client's ultimate chances of success." Commentary to 2003 ABA Guideline 10.15.1; *see also id.* ("As with

every other stage of capital proceedings, collateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues."). Here, post-conviction counsel had an obligation to raise the claims described in more detail below. Because counsel failed to raise them, counsel's performance was deficient.[26]

Post-conviction counsel's deficient performance was prejudicial because, had post-conviction counsel raised these claims, the result of Johnson's post-conviction proceedings would have been different as explained below.

A. Trial Counsel were ineffective for not challenging the State's theory Johnson killed the victims over a VCR (Claim Three(D)).

The State's theory of the offenses relied heavily on the alleged theft of a VCR from the crime scene, when in fact the VCR was still at the house the following day. Johnson in Claim Three(D) of his petition

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[26] The district court denied Johnson's request for an evidentiary hearing, precluding any opportunity for Johnson to present post-conviction counsel's testimony. *See* 49AA12231, 49AA12187; *see also* 49AA12352.

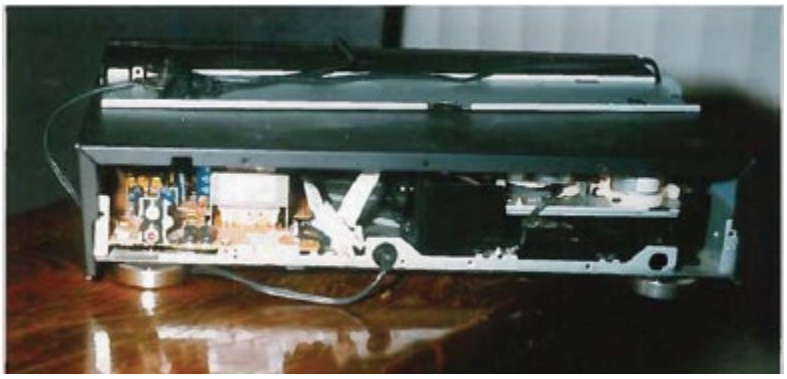
argued that defense counsel was ineffective for failing to object. 24AA5852–54. This claim has not been previously raised.

The State emphasized several times during the trial that Johnson had stolen a VCR from the victims' house. In his opening statement, the prosecutor first told the jury that the entertainment center at the crime scene was missing a VCR. 4AA848. The prosecutors then suggested several times over the opening statement and closing argument that Johnson took the VCR from the victims' house. 4AA856, 861–62, 864–65; 7AA1705, 1709, 1711–12, 1723, 1726, 1729, 1743–44, 8AA760. And the prosecutor said directly during closing argument that there was "[n]o VCR or Play Station at the murder scene." 8AA760; *see also id.* ("Is it reasonable to believe that the VCR and the Play Station that is now missing from the home is in the very home that Donte Johnson stays at?").

This emphasis served two important purposes. First, it aided the State in its attempt to portray Johnson as murdering four people for what amounted to trinkets. *See* 7AA1705 ("On August 14th, 1998, Matt, Peter, Tracey and Jeff died for nothing."); 7AA1705 ("[A] VCR was more valuable to Donte Johnson than Matt Mowen's life . . . ."). Moreover, the

prosecutor relied on the VCR to corroborate statements from other witnesses, thus supporting the most important evidence placing the gun in Johnson's hand. 7AA1723, 1726, 1729.

Defense counsel failed to counter the State's theory with evidence of a VCR at the crime scene when law enforcement personnel were collecting evidence *after* the homicides. The VCR is clearly visible in a crime scene photograph:



38AA9500–01. In addition, a crime-scene report notes a VCR at the scene on August 14, 1998. 38AA9491–99.

In addition to ignoring this evidence, defense counsel failed to object to misleading testimony about the VCR. The State presented evidence that a remote control in the possession of a victim's father operated the VCR found at the Everman residence. 7AA1575–77. It is likely that any remote from the same common brand of VCR would

operate the VCR taken to the crime lab. *See* 38AA9502–05 ("Most manufacturers use the same remote control codes for a product family, but may change or upgrade the codes for later products, usually to add support for additional features.").

Defense counsel—both trial and post-conviction—have a duty to investigate the State's evidence. *Jones*, 943 F.3d at 1229; *Hardy*, 849 F.3d at 818–24; *Thomas*, 789 F.3d at 768–71. And investigating the evidence here would not have been difficult—the VCR appears prominently in the crime scene photograph, and its existence is clearly noted in a police report. *See Rompilla*, 545 U.S. at 385–90 (criticizing trial counsel for failing to obtain readily available evidence); *see also Green v. Lee*, 964 F. Supp. 2d 237, 257 (E.D.N.Y. 2013) (collecting cases). Because the State made the purported VCR theft an important part of its theory of the case, counsel's failure to raise this claim prejudiced Johnson's defense.

B. Prosecutorial misconduct during the guilt phase (Claim Five)

Prosecutors may not engage in improper argument. *See Berger v. United States*, 295 U.S. 78, 85–86 (1935); *see also Valdez v. State*, 124

Nev. 1172, 1188–89, 196 P.3d 465, 476–77 (2008). Here the prosecutors' comments, singly and cumulatively, so infected the trial with unfairness that the resulting convictions are a denial of due process. 24AA5874–90.

Prosecutors appealed to the racial biases of jurors by displaying professional photos of the victims in contrast to mugshots of the codefendants, using the defendants' street names, and eliciting testimony that Johnson had braids and wore his pants baggy. *Compare* 38AA9381–84, *with* 38AA9385–88; *see also* 4AA878, 955–56; 5AA1122, 6AA1252, 1435–36; 5AA1020; 5AA1156–57, 6AA1253, 1291. At the State's prompting, the jury repeatedly heard racially coded language painting Johnson as a dangerous man fundamentally different from them. *See* Praatika Prasad, *Note, Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 Fordham L. Rev. 3091, 3107 (2018).

The State took inconsistent positions between Johnson and his codefendants: in Johnson's trial, the State argued Johnson was the leader; in Smith's trial, the State undercut this theory by saying Johnson was not the "scary leader" Smith made him out to be. 46AA11426–27.

The State also improperly vouched for witnesses Charla Severs and LaShawnya Wright, improperly questioned witnesses about perjury, and improperly vouched for the thoroughness of its own investigation. 4AA845, 847, 859, 871; 5AA1059, 1063–64, 1106–07, 1202–03, 1235–38, 1248; 7AA1720; 2AA437.

The State elicited irrelevant testimony related to biohazard stickers. 7AA1622. The State also overstated the strength of its evidence. *Compare* 4AA873–74, *with* § I, V.A above.

The State made improper remarks during closing arguments. The State made a "Golden Rule" argument, inviting jurors to put themselves in the shoes of the victim. *See* 7AA1713–14; *see also People v. Vance*, 116 Cal. Rptr. 3d 98, 102 (Cal. App. 2010). The State misstated the law by conflating first and second degree murder. See 7AA204, 8AA1761. The State argued facts not in evidence, speculating about whether Johnson let a victim have one last drag on a cigarette, trauma on Talamantez's head, and whether Johnson wore a mask. 7AA1725, 1722, 8AA1761. And the State improperly insulted Johnson by saying he had a "sick, sick mind." 8AA1763.

C. The trial court erred during the first trial (Claim Six (C), (F)–(H)).

In Claims Six (C), (F), (G), and (H), Johnson raised new arguments based on trial court errors during the 2000 trial. 24AA5900–05.

1. The trial court erred by allowing the State to conduct a direct examination months before trial (Claim Six(C)).

In September 1999, Severs was arrested in New York for solicitation of prostitution and sent to Nevada on a "material witness" warrant. 32–33AA7981–8004. The State then moved to conduct a videotaped deposition of Severs. 32–33AA7981–8004. Johnson opposed the State's motion, but the trial court allowed the deposition. 32–33AA7981–8004.

The deposition that took place was not an ordinary deposition. The trial court allowed the State to conduct a videotaped direct examination on Severs in open court, with media present. 33AA8051–160 (Under Seal); 37AA9211–14, 9221–24. Although Nevada law provides for depositions of witnesses who may be unable to attend trial, NRS

174.175, this provision does not allow videotaping that deposition or conducting the deposition in a public courtroom, with media present.[27]

By allowing the State to examine Severs in the courtroom, the trial court forced Johnson to reveal his trial strategy months before trial. In addition, media reported on Severs's testimony, tainting the jury pool. 37AA9211–14, 9221–24. And Severs was forced into testifying in exchange for her release from jail—where the State was holding her not because she had committed a crime, but simply because the State wanted her to testify against Johnson. This error rendered Johnson's trial fundamentally unfair. *See Romano v. Oklahoma*, 512 U.S. 1, 12 (1994).

2. The trial court erred by allowing speculative testimony from a State expert (Claim Six(F)).

Dr. Robert Bucklin, a retired forensic pathologist, testified about the autopsies he performed in this case. After testifying about a

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[27] A separate provision covering videotaped depositions does not apply here—it applies only for victims of sexual abuse or sex trafficking and witnesses under the age of 14 years. NRS 174.227.

laceration on Talamantez's forehead, the State elicited speculative testimony about the source of that laceration:

> Q Can you tell me, Doctor, what would cause a laceration such as this to the back of Peter Talamantez's head?
>
> A It's caused by blunt force trauma, some object struck his head, or his head struck some object.
>
> Q How much force would have to be used in order to cause an injury such as that?
>
> A This is fairly shallow, it went through the skin layers but no deeper than that, so it would not take a lot of force to do this.
>
> Q What—when we talk about force and being struck, would that—is that injury consistent with being struck with a hand?
>
> A No, it would have to be something which had a harder consistency than a hand.
>
> Q Can you give us an example of something with a harder—

6AA1406. Defense counsel objected, but the trial court overruled the objection, allowing Bucklin to speculate that Talamantez could have been hit with a gun. 6AA1406–07; *see also* 31AA7545–75 (testimony from different forensic pathologist that it was impossible to tell what caused Talamantez's injury).

Despite the speculative nature of this testimony, the State told the jurors during closing argument of the guilt phase, opening statement of the 2005 penalty retrial, and closing argument of the 2005 penalty retrial that Johnson had "pistol-whipped" Talamantez. 7AA1722; 15AA3689; 18AA4472; 22AA5304, 5368–69.

In addition, the trial court allowed Dr. Bucklin to testify over objection how close the gun was to the victims' heads. 6AA1385–86, 1392–94, 1398–99, 1406. This testimony conflicted with testimony given by a different forensic pathologist at Sikia Smith's trial, who opined that the gun was much farther away. 31AA7643–47, 7651–52, 7657–58.

These errors rendered Johnson's trial fundamentally unfair. *See Romano*, 512 U.S. at 12.

3. The trial court allowed the State to display unduly prejudicial photographs of the victims and defendants (Claim Six(G)).

Throughout the guilt phase of Johnson's trial, the State displayed to the jurors inflammatory images of the victims and defendants. 4AA840–41, 853, 887–88, 958–99; 5AA1125–27; *see* 6AA1336–37. On one board the State displayed professional photographs of the victims, with their ages and birthdates. 38AA9381–84. On a second board the

State displayed "mug shots" of the defendants taken immediately after their arrests, with aliases in place of their (similarly young) ages and birthdates. 38AA9385–88. Defense counsel objected, but the trial court overruled the objection. 4AA840–41.

In *Watters v. State*, this Court reversed a conviction after a PowerPoint slide during opening statements displayed the defendant's booking photo with the word "GUILTY" across it. 129 Nev. 886, 313 P.3d 243 (2013). This Court held the propriety of PowerPoint "as an advocate's tool . . . . depends on content and application . . . . [A] PowerPoint may not be used to make an argument visually that would be improper if made orally." *Id.* at 890, 313 P.3d at 247. Similarly, in *Sipsas v. State*, this Court recognized: "A photograph lends dimension to otherwise non-dimensional testimonial evidence. That an erroneous admission of a photograph would cause undue prejudice is certain. The extent of that prejudice is immeasurable." 102 Nev. 119, 124, n.6, 716 P.2d 231, 234 n.6 (1986).

The display was improper and intended only to inflame the jury. The trial court erred by overruling the objection, depriving Johnson of a fair trial. *See Romano*, 512 U.S. at 12.

4. The trial court inappropriately questioned jurors during deliberation (Claim Six(H)).

While deliberating during the 2000 penalty phase, the court received a juror question: "What do we do if someone's belief system has changed to where the death penalty is no longer an appropriate punishment under any circumstances?" 10AA2382. The judge responded, "I'm not permitted to answer your question." 10AA2382. Johnson objected both to the State's motion to seat an alternate juror and any questioning of the holdout juror, contending that the defense case had likely changed that juror's mind, and pointing out that jurors never have to impose the death penalty. 10AA2414–22. The trial court overruled Johnson's objection, learning from the foreperson the identity of the holdout, Timothy Lockinger, then questioning Lockinger about his thoughts on the death penalty. 10AA2414–22. After the jury resumed deliberating, only one hour passed before the jurors reported being hopelessly deadlocked, suggesting that any attempts at reaching an agreement ceased because of the trial court's interferences. 10AA2449, 2467–69. This process prevented the jury from properly

considering a sentence less than death and rendered Johnson's trial fundamentally unfair. *See Romano*, 512 U.S. at 12.

There was nothing contained in the model *Allen* charge approved by this Court that would have sanctioned the judge's inquiry into the motivations of a holdout juror. *See Wilkins v. State*, 96 Nev. 367, 373 n.2, 609 P.2d 309, 313 n.2 (1980). The approved *Wilkins/Allen* instruction addresses the jury as a whole; it does not permit the targeting or admonishment of individual jurors. *See Staude v. State*, 112 Nev. 1, 5–6, 908 P.2d 1373, 1376 (1996), *holding modified on other grounds by Richmond v. State*, 118 Nev. 924, 59 P.3d 1249 (2002). There was no legitimate justification for the trial court's inquiry, and the questioning of the holdout juror was prejudicial to Johnson. Unlike a guilty verdict, the selection of a penalty verdict is not necessarily based on the finding or absence of any particular facts, but it is rather a moral decision based on the circumstances of the offense and the character of the defendant. Here, one juror held out for several hours because he believed that a death sentence was inappropriate in Johnson's case. Instead of focusing the inquiry on the jury's ability to continue deliberations, the trial judge directly inquired into the holdout juror's

deliberations. The trial court failed to make any attempt to minimize prejudice by informing the jurors that they should not sacrifice an honestly held belief to obtain a verdict. *See Lowenfield v. Phelps*, 484 U.S. 231, 234–35 (1988) (noting portion of charge minimizing prejudice).

In addition, the trial judge's inquiry of the holdout juror was coercive in violation of Johnson's right to a fair trial and impartial jury. This was not a situation where the trial judge made legitimate inquiries of the jurors regarding the utility of continued deliberations. Nor did the judge provide an *Allen* charge, urging continued deliberations. No legitimate state interest was advanced by the trial court's questioning. *Cf. Lowenfield*, 484 U.S. at 240; *Brasfield v. United States*, 272 U.S. 448, 450 (1926); *Burton v. United States*, 196 U.S. 283, 307–08 (1905).

This Court previously addressed this issue in *Eden v. State*, 109 Nev. 929, 930, 860 P.2d 169, 170 (1993). In that case, the trial judge intervened in jury deliberations to ascertain whether a dissenting juror had viewed and considered all the evidence. *Id.* Replying to the judge's inquiry that he had, the juror was sent back to deliberate and returned a guilty verdict shortly thereafter. *Id.* This Court held that as a matter of degree the trial judge's interference was not error. *Id.* Justices Young

and Rose dissented, noting that calling the holdout juror to a face-to-face meeting with the trial judge was inherently coercive. *Id*. at 934–37, 860 P.2d at 172–94.

The facts here are strikingly similar. A lone juror, Lockinger, was summoned by the trial judge and asked to explain his change in heart on returning a verdict of death. 10AA2383, 2397–414, 2426–41. Because of the inherently coercive environment brought about by the judge's interference, the hung jury cannot be said to have rested purely with the jury's fact finding, and suggests that Johnson may have been acquitted but for the judge's interference. This Court should adopt the minority view in *Eden*, recognizing judicial interference as inherently coercive, and hold such interference violates the state and federal constitutions.

D. The State obtained convictions in violation of the Double Jeopardy Clause (Claim Eight).

In Claim Eight, Johnson made two arguments based on the Double Jeopardy Clause, which he had not previously raised. 24AA5911–16. First, Johnson argued that, because underlying felonies are the "same offense" as felony murder, some of his convictions are invalid. 24AA5913–14; *see Whalen v. United States*, 445 U.S. 684, 693–

94 (1980); *Harris v. Oklahoma*, 433 U.S. 682, 682–83 (1977). As Johnson acknowledged in his petition, this Court rejected this argument in *Talancon v. State*, 102 Nev. 294, 721 P.2d 764 (1986). 24AA5914. And this Court relied on *Talancon* to reject a similar argument in *Chappell*, 501 P.3d at 959–60. But *Talancon* was wrongly decided. This Court in *Talancon* assumed that the Nevada Legislature had intended cumulative punishments for robbery and felony murder because the statutes are aimed at "two separate evils." *Id.* at 768. But the same could be said for any two statutory provisions. That is why the High Court focuses the inquiry on the elements of the offenses absent "a clear indication" that the legislature intended cumulative punishment. *Whalen*, 445 U.S. at 692. There is no clear indication that the Nevada Legislature intended cumulative punishments for predicate felonies and felony murders.

Johnson also argued in Claim Eight that substantive conspiracy is a lesser-included offense within the conspiracy theory of first-degree murder, and, as a result, the State cannot subject Johnson to punishment for both. 24AA5914. This is a separate (but similar) argument to the one above. *See Rutledge v. United States*, 517 U.S. 292,

300 (1996). Unlike the argument concerning felony murder, this Court has never addressed this argument. And the State waived any challenge to this argument by not addressing it in its response to Johnson's petition. *See generally* 47AA11629–704; *cf. Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011); *Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 198–99 (2005).

E. The trial court admitted evidence in violation of the Confrontation Clause (Claim Nine).

In Claim Nine Johnson challenged his convictions and sentence as based on testimonial evidence in violation of the Confrontation Clause. 24AA5917–23.

1. Guilt phase

Cellmark Diagnostic performed DNA testing on a sample from a cigarette butt. *See* 32AA7825–35; 2AA252–54; 33AA8161–65 The State relied heavily on Cellmark Diagnostic's testing. 8AA1759–60, 63. But the State did not call anyone from Cellmark Diagnostic to testify about its report or methods. The State instead called Thomas Wahl of the Metro Police Department Crime Lab. 7AA1638–45, 48. This violated the

Confrontation Clause because Johnson has a right to cross-examine the person or persons who tested and analyzed the DNA. *See Crawford v. Washington*, 541 U.S. 36, 53–56 (2004). To the extent that a plurality of the Supreme Court held differently in *Williams v. Illinois*, 567 U.S. 50, 56 (2012), the decision was wrongly decided and does not apply to Johnson. *See Stuart v. Alabama*, 139 S. Ct. 36, 36–37 (2018) (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of cert.).

2. Penalty phase

During the eligibility stage of Johnson's 2005 penalty retrial, the state introduced impermissible hearsay through Detective Thomas Thowsen, who summarized the guilt-phase testimony of ten witnesses. 16AA3879–3974. Thowsen's summaries included several prejudicial hearsay statements. *Id.* In addition, an employee from the Clark County District Attorney's office read Charla Severs's testimony into the record. 17AA4010–4101. And the trial court allowed Dr. Berch Henry to testify in place of Thomas Wahl—despite the fact that Dr. Henry had no involvement in the testing done in this case. 17AA4160–79. Dr. Henry had a doctorate in molecular biology, while Wahl had a bachelor's degree. 7AA1604–05. Dr. Henry also testified about the

analysis conducted by Cellmark, constituting hearsay-within-hearsay, because Wahl had testified in place of Cellmark as to Cellmark's findings in the guilt phase trial.

Then, during the selection stage of the penalty re-trial, the court also allowed the State to introduce impermissible hearsay in the form of two probation reports from the juvenile justice system in California and Disciplinary reports from the Clark County Detention Center. 38AA9389–9403; 38AA9427–90.[28] The court also allowed the State's witness James Buczek to summarize guilt-phase testimony from Robert Honea, who had pulled over Johnson and Young on August 17, 1998. 19AA4624–31. Though this Court has held that the right of confrontation does not apply during the penalty phase, Johnson urges this Court to reconsider this precedent. *See Johnson II*, 122 Nev. at 1353, 148 P.3d at 773 (citing *Summers v. State*, 122 Nev. 1326, 148 P.3d 778 (2006)).

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[28] Johnson previously challenged the CCDC records on confrontation grounds, but this Court denied relief. *See Johnson II*, 122 Nev. at 1352–53, 148 P.3d at 773.

This testimony, singly and cumulatively, violated Johnson's right to confrontation. See *Crawford*, 541 U.S. at 53–56.

F. Nonunanimous jury verdicts violated Johnson's constitutional rights (Claim Eleven).

Claim Eleven contends that Johnson's convictions are unconstitutional because the jury was not required to be unanimous as to a specific theory of liability. 24–25AA5752–6129. Due process requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime . . . charged." *In re Winship*, 397 U.S. at 365. And there is a point where the means of committing an offense become so different "that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated as separate offenses." *See Schad v. Arizona*, 501 U.S. 624, 633 (1991). Here, the State presented multiple theories of liability: willful, deliberate, and premeditated murder; felony-murder based on kidnapping; and felony-murder based on robbery. 30AA7270–84. The State also argued principal, aiding and abetting, and co-conspirator liability. Each of these theories require different *mens rea*, and differing levels of involvement, and thus these

offenses present separate "moral and practical" implications. *Schad*, 501 U.S. at 637.[29] This error was exacerbated by the errors in the jury instructions. *See* § II above.

This error affected the guilt and penalty phases—the aiding and abetting, co-conspirator, and felony-murder theories all required additional elements of proof to make Johnson eligible for death. *See Tison*, 481 U.S. at 151; *Enmund v. Florida*, 458 U.S. 782, 797 (1982); *see also Hurst v. Florida*, 577 U.S. 92, 97 (2016) (holding that factors making defendant eligible for death penalty must be proven to a jury beyond a reasonable doubt). *Schad* was decided before *Apprendi v. New Jersey* held that proof beyond a reasonable doubt was required for each fact that increases the crime and before the Court held that unanimity is required even of state convictions. *See Apprendi*, 530 U.S. 466, 490 (2000); *see also Edwards v. Vannoy*, 141 S. Ct. 1547, 1556 n.4 (2021) (referencing *Schad*).

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[29] The non-unanimity was especially an issue for Johnson's conspiracy convictions; conspiracy has different punishments depending on the aims of the conspiracy, but the jury's general verdict did not distinguish between these offenses. *Compare* NRS 199.480(1)(a), *with* NRS 199.480(1)(b).

This error was structural because the State was not required to prove each element of first-degree murder beyond a reasonable doubt. Alternatively, the error was not harmless beyond a reasonable doubt because there is no assurance the jury found each element of the offense beyond a reasonable doubt; this is especially so because of the errors in the jury instructions. Trial and appellate counsel were ineffective for failing to raise this issue.

G. The State obtained death verdicts in violation of the Double Jeopardy and Due Process Clauses (Claim Thirteen).

In Claim Thirteen Johnson argued the State violated the double jeopardy clause by retrying him after the first jury hung. 24AA5940–44.

1. Double Jeopardy Clause

The Double Jeopardy clause of the Fifth Amendment prohibits a state from subjecting a defendant to prosecution for the same crime twice. In *Sattazhan v. Pennsylvania*, the Supreme Court applied this rule to bar retrial after "acquittal" of the death penalty during a sentencing hearing. 537 U.S. 101, 106 (2003). Although the Supreme Court explained a hung jury does not ordinarily bar retrial, *id*. at 109, the Court did not consider a hung jury caused by trial court interference

in juror deliberations. *See Lowenfield*, 484 U.S. at 241. Here, because of the inherently coercive questioning of a deliberating juror, retrying Johnson's penalty phase violated the Double Jeopardy Clause.

2. Due Process Clause

In *Green v. United States*, 355 U.S. 184, 187–88 (1957), the Supreme Court held, "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense . . . ." Johnson was subjected to exactly this ordeal. Following his first penalty phase trial, he was sentenced by a three-judge panel, a procedure now deemed unconstitutional. *Johnson I*, 118 Nev. at 803, 59 P.3d at 461. Then, he was tried for a third time in 2005, allowing the State years to marshal additional evidence, including an additional casualty and evidence of Johnson's infractions while incarcerated.

Repeated attempts to sentence Johnson to death violate principles of fair play essential to due process. *See Betterman v. Montana*, 578 U.S. 437, 441 (2016) (describing Due Process Clause "as a safeguard against fundamentally unfair prosecutorial conduct"); *Doggett v. United States*, 505 U.S. 647, 666 (1992) (Thomas, J., dissenting) ("[T]he Due

Process Clause always protects defendants against fundamentally unfair treatment by the government in criminal proceedings."). Successive prosecutions arising out of the same nucleus of fact or transaction are inherently violative of due process. *See Abbate v. United States,* 359 U.S. 187, 196–201 (1959) (Brennan, J., concurring) (characterizing as "disturbing" government insistence that it be allowed to bring successive prosecutions under different statutes for same set of facts).

H. Unconstitutional penalty-phase jury instructions (Claim Fifteen)

In Claim Fifteen, Johnson challenged four of the jury instructions given during the 2005 penalty phase. 24AA5994–99. With one exception noted below, this claim was not raised during prior proceedings.

1. The trial court failed to instruct the penalty phase jury that mitigating circumstances could be found by a single juror (Claim Fifteen(A)).

At sentencing, the trial court instructed the jurors that they "must find the existence of each aggravating circumstance, if any, unanimously and beyond a reasonable doubt." 35AA8622–39. But the court failed to instruct the jurors that a single member of the jury could

find a mitigating circumstance. This omission violated *Lockett v. Ohio*, where the Supreme Court held that a capital defendant is entitled to individualized consideration of his character and record, with the jury permitted to consider any mitigating circumstances proposed by the defense. 438 U.S. 586, 604–05 (1978). This claim was previously raised, *Johnson III*, 133 Nev. at 585–86, 402 P.3d at 1280, but should be considered in the context of other instructional errors.

2. The weighing instruction failed to properly address the situation in which the aggravating and mitigating circumstances are equally weighted (Claim Fifteen(B)).

Three circumstances are possible during a penalty proceeding under Nevada law: the aggravating circumstances outweigh the mitigating circumstances; the mitigating circumstances outweigh the aggravating circumstances; and the aggravating and mitigating circumstances are equally weighted. The instruction to the jury concerning the first two circumstances is clear, but the instructions omit any mention of the third option. *See* 35AA8628, 35AA8622–39. Likewise, the special verdict form allowed only the first two choices, excluding the "equally weighted" possibility. 38AA9533–44.

By excluding the option where the mitigating and aggravating circumstances are in equipoise, the jury instructions and special verdict forms misdirected the jury to believe Johnson was eligible for death unless the mitigating circumstances outweighed the aggravating factors. This violated *Lockett* by not requiring the jury to give sufficient weight to the mitigating circumstances. *But see Kansas v. Marsh*, 548 U.S. 163, 171 (2006); *Ybarra v. State*, 100 Nev. 167, 173–74, 679 P.2d 797, 801 (1984).

3. The sentencing court gave a defective reasonable doubt instruction (Claim Fifteen(C)).

During the penalty phase, the court used the same reasonable doubt instruction as the guilt phase. For all the same reasons indicated above, this was unconstitutional. *See* § II.B.1 above.

4. The sentencing court's "equal and exact" justice instruction impermissibly minimized the State's burden of proof (Claim Fifteen(D)).

The sentencing court provided an instruction which implied a lower standard of proof than the constitution requires, by instructing the jurors to do "equal and exact justice." 35AA8622–39. The phrase

"equal and exact" implies that both the State and the defendant are similarly situated, when in fact a far heavier burden rests on the State.

I. Prosecutorial misconduct during the 2005 penalty phase (Claim Sixteen)

In Claim Sixteen Johnson argued that the State engaged in pervasive misconduct during the penalty phase. 24AA6000–25AA6028. Portions of this claim, discussed here, have not been previously raised. Prosecutors engaged in misconduct in the following ways:

During opening argument of the eligibility stage, the State argued Johnson was already found to be the triggerman. 16AA3826–28. But the first jury returned only a general verdict. 34AA8497–503; 7AA1714–15. And all the witnesses that testified that Johnson was the shooter were discredited at trial. *See* 24–25AA6000–10.

The trial court ruled inadmissible evidence that Johnson was a member of the "Six Deuce Brims." 12AA2921–36; 34AA8516; 34AA8525. Nonetheless, the State persisted in introducing probation and jail reports that noted gang affiliation. 38AA9389–403; 38AA9427–90.

Per the trial court's order, the 2005 penalty phase was bifurcated into an eligibility phase and a selection stage. 12AA2995. During the

eligibility stage the State was restricted to presenting evidence of the sole aggravator, NRS 200.033(12), which could have been accomplished solely though the 2000 guilt verdicts. However, the state used the eligibility phase to repeatedly prejudice Johnson by telling the jury about Johnson's purported drug dealing, crime scene evidence, testimony from Johnson's ex-girlfriend, guns not related to the homicide, and autopsy reports. 16AA3823; 16AA3865–77, 3879–974; 16AA3983–84; 17AA4008–101; 17AA414–53; 17AA4159–218; 18AA4399–421; 18AA4460–74.

The State displayed inflammatory images of the three defendants, taken immediately after their arrest, which included the defendants' aliases: Sikia Smith, a/k/a "Tiny Bug"; Donte Johnson, a/k/a "John White/Deco"; and Terrel Young, a/k/a "Red". The State continually referred to the defendants by these aliases. 16AA3911, 26, 34, 39, 52, 59; 19AA4570; 22AA5286.

During closing arguments of the eligibility phase, the prosecution repeatedly trivialized valid mitigation evidence, and dismissed the concept of mitigation. 15AA3699–700("At some point, we're all adults, and we make choices, so how much weight do you give his difficult

upbringing?. . .How much mitigation does he get for his upbringing?") This is not only misconduct under *Berger*, but also misleads the jury's reasoning as to the role of mitigation by framing it as an excuse and minimizing valid mitigation evidence. The State misdirected the jury by arguing that they should dismiss mitigation evidence not directly related to the crime. 16AA3756, 3760. This misdirected the jury and misstated the law under *Lockett*, 438 U.S. 586.

During cross-examination of Johnson's brother-in-law, Moises Zamora, the State asked Zamora whether he had any misdemeanor convictions. 19AA4732. Misdemeanor convictions are not a proper source of impeachment material, and the prosecutor's strategy was an attempt to prejudice Johnson. Appellate counsel performed ineffectively for failing to raise this claim on direct appeal.

During the eligibility stage and selection stage closing arguments the State committed multiple instances of misconduct. *See* 25AA6020–28. While the State made numerous arguments not supported by the evidence and attempted to inflame the passions of the jury, the most notable is that the State again argued that Johnson was the actual shooter. 18AA4462–63. "The evidence is "unequivocal that . . . Johnson,

that fired the fatal rounds into each of the of the victim's heads."); *see also* 18AA4470. This was pure speculation in violation of *Berger* and coupled with numerous other misleading statements was highly prejudicial.

The State's misconduct during the trial "so infected" the proceedings "with unfairness" as to make the resulting conviction a denial of due process. *See Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *see also United States v. Leon-Reyes*, 177 F.3d 816, 822 (9th Cir. 1999) (noting prosecutors may not inflame passions and prejudices of jury); *Lisle v. State*, 113 Nev. 540, 552, 937 P.2d 473, 480 (1997); *Boyde v. California*, 494 U.S. 370, 384 (1990) (misconduct to misstate law); *Earl v. State*, 111 Nev. 1304, 1311, 904 P.2d 1029, 1033 (1995) (misconduct to belittle defendant). Individually and cumulatively the State's misconduct violated *Berger*, 295 U.S. 78 at 85–86.

J. Juror misconduct and bias during the penalty phase (Claim Eighteen)

Claim Eighteen alleges juror misconduct and bias because one of the penalty-phase jurors knew that Johnson had been previously sentenced to death and told at least another member of the venire about

the prior sentence. 25AA6045–49. This juror also told other jurors she was taking notes so that she could write a book about Johnson's case. 46AA11576–77. Although trial counsel briefed this issue, the court had already denied Johnson's motion for a new trial and never ruled on the written pleadings. *See* 46AA11578–79; 9AA2138–42. And this issue has not been presented to this Court.

On April 19, 2005, jury selection began for the 2005 penalty phase. Two days later, Prospective Juror Lawrence Epter brought to the court's attention an account regarding another prospective juror—Jami Carpenter. 14AA3284–86. According to Epter, while sitting outside of the courtroom, Carpenter revealed to several other jurors that she learned on the news that morning Johnson had already received a death sentence. 14AA3284–86. Epter was clear that there were at least three other prospective jurors present for this conversation. 14AA3284–86. One of those prospective jurors was Kitty Vu.

While being questioned about the incident, Vu gave very specific details about Johnson's prior death sentence. 15AA3538. Specifically, Vu believed that Johnson's prior sentence had been "decided by the Supreme Court in Nevada, however, it should have been decided by a

jury." 15AA3538. This was something Epter also attributed to Carpenter. 14AA3285–86. Two other prospective jurors, Aaron Stam and David Shirbroun, confirmed the conversation took place. 14AA3494, 15AA3534.

When confronted by the trial court, Carpenter denied that she provided this information to other members of the jury pool. 15AA3637–38. In fact, Carpenter denied any knowledge about whether there was even a prior death sentence. 15AA3637–38. The only thing she would acknowledge was that she heard on the news that a three-judge panel had previously heard Johnson's case. 15AA3637–38. In light of several statements to the contrary, the logical inference was that Carpenter was not being truthful. By lying during voir dire, Carpenter ensured her place on Johnson's jury. Indeed, she became the foreperson.[30]

Carpenter's motive for lying became apparent after the conclusion of the penalty hearing. On May 11, 2005, Johnson's defense counsel met with Teresa Knight, one of the alternate jurors. 46AA11576–77. Knight

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[30] Trial counsel were ineffective for not challenging Carpenter for cause, and the trial court erred by not sua sponte dismissing Carpenter for cause.

informed defense counsel that, throughout the 2005 penalty phase, Carpenter repeatedly stated that she was writing a book based on the information she learned from Johnson's case. 46AA11576–77. Knight also stated that, before deliberations, Carpenter had expressed discomfort because she already had her mind made up. 46AA11576–77. On May 24, 2005, a defense investigator met with another alternate juror, Wilfredo Mercado. Mercado confirmed that Carpenter had said on a daily basis that different information brought up during the penalty phase would be used in her book. 46AA11578–79.

Because of these allegations against Carpenter, the court held an evidentiary hearing. 22AA5396. At the hearing, Carpenter, who was accompanied by counsel, again denied having any knowledge of Johnson's prior death sentence. 22AA5406–07. Carpenter additionally denied that she was writing a book about Johnson's case. 22AA5414. Following the evidentiary hearing, defense counsel filed a post hearing brief. There is no record of the trial court addressing this brief. 46AA11576–77.

Supreme Court precedent is clear: An external influence affecting a juror's deliberations violates a defendant's right to a fair and

impartial jury. *See, e.g., Turner v. Louisiana,* 379 U.S. 466, 472–73 (1965) "An extraneous influence includes . . . consideration by jurors of extrinsic evidence." *Meyer v. State,* 119 Nev. 554, 562, 80 P.3d 447, 454 (2003). And the Supreme Court has held "information is deemed 'extraneous' if it derives from a source 'external' to the jury. 'External' matters include . . . information related specifically to the case the jurors are meant to decide." *Warger v. Shauers*, 574 U.S. 40, 51 (2014) (cleaned up). This Court similarly has held a jury's exposure to extraneous information requires reversal when "there is a reasonable probability that the information affected the verdict." *Meyer*, 119 Nev. at 565, 80 P.3d at 456. And, in *Tinsley v. Borg*, the Ninth Circuit recognized courts have found implied bias when jurors are "apprised of such prejudicial information about the defendant" it is "highly unlikely [they could] exercise independent judgment." 895 F.2d 520, 528 (9th Cir. 1990).

The information about Johnson's prior death sentences is of such a prejudicial nature. The Fourth Circuit has observed, "we are hard pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime

charged." *Arthur v. Bordenkircher,* 715 F.2d 118, 119 (4th Cir. 1983). And in *United States v. Keating*, the Ninth Circuit remanded for a new trial after finding an unacceptably high probability the verdict was based in part on extrinsic evidence that he had been previously convicted in state court of offenses stemming from the same conduct. 147 F.3d 895, 903 (9th Cir. 1988).

In addition, Carpenter was actually biased because she planned to write a book on Johnson's trial. Actual bias stems from a juror's preset disposition not to decide an issue impartially. *Fields v. Brown*, 503 F.3d 755, 765 (9th Cir. 2007). "Although [actual b]ias can be revealed by a juror's express admission of that fact, . . . more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence." The circumstantial evidence here shows Carpenter—the foreperson of the juror—had an incentive to vote in a way conducive to selling books, not coming to a just verdict. Alternatively, the evidence is sufficient to establish implied bias—"the relationship between [Carpenter] and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." *United*

States v. Mitchell, 568 F.3d 1147, 1151 (9th Cir. 2009); *see Sayedzada v. State*, 134 Nev. 283, 288–89, 419 P.3d 184, 191–92 (Nev. Ct. App. 2018). And because Carpenter denied these facts, the trial court's questioning did not cure her bias.

Errors based on juror bias are structural and not subject to harmless error analysis. *See Estrada,* 512 F.3d at 1240 (citing *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998)). Both direct appeal counsel and post-conviction counsel were ineffective in failing to raise this claim. Thus, this Court should consider this claim and grant relief.

K. No jury has found major participation by Johnson (Claim Nineteen).

Claim Nineteen challenges Johnson's death sentences as unconstitutional because the penalty proceedings did not conform to the requirements of *Enmund*, 458 U.S. at 797, and *Tison*, 481 U.S. 137. Specifically, no jury—neither Johnson's guilt nor penalty jury—found the requisite facts under *Enmund* and *Tison*. That is, no jury determined that Johnson (1) actually killed, attempted to kill, or intended to kill the victims; or (2) was a major participant in a violent felony and displayed a reckless indifference to human life. *See Enmund*,

458 U.S. at 797; *Tison*, 481 U.S. at 158. This error was structural, and Johnson's sentence must be reversed.[31]

However, even applying harmless error review, this error cannot be harmless. Johnson was charged under both aiding and abetting and coconspirator theories of liability, 30AA7270–84, distinguishing his case from *Browning v. State*, 124 Nev. 517, 532–33, 188 P.3d 60, 71 (2008). Additionally, the State charged multiple felony-murder theories. 30AA7270–84. The first jury explicitly found, as a mitigating circumstance, that there was no eyewitness to the identity of the shooter. 34AA8504–06. Testimony that Johnson admitted shooting the victims is unreliable. *See* §§ I.B.1, I.D above. The physical evidence does not point to Johnson as the triggerman. *See* § I.B.2 above; *see also* 42AA10463–72; 42AA10367–68. And errors in the guilt-phase

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[31] This Court has previously held, relying on Supreme Court precedent, that "[t]he *Enmund/Tison* determination can be made by a jury, trial judge, or an appellate judge." *Evans*, 112 Nev. at 1197, 926 P.2d at 281 (citing *Cabana v. Bullock*, 474 U.S. 376, 386–87 (1986)). However, the relevant line of precedent underlying this decision has been overturned: *Cabana* relied on *Spaziano v. Florida*, 468 U.S. 447 (1984), *Cabana*, 474 U.S. at 385, which the Supreme Court overturned in *Hurst*, 577 U.S. at 101–02.

instructions make it impossible to conclude that the jury found Johnson was the triggerman in these homicides. *See* § II above. Most notably, the premeditation instruction allowed the jury to conclude that felony-murder was sufficient to establish the *mens rea* for willful, premeditated, and deliberate murder. *See* 34AA8483.

L. The State improperly relied on juvenile conduct (Claim Twenty).

In Claim Twenty, Johnson argued that the State's reliance on his juvenile misdeeds during the penalty phase violated the Eighth Amendment. 25AA6061–68. Although Johnson raised a similar claim in his direct appeal from the third penalty hearing, the claims are fundamentally different. On direct appeal, Johnson argued that the trial court improperly allowed evidence of juvenile convictions that was more prejudicial than probative. *Johnson II*, 122 Nev. at 1353, 148 P.3d at 773. Thus, law of the case does not bar this Court's consideration of Claim Twenty. The State did not address the merits of this claim below.

After this Court granted Johnson a new penalty hearing, the State noted its intention to rely on Johnson's juvenile records in seeking death. 34AA8519; 34–35AA8593–621. Johnson objected, and the court

excluded the records, reasoning that they were more prejudicial than probative. 34AA8528–92; 18AA4493–94. But the court six days later changed course and allowed the evidence to be admitted. 12AA2916.

The State introduced this evidence of Johnson's juvenile offenses and misconduct during the selection stage of the 2005 penalty phase. The State started its statement by telling the jurors that, "[t]o understand Donte Johnson, you have to go back to 1992, when he was 14 years old" because that was "when his criminal conduct began." 18AA4481. Specifically, the State said, Johnson committed an armed robbery at the age of 14, was placed in a "camp," then returned home, "defied his grandparents," and violated probation. 18AA4481. The next year, a 15-year-old Johnson possessed a handgun at school and later took a vehicle without the owner's consent. 18AA4481. When he was 16 years old, Johnson was convicted of a bank robbery and was sent to a juvenile facility. 18AA4481–83. The State then introduced testimony from an officer who had investigated the bank robbery in Los Angeles, a bank teller who had been working during that robbery, and a parole officer who testified about Johnson's conviction and placement in the California Youth Authority. 19AA4515–41; 19AA4573–89.

The State also introduced two reports from probation officers that documented juvenile misconduct. 19AA4575–78; *see* 38AA9389–403. The first report noted that Johnson would "not attend school," was "difficult" and "uncooperative" at home, and was involved with a gang. 38AA9398–99. The second report noted that Johnson drank alcohol occasionally, smoked marijuana, was not attending school, did not work, was involved in a gang, and was "difficult and uncooperative at home." 38AA9411–17. That same report stated that Johnson and his codefendants "were joking and playing around" during juvenile proceedings. 38AA9416.

During closing argument in the selection phase, the State relied heavily on the evidence of Johnson's juvenile conduct, insisting to the jury that Johnson's teenage acts "tell you volumes about who this gentleman is." 22AA5286–93. And the State again noted that Johnson and his codefendants "were joking and playing around" during juvenile proceedings and repeated a statement Johnson's grandmother had made when Johnson was 16 years old. 22AA5291–93. The State ended its rebuttal argument by imploring the jurors not to "forget about the bank robbery at age 16." 22AA5369.

In *Roper v. Simmons*, the Supreme Court ruled that a defendant who is under the age of 18 when a capital offense is committed is categorically ineligible for the death penalty. 543 U.S. 551 (2005). The Court rested this conclusion on scientific evidence showing that juveniles are not as morally culpable as adults for criminal activity and "render[s] suspect any conclusion that a juvenile falls among the worst offenders." *Id.* at 569–73.

After recognizing the diminished culpability of juveniles, the Supreme Court explained that the penological justifications for the death penalty (retribution and deterrence) were not served by punishing juveniles with the death penalty. *Id.* at 571. "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Id.* And because juveniles do not weigh costs and benefits of illegal conduct to the same extent as adults, the death penalty's deterrent effect on juveniles is far from clear. *Id.*

If a state's capital punishment regime must meet the constitutional requirement of narrowing the death penalty to "the worst

offenders," and if *Roper* categorically excludes the State from prosecuting a juvenile as one of "the worst offenders," then *Roper* logically extends to preclude all of a capital defendant's juvenile criminal history from a capital jury's consideration at the penalty phase. Simply put, the crimes of the child are inapposite to individualized punishment of the adult. "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's deficiencies will be reformed." *Id.*

The State argued that Johnson's crimes as an adult showed he had not been reformed. But Johnson's convictions for homicide as an adult do not render his offenses as a juvenile more blameworthy. "[O]ur history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults. . . . [I]f 'death is different,' children are different too." *Miller v. Alabama*, 567 U.S. 460, 481 (2015) (cleaned up). Nothing in the Supreme Court's jurisprudence suggests a person's juvenile criminal history loses this "difference" once that person reaches the age of adulthood. Indeed it violates the rationale of *Roper* and *Miller* to use a capital defendant's juvenile history against

him as a "miniature" record of violence morally equal to the record of violence committed by an adult.

In addition, there is substantial evidence and scholarship showing that juries, law enforcement agencies, and the criminal justice system are more merciful toward white juvenile criminal offenders than toward black juvenile offenders. Robin Walker Sterling, *"Children Are Different": Implicit Bias, Rehabilitation, and the "New" Juvenile Jurisprudence*, 46 Loy. L.A. L. Rev. 1019, 1066–68 (2013) (noting racial disparities creep into even race-neutral procedures); *see also* Lesley Alexandra O'Neill, Note, *An Aggravating Adolescence: An Analysis of Juvenile Convictions as Statutory Aggravators in Capital Cases*, 51 Ga. L. Rev. 673 (2017). The State's heavy reliance on Johnson's juvenile criminal history benefitted from the racial disparities implicit in the juvenile criminal justice system. "The weight of history, the pseudo-scientific validation of the superpredator myth, and the influence of the stereotype-saturated media conspire to enable many Americans, consciously or subconsciously, [to] link black youth with crime, violence, and dangerousness." Sterling, *supra*, at 1065–66. Although the prosecution never used the term, the specter of the young black

"superpredator" hovered throughout the sentencing hearing. The State would not have benefitted as much from this pervasive and highly prejudicial stereotype had Johnson's juvenile history been properly excluded under *Roper*.

Finally, the State in introducing Johnson's juvenile record and the trial court in allowing the evidence ignored the coercive factors that led to Johnson's juvenile offenses. When Johnson was thirteen years old, he moved with his family to a drug-infested neighborhood. 38AA9557; 38AA9562; 38AA9564; 38AA9569; 38AA9575; 38AA9581; 9AA2130–33; 19AA4700. Johnson during this time was under pressure to protect his family members. 19AA4683. When a gang member threatened to rape Johnson's young cousin, Johnson joined the gang that same day to protect her. 9AA2134–44, 2169; 19AA4685–86. While with the gang, Johnson began getting in trouble with the law.

The State's unrestricted use of Johnson's juvenile history violated *Roper* and prejudiced Johnson's right to a reliable sentence, a fair trial and a racially unbiased sentencing hearing. The introduction of Johnson's juvenile history was structural error and prejudicial per se, and it warrants vacating his death sentences. In the alternative, this

error was not harmless beyond a reasonable doubt. Insofar as this claim was not adequately raised in prior proceedings, trial and appellate counsel were ineffective, and there is a reasonable probability of a more favorable outcome if counsel had performed effectively.

M. Nevada's death penalty scheme is unconstitutional (Claim Twenty-One(A), (B)).

In Claim Twenty-One(A) and (B), Johnson argued that execution by lethal injection violates state and federal constitutional protections against cruel and/or unusual punishments. 25AA6069–88. The district court did not address Johnson's claim other than potentially in its general reference to the procedural default bars. 50AA12361-62. But Johnson could not have raised his claim at an earlier time because this Court has held that a challenge to a method of execution is not cognizable in a habeas corpus proceeding as it does not challenge the conviction or sentence. *McConnell v. State*, 125 Nev. 243, 246-49, 212 P.3d 307, 310-11 (2009) (citing *Hill v. McDonough*, 547 U.S. 573 (2006)). The legal unavailability of the claim in prior proceedings excuses any failure to present it earlier.

Johnson urges this Court to distinguish its prior decision in *McConnell* because a challenge to a method of execution that would require a change in state law invalidates his sentence. The federal authority cited in *McConnell* may be qualified by the United States Supreme Court's recent grant of certiorari in *Nance v. Ward*, Case No. 21-439, 142 S. Ct. 858 (2022). In *Nance*, the Eleventh Circuit Court of Appeals held that a method of execution challenge that would require the state to change its law must be brought in habeas proceedings. *Nance v. Commissioner*, 981 F.3d 1201 (11th Cir. 2020). The court cited and distinguished *Hill*, 547 U.S. 573, the same case this Court relied upon in *McConnell*, stating that *Hill* only applies if an alternative method of execution proffered by the capital inmate does not require a change in state law. *Id.* at 1206–07. Otherwise, the court concluded such a claim challenges the validity of the sentence and must be raised in a habeas proceeding. *Id.* at 1206–07; *accord Adams v. Bradshaw*, 826 F.3d 306, 321 (6th Cir. 2016).

This Court should similarly review the merits of Johnson's claim as it challenges the validity of the sentence under state law. In pending federal litigation challenging the Nevada Department of Correction's

execution protocol the plaintiff asserts the firing squad is a more humane alternative than lethal injection, *see Floyd v. Daniels, et al.*, Case No. 3:21-cv-00176-RFB-CLB, Amended Complaint at 41-45 (filed July 1, 2021), ECF No. 120 at 46-49, which is the only currently permissible method of execution under state law. *See* NRS 176.355(1). And the failure of state law to specify the need for a barbiturate medication (*see* NRS 176.355(2)) means there is an unacceptable risk that Johnson will not be sufficiently anesthetized before the lethal drugs are administered. *Contra* NRS 638.005 (requiring use of "sodium pentobarbital," a barbiturate, to euthanize an animal). *See Baze v. Rees*, 553 U.S. 35, 44 (2008) (proper administration of barbiturate "ensures that the prisoner does not experience any pain associated with paralysis and cardiac arrest caused by the second and third drugs").

The failure of the current law to provide the same protections afforded to animals that are euthanized in this state creates a substantial and unacceptable risk of causing cruel pain and suffering in violation of the state constitutional guarantee proscribing cruel or unusual punishments. *See* Nev. Const. Article 1, § 6. There must be a state forum where Johnson can vindicate his rights under the state

constitution. *Cf. NDOC v. Eighth Judicial District Court (Dozier)*, 134 Nev. 1014, 417 P.3d 1117, 2018 WL 2272873, at *2 (2018). And, with respect to the federal constitution, it would be inconsistent for this Court to foreclose the existence of a state forum, citing federal law, when federal law could recognize such a claim challenges the sentence and can therefore be raised in a habeas proceedings. Johnson therefore requests that this Court reverse and remand for factual development where he can demonstrate the merits of his constitutional claims.

N. Johnson's case was infected with judicial bias (Claim Twenty-Three).

The Due Process Clause of the Fourteenth Amendment requires a trial before a judge with no bias against the defendant or interest in the outcome of the case. *Bracy v. Gramley*, 520 U.S. 899, 904–05 (1997). In determining whether a judge's failure to recuse is a constitutional question, "[t]he inquiry is an objective one. The Court asks not whether the judge is actually subjectively biased, but whether the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias." *Caperton v. A.T. Massey Coal Co.,*

Inc., 556 U.S. 868, 881 (2009); *see Rippo v. Baker*, 137 S. Ct. 905, 907 (2017).

Claim Twenty-Three alleges judicial bias infected Johnson's proceedings. 25AA6096–104. This claim has not been previously raised.

1. Bias during the guilt phase

Near the time of Johnson's trial Judge Sobel was the subject of multiple disciplinary actions concerning his lack of impartiality, and the Committee on Judicial Discipline permanently banned from serving as a judicial officer, after he pressured an attorney appearing before him to contribute to his reelection campaign. *In the Matter of Honorable Jeffrey Sobel* at 2–4 (Comm. on Jud. Discipline, July 19, 2005). By pressuring one attorney for campaign contributions, Judge Sobel displayed bias: his interest in who was and was not contributing implied favoritism to contributors and antagonism towards non-contributors. *See Caperton,* 556 U.S. at 881. Judge Sobel's comments reflect implicit bias because his interest in the contributions of counsel who appeared before him created a risk of bias. *Hurles v. Ryan*, 752 P.3d 768, 789 (9th Cir. 2014).

2. Bias during the 2006 appeal

On November 7, 2006, Justice Becker lost her bid for reelection to the Nevada Supreme Court. 35AA8657–60. Justice Becker then began negotiating for employment with the Clark County District Attorney's Office, which was prosecuting Johnson's case, then on appeal. 35AA8657–60; *see Johnson I*, 122 Nev. 1344, 148 P.3d 767. Becker's term on the Nevada Supreme Court expired three days after Johnson's appeal was decided. 35AA8657–60. The following month, Becker received a salary exemption from Clark County for $120,000 per year, approximately the salary she received as a justice. 35AA8657–60.

The right to an unbiased judge includes the right to an appellate court free from biased justices. *See Williams v. Pennsylvania*, 579 U.S. 1, 14 (2016); *Aetna Life Ins. Co v. Lavoie*, 475 U.S. 813, 827–28 (1986). The financial incentive created by Justice Becker's negotiation with the party opposing Johnson's appeal creates bias or the potential for bias.

This issue was previously presented to this Court as an attachment to a motion for extension of time.[32] This Court denied the

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[32] *See Johnson II*, No. 45456, Order (June 29, 2007).

extension of time and returned as unfiled the attachment, but then held that the result of Johnson's case would have been the same even without Justice Becker's participation. *Id.* Insofar as prior counsel failed to properly present this claim, counsel was ineffective.

3. Bias during the 2005 penalty phase

Judge Gates employed Nancy Bernstein as a law clerk. Prior to working with Judge Gates, Bernstein was an intern for the Clark County District Attorney's Office. During her time at the District Attorney's Office, Bernstein worked on Johnson's case and had access to his files. By not recusing himself from Johnson's case, Judge Gates suffered from bias.[33]

4. This Court's mandatory review

The Supreme Court has explained that, when a state chooses to incorporate appellate review to comport with the Eighth Amendment's requirements, state courts must conduct that review fairly and meaningfully in accordance with the Due Process Clause. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). Nevada's mandatory review statute

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[33] The State raised this issue in a motion to disqualify Judge Gates, filed April 4, 2005.

fails to provide guidance on the proper application of appellate review, creating arbitrary and excessive sentencing. This is structural error.

5. Elected judges

Judges and justices in Nevada's court system are popularly elected and thereby face the possibility of removal if they make a controversial or unpopular decisions. *See* Nev. Const. art. 6, §§ 3, 5. And Nevada law does not include any mechanism for insulating state judges and justices from majoritarian pressures which could affect the impartiality of a judge in a capital case. *See Beets v. State*, 107 Nev. 957, 973–78, 821 P.2d 1044, 1055–59 (1991) (Young, J., dissenting).

Johnson's trial, sentencing, and appeal were conducted before elected judges. This is structural error because the impartiality of judges implicates the fundamental fairness of the proceeding as well as aspects of mandatory review under the Due Process clause. This Court has previously rejected this claim, but Johnson urges this Court to reconsider its precedent. *See, e.g.*, *McConnell v. State*, 125 Nev. 243, 256, 212 P.2d 307, 316 (2009).

O. Implicit bias (Claim Twenty-Seven)

In Claim Twenty-Seven, Johnson challenges his convictions and death sentences because the trial court failed to protect against implicit bias. 25AA6113. Implicit bias "refers to the automatic attitudes and stereotypes that appear in individuals." Justin D. Levinson, Robert J. Smith, & Danielle M. Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513, 518 (2014). In the context of death penalty cases, implicit bias accounts for "racial disparities in the modern death penalty." *Id.* Moreover, death-qualified jurors harbor greater racial biases than jurors eliminated by death-qualification. *Id.* at 521. A study recently found that "the more the mock jurors showed implicit bias that related to race and the value of human life, the more likely they were to convict a Black defendant relative to a White defendant." *Id.*

No death sentence predicated on implicit racial bias can be constitutional. The Eighth Amendment's death penalty jurisprudence explicitly aims to end this kind of arbitrary sentencing. *See, e.g.*, *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). Race-based application of

the death penalty is arbitrary. Because the Eighth Amendment prohibits arbitrary death sentences, the trial court erred by failing to screen for implicit basis and failing to instruct seated jurors about the dangers of implicit bias. This error is structural; alternatively, it was not harmless beyond a reasonable doubt. Trial and appellate counsel were ineffective for failing to raise this claim.

P. The State improperly introduced evidence in violation of Johnson's First Amendment rights (Claim Twenty-Eight).

In Claim Twenty-Eight, Johnson claims the State improperly presented information of First Amendment protected activity. 25AA6115. This claim has not been previously raised.

In 2004, the State noted that it intended to call a "gang intelligence officer" during the penalty phase and introduce evidence that Johnson was a member of the "Six Deuce Brims." 34AA8516, 8525. Johnson objected, and the trial court ruled the evidence inadmissible in the State's case-in-chief. 12AA2904–58. The State, however, persisted in introducing multiple items with Johnson's purported gang ties during the penalty retrial. These included two probation reports from the juvenile justice system in California and disciplinary reports from

the Clark County Detention Center. 38AA9389–9403, 9427–90. This violated *Dawson v. Delaware*, 503 U.S. 159, 167 (1992), and was structural error. *See Flanagan v. State*, 109 Nev. 50, 57 846 P.2d 1053 1059 (1993).

VI. Trial counsel were ineffective during the penalty phase (Claim Fourteen).

In Claim Fourteen Johnson raised several claims of ineffective assistance of counsel during the 2005 penalty phase. 24AA5945. This section addresses the subclaims that have not been previously raised in prior proceedings. The ineffective assistance of post-conviction counsel excuses any procedural default.

Before discussing the subclaim, one point bears emphasis: a death verdict was never a forgone conclusion in this case. During the first penalty phase, the jury found two listed mitigating circumstances, and then handwrote 20 additional mitigating circumstances before deadlocking. 34AA8504–06; *see also Johnson I*, 118 Nev. at 799–800, 59 P.3d at 458. And during the third penalty phase, the jury found several additional mitigating circumstances, including the abuse and neglect Johnson suffered as a child, the violence he witnessed, and the lack of a

positive parental figure. 35AA8632; 38AA9535. Thus, in weighing prejudice related to the deficient performance of counsel, this Court should consider that this was a close case.

A. Counsel were ineffective because they did not adequately challenge Johnson's culpability.

Claims Fourteen(B)(3), (10), (12), (14), and (18) allege that penalty-phase counsel failed to challenge the State's evidence as it related to Johnson's culpability in the offenses. 24AA5973, 5980–81, 5991. Though a jury had already found Johnson guilty, many of the issues that came up during the guilt-phase came up again during the penalty phase, where the State alleged as an aggravating circumstance, "The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree." 38AA9537.

Several challenges were available to effective counsel. As discussed in Claim Four, the theories of first-degree murder were defective. *See* § II above. So too was the forensic evidence underlying the convictions. *See* §§ I.B.2, I.C above. And the witness statements accusing Johnson of the crimes. *See* § I.B.1 above. And the evidence

Johnson killed the victims for a VCR still present after the bodies were found. *See* § I.D.2.b above. These errors were exacerbated by trial counsel conceding that Johnson was the triggerman by stating that he was a "cold blooded killer." 18AA4489. Trial counsel provided no strategic reason for this concession, particularly in light of the problems with the guilt issues in the case. *See* 46AA11590–93. Thus, trial counsel performed deficiently by failing to move to strike the aggravating circumstances related to Johnson's guilt: there cannot be the multiple murder aggravating circumstance if Johnson's first-degree murder convictions are not valid. Trial counsel indicated she had no strategic reason for failing to challenge the aggravating circumstance. 46AA11592. Because, without these aggravating circumstances, Johnson would not be eligible for the death penalty, and the evidence would have reduced the overall evidence of aggravation for the jury's weighing calculation, this error was prejudicial.

Individually or cumulatively, these instances of deficient performance were prejudicial for two reasons. First, in undercutting the evidence of the multiple murder aggravating circumstance, effective counsel could have convinced the jury not to find the circumstance

proven beyond a reasonable doubt. Second, assuming the jury found the multiple murder circumstance, the jury would have given this evidence less weight and either have concluded that the mitigating evidence outweighed aggravation, or given a sentence less than death.

B. Penalty-phase counsel were ineffective for failing to adequately investigate and prepare for the penalty phase.

Claims Fourteen(B)(1), (11), (19), and (20) allege that penalty-phase counsel failed to properly investigate and prepare for the penalty phase. 24AA5967–69, 5980–81, 5991–93. Capital defense counsel must "formulate a defense theory" and "seek to minimize any inconsistencies." 2003 ABA Guideline 10.10.1; *see also* Nev. Def. Standard 2-13. Counsel can only fulfil this obligation with adequate investigation. 2003 ABA Guideline 10.11, Commentary, 31 Hofstra L. Rev. at 1059. And the investigation must be thorough: "Since an understanding of the client's extended, multi-generational history is often needed for an understanding of his functioning, construction of the narrative normally requires evidence that sets forth and explains the client's complete social history from before conception to the

present." *Id.* at 1061. Counsel failed to meet these obligations in four ways.

First, counsel failed to formulate a theory and maintain the consistency of that theory in their presentation. This was most visible in the opening and closing statements, when counsel disagreed with each other in front of the jury. *Compare* 22AA5313 ("There are no drugs in prison."), *with* 22AA5338 ("[T]here is one thing that my learned co-counsel said that I beg to differ; he said there are no drugs in prison. I beg to differ."). Counsel also disagreed about Johnson's level of involvement. During the opening statement, Whipple argued, "Mr. Daskas is right. My client committed First Degree Murder. We may differ with regard to his involvement." 16AA3845. But during opening statement for the selection phase, Jackson conceded that Johnson was the trigger-person by arguing, "You agreed with me and Mr. Whipple, we told you our client was a cold-blooded killer. That was the word we used so you would not be shocked by that." *Compare* 18AA4433 *with* 18AA4489. This error was especially harmful in light of the problems with the State's theories of first-degree murder. *See* §§ I–II above. Then, during Whipple's opening statement during the eligibility phase, he

focused on Johnson's loving family, 16AA3843, 3846, 3850–51, while Jackson during closing argument focused on Johnson's prenatal exposure to drugs and alcohol, his poverty-stricken childhood, and the violence he witnessed, 18AA4447–59.

Second, counsel never interviewed Johnson's father and failed to present his testimony during the penalty phase. Johnson's father had relevant mitigating evidence about Johnson's upbringing, Johnson's mother, and their relationships with one another, along with evidence that he and others in his family suffered from schizophrenia. 38AA9567–70.

Third, counsel failed to retain and present testimony from a trauma expert, who could opine about the effects of trauma on an individual, including the effects of complex trauma. 42AA10374.

Fourth, counsel were deficient with regard to Dr. Kinsora. Counsel failed to ask Dr. Kinsora to conduct a full neuropsychological battery. An earlier neuropsychological report showed borderline intellectual functioning and possible brain damage, thus counsel should have sought more information, or at the very least asked Dr. Kinsora to include the earlier report as part of his analysis. *See* 39AA9832–41.

Additionally, counsel retained Dr. Kinsora despite his conflict of interest—Dr. Kinsora had already been retained by Johnson's codefendant, Sikia Smith. 46AA11462–504; 21AA5095–96.

Individually and cumulatively, these errors were prejudicial. Had counsel performed effectively, the jury would have heard compelling testimony from Johnson's father and experts, along with persuasive argument from counsel, providing important context for Johnson's actions.

C. Penalty-phase counsel failed to object to or challenge the State's evidentiary presentation.

Claims Fourteen(B)(13), (15), & (16) allege that penalty-phase counsel were ineffective in their failure to object to the State's presentation of its case. 24AA5981, 5986–88. Johnson's penalty phase was, itself, bifurcated into an eligibility stage and a selection stage. 34AA8504–06. During the eligibility stage, the State only had to prove the aggravating circumstance for each murder. "Other matter" evidence was "not admissible for use by the jury in determining the existence of aggravating circumstances or in weighing them against mitigating circumstances." *Hollaway v. State*, 116 Nev. 732, 746, 6 P.3d 987, 997

(2000), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 351 P.3d 725 (2015). Thus, the only evidence the State needed to present during the eligibility phase was the verdict forms from the guilt phase, a point the State made during its closing argument. 18AA4401. Nonetheless, the State presented extensive other matter evidence related to drug deals, the crime scene, Johnson's ex-girlfriend, guns, and autopsy reports. 16AA3823–42; 16AA3865–77; 16AA3879–974; 16AA3983–84; 17AA4129–222; 17AA4144–53; 17AA4159–218; 18AA4382–420; 18AA4460–74. Indeed, the prosecutor presented evidence of a gun that was *not* used in these homicides. 16AA3931. And then, exacerbating the harm of "other evidence" presented, during argument, the State promised there would be even more "other evidence" presented during the selection phase. *See* 16AA3842; 18AA4401–02, 4404–05, 4420, 4461–62. Trial counsel did not object until the State was nearly finished arguing.

Counsel also performed deficiently in failing to object to leading questions. *See* 16AA3897–98, 3900, 3815–16, 3918. Although counsel objected on occasion, for the most part the State was left to lead

witnesses through prejudicial testimony, or even read testimony into the record. *See* 16AA3920–28, 3933–35, 3938–40.

Finally, counsel was deficient in failing to object to the introduction of gruesome photographs. 37AA9298–340, 37AA9352–59, 38AA9361–79.

This deficient performance was singly and cumulatively prejudicial because it allowed the State to prejudice the jury in favor of death.

D. Trial Counsel were ineffective for not requesting an instruction that the beyond-a-reasonable-doubt standard applies to the outweighing determination.

This Court in vacating Johnson's death sentences noted that the outweighing determination in Nevada is a finding of fact "necessary to authorize the death penalty in Nevada." *Johnson I*, 118 Nev. at 802, 59 P.3d at 460 (2002). Thus, the jury must make that finding beyond a reasonable doubt. *Id*. Although this Court later overruled that conclusion, *Nunnery*, 127 Nev. 749, 263 P.3d 235, it remained good law and law of the case at the time of Johnson's penalty rehearing in 2005. Trial counsel erred by not insisting that the jury make the outweighing

determination beyond a reasonable doubt. There is a reasonable probability of a different result had defense counsel requested the instruction and appellate counsel appealed the absence of the instruction. Johnson's death sentences are therefore invalid.

E. The cumulative prejudice of counsel's ineffectiveness requires reversal of Johnson's death sentences.

This Court must consider the cumulative prejudice of the deficient performance of counsel. *See Williams v. Filson*, 908 F.3d 546, 570 (9th Cir. 2018). Considering that cumulative prejudice here, Johnson's death sentences are invalid.

Considerable mitigation evidence was available in this case. Johnson's mother had a low IQ and married Johnson's father, who was older. 38AA9551, 9554, 9568, 9575. Johnson's father started drinking at age 13, started selling and using drugs at age 14, and was in and out of correctional facilities starting as a juvenile. 38AA9568. They both had substance abuse problems, and Johnson's mother continued "to smoke sherm and cigarettes and drink beer" and do "crack cocaine" while she was pregnant with Johnson. 38AA9551, 9554.

Johnson grew up in abusive and neglectful environments. His father would physically abuse his mother. 38AA9569. Johnson and his siblings would be placed in a closet, to wait until their mother returned, or they would have to get food out of trash cans. 38AA9564. Johnson's father would also abuse Johnson. 38AA9551. The children would be left in a shack, with only a bucket as a toilet, eventually leading to the children being taken into foster care. 38AA9551, 9564; 9AA2119; 39AA9825. After foster care, Johnson moved in with his grandmother in a "drug infested" neighborhood with excessive violence. 38AA9552, 9564, 9573, 9581. His grandmother provided care for too many children, so it was another house of neglect. 38AA9552, 9555, 9562, 9584. The girls in this home were victims of sexual assault. 46AA11573; 9AA2127; 38AA9566.

At age 14, Johnson was jumped into a gang; he agreed to this to protect his cousin from being raped. 19AA4685–86. Being in the gang eventually led to Johnson's involvement in the criminal justice system. 40AA9962–10060.

Though much of this evidence came out during Johnson's penalty phase, the deficient performance of counsel was nonetheless prejudicial.

Indeed, the deficient performance of counsel is more important because there was so much mitigating evidence available. Thus, failing to challenge Johnson's level of involvement, providing inconsistent theories to the jury, and failing to adequately challenge the State's case all contributed to the jury's failure to give proper weight to the mitigating evidence.

F. The ineffective assistance of post-conviction counsel establishes good cause and prejudice to excuse any applicable procedural default.

The ineffective assistance of post-conviction counsel excuses any procedural default to the above claims. *Chappell*, 501 P.3d at 949. Here, post-conviction counsel was deficient for the same reasons that penalty-phase counsel were deficient: post-conviction counsel had the same obligations to investigate Johnson's case, consider meritorious claims, and raise them. *See, e.g.*, 2003 ABA Guideline 10.15.1(C); *see also* Nev. Def. Standard 2-19(c); 2003 ABA Guideline 10.15.1, Commentary, 31 Hofstra L. Rev. at 1086; *id.* at 1083. Thus, in failing to raise meritorious instances of trial counsel's ineffectiveness, post-conviction counsel performed deficiently. And, because these claims of ineffectiveness are

meritorious, post-conviction counsel's deficient performance was prejudicial.

VII. Johnson is actually innocent of the death penalty.

In Claim Twenty-Nine, Johnson argued he is ineligible for the death penalty because of his youth at the time of the offense, borderline intellectual functioning, and the combination of the two. 25AA6117–23. This claim has not been previously raised.

Johnson was 21 years old when the offenses occurred. 35AA8699–8970. In *Roper*, the Supreme Court ruled that a defendant who is under the age of eighteen is categorically ineligible for the death penalty. 543 U.S. at 568. The Court held that developmental differences between juveniles and adults render juveniles more vulnerable to social pressures and prone to poor decision making, and the Court pointed out that their character has not yet fully formed. *Id*. at 569–73. This diminished culpability of juveniles undermines the goals of retribution and deterrence in imposing the death penalty. *Id.* 571.

Recent scientific research shows that young people at the age of 21—the age Johnson was at the time of his arrest—share the same characteristics as those who are 18 or younger. *See* 25AA6118–21

(collecting sources). As a result, state courts, as well as the ABA, have taken the position that young people at age 21 are as undeserving of execution as those 18 or younger. *See* ABA House of Delegates Recommendation 111 (adopted Feb. 2018); *Kentucky v. Bredhold*, No. 14-CR-161 (Ky. Cir. Ct. Aug. 1, 2017).[34]

In addition, Johnson's borderline intellectual functioning renders him ineligible for the death penalty. 42AA10372–75. In *Atkins v. Virginia*, the Supreme Court held that the features of intellectual disability which prohibit execution are, among others, a higher likelihood of false confession, inability to meaningfully assist counsel, poor judgement, and reduced culpability. 536 U.S. 304, 320–21 (2002). This reasoning applies equally to those with borderline intellectual functioning.

Finally, the combination of Johnson's youth at the time of the offense and his poor intellectual functioning render him ineligible for the death penalty. Even if this Court holds this is not so under the

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[34] *Reversed on procedural grounds by Kentucky v. Bredhold*, Case NO. 2017-SC-000436-TG, Docket No. 59 (Mar. 26, 2020).

federal constitution, this Court should hold that the Nevada Constitution offers broader protections that render Johnson ineligible.

Claim Twenty-Nine is not procedurally defaulted because Johnson is categorically ineligible for the death penalty. This Court has held that individuals who are actually innocent of the death penalty may overcome procedural bars and this Court may set aside the law of the case doctrine to avoid manifest injustice. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537; *accord Lisle*, 131 Nev. at 367–68, 351 P.3d at 734.

VIII. Johnson's previously raised claims warrant post-conviction relief.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Valdez*, 124 Nev. at 1195, 196 P.3d at 481; *see also Parles v. Runnels*, 505 F.3d 922, 927–28 (9th Cir. 2007); *Mak v. Blodgett*, 970 F.2d 614, 619 (9th Cir. 1992). Thus, this Court in reviewing cumulative error must consider all the errors raised in Johnson's petition, whether or not raised in previous proceedings.

A. Defense counsel were ineffective during the guilt phase (Claim Three(F)–(G)).

In Claim Three, Johnson reraised two previously raised instances of trial counsel's ineffectiveness. 24AA5854–57.

1. Defense counsel were ineffective for failing to object to hearsay.

During his testimony, the prosecutor questioned Tod Armstrong about a conversation he overheard between Bryan Johnson and police officers:

> Q: And who was it that tells the police first, if you know?
>
> A: I think Bryan.
>
> Q: Okay. Now when you're standing there with the police, do you hear Bryan tell the police his information?
>
> A: Not it all, just that he knew like that that it—we were—that it was involved with that case, that we knew who did it. And then he separated us and had us write down statements.

5AA1007–08. Trial counsel did not object.

This testimony constituted inadmissible hearsay and violated Johnson's right to confront the witnesses against him. *See Crawford*,

541 U.S. 36. Johnson argued in his first state post-conviction proceedings that appellate counsel were ineffective for not raising this claim on direct appeal. 28AA6901–03; 29AA7045–47; *Johnson III*, 133 Nev. at 580, 402 P.3d at 1276. In addition to appellate counsel's ineffectiveness, post-conviction counsel was ineffective for failing to argue trial counsel were ineffective for not objecting.

2. Defense counsel were ineffective for failing to object to improper references to the phases of the trial.

Trial counsel filed a motion in limine, seeking to prohibit any reference to the first phase of the trial as the guilt phase. 2AA302–04; 2AA305–06. The trial court denied the motion but suggested to defense counsel an instruction to the jury that "guilt phase" was merely shorthand. 2AA416–30.

The prosecutor repeatedly referred to the first phase as the "guilt phase" during voir dire. 4AA462–63, 484, 499, 3AA524, 750, 4AA768. Trial counsel failed to object. Johnson's due process rights include the right for a trial conducted in a manner that does not indicate that a particular outcome is expected or likely. The "guilt" label created an

unfair inference that the very purpose of the first phase of the trial was to find Johnson guilty.

Trial counsel were ineffective for failing to object, and appellate counsel was ineffective for failing to raise this argument on appeal. Johnson raised this claim in his first state post-conviction proceedings. 28AA6906; 29AA7048; *Johnson III*, 133 Nev. at 580–81, 402 P.3d at 1276–77.

B. The trial court erred during the guilt phase (Claim Six(A)–(B), (D)–(E)).

In Claim Six, Johnson reraised four previously raised instances of trial court error.[35] 24AA5891–900.

1. The trial court erred in its evidentiary rulings (Claim Six(A)–(B)).

NRS 48.045(2) provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show

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[35] Because of a typographical error, the petition shows four previously raised subclaims, Claim Six (A)–(B), (D)–(E), which should be three previously raised subclaims. 24AA5891–900. The improperly labeled Claim Six (B) is in fact Claim Six (A)(2), within the subclaim concerning the trial court's evidentiary rulings. For the sake of consistency, however, this brief will still refer to the subclaims within Claim Six with the petition claim numbers.

that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Once the court has ruled that evidence is probative of one of the permissible purposes under the statute, the court must decide whether the probative value of the evidence is substantially outweighed by its prejudicial effect.

The trial court erred in its evidentiary rulings here, allowing evidence of prior bad acts without following the guidelines in the statute. These errors rendered Johnson's trial fundamentally unfair, in violation of his due process right to a fair trial.

a) Prior narcotics sales (Claim Six(A))

During Charla Severs's direct examination, the prosecutor elicited testimony that Johnson was selling narcotics to several individuals. 5AA1132. Severs testified that she personally witnessed the sales. 5AA1132. When Bryan Johnson testified, the prosecutor again asked about Johnson selling narcotics. 6AA1287. This line of questioning had no relevance to the case other than for the impermissible purpose of showing that Johnson was a person of bad character. These alleged acts

were more prejudicial than they were probative. Further, they did nothing to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Johnson raised a claim concerning this evidence in his first state post-conviction proceedings. 28AA6907; 29AA7048; *Johnson III*, 133 Nev. at 580, 402 P.3d at 1276. To the extent post-conviction counsel failed to raise this claim as a constitutional error, counsel was ineffective. In addition, trial counsel were ineffective for failing to object, and appellate counsel was ineffective for failing to raise this issue on direct appeal.

b) Incident involving Trooper Honea (Claim Six(B))

The prosecution called Trooper Robert Honea to describe an incident that happened on the night of August 17, 1998. Honea testified that while on patrol that evening, he pulled a vehicle over, and the driver of the vehicle provided the name "Donte Fletch." 6AA1437. The driver of the vehicle was then asked to step out and, while speaking with the driver, Honea observed the passenger with a "small handgun." 6AA1439. According to Honea, both the driver and the passenger ran

away. 6AA1439. While searching the vehicle, Honea found a "sawed-off rifle" under the passenger seat. 6AA1440.

During his testimony, Honea identified Johnson as the driver of the vehicle. 6AA1445. When asked how he arrived at that conclusion, Honea testified that he saw Johnson's picture in the newspaper a few days later and recognized him as the driver. 6AA1445. The prosecution introduced the rifle into evidence. 6AA1440–42.

The alleged incident involving Trooper Honea bore no relevance to the case at hand. Indeed, the incident happened four days after the homicides at the Terra Linda residence. There is no evidence that the rifle found by the Trooper had any connection to the murders. Further, it was found under the passenger seat, where there was someone sitting, who allegedly had a weapon himself. The attenuated identification of Johnson as the driver only complicates things further. This alleged incident happened around 10:30 at night. There was no testimony regarding the conditions surrounding the traffic stop. Honea never testified to the lighting conditions, how long he stood with the driver, or whether or not he got a good look at him. Neither was there testimony as to the specifics of Johnson's picture in the newspaper.

Johnson raised a claim concerning this evidence in his first direct appeal. 25AA6205; 26AA6265; *Johnson I*, 118 Nev. at 795–96, 59 P.3d at 455–56. To the extent appellate counsel failed to raise this claim as a constitutional error, counsel was ineffective.

c) Evidence of guns and ammunition recovered at the Everman residence (Claim Six(D))

Before trial, Johnson filed a motion in limine to preclude evidence of guns and ammunition not used in the crime. 46AA11556–70. The guns were irrelevant, except for the improper purpose of informing the jury that Johnson was the kind of person who would possess and carry these types of weapons. *See United States v. Tai*, 994 F.2d 1204, 1211 (7th Cir. 1993). The trial court denied Johnson's motion. 2AA293–301.

Johnson raised a claim concerning this evidence in his first direct appeal. 25AA6205; 26AA6265; *Johnson I*, 118 Nev. at 795–96, 59 P.3d at 455–56. To the extent appellate counsel failed to raise this claim as a constitutional error, counsel was ineffective.

2. The trial court deprived Johnson of a full and fair opportunity to cross-examine Tod Armstrong (Claim Six(D)).

Tod Armstrong was a crucial witness for the State. He testified—despite previous inconsistent statements—that Johnson admitted shooting all four of the victims. 4AA992–96. Armstrong had previously testified about a different homicide in Henderson Justice Court. According to Armstrong, the defendant in that case, Michael Celis, had shot into a crowd outside a house party. 30AA7478–82.

During cross-examination, defense counsel questioned Armstrong about his testimony against Celis. 5AA1048. The State objected, arguing that the testimony was irrelevant. 5AA1048–51. The trial court then restricted defense counsel's examination, forcing defense counsel into an unhelpful colloquy with Armstrong. 5AA1051–57.

A trial court's discretion to control cross-examination is limited when the purpose of the cross-examination is to attack a witness's general credibility or reveal bias or motive. In addition, extrinsic evidence related to motive for testifying a certain way is not collateral to the controversy. Evidence that Armstrong was a witness in a second Clark County homicide was relevant for impeachment because it

showed that he had a preexisting relationship with the Clark County District Attorney's office. The evidence also suggested that Armstrong possibly had lied when he testified that he had received no benefit for repeatedly testifying for the State.

Johnson argued in his first state post-conviction proceedings that appellate counsel were ineffective for not raising this claim on direct appeal. 28AA6896–99; *Johnson III*, 133 Nev. at 580, 402 P.3d at 1276. In addition to appellate counsel's ineffectiveness, post-conviction counsel was ineffective for failing to argue this error violated Johnson's due process right to a fair trial.

3. The trial court erroneously admitted gruesome photographs (Claim Six(E)).

At trial, the State moved to admit various gruesome photographs. 37–38AA9297–380. Trial counsel objected to the introduction of these photographs as prejudicial, inflammatory, and duplicative of other photographs, but the trial court overruled defense counsel's objections and admitted the photographs. 4AA902, 949; 6AA1325, 1327, 1404, 1397, 1382, 1391.

Johnson argued in his first state post-conviction proceedings that appellate counsel were ineffective for not raising this claim on direct appeal. 28AA6915; 29AA7051; *Johnson III*, 133 Nev. at 580, 402 P.3d at 1276. In addition to appellate counsel's ineffectiveness, post-conviction counsel was ineffective for failing to argue this error violated Johnson's due process right to a fair trial.

C. Pretrial publicitly rendered Johnson's trial fundamentally unfair (Claim Twelve).

In Claim Twelve, Johnson argued that his convictions and death sentences were invalid because the publicity surrounding his case infected the jurors and rendered his trial unfair. 24AA5933–39. Johnson had previously raised this claim during his initial state post-conviction proceedings. This Court denied the claim, explaining Johnson had "pointed to nothing in the record suggesting that the empaneled jurors were not impartial." *Johnson III*, 133 Nev. at 579, 402 P.3d at 1275. This Court did not address presumed prejudice. In addition, the lack of evidence was caused by post-conviction counsel's ineffectiveness, *see Crump*, 113 Nev. at 293, 934 P.2d at 302–05, 252–54; *see also Rippo*, 134 Nev. at 418, 423–27, 423 P.3d at 1094, 1097–1100, and the facts included in Johnson's current petition substantially

change this claim. *See Bejarano v. State*, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006). Alternatively, this Court's prior determinations were clearly erroneous, and failing to depart from law of the case here would result in a fundamental miscarriage of justice. *See Hsu*, 123 Nev. at 631–32, 173 P.3d at 729.

The media exposed potential jurors to alleged threats and other shootings by Johnson, improper victim impact evidence, and the spectacle of his codefendant's trials, including their confessions and sentences. 36–37AA9026–96. This media attention was so widespread and intrusive that bias should be presumed. *See Sheppard v. Maxwell*, 384 U.S. 333, 340–41 (1966); *Rideau v. Louisiana*, 373 U.S. 723, 725–26 (1963).

In addition, the jurors were actually biased against Johnson because of the media exposure. *See Murray v. Schriro*, 882 F.3d 778, 802 (9th Cir. 2018). Although the potential jurors might have expressed their desire to put aside their biases, the record of both the guilt phase and the penalty phase shows they were unable to do so. *See Williams v. Taylor*, 529 U.S. 420, 441–42 (2000) (explaining that juror's lies during voir dire can violate petitioner's constitutional rights). During the guilt

phase, two jurors were exposed to media accounts about juror deliberations. 34AA8507–09. And during jury selection for the penalty rehearing, the eventual foreperson revealed to other potential jurors that Johnson had previously received a death sentence. 14AA3284–86, 3494, 15AA3534, 3538, 3637–38. It is immaterial that she revealed this information to potential jurors who did not end up on the final jury; the seating of even one biased juror is structural error requiring a new trial.

D. Counsel were ineffective during the penalty phase (Claim Fourteen).

Claim Fourteen (B)(2), (4)–(9), and (17) assert subclaims of ineffective assistance during the penalty phase. 24AA5969–80, 5989–91. These were raised during Johnson's initial post-conviction proceedings. *See Johnson III*, 133 Nev. at 582–85, 402 P.3d at 1278–80. Prejudice under *Strickland* must be evaluated cumulatively; thus, these subclaims must be considered with the subclaims, described above, that are raised for the first time in this petition. *See Williams*, 908 F.3d at 570; *see also* § VI above.

Trial counsel were deficient for failing to argue the 23 mitigating circumstances found by Johnson's first jury. *See* 34AA8504–06. This

was prejudicial because the 2005 jury could have found all these mitigating circumstances, including the circumstance that there was no eyewitness to identify the shooter. *Id.* Additionally, trial counsel were deficient in moving to bifurcate the trial, which allowed the State to make two—instead of one—closing and rebuttal arguments. The bifurcation also meant some evidence relevant to weighing was not presented until the selection phase. Trial counsel also were deficient by referring to the victims as "kids" notwithstanding that counsel, earlier in the trial, objected to the State's use of the word "kids" during closing arguments. See 22AA5320; 18AA4469. Trial counsel contradicted each other with regard to the availability of drugs in prison. 22AA5313–14; 22AA5339. Trial counsel failed to retain an expert on Fetal Alcohol Spectrum Disorder, despite a reference in the record to Johnson's mother drinking while pregnant; counsel also failed to have a PET Scan of Johnson performed. *See* 18AA4254. Counsel failed to present evidence of the codefendants' sentences. 23AA5692.

Counsel was also deficient in allowing the State to use defense work product to cross-examine defense expert Dr. Kinsora. Before Dr. Kinsora took the stand, the State conducted voir dire and learned that

Dr. Kinsora relied on a social history prepared by investigator Tena Francis. 21AA5086. The district court ordered the defense to produce that social history; the State then used it extensively to cross-examine Dr. Kinsora on points such as Johnson's mother's drug use, bad act evidence, and why Johnson moved to Las Vegas. *See* 21AA5184–99. Counsel should have either provided a social history report to Dr. Kinsora that did not include this damaging information (thereby preventing the State from using it during cross examination) or, if the information was necessary for Dr. Kinsora, prepared Dr. Kinsora for these lines of questioning.

Singly and cumulatively these instances of deficient performance were prejudicial.

E. Prosecutorial misconduct during the 2005 penalty phase (Claim Sixteen)

In Claim Sixteen Johnson argues that the State engaged in pervasive misconduct during the penalty phase. The portions of this claim that were not previously raised are discussed above. *See* § V.I. Here, Johnson re-raises the other instances of prosecutorial misconduct. Specifically, the State summarized inadmissible facts related to

Johnson's behavior while incarcerated, emphasized the age of the victims, used facts not in evidence (such as that Mowen had pizza money), and inappropriately compared Johnson to others who grew up in South Central L.A. 25AA6002-06, 6014–18. This Court rejected these arguments in earlier proceedings. *See Johnson II*, 122 Nev. at 1356–58, 148 P.3d at 775–77.

F. The trial court erred during the penalty phase (Claim Seventeen)

Claim Seventeen(A)–(E) and (G) assert the trial court erred in a number of rulings. *See* 25AA6029–44. This Court has previously denied relief on these claims. Where trial or appellate counsel failed to make an adequate objection or to adequately raise these claims, they were ineffective.

Trial counsel objected to the use of "stake out" questions during voir dire. *See, e.g.* 12AA3000. The court overruled this objection, and this court affirmed the district court on appeal. *See Johnson II*, 122 Nev. at 1354–55, 148 P.3d at 774. Stake out questions, which ask a juror to commit to resolve an issue in a particular way later, improperly bias potential jurors. *See Barlow v. State*, 138 Nev. ___, 507 P.3d 1185,

1193 (2022); *see also United States v. Fell*, 372 F. Supp. 2d 766, 770 (D. Vt. 2005); *United States v. Johnson*, 366 F. Supp. 2d 822, 842–43 (N.D. Iowa 2005). The use of stake out questions violates the right to an impartial jury. *See Morgan v. Illinois*, 504 U.S. 719 (1992). The use of the stake-out question, thus, was improper.

The State presented "other matter" evidence during the penalty phase, and the court erred by overruling Johnson's objections to that evidence. The court's errors "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." *Romano*, 512 U.S. at 12. Specifically, the State used Johnson's juvenile records. *See* 34AA8514–15; *see also* 34AA8519; 34AA8528; 38AA9389; 38AA9404. In addition to being substantially more prejudicial than probative, admitting this evidence violated *Roper*, 543 U.S. 551.[36] Additionally, the State presented an incident that occurred at the Clark County Detention Center. 34AA8525; 34AA8541. The State presented evidence of trivial misconduct from two probation officer's reports and disciplinary reports from Clark County Detention

[36] *See* § V.L above.

Center. *See* 38AA9389; 38AA9404; 19AA4575–78; 38AA9491; 19AA4640–41. The trial court also admitted gruesome photographs. 19AA4565. All this evidence was more prejudicial than probative and the court erred by admitting it.

The brother of one of the victim's groaned, passed out on the floor, and then, while crying, was aided out of the courtroom by the father of one of the other victims. *See* 18AA4412–18. This happened in front of the jury, rendering Johnson's penalty phase fundamentally unfair. *See Romano*, 512 U.S. at 12.

Finally, the trial court erred by denying the defense's request to argue last. Because "death is a different kind of punishment," *Gardner v. Florida*, 430 U.S. 349, 357 (1977), a higher standard of reliability is required. *See Lockett*, 438 U.S. at 605. This heightened reliability required Johnson be allowed to argue last. The trial court's error in denying this issue was structural.

G. Nevada's death-penalty scheme is unconstitutional (Claim Twenty-One(C)–(E)).

These subclaims were previously raised in Johnson's first post-conviction appeal. Nevada's death penalty scheme fails to adequately

narrow because nearly every first-degree murder is death-eligible. *Lowenfield*, 484 U.S. at 244; NRS 200.030, 200.033. The death penalty is cruel and unusual because it is disproportionate and inconsistent with the evolving standards of decency that mark a maturing society. *See Kennedy v. Lousiana*, 554 U.S. 407, 441 (2008); *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *see also* Death Penalty Information Center, *State by State*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (accessed May 23, 2022). Finally, though Nevada law provides the opportunity for clemency, it is, for all practical purposes, Nevada does not grant clemency to death row inmates. NRS 213.010–213.100; *see also Evitts*, 469 U.S. at 401.

This Court has previously rejected these arguments, but Johnson urges reconsideration of this precedent. *See Johnson III*, 133 Nev. at 577 n.3, 402 P.3d at 1274; *see also Belcher v. State*, 136 Nev. 261, 278, 464 P.3d 1013, 1031 (2020).

H. Other previously raised errors

In addition to the errors listed above, this Court should reconsider, or weigh in its consideration of this appeal, the following previously raised errors. During the guilt-phase, prosecutors engaged in

misconduct by invoking intestinal fortitude, taking inconsistent positions on whether Johnson lived in the house, and emphasizing the age of the victims.[37] Additionally, the trial court erred by denying Johnson's suppression motion, particularly because of the State's inconsistent position on whether Johnson lived in the house.[38] *See United States v. Isaacs*, 708 F.2d 1365, 1367 (9th Cir. 1983). The trial court also erred by failing to ensure all bench conferences were recorded.[39] Finally, Johnson's conviction violates international law.[40]

IX. Cumulative error

As referenced above, the cumulative effect of errors may independently violate a defendant's right to a fair trial. *See Valdez*, 124 Nev. at 1195, 196 P.3d at 481; *see also Parles*, 505 F.3d at 927–28; *Mak*, 970 F.2d at 619. The gravity of this offense requires commensurately reliable proceedings. *See Valdez*, 124 Nev. at 1197, 196 P.3d at 482.

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[37] *See* 24AA5874–75, 5878–79, 5882–83 (Claim Five).

[38] 24AA5924–27 (Claim Ten); *Johnson I*, 118 Nev. at 798, 59 P.3d at 457–58.

[39] 25AA6108–10 (Claim Twenty-Five). This error is particularly problematic because in November of 1999, Johnson himself requested that all proceedings be recorded.

[40] 25AA6111–12 (Claim Twenty-Six, providing sources of international law).

The question of quantity and quality of error is tied to the evidence of guilt, which this Court has historically described as "overwhelming." *See Johnson I*, 118 Nev. at 797, 59 P.3d at 457; *Johnson II*, 122 Nev. at 1359, 148 P.3d at 777; *Johnson III*, 133 Nev. at 572, 402 P.3d at 1271. But this "overwhelming evidence" crumples under scrutiny: witness coercion and faulty forensics undermine it. *See* § I. In another case, this might not be enough, but here the guilt-instructions were faulty beyond repair. *See* § II. And, these guilt-phase errors segue directly into the *Enmund*/*Tison* error. *See* § V.K.

Thus, not only is the Court prevented from finding the evidence "overwhelming" because of the error in this case, the quantity and quality of the errors are substantial.

X. Johnson can overcome procedural bars because of a new, retroactive rule of constitutional law.

The district court failed to instruct the jury that the State was required to prove *beyond a reasonable doubt* that the mitigation evidence did not outweigh the aggravating circumstances. *See Hurst*, 577 U.S. at 94, 97. Johnson in Claim Twenty-Four raised a new argument that this instructional error violated his Sixth Amendment rights. 25AA6105–06. He can overcome the procedural defaults invoked

by the State because the claim relies on a new rule of constitutional law, announced by the United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016). This Court has rejected this argument, but Johnson urges the Court to reconsider this issue. *See Castillo v. State*, 135 Nev. 126, 442 P.3d 558 (2019); *see also Thomas v. State*, No. 77345, 138 Nev. Adv. Op. 37, at 33–34.

XI. The district court erred by denying Johnson's petition without an evidentiary hearing or discovery.

A district court may not resolve a factual dispute created by pleadings or exhibits without an evidentiary hearing. NRS 34.770; *Mann v. State*, 118 Nev. 351, 46 P.3d 1228 (2002). In *Mann* this court held, "petitioners are entitled to an evidentiary hearing if they plead specific facts not belied by the record that, if true, would entitle them to relief . . . ." *Id.* at 356, 1231. The district court erred in denying Johnson's post-conviction petition on procedural grounds without an evidentiary hearing or discovery. Because Johnson raised numerous claims which sought to overcome the procedural bars under NRS 34.810, he was, as a threshold matter, entitled to an evidentiary hearing on facts concerning the factual basis for good cause and

prejudice. *See Ford v. State*, 497 P.3d 276, 2021 WL 4860345 (2021) (unpublished table disposition). In *Ford*, the petitioner raised a claim alleging a violation of *Brady*, 373 U.S. 83. This court held that because the prejudice required to overcome the procedural bar paralleled the factual underpinnings of the *Brady* claim, and because those facts were not belied by the record, the petitioner was entitled to an evidentiary hearing.

In the instant case, Johnson's substantive claims for relief parallel the good cause and prejudice necessary to overcome the procedural bars cited by the district court. This Court should remand for an evidentiary hearing and discovery under NRS 34.780.

CONCLUSION

Based on the foregoing, Johnson requests that this Court reverse the district court and grant Johnson post-conviction relief.

In the alternative, Johnson requests that this Court remand these

. . .

. . .

proceedings for an evidentiary hearing and discovery.

Dated this 27th day of May, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this 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 in 14 point Century Schoolbook.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 36,756 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is

not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 27th day of May, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of May, 2022, I electronically filed the foregoing document with the Nevada Supreme Court by using the appellate electronic filing system. The following participants in the case will be served by the electronic filing system:

Alex Chen
Chief Deputy District Attorney
Clark County District Attorney's Office

/s/ Celina Moore
An Employee of the
Federal Public Defender