IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 83796

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Elizabeth A. Brown
Clerk of Supreme Court

DONTE JOHNSON,
Petitioner,

v.

STATE OF NEVADA, *et al.*,
Respondent.

Appeal From Clark County District Court
Eighth Judicial District, Clark County
The Honorable Jacqueline M. Bluth, District Judge
(Dist. Ct. No. A-19-789336-W)

APPELLANT'S APPENDIX

Volume 47 of 50

RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
RANDOLPH M. FIEDLER
Assistant Federal Public Defender
Nevada State Bar No. 12577
Assistant Federal Public Defender
ELLESE HENDERSON
Assistant Federal Public Defender
Nevada State Bar No. 14674

411 E. Bonneville, Suite 250
Las Vegas, Nevada 89101
Telephone: (702) 388-6577
Fax: (702) 388-6419
Randolph_Fiedler@fd.org
Ellesse_Henderson@fd.org

Counsel for Petitioner
Donte Johnson

DOCUMENT	DATE	VOLUME	PAGE(S)
Amended Verification, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	05/17/2019	47	11613–11615
Amended Verification – Index of Exhibit and Exhibit in Support, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	05/17/2019	47	11616–11620
Court Minutes, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	02/13/2019	49	12248
Court Minutes, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	10/28/2021	50	12365
Defendant's (Pro Se) Request for Petition to be Stricken as it is Not Properly Before the Court, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	04/11/2019	46	11606–11608
Defendant's (Pro Se) Request to Strike Petition, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	04/04/2019	46	11603–11605

DOCUMENT	DATE	VOLUME	PAGE(S)
Exhibits and Exhibit List in Support of Petition for Writ of Habeas Corpus	02/13/2019	25	6130–6146
6. Judgment of Conviction, State *v.* Johnson, Case No. 153154, District Court, Clark County (Oct. 3, 2000)	02/13/2019	25	6147–6152
7. Judgment of Conviction (Amended), *State v. Johnson*, Case No. 153154, District Court, Clark County (Oct. 9, 2000)	02/13/2019	25	6153–6158
8. Appellant's Opening Brief, Johnson v. State, Case No. 36991, In the Supreme Court of the State of Nevada (July 18, 2001)	02/13/2019	25	6159–6247
10. Appellant's Reply Brief, Johnson v. State, Case No. 36991, In the Supreme Court of the State of Nevada (Jan. 15, 2002)	02/13/2019	25–26	6248–6283
15. Motion to Amend Judgment of Conviction, *State v. Johnson*, Case No. 153154, District Court, Clark County (Apr. 8, 2004)	02/13/2019	26	6284–6295
16. Amended Judgment of Conviction, *State v. Johnson*, Case No. 153154, District Court, Clark County (Apr. 20, 2004)	02/13/2019	26	6296–6298
17. Judgment of Conviction, *State v. Johnson*, Case No. 153154, District Court,	02/13/2019	26	6299–6303

DOCUMENT		DATE	VOLUME	PAGE(S)
	Clark County (June 6, 2005)			
21.	Judgment Affirming Death Sentence (45456), *Johnson v.* State, Case No. 45456, In Supreme Court of the State of Nevada (Dec. 28, 2006)	02/13/2019	26	6304–6330
22.	Notice of filing of writ of certiorari, *Johnson v. State*, Case No. 45456, In Supreme Court of the State of Nevada (Apr. 5, 2007)	02/13/2019	26	6331–6332
24.	Petition for Writ of Habeas Corpus, *State v. Johnson*, Case No. 153154, District Court, Clark County (Feb. 11, 2008)	02/13/2019	26	6333–6343
25.	Pro Per Petition, *Johnson v. State*, Case No. 51306, In the Supreme Court of the State of Nevada (Mar. 24, 2008)	02/13/2019	26	6344–6364
26.	Response to Petition Writ of Habeas Corpus, *State v. Johnson*, Case No. 153154, District Court, Clark County (Apr. 29, 2008)	02/13/2019	26	6365–6369
27.	Order denying Pro Per Petition, *Johnson v. State,* Case No. 51306, In the Supreme Court of the State of Nevada (May 6, 2008)	02/13/2019	26	6370–6372
28.	Supplemental Brief in Support of Petition for Writ of Habeas Corpus, *State v. Johnson*, Case No.	02/13/2019	26	6373–6441

DOCUMENT		DATE	VOLUME	PAGE(S)
	153154, District Court, Clark County (Oct. 12, 2009)			
29.	Second Supplemental Brief in Support of Petition for Writ of Habeas Corpus, *State v. Johnson*, Case No. 153154, District Court, Clark County (July 14, 2010)	02/13/2019	26	6442–6495
30.	Response to Petition Writ of Habeas Corpus, *State v. Johnson*, Case No. 153154, District Court, Clark County (Jan. 28, 2011)	02/13/2019	26–27	6496–6591
31.	Reply to Response to Petition Writ of Habeas Corpus, *State v. Johnson*, Case No. 153154, District Court, Clark County (June 1, 2011)	02/13/2019	27	6592–6627
32.	Reply Brief on Initial Trial Issues, *State v.* Johnson, Case No. 153154, District Court, Clark County (Aug. 22, 2011)	02/13/2019	27–28	6628–6785
33.	Findings of Fact and Conclusions of Law, *State v. Johnson*, Case No. 153154, District Court, Clark County (Mar. 17, 2014)	02/13/2019	28	6786–6793
34.	Petition for Writ of Habeas Corpus, *State v. Johnson*, Case No. 153154, District Court, Clark County (Oct. 8, 2014)	02/13/2019	28	6794–6808

DOCUMENT	DATE	VOLUME	PAGE(S)
35. Response to Second Petition for Writ of Habeas Corpus (Post-Conviction), *State v. Johnson*, Case No. 153154, District Court, Clark County (Dec. 15, 2014)	02/13/2019	28	6809–6814
36. Reply to Response to Second Petition for Habeas Corpus (Post-Conviction), *State v. Johnson*, Case No. 153154, District Court, Clark County (Jan. 2, 2015)	02/13/2019	28	6815–6821
37. Appellant's Opening Brief, No. 65168, Nev. Sup. Ct., Jan. 9, 2015	02/13/2019	28	6822–6973
38. Findings of Fact and Conclusions of Law), *State v. Johnson*, Case No. 153154, District Court, Clark County (Feb. 4, 2015)	02/13/2019	28	6974–6979
40. Appellant's Reply Brief, No. 65168, Nev. Sup. Ct., Nov. 18, 2015	02/13/2019	28–29	6980–7078
45. Autopsy Report for Peter Talamantez (Aug. 15, 1998)	02/13/2019	29	7079–7091
46. Las Vegas Metropolitan Police Dept. Voluntary Statement of Ace Rayburn Hart_Redacted (Aug. 17, 1998)	02/13/2019	29	7092–7121
47. Las Vegas Metropolitan Police Dept., Voluntary Statement of Brian	02/13/2019	29	7122–7138

DOCUMENT		DATE	VOLUME	PAGE(S)
	Johnson_Redacted (Aug. 17, 1998)			
48.	Indictment, *State v.* Johnson, District Court, Clark County, Nevada Case No. C153154 (Sep. 2, 1998)	02/13/2019	29	7139–7149
49.	Las Vegas Metropolitan Police Dept., Voluntary Statement of Terrell Young_Redacted (Sep. 2, 1998)	02/13/2019	29	7150–7205
50.	Las Vegas Metropolitan Police Dept., Voluntary Statement of Charla Severs _Redacted (Sep. 3, 1998)	02/13/2019	29	7206–7239
51.	Las Vegas Metropolitan Police Dept., Voluntary Statement of Sikia Smith_Redacted (Sep. 8, 1998)	02/13/2019	29–30	7240–7269
52.	Superseding Indictment, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Sep. 15, 1998)	02/13/2019	30	7270–7284
53.	Las Vegas Metropolitan Police Dept., Voluntary Statement of Todd Armstrong_Redacted (Sep. 17, 1998)	02/13/2019	30	7285–7338
54.	Las Vegas Metropolitan Police Dept., Voluntary Statement of Ace Hart_Redacted (Sep. 22, 1998)	02/13/2019	30	7339–7358

DOCUMENT	DATE	VOLUME	PAGE(S)
55. Testimony of Todd Armstrong, *State of Nevada v. Celis*, Justice Court, Clark County, Nevada Case No. 1699-98FM (Jan. 21, 1999)	02/13/2019	30–31	7359–7544
56. Trial Transcript (Volume VIII), *State v. Smith*, District Court, Clark County, Nevada Case No. C153624 (June 17, 1999)	02/13/2019	31	7545–7675
57. Trial Transcript (Volume XVI-AM), *State v. Smith*, District Court, Clark County, Nevada Case No. 153624 (June 24, 1999)	02/13/2019	31–32	7676–7824
58. Motion to Permit DNA Testing of Cigarette Butt (Aug. 17, 1998)	02/13/2019	32	7825–7835
59. Trial Transcript (Volume VI), *State v. Young,* District Court, Clark County, Nevada, Case No. C153154 (Sep. 7, 1999)	02/13/2019	32	7836–7958
60. Interview of Charla Severs (Sep. 27, 1999)	02/13/2019	32	7959–7980
61. Motion to Videotape Deposition of Charla Severs, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Sep. 29, 1999)	02/13/2019	32–33	7981–8004
62. Opposition to Videotape Deposition of Charla Severs, *State v. Johnson*, District Court, Clark	02/13/2019	33	8005–8050

DOCUMENT		DATE	VOLUME	PAGE(S)
	County, Nevada Case No. C153154 (Oct. 6, 1999)			
63.	Transcript of Video Deposition of Charla Severs (Filed Under Seal), *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Oct. 6, 1999)	02/13/2019 **SEALED**	33	8051–8160
64.	Cellmark Report of Laboratory Examination (Nov. 17, 1999)	02/13/2019	33	8161–8165
65.	Motion for Change of Venue, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Nov. 29, 1999)	02/13/2019	33	8166–8291
66.	Records from the California Youth Authority_Redacted	02/13/2019	33–34	8292–8429
67.	Jury Instructions (Guilt Phase), *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (June 8, 2000)	02/13/2019	34	8430–8496
68.	Verdict Forms (Guilt Phase), *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (June 9, 2000)	02/13/2019	34	8497–8503
69.	Special Verdict, *State v.* Johnson, District Court, Clark County, Nevada Case No. C153154 (June 15, 2000)	02/13/2019	34	8504–8506
70.	Affidavit of Kristina Wildeveld (June 23, 2000)	02/13/2019	34	8507–8509

DOCUMENT	DATE	VOLUME	PAGE(S)
71. Amended Notice of Evidence Supporting Aggravating Circumstances, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Mar. 17, 2004)	02/13/2019	34	8510–8518
72. Second Amended Notice of Evidence Supporting Aggravating Circumstances, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Apr. 6, 2004)	02/13/2019	34	8519–8527
73. Opposition to Second Amended Notice of Evidence Supporting Aggravating Circumstances, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Apr. 20, 2004)	02/13/2019	34	8528–8592
74. Reply to Opposition to Notice of Evidence Supporting Aggravating Circumstances, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Apr. 26, 2004)	02/13/2019	34–35	8593–8621
75. Jury Instructions (Penalty Phase 3), *State v.* Johnson, District Court, Clark	02/13/2019	35	8622–8639

DOCUMENT		DATE	VOLUME	PAGE(S)
	County, Nevada Case No. C153154 (Apr. 28, 2005)			
76.	Petition for rehearing, Johnson *v. State*, Nevada Supreme Court, Case No. 45456 (Mar. 27, 2007)	02/13/2019	35	8640–8652
77.	John L. Smith, *Mabey takes* heat *for attending his patients* instead *of the inauguration*, Las Vegas Review-Journal (Jan. 5, 2007)	02/13/2019	35	8653–8656
78.	Sam Skolnik, *Judge out of order, ethics claims say*, Las Vegas Sun (Apr. 27, 2007)	02/13/2019	35	8657–8660
79.	EM 110 - Execution Procedure_Redacted (Nov. 7, 2017)	02/13/2019	35	8661–8667
80.	*Nevada v. Baldonado*, Justice Court, Clark County, Nevada Case No. 04FH2573X (Mar. 30, 2004)	02/13/2019	35	8668–8698
81.	Birth Certificate John White Jr_Redacted	02/13/2019	35	8699–8700
82.	Declaration of Eloise Kline (Nov. 19, 2016)	02/13/2019	35	8701–8704
83.	Jury Questionnaire 2000_Barbara Fuller_Redacted (May 24, 2000)	02/13/2019	35	8705–8727
84.	Media Jury Questionnaire 2000	02/13/2019	35–36	8728–8900
85.	Media Jury Questionnaire 2005	02/13/2019	36	8901–9025
86.	News Articles	02/13/2019	36–37	9026–9296

DOCUMENT	DATE	VOLUME	PAGE(S)
87. State's Exhibit 63 – Photo	02/13/2019	37	9297–9299
88. State's Exhibit 64 – Photo	02/13/2019	37	9300–9302
89. State's Exhibit 65 – Photo	02/13/2019	37	9303–9305
90. State's Exhibit 66 – Photo	02/13/2019	37	9306–9308
91. State's Exhibit 67 – Photo	02/13/2019	37	9309–9311
92. State's Exhibit 69 – Photo	02/13/2019	37	9312–9314
93. State's Exhibit 70 – Photo	02/13/2019	37	9315–9317
94. State's Exhibit 74 – Photo	02/13/2019	37	9318–9320
95. State's Exhibit 75 – Photo	02/13/2019	37	9321–9323
96. State's Exhibit 76 – Photo	02/13/2019	37	9324–9326
97. State's Exhibit 79 – Photo	02/13/2019	37	9327–9329
98. State's Exhibit 80 – Photo	02/13/2019	37	9330–9332
99. State's Exhibit 81 – Photo	02/13/2019	37	9333–9335
100. State's Exhibit 82 – Photo	02/13/2019	37	9336–9338
101. State's Exhibit 86 – Photo	02/13/2019	37	9339–9341
102. State's Exhibit 89 – Photo	02/13/2019	37	9342–9344
103. State's Exhibit 92 – Photo	02/13/2019	37	9345–9347
104. State's Exhibit 113 – Photo	02/13/2019	37	9348–9350
105. State's Exhibit 116 – Photo	02/13/2019	37	9351–9353
106. State's Exhibit 120 – Photo	02/13/2019	37	9354–9356
107. State's Exhibit 125 – Photo	02/13/2019	37	9357–9359
108. State's Exhibit 130 – Photo	02/13/2019	38	9360–9362
109. State's Exhibit 134 – Photo	02/13/2019	38	9363–9365
110. State's Exhibit 137 – Photo	02/13/2019	38	9366–9368
111. State's Exhibit 145 – Photo	02/13/2019	38	9369–9371
112. State's Exhibit 146 – Photo	02/13/2019	38	9372–9374
113. State's Exhibit 148 – Photo	02/13/2019	38	9375–9377
114. State's Exhibit 151 – Photo	02/13/2019	38	9378–9380
115. State's Exhibit 180 – Photo	02/13/2019	38	9381–9384
116. State's Exhibit 181 – Photo	02/13/2019	38	9385–9388
117. State's Exhibit 216 - Probation Officer's Report - Juvenile_Redacted	02/13/2019	38	9389–9403
118. State's Exhibit 217 - Probation Officer's Report_Redacted	02/13/2019	38	9404–9420

DOCUMENT	DATE	VOLUME	PAGE(S)
119. State's Exhibit 221 – Photo	02/13/2019	38	9421–9423
120. State's Exhibit 222 – Photo	02/13/2019	38	9424–9426
121. State's Exhibit 256	02/13/2019	38	9427–9490
122. Las Vegas Metropolitan Police Dept. Crime Scene Report (Aug. 14, 1998)	02/13/2019	38	9491–9499
123. VCR at Terra Linda	02/13/2019	38	9500–9501
124. VCR Remote Control Buying Guide	02/13/2019	38	9502–9505
125. Jury Instructions (Penalty Phase 3), *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (May 4, 2005)	02/13/2019	38	9506–9519
126. Motion to Bifurcate Penalty Phase, *State v.* Johnson, District Court, Clark County, Nevada Case No. C153154 (Apr. 27, 2004)	02/13/2019	38	9520–9525
127. Motion to Reconsider Request to Bifurcate Penalty Phase, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Apr. 11, 2005)	02/13/2019	38	9526–9532
128. Special Verdicts (Penalty Phase 3), *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Apr. 28, 2005)	02/13/2019	38	9533–9544
129. Verdict (Penalty Phase 3), *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (May 5, 2005)	02/13/2019	38	9545–9549

DOCUMENT	DATE	VOLUME	PAGE(S)
130. Declaration of Arthur Cain (Oct. 29, 2018)	02/13/2019	38	9550–9552
131. Declaration of Deborah White (Oct. 27, 2018)	02/13/2019	38	9553–9555
132. Declaration of Douglas McGhee (Oct. 28, 2018)	02/13/2019	38	9556–9558
133. Declaration of Elizabeth Blanding (Oct. 29, 2018)	02/13/2019	38	9559–9560
134. Declaration of Jesse Drumgole (Oct. 27, 2018)	02/13/2019	38	9561–9562
135. Declaration of Johnnisha Zamora (Oct. 28, 2018)	02/13/2019	38	9563–9566
136. Declaration of Johnny White (Oct. 26, 2018)	02/13/2019	38	9567–9570
137. Declaration of Keonna Bryant (Oct. 30, 2018)	02/13/2019	38	9571–9573
138. Declaration of Lolita Edwards (Oct. 30, 2018)	02/13/2019	38	9574–9576
139. Declaration of Loma White (Oct. 31, 2018)	02/13/2019	38	9577–9579
140. Declaration of Moises Zamora (Oct. 28, 2018)	02/13/2019	38	9580–9582
141. Declaration of Vonjelique Johnson (Oct. 28, 2018)	02/13/2019	38	9583–9585
142. Los Angeles Dept. of Child & Family Services_Redacted	02/13/2019	38–39	9586–9831
143. Psychological Evaluation of Donte Johnson by Myla H. Young, Ph.D. (June 6, 2000)	02/13/2019	39	9832–9841
144. Psychological Evaluation of Eunice Cain (Apr. 25, 1988)	02/13/2019	39	9842–9845

DOCUMENT	DATE	VOLUME	PAGE(S)
145. Psychological Evaluation of John White by Harold Kates (Dec. 28, 1993)	02/13/2019	39–40	9846–9862
146. Student Report for John White	02/13/2019	40	9863–9867
147. School Records for Eunnisha White_Redated	02/13/2019	40	9868–9872
148. High School Transcript for John White_Redacted	02/13/2019	40	9873–9874
149. School Record for John White_Redacted	02/13/2019	40	9875–9878
150. Certified Copy SSA Records_Eunice Cain_Redacted	02/13/2019	40	9879–9957
151. Declaration of Robin Pierce (Dec. 16, 2018)	02/13/2019	40	9958–9961
152. California Department of Corrections Records_Redacted (Apr. 25, 2000)	02/13/2019	40	9962–10060
153. Letter from Maxine Miller to Lisa Calandro re forensic lab report (Apr. 13, 1999)	02/13/2019	40	10061–10077
154. Letter from Lisa Calandro Forensic Analytical to Maxine Miller (Apr. 20, 1994)	02/13/2019	40	10078–10080
155. Memorandum re call with Richard Good (Apr. 29, 1999)	02/13/2019	40	10081–10082
156. Letter from Maxine Miller to Berch Henry at Metro DNA Lab (May 7, 1999)	02/13/2019	40	10083–10086
157. Letter from Maxine Miller to Richard Good (May 10, 1999)	02/13/2019	40	10087–10092

DOCUMENT	DATE	VOLUME	PAGE(S)
158. Letter from Maxine Miller to Tom Wahl (May 26, 1999)	02/13/2019	40	10093–10098
159. Stipulation and Order, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (June 8, 1999)	02/13/2019	40	10099–10101
160. Stipulation and Order, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154, (June 14, 1999)	02/13/2019	40	10102–10105
161. Letter from Maxine Miller to Larry Simms (July 12, 1999)	02/13/2019	40–41	10106–10110
162. Stipulation and Order, *State v.* Johnson, District Court, Clark County, Nevada Case No. C153154 (Dec. 22, 1999)	02/13/2019	41	10111–10113
163. Letter from Maxine Miller to Nadine LNU re bullet fragments (Mar. 20, 2000)	02/13/2019	41	10114–10118
164. Memorandum (Dec. 10, 1999)	02/13/2019	41	10119–10121
165. Forensic Analytical Bloodstain Pattern Interpretation (June 1, 2000)	02/13/2019	41	10122–10136
166. Trial Transcript (Volume III), State *v. Young*, District Court, Clark County, Nevada, Case No. C153461 (Sep. 7, 1999)	02/13/2019	41	10137–10215
167. Trial Transcript (Volume VII), *State v. Young*,	02/13/2019	41	10216–10332

DOCUMENT	DATE	VOLUME	PAGE(S)
District Court, Clark County, Nevada, Case No. C153461 (Sep. 13, 1999)			
168. National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, Washington, D.C.: The National Academies Press (2009)	02/13/2019	41	10333–10340
169. Las Vegas Metropolitan Police Dept. Forensic Lab Report of Examination (Sep. 26, 1998)	02/13/2019	41	10341–10343
170. Todd Armstrong juvenile records_Redacted	02/13/2019	41–42	10344–10366
171. Handwritten notes on Pants	02/13/2019	42	10367–10368
172. Declaration of Cassondrus Ragsdale (Dec. 16, 2018)	02/13/2019	42	10369–10371
173. Report of Dr. Kate Glywasky (Dec. 19, 2018)	02/13/2019	42	10372–10375
174. Curriculum Vitae of Dr. Kate Glywasky	02/13/2019	42	10376–10384
175. Report of Deborah Davis, Ph.D. (Dec. 18, 2018)	02/13/2019	42	10385–10435
176. Curriculum Vitae of Deborah Davis, Ph.D.	02/13/2019	42	10436–10462
177. Report of T. Paulette Sutton, Associate Professor, Clinical Laboratory Sciences (Dec. 18, 2018)	02/13/2019	42	10463–10472
178. Curriculum Vitae of T. Paulette Sutton	02/13/2019	42	10473–10486

DOCUMENT	DATE	VOLUME	PAGE(S)
179. Report of Matthew Marvin, Certified Latent Print Examiner (Dec. 18, 2018)	02/13/2019	42	10487–10494
180. Curriculum Vitae of Matthew Marvin	02/13/2019	42	10495–10501
181. Trial Transcript (Volume V), *State v. Smith*, District Court, Clark County, Nevada Case No. C153624 (June 16, 1999)	02/13/2019	42–43	10502–10614
182. Trial Transcript (Volume VI), *State v. Smith*, District Court, Clark County, Nevada Case No. C153624 (June 16, 1999)	02/13/2019	43	10615–10785
183. Las Vegas Metropolitan Police Dept. Interview of Tod Armstrong_Redacted (Aug. 17, 1998)	02/13/2019	43	10786–10820
184. Las Vegas Metropolitan Police Dept. Interview of Tod Armstrong _Redacted (Aug. 18, 1998)	02/13/2019	43	10821–10839
185. Las Vegas Metropolitan Police Dept. Interview of Charla Severs_Redacted (Aug. 18, 1998)	02/13/2019	43–44	10840–10863
186. Las Vegas Metropolitan Police Dept. Interview of Sikia Smith_Redacted (Aug. 17, 1998)	02/13/2019	44	10864–10882
187. Las Vegas Metropolitan Police Dept. Interview of Terrell Young_Redacted (Sep. 2, 1998)	02/13/2019	44	10883–10911
188. Declaration of Ashley Warren (Dec. 17, 2018)	02/13/2019	44	10912–10915

DOCUMENT	DATE	VOLUME	PAGE(S)
189. Declaration of John Young (Dec. 10, 2018)	02/13/2019	44	10916–10918
190. Brief of Plaintiffs-Appellants, *Abdur'rahman v.* Parker, Tennessee Supreme Court, Nashville Division, Case No. M2018-10385-SC-RDO-CV	02/13/2019	44–45	10919–11321
191. Sandoz' Inc.'s Motion for Leave Pursuant to NRAP 29 to Participate as Amicus Curiae in Support of Real Parties in Interest, *Nevada v. The Eighth Judicial Disrict Court of the State of Nevada*, Nevada Supreme Court, Case No. 76485	02/13/2019	45	11322–11329
192. Notice of Entry of Order, *Dozier v. State of Nevada*, District Court, Clark County, Nevada, Case No. 05C215039	02/13/2019	45	11330–11350
193. Declaration of Cassondrus Ragsdale (2018.12.18)	02/13/2019	45	11351–11353
194. Affidavit of David B. Waisel, *State of Nevada*, District Court, Clark County, Case No. 05C215039 (Oct. 4, 2018)	02/13/2019	45–46	11354–11371
195. Declaration of Hans Weding (Dec. 18, 2018)	02/13/2019	46	11372–11375
196. Trial Transcript (Volume IX), *State v. Smith*, District Court, Clark County, Nevada Case No. C153624 (June 18, 1999)	02/13/2019	46	11376–11505

DOCUMENT	DATE	VOLUME	PAGE(S)
197. Voluntary Statement of Luis Cabrera (August 14, 1998)	02/13/2019	46	11506–11507
198. Voluntary Statement of Jeff Bates (handwritten)_Redacted (Aug. 14, 1998)	02/13/2019	46	11508–11510
199. Voluntary Statement of Jeff Bates_Redacted (Aug. 14, 1998)	02/13/2019	46	11511–11517
200. Presentence Investigation Report, State's Exhibit 236, *State v. Young*, District Court, Clark County, Nevada Case No. C153461_Redacted (Sep. 15, 1999)	02/13/2019	46	11518–11531
201. Presentence Investigation Report, State's Exhibit 184, *State v. Smith*, District Court, Clark County, Nevada Case No. C153624_Redacted (Sep. 18, 1998)	02/13/2019	46	11532–11540
202. School Record of Sikia Smith, Defendant's Exhibit J, *State v. Smith*, District Court, Clark County, Nevada (Case No. C153624)	02/13/2019	46	11541–11542
203. School Record of Sikia Smith, Defendant's Exhibit K, *State v. Smith*, District Court, Clark County, Nevada (Case No. C153624)	02/13/2019	46	11543–11544

DOCUMENT	DATE	VOLUME	PAGE(S)
204. School Record of Sikia Smith, Defendant's Exhibit L, *State v. Smith*, District Court, Clark County, Nevada (Case No. C153624)	02/13/2019	46	11545–11546
205. Competency Evaluation of Terrell Young by Greg Harder, Psy.D., Court's Exhibit 2, *State v. Young*, District Court, Clark County, Nevada Case No. C153461 (May 3, 2006)	02/13/2019	46	11547–11550
206. Competency Evaluation of Terrell Young by C. Philip Colosimo, Ph.D., Court's Exhibit 3, *State v. Young*, District Court, Clark County, Nevada Case No. C153461 (May 3, 2006)	02/13/2019	46	11551–11555
207. Motion and Notice of Motion in Limine to Preclude Evidence of Other Guns Weapons and Ammunition Not Used in the Crime, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (Oct. 19, 1999)	02/13/2019	46	11556–11570
208. Declaration of Cassondrus Ragsdale (Dec. 19, 2018)	02/13/2019	46	11571–11575
209. Post –Evidentiary Hearing Supplemental Points and Authorities, Exhibit A: Affidavit of Theresa Knight, *State v. Johnson*,	02/13/2019	46	11576–11577

DOCUMENT	DATE	VOLUME	PAGE(S)
District Court, Clark County, Nevada Case No. C153154, June 5, 2005			
210. Post –Evidentiary Hearing Supplemental Points and Authorities, Exhibit B: Affidavit of Wilfredo Mercado, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154, June 22, 2005	02/13/2019	46	11578–11579
211. Genogram of Johnson Family Tree	02/13/2019	46	11580–11581
212. Motion in Limine Regarding Referring to Victims as "Boys", *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154	02/13/2019	46	11582–11585
213. Declaration of Schaumetta Minor, (Dec. 18, 2018)	02/13/2019	46	11586–11589
214. Declaration of Alzora Jackson (Feb. 11, 2019)	02/13/2019	46	11590–11593
Exhibits in Support of Petitioner's Motion for Leave to Conduct Discovery	12/13/2019	49	12197–12199
1. *Holloway v. Baldonado*, No. A498609, Plaintiff's Opposition to Motion for Summary Judgment, District Court of Clark County, Nevada, filed Aug. 1, 2007	12/13/2019	49	12200–12227
2. Handwritten letter from Charla Severs, dated Sep. 27, 1998	12/13/2019	49	12228–12229

DOCUMENT	DATE	VOLUME	PAGE(S)
Exhibits in Support of Reply to State's Response to Petition for Writ of Habeas Corpus	12/13/2019	47	11837–11839
215. *Holloway v. Baldonado*, No. A498609, Plaintiff's Opposition to Motion for Summary Judgment, District Court of Clark County, Aug. 1, 2007	12/13/2019	47–48	11840–11867
216. *Holloway v. Baldonado*, No. A498609, Opposition to Motion for Summary Judgment Filed by Defendants Stewart Bell, David Roger, and Clark County, District Court of Clark County, filed Jan. 16, 2008	12/13/2019	48–49	11868–12111
217. Letter from Charla Severs, dated Sep. 27, 1998	12/13/2019	49	12112–12113
218. Decision and Order, *State of Nevada v. Johnson*, Case No. C153154, District Court of Clark County, filed Apr. 18, 2000	12/13/2019	49	12114–12120
219. State's Motion to Disqualify the Honorable Lee Gates, State *of Nevada v. Johnson*, Case No. C153154, District Court of Clark County, filed Apr. 4, 2005	12/13/2019	49	12121–12135
220. Affidavit of the Honorable Lee A. Gates, *State of Nevada v. Johnson*, Case No. C153154, District	12/13/2019	49	12136–12138

DOCUMENT	DATE	VOLUME	PAGE(S)
Court of Clark County, filed Apr. 5, 2005			
221. Motion for a New Trial (Request for Evidentiary Hearing), *State of Nevada v. Johnson*, Case No. C153154, District Court of Clark County, filed June 23, 2000	12/13/2019	49	12139–12163
222. Juror Questionnaire of John Young, *State of Nevada v. Johnson*, Case No. C153154, District Court of Clark County, dated May 24, 2000	12/13/2019	49	16124–12186
Findings of Fact, Conclusions of Law and Order, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	10/08/2021	49	12352–12357
Minute Order (denying Petitioner's Post–Conviction Writ of Habeas Corpus, Motion for Discovery and Evidentiary Hearing), *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	05/15/2019	49	12264–12266
Minutes of Motion to Vacate Briefing Schedule and Strike Habeas Petition	07/09/2019	47	11710
Motion and Notice of Motion for Evidentiary Hearing, *Johnson v.*	12/13/2019	49	12231–12241

DOCUMENT	DATE	VOLUME	PAGE(S)
Gittere, et al., Case No. A–19–789336–W, Clark County District Court, Nevada			
Motion and Notice to Conduct Discovery, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	12/13/2019	49	12187–12196
Motion for Leave to File Under Seal and Notice of Motion	02/15/2019		11600–11602
Motion in Limine to Prohibit Any References to the First Phase as the "Guilt Phase"	11/29/1999	2	302–304
Motion to Vacate Briefing Schedule and Strike Habeas Petition, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	05/16/2019	46–47	11609–11612
Motion to Vacate Briefing Schedule and Strike Habeas Petition, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	05/23/2019	47	11621–11624
Motion to Withdraw Request to Strike Petition and to Withdraw Request for Petition to be Stricken as Not Properly Before the Court), *Johnson v. Gittere, et al.*, Case No. A–19–789336–	06/26/2019	47	11708–11709

DOCUMENT	DATE	VOLUME	PAGE(S)
W, Clark County District Court, Nevada			
Notice of Appeal, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	11/10/2021	50	12366–12368
Notice of Entry of Findings of Fact, Conclusions of Law and Order, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	10/11/2021	49–50	12358–12364
Notice of Hearing (on Discovery Motion), *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	12/13/2019	49	12330
Notice of Objections to Proposed Order, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	02/02/2021	49	12267–12351
Notice of Supplemental Exhibit 223, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	02/11/2019	49	11242–12244
223. Declaration of Dayvid J. Figler, dated Feb. 10, 2020	02/11/2019	49	12245–12247
Opposition to Defendants' Motion in Limine to Prohibit	12/02/1999	2	305–306

DOCUMENT	DATE	VOLUME	PAGE(S)
Any References to the First Phase as the "Guilt Phase"			
Opposition to Motion in Limine to Preclude Evidence of Other Guns, Weapons and Ammunition Not Used in the Crime	11/04/1999	2	283–292
Opposition to Motion to Vacate Briefing Schedule and Strike Habeas Petition, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	05/28/2019	47	11625–11628
Petition for Writ of Habeas Corpus, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	02/13/2019	24–25	5752–6129
Post–Evidentiary Hearing Supplemental Points and Authorities	06/22/2005	22	5472–5491
Reply to Opposition to Motion to Vacate Briefing Schedule and Strike Habeas Petition	06/20/2019	47	11705–11707
Reply to State's Response to Petition for Writ of Habeas Corpus	12/13/2019	47	11718–11836
State's Response to Defendant's Petition for Writ of Habeas Corpus (Post–Conviction),	05/29/2019	47	11629–11704

DOCUMENT	DATE	VOLUME	PAGE(S)
Johnson v. Gittere, et al., Case No. A–19–789336–W, Clark County District Court, Nevada			
Stipulation and Order to Modify Briefing Schedule, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	09/30/2019	47	11711–11714
Stipulation and Order to Modify Briefing Schedule, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	11/22/2019	47	11715–11717
Transcript of All Defendant's Pending Motions	03/02/2000	2	416–430
Transcript of Argument to Admit Evidence of Aggravating Circumstances	05/03/2004	12	2904–2958
Transcript of Argument: Petition for Writ of Habeas Corpus (All Issues Raised in the Petition and Supplement)	12/01/2011	22–23	5498–5569
Transcript of Arguments	04/28/2004	12	2870–2903
Transcript of Decision: Procedural Bar and Argument: Petition for Writ of Habeas Corpus	07/20/2011	22	5492–5497
Transcript of Defendant's Motion for Leave to File Under	02/25/2019	46	11594–11599

DOCUMENT	DATE	VOLUME	PAGE(S)
Seal, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada			
Transcript of Defendant's Motion to Reveal the Identity of Informants and Reveal Any Benefits, Deals, Promises or Inducements; Defendant's Motion to Compel Disclosure of Existence and Substance of Expectations, or Actual Receipt of Benefits or Preferential Treatment for Cooperation with Prosecution; Defendant's Motion to Compel the Production of Any and All Statements of Defendant; Defendant's Reply to Opposition to Motion in Limine to Preclude Evidence of Other Guns, Weapons, Ammunition; Defendant's Motion in Limine to Preclude Evidence of Witness Intimidation	11/18/1999	2	293–301
Transcript of Evidentiary Hearing	05/17/2004	12	2959–2989
Transcript of Evidentiary Hearing	06/14/2005	22	5396–5471
Transcript of Evidentiary Hearing	04/04/2013	23	5570–5673
Transcript of Evidentiary Hearing	04/11/2013	23	5674–5677

DOCUMENT	DATE	VOLUME	PAGE(S)
Transcript of Evidentiary Hearing	06/21/2013	23	5678–5748
Transcript of Evidentiary Hearing	09/18/2013	23–24	5749–5751
Transcript of Excerpted Testimony of Termaine Anthony Lytle	05/17/2004	12	2990–2992
Transcript of Jury Trial – Day 1 (Volume I)	06/05/2000	2–4	431–809
Transcript of Jury Trial – Day 2 (Volume II)	06/06/2000	4–5	810–1116
Transcript of Jury Trial – Day 3 (Volume III)	06/07/2000	5–7	1117–1513
Transcript of Jury Trial – Day 4 (Volume IV)	06/08/2000	7–8	1514–1770
Transcript of Jury Trial – Day 5 (Volume V)	06/09/2000	8	1771–1179
Transcript of Jury Trial – Penalty – Day 1 (Volume I) AM	04/19/2005	12–13	2993–3018
Transcript of Jury Trial – Penalty – Day 1 (Volume I) PM	4/19/2005[1]	13	3019–3176
Transcript of Jury Trial – Penalty – Day 10 (Volume X)	05/02/2005	20–21	4791–5065

[1] This transcript was not filed with the District Court nor is it under seal.

DOCUMENT	DATE	VOLUME	PAGE(S)
Transcript of Jury Trial – Penalty – Day 10 (Volume X) – Exhibits	05/02/2005	21	5066–5069
Transcript of Jury Trial – Penalty – Day 11 (Volume XI)	05/03/2005	21–22	5070–5266
Transcript of Jury Trial – Penalty – Day 12 (Volume XII)	05/04/2005	22	5267–5379
Transcript of Jury Trial – Penalty – Day 12 (Volume XII) – Deliberations	05/04/2005	22	5380–5383
Transcript of Jury Trial – Penalty – Day 13 (Volume XIII)	05/05/2005	22	5384–5395
Transcript of Jury Trial – Penalty – Day 2 (Volume I) AM	04/20/2005	13	3177–3201
Transcript of Jury Trial – Penalty – Day 2 (Volume II) PM	04/20/2005	13–14	3202–3281
Transcript of Jury Trial – Penalty – Day 3 (Volume III) PM	04/21/2005	14–15	3349–3673
Transcript of Jury Trial – Penalty – Day 3 (Volume III–A) AM	04/21/2005	14	3282–3348
Transcript of Jury Trial – Penalty – Day 4 (Volume IV) AM – Amended Cover Page	04/22/2005	16	3790–3791
Transcript of Jury Trial – Penalty – Day 4 (Volume IV) PM	04/22/2005	15–16	3674–3789

DOCUMENT	DATE	VOLUME	PAGE(S)
Transcript of Jury Trial – Penalty – Day 4 (Volume IV–B)	04/22/2005	16	3792–3818
Transcript of Jury Trial – Penalty – Day 5 (Volume V) PM	04/25/2005	16	3859–3981
Transcript of Jury Trial – Penalty – Day 5 (Volume V–A)	04/25/2005	16	3819–3858
Transcript of Jury Trial – Penalty – Day 6 (Volume VI) PM	04/26/2005	17–18	4103–4304
Transcript of Jury Trial – Penalty – Day 6 (Volume VI–A) PM	04/26/2005	16–17	3982–4102
Transcript of Jury Trial – Penalty – Day 7 (Volume VII–PM)	04/27/2005	18	4382–4477
Transcript of Jury Trial – Penalty – Day 7 (Volume VII–A)	04/27/2005	18	4305–4381
Transcript of Jury Trial – Penalty – Day 8 (Volume VIII–C)	04/28/2005	18–19	4478–4543
Transcript of Jury Trial – Penalty – Day 9 (Volume IX)	04/29/2005	19–20	4544–4790
Transcript of Jury Trial – Penalty Phase – Day 1 (Volume I) AM	06/13/2000	8	1780–1908
Transcript of Jury Trial – Penalty Phase – Day 1 (Volume II) PM	06/13/2000	8–9	1909–2068

DOCUMENT	DATE	VOLUME	PAGE(S)
Transcript of Jury Trial – Penalty Phase – Day 2 (Volume III)	06/14/2000	9–10	2069-2379
Transcript of Jury Trial – Penalty Phase – Day 3 (Volume IV)	06/16/2000	10	2380–2470
Transcript of Material Witness Charla Severs' Motion for Own Recognizance Release	01/18/2000	2	414–415
Transcript of Motion for a New Trial	07/13/2000	10	2471–2475
Transcript of Petition for Writ of Habeas Corpus and Setting of 1. Motion for Leave and 2. Motion for Evidentiary Hearing, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	02/13/2020	49	12249–12263
Transcript of Preliminary Hearing	10/12/1999	2	260–273
Transcript of State's Motion to Permit DNA Testing	09/02/1999	2	252 – 254
Transcript of State's Motion to Videotape the Deposition of Charla Severs	10/11/1999	2	255–259
Transcript of Status Check: Filing of All Motions (Defendant's Motion to Reveal	10/21/1999	2	274–282

DOCUMENT	DATE	VOLUME	PAGE(S)
the Identity of Informants and Reveal Any Benefits, Deals, Promises or Inducements; Defendant's Motion to Compel Disclosure of Existence and Substance of Expectations, or Actual Receipt of Benefits or Preferential Treatment for Cooperation with Prosecution; Defendant's Motion to Compel the Production of Any and All Statements of Defendant; State's Motion to Videotape the Deposition of Charla Severs; Defendant's Motion in Limine to Preclude Evidence of Other Crimes; Defendant's Motion to Reveal the Identity of Informants and Reveal any Benefits, Deals' Defendant's Motion to Compel the Production of any and all Statements of the Defendant			
Transcript of the Grand Jury, *State v. Johnson*, Case No. 98C153154, Clark County District Court, Nevada	09/01/1998	1–2	001–251
Transcript of Three Judge Panel – Penalty Phase – Day 1 (Volume I)	07/24/2000	10–11	2476–2713
Transcript of Three Judge Panel – Penalty Phase – Day 2 and Verdict (Volume II)	07/26/2000	11–12	2714–2853

DOCUMENT	DATE	VOLUME	PAGE(S)
Transcript Re: Defendant's Motions	01/06/2000	2	307–413
Verdict Forms – Three Judge Panel	7/26/2000	12	2854–2869

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2022, I electronically filed the foregoing Appendix 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:

Alexander G. Chen
Chief Deputy District Attorney
Clark County District Attorney's Office

/s/ Celina Moore
Celina Moore
An employee of the Federal
Public Defender's Office

Public Defender's petition is an unauthorized fugitive document that may not be entertained. NRS 34.730(4) (no hearing upon an unauthorized petition may be set).

At least twice before to the State's knowledge, the Federal Public Defender has filed unauthorized habeas petitions in other capital cases without their client's consent or knowledge. First, in Paul Browning, C072536, Federal Public Defender Michael Pescetta filed an unauthorized habeas petition which prompted Browning to file a pro per motion to strike the petition on November 24, 2009. Judge Michelle Leavitt granted the motion and struck the petition on February 11, 2010. As a result of acting contrary to their client's interests in state court, the Federal Public Defender's Office was conflicted and withdrawn as counsel from representing Browning any further in federal habeas proceedings by order filed on March 22, 2010. 3:05-cv-00087-RCJ-RAM. Next, Federal Public Defender Brian Abbington filed an unauthorized habeas petition on behalf of capital litigant Gregory Bolin in federal court which contained a fraudulent verification that Bolin had authorized the petition when he had not. 3:07-cv-00481-RLH-VPC. This conduct resulted in an ethics complaint against Abbington and his eventual termination of employment with the Federal Public Defender.

In the instant case, Donte Johnson twice has made clear that he does not authorize nor consent to the Federal Public Defender's petition filed on February 13, 2019, and has requested it be stricken. The Federal Public Defender has not been appointed to represent Johnson in state court and may not appear on his behalf without Johnson's consent. Regardless of whether the Federal Public Defender had Johnson's consent to initiate the instant habeas proceeding, Johnson retains authority to continue or terminate the litigation at any time. Such a choice to pursue state post-conviction habeas relief or not belongs exclusively to Johnson, not federally appointed counsel. This court must respect Johnson's wishes.

WHEREFORE, the State respectfully requests that the briefing schedule be vacated and the habeas petition filed on February 13, 2019, be stricken.

/ / /

/ / /

/ / /

DATED this 16th day of May, 2019.

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY *<u>/s/ Steven S. Owens</u>*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the District Attorney
Regional Justce center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155
(702) 671-2750

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Motion to Comply with Mandamus, was made this 16th day of May, 2019, by Electronic Filing to:

RANDOLPH M. FIEDLER
Email: Randolph_Fiedler@fd.org

ELLESSE HENDERSON
Email: Ellesse_Henderson@fd.org

JOSE A. GERMAN
Email: Jose_German@fd.org

By: /s/ E.Davis

Employee, District Attorney's Office

SSO//ed

Electronically Filed
5/17/2019 3:19 PM
Steven D. Grierson
CLERK OF THE COURT

AMEN
RENE L. VALLADARES
Federal Public Defender
Nevada Bar No. 11479
RANDOLPH M. FIEDLER
Assistant Federal Public Defender
Nevada Bar No. 12577
Randolph_fiedler@fd.org
ELLESSE HENDERSON
Assistant Federal Public Defender
Nevada Bar No. 14674C
Ellesse_henderson@fd.org
JOSE A. GERMAN
Assistant Federal Public Defender
Nevada Bar No. 14676C
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (Fax)

Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

DONTE JOHNSON, Petitioner, v. WILLIAM GITTERE, Warden of Ely State Prison, and AARON FORD, Attorney General of the State of Nevada, Respondents.	Case No. A-19-789336-W Dept. No. 6 **AMENDED VERIFICATION** Date of Hearing: Time of Hearing: (Death Penalty Habeas Corpus Case)

Petitioner Donte Johnson, through undersigned counsel, files this Amended Verification for the Petition filed on February 13, 2019. *See* Ex. 1.

DATED this 17th day of May, 2019.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

/s/ Randolph M. Fiedler
RANDOLPH M. FIEDLER
Assistant Federal Public Defender

/s/ Jose A. German
JOSE A. GERMAN
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(1), the undersigned hereby certifies that on this 17th day of May, 2019, a true and correct copy of the foregoing AMENDED VERIFICATION, was filed electronically with the Eighth Judicial District Court. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

Steven S. Owens
Chief Deputy District Attorney
motions@clarkcountyda.com
steven.owens@clarkcountyda.com

/s/ Jessica Pillsbury
JESSICA PILLSBURY

Electronically Filed
5/17/2019 3:19 PM
Steven D. Grierson
CLERK OF THE COURT

EXHS
RENE L. VALLADARES
Federal Public Defender
Nevada Bar No. 11479
RANDOLPH M. FIEDLER
Assistant Federal Public Defender
Nevada Bar No. 12577
Randolph_fiedler@fd.org
ELLESSE HENDERSON
Assistant Federal Public Defender
Nevada Bar No. 14674C
Ellesse_henderson@fd.org
JOSE A. GERMAN
Assistant Federal Public Defender
Nevada Bar No. 14676C
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (Fax)

Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

DONTE JOHNSON, Petitioner, v. WILLIAM GITTERE, Warden of Ely State Prison, and AARON FORD, Attorney General of the State of Nevada, Respondents.	Case No. A-19-789336-W Dept. No. 6 **INDEX OF EXHIBIT IN SUPPORT OF AMENDED VERIFICATION** Date of Hearing: Time of Hearing: (Death Penalty Habeas Corpus Case)

No.	DATE	DOCUMENT
1.	5/14/2019	Verification of Donte Johnson

DATED this 17th day of May, 2019.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

/s/ Randolph M. Fiedler
RANDOLPH M. FIEDLER
Assistant Federal Public Defender

/s/ Jose A. German
JOSE A. GERMAN
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(1), the undersigned hereby certifies that on this 17th day of May, 2019, a true and correct copy of the foregoing AMENDED VERIFICATION, was filed electronically with the Eighth Judicial District Court. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

Steven S. Owens
Chief Deputy District Attorney
motions@clarkcountyda.com
steven.owens@clarkcountyda.com

/s/ Jessica Pillsbury
JESSICA PILLSBURY

EXHIBIT 1

Verification

Under penalty of perjury, the undersigned declares that the undersigned is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true

Dated this 14th day of May, 2019.

Donte Johnson

Donte Johnson
Petitioner

Randolph M. Fiedler
Attorney for petitioner

Electronically Filed
5/23/2019 2:27 PM
Steven D. Grierson
CLERK OF THE COURT

MOT
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- DONTE JOHNSON, #1586283 Defendant.	CASE NO: A-19-789336-W DEPT NO: VI **HEARING REQUESTED**

MOTION TO VACATE BRIEFING SCHEDULE AND STRIKE HABEAS PETITION

On February 13, 2019, the Federal Public Defender filed the instant 359-page habeas petition ostensibly on behalf of Donte Johnson by representing that he had personally authorized counsel to commence this habeas action. On February 25, 2019, counsel appeared in court and a briefing schedule was set. Thereafter, Donte Johnson filed motions to strike the petition on April 4 and April 11, 2019, representing that he did not verify or consent to federal counsel filing the petition. The State now moves to vacate the briefing schedule and to strike the unauthorized petition.

Without the client's consent, federal counsel has no authority to commence or continue a habeas proceeding in state court. NRS 34.730. In fact, without the client's consent the Federal Public Defender may not represent Donte Johnson in state court and certainly may not act contrary to his wishes. Because Donte Johnson has not sought counsel from this court per NRS 34.750 nor authorized the commencement of this proceeding on his behalf, the Federal

Public Defender's petition is an unauthorized fugitive document that may not be entertained. NRS 34.730(4) (no hearing upon an unauthorized petition may be set).

At least twice before to the State's knowledge, the Federal Public Defender has filed unauthorized habeas petitions in other capital cases without their client's consent or knowledge. First, in Paul Browning, C072536, Federal Public Defender Michael Pescetta filed an unauthorized habeas petition which prompted Browning to file a pro per motion to strike the petition on November 24, 2009. Judge Michelle Leavitt granted the motion and struck the petition on February 11, 2010. As a result of acting contrary to their client's interests in state court, the Federal Public Defender's Office was conflicted and withdrawn as counsel from representing Browning any further in federal habeas proceedings by order filed on March 22, 2010. 3:05-cv-00087-RCJ-RAM. Next, Federal Public Defender Brian Abbington filed an unauthorized habeas petition on behalf of capital litigant Gregory Bolin in federal court which contained a fraudulent verification that Bolin had authorized the petition when he had not. 3:07-cv-00481-RLH-VPC. This conduct resulted in an ethics complaint against Abbington and his eventual termination of employment with the Federal Public Defender.

In the instant case, Donte Johnson twice has made clear that he does not authorize nor consent to the Federal Public Defender's petition filed on February 13, 2019, and has requested it be stricken. The Federal Public Defender has not been appointed to represent Johnson in state court and may not appear on his behalf without Johnson's consent. Regardless of whether the Federal Public Defender had Johnson's consent to initiate the instant habeas proceeding, Johnson retains authority to continue or terminate the litigation at any time. Such a choice to pursue state post-conviction habeas relief or not belongs exclusively to Johnson, not federally appointed counsel. This court must respect Johnson's wishes.

WHEREFORE, the State respectfully requests that the briefing schedule be vacated and the habeas petition filed on February 13, 2019, be stricken.

/ / /

/ / /

/ / /

DATED this 23rd day of May, 2019.

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY *<u>/s/ Steven S. Owens</u>*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the District Attorney
Regional Justice center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155
(702) 671-2750

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Motion to Comply with Mandamus, was made this 23rd day of May, 2019, by Electronic Filing to:

RANDOLPH M. FIEDLER
Email: Randolph_Fiedler@fd.org

ELLESSE HENDERSON
Email: Ellesse_Henderson@fd.org

JOSE A. GERMAN
Email: Jose_German@fd.org

By: */s/ E.Davis*

Employee, District Attorney's Office

SSO//ed

Electronically Filed
5/28/2019 9:17 AM
Steven D. Grierson
CLERK OF THE COURT

OPPM
RENE L. VALLADARES
Federal Public Defender
Nevada Bar No. 11479
RANDOLPH M. FIEDLER
Assistant Federal Public Defender
Nevada Bar No. 12577
Randolph_fiedler@fd.org
ELLESSE HENDERSON
Assistant Federal Public Defender
Nevada Bar No. 14674C
Ellesse_henderson@fd.org
JOSE A. GERMAN
Assistant Federal Public Defender
Nevada Bar No. 14676C
Jose_german@fd.org
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (Fax)

Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

DONTE JOHNSON, Petitioner, v. WILLIAM GITTERE, et al., Respondents.	Case No. **A-19-789336-W** Dept. No. **6** **OPPOSITION TO MOTIONS TO VACATE BRIEFING SCHEDULE AND STRIKE HABEAS PETITION** Date of Hearing: July 9, 2019 Time of Hearing: 9:30 a.m. (Death Penalty Habeas Corpus Case)

POINTS AND AUTHORITIES

I. BACKGROUND

On February 13, 2019, Donte Johnson, through counsel, filed a Petition for Writ of Habeas Corpus (Post-Conviction) and Notice of Motion. Two months later Johnson filed, pro se, two requests to strike his petition.[1]

The State filed a Motion to Vacate Briefing Schedule and Strike Habeas Petition.[2] Johnson filed an Amended Verification.[3] The State then filed a second Motion to Vacate Briefing Schedule and Strike Habeas Petition, the same as the first, but adding a request for hearing.[4]

This opposition follows.

II. ARGUMENT

Under NRS 34.730(1), "A petition must be verified by the petitioner or the petitioner's counsel. If the petition is verified by counsel, counsel shall also verify that the petitioner personally authorized counsel to commence the action." In *Miles v. State*, 120 Nev. 383, 384, 91 P.3d 588, 588 (2004), the Nevada Supreme Court recognized that an improper verification is a defect that "is not jurisdictional and, therefore, the district court has discretion to permit a petitioner to amend the petition to cure an inadequate defect." The court noted that "permitting an

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[1] *See* Request to Strike Petition (Death Penalty) (Apr. 4, 2019); Request for petition to be stricken as it is not properly before the court (Apr. 11, 2019).

[2] Motion to Vacate Briefing Schedule and Strike Habeas Petition (May 16, 2019).

[3] Amended Verification (May 17, 2019).

[4] Motion to Vacate Briefing Schedule and Strike Habeas Petition (May 23, 2019).

improper verification to be cured will serve to promote, rather than hinder the policy objectives" of ensuring the allegations in a petition are true, protecting against the filing of frivolous petitions, and serving judicial economy. *Id.* at 386, 91 P.3d at 589–90. The court concluded that the district court erred by granting a motion to dismiss based on an inadequate verification. *Id.* at 387, 91 P.3d at 590.

On May 17, 2019, Johnson filed an Amended Verification. The State offers no argument that this verification is inadequate. And the Amended Verification meets the requirements of NRS 34.730, copying verbatim the language set forth in the form found at NRS 34.735.[5] Unlike the prior verification signed by counsel, the Amended Verification was personally executed by Johnson.[6] Thus, the State's motion lacks merit, and this Court should deny it.

DATED this 28th day of May, 2019.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

/s/ Randolph M. Fiedler
RANDOLPH M. FIEDLER
Assistant Federal Public Defender

/s/ Ellesse Henderson
ELLESSE HENDERSON
Assistant Federal Public Defender

/s/ Jose A. German
JOSE A. GERMAN
Assistant Federal Public Defender

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[5] *Compare* NRS 34.735 *with* Amended Verification.

[6] NRS 34.730 provides that either petitioner or counsel can verify a petition. If verified by counsel, counsel is also required to verify that the petitioner personally authorized counsel to commence the action. NRS 34.730.

CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 28th day of May 2019, a true and correct copy of the foregoing **OPPOSITION TO MOTIONS TO VACATE BRIEFING SCHEDULE AND STRIKE HABEAS PETITION** was filed electronically with the Eighth Judicial District Court. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

Steven S. Owens
200 Lewis Avenue
P.O. Box 552212
Las Vegas,, NV 89155
Steven.Owens@clarkcountyda.com

/s/ Sara Jelinek
AN EMPLOYEE OF THE FEDERAL PUBLIC DEFENDERS OFFICE

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Steven D. Grierson
CLERK OF THE COURT

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- DONTE JOHNSON, #1586283 Defendant.	CASE NO: A-19-789336-W / 98C153154 DEPT NO: VI

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

DATE OF HEARING: July 31, 2019
TIME OF HEARING: 9:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On June 9, 2000, Donte Johnson (a.k.a. John White, see Exhibit 81) was convicted by a jury of four counts each of first-degree murder with the use of a deadly weapon, robbery with use of deadly weapon, first-degree kidnapping with use of deadly weapon, and burglary with use of deadly weapon. After the first penalty-phase jury could not agree on a sentence, Johnson was sentenced to death by a three-judge panel on July 26, 2000. On direct appeal, the Nevada Supreme Court affirmed Johnson's convictions but vacated the death sentences and remanded for a new penalty hearing. Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002) ("Johnson I") (en banc), overruled on other grounds by Nunnery v. State, 127 Nev. 749, 263 P.3d 235 (2011). That new penalty hearing, bifurcated into a death-eligibility and a sentence-selection phase, was conducted in April and May of 2005. After a total of nine days, the jury returned verdicts imposing a sentence of death for each of the four murders. On appeal, the Nevada Supreme Court affirmed the death sentences. Johnson v. State, 122 Nev. 1344, 148 P.3d 767 (2006) ("Johnson II"). Remittitur issued on January 28, 2008.

Johnson timely filed a first post-conviction petition for writ of habeas corpus ("First Petition"), in proper person, on February 13, 2008. Christopher Oram, Esq., was appointed as post-conviction counsel. Extensive briefing commenced, including counsel's October 12, 2009 supplement and July 14, 2010 second supplement. This Court also ordered an evidentiary hearing, wherein on April 4, 11, and June 21, 2013, all Johnson's prior counsel[1] testified, including: now-judge Joseph Sciscento, guilt-phase counsel; Dayvid Figler, Esq., guilt-phase and first and second penalty-phase counsel; and Bret Whipple, Esq. and Alzora Jackson, Esq., final penalty-phase counsel. This Court denied the First Petition by minute order on February 13, 2014. Written findings of fact and conclusions of law were filed on March 17, 2014. Mr. Oram continued to represent Johnson on appeal from this denial. The Nevada Supreme Court affirmed the denial in a published opinion on October 5, 2017. Johnson v. State, 133 Nev. ___,

[1] With the exception of Johnson's appellate counsel, Lee-Elizabeth McMahon, Esq., deceased.

402 P.3d 1266 (2017), reh'g denied (Jan. 19, 2018) ("Johnson III") (en banc). Remittitur issued on February 13, 2018.

While that appeal was pending, Johnson filed a second petition for writ of habeas corpus in proper person ("Second Petition") on October 8, 2014. That petition was denied by written findings of fact and conclusions of law on February 4, 2015. Johnson appealed, and the Nevada Supreme Court affirmed the denial of second habeas in an unpublished order on February 9, 2018. Johnson v. State, 412 P.3d 11 (2018) (SC# 67492). Remittitur issued on March 6, 2018.

Thereafter, Johnson initiated federal habeas proceedings by filing a petition in federal court on April 23, 2018, whereupon the Federal Public Defender was appointed. Third Petition at 10. With that petition still pending, the Federal Public Defender filed the instant 359-page Petition for Writ of Habeas Corpus (Post-Conviction) ("Third Petition") before this Court on February 13, 2019. The State was ordered to respond.

STATEMENT OF FACTS

In August of 1998, Johnson murdered 20–year–olds Tracey Gorringe and Matthew Mowen, 19–year–old Jeffery Biddle, and 17–year–old Peter Talamantez. Johnson bound these four young men, robbed them, and then—after taking Talamantez to the back room and shooting and killing him—shot and killed Gorringe, Mowen, and Biddle. Johnson killed them all by shooting them in the back of the head, execution style.

The evidence of his guilt was overwhelming, according to the Nevada Supreme Court: Johnson's DNA and fingerprints were found at the crime scene; DNA confirmed that one victim's blood was found on a pair of Johnson's pants; Johnson was in possession of the victims' property (including a VCR, a video game system, a personal beeper, a set of keys, and about $200 in cash); and several witnesses testified that Johnson confessed to the killings. Johnson I, 118 Nev. at 791–93, 797, 59 P.3d at 453–54, 457.

After a third and final penalty hearing, a jury found that the State had proven the single aggravating circumstance alleged—that Johnson had been convicted of more than one murder in the prior proceeding—beyond a reasonable doubt. Despite finding seven mitigating factors,

the jury found that they did not outweigh the aggravating circumstance. Thus, the jury unanimously imposed the death sentence for each murder. The Nevada Supreme Court affirmed these death sentences, finding that the evidence of the aggravating factor was overwhelming, that the death sentence was not imposed under the influence of passion, prejudice, or any arbitrary factor, and that the death sentence was not excessive considering both the crime and the defendant. Johnson II, 122 Nev. at 1359, 148 P.3d at 777.

ARGUMENT

I. APPLICATION OF THE MANDATORY STATE PROCEDURAL BARS

This Third Petition is both untimely and successive. Filed on February 13, 2019, it violates the one-year time limitation of NRS 34.726, which requires post-conviction petitions to be filed within one year of issuance of remittitur after direct appeal. The Nevada Supreme Court rejected a habeas petition that was filed just two days late, pursuant to the clear, unambiguous, and mandatory provisions of NRS 34.726. Gonzales v. State, 118 Nev. 590, 53 P.3d 901 (2002). The one-year time bar in NRS 34.726 also applies to successive petitions. Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001). The instant post-conviction proceedings were initiated on February 13, 2019, more than *eleven (11) years* after the January 28, 2008 issuance of remittitur from the affirmance of Johnson's final penalty hearing. Thus, this Third Petition is barred absent a showing of good cause for the delay—i.e., that the delay is not the fault of the petitioner, and that dismissal of the petition as untimely will unduly prejudice the petitioner. NRS 34.726(1).

The State also affirmatively pleads laches because the State is prejudiced in responding to this petition and in its ability to conduct a retrial of Johnson, due to the long passage of time since the guilt phase of the jury trial in 2000 and the final penalty phase in 2005. The instant Third Petition has been filed approximately *nineteen years* after the original guilt-phase judgment of conviction, *thirteen years* after the Nevada Supreme Court affirmed Johnson's guilt, and *eleven years* after the Court affirmed Johnson's final penalty. Because these time periods exceed five years, the State is entitled to a rebuttable presumption of prejudice. NRS 34.800(2). This can only be overcome by a showing that this Third Petition is based upon

grounds of which petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred or by a demonstration that a fundamental miscarriage of justice has occurred. NRS 34.800(1).

Additionally, the Third Petition is subject to dismissal under NRS 34.810(1) because the grounds for the petition could have been presented to the trial court or raised in a prior proceeding. The instant petition is Johnson's third attempt to obtain state post-conviction relief. Dismissal of a successive petition is required if it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the failure to assert those grounds in a prior petition constitutes an abuse of the writ. NRS 34.810(2). Johnson has the burden of pleading and proving specific facts that demonstrate good cause for the failure to present the claim or for presenting the claim again, and actual prejudice. NRS 34.810(3); see also Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001) ("A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner.") "Unlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). If the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991).

Appellant claims that "application of procedural default to bar consideration of Johnson's constitutional claims would violate due process and equal protection under the state and federal constitutions, because the Nevada Supreme Court applies or disregards default rules arbitrarily and treats similarly situated habeas petitions inconsistently with regard to procedural defaults..[sic]" Third Petition at 11–12. Not only is this proposition utterly unsupported by further argument, let alone any citation to a single fact in this case or any other—the argument is belied by Nevada precedent. The Nevada Supreme Court has held that the district court has a *duty* to consider whether a defendant's post-conviction petition claims

are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. (quoting Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984)). The Court held that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. That is, district courts have no discretion regarding whether to apply the statutory procedural bars; the rules must be applied.

Indeed, the Nevada Supreme Court has observed "[w]ithout such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

II. THERE IS NO GOOD CAUSE FOR THE UNTIMELY FILING OF THIS SUCCESSIVE PETITION

While the bulk of Johnson's Third Petition primarily focuses on the merits of each of his claims, relatively few pages are devoted to application of state procedural bars and a showing of good cause and prejudice. This is where Johnson's petition must fail.

A petitioner has the burden of pleading and proving facts to demonstrate good cause to excuse the delay. State v. Haberstroh, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003). "In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (citing Lozada, 110 Nev. at 353, 871 P.2d at 946). This language contemplates that the delay in filing a petition must be caused by a circumstance not within the actual control of the defense team. "An impediment external to the defense may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance

impracticable.'" Id. (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). "Appellate courts will not disturb a trial court's discretion in determining the existence of good cause except for clear cases of abuse." Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

In his Third Petition, Johnson acknowledges that many of his claims have been raised previously and that other claims are being raised for the first time, either in whole or in part. Third Petition at 10–12. Although the Third Petition is 359 pages in length and raises thirty (30) substantive claims—most with many subsections—this Court need only concern itself with the relatively few allegations of good cause identified on pages ten through fourteen. Absent a good cause explanation for the delay in filing the current, successive Third Petition, none of the thirty substantive claims are reviewable on the merits and must be dismissed as procedurally barred. Johnson's good cause explanations for his untimely and successive petition are that: 1) he is entitled to cumulative consideration of constitutional errors; 2) this Court failed to grant an evidentiary hearing, adequate funds, or discovery during prior habeas proceedings; 3) prior counsel was ineffective; 4) the State withheld exculpatory evidence; and 5) there would be a fundamental miscarriage of justice if this Petition is procedurally dismissed because Johnson is actually innocent and ineligible for the death penalty. Accordingly, the State now addresses these five good cause arguments. Because the ineffective assistance of counsel argument is the only allegation of good cause that warrants any consideration, and because it relates at least tangentially to the merits of some of Johnson's numbered claims, the State disposes of that argument last.

A. **A desire for "cumulative consideration" does not provide good cause for re-raising claims that the Nevada Supreme Court has already denied**.

Johnson acknowledges that many of his claims have been raised previously (**Claims 1, 3(E)** and **(F), 4(B)–(E), 6(A), (B), (D),** and **(E), 7(A), 14(B)(subparts 2, 4, 5–9, and 17), 15(A), 17(A), (C), (D), (E)** and **(F), 21(C)–(E), 22, 25, 26,** and **30**) and that others have been raised in part (**Claims 2, 4(A), 5, 6(B)** and **(C), 9, 10, 12, 14(A), 16,** and **17(B)**). Third Petition at 10–11. Johnson's explanation for re-raising these claims is that he desires cumulative consideration of constitutional errors, that cumulative consideration is necessary for any harmless error analysis, and that cumulative consideration requires these claims to be

considered again because they were inadequately raised due to ineffective assistance of post-conviction counsel. Third Petition at 10.

A desire to re-examine claims the Nevada Supreme Court has already decided is not good cause for re-raising the same issue again because the district court does exercise supervisory and appellate review over the functioning and decisions of the Nevada Supreme Court; rather, this Court is bound instead by law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Where an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue will not be revisited. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999), Hall v. State, 91 Nev. 314, 315–16, 535 P.2d 797, 798–99 (1975); see also Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993). A defendant cannot avoid the doctrine of law of the case by a more detailed and precisely focused argument. Hall, 91 Nev. at 316, 535 P.2d at 798–99; see also Pertgen v. State, 110 Nev. 557, 557–58, 875 P.2d 316, 362 (1994).

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

Regardless, while ineffective assistance of post-conviction counsel may provide a good cause explanation as to why a claim was previously omitted, it is not good cause for re-raising a claim that Johnson concedes prior counsel already raised. Johnson does not explain which prior decisions of the Nevada Supreme Court no longer constitute law of the case or why. Furthermore, this allegation of good cause is bare, undeveloped, and without legal authority.

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B. **This Court's rulings during the first habeas proceeding did not prevent Johnson from asserting any claims and do not constitute good cause**.

Johnson argues that his procedural default should be excused because this Court failed to grant a sufficient evidentiary hearing, investigative funds, expert funding, or discovery during his prior habeas proceeding, which Johnson claims prevented him from adequately developing the factual bases for his current claims. Third Petition at 11–12. This allegation is ironic, considering that this Court's predecessor, Judge Cadish, declined to put any limitation at all on the scope of the evidentiary hearing in the first post-conviction proceedings, Transcript, Jan. 18, 2012, at 5–6. The Court stated that it was "not inclined to narrow" the scope of the hearing and that Johnson's post-conviction counsel, Mr. Oram, would be permitted to "show what he thinks he needs to show to try to establish ineffective assistance." Id. at 6. In that same hearing, the Court even permitted an expensive Positron Emission Tomography ("PET") scan so that Mr. Oram could pursue his ineffective assistance of counsel claim of failure to investigate fetal alcohol syndrome—out of an abundance of caution, when there was no legal basis for it. Id. at 4. Johnson simply makes the blanket statement that he was denied funds and discovery, not bothering to specify which funds or discovery he was allegedly disallowed—or even what new facts have been developed in this round of post-conviction review.

Furthermore, good cause must establish a reason why a claim was not "raised" previously, rather than why facts were not "developed." An evidentiary hearing is not a discovery tool; it is only permitted once a petitioner first asserts specific factual allegations not belied nor repelled by the record, which, if true, would entitle him to relief. Nika v. State, 124 Nev. 1272, 1300–01, 198 P.3d 839, 858 (2008). Nothing this Court did during the first post-conviction proceeding impeded or impaired Johnson's ability to raise any factual claim he desired.

Finally, if this Court had erred in restricting the development of facts, that issue would have been addressed in the subsequent appeal. Instead, the Nevada Supreme Court affirmed this Court's handling and denial of the First Petition in all respects. Johnson III, 133 Nev. at ___, 402 P.3d at 1266. This Court's treatment of Johnson's first post-conviction proceeding

simply does not constitute good cause for any of these claims, whether re-raised or for raised for the first time.

C. **The alleged *Brady* violations are meritless and do not constitute as good cause**.

Next, Johnson claims that the delay in filing the instant Third Petition is attributable to the State for withholding Brady evidence, which appears to be alleged in **Claim 7**. Third Petition at 14, 136–40. Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). To prove a Brady violation, a petitioner must show 1) the evidence is favorable to the accused, either because it is exculpatory or impeaching, 2) the State withheld the evidence, either intentionally or inadvertently, and 3) that the evidence was material. Id. When a Brady claim is raised in an untimely post-conviction petition for a writ of habeas corpus, the petitioner has the burden of pleading and proving specific facts that demonstrate both components of the good-cause showing required by NRS 34.726(1), namely "[t]hat the delay is not the fault of the petitioner" and that the petitioner will be "unduly prejudice[d]" if the petition is dismissed as untimely. State v. Huebler, 128 Nev. ___, 275 P.3d 91 (2012). Those components parallel the second and third prongs of a Brady violation: establishing that the State withheld the evidence demonstrates that the delay was caused by an impediment external to the defense; and establishing that the evidence was material generally demonstrates that the petitioner would be unduly prejudiced if the petition is dismissed as untimely. Id., citing State v. Bennett, 119 Nev. 589, 81 P.3d 1 (2003). However, "a Brady violation does not result if the defendant, exercising reasonable diligence, could have obtained the information." Rippo v. State, 113 Nev. 1239, 1257, 946 P.2d 1017, 1028 (1997).

An allegation that the government may have been responsible for part of the initial delay in bringing a claim does not explain or excuse continued delay once the basis for the claim became known to a petitioner. See Hathaway v. State, 119 Nev. 248, 252–53, 71 P.3d 503, 506 (2003); see also State v. Huebler, 128 Nev. ___, 275 P.3d 91, 96 at n.3 (2012) ("We note that a Brady claim still must be raised within a reasonable time after the withheld evidence was disclosed to or discovered by the defense."). Even legitimate Brady claims are

procedurally barred when the basis for the claim was known and it was either not brought in an earlier proceeding or within an applicable time bar. Hutchison v. Bell, 303 F.3d 720, 742-43 (6th Cir. 2002) (Brady claim barred where no good cause for delay of eleven months between discovery of claim and assertion of claim in state court).

First in **Claim 7**, Johnson alleges that the State failed to disclose benefits it must have given to Tod Armstrong because he was not prosecuted for some of the same crimes with which Johnson was charged, despite evidence that he was involved. Third Petition at 136–37. This an old allegation—based on nothing but speculation—and is belied by the record. At trial, Armstrong was cross-examined at length on this very issue, and both he and the prosecutor denied that any such benefit was given or would be forthcoming. Transcript, June 6, 2000, II-241-50. Further, this claim was previously denied when raised in prior post-conviction proceedings, a denial affirmed on appeal when the Court found that "the notion that the prosecutor failed to disclose benefits lacked support in the record." Johnson III, 133 Nev. at ___, 402 P.3d at 1277.

Even the information Johnson now attempts to use to support his allegation is old. The Federal Public Defender's own documentation reveals that the clearing of Armstrong's juvenile warrant in April of 1999 was information obtained by Johnson's trial attorneys pursuant to court order in this case on May 31, 2000, which belies any claim that it was withheld. Exhibit 170. Because none of these allegations are new and because they are based on nothing more than suspicions drawn from the existing record, they do not constitute a good cause explanation for the delay in filing the instant petition.

Second in **Claim 7**, as a new allegation not previously raised, Johnson claims that the State withheld evidence that its investigator, Pete Baldonado, had a history of illegal conduct with State witnesses, including sexual relations in exchange for help quashing warrants, and was convicted in 2004 for Coercion and Misconduct by Public Officer. Third Petition at 137–38. Curiously, the factual information for this claim comes entirely from public sources—including newspapers and public records in 2004. Exhibit 80. This belies any claim that information about Baldonado was "withheld" by the State or otherwise could not have been

obtained sooner by exercising reasonable diligence. In fact, the newspaper articles indicate this was a widely publicized and known scandal, of which Johnson's penalty-phase counsel would have been aware from general knowledge in the legal community in 2004–05. It would not even have taken any diligence to obtain this information. Rippo, 113 Nev. at 1257, 946 P.2d at 1028. The affidavit of Eloise Kline (Exhibit 82) bears no relation at all to the instant case and simply confirms information about Baldonado's character and misconduct which he had already publicly admitted and for which was punished in 2004. Johnson fails to show that the prosecution allegedly withholding this information more than fifteen years ago explains his delay in waiting until 2019 to raise it. Hathaway, 119 Nev. at 252–53, 71 P.3d at 506.

Johnson also fails to show how such information constitutes material exculpatory or impeachment evidence in his case, considering that Baldonado was not a witness. Baldonado's only connection to Johnson's case seems to be that he conducted a transcribed interview of witness Charla Severs in 1999, five years before Baldonado's termination and arrest. Third Petition at 137; Exhibit 60. There is no indication, let alone in the transcript of Baldonado's interview with Severs, that he acted inappropriately with her. Exhibit 60. Nor does Johnson explain how if he had, it would constitute impeachment evidence favorable to Johnson. For example, Severs had already told police that Johnson had confessed the murders to her long before her interview with Baldonado. Exhibit 50. In fact, Severs had already testified before the grand jury when Baldonado interviewed her. Exhibit 60 at 10. There is no chance that even had Baldonado behaved inappropriately with Severs, it would have had any impact on her testimony. Furthermore, Severs did not even testify at the new penalty hearing in 2005, which was just after Baldonado's criminal activity first came to light. Thus, she would not have been subject to cross-examination about it. Thus, this allegation does not constitute a good cause explanation for the delay in filing the instant petition.

Third in **Claim 7**, Johnson claims that discovery was delayed. Third Petition at 138–40. However, his own pleading makes it abundantly clear that the defense was fully capable of obtaining the relevant forensic information—and did in fact obtain it, with the reasonable diligence required of it, before trial in 2000. There is thus no Brady violation. Rippo, 113 Nev.

at 1257, 946 P.2d at1028. Nor does Johnson even attempt to explain how a more "timely" disclosure by the State would have affected the results of the proceeding.

Fourth in **Claim 7,** related to the discovery claim, Johnson claims that it is not clear from the record whether blood-spatter evidence was produced before trial. Third Petition at 138–40. However, as an initial matter, Johnson does not explain how the blood-spatter report photo-copied in his Third Petition is exculpatory or material. It merely states that that particular expert did not have enough information to draw conclusions about the blood stains or how they were caused.

Regardless, the supposedly exculpatory blood results came from Johnson's own trial-period expert witness, the employee at Forensic Analytical he references in the Third Petition. See Notice of Expert Witnesses, filed May 15, 2000, at 1–2, 4. The State prosecutor does not control the timing of defense investigation. This forecloses any argument that the results were withheld from the defense. Moreover, Johnson concedes that these results *were* made known to his counsel at least by the middle of trial. Third Petition at 140. Johnson does not explain how this was not sufficient for use at trial even if the results had been withheld and were exculpatory—which they were not. United States v. Fernandez, 231 F.3d 1240, 1248 n.5 (9th Cir. 2000); see also United States v. Gordon, 844 F.2d 1397, 1403 (9th Cir. 1988) ("Brady does not necessarily require that the prosecution turn over exculpatory material before trial. To escape the Brady sanction, disclosure must be made at a time when disclosure would be of value to the accused."). The relevant discovery and the defense expert's blood results were available in 2000. This does not explain why it is being raised now—let alone how it constitutes good cause to overcome the procedural bars. Hathaway, 119 Nev. at 252–53, 71 P.3d at 506.

Johnson's Brady claims fail to account for the entire length of delay. Thus, they do not establish good cause for this untimely and successive Third Petition.

D. **There would be no fundamental miscarriage of justice because Johnson is not ineligible for the death penalty**.

To overcome the procedural default, Johnson alleges a fundamental miscarriage of justice if this Third Petition were to be procedurally barred because he is actually innocent

"or" ineligible for the death penalty. Third Petition at 14. Nevada recognizes actual innocence as a "gateway" where applicable procedural bars may be excused when "the prejudice from a failure to consider [a] claim amounts to a 'fundamental miscarriage of justice.'" Pellegrini, 117 Nev. at 887, 34 P.3d at 537 (quoting Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996)). Where the petitioner has argued that the procedural default should be ignored because he is actually ineligible for the death penalty, he must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible. Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (citing Sawyer v. Whitely, 505 U.S. 333, 112 S.Ct. 2514 (1992)).

Johnson's actual innocence argument appears premised upon **Claim 29**, wherein he alleges he is ineligible for the death penalty due to his youth (twenty-one years of age) at the time he killed four other young men coupled with borderline intellectual functioning. Third Petition at 247–53. However, juvenile exclusion from the death penalty has not been extended beyond age eighteen. Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183 (2005) (holding that the Eighth Amendment's prohibition of cruel and unusual punishment precludes the execution of offenders who were under eighteen years of age when their crimes were committed). Furthermore, Johnson has previously tried to avail himself of the holding in Roper, to no avail. Johnson II, 122 Nev. at 1353, 148 P.3d at 774 ("Because there is no question that Johnson was not a juvenile when he committed the murders, his reliance upon Roper is misplaced."). Thus, the fact that he is not ineligible for the death penalty due to his age at the time of the murders is law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710.

Likewise, Johnson's "borderline intellectual functioning" does not render him ineligible for the death penalty. Exclusion from the death penalty due to intellectual disability (i.e., mental retardation) requires much more than mere borderline intellectual functioning. Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002); NRS 174.098; NRS 175.554.

Intellectual disability is defined as "significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period." Id. Johnson has been evaluated repeatedly by defense mental health experts and none have diagnosed him with intellectual disability. Exhibits 143 (2000 Neuropsychological Evaluation by Dr. Myla Young), 144 (1988 Psychological Evaluation by Eunice Cain), 145 (1993 Psychological Evaluation by Harold Kates), 173 (2018 Report by Dr. Kate Gylwasky); Transcript, May 3, 2005,14-133. Therefore, Johnson is not ineligible for the death penalty due to age or any other factor. His actual innocence claim must fail.

E. **There was no ineffective assistance of post-conviction counsel constituting good cause**.

Finally, Johnson attempts to offer ineffective assistance of counsel as good cause for this untimely, successive Third Petition. Specifically, he alleges prior post-conviction counsel, Mr. Oram, was ineffective in failing to raise some of these issues or for inadequately raising those issues Johnson now re-raises. Third Petition at 13. However, Johnson's claim that Mr. Oram was ineffective overlooks over half a decade of work—including careful selection of worthy claims, extensive briefing, and days of evidentiary hearing testimony and argument—Mr. Oram put into Johnson's first attempt at obtaining post-conviction relief.

1. Entitlement to Effective Post-Conviction Counsel for Death-Row Petitioners

The State agrees that as a death row petitioner, Johnson had a right to effective assistance of counsel in his first post-conviction proceeding, so he may raise claims of ineffective assistance of post-conviction counsel in a successive petition. See McNelton, 115 Nev. at 416 n.5, 990 P.2d at 1276 n.5; Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997). However, he must raise these matters in a reasonable time to avoid application of procedural default rules. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim of ineffective assistance of post-conviction counsel has been raised within a reasonable time after it became available so long as the post-conviction petition is

filed within one year after entry of the district court's order disposing of the prior post-conviction petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur. Rippo v. State, 134 Nev. ___, 423 P.3d 1084, 1097, amended on denial of reh'g, 432 P.3d 167 (2018).

In the present case, remittitur from affirmance of the denial of the first post-conviction proceedings involving Mr. Oram issued on February 13, 2018, and the instant Third Petition appears to have been timely filed exactly one year later, on February 13, 2019.

2. *Strickland* Standard for Effective Counsel

Although there is no recognized constitutional right to effective assistance of post-conviction counsel, McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 257-58 (1996) (concluding that neither the United States nor Nevada Constitution provides for a right to counsel in post-conviction proceedings), Strickland has been adopted as the standard to evaluate post-conviction counsel's performance where there is a statutory right to effective assistance of that counsel. Rippo, 134 Nev. at ___, 423 P.3d at 1084.

A defendant making an ineffectiveness claim must show both that counsel's performance was deficient, which means that "counsel's representation fell below an objective standard of reasonableness," and that the deficient performance prejudiced the defendant, which means that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 686, 694, 104 S.Ct. 2052, 2063 (1984). "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997); Molina v. State, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371, 130 S. Ct. 1473, 1485 (2010). The question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). Further, "[e]ffective counsel does not mean errorless counsel,

but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.' " Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

Based on the above law, the court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by "strong and convincing proof" that counsel was ineffective. Homick v State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996) (citing Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981)); Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991). The role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

This analysis does not indicate that the court should "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. "Strategic choices"—such as "deciding if and when to object, which witnesses, if any, to call, and what defenses to develop"—"made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Id. at 691, 104 S. Ct. at 2064; Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton, 115 Nev. at 403, 990 P.2d ta 1268 (citing Strickland, 466 U.S. at 687).

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., citing Strickland, 466 U.S. at 687–89, 694.

A petitioner who contends that his attorney was ineffective because he did not adequately investigate must show how a better investigation probably would have rendered a more favorable outcome. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). In order to demonstrate a reasonable probability that, but for counsel's failure to investigate, the result would have been different, it must be clear from the "record what it was about the defense case that a more adequate investigation would have uncovered." Id. For example, a defendant claiming ineffective assistance from the failure to prepare defendant's mother and two sisters for the penalty phase so that they could provide more mitigating evidence should have alleged with specificity what that evidence would have been. Evans, 117 Nev. at 609, 28 P.3d at 498.

Specifically as to ineffective assistance based on failure to investigate or present expert witnesses, counsel may make reasonable decisions that make particular investigations unnecessary. Harrington, 562 U.S. at 86, 131 S.Ct. at 788 (citing Strickland, 466 U.S. at 691, 104 S.Ct. 2052.) There are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S.Ct. 2052. Rare are the situations in which the "wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach. Id. Counsel is entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies. Id.

Strategy decisions, such as who to call as a witness, are solely within the discretion of the attorney and counsel may exclude witnesses in favor of a strategy, reasonable at the time, to balance limited resources in accord with effective assistance. Harrington, 562 U.S. at 107, 131 S.Ct. at 789. Even if an expert theoretically could support a client's defense theory, a competent attorney may strategically exclude it, consistent with effective assistance, if such expert may be fruitless or harmful to the defense. Id. at 108, 131 S.Ct. at 789–90. As to prejudice, even if the proposed testimony conceivably would affect the trial, such is

insufficient to show prejudice, as the "likelihood of a different result must be substantial, not just conceivable." Id. at 112, 131 S.Ct. at 792.

Finally, claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.

3. Post-conviction counsel did not render ineffective assistance.

a. Mr. Oram's Representation

Johnson claims Mr. Oram failed to adequately investigate and develop his claims, never retained an investigator nor any expert, did not seek discovery, and only raised record-based claims for relief while handling Johnson's first post-conviction proceeding. Third Petition at 13. These are bare and non-specific allegations which utterly fail to recognize the competence of Mr. Oram's performance and fail to establish how the outcome of the first post-conviction proceedings would have been any different had Mr. Oram taken other actions. In fact, only on this single page of his 359-page Third Petition does Johnson specifically allege that Mr. Oram was ineffective—and at that, without alleging specific facts as to how. Third Petition at 13. There is no additional investigation, witness, or expert identified anywhere in the Third Petition that Mr. Oram would have been deficient not to have included in the First Petition. Nor is there any showing that the result would have been different had Mr. Oram obtained any further information or presented it to this Court.

Mr. Oram was appointed in 2008 to handle the first post-conviction proceedings. He filed a sixty-three (63) page supplement on October 12, 2009, which raised fourteen (14) grounds for relief pertaining to the penalty hearing. Exhibit 28. This supplement included numerous claims of ineffective assistance of counsel for failing to investigate and present evidence of Johnson's mental health and mitigation evidence. Mr. Oram then filed a second supplement of fifty (50) pages on July 14, 2010, which raised an additional twenty (20) claims pertaining to the original guilt phase trial and on appeal. Exhibit 29. This supplement included numerous claims of ineffective assistance of counsel regarding jury selection under Batson,

omitted issues on appeal, Brady violations, and jury instruction errors. Two separate reply briefs further expanded and refined the issues. Exhibits 31, 32.

After extensive briefing, Mr. Oram successfully argued against the application of procedural bars raised by the State as to guilt-phase issues and won Johnson an unlimited evidentiary hearing. Over the course of two days', Mr. Oram presented testimony from both guilt-phase counsel, Mr. Figler and now-Judge Sciscento, as well as both penalty phase counsel, Mr. Whipple and Ms. Jackson. Prior counsel testified as to their respective strategies in their investigation and calling of witnesses in defending Johnson at trial and at penalty hearing. See Transcripts, April 4, 2013, June 21, 2013. After evidentiary hearing, Mr. Oram filed Post-Evidentiary Hearing Supplemental Points and Authorities, including affidavits from two alternate jurors who had been contacted about potential jury misconduct during the final penalty phase in 2005. Exhibits 209, 210. At the conclusion, the district court denied the habeas petition, a decision then affirmed on appeal. Johnson III, 133 Nev. at ___, 402 P.3d at 1280.

The record is clear: Johnson's claims that Mr. Oram did not seek discovery and that he only raised record-based claims for relief are explicitly belied. Third Petition at 13; Hargrove, 100 Nev. at 502, 686 P.2d at 225. Mr. Oram obtained extensive discovery beyond that available in the record, including from jurors and prior counsel. That this discovery did not lead him to raise the exact claims Johnson now raises does not mean that he was ineffective.

Again, Mr. Oram is presumed effective. Homick, 112 Nev. at 310, 913 P.2d at 1285. And Johnson has not overcome that presumption by establishing that Mr. Oram was infective for not raising any of the fruitless claims in this Third Petition, including: trial counsel ineffectiveness, jury instruction error, prosecutorial misconduct at guilt and penalty phase, Court error at guilt and penalty phase, Brady, Double Jeopardy, or Confrontation Clause violation, multiple first-degree murder theories, venue, juror misconduct/bias, juror findings of first-degree murder culpability, unconstitutional death penalty, judicial (including systematic) bias, weighing aggravators and mitigators, juror implicit bias, freedom of association, and death-penalty ineligibility. See Sections III(B)(3), (4), (5), (6), (7), (8), (9),

(11), (12), (13), (15), (16), (17), (18), (19), (21), (23), (24), (27), (28), (29) *infra*. On their face, as discussed in Section III, *infra*, all of these claims are meritless. In addition, several of their subsections are barred by the doctrine if the law of the case—as were some entire claims, including: jury selection error, illegal seizure, juvenile records, appellate counsel failure, unrecorded bench conferences, international law concerns, and cumulative error. See Sections III(B)(1), (10), (20), (22), (25), (26), (30). Johnson current arguments fail to establish that guilt- or penalty-phase, appellate, or post-conviction counsel would have been successful in raising the same arguments. Indeed, based on the fact that Mr. Oram did not re-argue those claims already governed by law of the case, and given that he focused his attention on several meritorious claims rather than throwing 359 pages at the Court to see what stuck, it is clear that Mr. Oram reviewed Johnson's case thoroughly and only pursued those claims he deemed as having the highest likelihood of success. The fact that he did not succeed, or that his strategy did not lead to the results Johnson wanted, does not mean he was ineffective.

b. *Johnson's new documents do not establish Mr. Oram was ineffective with regard to challenging the guilt-phase*.

In thousands of pages of exhibits, Johnson offers scant few new documents. These include new affidavits and reports concerning guilt-phase trial issues that Johnson raises in his various claims. As an initial matter, Johnson does not specifically allege that Mr. Oram was ineffective for not obtaining these documents. Again, his ineffective assistance of counsel claim against Mr. Oram is less than one page long—and throughout his 359-page petition, he includes only vague references to ineffective assistance. Third Petition at 13. But to demonstrate that Johnson cannot overcome the threshold of good cause and have his claims examined on the merits, it will be helpful to examine Johnson's new documents in the context of the case. On doing so, it is clear that Mr. Oram was not objectively unreasonable for failing to obtain these documents—and further, that Johnson was not prejudiced, because even had Mr. Oram obtained them, this Court and the Nevada Supreme Court would have denied these claims.

As discussed in Section III(B)(2), *infra*, the two new declarations from guilt-phase jurors Ashley Warren and Hans Weding do not support Johnson's wild claim that any juror

"harassed" or "intimidated" any other or that anyone had been bribed. Third Petition at 36; Exhibits 188, 195. The new declaration from guilt-phase juror John Young does nothing other than reveal information about the jurors' thought processes as they deliberated —including their common-sense observations about how Johnson's semen was deposited on the pair of jeans on which one victim's blood was also found—a topic also explored, as Young discusses, by Johnson's girlfriend, who testified that she and Johnson were sexually active after the murders. Exhibit 189. Mr. Oram was therefore not ineffective for not obtaining these declarations or otherwise investigating any of the spurious claims of juror misconduct. Indeed, Mr. Oram strategically acted on the knowledge that most of these claims were already foreclosed by the Nevada Supreme Court's finding on the first direct appeal: that the very misconduct Johnson now claims about, including jurors accessing media reports, was not prejudicial. Johnson I, 118 Nev. at 796–97, 59 P.3d at 456–57.

As discussed in Section III(B)(3)(a), *infra*, the analysis of witness testimony by Dr. Deborah Davis discusses police interviewing tactics and witness memory. Exhibit 175. However, guilt- and penalty-phase counsel had other, much stronger theories of defense than asserting police conspiracy resulting in the false statements of six separate witnesses; thus, that tactic would have been fruitless if not outright harmful to the defense. Harrington, 562 U.S. at 108, 131 S.Ct. at 789–90. Mr. Oram was therefore not ineffective for not obtaining this analysis—which does not even establish that any witness was actually coerced.

As discussed in Section III(B)(3)(a), *infra*, the analysis by T. Paulette Sutton discusses blood-stain evidence. Exhibit 177. However, not only did guilt-phase counsel have the underlying information about the blood spatter *during trial* and elect not to use it—suggesting a conscious, strategic choice not to do so—there was no prejudice. Third Petition at 66. Even if it were somehow revealed that victim Gorringe's blood did not make its way onto Johnson's pants directly from a gunshot wound, it does not in any way demonstrate that Johnson was *not* the shooter—let alone that he was not at the scene. Third Petition at 62–67. As is clear from his efforts to explore much stronger claims, Mr. Oram was not objectively unreasonable for not raising prior counsel's handling of blood-spatter evidence.

Finally, as discussed in Section III(B)(3)(c), *infra*, the new fingerprint analysis by Matthew Marvin does not demonstrate that prior counsel was ineffective. Exhibit 179. This analysis reveals only that there "appears to be a *minor* issue related to articulation of procedure" by the State's fingerprint expert, and that the "current state of knowledge regarding the terms '100% accuracy' and 100% certainty' has changed since the testimony of" the Sate's guilt-phase fingerprint expert. Exhibit 179 at 3, 6 (emphasis added). But these facts are irrelevant. This report examines the fingerprints found on a box of Black & Mild cigars found at the murder scene. Exhibit 179 at 3. Guilt-phase counsels' strategic cross-examination of the State's fingerprint expert was premised around Johnson's defense theory: that his fingerprints *were* at the scene, including on that box, due to an earlier drug transaction. Transcript, June 8, 2000, at 232. To challenge the accuracy of the fingerprints would be to undermine the that theory. Nor has Johnson demonstrated that another defense theory would have been possible. Johnson has not brought any evidence—let alone in Exhibit 179—that the fingerprints on the Black & Milds were *not* Johnson's, after all. Thus, Johnson has not demonstrated that prior counsel rendered ineffective assistance with regard to this fingerprint evidence—and thus, has not established that Mr. Oram was in any way ineffective with regard to challenging this evidence or guilt-phase counsel's handling of it.

c. *Johnson's new documents do not establish Mr. Oram was ineffective with regard to challenging the penalty-phase*.

The most detailed arguments and most numerous of the new supporting documentation Johnson brings to challenge Mr. Oram's effectiveness primarily concern what Johnson alleges penalty-phase counsel should have done, as detailed in **Claims 14** (mitigation via evidence of Johnson's life story) and **29** (mitigation / challenge to death-penalty eligibility via evidence of Johnson's cognitive issues). Third Petition at 175–96. But even this allegedly new information does not support a finding that Mr. Oram was ineffective.

A major part of Johnson's claim that penalty-phase counsel were ineffective is that they did not present the jury with Johnson's entire life story—the inference being that Mr. Oram was ineffective for failure to include in the First Petition every single instance from Johnson's

life that penalty-phase counsel did not raise. Third Petition at 175. Johnson includes various affidavits from family members that purportedly support such a claim.

However, this Court's findings after evidentiary hearing—and then the Nevada Supreme Court's holdings in the post-conviction appeal—demonstrate that Mr. Oram was not ineffective for narrowing the scope of the information he alleged penalty-phase counsel should have presented. In the prior post-conviction proceedings, both Courts held that penalty-phase counsel were not ineffective for not introducing much of the same information Johnson now presents, including: "additional mitigation evidence concerning fetal alcohol disorder, the results of a Positron Emission Tomography scan, and testimony from his abusive father"; and "all of the mitigating circumstances found by the jury at his first penalty hearing." Johnson III, 402 P.3d at 1278–79. The Nevada Supreme Court specifically held that penalty-phase "counsel made reasonable decisions regarding which evidence to investigate and how to present the evidence deemed worthy of presentation." Id. Further, the Court held, "[t]he jurors at the 2005 penalty hearing heard evidence concerning most of the mitigating circumstances found in the first trial and were instructed that they could find 'any other mitigating circumstance,' even if those circumstances were not specifically listed." Id.

In other words, it is already law of the case that Johnson was not prejudiced by not having his entire life story presented to the jury at the third penalty hearing. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710. Penalty-phase counsel's investigations were adequate, and Johnson was not prejudiced by the information they chose to present and to exclude. Though Mr. Oram did not present this claim in the exact same manner—choosing to examine particular incidents from Johnson's life that he stated should have been presented to the penalty-phase jury, rather than a general claim that his entire life story should have been presented to the jury—Johnson cannot establish that Mr. Oram was ineffective when he raised essentially this same issue in the First Petition.

Examining the information actually presented to the penalty-phase jury—contrasted against the information now Johnson presents—it is clear that Mr. Oram was not ineffective and did not mishandle this claim during the prior post-conviction proceedings. Indeed, penalty-phase counsel presented significant information to the jury about Johnson's life story. The following was summarized by the Nevada Supreme Court:

> The defense again called members of Johnson's family, many of whom had already testified during the death-eligibility phase. These family members, including his young son, again testified about the positive aspects of Johnson's character and their love for him.
>
> Much testimony was presented regarding Johnson's involvement with street gangs beginning when he was about 13 or 14 years old. Johnson joined the Six Duece Brims gang, affiliated with the larger Bloods gang, to stop the harassment of his family. A professor of sociology at the University of California at Berkeley testified about gangs and provided the jury with extensive sociological data.
>
> Several specialists who had worked with Johnson also testified. Johnson's former parole agent for the CYA testified that he supervised Johnson after his release from the juvenile program and found Johnson to be "a small, quiet young man that seemed to be pleasant and workable." A therapist who worked with Johnson in 2000 at the Clark County Detention Center testified that Johnson "was a fairly consistent, decent person in that setting." And a psychologist and clinical neuropsychologist profiled Johnson's personality and summarized his life.
>
> Two inmates testified that they saw inmate Irias fall over the second-tier balcony. Johnson's alleged accomplice in the incident, Reginald Johnson (no relation to the appellant), testified that he alone, without Johnson's participation, "assaulted [Irias] and helped him over the tier" because Irias was a child molester. Reginald's former counsel confirmed that Reginald admitted to her that he did it.
>
> A retired California Department of Corrections officer testified about the life that would be expected for an inmate sentenced to a term of life without the possibility of parole in Nevada's Ely State Prison. To rebut this evidence, the State called the warden of the Southern Desert Correctional Facility.

Johnson II, 122 Nev. at 1351–52, 148 P.3d at 772–73.

The Court also described the mitigation evidence with regard to Johnson's upbringing, in more detail:

> Johnson called only members of his family to testify during this phase. They testified that Johnson's mother, who by her own admission was "a little slow," abused alcohol and illegal drugs, including crack cocaine and PCP, when Johnson was a child. She even did so in his presence. She would sometimes leave Johnson and his sisters alone or lock them in a closet. Johnson's father abused his mother in front of Johnson and his sisters, once knocking her teeth out and attempting to throw her out of a hotel window. Johnson was also beaten.

> At one point, Johnson, his two sisters, and several of his cousins were forced to live in a one-room shed for about a month. The shed had no running water, no carpet, and no furniture. The children had to go to the bathroom in a bucket and sleep on the floor with no covers. While living in the shed, the children sometimes did not comb their hair or eat. Because they had no shower, the children often had to go to school with body odor. They were also hungry at times.
>
> The police were eventually contacted, and the children, including Johnson, were taken into foster care. Johnson and his sisters were thereafter sent to live with their grandmother, who was also caring for about ten other children. Johnson's grandfather, according to Johnson's sister Johnnisha Zamora, did the best he could, but she could not recall any time he ever spent with Johnson.
>
> Johnson's grandmother's house was in the Compton area of Los Angeles, where, as Johnson's sister Johnnisha explained, there was "a lot of violence." Johnson and his two sisters were often chased and beaten up at school. His sister Eunisha White testified that Johnson was short and that they were "picked on a lot by different people for no reason."
>
> Johnson's family testified about the positive aspects of his personality and their love for him. A video and several family pictures were admitted into evidence. Johnson's eight-year-old son Allen White, who was in the third grade, read to the jury a letter he wrote to his father which stated in part: "I will love you in my heart, and you will love me in mine."

Id. at 1350, 148 P.3d at 771.

Indeed, based on this evidence, "[s]even mitigating circumstances were found: Johnson's youth at the time of the murders (he was 19 years old); he was taken as a child from his mother due to her neglect and placed in foster care; he had 'no positive or meaningful contact' with either parent; he had no positive male role models; he grew up in violent neighborhoods; he witnessed many violent acts as a child; and while a teenager he attended schools where violence was common." Id.

To attempt to undermine penalty-phase counsel's presentation of this evidence—and, ostensibly, to demonstrate that Mr. Oram was ineffective in the way he handled this same claim—Johnson has included several new declarations from family and friends of Johnson's and friends of Johnson's family members (Exhibits 130–41, 213). None of these establish that Mr. Oram was ineffective for not obtaining these or presenting them during the first post-conviction proceedings. Indeed, **Claim 14** includes a mere rehashing, albeit with more details, of exactly the same life story the penalty-phase jury heard: Johnson's abuse and neglect at the hands of his mother and father, Johnson's placement in foster care and then with his

grandmother, his childhood in violent neighborhoods, his witnessing of violent incidents, and his joining gangs to protect his family. Id.; see also Third Petition at 175–96. In other words, the substance of Johnson's "new" information was indeed presented to the penalty-phase jury—and moreover, that exact evidence *was* found to constitute mitigation. Johnson II, 122 Nev. at 1350, 148 P.3d at 771. Yet, it was not enough mitigation to outweigh the fact that Johnson killed four young men. The mere fact that penalty-phase counsel did not present it in the exact manner as the Federal Public Defender's twenty-page summary does not mean that penalty-phase counsel was ineffective. Johnson cannot demonstrate that a different or more detailed presentation of this exact information—which was already found to constitute mitigation—would have led to a different weighing of the aggravating and mitigating circumstances.

Thus, Mr. Oram was not ineffective for investigating and presenting a narrower subset of the mitigation evidence Johnson alleges should have been presented in addition to what penalty-phase counsel did present. During the first post-conviction proceedings, Mr. Oram claimed penalty-phase counsel were ineffective with regard to investigating and presenting mitigating evidence. See, e.g., Supplemental Brief, filed Oct. 12, 2009, 30–34; Second Supplemental Brief, July 14, 2010, 39–41. He challenged specific areas he believed penalty-phase counsel should have explored: fetal alcohol syndrome, a PET scan to explore potential mental/cognitive issues, and the fact that 2005 penalty-phase counsel did not introduce all the same mitigation evidence that the original 2000 penalty-phase counsel had introduced. In other words, in the first post-conviction proceedings, Mr. Oram narrowed down the specific information he believed should have been presented during the final penalty hearing. This was not ineffective assistance of counsel.

For the same reasons, Johnson's new documents relating to Johnson's mental state do not establish that Mr. Oram was deficient or that Johnson was prejudiced. Johnson includes a 2018 psychological records review by Dr. Kate Gylwasky. Exhibit 173. However, this would not have helped Mr. Oram's argument that penalty-phase counsel were ineffective. Neither Dr. Gylwasky, nor any other doctor or expert, has diagnosed Johnson as intellectual disabled

or as having any other mental illness. See Exhibit 143 (2000 Psychological Evaluation by Dr. Myla Young), 144 (1988 Psychological Evaluation by Eunice Cain), and 145 (1993 Psychological Evaluation by Harold Kates). For example, the 2000 Neuropsychological Report by Dr. Young states: "Although [Johnson] demonstrates limited intellectual ability and specific brain impairment, it is important to re-emphasize that his response to testing *does not suggest* that he experiences a major mental disorder or a personality disorder characterized by ether Narcissistic or Borderline features." Exhibit 143 at 7 (emphasis added). Even with Dr. Gylwasky's 2018 report, Johnson has not presented a single doctor or other expert who is able to diagnose Johnson as intellectually disabled—and therefore ineligible for the death penalty. Nor has he argued, let alone proven, that this information could or should have been used for any other purpose.

"[W]hile in some instances even an isolated error can support an ineffective-assistance claim if it is sufficiently egregious and prejudicial, it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." Harrington, 562 U.S. at 111, 131 S. Ct. at 791. Not only can Johnson not point to any sufficiently egregious and prejudicial error to support a claim that Mr. Oram was ineffective, Johnson has done—and indeed, cannot do—anything to undermine Mr. Oram's overall performance. The record supports Mr. Oram's "active and capable advocacy." Id. Thus, Johnson has utterly failed to articulate good cause for this untimely, successive Third Petition.

III. BECAUSE JOHNSON'S CLAIMS ARE MERITLESS, HE WOULD SUFFER NO PREJUDICE IF THIS PETITION IS DENIED

An answer to a petition is only required when it is the first petition filed by the petitioner. NRS 34.745(1). If the petition is a second or successive petition and if it plainly appears from the face of the petition and its exhibits, or from records of the court, that the petitioner is not entitled to relief, the court shall enter an order for its summary dismissal. NRS 34.745(4).

The instant petition is Johnson's third attempt at post-conviction relief and is filed *nineteen years* after conviction and *eleven years* after affirmance of his sentence. Given the utter dearth of good cause argument, this Third Petition is woefully insufficient on its face to

overcome the procedural bars. Nonetheless, the State will demonstrate that each of Johnson's claims is without merit and therefore would not prejudice Johnson if dismissed. The State examines each claim *only* to demonstrate that Mr. Oram cannot be considered ineffective for not raising it during the first post-conviction proceeding.

A. **Most of Johnson's substantive claims are waived**.

As an initial matter, most of Johnson's claims are waived. NRS 34.810(1) reads:

> The court shall dismiss a petition if the court determines that:
>
> . . .
>
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
>
> . . .
>
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.
>
> unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings…. [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans, 117 Nev. at 646–47, 29 P.3d at 523.

Specifically, Johnson's Claims 1, 2, 4–13, 15–21, 23, part of 24, and 25–29 all allege issues with the guilt and penalty phases of Johnson's trial and with the death penalty itself. In a reoccurring issue throughout this Third Petition, Johnson seems to attempt to frame only some of these claims in a manner appropriate for a habeas petition—that is, as claims of

ineffective assistance of counsel. Compare, e.g., Third Petition at 31– 32 with 33–41. Various claims include a generic paragraph that counsel was ineffective for not raising issues—merely asserting the underlying substantive merits without any attempt to analyze the claims through the required Strickland lens. Without that framing, these claims are only appropriate for direct appeal and should have been brought at that stage. Franklin, 110 Nev. at 752, 877 P.2d at 1059. To the extent they were not, they are waived.

B. **Johnson's substantive claims are meritless**.

To the extent Johnson argues that his Third Petition claims are not inappropriate for a habeas petition because they are actually ineffective assistance of counsel claims—i.e. that his first post-conviction counsel was ineffective for not raising these arguments—such arguments are without merit. None of these claims would have been successful at trial or on appeal. Counsel need not "protect himself against allegations of inadequacy [by] mak[ing] every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). Indeed, counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Because trial and/or appellate counsels were not ineffective for not raising any of the meritless claims below, post-conviction counsel was not ineffective for not raising them.

1. Claim One: Jury Selection

In this ground, Johnson alleges his jury selection process was unconstitutional due to a Batson violation, an unconstitutional jury venire, a denial of his for-cause challenges, and cumulative error; he alleges counsel was ineffective for not raising these issues. Third Petition at 17–32. However, Johnson admits that this claim was previously raised and denied in his first post-conviction appeal. Third Petition at 11. Therefore, it is barred by the doctrine of law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860

P.2d at 710. Because Johnson does not allege that any parts of this claim cover new grounds, this entire claim must be summarily dismissed. Third Petition at 12.

2. Claim Two: Juror Misconduct – Guilt Phase

In this ground, Johnson alleges guilt-phase and penalty phase juror misconduct, including exposure to pretrial publicity. Third Petition at 33–38. As an initial matter, as discussed in Section III(A), *supra*, this claim is framed solely as court error, not ineffective assistance of counsel. Framed as court error, it was appropriate for direct appeal, and there is no good cause for entertaining it in a successive petition. Franklin, 110 Nev. at 752, 877 P.2d at 1059. Johnson fails to allege what counsel did or did not do with regard to these alleged juror issues or how those actions would have changed the outcome of the case.

Further, Johnson admits that this claim was previously raised in part and denied in his first direct appeal. Third Petition at 10. Indeed, Johnson raised a claim of private juror communications and exposure to media coverage in that appeal. Johnson I, 118 Nev. at 796–97, 59 P.3d at 456–57. The Nevada Supreme Court specifically held that this Court did not err in denying Johnson's motion for new trial based on the very misconduct Johnson now complains about, because the conduct—even if it occurred during both guilt and penalty phases—was not prejudicial. Id. Therefore, this issue is barred by the doctrine of law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710.

Though Johnson alleges this issue was raised only "in part" in his first direct appeal, it is clear that no part of this claim covers new grounds. Third Petition at 12. The only piece of information that may not have been raised on direct appeal is one juror's "elevator incident"; but Johnson admits that this Court knew and in fact interviewed that juror about the incident before it denied Johnson's motion for new trial in 2000. Third Petition at 33–35. The two new declarations from guilt-phase jurors Ashley Warren and Hans Weding do not support Johnson's wild claim that any juror "harassed" or "intimidated" any other or that anyone had

been bribed. Third Petition at 36; Exhibits 188, 195. And the new declaration from guilt-phase juror John Young does not do anything other than reveal information about the jurors' thought processes as they deliberated: for example, their common-sense observations about how Johnson's semen was deposited on the pair of jeans on which one victim's blood was also found—the possible explanation for which, as Young discusses, Johnson's girlfriend testified to in that she and Johnson were sexually active after the murders. Exhibit 189. Even assuming this Court chooses to construe this waived claim as a valid habeas claim of ineffective assistance of counsel, neither counsel was deficient for, nor did prejudice result from, not adding these allegations of juror misconduct to a juror misconduct claim the Nevada Supreme Court rejected on direct appeal. Without any chance of success, Johnson cannot establish that he would be prejudiced if this claim were dismissed per the mandatory procedural bar.

3. Claim Three: Ineffective Assistance of Counsel – Guilt-Phase

In this ground, Johnson alleges that his guilt-phase counsel was ineffective, including for failure to present expert testimony (3(A)), to impeach (3(B)), to cross-examine (3(C)), to acknowledge the VCR (3(D)), to move to dismiss kidnapping (3(E)), to object to hearsay (3(F)), and to object to improper references to the trial phases (3(G)). Third Petition at 42–87. Again, this is one of the few grounds that is not waived. See Section III, Intro, *supra*; NRS 34.810(1); Franklin, 110 Nev. at 752, 877 P.2d at 1059. However, Johnson admits that subsections 3(E) and (F) of this claim were previously raised and denied in his first post-conviction appeal. Third Petition at 11. Indeed, in that appeal, the Nevada Supreme Court held that guilt-phase counsel was not ineffective for not moving to dismiss the kidnapping charge and that appellate counsel was not ineffective for failing to raise guilt-phase counsel's lack of object to hearsay. Johnson III, 133 Nev. at ___, 402 P.3d at 1276–77. Though Johnson does not explain whether subsection 3(G) constitutes new grounds, on post-conviction appeal, the Nevada Supreme Court also held that counsel was not ineffective for failure to challenge the State's references to the "phases" of trial. Id. Therefore, subsections 3(E), (F), and (G) are barred by the doctrine of law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276

(1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710.

Johnson alleges subsections 3(A) to (D) cover new ground. Third Petition at 12.

a. 3(A): Experts

There are strategic reasons not to present such experts—for example if it would be fruitless, or harmful to the defense. Harrington, 562 U.S. at 108, 131 S.Ct. at 789–90. To establish resulting prejudice, the "likelihood of a different result must be substantial, not just conceivable." Id. at 112, 131 S.Ct. at 792.

Regarding an expert on police coercion and witness reliability, it would have been fruitless and possibly even harmful to claim that there were only statements made against Johnson due to the type of conspiracy-theory police coercion that would have resulted in false statements and testimony from six separate witnesses. Third Petition at 43–61; Exhibit 175. Regardless, Johnson cannot even demonstrate that the allegedly coercive methods were used; he simply claims that they were "likely" used." Third Petition at 43. Thus, there is no "substantial likelihood" that a jury would have been convinced by such spurious evidence—particularly in the case of what the Nevada Supreme Court described as "overwhelming evidence" against Johnson. Harrington, 562 U.S. at 112, 131 S.Ct. at 792; Johnson I, 118 Nev. at 791–93, 797, 59 P.3d at 453–54, 457. Counsel had strategic reasons to pursue other, stronger defenses.

Regarding an expert on blood spatter, even if it were somehow revealed that victim Gorringe's blood did not make its way onto Johnson's pants directly from a gunshot wound, it does not in any way demonstrate that Johnson was *not* the shooter—let alone that he was not at the scene. Third Petition at 62–67. Even the new expert report states only that the type of shootings that took place here would lead to "a *possible* spatter producing event." Exhibit 177 (emphasis added). Further, as Johnson admits, guilt-phase counsel had the underlying information about the blood spatter during trial and elected not to use it—suggesting a conscious, strategic choice not to do so. Third Petition at 66. Again, Johnson himself confessed to multiple witnesses that he killed four people. Johnson I, 118 Nev. at 791–93, 797, 59 P.3d

at 453–54, 457; see also Exhibit 50 (Severs' statement). Counsel was not deficient for not presenting such a fruitless expert, nor can Johnson demonstrate a "substantial likelihood" that this expert would have led to a different outcome. Harrington, 562 U.S. at 112, 131 S.Ct. at 792

b. 3(B): Impeachment

"Strategic choices"—such as "deciding if and when to object, which witnesses, if any, to call, and what defenses to develop"—"made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 691, 104 S. Ct. at 2064; Rhyne, 118 Nev. at 8, 38 P.3d at 167. While Johnson points out at length the various inconsistencies in witnesses' statements, he does not actually explain what questions counsel failed to ask—or even what questions counsel *did* ask and how they were deficient. Third Petition at 68–73. Thus, even in the virtually unchallengeable area of strategic witness questioning, Johnson has put forth no argument. As such, this is a bare and naked claim and should be dismissed. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

c. 3(C): Cross-Examination

As with subsection 3(B), cross-examination falls under the type of strategic choice that is "virtually unchallengeable." Strickland, 466 U.S. at 691, 104 S. Ct. at 2064; Rhyne, 118 Nev. at 8, 38 P.3d at 167. And again, Johnson fails to establish how guilt-phase counsel's cross-examination of the State's fingerprint, firearms, forensic pathology, and DNA witnesses was specifically deficient and/or how it prejudiced him. Third Petition at 74–81. In fact, counsel conducted a thorough cross-examination of the State's fingerprint, firearms, and forensic pathology witnesses. Transcript, June 7, 2000, III-295–99; June 8, 2000, IV-26–37, IV-57–58.

Regarding the fingerprint expert, Johnson merely makes the blanket statements that counsel did not ask the specific questions he demands counsel should have asked—without citing the trial transcript even once, to verify what questions counsel did ask these witnesses and discuss exactly how it was deficient. As discussed in Section II, *supra*, Johnson has included a new fingerprint analysis by Matthew Marvi—but in combination with Johnson's

lack of argument about what difference it would have made had counsel cross-examined the State's fingerprint expert in a different manner, this report does not demonstrate that guilt-phase counsel was ineffective. Exhibit 179. Regarding the firearms expert, Johnson's own petition undermines that the cross-examination was ineffective; counsel asked "about the absence in evidence of the gun that fired the bullets in this case." Third Petition at 77. That is, counsel pointed out that the four cartridges the witness examined came from an "unknown" firearm and that the firearms expert had not examined any firearms in this case. Transcript, June 8, 2000, IV-57–58. Thus, the doubts Johnson now claim should have been planted in the jury's mind about this evidence were in fact planted. Regarding the forensic pathology expert, Johnson makes no attempt at explaining, whether the gunshot wounds were inflicted from two inches or two feet away, what difference it would have made in the outcome—thus failing to establish prejudice. Regarding the DNA evidence, Johnson merely claims that terms like "certain" are no longer acceptable when discussing forensic evidence without any attempt at explaining how the more current terms like "within a reasonable degree of certainty" would have made a different result at trial any more likely—again, failing to establish prejudice.

d. 3(D): VCR

As with subsection 3(B) and (C), whether to object falls under the type of strategic choice that is "virtually unchallengeable." Strickland, 466 U.S. at 691, 104 S. Ct. at 2064; Rhyne, 118 Nev. at 8, 38 P.3d at 167. Guilt-phase counsel was in no way deficient for not challenging the VCR allegedly still inside the house where Johnson murdered four young men because even now, Johnson does not—and cannot—claim that it was the same VCR as that alleged to be missing from the home and that was in fact found in Johnson's possession. Johnson I, 118 Nev. at 791–93, 797, 59 P.3d at 453–54, 457. Further, the crime scene report Johnson references explicitly calls the equipment Johnson claims was still in the home a "VCR, multi-play compact disk." Third Petition at 83. These are in fact two separate things: VCRs play video-cassette tapes; compact disk ("CD") players play compact disks. The presence of the CD player Johnson references does not undermine the fact that a VCR was missing from the murder-scene and then found in Johnson's possession. It was not objectively

unreasonable not to challenge this evidence. Regardless, Johnson cannot establish prejudice because he fails to take into account the other things that were missing from the murder-scene and then found in Johnson's possession—including the video game system. Johnson I, 118 Nev. at 791–93, 797, 59 P.3d at 453–54, 457. Thus, even if it were discovered that the VCR were not the same, Johnson cannot explain how a more favorable outcome would have been likely.

Because guilt-phase counsel was in no way ineffective regarding any of these four trial-strategy issues, Mr. Oram was not ineffective for not raising these issues in the first post-conviction proceedings. Without any chance of success, Johnson cannot establish that he would be prejudiced if this claim were dismissed per the mandatory procedural bars.

4. Claim Four: Jury Instructions – Guilty Phase

In this ground, Johnson alleges the trial court gave deficient jury instructions during the guilt phase of trial, including as to reasonable doubt (4(A)), premeditation and deliberation (4(B)), conspiracy (4(C)), aiding and abetting (4(D)), failure to instruct on malice (4(E)), felony murder (4(F)), presumption of intent in burglary (4(G)), murder and kidnapping as predicates of one another (4(H)), and elements of kidnapping (4(I)). Third Petition at 88–99. As an initial matter, as discussed in Section III(A), *supra*, parts of this claim are framed solely as Court error, not ineffective assistance of counsel. Compare, e.g., Third Petition at 104–05 (Claim 5(A)(1)) to Third Petition at 106–08 (Claim 5(A)(2)). Though Johnson attempts to tack a generic paragraph to the conclusion of Claim 4, stating in general that counsel was ineffective for failing to object and that a more favorable outcome was likely if he had so objected, Johnson does not actually make Strickland arguments specific to each claim. Third Petition at 103. Framed as Court error, this claim was appropriate for direct appeal, and there is no good cause for entertaining it in a successive petition. Franklin, 110 Nev. at 752, 877 P.2d at 1059. In several of these subsections, Johnson fails to allege what counsel did or did not do with regard to the jury instructions or how those actions would have changed the outcome of the case.

Further, Johnson admits that subsections (B) through (E), and subsection (A) in part, of this claim were previously raised and denied in his first direct and first post-conviction appeals. Third Petition at 10–11. Indeed, the Nevada Supreme Court found on direct appeal that the reasonable doubt instruction was sufficient. Johnson I, 118 Nev. at 806, 59 P.3d at 462. The Court then found on post-conviction appeal that counsel was not ineffective with regard to the reasonable doubt and premeditation and deliberation instructions because they were sufficient, that counsel was not ineffective with regard to the conspiracy instruction and aiding and abetting instructions because Johnson was not charged with kidnapping as a conspirator, and that any lack of express and implied malice instruction did not prejudice Johnson. Johnson III, 133 Nev. at ___, 402 P.3d at 1277–78. Therefore, these subsections are barred by the doctrine of law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710.

Johnson alleges subsections 4(F) to (J) cover new ground. Third Petition at 12. Section 4(J) merely asserts cumulative error; but as there was no error, that claim is irrelevant.

District courts have "broad discretion" with regard to jury instructions. Cortinas v. State, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). District courts' decisions settling jury instructions are reviewed for an abuse of discretion. Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2003). Further, even if there is any error regarding instructions, it may be harmless. Instructional errors are harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," and the error is not the type that would undermine certainty in the verdict. Wegner v. State, 116 Nev. 1149, 1155–56, 14 P.3d 25, 30 (2000), overruled on other grounds, Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006); see also NRS 178.598.

a. 4(F): Felony Murder

Johnson's complaint about the felony murder instruction he quotes—Instruction 40—is without merit. Third Petition at 93–95; Exhibit 67 at 40. That instruction simply states that

if a murder is committed in the perpetration of robbery or kidnapping, it is murder of the first degree; premeditation and malice aforethought need not be separately proven. Exhibit 67 at 40. This is accurate. NRS 200.030(1)(b). Felony murder was further explained—including the causation test—in Instruction 41. Exhibit 67 at 41. Even if there were a more elegant way to phrase it, there is no prejudice. The district court did not abuse its broad discretion in issuing the relevant felony murder instructions. Crawford, 121 Nev. at 748, 121 P.3d at 585. Further, Johnson was found guilty of robbery and kidnapping. Thus, felony murder would have been a properly theory for first-degree murder. Thus, the instruction in no way undermines the verdict, making any error harmless. Wegner, 116 Nev. at 1155–56, 14 P.3d at 30. Thus, guilt-phase counsel was not deficient for not objecting to this instruction, and appellate counsel was not ineffective for not challenging it.

b. 4(G): Presumption of Intent in Burglary

Johnson's complaint about the burglary instruction he quotes—Instruction 8—is without merit. Third Petition at 95–96. Contrary to Johnson's assertion, the instruction contains no "presumption." It merely states that a defendant "may reasonably be *inferred* to have entered with" the requisite intent. Exhibit 67 at 8 (emphasis added). Indeed, the instruction required the jury to infer, and reasonably—and at that, only if other evidence did not explain that the entry was lawful. Id. No "presumed of fact" instruction was necessary because an inference and a presumption are not the same thing. The district court did not abuse its broad discretion in issuing the relevant burglary instruction. Crawford, 121 Nev. at 748, 121 P.3d at 585. Thus, guilt-phase counsel was not deficient for not objecting to this instruction, and appellate counsel was not ineffective for not challenging it.

c. 4(H): Murder/Kidnapping Predicates

Johnson's complaint that the jury was not instructed that it could not find both first-degree kidnapping predicated on murder and also find felony murder predicated on kidnapping is without merit. Third Petition at 96–98. It is unlikely trial or appellate counsel could have established that this Court abuse its broad discretion in issuing the relevant instructions. Crawford, 121 Nev. at 748, 121 P.3d at 585. Even assuming Johnson's argument is correct,

that these two crimes could not be predicates of each other and the jury should have been so instructed, Johnson admits that only "*one* of the kidnapping theories" was kidnapping "for the purpose of committing . . . murder." Third Petition at 96 (emphasis added). The other theories offered in Instruction 26 included that kidnapping "for the purpose of committing . . . robbery upon or from the person" was also first-degree kidnapping. Exhibit 67 at 26. Likewise, as discussed *supra*, felony murder was also charged with robbery as a predicate. Section III(B)(4)(a). Johnson was, in fact, convicted of robbery. Johnson I, 118 Nev. at 798, 59 P.3d at 457. This satisfies the other first-degree kidnapping theories. Thus, there was no prejudice, and counsel was not ineffective for not challenging this instruction. Further, due to that robbery conviction, a rational jury would have convicted Johnson even without this alleged error, and the instruction in no way undermines the verdict; thus, any error was harmless. Wegner, 116 Nev. at 1155–56, 14 P.3d at 30. Thus, appellate counsel was not ineffective for not raising it.

d. 4(I): Elements of Kidnapping

Johnson's complaint that the jury was not instructed on all elements of kidnapping is without merit. Third Petition at 96–98. Even assuming Johnson's argument that the word "substantial" should have been included in the instruction, the Nevada Supreme Court has already determined that counsel was not ineffective for not challenging the kidnapping conviction—and held that Johnson had not demonstrated that the kidnapping was incidental to the robbery. Johnson III, 133 Nev. at __, 402 P.3d at 1277. In other words, a rational jury would have convicted Johnson of kidnapping even without this alleged error, and the instruction in no way undermines the verdict; thus, any error was harmless. Wegner, 116 Nev. at 1155–56, 14 P.3d at 30.

Because trial and appellate counsel were in no way ineffective regarding any of these four jury-instruction issues, Mr. Oram was not ineffective for not raising these issues in the first post-conviction proceedings. Without any chance of success, Johnson cannot establish that he would be prejudiced if this claim were dismissed per the mandatory procedural bars.

/ / /

5. Claim Five: Prosecutorial Misconduct – Guilty Phase

In this ground, Johnson alleges prosecutorial misconduct, including improper argument and discovery issues. Third Petition at 104–20. As an initial matter, as discussed in Section III(A), *supra*, parts of this claim are framed solely as State error, not ineffective assistance of counsel. Compare, e.g., Third Petition at 104–05 (Claim 5(A)(1)) to Third Petition at 106–08 (Claim 5(A)(2)). Though Johnson attempts to tack a generic paragraph to the conclusion of Claim 5, stating in general that counsel was ineffective for failing to object and that a more favorable outcome was likely if he had so objected, Johnson does not actually make Strickland arguments specific to each claim. Third Petition at 120. Framed as State error, this claim was appropriate for direct appeal, and there is no good cause for entertaining it in a successive petition. Franklin, 110 Nev. at 752, 877 P.2d at 1059. In several of these subsections, Johnson fails to allege what counsel did or did not do with regard to the State's alleged misconduct or how those actions would have changed the outcome of the case.

Further, Johnson admits that this claim was previously raised in part and denied in his first post-conviction appeal. Third Petition at 11. Indeed, the Nevada Supreme Court found: that appellate counsel was not ineffective for not challenging the prosecutor's question whether a potential juror "had the 'intestinal fortitude' to issue a death verdict and arguing further dangerousness" because counsel did not object and, in context, the comment did not constitute plain error; and that the State did not commit misconduct "by vouching for the State's witnesses, commenting on facts not in evidence, making a golden rule argument, failing to disclose witness benefits, and using the term 'guilt phase.'" Johnson III, 133 Nev. at __, 402 P.3d at 1275–77. Further, though Johnson does not inform this Court of this fact, Johnson also raised a claim of inconsistent prosecutorial theories in his direct appeal, which the Nevada Supreme Court denied, noting that the State at first put forth three theories but then properly abandoned one when this Court rejected it. Johnson I, 118 Nev. at 798–99, 59 P.3d at 457–58. Therefore, these claims are barred by the doctrine of law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton,

115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710.

Johnson alleges parts of Claim 5 cover new ground. Third Petition at 12. However, Johnson does not specify which parts these are. It is the responsibility of the party making the argument to provide relevant authority and cogent argument, and when a party fails to adequately brief the issue, it will not be addressed. Maresca v. State, 103 Nev. 669, 672–73, 748 P.2d 3, 6 (1987). Further, the appellate court cannot consider matters not properly appearing in the record on appeal. Tabish v. State, 119 Nev. 293, 296, 72 P.3d 584, 586 (2003). See also Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that the court need not consider claims that are not cogently argued or supported by relevant authority); Byford v. State, 116 Nev. 215, 225, 994 P.2d 700, 707 (2000) (issue unsupported by cogent argument warrants no relief).

Because Johnson has failed to disclose, specifically, which of his allegations of guilt-phase prosecutorial misconduct have already been decided by the Nevada Supreme Court—and are thus law of the case—this Court should not consider any of these arguments. Nonetheless, a thorough review of this Third Petition and of the three Nevada Supreme Court decisions regarding his case reveal that Johnson's "new" grounds are these: that, somehow, the prosecutor showing the jury photographs of the white victims and then showing the jury photographs of the black co-defendants "appealed to the racial biases" of the jurors; that the prosecutor "appealed to the passions of the jurors" by revealing the victims' ages and by eliciting from a witness that blood-stained items are deposited in biohazard bags; that the prosecutor claimed the evidence of guilt would be "overwhelming"; and that the State committed discovery violations. Third Petition at 106–08, 112–15, 118–20.

In resolving claims of prosecutorial misconduct, this Court undertakes a two-step analysis: determining whether the comments were improper; and deciding whether the comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). The standard of review for prosecutorial misconduct rests upon a defendant showing "that the remarks made by the prosecutor were 'patently

prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (citing Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). This is based on a defendant's right to have a fair trial, not a perfect one. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). The Nevada Supreme Court views the statements in context, and it will not lightly overturn a jury's verdict based upon a prosecutor's statements. Byars v. State, 130 Nev. ___, ___, 336 P.3d 939, 950–51 (2014). Notably, "statements by a prosecutor, in argument… made as a deduction or conclusion from the evidence introduced in the trial are permissible and unobjectionable." Parker v. State, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1993) (quoting Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971)).

Johnson's accusations of appealing to passions and racial biases are risible. The State's factual descriptions of the victims and witnesses—names, appearances, and ages—do not constitute misconduct. Indeed, the Nevada Supreme Court has already found that the sentence of death was not "imposed under the influence of passion, prejudice, or any arbitrary factor." Johnson II, 122 Nev. at 1359, 148 P.3d ta 777. Even on the merits, Johnson does not explain how merely showing photographs of the victims and co-defendants, and describing the perpetrators—when identification is a crucial element of every crime—is improper, let alone "patently prejudicial." Riker, 111 Nev. at 1328, 905 P.2d at 713. Nor was disclosing the victims' ages. Id. Indeed, in this argument, Johnson utterly ignores the fact that the Nevada Supreme Court has already held that "describing the victims as kids was not improper given their youth." Johnson III, 122 Nev. at 1356, 148 P.3d at 776 (citing Johnson II, 402 P.3d at 1277). Further, when the aliases used by the co-defendants are put in context, the jury needed to know those aliases in order to follow the testimony of various witnesses who called the co-defendants by these aliases. Byars, 130 Nev. at ___, 336 P.3d at 950–51.

Next, as the Nevada Supreme Court found on the first direct appeal, the evidence of Johnson's guilt was, in fact, overwhelming. Johnson I, 118 Nev. at 791–93, 797, 59 P.3d at 453–54, 457. In the context of all the evidence, then, the State's comment was not only a fair conclusion based on the evidence but could not have denied Johnson a fair trial. Parker, 109 Nev. at 392, 849 P.2d at 1068; Valdez, 124 Nev. at 1188, 196 P.3d at 476.

With regard to discovery, Johnson does not actually allege that he did not receive the information—just that he obtained some of it on his own and that it was not "timely" received. As the defense was clearly capable of obtaining this information, this rebuts any Brady argument. Rippo, 113 Nev. at 1257, 946 P.2d at1028; See also Section II(C), *supra*. Further, how a more "timely" disclosure would have made a difference in the outcome, Johnson does not explain.

Absent any chance of success on appeal, appellate counsel was in no way ineffective regarding any of these four alleged prosecutorial misconduct issues. Thus, Mr. Oram was not ineffective for not raising these issues in the first post-conviction proceedings. Without any chance of success, Johnson cannot establish that he would be prejudiced if this claim were dismissed per the mandatory procedural bars.

6. Claim Six: Trial Court Error – Guilt Phase

In this ground, Johnson alleges the Court erred during the first trial, including in evidentiary rulings, in handling of direct and cross-examinations, and in questioning jurors. Third Petition at 121–35. As an initial matter, as discussed in Section III(A), *supra*, parts of this claim are framed solely as Court error, not ineffective assistance of counsel. Compare, e.g., Third Petition at 121–22 (Claim 6(A)) to Third Petition at 122–23 (Claim 6(B)). Though Johnson attempts to tack a generic paragraph to the conclusion of Claim 6, stating in general that counsel was ineffective for failing to object and that a more favorable outcome was likely if he had so objected, Johnson does not actually make Strickland arguments specific to each claim. Framed as Court error, this claim was appropriate for direct appeal, and there is no good cause for entertaining it in a successive petition. Franklin, 110 Nev. at 752, 877 P.2d at 1059. In several of these subsections, Johnson fails to allege what counsel did or did not do with regard to the State's alleged misconduct or how those actions would have changed the outcome of the case.

Further, Johnson admits that subsections (A), (D), and (E) of this claim, and subsections (B) and (C) in part, were previously raised and denied in his first direct and post-conviction appeals. Third Petition at 10–11. Indeed, in his first direct appeal, the Nevada Supreme Court

rejected Johnson's claim that this Court erred in various evidentiary respects—such as in allowing the prosecution to admit evidence of other weapons—and that Armstrong had not been "aggressively cross-examined." Johnson I, 118 Nev. at 793, 795–96, 59 P.3d at 454–56. The Court also rejected Johnson's argument of unnecessarily gruesome autopsy photos in his post-conviction appeal. Johnson III, 133 Nev. at __, 402 P.3d at 1276. Therefore, these subsections are barred by the doctrine of law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710.

Johnson alleges Claims 6(F) to (H) cover new ground. Third Petition at 12. With regard to trial, a judge retains wide latitude regarding the decision to admit or exclude evidence. See McLellan v. State, 124 Nev. 263, 182 P.3d 106, 109 (2008). Such decisions are reviewed for abuse of discretion. McLellan, 124 Nev. at 267, 182 P.3d at 109. However, such discretion "should not be disturbed [on] appeal absent a showing that the district court was *manifestly* wrong when it allowed the admission of this evidence." Crawford v. State, 107 Nev. 345, 353, 811 P.2d 67, 72 (1991) (emphasis added).

a. 6(F): Expert Testimony

Johnson's complaint about the State's expert's testimony is without merit. Third Petition at 130–31. The testimony was not "speculative"; it was an expert offering explanation as to how a particular blunt-force wound was inflicted, based on his expertise as a forensic pathologist. Johnson cannot establish that this Court abused its discretion or was manifestly wrong in admitting this evidence. McLellan, 124 Nev. at 267, 182 P.3d at 109; Crawford, 107 Nev. at 353, 811 P.2d at 72. Indeed, as Johnson admits, this Court overruled the defense's objection to this evidence. Third Petition at 130. Appellant counsel would have had no chance of success on appeal and therefore was not ineffective for not raising the issue.

b. 6(G): Victim/Defendant Photographs

Johnson's complaint about the photographs of the victims and the co-defendants shown at trial is without merit. Third Petition at 131–32. As discussed in Section III(B)(5), *supra*,

there was no issue with the State's use of the photos. Johnson cannot establish that this Court abused its discretion or was manifestly wrong in admitting this evidence. McLellan, 124 Nev. at 267, 182 P.3d at 109; Crawford, 107 Nev. at 353, 811 P.2d at 72. Again, as Johnson admits, this Court overruled the defense's objection to this evidence. Third Petition at 132. Appellant counsel would have had no chance of success on appeal and therefore was not ineffective for not raising the issue.

c. 6(H): Court Questioning Jurors

Johnson's complaint about this Court's questioning of jurors is without merit. Third Petition at 132–35. Any claim regarding the 2000 penalty phase is utterly irrelevant. That jury was hung as to the issue of whether to impose the death penalty. Johnson received a brand-new, final penalty hearing before a jury in 2005. Any challenges to the 2000 penalty hearing would have no chance of success on appeal because it is not—and never has been—the controlling penalty hearing and because any issues with it were cured by the fact that Johnson was given a new penalty hearing in 2005.

Absent any chance of success on appeal, appellate counsel was in no way ineffective regarding any of these alleged Court errors. Thus, Mr. Oram was not ineffective for not raising these issues in the first post-conviction proceedings. Without any chance of success, Johnson cannot establish that he would be prejudiced if this claim were dismissed per the mandatory procedural bars.

7. Claim Seven: Discovery Issues

In this ground, Johnson alleges the State failed to disclose, or timely disclose, certain evidence. Third Petition at 136–40. Johnson admits that subsection (A) of this claim was previously raised and denied in his first post-conviction appeal. Third Petition at 11. Therefore, it is barred by the doctrine of law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710.

Johnson alleges Claims 7(B) to (E) cover new ground. Third Petition at 12. However, as discussed in response to Johnson's good cause arguments, Johnson has not established a Brady violation—including as to investigator Baldonado's eventual criminal conviction, the forensic evidence, or the defense expert's own blood spatter expert's report. See Section II(C), *supra*. Johnson has not established that any of this information was withheld by the State, that the defense could not obtain it with reasonable diligence, or that it was even material. Id.; see also Rippo, 113 Nev. at 1257, 946 P.2d at1028. Any Brady violation claim would not have been successful, either at trial or on appeal. Thus, even if this Court construes this claim as one suitable for a habeas petition—given the aforementioned lack of analysis of this claim through the Strickland lens, see Section III(A), *supra*—post-conviction counsel was not ineffective for not raising this claim.

8. Claim Eight: Double Jeopardy – Lesser-Included Offenses

In this ground, Johnson alleges violations of the Double Jeopardy Clause in that certain offenses were lesser-included in those of which he was convicted. Third Petition at 141–46. This is one of Johnson's few claims that was not previously raised at least in part. See Third Petition at 10–11. However, Johnson's argument is utterly meritless. It boils down to a complaint that if a defendant is convicted of both felony murder and of the predicate felony (e.g., both first-degree murder and the kidnapping during which that murder took place), then a double jeopardy violation has occurred—that the predicate felony is a "lesser-included offense" of the felony murder.

However, as Johnson admits, the Nevada Supreme Court expressly rejected this argument in Talancon v. State, 102 Nev. 294, 297–301, 721 P.2d 764, 766–69 (1986). As this Court has no supervisory authority over the Nevada Supreme Court and cannot overrule its precedent, guilt-phase counsel was not ineffective for not raising this argument, which is in direct contradiction to Nevada law. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Appellate counsel was not ineffective for raising it because it would be a fruitless request to ask the Court to overturn its precedent that, at the time of Johnson's conviction, was only fourteen years old. Thus, even if this Court construes this claim as one suitable for a habeas petition—given the

aforementioned lack of analysis of this claim through the Strickland lens, see Section III(A), *supra*—post-conviction counsel was not ineffective for not raising this claim.

9. Claim Nine: Confrontation Clause

In this ground, Johnson alleges a violation of the Confrontation Clause at both guilt and penalty phase. Third Petition at 147–53. Johnson admits that this claim was previously raised in part and denied in his second direct appeal. Third Petition at 11. Indeed, in that appeal from the final penalty phase, the Nevada Supreme Court rejected Johnson's claim that the Confrontation Clause even applies at a capital penalty hearing. Johnson II, 122 Nev. at 1353, 148 P.3d at 773. Therefore, these claims are barred by the doctrine of law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710.

Johnson alleges parts of Claim 9 cover new ground. Third Petition at 12. However, Johnson does not specify which parts these are. As discussed in Claim 5, this Court should examine the issue no further, because Johnson has not made a clear record of which claims have already been rejected by the Nevada Supreme Court. Section III(B)(5), *supra*; see, e.g., Maresca, 103 Nev. at 672–73, 748 P.2d at 6. Nonetheless, because the Nevada Supreme Court has already held that a defendant has no Confrontation Clause rights during a penalty hearing, only issues from the guilt-phase can be examined. But even these claims are utterly without merit. As Johnson admits, the United States Supreme Court has specifically held that an expert who has personal knowledge of the DNA testing, despite not having performed it, may testify about a DNA match. Williams v. Illinois, 567 U.S. 50, 70, 132 S. Ct. 2221, 2235 (2012). It is not this Court's—nor even the Nevada Supreme Court's—prerogative to hold, as Johnson asks, that this "decision was wrongly decided." Third Petition at 148. Neither trial nor appellate counsel would have been successful arguing that this was a Confrontation Clause violation. Thus, Mr. Oram was not ineffective for not raising these issues in the first post-conviction proceedings. Without any chance of success, Johnson cannot establish that he would be prejudiced if this claim were dismissed per the mandatory procedural bars.

10. Claim Ten: Illegal Seizure

In this ground, Johnson alleges certain evidence was illegal seized and claims prosecutorial misconduct around said seizure. Third Petition at 154–57. Johnson admits that this claim was previously raised and denied in his first direct appeal. Third Petition at 11. Indeed, Johnson raised a claim of illegally seized evidence, arguing that this Court should have granted Johnson's motion to suppress said evidence, in that appeal. Johnson I, 118 Nev. at 794–95, 59 P.3d at 454–55. Therefore, it is barred by the doctrine of law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710. Because Johnson does not allege that any parts of this claim cover new grounds, this entire claim must be summarily dismissed. Third Petition at 12.

11. Claim Eleven: Multiple Theories

In this ground, Johnson alleges he was improperly convicted on multiple theories and that the jury was not unanimous as to its theory of conviction. Third Petition at 163–69. This is one of Johnson's few claims that was not previously raised at least in part. See Third Petition at 10–11. However, Johnson's argument is utterly meritless. He claims that the jury must have been unanimous as to a theory for first-degree murder without any support for that assertion. He cites to no cases that would extend the U.S. Supreme Court's admonition about "separate offenses" to the theories of first-degree murder. Schad v. Arizona, 501 U.S. 624, 633 (1991). The Nevada legislature clearly considers first-degree murder to be one offense, regardless of the theory under which it is charged. NRS 200.030. Johnson's point that there are "separate statutes provid[ing] for liability under theories of aiding and abetting or conspiracy" does not support his conclusion that the Nevada legislature intends for crimes charged under this theory to be considered separate offenses. Third Petition at 160. Rather, it points to the simple fact that the legislature has intended aiding/abetting and conspiracy to apply as theories of liability for *all* crimes, whereas felony murder is a special category of vicarious liability. By necessity, it needed to be set out in the first-degree murder statute—because murder is the only crime to

which this theory applies. It simply does not apply in other crimes; i.e. there is no "felony larceny" theory of convicting someone of that crime. Further, Johnson can point to no law requiring unanimity among the jury as to its theory for convicting a defendant of first-degree murder.

Because trial and appellate counsel were in no way ineffective regarding this issue, Mr. Oram was not ineffective for not raising these issues in the first post-conviction proceedings. Without any chance of success, Johnson cannot establish that he would be prejudiced if this claim were dismissed per the mandatory procedural bars.

12. Claim Twelve: Venue

In this ground, Johnson alleges that he should have been granted another venue at both guilt and penalty phases due to extensive media coverage. Third Petition at 163–70. Johnson admits that this claim was previously raised in part and denied in his first post-conviction appeal. Third Petition at 11. Indeed, the Nevada Supreme Court decided in the post-conviction appeal that the trial court did not err by denying Johnson's motion to change venue based on pretrial publicity: that despite it, the empaneled jurors were not impartial. Johnson III, 133 Nev. __, 402 P.3d at 1275. Therefore, this claim is barred by the doctrine of law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710.

Johnson alleges parts of Claim 12 cover new ground. Third Petition at 12. Johnson does not specify which parts these are. As discussed in Claim 5, this Court should examine the issue no further, because Johnson has not made a clear record of which claims have already been rejected by the Nevada Supreme Court. Section III(B)(5), *supra*; see, e.g., Maresca, 103 Nev. at 672–73, 748 P.2d at 6. Nonetheless, it seems that Johnson raises for the first time a claim that counsel was ineffective for not moving to change the venue at the final penalty hearing in 2005. Third Petition at 167–69. But as the Nevada Supreme Court discussed when it found that the guilt-phase jury was not impartial, "[e]ven where pretrial publicity has been pervasive, this court has upheld the denial of motions for change of venue where the jurors assured the

district court during voir dire that they would be fair and impartial in their deliberations." Johnson III, 133 Nev. __, 402 P.3d at 1275 (citing Floyd v. State, 118 Nev. 156, 165, 42 P.3d 249, 255 (2002), abrogated on other grounds by Grey v. State, 124 Nev. 110, 118–19, 178 P.3d 154, 160–61 (2008)).

Just as with the venue claim in his First Petition, all Johnson has alleged is that there was media exposure. He has not established that any particular juror was not fair and impartial. As Johnson admits, this Court already "confronted" several penalty-phase jurors about the media coverage. Third Petition at 168. Four of the five specific individuals Johnson discusses were not empaneled; thus, their potential media exposure is irrelevant. Transcript, April 21, 2005, III-AM-5; III-PM-149, 186, 194. Regarding the juror Johnson alleges may have discussed the procedural history of the case with those particular prospective jurors, this Court admonished her that she was not to discuss the case with anyone and determined that no corrective action was needed. Id. at III-PM-289–90, 302. Johnson has not even alleged (as part of this venue claim) that that particular juror was not fair and impartial. Appellate counsel was not ineffective for not raising this issue because, just as the trial-phase venue challenge, it would have had no chance of success on appeal. Thus Mr. Oram was not ineffective for not raising these issues in the first post-conviction proceedings. Without any chance of success, Johnson cannot establish that he would be prejudiced if this claim were dismissed per the mandatory procedural bars.

13. Claim Thirteen: Double Jeopardy – Penalty Phase Retrial

In this ground, Johnson alleges that because the first penalty phase jury was hung, his final penalty phase of 2005 violated double jeopardy and due process. Third Petition at 170–74. This is one of Johnson's few claims that was not previously raised at least in part. See Third Petition at 10–11. However, Johnson cannot establish a violation of the Double Jeopardy or Due Process Clauses because Johnson only received his third and final penalty hearing due to the initial deadlocked jury. Sattazahn v. Pennsylvania, 537 U.S. 101, 109 (2003). The United States Supreme Court's explicit, deadlocked-jury exception to the general double jeopardy rule rebuts Johnson's attempt to root his argument that the State "should not be allowed to

make repeated attempts to convict an individual" in an in applicable due process framework. Third Petition at 173. Indeed, Johnson's basic due process argument that with each penalty hearing, the State had more opportunity to "marshal more evidence in an attempt to secure a death sentence" is unpersuasive, given that Johnson was sentenced to death at both the second and third penalty hearings. Third Petition at 173.

Johnson also cites no caselaw supporting his argument that the court "interfered with the process and caused the mistrial" by inquiring into the status of deliberations. Third Petition at 172. Indeed, it is true that "[a]ny criminal defendant . . . being tried by a jury is entitled to the uncoerced verdict of that body." Lowenfield v. Phelps, 484 U.S. 231, 241, 108 S. Ct. 546, 552 (1988). However, this Court has articulated only a few actions that may be considered coercive. Such conduct includes polling a dissenting juror in an unduly coercive manner. Saletta v. State, 127 Nev. 416, 418, 254 P.3d 111, 112 (2011). Explicitly demanding that the jury return a verdict may also constitute coercion. Redeford v. State, 93 Nev. 649, 652, 572 P.2d 219, 220 (1977) (wherein the trial court admonished the jury that the trial would be a waste in light of the jury's "failure to reach a verdict"); Ransey v. State, 95 Nev. 364, 367, 594 P.2d 1157, 1158 (1979) (wherein the trial court gave a charge under Allen v. U.S., 164 U.S. 492 (1896), knowing there was only one dissenting juror, that "in essence told the lone dissenting juror that he should be open-minded and not obstinate"). Johnson fails to allege that the trial court was in any manner inappropriately coercive or otherwise illegally interfered in its deliberations.

Finally, in obtaining the third penalty hearing, Johnson received part of the relief he sought in his first direct appeal. The Nevada Supreme Court determined that NRS 175.556(1), the then-existing Nevada statute that permitted a three-judge panel to sentence a defendant convicted of first-degree murder, violated Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002). Johnson I, 118 Nev. 787, 799–800, 59 P.3d 450, 458–59. The Nevada Supreme Court also affirmed his ultimate death sentence in his second direct appeal. Johnson II, 122 Nev. at 1360, 148 P.3d at 778. Neither trial nor appellate counsel would have been successful arguing a double jeopardy or due process violation. Thus, Mr. Oram was not ineffective for not raising

these issues in the first post-conviction proceedings. Without any chance of success, Johnson cannot establish that he would be prejudiced if this claim were dismissed per the mandatory procedural bars.

14. Claim Fourteen: Ineffective Assistance of Counsel – Penalty Phase

In this ground, Johnson alleges counsel was ineffective in preparation, investigation, and presentation during his final penalty phase, including for failing to present his "life story." Third Petition at 175–223. Again, this is one of the few grounds that is not waived. See Section III, Intro, *supra*; NRS 34.810(1); Franklin, 110 Nev. at 752, 877 P.2d at 1059. However, Johnson admits that subsection (B), subparts 2, 4, 5–9, and 17 of this claim, and subsection (A) in part, were previously raised and denied in his first post-conviction appeal. Third Petition at 11. Indeed, Johnson raised several claims of ineffective assistance of counsel at penalty phase in his appeal from the denial of his First Petition, all of which were denied—including for: moving for a bifurcated hearing; failing to investigate; failing to present mitigation in the form of fetal alcohol disorder, Johnson's PET scan, and testimony from his abusive father; failing to prevent evidence of the codefendants' sentences; failing to present mitigating evidence from the first penalty hearing; permitting the defense's expert's mitigation report to be impeached by the State; contradicting each other during closing argument; failing to request a jury instruction on mitigation being found only by one juror. Johnson III, 133 Nev. at ___, 402 P.3d at 1278–80. Therefore, these subsections are barred by the doctrine of law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710.

Johnson alleges Claim 14(A), "in part," and Claim 14(B) (subparts 1, 3, 10–16, and 18–20) cover new ground. Third Petition at 12. Each subpart of this subsection is without merit.

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a. 14(A): Johnson's Life Story

Johnson claims penalty-phase counsel were ineffective for failure to "present a coherent narrative of Donte Johnson's life." Third Petition at 175–96. Again, Johnson admits that it was previously raised in part. Id. at 12. Moreover, as discussed in Section II(E)(3)(b), *supra*, this claim has already been rejected in all but name, and its substantive is governed by the law of the case. Indeed, the individual pieces of information Johnson discusses in this claim either were presented by penalty-phase counsel or the fact that they were not presented was not held to be ineffective assistance of counsel, including issues with Johnson's mother's drinking and his abusive upbringing. Third Petition at 176; Johnson III, 402 P.3d at 1278.

Specifically, after evidentiary hearing, this Court held—and then the Nevada Supreme Court held in the post-conviction appeal—that penalty-phase counsel were not ineffective for not introducing much of the same information Johnson now presents, including: "additional mitigation evidence concerning fetal alcohol disorder, the results of a Positron Emission Tomography scan, and testimony from his abusive father"; and "all of the mitigating circumstances found by the jury at his first penalty hearing." Johnson III, 402 P.3d at 1278–79. The Court specifically held that "counsel made reasonable decisions regarding which evidence to investigate and how to present the evidence deemed worthy of presentation." Id. Further, the Court held, "[t]he jurors at the 2005 penalty hearing heard evidence concerning most of the mitigating circumstances found in the first trial and were instructed that they could find "any other mitigating circumstance," even if those circumstances were not specifically listed." Id. That is, the highest court in Nevada has already found that Johnson was not prejudiced by not having his entire life story presented to the jury at the third penalty hearing. Penalty-phase counsel's investigations were adequate, and Johnson was not prejudiced by the information they chose to present and to exclude. Thus, post-conviction counsel was not ineffective when he raised essentially this same issue in the First Petition. Even given the new affidavits from family members, discussed *supra*, there is no good cause to reexamine this claim.

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b. 14(B)(1): Consistent Theory

The premise of Johnson's argument that counsel was ineffective for not presenting a "consistent" theory due to fears about "credibility" is flawed. Third Petition at 197–99. Johnson relies on non-binding ABA guidelines about consistency "through both the first and second phases of the trial"—but the jury that sentenced Johnson to death was not the same guilt-phase jury of five years earlier. Third Petition at 197. Counsel can hardly be considered ineffective for failure to present a "consistent" defense to an entirely new jury. Further, the Nevada Supreme Court has already examined at least one instance of "inconsistency" between Johnson's penalty-phase counsels, that of drugs in prison, and found there was no "prejudice considering the unlikelihood that a more consistent argument on this point would have changed the outcome of the penalty hearing." Johnson III, 402 P.3d at 1280. Johnson's attempts to paint other comments as "inconsistent" among counsel are disingenuous attempts to mischaracterize counsel's words. Third Petition at 198; see also Section III(B)(14)(f), *infra*. Further, Johnson complains not that counsel failed to present mitigation evidence, but rather about the order in which they presented it. This is not ineffective assistance of counsel but rather a matter of "virtually unchallengeable" strategy. Strickland, 466 U.S. at 691, 104 S. Ct. at 2064; Rhyne, 118 Nev. at 8, 38 P.3d at 167. Penalty-phase counsel were not ineffective.

c. 14(B)(3): Jury Instruction Issues

Johnson's claim that penalty-phase counsel should have moved to strike the multiple-murder aggravator because the convictions themselves were invalid, due to alleged errors in jury instructions, is utterly without merit. Third Petition at 197–99. At that point in time, the Nevada Supreme Court had affirmed Johnson's conviction but remanded for the third penalty phase. See generally Johnson I. It was not ineffective for penalty-phase counsel to refrain from moving to challenge the underlying convictions yet again. Indeed, at that point, there was no vehicle for counsel to challenge the convictions. Penalty-phase counsel handled an aspect of Johnson's trial, not his post-conviction litigation, which is the only proper vessel for claims of ineffective assistance of counsel—which would have been the only way to challenge the jury

instructions at that point in time. Penalty-phase counsel were not ineffective, and there was no chance of success on appeal.

d. 14(B)(10): Johnson's Father

Johnson vainly attempts to paint this claim—that penalty-phase counsel were ineffective for failing to present the testimony of Johnson's father—as new. Third Petition at 210. But the Nevada Supreme Court has already held that counsel was not ineffective in this regard. Johnson III, 402 P.3d at 1278. Though Johnson attempts to use his "full life story" to allege what his father would or should have testified to, Johnson cannot avoid the doctrine of the law of the case with a more detailed argument in these post-conviction proceedings. Hall, 91 Nev. at 316, 535 P.2d at 798–99; see also Pertgen, 110 Nev. at 557–58, 875 P.2d at 362. This claim must be summarily dismissed.

e. 14(B)(11): Trauma Expert

Johnson does not actually allege what a trauma expert would have testified to or what difference it would have made at the penalty phase. Third Petition at 210. As such, this is a bare and naked claim and should be dismissed. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

f. 14(B)(12): Conceding "Triggerman" Status

Johnson again mischaracterizes his penalty-phase counsel's words in claiming that she "conceded" that he pulled the trigger. Third Petition at 211. In fact, counsel stated that she and her co-counsel called Johnson a "cold-blooded killer" so the jury "would not be shocked by that." Transcript, April 28, 2005, VII-C-12. Not only is this not a concession that Johnson pulled the trigger—because a defendant can be convicted of a killing, and thereby be a killer, without ever touching the murder weapon. This was clear strategy to prime the jury for the evidence the State would bring to paint Johnson as a "cold-blooded killer." Because a reviewing court is instructed not to second-guess every strategic decision, there was no chance of success in challenging counsel's strategy. Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)).

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g. 14(B)(13): Other-Matter Evidence

Johnson's argument that penalty-phase counsel did not object to evidence beyond the verdict forms during the eligibility stage is essentially a re-argument of his claim that counsel was ineffective for moving for a bifurcated penalty hearing in the first place. Third Petition at 211–14. But the Nevada Supreme Court has already held that counsel was not ineffective for doing so. Johnson III, 133 Nev. at ___, 402 P.3d at 1278. Further, Johnson cannot establish—and does not even argue—prejudice. He does not explain how a different outcome would have been likely had the jury received the evidence he complains only during the selection phase. Penalty-phase counsel was not ineffective.

h. 14(B)(14): VCR

As discussed, Johnson's complaint that counsel should have mentioned the VCR is without merit. Third Petition at 214–16; Section III(B)(3)(d), *supra*.

i. 14(B)(15): Leading Questions

Johnson complaint about leading questions is without merit. Third Petition at 216–18. Not only are few of the questions he cites actually leading; this Court sustained the defense's objection to a question that was. Transcript, April 25, 2005, V-PM-60. Therefore, counsel cannot be considered deficient. Further, Johnson fails to establish prejudice. As discussed, a defendant has no Confrontation Clause rights during a capital penalty hearing. Section III(B)(9), *supra*; Johnson II, 122 Nev. at 1353, 148 P.3d at 773. And Johnson has not argued how a different result would have been likely had counsel objected to every allegedly leading question by the State on direct examination. He cannot establish that penalty-phase counsel was ineffective, and there was no chance of success on appeal.

j. 14(B)(16): Photographs

Johnson has made absolutely no attempt to argue which photographs were overly gruesome or how. Third Petition at 218. Regardless, "[i]t is within the district court's discretion to admit photographs where the probative value outweighs any prejudicial effect the photographs might have on the jury." Sipsas v. State, 102 Nev. 119, 123, 716 P.2d 231, 234 (1986). The Nevada Supreme Court has consistently held gruesome photographs are not

per se inadmissible. See, e.g., Archanian v. State, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006); West v. State, 119 Nev. 410, 420, 75 P.3d 808, 815 (2003).

In this case, the Nevada Supreme Court has already rejected Johnson's argument of unnecessarily gruesome autopsy photos in his post-conviction appeal. Johnson III, 133 Nev. at __, 402 P.3d at 1276. Even if Johnson is talking about other photographs, Johnson has not bothered to argue how a different result would have been more likely even had counsel objected to them. He cannot establish that penalty-phase counsel were ineffective, and there was no chance of success on appeal.

k. 14(B)(18): Physical Evidence / Police Questioning Expert

For the same reasons Johnson's ineffective assistance of guilt-phase counsel fails, his claim that penalty-phase counsel were ineffective for failure with regard to blood spatter and police coercion fails. Third Petition at 221; Section III(B)(3)(a), *supra.*

l. 14(B)(19): Cross-Examination

For the same reasons Johnson's ineffective assistance of guilt-phase counsel fails, his claim that penalty-phase counsel were ineffective for failure to cross-examine the autopsy, DNA, firearms, and fingerprint witnesses fails. Third Petition at 221–22; Section III(B)(3)(c), *supra.*

m. 14(B)(20): Dr. Kinsora

Johnson's claim that penalty-phase counsel should have obtained neuropsychological testing and a report is without merit. Third Petition at 222–23. The Neuropsychological Evaluation completed by Dr. Myla Young in 2000, during the guilt-phase, does not actually indicate that Johnson was intellectually disabled. Exhibits 143. Nor has Johnson pointed to anything in Dr. Myla's that would have indicated to penalty-phase counsel that a brand-new neuropsychological evaluation, merely five years after Dr. Young's, would have been necessary or even helpful. Indeed, during the State's penalty phase voir dire of Dr. Kinsora, the doctor specifically stated that he "determined early on in talking with [Johnson] and reviewing the records that *there probably wasn't any point in doing any kind of neuropsychological assessment*, although I know one had been done in the past that I disagreed

with. *I did not see [Johnson] as having brain damage or anything* there that would suggest that there's anything that would . . . get out of a lot of testing." Transcript, May 3, 2005, 15–16 (emphasis added). Thus, even had counsel asked, the very witness Johnson asserts should have been asked to do an evaluation stated on the record that there was no point in doing one. Thus, Johnson cannot establish that the result would have been any different—even assuming he is accurate in alleging that Dr. Kinsora was never asked to do an evaluation. Finally, Johnson has cited no authority whatsoever to support his assertion that an expert who is hired to examine one co-defendant is conflicted from examining or testifying about another. Penalty-phase counsel were not ineffective.

Because penalty-phase and appellate counsel were in no way ineffective regarding any of these penalty-phase issues, Mr. Oram was not ineffective for not raising these issues in the first post-conviction proceedings. Without any chance of success, Johnson cannot establish that he would be prejudiced if this entire claim were dismissed per the mandatory procedural bars.

15. Claim Fifteen: Jury Instructions – Penalty-Phase

In this ground, Johnson alleges the Court gave deficient jury instructions during the final penalty phase. Third Petition at 224–27. Johnson admits that subsection (A) of this claim was previously raised and denied in his first post-conviction appeal. Third Petition at 11. Johnson also falsely states that 15(C) a new claim; indeed, the Nevada Supreme Court has twice rejected counsel's challenge to the reasonable doubt instruction: once in substance on direct appeal and once in affirming that counsel was not deficient in this respect on post-conviction appeal. Third Petition at 12; Johnson I, 118 Nev. at 806, 59 P.3d at 462; Johnson III, 402 P.3d at 1277. Therefore, these two subsections are barred by the doctrine of law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710.

Johnson alleges Claim 15(B) and (D) cover new ground. Third Petition at 12. But Johnson's argument that the weighing instructions given allowed for the possibility of a death sentence where "aggravating and mitigating circumstances are found to be in equal balance" is nonsensical. Third Petition at 225–26. The instructions Johnson cite explicitly gave the option for the jury to note that they found the aggravator to outweigh the mitigators or vice versa. Had the jury selected anything besides "The aggravating circumstance outweighs any mitigating circumstances," Johnson would not have received the death penalty. Johnson's challenge to the "equal and exact justice" instruction is likewise futile. Third Petition at 227–29. The Nevada Supreme Court has consistently upheld this exact instruction. See, e.g., Leonard v. State, 114 Nev. 1196, 1209, 969 P.2d 288, 298 (1998).

With no possibility of success in challenging these jury instructions at penalty-phase of the trial or on appeal, penalty-phase and appellate counsel were not ineffective for not challenging these instructions. Thus, Mr. Oram was not ineffective for not raising these issues in the first post-conviction proceedings. Without any chance of success, Johnson cannot establish that he would be prejudiced if this entire claim were dismissed per the mandatory procedural bars.

16. Claim Sixteen: Prosecutorial Misconduct – Penalty Phase

In this ground, Johnson alleges the State committed prosecutorial misconduct at the final penalty phase, at every stage from opening statements to closing arguments. Third Petition at 230–58. Johnson admits that this claim was previously raised in part and denied in his second direct and first post-conviction appeals. Third Petition at 11. Indeed, the Nevada Supreme Court denied Johnson's claims that prosecutors engaged in misconduct during penalty-phase opening statement, closing argument, and rebuttal in his second direct appeal. Johnson II, 122 Nev. at 1355–58, 148 P.3d at 775–77. Then, on post-conviction appeal, the Court denied Johnson's claims that prosecutors engaged in misconduct "by vouching for the State's witnesses, commenting on facts not in evidence, making a golden rule argument, failing to disclose witness benefits, and using the term 'guilt phase.'" Johnson III, 133 Nev. __, 402 P.3d at 1277. Therefore, these claims are barred by the doctrine of law of the case.

Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710.

Johnson alleges parts of Claim 16 cover new ground. Third Petition at 12. However, Johnson does not specify which parts these are. As discussed in Claim 5, this Court should examine the issue no further, because Johnson has not made a clear record of which claims have already been rejected by the Nevada Supreme Court. Section III(B)(5), *supra*; see, e.g., Maresca, 103 Nev. at 672–73, 748 P.2d at 6. Nonetheless, a comparison of Johnson's claims to the second direct and the post-convictions appeals makes it clear that the Nevada Supreme Court has already examined Claims 16(A)(1)(b) and (2)(a), 16(H)(1)(a) and (b), and 16(H)(2)(a) ("commenting on facts not in evidence," Johnson III, 402 P.3d at 1277) 16(C) ("describing the victims as kids was not improper given their youth") Johnson III, 122 Nev. at 1356, 148 P.3d at 776 (citing Johnson II, 402 P.3d at 1277).

a. 16(A)(1)(a): Johnson As Shooter

Johnson's claim that the State committed "misconduct" in identifying Johnson as the shooter is without merit. Third Petition at 230–41. Even the evidence Johnson presents in this very claim supports the fact that the prosecution made a permissible "deduction or conclusion from the evidence introduced in the trial" by labeling Johnson as the shooter. Parker, 109 Nev. at 392, 849 P.2d at 1068. Indeed, in its own rendition of the facts of this case, the Nevada Supreme Court has explicitly done the same: "*Johnson* took Talamantez to a back room and *shot him* in the head. Realizing that there were three witnesses, *Johnson* went back to the front room and *shot the three other victims* in the back of the heads, execution style," Johnson I, 118 Nev. at 791, 59 P.3d at 453 (emphasis added); "*Johnson bound and shot* four young men execution-style in the head," Johnson II, 122 Nev. at 1359, 148 P.3d at 777 (emphasis added); "*Johnson* bound the hands and feet of four young men, robbed them, and *killed them by shooting them* in the head, execution style." Johnson III, 402 P.3d at 1271. Penalty-phase counsel were not ineffective for not challenging this alleged misconduct—particularly when, as Johnson admits, counsel stated that the defense "attempt[ed] [to] cast[] doubt about the

State's theory that Jonson actually pulled the trigger," telling the jury that the defense and the State's accounts would "differ with regard to Johnson's involvement" in the shooting. Third Petition at 198; Transcript, April 25, 2005, 27. Counsel would have had no chance of success challenging the State's alleged "misconduct" either at trial or on appeal.

b. 16(B): Gang Affiliation

Johnson's complaint that the State violated his right to association and a pretrial order by introducing evidence of Johnson's gang affiliation is irrelevant. Third Petition at 241–42. Johnson's own penalty-phase counsel presented "[m]uch testimony . . . regarding Johnson's involvement with street gangs." Johnson II, 122 Nev. at 1351, 148 P.3d at 772. Indeed, the record is clear that Johnson's gang affiliation was a key part of the defense's mitigation case; the defense presented an expert who testified with "extensive sociological data" about gangs. Id. at 1352, 148 P.3d at 773. Johnson does not claim, for example, that counsel would not have done so without the State's first submitting gang-related evidence. Counsel would have had no chance of success challenging the State's alleged "misconduct" either at trial or on appeal. See, e.g., Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008) ("It is true that the 'substantial rights' standard of plain error review is identical to the 'prejudice' standard of an ineffective assistance claim.")

c. 16(D): Other-Matter Evidence

Johnson's claim that the State committed misconduct in presenting additional evidence at the eligibility phase of the third penalty hearing is without merit. Third Petition at 245 – 48. As discussed in response to Johnson's ineffective assistance of trial counsel framework of this very issue, Johnson has not demonstrated that this so-called "other-matter" evidence constituted misconduct. Section III(B)(14)(f), *supra*.

d. 16(E): Inflammatory Images

Johnson's claim that the State committed misconduct in showing images and stating alias of the co-defendants is without merit. Third Petition at 248. As discussed in response to Johnson's identical claim of prosecutorial misconduct during the guilt-phase, Johnson has not

demonstrated that presenting the so-called "inflammatory" images and alias constituted misconduct. Section III(B)(5), *supra*.

e. 16(F): Disparaging Mitigation Strategy

Johnson's claim that the State committed misconduct by "disparaging" his mitigation strategy is without merit. Third Petition at 248–50. The State's argument that Johnson's difficult life did not mitigate or even explain the murder of three young men and one actual child can hardly be called improper, let alone "patently prejudicial." Valdez, 124 Nev. at 1188, 196 P.3d at 476; Riker, 111 Nev. at 1328, 905 P.2d at 713. Counsel would have had no chance of success challenging the State's alleged "misconduct" either at trial or on appeal.

f. 16(G): Impeachment

Johnson's claim about allegedly improper impeachment is bare and naked, unsupported by any authority, and should be summarily dismissed. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Regardless, the Nevada Supreme Court denied Johnson's claim of ineffective assistance of appellate counsel for not challenging this very same impeachment in his post-conviction appeal. Johnson III, 133 Nev. at ___, 402 P.3d at 1277, 1279. Thus, Johnson cannot establish the prejudice necessary to support a prosecutorial misconduct claim.

g. 16(H)(1)(c) and 16(H)(2)(b): Passions of the Jurors

Johnson's claim that the State improperly appealed to the passions of the jurors is without merit. Third Petition at 253–54. As discussed in response to Johnson's identical claim of prosecutorial misconduct during the guilt-phase, Johnson has not demonstrated that the State inflamed the jury's passions. Section III(B)(5), *supra*. Specifically with regard to the State's arguments that Johnsons' difficult life did not mitigate or explain the four murders he committed, Johnson cannot establish there would have been able to establish "prosecutorial misconduct" on appeal—particularly since, in the Nevada Supreme Court's own independent evaluation of Johnson's death sentence, it explicitly determined that the death sentence was *not* imposed under the influence of passion, prejudice, or any arbitrary factor, and that the death sentence was not excessive considering both the crime and the defendant. Johnson II,

122 Nev. at 1359, 148 P.3d at 777. Counsel would have had no chance of success challenging the State's alleged "misconduct" either at penalty-phase of the trial or on appeal.

With no possibility of success in challenging this alleged prosecutorial misconduct at penalty-phase of the trial or on appeal, penalty-phase and appellate counsel were not ineffective for not challenging it. Thus, Mr. Oram was not ineffective for not raising these issues in the first post-conviction proceedings. Without any chance of success, Johnson cannot establish that he would be prejudiced if this entire claim were dismissed per the mandatory procedural bars.

17. Claim Seventeen: Trial Court Error – Penalty Phase

In this ground, Johnson alleges the Court erred during the final penalty phase, including in jury selection, in admitting evidence, in handling cross-examinations, and in refusing to allow the defense to argue last. Third Petition at 259–74. Johnson admits that subsections (A) and (C) through (F) of this claim, and subsection (B) in part, were previously raised and denied in his second direct and first post-conviction appeals. Third Petition at 11. Johnson also falsely states that subsection (G) is new. Indeed, in his direct appeal, the Nevada Supreme Court rejected Johnson's claim that this Court should have allowed the defendant to argue last during the penalty hearing. Johnson I, 118 Nev. at 805–06, 59 P.3d at 462. Then, on second direct appeal, the Court denied Johnson's claims that this Court erred by: admitting Johnson's juvenile record; allowing "stake-out" questions of jurors in his direct appeal from the final penalty phase; or not declaring a mistrial when a victim's brother fainted in court. Johnson II, 122 Nev. at 1353–55, 1358–59, 148 P.3d at 773–75, 777. Finally, on post-conviction appeal, the Court denied Johnson's claim about unnecessarily gruesome photographs and improper cross-examination. Johnson III, 133 Nev. __, 402 P.3d at 1276, 1279. Therefore, these subsections are barred by the doctrine of law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710.

Accordingly, this Court may only examine Claim 17(B). However, the claim is without merit. Third Petition at 261–68. As an initial matter, Johnson alleges parts of Claim 17(B) cover new ground. Third Petition at 12. However, Johnson does not specify which parts these are. As with Claims 5, 9, 12, and 16, *supra*, this Court should not consider this argument without Johnson having made a cogent argument about what parts of this claim are already law of the case. See, e.g., Maresca, 103 Nev. at 672–73, 748 P.2d at 6. Regardless, it is clear that the Nevada Supreme Court has already examined 17(B)(1) and (3) (juvenile and Clark County Detention Center records).

This Court did not improperly admit prior bad act evidence is the form of the incident with inmate Irias. Indeed, Johnson admits that this Court held an evidentiary hearing to determine the admissibility of this evidence. Third Petition at 265. Thus, it is clear that this Court did not abuse its discretion, properly using its wide latitude in admitting it. McLellan, 124 Nev. at 267, 182 P.3d at 109. With no possibility of success in challenging this allegedly inadmissible evidence at penalty-phase of the trial or on appeal, penalty-phase and appellate counsel were not ineffective for not challenging it. Thus, Mr. Oram was not ineffective for not raising these issues in the first post-conviction proceedings. Without any chance of success, Johnson cannot establish that he would be prejudiced if this entire claim were dismissed per the mandatory procedural bars.

18. Claim Eighteen: Juror Misconduct and Bias – Penalty Phase

In this ground, Johnson alleges a member of his penalty-phase jury—Juror Carpenter—committed misconduct and was biased. Third Petition at 275–79. This is one of a few claims Johnson alleges was not previously raised at least in part. See Third Petition at 10–11. However, as with several other mischaracterizations of prior claims in this Third Petition, this claim is not new; and as this Court has previously found, it is without merit.

Johnson has not presented any new evidence supporting a claim that Juror Carpenter committed misconduct or was biased. As Johnson admits, this Court held an evidentiary hearing concerning these exact same allegations during the 2005 penalty hearing. Third Petition at 277; see also Transcript, June 14, 2005. At that hearing, this Court determined that

Juror Carpenter had committed no misconduct, was not "biased or prejudiced," and there was no evidence "that she had made up her mind as to what the sentence should be" or "that she had her mind made up as to what the verdict should be." Transcript, June 14, 2005, at 71–76. Then, as a part of the previous post-conviction proceedings, Mr. Oram brought to this Court's attention affidavits from two alternate jurors who had been contacted about potential jury misconduct during the final penalty phase in 2005, in preparation of that 2005 evidentiary hearing. Exhibits 209, 210. Johnson has not demonstrated there is any purpose in bringing these same affidavits before this Court again. This Court has already found that all matters "raised regarding the 2005 penalty phase and the appeal therefrom are rejected as failing under both prongs of Strickland." Findings of Fact, Conclusions of Law and Order, filed March 17, 2014, at 3. Further, on appeal from this Court's denial of his First Petition, the Nevada Supreme Court found that Johnson "has not demonstrated that the empaneled jurors were not impartial." Johnson III, 133 Nev. __, 402 P.3d at 1275. Thus, this claim is barred at least by res judicata, if not also law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710. Regardless, this claim cannot constitute good cause, because Mr. Oram did in fact present this claim to this Court in the First Petition, and there is no new information constituting good cause to re-raise it.

19. Claim Nineteen: Juror Findings re: *Enmund* and *Tison*

In this ground, Johnson alleges that the jury did not actually find that he was "the triggerman." Third Petition at 280–90. This is one of Johnson's few claims that was not previously raised at least in part. See Third Petition at 10–11. However, Johnson ignores explicit Nevada precedent examining the cases he relies upon in claiming the necessity of such a finding.

The United States Supreme Court has held that the Eighth Amendment does not permit imposition of death penalty on defendant who aids and abets felony in course of which murder is committed by others but who does not himself kill, attempt to kill, or intend that killing take

place or that lethal force will be employed. Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368 (1982). The Court limited that holding five years later, explaining that "[t]he Eighth Amendment does not prohibit the death penalty as disproportionate in the case of a defendant whose participation in a felony that results in murder is major and whose mental state is one of reckless indifference." Tison v. Arizona, 481 U.S. 137, 137–38, 107 S. Ct. 1676, 1678 (1987). However, the Nevada Supreme Court has specifically held that "[a] determination of culpability under Enmund need not be made by the jury, and although a jury determination is preferable, it may be made on appeal." Browning v. State, 124 Nev. 517, 533, 188 P.3d 60, 71 (2008).

As discussed in Section III(B)(16), *supra*, the Nevada Supreme Court has explicitly found that Johnson did actually kill the victims, explaining in all three of Johnson's appeals: "*Johnson* took Talamantez to a back room and *shot him* in the head. Realizing that there were three witnesses, *Johnson* went back to the front room and *shot the three other victims* in the back of the heads, execution style," Johnson I, 118 Nev. at 791, 59 P.3d at 453 (emphasis added); "*Johnson bound and shot* four young men execution-style in the head," Johnson II, 122 Nev. at 1359, 148 P.3d at 777 (emphasis added); "*Johnson* bound the hands and feet of four young men, robbed them, and *killed them by shooting them* in the head, execution style." Johnson III, 402 P.3d at 1271. Thus, despite the four theories under which Johnson was charged with first-degree murder, there was never any question that Johnson was the actual shooter. Even had counsel raised an Enmund/Tison question on appeal, it would have had no chance of success—as evidenced by the Nevada Supreme Court's actual finding that Johnson was "the triggerman."

With no possibility of success on appeal, appellate counsel was not ineffective for not raising this issue. Thus, Mr. Oram was not ineffective for not raising these issues in the first post-conviction proceedings. Without any chance of success, Johnson cannot establish that he would be prejudiced if this entire claim were dismissed per the mandatory procedural bars.

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20. Claim Twenty: Use of Juvenile Record

In this ground, Johnson alleges the State's use of his juvenile convictions, during his final penalty phase, violated his constitutional rights. Third Petition at 291–98. Johnson does not admit that he previously raised this claim. Third Petition at 10–11. However, Johnson did in fact claim that this Court erred by admitting evidence of his juvenile criminal record in his direct appeal from the final penalty phase, and the Nevada Supreme Court rejected that claim. Johnson II, 122 Nev. at 1353–54, 148 P.3d at 773–74. The Court specifically found that the record's admission did not violate Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183 (2005), that it was significantly probative and not unfairly prejudicial, and that "[b]ecause this evidence was admitted only during the selection phase of his hearing, there are no concerns that it may have improperly influenced the jury's weighing of aggravating and mitigating circumstances." Id. Therefore, this claim is barred by the doctrine of law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710. Because Johnson cannot establish that any parts of this claim cover new grounds, this entire claim must be summarily dismissed. Third Petition at 12.

21. Claim Twenty-One: Unconstitutional Penalty

In this ground, Johnson alleges the death penalty itself is unconstitutional, including in the method of execution, in determining the class of eligibility, in being cruel and unusual, in denying executive clemency, and in being arbitrary and discriminatory. Third Petition at 299–323. Johnson states that only subsections (C) through (E) of this claim were previously raised and denied in his first post-conviction appeal. Third Petition at 11. However, it is clear that subsections (F) has also already been raised. In his post-conviction appeal, "Johnson argue[d] that the death penalty is unconstitutional because: (1) Nevada's death penalty scheme fails to narrow death eligibility, (2) it constitutes cruel and unusual punishment, (3) Nevada law does not afford the opportunity for executive clemency, (4) it is applied in an arbitrary and capricious manner, and (5) it violates international law. Because these claims should have been

raised on direct appeal and Johnson has not demonstrated good cause to overcome the procedural default, see NRS 34.810(b)(2), the district court properly denied them." Johnson III, 133 Nev. at ___, 402 P.3d at 1274. Therefore, these subsections are barred by the doctrine of law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710.

Only Claims 21(A), (B), and (G) cover new ground. Third Petition at 12. Regardless, Mr. Oram cannot be considered ineffective for failure to raise them. As the Nevada Supreme Court explicitly found of the death-penalty challenges he did in fact raise, "these claims should have been raised on direct appeal and Johnson has not demonstrated good cause to overcome the procedural default." Johnson III, 133 Nev. at ___, 402 P.3d at 1274. Here, the only good cause asserted for this untimely and successive Third Petition are those meritless grounds discussed in Section II, *supra*. This is not "good cause" for making an untimely constitutional challenge to Nevada's lethal-injection protocol,[2] subsections (A) and (B), or a claim that the death penalty itself is racially discriminatory, subsection (G). As such, post-conviction counsel was not ineffective for not raising these procedurally barred claims—particularly when it is clear that Mr. Oram did in fact raise other challenges to the death penalty. Without any chance of success, Johnson cannot establish that he would be prejudiced if this entire claim were dismissed per the mandatory procedural bars.

22. Claim Twenty-Two: Ineffective Assistance of Counsel – Direct Appeal

In this ground, Johnson alleges his appellate counsel was ineffective for failure to challenge the kidnapping conviction and the impeachment of a witness. Third Petition at 324–25. Again, this is one of the few grounds that is not waived. See Section III, Intro, *supra*; NRS 34.810(1) Franklin, 110 Nev. at 752, 877 P.2d at 1059. However, Johnson admits that this claim was previously raised and denied in his first post-conviction appeal. Third Petition at 11. Indeed, the Nevada Supreme Court denied Johnson's claim of ineffective assistance of

[2] A redacted version of which Johnson has included as Exhibit 79.

appellate counsel for not challenging the kidnapping or the impeachment in his post-conviction appeal. Johnson III, 133 Nev. at ___, 402 P.3d at 1277, 1279. Therefore, these subsections are barred by the doctrine of law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710. Because Johnson does not allege that any parts of this claim cover new grounds, this entire claim must be summarily dismissed. Third Petition at 12.

23. Claim Twenty-Three: Judicial Bias

In this ground, Johnson alleges that three separate district court judges were biased and/or had conflicts of interest while presiding over his case; further, Johnson claims, the Nevada Supreme Court's review was unconstitutional, and every elected judge—that is, every judge in Nevada—is ineligible to review his case. Third Petition at 326–34. This is one of Johnson's few claims that was not previously raised at least in part. See Third Petition at 10–11. As an initial matter, if Johnson indeed claims that elected judges may not review capital cases, this Court itself has no business reviewing Johnson's case. Thus, this Court must choose to ignore subsection 23(E) if it is to decide on any of Johnson's Third Petition. Alternatively, Johnson is welcome to maintain the claim, abandon this state proceeding, and seek relief with an un-elected federal judge, as he has already done.

a. 23(A): Judge Sobel Alleged Bias

Even though Judge Sobel was removed as a judicial officer in 2005—five years after presiding over the guilt phase of Johnson's trial—Johnson has not actually alleged that Judge Sobel was specifically biased against Johnson. Third Petition at 326. The claim that he was biased "against defendants like Johnson" is a bare and naked claim that this Court should not credit. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Johnson has not demonstrated that he has any information that would support a specific claim of Judge Sobel's judicial bias against Johnson.

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b. 23(B): Judge Becker's Alleged Conflict of Interest

Johnson admits that the merits of this claim were examined by the Nevada Supreme Court in its June 29, 2007 Order Denying Johnson's motion for extension of time to file a petition for rehearing. Third Petition at 329; Exhibit 23. The Court explicitly found that "the result would have remained the same regardless of [Judge Becker's] participation," because although "four justices [] sign[ed] the majority opinion in Johnson [II], three justices signed a concurrence. All seven justices of this court were in agreement that Johnson's death sentence should be affirmed." Exhibit 23 at 2. Because this Court has no supervisory authority over the Nevada Supreme Court, it cannot reverse this finding. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21.

c. 23(C): Judge Gates' Alleged Bias

Johnson's claim that his final penalty phase judge employed a prior Clark County District Attorney's Office intern—let alone that said former intern "worked on Johnson's case and had access to his files"—is a bare and naked claim, unsupported by any citation whatsoever, that this Court should not credit. Third Petition at 329; Hargrove, 100 Nev. at 502, 686 P.2d at 225. Johnson has not demonstrated that he has any information that would support this claim.

d. 23(D): Nevada Supreme Court's Review

Johnson's claim that the Nevada Supreme Court must articulate "standards" in its independent review of death sentences is utterly without merit. Third Petition at 330. NRS 177.055(2) explicitly states that the Court must consider:

> (c) Whether the evidence supports the finding of an aggravating circumstance or circumstances;
> (d) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and
> (e) Whether the sentence of death is excessive, considering both the crime and the defendant.

Johnson fails to indicate what other "standards" might be required, let alone any authority for requiring them. Johnson cannot support this bare and naked claim. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

e. 23(E): Elected Judges as Ineligible for Death-Penalty Review

Again, if Johnson continues to assert his claim that elected judges may not review capital cases, this Court should not review Johnson's case. Third Petition at 331–34. Any finding made by this Court about the merits of Johnson's claims would thus be tainted by what he alleges is the inherent bias of an elected judiciary. More to the point, an untimely and successive habeas petition is not the place to challenge Nevada's entire judicial system. There is absolutely no good cause that could justify such review at this stage.

With no possibility of success in challenging these individual judges, let alone Nevada's entire judicial system, prior counsel were not ineffective for not making these challenges, let alone with respect to Judge Becker, where counsel did in fact make a challenge. Thus, Mr. Oram was not ineffective for not raising these issues in the first post-conviction proceedings. Without any chance of success, Johnson cannot establish that he would be prejudiced if this entire claim were dismissed per the mandatory procedural bars.

24. Claim Twenty-Four: Weighing Standard at Penalty Phase (Including IAC)

In this ground, Johnson alleges his penalty phase jury should have made its determination that the mitigating circumstances outweighed the aggravating beyond a reasonable doubt and that counsel was ineffective for failing to move for said instruction. Third Petition at 235–37. Again, the second half of this claim is one of the few grounds that is not waived. See Section III, Intro, *supra*; NRS 34.810(1) Franklin, 110 Nev. at 752, 877 P.2d at 1059. In addition, this is one of Johnson's few claims that was not previously raised at least in part. See Third Petition at 10–11. However, the claim is without merit.

Last year, the Nevada Supreme Court rejected Johnson's interpretation of Hurst v. Florida, 136 S.Ct. 616 (2016) put forth by another defendant sentenced to death, holding that "Hurst did nothing more than apply Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), to Florida's death penalty procedure; it made no new law relevant to Nevada." Jeremias v. State, 134 Nev. __, 412 P.3d 43, 53, reh'g denied (Apr. 27, 2018), cert. denied, 139 S. Ct. 415 (2018). This claim would have had no chance of success at the penalty hearing

(during which time in 2005 Hurst had not even been decided) or on appeal (due to the Court's explicit holding in Jeremias).

With no possibility of success on appeal, appellate counsel was not ineffective for not raising this issue. Thus, Mr. Oram was not ineffective for not raising this issue in the first post-conviction proceedings. Without any chance of success, Johnson cannot establish that he would be prejudiced if this entire claim were dismissed per the mandatory procedural bars.

25. Claim Twenty-Five: Unrecorded Bench Conferences

In this ground, Johnson alleges that he was deprived of meaningful appellate review because some unspecified bench conferences were unrecorded. Third Petition at 338–40. Johnson admits that this claim was previously raised and denied in this first direct appeal and then raised in full and denied in his first post-conviction appeal. Third Petition at 10–11. Indeed, the Nevada Supreme Court held that Johnson failed to show plain error with regard to off-record bench conferences in the issue in his direct appeal. Johnson I, 118 Nev. at 806, 59 P.3d at 463. Then, the Court denied Johnson's claim of ineffective assistance of counsel concerning this issue in his post-conviction appeal. Johnson III, 133 Nev. at __, 402 P.3d at 1276. Therefore, it is barred by the doctrine of law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710. Because Johnson does not allege that any parts of this claim cover new grounds, this entire claim must be summarily dismissed. Third Petition at 12.

26. Claim Twenty-Six: International Law

In this ground, Johnson alleges the trial court violated his rights under international law. Third Petition at 341–42. Johnson admits this claim was previously raised and denied in his first post-conviction appeal. Third Petition at 11. Indeed, Johnson raised claims that his trial and sentence violated international law in his appeal from the denial of his First Petition. Johnson III, 133 Nev. at ___, 402 P.3d at 1274, n.3. Therefore, it is barred by the doctrine of law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884,

34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710. Because Johnson does not allege that any parts of this claim cover new grounds, this entire claim must be summarily dismissed. Third Petition at 12.

27. Claim Twenty-Seven: Jury's Implicit Bias

In this ground, Johnson alleges that all juries are inherently, implicitly biased. Third Petition at 343–44. This is one of Johnson's few claims that was not previously raised at least in part. See Third Petition at 10–11. However, the claim is without merit.

Johnson has not offered a single fact to support his allegation that his penalty phase jurors suffered from implicit bias. Nor has he cited anything except a 2014 New York University Law Review article to support his allegation that implicit bias even exists—let alone that it is more inherent in death-qualified jurors than in others. He cites no case law to support his allegation that it is error not to instruct a jury on such bias. Thus, this is a bare and naked claim that should be summarily dismissed. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Because Johnson has not demonstrated that he has any information that would support a specific claim of implicit bias that led to his death sentence, he has not established any possibility of success on appeal; thus, appellate counsel was not ineffective for not raising this issue. Accordingly, Mr. Oram was not ineffective for not raising these issues in the first post-conviction proceedings. Without any chance of success, Johnson cannot establish that he would be prejudiced if this entire claim were dismissed per the mandatory procedural bars.

28. Claim Twenty-Eight: Freedom of Association

In this ground, Johnson alleges a violation of his right to freedom of association. Third Petition at 345–46. This is one of Johnson's few claims that was not previously raised at least in part. See Third Petition at 10–11. However, as with his related prosecutorial misconduct argument, the claim is irrelevant. Section III(B)(16)(b), *supra*. Johnson himself based a large part of his mitigation case on gang psychology and on his own involvement in gangs as an explanation for various life choices. Johnson II, 122 Nev. at 1351, 148 P.3d at 772. Counsel would have had no chance of success challenging the State's presentation of gang-related

evidence, on whatever grounds, either at trial or on appeal. Thus, Mr. Oram was not ineffective for not raising these issues in the first post-conviction proceedings. Without any chance of success, Johnson cannot establish that he would be prejudiced if this entire claim were dismissed per the mandatory procedural bars.

29. Claim Twenty-Nine: Death Penalty Ineligibility

In this ground, Johnson alleges he is ineligible for the death penalty, entirely, due to his age and borderline intellectual functioning. Third Petition at 347–53. Johnson alleges this claim was not previously raised. See Third Petition at 10–11. However, as discussed *supra*, Johnson asserted a Roper argument in his second direct appeal, which the Nevada Supreme Court rejected. Johnson II, 122 Nev. at 1353, 148 P.3d at 774 ("Because there is no question that Johnson was not a juvenile when he committed the murders, his reliance upon Roper is misplaced."). See Section II(D), *supra*. Therefore, this part of the claim is barred by the doctrine of law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710. To the extent Johnson now attempts to assert new scientific and sociological research and non-binding extra-state precedent to add support to his previous argument that Roper should be extended, this cannot help him avoid the law of the case. Third Petition at 347–52; Hall, 91 Nev. at 316, 535 P.2d at 798–99; Pertgen, 110 Nev. at 557–58, 875 P.2d at 362.

As discussed, Johnson's argument that he is ineligible for the death penalty under Atkins is also without merit. 536 U.S. at 304, 122 S.Ct. at 2242; NRS 174.098; NRS 175.554; see Section II(D), *supra*. Under Atkins, and relevant Nevada law, Johnson would have to establish intellectual disability—not mere borderline intellectual functioning. Intellectual disability is defined as "significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period." Id. Johnson has been evaluated repeatedly by defense mental health experts and none

have ever diagnosed him with intellectual disability. Exhibits 143, 145, 173; Transcript, May 3, 2005, 14-133. Thus, any Atkins claim would not have been successful.

Johnson has not offered any authority to support his argument that two factors that, independently, would not have disqualified him from the death penalty can somehow be combined to disqualify him. Third Petition at 353. Therefore, even if this Court construes this claim as one suitable for a habeas petition, counsel was not ineffective for not raising this claim on direct appeal. Thus, Mr. Oram was not ineffective for not raising these issues in the first post-conviction proceedings. Without any chance of success, Johnson cannot establish that he would be prejudiced if this entire claim were dismissed per the mandatory procedural bars.

30. Claim Thirty: Cumulative Error

In this ground, Johnson alleges he is entitled to relief due to cumulative error. Third Petition at 354. Johnson admits this claim was previously raised and denied in his first post-conviction appeal. Third Petition at 11. Therefore, it is barred by the doctrine of law of the case. Evans, 117 Nev. at 641–43, 28 P.3d at 519–21. Pellegrini, 117 Nev. at 884, 34 P.3d at 535; McNelton, 115 Nev. at 396, 990 P.2d at 1276 (1999), Hall, 91 Nev. at 315–16, 535 P.2d at 798–99; Valerio, 112 Nev. at 386, 915 P.2d at 876; Hogan, 109 Nev. at 952, 860 P.2d at 710. Because Johnson does not allege that any parts of this claim cover new grounds, this entire claim must be summarily dismissed. Third Petition at 12.

WHEREFORE, the State respectfully requests the instant Third Petition be denied.

DATED this 29th day of May, 2019.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY *<u>/s/ Steven S. Owens</u>*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the District Attorney

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of State's Response to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction), was made this 29th day of May, 2019, by Electronic Filing to:

RANDOLPH M. FIEDLER
Email: Randolph_Fiedler@fd.org

ELLESSE HENDERSON
Email: Ellesse_Henderson@fd.org

JOSE A. GERMAN
Email: Jose_German@fd.org

By: /s/ E.Davis

Employee, District Attorney's Office

SO/Andrea Orwoll/ed

Electronically Filed
6/20/2019 11:14 AM
Steven D. Grierson
CLERK OF THE COURT

ROPP
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- DONTE JOHNSON, #1586283 Defendant.	CASE NO: A-19-789336-W DEPT NO: VI

REPLY TO OPPOSITION TO MOTION TO VACATE BRIEFING SCHEDULE AND STRIKE HABEAS PETITION

In its Opposition, the Federal Public Defender acknowledges that Donte Johnson filed two requests to strike their recent habeas petition but argue that he subsequently filed an Amended Verification as if that somehow cures the problem. It does not. There was absolutely nothing wrong with the first verification which can be "by the petitioner or the petitioner's counsel." NRS 34.730(1). So, having Donte Johnson personally re-verify the petition did not "cure" any defect nor undermine the motion to strike. Miles v. State, 120 Nev. 383, 91 P.3d 588 (2004).

The fact remains that Donte Johnson has moved this court to strike the petition even though he may have personally verified that the contents of the petition are true. See Amended Verification, filed May 17, 2019. Donte Johnson has not withdrawn his two requests to strike the petition. As the State explained in its motion to strike, regardless of whether the petition is verified or not, Donte Johnson retains authority to

continue or terminate the habeas litigation at any time without interference by federal counsel. Such a choice to pursue state post-conviction habeas relief or not belongs exclusively to Johnson, not federally appointed counsel. Unless and until Donte Johnson personally withdraws his requests to strike, this court must respect his wishes.

DATED this 20th day of June, 2019.

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY *<u>/s/ Steven S. Owens</u>*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the District Attorney
Regional Justce center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155
(702) 671-2750

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Motion to Comply with Mandamus, was made this 20th day of June, 2019, by Electronic Filing to:

RANDOLPH M. FIEDLER
Email: Randolph_Fiedler@fd.org

ELLESSE HENDERSON
Email: Ellesse_Henderson@fd.org

JOSE A. GERMAN
Email: Jose_German@fd.org

By: */s/ E.Davis*

Employee, District Attorney's Office

SSO//ed

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6/26/2019 10:42 AM
Steven D. Grierson
CLERK OF THE COURT

Donte Johnson #66858
P.O. Box 1989
Ely, Nevada 89301

DISTRICT COURT
CLARK COUNTY, NEVADA

DONTE JOHNSON, Petitioner, v. WILLIAM GITTERE, Warden of Ely State Prison, and AARON FORD, Attorney General of the State of Nevada, Respondents.	Case No. **A-19-789336-W** Dept. No. **6** **MOTION TO WITHDRAW REQUEST TO STRIKE PETITION AND TO WITHDRAW REQUEST FOR PETITION TO BE STRICKEN AS NOT PROPERLY BEFORE THE COURT** Date of Hearing: July 9, 2019 Time of Hearing: 9:30 AM (Death Penalty Habeas Corpus Case)

I, Donte Johnson, move to withdraw two prior pro se filings: the Request to Strike Petition (filed on Apr. 4, 2019) and the Request for Petition to Be Stricken as It is Not Properly Before the Court (filed on Apr. 11, 2019).

DATED this 25th day of June, 2019.

Respectfully submitted

DONTE JOHNSON
#66858

BY _____
RANDOLPH M. FIEDLER
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 26th day of June, a true and correct copy of the foregoing MOTION TO WITHDRAW REQUEST TO STRIKE PETITION AND TO WITHDRAW REQUEST FOR PETITION TO BE STRICKEN AS NOT PROPERLY BEFORE THE COURT, was filed electronically with the Eighth Judicial District Court. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

Steven S. Owens
Chief Deputy District Attorney
motions@clarkcountyda.com
steven.owens@clarkcountyda.com

/s/ Celina Moore
AN EMPLOYEE OF THE FEDERAL
PUBLIC DEFENDERS OFFICE

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus | **COURT MINUTES** | **July 09, 2019**

A-19-789336-W Donte Johnson, Plaintiff(s)
vs.
William Gittere, Defendant(s)

July 09, 2019 **09:30 AM** **Defendant's Motion to Vacate Briefing Schedule and Strike Habeas Petition**

HEARD BY: Bluth, Jacqueline M. **COURTROOM:** RJC Courtroom 10C

COURT CLERK: Reed, Keith

RECORDER: Takas, De'Awna

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

Also present on behalf of the Defendant, Federal Public Defender Alise Henderson and David Anthony. Mr. Owens advised proceedings are on for his motion to dismiss, for which the basis is that in Pro Per the Defendant filed a request to strike his petition and has since filed a motion to withdraw the request which should be granted, rendering his motion to dismiss moot. Mr. Fiedler concurred. Colloquy regarding continuation of July 31, 2019 petition and briefing. COURT ORDERED, Defendant's reply is due September 30th, matter SET for argument October 8th; Defendant's Motion to Vacate Briefing Schedule and Strike Habeas Petition DENIED/OFF CALENDAR.

10-8-19 9:00 AM ARGUMENT: PETITION FOR WRIT OF HABEAS CORPUS

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9/30/2019 2:15 PM
Steven D. Grierson
CLERK OF THE COURT

SAO
RENE L. VALLADARES
Federal Public Defender
Nevada Bar No. 11479
RANDOLPH M. FIEDLER
Assistant Federal Public Defender
Nevada Bar No. 12577
randolph_fiedler@fd.org
ELLESSE HENDERSON
Assistant Federal Public Defender
Nevada Bar No. 14674C
Ellesse_henderson@fd.org
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (Fax)

Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADAS

DONTE JOHNSON, Petitioner, v. WILLIAM GITTERE, et al., Respondents.	Case No. A-19-789336-W Dept. No. VI **STIPULATION AND ORDER TO MODIFY BRIEFING SCHEDULE** Date of Hearing: Oct. 8, 2019 Time of Hearing: 9:00 a.m. (Death Penalty Case)

STIPULATION

Petitioner Donte Johnson, through his counsel Randolph M. Fiedler, Assistant Federal Public Defender, and Respondent William Gittere, through his counsel Steven S. Owens, Chief Deputy District Attorney, hereby stipulate as follows:

Johnson's Reply to the State's Response to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction), currently scheduled to be filed on September 30, 2019, is rescheduled to be filed on November 14, 2019.

The hearing on Johnson's petition, currently scheduled for October 8, 2019, is vacated, to be rescheduled at the court's convenience after Johnson's Reply is filed.

DATED this 25th day of Sept., 2019.

RENE L. VALLADARES
Federal Public Defender

RANDOLPH M. FIEDLER
Nevada Bar No. 12577
Assistant Federal Public Defender
Attorneys for Petitioner

DATED this 25th day of Sept., 2019

STEVEN B. WOLFSON
Clark County District Attorney

STEVEN S. OWENS
Nevada Bar No. 4352
Deputy District Attorney
Attorneys for Respondent

ORDER

The Court having considered the Stipulation of the parties above and good cause appearing,

IT IS HEREBY ORDERED that Petitioner's Reply to the State's Response to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) shall be filed on or before November 14, 2019.

IT IS FURTHER ORDERED that the hearing on Johnson's petition, currently scheduled for October 8, 2019, is vacated.

DATED this 26th day of September, 2019

HON. JACQUELINE BLUTH
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 30th day of September, 2019, a true and correct copy of the foregoing STIPULATION AND ORDER TO MODIFY BRIEFING SCHEDULE, was filed electronically with the Eighth Judicial District Court. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

Steven S. Owens
Chief Deputy District Attorney
motions@clarkcountyda.com
steven.owens@clarkcountyda.com

/s/ Celina Moore
AN EMPLOYEE OF THE FEDERAL
PUBLIC DEFENDERS OFFICE

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11/22/2019 2:33 PM
Steven D. Grierson
CLERK OF THE COURT

SAO
RENE L. VALLADARES
Federal Public Defender
Nevada Bar No. 11479
ELLESSE HENDERSON
Assistant Federal Public Defender
Nevada Bar No. 14674C
randolph_fiedler@fd.org
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (Fax)

Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADAS

DONTE JOHNSON, Petitioner, v. WILLIAM GITTERE, et al., Respondents.	Case No. A-19-789336-W Dept. No. VI **STIPULATION AND ORDER TO MODIFY BRIEFING SCHEDULE** Date of Hearing: Time of Hearing: (Death Penalty Case)

STIPULATION

Petitioner Donte Johnson, through his counsel Ellesse Henderson, Assistant Federal Public Defender, and Respondent William Gittere, through his counsel Alexander G. Chen, Chief Deputy District Attorney, hereby stipulate as follows:

Johnson's Reply to the State's Response to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction), currently scheduled to be filed on November 14, 2019, is rescheduled to be filed on December 13, 2019.

The hearing on Johnson's petition is to be scheduled at the court's convenience after Johnson's Reply is filed.

DATED this 15th day of Nov., 2019.

RENE L. VALLADARES
Federal Public Defender

ELLESSE HENDERSON
Nevada Bar No. 14674C
Assistant Federal Public Defender
Attorneys for Petitioner

DATED this 15th day of Nov., 2019

STEVEN B. WOLFSON
Clark County District Attorney

ALEXANDER G. CHEN
Nevada Bar No. 10539
Chief Deputy District Attorney
Attorneys for Respondent

ORDER

The Court having considered the Stipulation of the parties above and good cause appearing,

IT IS HEREBY ORDERED that Petitioner's Reply to the State's Response to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) shall be filed on or before December 13, 2019.

DATED this 19th day of November, 2019

J. Charles Thompson
for HON. JACQUELINE BLUTH
DISTRICT COURT JUDGE

Electronically Filed
12/13/2019 11:10 AM
Steven D. Grierson
CLERK OF THE COURT

RPWHC
RENE L. VALLADARES
Federal Public Defender
Nevada Bar No. 11479
RANDOLPH M. FIEDLER
Assistant Federal Public Defender
Nevada Bar No. 12577
Randolph_fiedler@fd.org
ELLESSE HENDERSON
Assistant Federal Public Defender
Nevada Bar No. 14674C
Ellesse_henderson@fd.org
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (Fax)

Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

DONTE JOHNSON, Petitioner, v. WILLIAM GITTERE, Warden, Ely State Prison; AARON FORD, Attorney General, State of Nevada, Respondents.	Case No. A-19-789336-W Dept. No. 6 **REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** **(DEATH PENALTY CASE)**

TABLE OF CONTENTS

I. INTRODUCTION 6

II. ARGUMENT 6

A. Johnson Can Establish Good Cause and Prejudice to Overcome any Procedural Bars 6

1. Johnson can show good cause for not raising his claims sooner 7

a. Ineffective assistance of initial post-conviction counsel constitutes good cause 8

(1) Initial post-conviction counsel performed deficiently 8

(2) Johnson was prejudiced by initial post-conviction counsel's deficient performance 12

b. The State's *Brady* violations constitute good cause 13

c. New law from the United States Supreme Court constitutes good cause 17

2. Johnson can establish prejudice because his claims have merit 18

a. Claim One: unconstitutional jury selection process 18

(1) Claim One(A): The State struck a prospective juror on the basis of race in violation of *Batson v. Kentucky* 19

(2) Claim One(B): Johnson was denied a jury venire representing a fair cross section of Clark County, Nevada 27

(3) Claim One(C): Unconstitutional use of peremptory strikes 29

(4) Claim One(D): Cumulative error 33

b. Claim Two: Juror bias and misconduct during the first trial 37

(1) This Court may consider the merits of Johnson's juror claim notwithstanding the State's arguments to the contrary 37

(2) Juror misconduct occurred and presumptively prejudiced the jury against Johnson during the guilt and penalty phases of trial 43

(a) Jurors Bruce and Patterson 43

(b) Juror Young 46

c. Claim Three: ineffective assistance of first trial counsel 48

(1) Claim Three(A): defense counsel were ineffective for failing to present expert testimony 49

(a) Expert on police coercion 49

(b) Expert on blood spatter and crime scene reconstruction 52

(2) Claim Three(B): defense counsel were ineffective for failing to adequately impeach the State's fact witnesses 54

(3) Claim Three(C): defense counsel were ineffective for failing to adequately cross-examine the State's expert witnesses 54

(4) Claim Three(D): defense counsel were ineffective for failing to acknowledge the VCR in crime scene photographs and reports 58

(5) Claim Three(E): defense counsel were ineffective for failing to move to dismiss the kidnapping charge 59

(6) Claim Three(F): defense counsel were ineffective for failing to object to hearsay 60

(7) Claim Three(G): defense counsel were ineffective for failing to object to improper references to the phases of the trial 61

d. Claim Four: unconstitutional guilt-phase jury instructions 61

e. Claim Five: prosecutorial misconduct during the guilt-phase 69

f. Claim Six: trial court error during the guilt-phase 71

g. Claim Seven: State suppression of evidence 72

h. Claim Eight: double-jeopardy violations 73

i. Claim Nine: confrontation clause 74

j. Claim Ten: violation of Fourth Amendment 75

k. Claim Eleven: multiple theories and non-unanimity 76

l. Claim Twelve: venue 77

m. Claim Thirteen: retrial after hung jury 79

n. Claim Fourteen: ineffective assistance during penalty phase 80

o. Claim Fifteen: unconstitutional penalty-phase jury instructions 87

p. Claim Sixteen: prosecutorial misconduct at the 2005 penalty phase 89

q. Claim Seventeen: trial court errors during the penalty phase 93

r. Claim Eighteen: juror misconduct during penalty-phase 94

s. Claim Nineteen: no jury finding that Johnson was the triggerman 95

t. Claim Twenty: the State's penalty-phase presentation of Johnson's juvenile record violated his constitutional rights 96

u. Claim Twenty-One: death penalty is unconstitutional ... 97

v. Claim Twenty-Two: inadequate theory of kidnapping 97

w. Claim Twenty-Three: elected judges, fair appellate review, and judicial bias 101

x. Claim Twenty-Four: wrong standard for outweighing determination 103

y. Claim Twenty-Five: unrecorded bench conferences 104

z. Claim Twenty-Six: violation of international law 105

aa. Claim Twenty-Seven: implicit bias in jury 105

bb. Claim Twenty-Eight: violation of Johnson's right to freedom of association 106

cc. Claim Twenty-Nine: Johnson is ineligible for the death penalty 106

dd. Claim Thirty: cumulative error 108

B. Procedurally Barring Johnson's Claims Will Result in a Fundamental Miscarriage of Justice 109

C. The Doctrine of Law of the Case does not Bar this Court's Review of Johnson's Claims 111

D. Laches does not Bar Consideration of Johnson's Claims 112

E. None of the Procedural Bars Raised by the State Can Be Constitutionally Applied 114

F. This Court Must Consider all Errors Cumulatively, Including Those Previously Rejected by the Nevada Supreme Court 117

III. CONCLUSION 118

CERTIFICATE OF SERVICE 119

POINTS AND AUTHORITIES

I. INTRODUCTION

Donte Johnson was charged with capital murder when he was twenty-one years old. His first jury was hopelessly deadlocked on the appropriate penalty and noted concern about who acted as the trigger person. A three-judge panel then unconstitutionally sentenced to him death. Finally, after a third penalty hearing, a second jury also sentenced Johnson to death. But numerous constitutional issues pervaded that proceeding and Johnson's guilt phase, including juror bias and misconduct, counsel ineffectiveness, and invalid jury instructions that allowed conviction on proof on a standard less than reasonable doubt. For these reasons, and the additional reasons in Johnson's petition, he is entitled to a new trial.

II. ARGUMENT

A. Johnson Can Establish Good Cause and Prejudice to Overcome any Procedural Bars

The State's primary argument in its Response is that Johnson's petition is barred by procedural default.[1] However, as the State acknowledges, even the mandatory application of procedural default can be overcome: if Johnson can establish good cause and prejudice to excuse the default or a miscarriage of justice, this Court must consider his claims on their merits. *See* Resp. at 6 (implicitly acknowledging that if good cause exists, this Court must excuse procedural default); *see also Branham v. Baca*, 134 Nev. 814, 815, 434 P.3d 313, 315 (2018) (noting "a petitioner may overcome the [procedural bars] in one of two ways: (1) by

[1] *See, e.g.*, Resp. at 4–6.

demonstrating good cause and actual prejudice . . . or (2) by demonstrating actual innocence, such that a fundamental miscarriage of justice would result were the underlying claims not heard on the merits . . . ." (internal citations omitted)). Here, this Court must excuse the procedural defaults and consider Johnson's claims on the merits.

Moreover, the State ignores the standard of review applicable in the absence of an evidentiary hearing. This Court must liberally construe Johnson's petition and accept all factual allegations as true. *See Vacation Vill., Inc. v. Hitachi Am. Ltd.*, 110 Nev. 481, 484, 874 P.2d 744, 756 (1994); *see also Doleman v. Meiji Mut. Life Ins. Co.*, 727 F.2d 1480, 1482 (9th Cir. 1984). This Court may dismiss Johnson's petition only if "it appears beyond a doubt that [he] could prove no set of facts which, if accepted by the trier of fact, would entitle him to relief." *Vacation Vill., Inc.* 110 Nev. at 484, 872 P.2d at 746 (citations omitted).[2]

1. Johnson can show good cause for not raising his claims sooner

Johnson can establish good cause for three reasons. First, the ineffective-assistance of post-conviction counsel constitutes good cause. Second, the State's violation of *Brady v. Maryland*, 373 U.S. 83 (1963) constitutes good cause. Third, intervening new law from the Supreme Court constitutes good cause.

---

[2] As argued in the contemporaneously filed Motion for Evidentiary Hearing, this Court must grant a hearing if it finds that Johnson "asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief." *See Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

a. Ineffective assistance of initial post-conviction counsel constitutes good cause

In capital cases, ineffective assistance of initial post-conviction counsel constitutes good cause to overcome procedural bars. *See Crump v. Warden*, 113 Nev. 293, 934 P.2d 247, 302–05, 252–54 (1997); *see also Rippo v. State*, 134 Nev. 411, 418, 423–27, 423 P.3d 1084, 1094, 1097–1100, *amended on denial of reh'g*, 432 P.3d 167 (2018). "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 422–23, 423 P.3d at 1097–98. Johnson can make both showings. Because he raised this argument within one year of remittitur following denial of his initial post-conviction petition, his arguments of cause and prejudice are timely. *See id.* at 421–22, 423 P.3d at 1096–97.

(1) Initial post-conviction counsel performed deficiently

There are well-established standards for counsel representing capital clients in post-conviction proceedings. Counsel "should seek to litigate all issues, whether or not previously presented, that are arguably meritorious." *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal & Juvenile Delinquency Cases*, ADKT 411, [hereinafter ADKT 411], Standards 2-19(c), 3-9(c), (g) (Nev. Oct. 6, 2008); *see* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 11.9.3(B) (1989) (explaining that post-conviction counsel in capital cases "should seek to present to the appropriate court or courts all arguably meritorious issues"). In order to decide which claims are "arguably meritorious," counsel must investigate the client's case. ADKT 411,

Standard 3-9(e); *see* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.15.1(c) (2003) ("Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to . . . continue an aggressive investigation on all aspects of the case."); ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 11.9.3(C) (1989) (explaining that post-conviction counsel in capital cases "should consider conducting a full investigation of the case relating to both the guilt-innocence and sentencing phases"); *accord Strickland v. Washington*, 466 U.S. 668, 691 (1984); *see also Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524–25 (2003). And reasonable investigation includes consulting experts when appropriate. Nevada Indigent Defense Standards of Performance, Standard 3-9(f); *see Hinton v. Alabama*, 571 U.S. 263, 273–75 (2014); *Browning v. Baker*, 875 F.3d 444, 471–74 (9th Cir. 2017); *Blake v. Baker*, 745 F.3d 977, 982–84 (9th Cir. 2014).

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 in support of Johnson's petition and failed to consult with any experts—at the same time criticizing prior counsel for identical failures.[3] Instead, counsel raised primarily record-based claims, which, without support from outside investigation and experts, he pled in a deficient, conclusory manner. *See Hargrove*

[3] *See generally* Ex. 28; Ex. 29.

v. State, 100 Nev. 498, 502–03, 686 P.2d 222, 225 (1984) (explaining that claims for relief are insufficient if they are "'bare' or 'naked'" and "unsupported by specific factual allegations").[4] This approach is 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) ("[I]neffectiveness of counsel claims usually cannot be advanced without the development of facts outside the original record." (quoting *United States v. Jeronimo*, 398 F.3d 1149, 1156 (9th Cir. 2005)); *Hoffman v. Arave*, 236 F.3d 523 (9th Cir. 2001) ("[A] claim of ineffective assistance of counsel requires that new counsel have the opportunity to conduct an investigation beyond the court records to uncover possible omissions made by trial counsel in the investigation and presentation of the case."). 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) (quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.1.1, cmt (2003)), *abrogated on other grounds by Ryan v. Gonzales*, 568 U.S. 57 (2013).

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[4] *See generally* Ex. 28; Ex. 29.

The State makes two attempts to portray counsel's actions as effective. First, the State exaggerates the few things that counsel did do.[5] Counsel presented the testimony of Johnson's trial attorneys at an evidentiary hearing.[6] And counsel refiled two affidavits *previous* counsel had obtained from jurors in 2005.[7] Contrary to the State's assertions, however, counsel did *not* obtain discovery. Nor did counsel hire an investigator or consult with any experts. This work does not come close to meeting the requirements for post-conviction counsel in capital cases. *See* ADKT 411, Standards 2-19(c), 3-9(c), (f), (g).

Second, the State insists—without any basis in the record—that post-conviction counsel made the decisions he did for strategic reasons.[8] But counsel's failure to reasonably investigate Johnson's case renders his decisions to include or omit claims not strategic. *See Correll v. Ryan*, 539 F.3d 938, 948 (9th Cir. 2008) ("An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all."); *Poindexter v. Mitchell*, 454 F.3d 564, 578–79 (6th Cir. 2006) ("The record reflects that . . . counsel failed to conduct virtually any investigation, let alone sufficient investigation to make any strategic choices possible."); *see also Silva v. Woodford*, 279 F.3d 825, 846–47 (9th Cir. 2002). Alternatively, Johnson is entitled to an evidentiary hearing to present testimony showing that counsel's decisions

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[5] Resp. at 20–21.

[6] *Id.* at 20.

[7] *Id.*

[8] *See* Resp. at 21.

were not strategic. *See Mann v. State*, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002); *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 226 (1984).[9]

(2) Johnson was prejudiced by initial post-conviction counsel's deficient performance

Had counsel performed effectively, he would have raised the meritorious claims Johnson raised in the instant post-conviction petition, likely leading to a different result for Johnson's initial post-conviction petition. *See Rippo*, 134 Nev. at 423, 423 P.3d at 1098–99. For example, effective counsel would have consulted with experts, in order to undermine questionable statements from witnesses and Johnson's codefendants—statements that provided the strongest evidence that Johnson was the triggerman. *Cf. Brady v. Maryland*, 373 U.S. 83, 85, 88 (withholding from trier of fact evidence implicating another codefendant as actual killer was prejudicial). Consequently, had post-conviction counsel consulted an expert and raised a claim concerning the problematic statements, there is a reasonable probability of a different result for the initial post-conviction proceedings. *See Rippo*, 134 Nev. at 423, 423 P.3d at 1098–99; *see also Tison v. Arizona*, 481 U.S. 137, 151 (1987); *Enmund v. Florida*, 458 U.S. 782, 797 (1982). And this is just one example. For the reasons given below, there is a reasonable probability of a different outcome had initial post-conviction counsel raised any of the claims in Johnson's current petition.[10]

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[9] *See* Mot. & Notice of Mot. for Evid. Hr'g (Dec. 13, 2019) (filed contemporaneously with this Reply).

[10] *See* § II.A.2 below.

b. The State's *Brady* violations constitute good cause

The State's violation of *Brady v. Maryland*, 373 U.S. 83 (1963), establishes cause and prejudice to overcome any procedural default. *See, e.g., Rippo v. State*, 134 Nev. 411, 431, 423 P.3d 1084, 1103 (2018) (noting that cause is established by showing the state withheld favorable evidence and prejudice is established by showing that there is a reasonable possibility of a different result had there been disclosure).

Here, the State suppressed benefits given to Tod Armstrong in exchange for his testimony, as indicated by the fact that Armstrong was implicated in these offenses but never charged for them.[11] The failure to disclose any benefits establishes good cause.[12]

The State has also suppressed evidence of investigator Peter Baldonado's inappropriate conduct with witnesses. On September 27, 1999, Baldonado interviewed a key prosecution witness, Charla Severs.[13] The transcription of this interview does not provide important details: there is no indication of where the interview took place; there is no indication of how Baldonado came to be in contact with Severs; there is not even an indication of the year the interview took place.[14]

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[11] *See* Exs. 49–51, 53–54.

[12] Further development of these claims will occur if this Court grants Johnson's contemporaneously filed request for an evidentiary hearing and discovery.

[13] *See* Ex. 60 at 1.

[14] The content of the interview evidences that it took place in 1999. *See* Ex. 60 at 1–2 (indicating Severs left Las Vegas in February, was then arrested, and then picked up by Baldonado."); *see* 6/7/00 TT at III-84.

Indeed, the State filed a motion, listing every interaction between Severs and law enforcement except the September 27, 1999 interrogation conducted by Baldonado.[15]

While Johnson's case was pending, Baldonado was charged with raping a witness. FBI reports indicated that Baldonado raped a potential witness in the case of Kenneth Curtis:

> According to the reports, as the Curtis case was progressing through the courts, the potential witness said Baldonado repeatedly told her she was pretty and asked her out. The woman said she declined his advances because she thought he was being kind only out of concern for her well-being.
>
> On Dec. 12, 2003, the woman said she was supposed to be in court for Curtis' case, but Baldonado called her and told her the court proceedings were postponed. Baldonado told the woman he would come to her home and explain why.
>
> The woman said Baldonado showed up at her house and "began telling her how pretty she was and began touching her breasts and said they were beautiful."
>
> "She said that she asked him not to touch her and told him that she was not comfortable," a police report states.
>
> The woman said she went into her bedroom to try to find a tape recorder, but Baldonado followed her.
>
> "She became frightened and could not believe this was happening to her," authorities wrote in reports.
>
> The woman said Baldonado was persistent in having sex with her. He eventually undressed and forced himself on her.
>
> "I lied there quietly, obediently, just wanting him to get finished," the woman told authorities.

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[15] *See* Ex. 61 at 4 (listing: Aug. 18, 1998 interview with Detective Thowsen; Sept. 1, 1998 grand jury testimony; Sept. 3, 1998 interview with Detective Thowsen; Sept. 15, 1998 grand jury testimony; Sept. 27, 1998 letter to Guymon; Sept. 17, 1999 arrest of Severs in Manhattan, New York; Sept. 28, 1999 interview with Guymon).

The FBI said the woman complied with
Baldonado's demands for sex because she feared him.

Ex. 80 at 21–22 (Glenn Puit, Former investigator charged with rape, *Las Vegas Rev. J.* (Mar. 19, 2004)). The State had notice of Baldonado's conduct as early as 2001, when at least one person spoke to the District Attorney about Baldonado's conduct.[16]

Here, too, there is an apparent allegation of sexual violence: Severs left a letter for the deputy district attorney indicating: "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!*"[17] Severs later testified that B-lo did not refer to an actual person.[18] Nonetheless, Baldonado's improprieties with witnesses was favorable evidence because it undermined the integrity of the State's investigation and would support a defense theory that Severs's statement was coerced.

The State suppressed this evidence by failing to disclose it to defense counsel. The District Attorney learned of this impropriety no later than 2001.[19] Johnson's conviction was not yet final at that time; even assuming the State did not suppress this evidence for Johnson's first trial, the State knew of it at the time of Johnson's

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[16] Ex. 215.

[17] Ex. 217.

[18] *See* June 7, 2000 Tr. at III-79.

[19] Ex. 215. Additionally, the district attorney knew of earlier workplace sexual harassment allegations. *See* Ex.216

retrial, which was not until 2005.[20] The State did not disclose this information to the defense.

The State emphasized the importance of Severs during closing argument.[21] Thus, Baldonado's impropriety—which could have undermined Severs's testimony—was material.

The State raises a number of arguments for why this *Brady* violation does not establish good cause or prejudice. First, the State argues that because the basis for this claim comes from public sources, the State could not have suppressed this information.[22] But the fact that, by 2005, Baldonado's impropriety was reported in the newspaper does not negate the State's obligation to turn over the evidence. *See Milke v. Ryan*, 711 F.3d 998, 1017 (9th Cir. 2013) ("That the court documents showing Saldate's misconduct were available in the public record doesn't diminish the state's obligation to produce them under *Brady*."); *see also Wilson v. Beard*, 589 F.3d 651, 664 (3d Cir. 2009) ("the fact that a criminal record is a public document

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[20] The State argues that Severs did not testify during the penalty phase in 2005. *See* Resp. at 12. This is only partially accurate: Severs did not testify in person, but her 2000 testimony was read into the record. *See* Apr. 26, 2005 (a.m.) Tr. at 29. Thus, the State is wrong to argue that Severs "would not have been subject to cross-examination about it" and that "this allegation does not constitute a good cause explanation for the delay in filing the instant petition." Resp. at 12; *see also* NRS 51.069(1) ("When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked or supported by evidence which would have been admissible for those purposes if the declarant had testified as a witness.").

[21] *See, e.g.*, June 8, 2000 Tr. at IV-205–06 ("Point number one, Deco confessed to Charla. You recall Charla Severs the defendant's ex-girlfriend, the story she conveyed . . . . If you believe Charla Severs testimony you must convict Donte Johnson. In fact, if you believe Charla Severs that in itself is proof beyond a reasonable doubt that he's guilty.").

[22] Resp. at 11–12.

cannot absolve the prosecutor of her responsibility to provide that record to defense counsel."). The State argues that this evidence is not impeachment or exculpatory because Baldonado did not testify.[23] But as discussed above, this evidence undercuts the integrity of the State's case and also indicates that Severs testimony may have been coerced.[24]

c. New law from the United States Supreme Court constitutes good cause

Good cause to overcome procedural default exists when "a federal court concludes that a determination of [the Nevada Supreme Court] is erroneous." *Evans v. State*, 117 Nev. 609, 644, 28 P.3d 498, 521 (2001), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015). The High Court's opinion in *Hurst v. Florida* effectively overruled the Nevada Supreme Court's decisions in *McConnell v. State*, 125 Nev. 243, 254, 212 P.3d 307, 314–15 (2009), and *Nunnery v. State*, 127 Nev. 749, 770–76, 263 P.3d 235, 250–53 (2011). Thus, *Hurst* constitutes good cause to overcome any procedural bars to the consideration of Claim Twenty-Four.

Johnson acknowledges that the Nevada Supreme Court has rejected this claim. *See Castillo v. State*, 135 Nev. Adv. Op. 16, 442 P.3d 558 (2019).

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[23] *Id.* at 12.

[24] Insofar as the State's argument is that this theory is too speculative, Johnson files, contemporaneously with this Reply, a motion for an evidentiary hearing and a motion for discovery, which would both allow Johnson the factual development necessary for a full and fair adjudication of his arguments for good cause and prejudice.

Nevertheless, Johnson raises the argument now to preserve the challenge for later review.

2. Johnson can establish prejudice because his claims have merit

The bases for good cause listed above are prejudicial because Johnson's claims are meritorious. Thus, this Court should both excuse any applicable procedural default and also grant Johnson post-conviction relief.

a. Claim One: unconstitutional jury selection process

In Claim One, Johnson argued that the jury selection process during the guilt phase of his trial was unconstitutional insofar as (1) the jury venire did not represent a fair cross section of Clark County, Nevada at the time, (2) the State had engaged in discriminatory behavior in striking an African-American venire member, (3) the trial court improperly denied Johnson's challenges for cause, thereby forcing him to use several of his limited peremptory strikes and (4) cumulative error. Instead of addressing any of these subclaims on the merits, the State simply argues that these subclaims are barred by the law of the case doctrine. Further, because the State contends that no part of Claim One covers new ground, the entire claim must be "summarily dismissed." As discussed below, the law of the case doctrine does not preclude this Court's review.[25] Further, the law of the case doctrine does not preclude further consideration because the Nevada Supreme Court's prior ruling on Claim One is clearly erroneous. *Hsu v. County of Clark*, 123 Nev. 625, 173 P.3d 724, 729 (2007) (recognizing exceptions to the law of the case

[25] *See* § II.C below.

doctrine); *see also Bejarano v. State*, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006) ("the doctrine of the law of the case is not absolute, and we have the discretion to revisit the wisdom of our legal conclusions if we determine such action is warranted."); *Doyle v. State*, No. 62807, 2015 WL 5604472, at *6 (Sept. 22, 2015) (Cherry, J., with Saitta, J., dissenting) (explaining that prior Nevada Supreme Court's "failure to remedy the structural error raised by [petitioner] in his direct appeal and petition for rehearing was an impediment external to the defense that resulted in a manifest injustice" regarding prior erroneous determination of a *Batson* claim).[26]

(1) Claim One(A): The State struck a prospective juror on the basis of race in violation of *Batson v. Kentucky*

"The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019); *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). To determine when a peremptory strike has been used in a discriminatory manner,

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Snyder, 552 U.S. at 476–77 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

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[26] NRAP 36(c)(3) notes that decisions published after Jan. 1, 2016 may be cited for their persuasive value. Johnson files this pre-2016 decision only to note that two former Justices of the Nevada Supreme Court acknowledged the need to excuse procedural default for meritorious claims under *Batson v. Kentucky*, 476 U.S. 79 (1986).

Here, notwithstanding the State's claim that the law of the case doctrine bars this Court's review, it is clear that doctrine does not apply because the Nevada Supreme Court essentially refused to consider the merits of Johnson's claim that the State's proffered reasons for striking Juror Fuller were pretext for purposeful discrimination, finding that Johnson had waived post-conviction review because trial counsel had failed to argue that the state's allegedly race-neutral explanations were pretext in the trial court.[27] *Johnson v. State*, 133 Nev. 571, 578, 402 P.3d 1266, 1275 (2017); *see*, *e.g.*, *Reconstruct Co. v. Zhang*, 130 Nev. 1, 8, 317 P.3d 814, 818 (2014) ("for the law-of-the-case doctrine to apply, the appellate court must actually address and decide the issue explicitly or by necessary implication."); *Fergason v. Las Vegas Metro. Police Dep't*, 131 Nev. 939, 947, 364 P.3d 592, 597 (2015).

Even if the Nevada Supreme Court considered the claim on the merits, the doctrine still does not apply because the Nevada Supreme Court clearly erred in relying on *Hawkins v. State*, 127 Nev. 575, 578, 256 P.3d 965, 967 (2011) in refusing to consider the merits of Johnson's claim because trial counsel did not elaborate as to why the State's proffered explanations were pretextual. *Johnson*, 133 Nev. at 578, 402 P.3d at 1275. *Hawkins'* reasoning that failing to challenge the State's explanations for a strike was pretextual precludes further review is completely contrary to United States Supreme Court precedent allowing petitioners who had

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[27] The Nevada Supreme Court also indicated that appellate counsel's failure to raise the *Batson* claim on direct appeal would have made no difference since trial counsel's failure to argue that the State's alleged reasons for the strike were pretext "would have thwarted appellate review had appellate counsel pressed the alleged *Batson* violation." *Johnson*, 133 Nev. at 578, 402 P.3d at 1275.

lodged *Batson* objections in the trial court to press *Batson* violations on habeas review. *See Miller-El v. Dretke*, 545 U.S. 231 (2005); *Murray v. Schriro*, 745 F.3d 984 (9th Cir. 2014). While appellate and habeas review is deferential to factfinding by the trial court, the US Supreme Court has made clear that "deference does not by definition preclude relief." *Miller-El*, 545 U.S. at 240.

Further, the law of the case doctrine does not apply when substantially new or different evidence has developed. *Hsu*, 123 Nev. at 630, 173 P.3d at 729. This Court should consider the merits of Johnson's *Batson* claim in light of the comparative juror analysis that Johnson presented in his Third Petition, which demonstrates that one of the reasons proffered by the State for striking Juror Fuller—that she had a stepson who had been in jail—was pretextual.

Moreover, the State's allegedly race-neutral reasons for striking Juror Fuller were (1) she allegedly stated during voir dire that it would be "difficult to pass judgment on" Johnson, (2) she allegedly stated that she had no comment when asked about her thoughts on holding people responsible for their actions or choices, (3) her supposed failure to answer a question on the questionnaire regarding the death penalty, (4) that she had a stepson who had been in jail, (5) that she could give a sentence of life with the possibility of parole to someone convicted of a quadruple homicide, and (6) her demeanor during voir dire. As explained below, these reasons were pretextual and discriminatory, resulting in a strike used by the State in violation of *Batson*.

First, the State's contention that Juror Fuller stated that it would be "difficult to pass judgment on" Johnson is an incorrect and misleading characterization of her responses during individual voir dire. Juror Fuller made it unequivocally clear during her voir dire that sitting in judgment of Johnson did not cause her concern and would not impair her ability to be fair.[28] Further, she clarified that nothing in her social or religious background would alter that position. While Juror Fuller agreed with the State that the task might be difficult, she nevertheless affirmed that passing judgment on Johnson would not be a problem for her and that she would judge his case fairly.[29] Juror Fuller, thus, would have been a fair and impartial juror. This reason for striking her was pretextual.

Second, the State again mischaracterized Juror Fuller's responses during voir dire when it claimed that she had said that she had no comment when asked about her thoughts on holding people responsible for their actions.[30] The State's characterization falsely suggested that Juror Fuller was being evasive by refusing to share her thoughts on the topic or that she lacked belief in holding people accountable. In actuality, Juror Fuller was asked the vague question "Do you have any thoughts about holding people responsible for their criminal activity, for their

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[28] 6/5/00 TT at I-219.

[29] The State represented to the trial court during the *Batson* challenge that Juror Fuller stated verbatim that it would be "difficult to pass judgment on" Johnson. (6/6/00 TT at II-6.) This is not true. Juror Fuller never affirmatively said that it would be "difficult to pass judgment" on Johnson. Rather, she was asked the leading question "You and I can agree it'll be difficult, however?" to which she responded "Yes." (6/5/00 TT at I-219)

[30] 6/6/00 TT at II-6.

criminal conduct?" In response, Juror Fuller said "No," indicating that she had no thoughts one way or another. When asked more specific questions about the criminal justice system, Juror Fuller answered that she believed the system attempted to hold people responsible for their criminal acts and that the system worked overall.[31] Further, in her questionnaire, Juror Fuller stated that she believed that the legal system treats persons accused of crimes fairly.[32] Juror Fuller, thus, was not evasive or reluctant to express her thoughts regarding the criminal justice system and affirmed her belief in its integrity. Juror Fuller's responses once again confirm that she would have been a fair and impartial juror. This excuse for striking her was again pretextual.

Third, the State explained that it was concerned by Juror Fuller's omitted response to Question #33 on the questionnaire regarding her opinion on the death penalty. While the State suggested to the trial court during the *Batson* challenge that such an omission was purposeful, it took a contrary position during Juror Fuller's voir dire, expressly suggesting that it might have been an "oversight."[33] Indeed, the State never established that the omitted response to Question #33 was anything other than an oversight. Further, when asked how she would have answered, Juror Fuller forthrightly stated that she had never thought about the death penalty and that she would consider it in certain circumstances. Moreover, Juror Fuller affirmed that she would consider all four punishment options and

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[31] 6/5/00 TT at I-220.

[32] Ex. 83.

[33] 6/5/00 TT at I-221.

could impose the death penalty if she believed it was the appropriate punishment for the crime. Thus, the State's alleged reason for striking Juror Fuller as being evasive regarding her true opinions regarding the death penalty was pretextual. *See Conner v. State*, 130 Nev. 457, 465, 327 P.3d 503, 509 (2014) (reversing conviction for a *Batson* violation, finding that the State's explanation for striking a juror for being unwilling to impose the death penalty was belied by the record, in which the prospective juror stated that he could consider all three forms of punishment and was not concerned about his ability to impose the death penalty).

Fourth, the State claims that it struck Juror Fuller because she had a stepson who had been in jail. The State's supposed concern about Juror Fuller's stepson is belied by the fact that the State never questioned Juror Fuller during individual voir dire about her stepson.[34] This clearly suggests that the State's supposed concern is pretextual since the issue was not important enough to raise. *See Miller-El*, 545 U.S. at 246 (the "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 pretext for discrimination."); *Flowers*, 139 S. Ct. at 2249 (same).

Further, at least one other individual, who was eventually seated as a juror, had a similar issue, but was not stricken by the prosecution. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise similar nonblack who is permitted to serve, that is evidence tending to prove

[34] 6/5/00 TT at I-217–231.

purposeful discrimination to be considered at *Batson*'s third step." *Miller-El*, 545 U.S. at 241; *Williams v. State*, 134 Nev. 687, 695, 429 P.3d 301, 310 (2018) (reversing conviction for a *Batson* violation and stating "[t]hat the State failed to follow up on this line of questioning with Juror 23, and did not strike other jurors who expressed skepticism similar to Juror 23's, suggests pretext."). Here, Juror Lockinger admitted during individual voir dire that he had a brother who was in prison for bank robbery.[35] Nevertheless, Juror Lockinger, who is not African-American, was eventually seated on the petit jury. If family trouble with the law was truly of concern to the State, then Juror Lockinger should have given more pause to the prosecution than did Juror Fuller. All the prosecution knew about Juror Fuller's stepson was that he had been in jail. Because Juror Fuller was not aware of the circumstances of his arrest, the prosecution did not know whether her stepson had even been charged or convicted in relation to the arrest that landed him in jail. On the other hand, the prosecution knew that Juror Lockinger's brother had been convicted of bank robbery and was then serving a prison sentence.[36] Because Juror Lockinger's brother's crime was far more serious than what the State

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[35] This Court may consider Johnson's comparative juror analysis even though it was not presented to the trial court. As the Ninth Circuit has observed, courts routinely conduct a comparative juror analysis for the first time on appellate and habeas review. *Murray*, 745 F.3d at 1005. Performing such an analysis is *not* contingent on such an analysis having been performed before by the trial court. *Id.* Moreover, as the Supreme Court has pointed out, "a defendant is not required to identify an *identical* white juror for side-by-side comparison to be suggestive of discriminatory intent." *Flowers*, 139 S. Ct. at 2249.

[36] 6/5/00 TT I-302.

knew about Juror Fuller's stepson's alleged crime, its strike of her can only be explained as discriminatory.

Moreover, given the high percentage of African-Americans who are incarcerated, virtually every African-American prospective juror will know someone who is or has been incarcerated. Accepting the State's explanation would mean that the State would always be free to strike African-Americans from a jury.

Fifth, the State explained that it struck Juror Fuller because on her questionnaire she indicated that she could give a sentence of life with the possibility of parole to someone convicted of a quadruple homicide. This is yet another pretextual explanation since other jurors also indicated that they could give a sentence of life with the possibility of parole to someone convicted of a quadruple homicide. For example, Juror Lockinger, who was seated, affirmed during voir dire that he could consider imposing all four punishments, including life with the possibility of parole.[37]

Finally, the State claims that it struck Juror Fuller because of her demeanor during voir dire. Yet at no point did the trial court find Juror Fuller's demeanor to be as characterized by the State. As the Nevada Supreme Court has explained, "where only part of the basis for a peremptory strike involves the demeanor of a struck juror, and the district court summarily denies the *Batson* challenge without making a factual finding as to the juror's demeanor, we cannot assume that the district court credited the State's demeanor argument." *Williams* 134 Nev. at 693

[37] 6/5/00 TT at I-303.

429 P.3d at 308 (citing *Snyder v. Louisiana*, 552 U.S. 472, 479 (2008)). Here, the State's demeanor argument was one of several reasons it gave for striking Juror Fuller. Further, the trial court summarily denied Johnson's *Batson* objection, finding State's explanations not be pretextual, without ever making a specific factual finding regarding Juror Fuller's demeanor. Thus, this Court may not assume that the trial court credited the State's demeanor argument. Accordingly, because the State's other explanations for striking Juror Fuller were pretextual and this Court may not rely on the State's demeanor argument, none of the State's supposed explanations for striking Juror Fuller withstand scrutiny. Johnson's *Batson* claim is meritorious and thus should be granted.

(2) Claim One(B): Johnson was denied a jury venire representing a fair cross section of Clark County, Nevada

The Sixth Amendment guarantees a criminal defendant a jury pool that reflects a fair cross section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 528–29 (1975); *Duren v. Missouri*, 439 U.S. 357, 363–64 (1979); *Williams v. State*, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005). To establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. *Duren*, 439 U.S. at 364; *Williams*, 121 Nev. at 939, 125 P.3d at 631. Once the defendant establishes a prima facie case, the burden shifts to the

government to show a "significant state interests be manifestly and primarily advanced by those aspects of the jury-selection process . . . that result in the disproportionate exclusion of a distinctive group." *Duren*, 439 U.S. at 367–68.

Here, the Nevada Supreme Court previously found that Johnson had failed to make a prima facie showing of a violation of the fair cross section requirement because "Johnson's counsel did not allege or present facts to demonstrate that the underrepresentation of African Americans in the venire was due to systematic exclusion." *Johnson*, 133 Nev. at 577, 402 P.3d at 1274–75. The Nevada Supreme Court's determination was clearly erroneous because it failed to consider the impact of trial counsel's ineffectiveness in failing to develop such evidence, an issue that would have been raised had Johnson received effective assistance of appellate counsel. While the Nevada Supreme Court recognized that Johnson's trial counsel had not alleged or presented facts showing systematic exclusion, it never considered whether this was because of trial counsel's ineffectiveness.

Further, the Nevada Supreme Court's opinion is clearly erroneous because it ruled on the last prong of the *Duren* test without the benefit of testimony establishing whether the exclusion of African Americans was systematic. Courts have recognized the difficulty in ruling on a fair cross section claim prior to the retention of an expert and an evidentiary hearing on the issue, which would establish whether there had been a systematic exclusion as required to make a prima facie case. *See United States v. Rodriguez-Lara*, 421 F.3d 932, 946–47 (9th Cir. 2005) (holding that it was an abuse of discretion not to grant the defendant's

request for an expert to establish a plausible fair cross section claim even though it was uncertain whether the expert's assistance would ultimately vindicate the claim). The Nevada Supreme Court implicitly credited that Johnson satisfied the first two prongs of the *Duren* test. Had the court permitted an evidentiary hearing at which an expert could testify, there is a reasonable probability that Johnson could establish the third *Duren* prong that the disparity of African Americans in his venire from the percentage in Clark County was the result of systematic exclusion, not happenstance.

(3) Claim One(C): Unconstitutional use of peremptory strikes

The "State infringes a capital defendant's right under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excuses for cause all those members of the venire who express conscientious objections to capital punishment." *Wainwright v. Witt*, 469 U.S. 412, 416 (1985); *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968). "[A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. 38, 45 (1980); *Wainwright*, 469 U.S. at 424 (same). Compounding the harm from the State's systematic removal of life-affirming jurors is a trial court's deliberate refusal to remove certain prospective jurors for cause, forcing a criminal defendant to use several peremptory strikes to eliminate those jurors from sitting on the jury. *See United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000); *Ross v. Oklahoma*, 487 U.S. 81, 91 n.5 (1988).

Here, the Nevada Supreme Court stated that it was declining to consider Johnson's claim regarding the State's use of peremptory strikes to remove "life affirming jurors" because it presented "no cogent argument or authority in support of [the] claim." *Johnson*, 133 Nev. at 578 n.4, 402 P.3d at 1275 n.4. Clearly the Nevada Supreme Court overlooked the long-standing body of United States Supreme Court case law addressing this very issue when it made this statement. *See Wainwright*, 469 U.S. at 416; *Witherspoon*, 391 U.S. at 522 ("we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."). In any event, the law of the case doctrine does not bar this Court from considering Johnson's claim regarding the removal of "life affirming" prospective jurors because the Nevada Supreme Court admittedly never considered or decided the issue on the merits. *Zhang*, 130 Nev. at 8, 317 P.3d at 818; *Fergason*, 131 Nev. at 947, 364 P.3d at 597. And as to the part of Johnson's claim regarding forcing Johnson to use his preemptory strikes to remove prospective jurors who clearly should have been removed for cause, the Nevada Supreme Court declined to consider the merits of whether the trial court violated Johnson's due process rights by deliberately forcing him to use his peremptory strikes, stating only that "appellate counsel was not ineffective for failing to litigate a claim based on admittedly unsettled legal questions." *Johnson*, 133 Nev. at 578, 402 P.3d at 1275 (internal citations omitted). As such, the law of the case doctrine does not bar this

aspect of Johnson's claim either. *Zhang*, 130 Nev. at 8, 317 P.3d at 818; *Fergason v. LVMPD*, 131 Nev. at 947, 364 P.3d at 597.

As to the merits, the trial court erred in excusing two life-affirming jurors – Prospective Jurors Grecco and Davis – for cause when one of the prospective jurors indicated that his reservations about the death penalty would not prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and their oath, and when the other was excused before the defense was finished with its questioning.[38] Particularly as to Prospective Juror Grecco, he affirmed that he could fairly judge the defendant's conduct based on the evidence presented and that he would legally consider all four forms of punishment.[39] Thus, it was error for the trial court to excuse these jurors for cause after they had indicated their reservations about the death penalty.

Further, the trial court denied Johnson due process of law when it deliberately refused to remove Prospective Jurors Shink, Fink, and Baker for cause, and instead forced Johnson to use nearly half of his peremptory strikes to prevent them from sitting on the jury.[40] *See Martinez-Salazar*, 528 U.S. at 316; *Ross*, 487 U.S. at 91 n.5. The State does not attempt to dispute that Prospective Jurors Shink, Fink, and Baker should have been removed for cause insofar as they made it plain that they would automatically impose the death penalty if a defendant's guilt for

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[38] 6/5/00 TT at I-301, 338–339.

[39] 6/5/00 TT at I-338–339.

[40] Johnson maintains that the forced use of nearly half of his peremptory strikes was constitutional error in of itself. *See Martinez-Salazar*, 528 U.S. at 316.

first-degree murder were established without considering mitigating evidence.[41] *See Morgan v. Illinois*, 504 U.S. 719, 729 (1992) ("[a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do."). Further, the reasons that the trial court gave for denying the for-cause challenges to these prospective jurors was far from convincing.[42] First, the trial court responded to the defense's challenge for cause by circularly denying that Prospective Jurors Shink, Fink and Baker qualified for challenges for cause.[43] The trial court did not explain what, if anything, about the voir dire responses given by Prospective Jurors Shink, Fink, and Baker made *Witherspoon v. Illinois*, 391 U.S. 510 (1968) or *Morgan v. Illinois*, 504 U.S. 719 (1992) inapplicable. Second, notwithstanding the damning responses given by these prospective jurors, the trial court denied the challenge for cause based on the purportedly erroneous form of the voir dire as "violative of both of the 770 provisions, touching on anticipated instructions and questions that pose hypothetical fact situations."[44] This purported explanation failed to address, however, the substance of the responses given by Prospective Jurors Shink, Fink and Baker, all of which indicated that they would vote to automatically impose the death penalty upon a finding a guilt for first-degree

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[41] 6/5/00 TT at I-190, 192 (Shink), I-137–38 (Fink), I-152–53, 156 (Baker).

[42] 6/5/00 TT at I-202.

[43] 6/5/00 TT at I-202 ("Number one, I believe that in terms of *Morgan [v. Illinois*], the questionnaire, which was answered under oath, is sufficient. And those people who are seated on the jury did not, in either *Witherspoon* or the *Morgan* sense, qualify for challenges for cause.").

[44] 6/5/00 TT at I-202.

murder notwithstanding the mitigation evidence presented. Moreover, NRS 175.031, concerning voir dire of prospective jurors, contains no limitation on voir dire based on anticipated instructions or hypotheticals based on anticipated facts that will be at issue. Rather NRS 175.031 states that "The court shall conduct the initial examination of prospective jurors, and the defendant or the defendant's attorney and the district attorney are entitled to supplement the examination by such further inquiry as the court deems proper." Importantly, NRS 175.031 cautions that "Any supplemental examination must not be unreasonably restricted." Thus, the purportedly improper form of questioning should not have been a reason for denying the challenges for cause. Finally, the trial court denied the challenge for cause based on the court's instruction to prospective jurors that the death penalty is not automatic.[45] Yet the trial court did not admonish Prospective Jurors Shink, Fink, or Baker that they could not impose the death penalty automatically. Accordingly, the trial court's explanations for its denial of the challenge for cause are belied by the record, indicating that its denial of Johnson's challenge for cause was deliberate. As such, the trial court denied Johnson due process of law by deliberately denying his challenges for cause and forcing him to use nearly half of his peremptory challenges to remove biased prospective jurors.

(4) Claim One(D): Cumulative error

Finally, in Claim One Johnson claims that the combined effect of the multiple errors during jury selection violated his right to due process. The State contends

[45] 6/5/00 TT at I-202.

that the Nevada Supreme Court previously ruled on Johnson's cumulative error claim and thus, that this Court may not consider it given the law of the case doctrine. Contrary to the State's contention, the Nevada Supreme Court's prior opinion is silent on the issue of cumulative error even though the claim was raised in Johnson's second amended habeas petition. Because the Nevada Supreme Court has not considered the issue, the law of the case doctrine does not apply and does not prohibit this Court's review. *Zhang*, 130 Nev. at 8, 317 P.3d at 818; *Fergason*, 131 Nev. at 947, 364 P.3d at 597.

On the merits, it is well-established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair. *Chambers v. Mississippi,* 410 U.S. 284, 298, 302–03 (1973) (combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"); *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (same). The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal. *Chambers,* 410 U.S. at 290 n. 3; *Parle*, 505 F.3d at 927*; Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 480–81 (2008).

Cumulative error warrants habeas relief where the errors have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974); *Parle*, 505 F.3d at 927. Thus, where the combined effect of errors renders a criminal defense "far less

persuasive than it might [otherwise] have been," the resulting conviction violates due process. *See Chambers,* 410 U.S. at 294, 302–03, 93 S. Ct. 1038.

In reviewing a due process challenge based on the cumulative error, the reviewing court must determine the relative harm caused by the errors. To do this, a court considers the following: (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged. *Valdez*, 124 Nev. at 1195, 196 P.3d at 481. As the Nevada Supreme Court has cautioned, courts "must ensure that harmless-error analysis does not allow prosecutors to engage in misconduct by overlooking cumulative error in cases with substantial evidence of guilt." *Id.* at 1196, 196 P.3d at 481.

First, the issue of guilt was not close insofar as there were few pieces of physical evidence tying Johnson to the crimes. What little physical evidence that existed was flawed for the reasons discussed in Johnson's petition. Further, the lack of reliable physical evidence compounded with the faulty jury instructions given during the guilt phase of Johnson's trial permitted the jury to convict Johnson without holding the State to its burden of proving every element of the crime beyond a reasonable doubt. For example, and as discussed in detail below, the trial court instructed the jury on five different theories of first-degree murder, yet only one of these theories was constitutionally sound. Indeed, the trial court permitted Johnson to be convicted of first-degree murder without requiring the State to prove beyond a reasonable doubt that Johnson premeditated and deliberated the murders of Matthew Mowen, Jeffrey Biddle, Tracey Gorringe, and Peter Talamantez. The

same instructional defect plagued other charges of which Johnson was convicted. Thus, the issue of Johnson's guilt was not close.

Second, the quantity and character of the errors were substantial. There were at least four errors committed during the jury selection process. These errors infringed fundamental constitutional rights guaranteed to Johnson. For example, the State infringed Johnson's right to equal protection of the law in addition to his Sixth Amendment fair trial rights when it used peremptory strikes in a racially discriminatory manner during jury selection in the guilt phase in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). Johnson was denied his Sixth Amendment rights when he was denied a jury venire that reflected a fair-cross section of Clark County at the time. The remaining errors—removing for cause prospective jurors who expressed reservations about the death penalty and forcing Johnson to use nearly half of his peremptory strikes to strike prospective jurors who should have been struck for cause—were also substantial insofar as the jury became a tribunal predisposed to returning a guilty verdict and a sentence of death.

As to the third factor, the charges of first-degree murder, burglary while in possession of a deadly weapon, robbery with use of a deadly weapon, kidnapping with use of a deadly weapon, and conspiracy are undoubtedly grave. *See Valdez*, 124 Nev. at 1198, 196 P.3d at 482. Yet the evidence against Johnson was far from overwhelming. When that is the case, the Nevada Supreme Court has concluded that it "cannot say without reservation that the verdict would have been the same in the absence of error," and has reversed a conviction because the cumulative effect

of the errors has denied the petitioner a fair trial. *Valdez*, 124 Nev. at 1198, 196 P.3d at 482 (concluding that first-degree murder with a deadly weapon and attempted murder with a deadly weapon were grave crimes, but because the evidence was not overwhelming, the Court could not say that the verdict would have been the same absent the error). Accordingly, this Court should find that the errors during jury selection, when cumulated, denied Johnson a fair trial.

b. Claim Two: Juror bias and misconduct during the first trial

Claim Two alleges various issues concerning the guilt-phase jury. This Court must consider this claim on the merits and grant relief.

(1) This Court may consider the merits of Johnson's juror claim notwithstanding the State's arguments to the contrary

The State attempts to have it both ways – claiming that Johnson has waived his juror claim because it was not raised on direct appeal, only to turn around and admit that the claim was raised on direct appeal, but barred by the law of the case doctrine.[46] Neither argument has merit.

First, the State claims that there is no "good cause" for Johnson to raise his guilt and penalty phase juror misconduct claims in the post-conviction context when such claims could have been raised on direct appeal.[47] Johnson raised his juror misconduct claim as to jurors Kathleen Bruce and Connie Patterson in his motion

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[46] Resp. at 31.

[47] Resp. at 31.

for new trial.[48] Specifically Johnson raised Juror Bruce's misconduct in harboring undisclosed racial bias exemplified by her fright and hesitation to ride an elevator with an African-American man, in communicating with her husband about media reports, and in possibly having seen media reports of the trial herself.[49] Johnson also raised Juror Patterson's misconduct in discussing the case and being aware of media accounts.[50] Juror Bruce's and Juror Patterson's external communications and their exposure to media reports were also raised as claims in Johnson's direct appeal.[51] To the extent that Johnson's appellate counsel failed to raise Juror Bruce's juror bias on direct appeal, appellate counsel provided ineffective assistance of counsel which prejudiced Johnson insofar as if such a claim had been raised, there is a reasonable probability that but for appellate counsel's ineffectiveness, the outcome of the direct appeal would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). First post-conviction counsel was similarly ineffective in failing to raise Juror Bruce's juror bias claim. *Crump v. Warden*, 113 Nev. 293, 304, 934 P.2d 247, 253 (1997).

Next, the State claims that Johnson's juror misconduct and exposure to pretrial publicity claim is barred by law of the case because on direct appeal, the Nevada Supreme Court held that there was no prejudice. *Johnson v. State*, 118 Nev. 787, 797, 59 P.3d 450, 457 (2002) *overruled on other grounds by Nunnery v.*

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[48] Mot. for New Trial, at 4 (June 23, 2000).

[49] *Id.*

[50] *Id.*

[51] Ex. 8 at 39–40.

State, 127 Nev. 749, 771, 263 P.3d 235, 250. This Court may consider Johnson's juror misconduct and exposure to pretrial publicity claim because the Nevada Supreme Court's disposition was clearly erroneous insofar as it applied the incorrect legal standard and in so doing concluded that there was no prejudice from the misconduct even though it expressly recognized that the trial court "should have held an evidentiary hearing to determine whether the misconduct was prejudicial." *Johnson*, 118 Nev. at 797, 59 P.3d at 457; *see also Hsu*, 123 Nev. at 631, 173 P.3d at 728–29.

When confronted with allegations of improper contact between a juror and an outside party, courts apply a "settled two-step framework." *Godoy v. Spearman*, 861 F.3d 956, 959 (9th Cir. 2017) (citing *Mattox v. United States*, 146 U.S. 140, 149–50 (1892)). First, the court must consider "whether the contact was 'possibly prejudicial,' meaning it had a 'tendency' to be 'injurious to the defendant.'" *Id.* "If so, the contact is 'deemed presumptively prejudicial,'" and the court must proceed to step two, where the "'burden rests heavily upon the [state] to establish' the contact was, in fact, 'harmless.'" *Id.* If the prejudicial effect of the contact is unclear from the existing record, the trial court "must" hold a hearing to determine the circumstances of the contact, the impact thereof on the juror, and whether or not it was prejudicial. *Id.* If, ultimately, the state cannot show harmlessness, "the court must grant the defendant a new trial." *Id.*

Despite this framework being long "settled," the Nevada Supreme Court applied the incorrect legal standard and therefore clearly erred in its disposition of

this claim. First, an evidentiary hearing establishing all the necessary facts should have been held before the Nevada Supreme Court considered the claim. The Nevada Supreme Court stated this itself. This conclusion is further confirmed by the Nevada Supreme Court's recognition that it did not have all the facts, and indeed, did not know for sure whether misconduct had occurred in the guilt phase of Johnson's trial. *Johnson*, 118 Nev. at 797, 59 P.3d at 457 ("First, even assuming the jurors committed similar misconduct during the guilt phase, as Johnson argues is likely, the established misconduct tis de minimis, and the issue of guilt was not close."). A similar scenario was at issue in *Remmer v. United States*, 347 U.S. 227, 228-30 (1954), where the United States Supreme Court vacated the judgment of the Court of Appeals, determining that the Court of Appeals could not have held that there was no prejudice from a juror's misconduct based on the record without having established "what actually transpired," "the impact thereof upon the juror, and whether or not it was prejudicial"; *see also Remmer v. United States*, 350 U.S. 377, 379 (1956) ("[i]t was the paucity of information relating to the entire situation coupled with the presumption which attaches to the kind of facts alleged by petitioner which, in our view, made manifest the need for a full hearing.");*compare Bayramoglu v. Estelle*, 806 F.2d 880, 886 (9th Cir. 1986) (affirming trial court's finding that juror misconduct was harmless beyond a reasonable doubt because "the trial judge conducted lengthy and detailed examinations of each juror concerning the circumstances and effect of [the juror in question's] misconduct," the other jurors declined to consider the external information, the juror in question was

removed, and following removal, the trial judge ordered the jury to deliberate anew and disregard all prior discussions). Similarly here, it was clearly erroneous for the Nevada Supreme Court to hold that the juror misconduct was harmless when it lacked the complete set of necessary facts to make that determination.

Next, the Nevada Supreme Court employed the wrong legal standard to determine whether the misconduct was harmless. The Nevada Supreme Court failed to hold the State to its "heavy" burden of showing that the presumptively prejudicial external contact was harmless beyond a reasonable doubt as required. Instead, it appears that the Nevada Supreme Court inverted the burden of proof, suggesting that to establish prejudice, Johnson had to "allege" that the news report "encouraged the jury to impose a particular sentence." *Johnson*, 118 Nev. at 798, 59 P.3d at 457; *see Godoy*, 861 F.3d at 966 ("There is no additional requirement that the defendant establish a 'strong possibility' of prejudice."). United State Supreme Court precedent is clear that "the burden rests heavily upon the Government to establish…that such contact with the juror was harmless to the defendant." *Remmer*, 347 U.S. at 229.

Further, instead of considering whether the State had established that the external contact had not impacted the jury and therefore was not prejudicial, the Nevada Supreme Court applied the incorrect standard—the standard for cumulative error—which altogether failed to take into consideration what impact the guilt phase misconduct actually had on the jury. *Johnson*, 118 Nev. at 797, 59 P.3d at 457. And the only consideration the Nevada Supreme Court gave to the

impact the penalty phase misconduct had on the jury was to speculate that there was no impact because there was "no allegation that the report encouraged the jury to impose a particular sentence," and because the jury was deadlocked after the jurors learned of the news reports. *See Godoy*, 861 F.3d at 966 ("*Remmer*, however, clearly requires a hearing where, as here, the presumption of prejudice attaches yet the prejudicial effect of the communications is unclear from the existing record."). Notwithstanding that the jury did not *remain* deadlocked after learning of the news reports, and indeed returned a death sentence, the Nevada Supreme Court appears to have taken a "no harm, no foul" approach, reasoning that there was no prejudice because Johnson received a second penalty hearing in any event. Thus, the Nevada Supreme Court applied the wrong legal standard, rendering its opinion on the issue of juror misconduct clearly erroneous. *See Hsu*, 123 Nev. 625, 630–31, 173 P.3d 724, 728–29 (2007). Further, continuing to adhere to the Nevada Supreme Court's fundamentally flawed disposition of Johnson's juror misconduct claim would work a manifest injustice to Johnson, particularly as the misconduct prejudicially impacted the jury during both the guilt and penalty phases of trial, as discussed below.

Lastly, contrary to the State's claim that Johnson's juror misconduct claim does not cover new grounds other than Juror Bruce's elevator incident exemplifying her racial bias, which was raised by trial counsel, but was not raised by appellate counsel because of ineffectiveness, Juror John Young's misconduct revealed in 2018

constitutes a new ground.[52] Accordingly, neither waiver nor the law of the case doctrine apply to preclude this Court's review.

(2) Juror misconduct occurred and presumptively prejudiced the jury against Johnson during the guilt and penalty phases of trial

On the merits, juror misconduct during the guilt and penalty phases of trial occurred and prejudicially impacted the conviction and death sentence handed down by the jury.[53]

(a) Jurors Bruce and Patterson

To meet the "low threshold" of a "tendency to be injurious," it is clear that the external contact with Jurors Bruce and Patterson had a "tendency to be injurious" to Johnson, and therefore was "presumptively prejudicial." *Godoy*, 861 F.3d at 966–67. Jurors Bruce and Patterson, and a third juror admitted that they were aware of media accounts of Johnson's trial either through communicating with third parties about media or witnessing the media accounts for themselves. This contact had a "tendency to be injurious" and therefore was "possibly prejudicial" insofar as the news accounts were exceedingly derogatory to Johnson. Further, it is likely that the immense media interest created pressure on the jurors to convict. Juror Bruce, for example, expressed her nervousness and concern that she not be considered the

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[52] Resp. at 31.

[53] The penalty phase aspect of this claim is not mooted by the fact that the jury hung during the penalty phase and Johnson eventually received a new jury penalty phase. Rather, the misconduct and bias here allowed the jury to hang where it could have reached a sentence less than death. Thus, This Court should hold that the prejudice from the juror misconduct is so great as to require striking Johnson's death sentence.

lone "hold-out" juror.[54] She went so far as to express her concern that she was being singled out as the hold-out juror.[55] Juror Patterson expressed a similarly acute awareness that she was being labelled the hold-out juror by the media.[56]

Further, Juror Bruce may have weaponized, so to speak, the elevator incident in which Juror Lockinger remained in an elevator with an African American man carrying a duffel bag—a man of whom Juror Bruce admitted to fearing—by spreading a false rumor that Juror Lockinger was being paid off by Johnson. By either peer-pressuring Juror Lockinger into changing his vote and not being the hold-out juror, or getting him removed from the jury, Juror Bruce would rebut any speculation by the media that she was the hold-out juror once a guilty verdict was returned. Juror Bruce's intentions with respect to Juror Lockinger are made clearer insofar as the elevator incident occurred before the penalty phase, yet Juror Bruce only came forward during the penalty phase deliberations.[57] She, nonetheless, told other jurors about the elevator incident involving Juror Lockinger during guilt phase deliberations.[58] Indeed, other jurors such as Ashley Warren took note of Juror Lockinger's changed vote following Juror Bruce's suggestion that Juror Lockinger had been bought off by Johnson during the guilt phase.[59] Thus, the

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[54] Ex. 70 ¶¶ 4, 7.
[55] *Id.*
[56] Ex. 70 ¶ 8.
[57] 6/16/00 TT at IV-74.
[58] *See* Ex. 188 ¶3.
[59] *Id.*

external contact was possibly prejudicial because it had a tendency to be injurious to Johnson. Accordingly, a presumption of prejudice arose.

As to the second step of the *Godoy* test, the State has not attempted to rebut this presumption of prejudice. Nor could it. Juror Bruce was biased against Johnson as exemplified by her fear of even riding in an elevator with an African American man carrying a duffel bag, a fear she tied directly to testimony she heard about a duffel bag and gun. Based on her bias alone, she should not have sat on the jury. *See Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1997) ("The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors. The bias or prejudice of even a single juror would violate [a defendant's] right to a fair trial."). Once a colorable claim of Juror Bruce's bias was raised, the trial court had an obligation to ensure that Juror Bruce was impartial before allowing her to continue serving on the jury. *Id.* at 978 ("the judge has an independent responsibility to satisfy himself that the allegation of bias is unfounded."). The trial court's failure to ensure Juror Bruce was impartial and its attendant failure to remove her notwithstanding her demonstrated bias resulted in a biased juror convicting Johnson and sentencing him to death. This constituted structural error. *Id.* at 973 n.2 ("the presence of a biased juror introduces a structural defect not subject to harmless error analysis.").

Against this backdrop is the prejudicial impact of Juror Bruce's misconduct properly assessed. Juror Bruce's misconduct of communicating with her husband about media reports and possibly viewing those reports herself likely impacted the

jury insofar as it appears that Juror Bruce took various steps to pressure Juror Lockinger into a guilty verdict and death sentence to rebut any notion that she was the hold-out juror. Accordingly, because the State has not even attempted to rebut the presumption of prejudice, Johnson should prevail on his claim as to Jurors Bruce and Patterson and this Court should grant him relief.

(b) Juror Young

Juror Young—the foreperson who held a Ph.D. in exercise physiology[60]—admitted that during the jury's guilt phase deliberations when "some jurors questioned how semen was found on Donte Johnson's jeans, I explained how it was common to be highly aroused/excited after such an event of killing four people."[61] Young further explained that "It would be normal to have a heightened sexual arousal. It correlated to the timing of [Johnson's] return home and being sexually active with his girlfriend as she reported."[62] Notably, the State does not dispute that neither this opinion nor the basis for this opinion ever came through the testimony. The basis for Juror Young's opinion is, thus, unknown but his background did not justify inserting this extra-record evidence into the jury's deliberations. An evidentiary hearing is required to determine the source of his opinion.

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[60] Ex. 222 at 5. Young also stated in his questionnaire that he had completed a postdoctoral fellowship in exercise biochemistry at the Washington University in St. Louis, School of Medicine. *Id.*

[61] Ex. 189 at paragraph 3.

[62] *Id.* at paragraph 4.

The Nevada Supreme Court has acknowledged, if a juror has knowledge of the issues involved in the trial that might affect the verdict, the communication of that knowledge to other jurors is considered extrinsic evidence and a form of misconduct. *See Meyer v. State*, 119 Nev. 554, 563, 568, 80 P.3d 447, 454, 458 (2003) (earlier stating that extraneous influence includes "publicity or media reports received and discussed among jurors during deliberations, consideration by jurors of extrinsic evidence, and third-party communications with sitting jurors."; *Hard v. Burlington N. R.R.*, 812 F.2d 482, 486 (9th Cir. 1987) (former railroad employee related his knowledge of railroad practices to other jurors). As a form of external contact, Juror Young's opinions during the guilt phase of trial had a tendency to be injurious to Johnson and therefore were presumptively prejudicial. The opinion that it was "common" for a man to be aroused after killing four people conveyed to other jurors that Johnson's arousal betrayed his guilt for the crime, which undoubtedly was "injurious" to Johnson during the guilt and penalty phases of trial. That Juror Young had a doctoral degree in an area (physiology) that would make him appear qualified to opine likely gave his opinions great weight with the jurors who were otherwise puzzled at the semen evidence, which would only add to the injurious effect of the external information. Accordingly, because Juror Young's opinion had a tendency to be injurious to Johnson, his misconduct was presumptively prejudicial.

As to the second step of the *Godoy* test, the State does not attempt to carry its burden by showing that Juror Young's misconduct was harmless beyond a

reasonable doubt. Instead, the State suggests that Johnson's claim based on Young's misconduct is improper because it "reveal[s] information about the jurors' thought processes as they deliberated . . . ."[63] It is well settled, however, that there is an exception to the anti-impeachment rule: "where the misconduct involves extrinsic information or contact with the jury, juror affidavits or testimony establishing the fact that the jury received the information or was contacted are permitted." *Meyer*, 119 Nev. at 562, 80 P.3d at 454; *Hard*, 812 F.2d at 485–86 ("[j]uror testimony is . . . admissible as to objective facts bearing on extraneous influences on the deliberation process."); *Warger v. Shauers*, 574 U.S. 40, 47 (2014). Here, because the State does not deny that the basis for Juror Young's opinion did not come through the testimony at trial, Juror Young's provision of information relating to Johnson's arousal, leading to the deposit of semen on his jeans, was an extraneous influence on the deliberation process, and thus, within the exception to the anti-impeachment rule. Further, because the State does not even attempt to argue that Juror Young's presumptively prejudicial misconduct was harmless beyond a reasonable doubt, Johnson should prevail on his juror misconduct claim and his conviction and sentence should be vacated.

c. Claim Three: ineffective assistance of first trial counsel

In Claim Three, Johnson argued his convictions and death sentences are invalid because of ineffective assistance of counsel during the guilt phase of his

[63] Resp. at 32.

trial.[64] Specifically, Johnson challenged his trial counsel's failure to (1) consult with and present expert testimony, (2) impeach the State's fact witnesses, (3) impeach the State's expert witnesses, (4) acknowledge a VCR in crime scene photographs and reports, (5) move to dismiss the kidnapping charge, (6) object to hearsay, and (7) object to improper references to the phases of the trial.[65]

(1) Claim Three(A): defense counsel were ineffective for failing to present expert testimony

"Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." *Hinton v. Alabama*, 571 U.S. 263, 273 (2014) (quoting *Harrington v. Richter*, 562 U.S. 86, 106 (2011)); *see Duncan v. Ornoski*, 528 F.3d 1222, 1235 (9th Cir. 2008); *Dugas v. Coplan*, 428 F.3d 317, 328–32 (1st Cir. 2005). This was one of those cases. As Johnson alleged in Claim Three (A), defense counsel were ineffective for failing to consult with and present testimony from two types of experts—an expert on police coercion and an expert on blood spatter and crime scene reconstruction.[66]

(a) Expert on police coercion

The State during trial introduced damaging evidence against Johnson in the form of statements from purported witnesses (including Johnson's two codefendants). What the jury did not hear, however, was expert testimony casting doubt on the validity of these statements. Counsel was deficient in failing to consult

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[64] Pet. at 42–87.

[65] *Id.*

[66] *Id.* at 43–67.

with and present testimony from an expert on police coercion. *See 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"); *cf. United States v. Belyea*, 159 F. App'x 525, 529–31 (4th Cir. 2005); *United States v. Hall*, 93 F.3d 1337, 1344 (7th Cir. 1996). And, because of the importance of these statements to the prosecution, there is a reasonable probability of a different result had counsel performed effectively. *See Belyea*, 159 F. App'x at 530–31 (concluding exclusion of expert testimony concerning false confessions was not harmless when confession was only direct evidence of crime); *United States v. Hall*, 93 F.3d 1337, 1344–46 (7th Cir. 1996) (similar); *Evans*, 141 A.D.3d at 125–26 (similar).

In its single-paragraph response to this subclaim, the State makes four largely conclusory arguments. First, the State baldly asserts that presentation of this evidence would have been "fruitless and possibly even harmful."[67] But the State relies on exactly the assumption that this evidence would have rebutted in jurors—that police using coercive techniques is a "conspiracy theory," and that witnesses

[67] Resp. at 33.

and suspects never lie during interrogations. *See, e.g.*, Central Park jogger case, Wikipedia, https://en.wikipedia.org/wiki/Central_Park_jogger_case.

Second, the State contends that Johnson cannot show likelihood because his expert report says only that coercive methods were "likely" used.[68] As Dr. Deborah Davis documented in her report, law enforcement failed to properly record all of the interactions with witnesses and suspects. But that failure makes an evidentiary hearing on this claim even more important, so law enforcement can testify about the actions taken in the interviews in this case. In any event, Dr. Davis concluded that "it is *almost certain* that police employed suggestive and coercive interviewing or interrogation tactics to influence witnesses and suspects who were particularly vulnerable for a number of reasons."[69]

Third, the State argues that Johnson cannot show prejudice because the Nevada Supreme Court described the evidence against him as "overwhelming."[70] The State ignores that the coerced statements represent a significant portion of that "overwhelming" evidence and that the statements provide the *only* evidence that Johnson was the triggerman (and thus eligible for the death penalty without additional showings by the State). *See Johnson v. State*, 118 Nev. at 797, 59 P.3d at 457 (providing first in list of "overwhelming evidence" statements from Johnson's former girlfriend and other witnesses).

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[68] *Id.*

[69] Ex. 175 at 50.

[70] Resp. at 33.

Fourth, the State asserts without any support that counsel made a strategic decision "to pursue other, stronger defenses."[71] Penalty-phase counsel Alzora Jackson said exactly the opposite.[72] To the extent that the State claims Johnson's guilt-phase counsel had a strategic reason for failing to consult an expert in police coercion, Johnson is entitled to an evidentiary hearing to dispute this claim. *See Mann v. State*, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002); *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 226 (1984).

(b) Expert on blood spatter and crime scene reconstruction

The State during Johnson's trial additionally introduced evidence of blood on a pair of pants, which the State implied during closing argument was spatter from the gunshot that killed Tracey Gorringe. Because Johnson's DNA was also on the pants, the jury was left with the uncorrected perception that Johnson personally killed Gorringe. But an expert in blood spatter and crime scene reconstruction could have undermined that perception by testifying that the evidence in this case shows the opposite—that the blood was not deposited on the pants while the wearer was "in the position of an active shooter."[73]

The State first relies on one phrase from Johnson's petition to argue that Johnson still could have been the triggerman without blood spatter appearing on

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[71] *Id.*

[72] Ex. 214.

[73] *See* Ex. 177.

the front of his jeans.[74] This argument misses the point. The State relied on the blood evidence at trial in its efforts to prove that Johnson was the shooter. Effective counsel would have been able to undermine that testimony with testimony from an expert. *See Rippo*, 134 Nev. at 424, 423 P.3d at 1098 (explaining that *Strickland* prejudice standard requires only a "reasonable probability" of a different result).

The State next asserts that counsel had "a conscious, strategic choice" not to use this evidence at trial.[75] Just as with the expert in police coercion, penalty-phase counsel Alzora Jackson said exactly the opposite.[76] To the extent that the State alleges Johnson's guilt-phase counsel had a strategic reason for failing to consult an expert in police coercion, Johnson is entitled to an evidentiary hearing to dispute this claim. *See Mann*, 118 Nev. at 356, 46 P.3d at 1231; *Hargrove*, 100 Nev. at 502, 686 P.2d at 226.

Finally, the State argues no prejudice resulted from not presenting this expert because, according to the State, "Johnson himself confessed to multiple witnesses that he killed four people."[77] As Johnson explained in other sections of his petition, those witness statements are unreliable.[78] Among several other problems, none of the witnesses accused Johnson of being the triggerman in their initial statements to police.

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[74] Resp. at 33. Quotation marks were mistakenly included in the petition around the phrase "a possible spatter producing event."

[75] *Id.*

[76] Ex. 214.

[77] Resp. at 33–34.

[78] *See, e.g.*, Pet. at 283–90.

(2) Claim Three(B): defense counsel were ineffective for failing to adequately impeach the State's fact witnesses

During the guilt phase, several witnesses testified for the State in ways that conflicted with earlier statements to police, statements from other witnesses, and other evidence. But defense counsel failed to impeach these experts. In the petition, Johnson explained in detail the inconsistencies between the statements and claimed that defense counsel were ineffective for not impeaching the witnesses with these inconsistencies.[79] The State calls this a "bare and naked claim," but the State cites nothing requiring post-conviction petitioners to script the cross-examination of effective counsel.[80] It is sufficient that Johnson provided in detail the inconsistencies that effective counsel would have examined. *Contra Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). The State also dismisses the lack of effective cross-examination as a strategic choice. Nothing in the record supports the State's assertion that counsel made a strategic choice or that counsel thoroughly investigated the law and facts. *See Strickland*, 466 U.S. at 691.

(3) Claim Three(C): defense counsel were ineffective for failing to adequately cross-examine the State's expert witnesses

Four experts testified for the State during the guilt phase of Johnson's trial, a fingerprint expert, a firearms expert, a forensic pathologist, and a DNA expert. All three of these experts testified in inaccurate and misleading ways. Defense counsel,

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[79] *Id.* at 67–73.

[80] Resp. at 34.

however, failed to adequately cross-examine and undermine their testimony. In Claim Three (C), Johnson argued that this failure constituted ineffective assistance.[81]

The State first contends that cross-examination is a strategic decision not susceptible to attack through a claim of ineffective assistance of counsel.[82] Again, nothing in the record supports the State's assertion that counsel made a strategic choice or that counsel thoroughly investigated the law and facts. *See Strickland*, 466 U.S. at 691. And without that thorough investigation or strategic decision, inadequate cross-examination is as susceptible to an ineffectiveness claim as any other deficient action during trial. *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).

The State also generally disputes that counsel's ineffective cross-examination was prejudicial.[83] But the State ignores that undermining portions of the experts' testimony would have gone a long way towards undermining their ultimate harmful conclusions. In addition, the State's closing argument relied heavily on this testimony. For example, the State several times during closing argument referenced the forensic pathologist's testimony—which conflicted with previous testimony—that the gunshot wounds showed that the victims were shot at close range (within a couple of inches). First, the prosecutor referenced the testimony to support his argument that Johnson was guilty of robbery:

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[81] Pet. at 74–82.

[82] Resp. at 34.

[83] *Id.*

> There should be no doubt in anybody's mind that these three boys had fear in their minds as they laid face down, duct taped and defenseless, waiting for the bullet that would send each of them into eternity. I'm certain that they were in fear as Donte placed the barrel of the gun two inches from the skull of each boy.[84]

Then to support his argument that Johnson intentionally killed the victims: "You recall the evidence, what the physical evidence suggest, 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. Certainly that evidence is an intent to kill on Donte Johnson's part."[85] And premeditation: "As quickly as he laced the gun to the back of each of their heads, is as quickly as he could form premeditation."[86] And deliberation: "As each one of those acts being deliberate and being calculated, the pulling of a trigger, a deliberate act, but within inches from each boy."[87] And, lastly, to argue the cigar box with Johnson's fingerprints was dropped during the killings: "Is it a coincidence that that box is lying there at the feet of one of the decedents? Or someone would have had to stand over it, or Donte Johnson would have to stand over as he puts that gun within two inches and shoots and kills him."[88] The State similarly questions the prejudice from counsel's failure to cross-examine the DNA expert.[89] But, again, the prosecutor relied on the DNA expert's testimony to argue in closing

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[84] 6/8/2000 TT at IV-200–01.

[85] *Id.* at 202.

[86] *Id.* at 204.

[87] *Id.* at 248.

[88] *Id.* at 246.

[89] *Id.*

that DNA conclusively matched Johnson.[90] If this testimony had not been prejudicial, the prosecutor would have had no reason to rely on it to establish elements of the charged offenses.

The State next says in a conclusory manner that Johnson has not established what difference proper cross-examination of the fingerprint expert would have made. In his petition, Johnson pointed out specific problems with the testimony from the State's fingerprint examiner.[91] For example, the expert testified misleadingly that he was 100 percent sure that the fingerprint found at the crime scene matched Johnson—a certainty level impossible to actually meet.[92] Had counsel performed effectively, they would have undermined this testimony, poking holes in one of the few pieces of physical evidence placing Johnson at the crime scene.

Turning next to the firearms expert, the State contends that the questions defense counsel did ask were sufficient.[93] All counsel asked about, however, was the absence of the murder weapon in evidence.[94] The damaging aspect of this testimony was not related to any comparison with the murder weapon. The testimony was damaging because the expert told the jury that all four bullets came from the same

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[90] *Id.* at 211–12, 250.

[91] Pet. at 74–76.

[92] 6/08/2000 TT at IV-19, IV-24; Ex. 179.

[93] Resp. at 34.

[94] 6/8/2000 TT at IV-57–58.

gun—wherever that gun might be—and, consequently, were probably fired by the same person.[95] Effective counsel would have undermined this testimony.

(4) Claim Three(D): defense counsel were ineffective for failing to acknowledge the VCR in crime scene photographs and reports

The State emphasized several times during the trial that Johnson had stolen a VCR from the victims' house, when in fact the VCR was still at the house the following day. Johnson claimed in his petition that defense counsel was ineffective for failing to object.[96] The State now says that defense counsel's failure to object was strategic, but again the State fails to provide any support for its conclusory statement.[97]

The State also argues that Johnson cannot prove that the VCR in the photograph and report "was the same VCR as that alleged to be missing from the home and that was in fact found in Johnson's possession."[98] This is nonsensical. The VCR in the photograph and report was never missing from the victims' house and cannot be the same VCR found in Johnson's house. To the extent the State is claiming that the victims owned two VCRs, one of which Johnson stole, there is absolutely no evidence this is the case.

Next, the State confusingly conflates the VCR clearly seen in the photograph with a CD player.[99] From the description given in the crime scene report—"VCR,

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[95] *See id.* at IV-206–07.

[96] Pet. at 82–84.

[97] Resp. at 35.

[98] *Id.*

[99] *Id.*

multi-play compact disk"—it is likely that the VCR also played CDs; that does not negate the fact that it was a VCR.

Finally, the State argues that Johnson cannot establish prejudice. But the State ignores the emphasis placed on this "stolen" VCR at trial. In the opening statement, the prosecutor first told the jury that the entertainment center at the crime scene was missing a VCR.[100] The prosecutor then suggested several times over the opening statement and closing argument that Johnson took the VCR from the victims' house.[101] And this emphasis served two important purposes aiding the State in its attempt to portray Johnson as murdering four people for what amounted to trinkets. 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.[102] Relatedly, evidence that the VCR had not in fact been stolen would have undermined those same witness statements.

(5) Claim Three(E): defense counsel were ineffective for failing to move to dismiss the kidnapping charge

In Claim Three (E), Johnson argued that the kidnapping charge was "incidental" to the robbery charge, and defense counsel were therefore ineffective for

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[100] 6/6/00 TT at II-39.

[101] *Id.* at II-47, II-52–53, II-55–56; 6/8/00 TT at IV-192, IV-196, IV-199–200, IV-210, IV-213, IV-216, IV-230–31, IV-247; *see also* 6/8/00 TT at IV-247 (prosecutor saying direct during closing argument that there was "[n]o VCR or Play Station at the murder scene"); *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?").

[102] 6/8/2000 TT at IV-210, 213, 216.

failing to move to dismiss the kidnapping charge.[103] The State argues that this claim is barred by law of the case, since it was previously denied by the Nevada Supreme Court.[104] The Nevada Supreme Court's denial of this claim was 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.

(6) Claim Three(F): defense counsel were ineffective for failing to object to hearsay

In Claim Three (F), Johnson argued that defense counsel were ineffective for failing to object to a harmful hearsay statement elicited during Tod Armstrong's direct examination.[105] The State argues that this claim is barred by law of the case.[106] The Nevada Supreme Court in that case rejected a claim that *appellate counsel* was ineffective for failing to raise the unpreserved issue on appeal. *See Johnson v. State*, 133 Nev. at 580, 402 P.3d at 1276. To the extent that the State contends the Nevada Supreme Court also implicitly rejected the current claim concerning *trial counsel*, the Nevada Supreme Court's denial of this claim was 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.

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[103] Pet. at 84–85.
[104] Resp. at 32.
[105] Pet. at 85–86.
[106] Resp. at 32.

(7) Claim Three(G): defense counsel were ineffective for failing to object to improper references to the phases of the trial

In Claim Three (G), Johnson argues that effective trial counsel would have objected to the State's references to the first phase of the proceedings as the "guilt phase," especially after filing a motion in limine to prohibit that reference.[107] The State argues that this claim is barred by law of the case.[108] The Nevada Supreme Court rejected a claim that *appellate counsel* was ineffective for failing to raise prosecutorial misconduct on direct appeal. *See Johnson v. State*, 133 Nev. at 580–81, 402 P.3d at 1276–77. To the extent that the State contends the Nevada Supreme Court also implicitly rejected the current claim concerning *trial counsel*, the Nevada Supreme Court's denial of this claim was 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.

d. Claim Four: unconstitutional guilt-phase jury instructions

Claim Four raises a number of jury instruction issues as to the guilt phase. The State argues that these issues are meritless, procedurally defaulted, or both. Johnson addresses each, in turn.

Claim Four(A): The reasonable doubt instruction improperly minimized the State's burden of proof. *Compare* Ex. 67 *with Cage v. Louisiana*, 498 U.S. 39, 41

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[107] Pet. at 86.

[108] Resp. at 32.

(1990).[109] The State argues that the Nevada Supreme Court denied the challenge to this instruction, and also denied an ineffective assistance claim based on this instruction.[110] Thus, the State concludes, this claim is barred by law of the case.[111] Because the reasonable doubt instruction is unconstitutional, the Nevada Supreme 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.

Claim Four(B): The premeditation instructions, allowing for instantaneous premeditation and deliberation, fails to distinguish between first- and second-degree murder.[112] The Nevada Supreme Court's prior determination of this claim was 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.

Claim Four(C): The conspiracy instruction failed to instruct the jury that, co-conspirator liability of a specific intent crime, the jury needed to find that Johnson possessed the same specific intent required for the underlying offense. *Compare* Ex. 67 (Instr. 12) *with Bolden v. State*, 124 P.3d 191, 200 (Nev. 2005), *overruled on other grounds by Cortinas v. State*, 195 P.3d 315, 324 (Nev. 2008).

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[109] *Cage* was overruled on other grounds in *Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991).

[110] Resp. at 37.

[111] *Id.*

[112] *See* Ex. 67 (Instr. 34–39).

The State argues that, because the Nevada Supreme Court previously ruled on this instruction, law of the case prevents consideration now.[113] Here, however, the Nevada Supreme Court's prior determination was clearly erroneous for three reasons. First, in its prior determination, the Nevada Supreme Court improperly read the claim as applying only to kidnapping. In fact, the claim applied to all specific intent crimes that Johnson was charged with.[114]

Second, though the Nevada Supreme Court was correct that the State did not charge kidnapping under a coconspirator theory of liability, the court ignored the fact that State argued coconspirator liability.[115]

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[113] Resp. at 37 (citing *Johnson*, 133 Nev. at 582, 402 P.3d at 1277).

[114] The relevant language from the post-conviction direct appeal reads:

> Jury Instruction 12 fails to inform the jury that Mr. Johnson would have been required to have the intent that the crime charged was to be committed. In fact, the instruction fails to provide the fundamental elements of intent. The instruction given to the jury fails to dictate that a defendant cannot be convicted under conspiracy to specific intent crimes unless the defendant had the specific intent to commit those crimes.

Ex. 37 at 89–90. These arguments apply to any of the specific intent crimes that Johnson was charged with. Though the next sentence of the brief referred to kidnapping, it did not limit the scope of Johnson's arguments. *Id.* Insofar as the claim was limited only to kidnapping, post-conviction counsel was ineffective.

[115] 6/8/00 TT at IV-202. In this regard, Instruction Twelve was also improper under *Barren v. State*, 99 Nev. 661, 668, 669 P.2d 725, 729 (1983) (requiring indictment to allege each theory of liability); *see also Simpson v. Eighth Jud. Dist. Ct.*, 88 Nev. 654, 661, 503 P.2d 1225, 1230 (1972). Johnson has a constitutionally protected liberty interest in the fair administration of state rules governing his case. *See Hewitt v. Helms*, 459 U.S. 460, 466 (1983). Additionally, the lack of notice violated his right to due process. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1224 (2018) (Gorsuch, J., concurring in part) ("Perhaps the most basic of due process's customary protections is the demand of fair notice.").

Third, the Nevada Supreme Court disposed of the ineffective assistance claim by holding that Johnson failed to "explain why an objectively reasonable appellate attorney would have forgone some of his other appellate issues to challenge the kidnapping convictions under the circumstances." *Johnson*, 133 Nev. at 582, 402 P.3d at 1277. This is not the legal standard. Attorneys are not limited in the number of issues they may raise; indeed, in death penalty cases, counsel has an obligation to raise all non-frivolous issues. *See* ADKT No. 411, Standard 2-10.

Thus, law of the case does not bar this claim, and this Court should grant relief.

Claim Four(D): The trial court failed to provide an instruction requiring that the jury find the same mens rea of a specific intent crime before finding liability under an aiding and abetting theory.[116] *See Sharma v. State*, 118 Nev. 648, 656, 56 P.3d 868, 872–73 (2002). Kidnapping, burglary, and murder are specific intent crimes, and the State pursued aiding and abetting liability for each of these theories.[117] *See Walker v. State*, 116 Nev. 442, 447, 997 P.2d 803, 807 (2000); *Wilson v. State*, 127 Nev. 740, 745, 267 P.3d 58, 61 (2011); *Bolden*, 121 Nev. at 922–23, 124 P.3d 191, 201 (2005).

During the prior post-conviction proceedings, counsel raised this issue as an ineffective assistance of appellate counsel, because appellate counsel did not object

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[116] *See* Ex. 67 (Inst. 17).

[117] *See* Ex. 52.

to the aiding and abetting instructions.[118] The Nevada Supreme Court failed to rule on this specific argument. *See Johnson*, 133 Nev. at 582, 402 P.3d at 1277. Thus, law of the case does not bar consideration of this claim. Trial counsel also failed to raise this objection; post-conviction counsel was ineffective in failing to raise trial counsel's deficient performance.

Four(E): The trial court failed to instruct the jury on malice aforethought. Trial and appellate counsel were deficient in failing to object or request an instruction. The Nevada Supreme Court's prior determination of this claim was that, even assuming deficient performance, "the evidence at trial overwhelmingly shows that Johnson was guilty of first-degree murder under the theories that the murders were willful, deliberate, and premeditated or were committed during the course of a felony." *Johnson*, 133 Nev. at 582, 402 P.3d at 1277–78. However, as discussed below, these other theories were improperly instructed, thus the court was clearly erroneous and relying on the "overwhelming" showing of evidence.

Four(F): The trial court incorrectly instructed the jury that "murder committed in the perpetration, or attempted perpetration of robbery and/or kidnapping" carried with it "conclusive evidence of premeditation and malice aforethought."[119] This instruction is an erroneous statement of the law; trial,

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[118] *See* Ex. 37 at 90–91. Insofar as post-conviction counsel's claim was unclear, post-conviction counsel was ineffective in failing to adequately plead a challenge to the aiding and abetting instruction.

[119] Ex. 67 (Inst. 40).

appellate, and post-conviction counsel were deficient in failing to challenge this instruction.

The Nevada Supreme Court has explicitly held that establishing a killing by one of the means enumerated for first-degree murder is insufficient to establish murder: "[w]ithout a showing of malice, it is immaterial that the killing was perpetrated by one of the means enumerated in the statute." *Collman v. State*, 116 Nev. 687, 7 P.3d 426, 444 (2000). Felony-murder does not establish willfulness, deliberation, or premeditation. The instruction here incorrectly states the opposite: that felony murder establishes premeditation.

The State argues that the instruction "simply states that if a murder is committed in the perpetration of robbery or kidnapping, it is murder of the first degree; premeditation and malice aforethought need not be separately proven."[120] The State misses the point. The problem with this instruction is not that it describes felony-murder, the problem with the instruction is that it reduces the State's burden of proof for premeditation.

The State argues that because the jury found Johnson guilty of robbery and kidnapping, there were valid felony-murder theories and thus any error is harmless. But, as described above and below, these theories all have their own problems; thus alternative theories cannot serve as the basis to find error harmless.

Four(G): Instruction Eight improperly allowed jurors to presume the specific intent for burglary without also instructing the jury that it was not required to find

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[120] Resp. at 38.

the presumed fact and that the presumed fact still needed to be found beyond a reasonable doubt. *See* NRS 47.230(3). The State argues that this instruction did not create a presumption because the instruction did not require a "presumption" but an "inference."[121] This is a distinction without content. *Compare Inference*, *Black's Law Dictionary* (11th ed. 2019) ("A conclusion reached by considering other facts and deducing a logical consequence from them") *with Presumption*, *Black's Law Dictionary*, (11th ed. 2019) (2. "A legal inference or assumption that a fact exists because of the known or proven existence of some other fact or group of facts."). Thus, the district court erred by failing to give the appropriate presumption instructions.

Four(H): The trial court failed to instruct the jury that the jury could not both find kidnapping predicated off of murder and murder predicated off of kidnapping. The State does not argue otherwise.[122] Rather, the State argues that, assuming an error, the error would be harmless because the jury found Johnson guilty of robbery, and robbery could have served as the predicate for both kidnapping and first-degree murder.[123] However, the State overlooks that the kidnapping-robbery theory was not properly instructed. *See* Claim Four(I).

Four(I): The Nevada Supreme Court has offered that to find first-degree kidnapping an associated robbery, the jury should be instructed to find beyond a reasonable doubt:

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[121] Resp. at 38.
[122] Resp. at 38–39.
[123] Resp. at 38–39.

> (1) That any movement of the victim was not incidental to the robbery;
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> (2) That any incidental movement of the victim substantially increased the risk of harm to the victim over and above that necessarily present in the robbery;
>
> (3) That any incidental movement of the victim substantially exceeded that required to complete the robbery;
>
> (4) That the victim was physically restrained and such restraint increased the risk of harm to the victim; or
>
> (5) The movement or restraint had an independent purpose or significance.

Mendoza v. State, 122 Nev. 267, 275–76, 130 P.3d 176, 181 (2006). Johnson's jury did not receive this instruction. This was error. Specifically, the jury was not instructed that the movement had to substantially increase the risk of harm to the victim. *See Wright v. State*, 581 P.2d 442, 443–44 (1978). The State argues that this error was harmless because the Nevada Supreme Court already upheld the kidnapping offenses.[124] But the Nevada Supreme Court's determination did not address or indicate that any movement in this case substantially increased the risk of harm to the victims, over and above that already required for robbery.

Four(J): The State argues that because there was no error, there cannot be cumulative error.[125] But this overlooks that the State itself relied on harmlessness to argue that relief is not warranted for the instructional errors. *See* Resp. at 38 (any error with regard to felony murder was harmless); *id.* at 39 (arguing that any error lacked prejudice); *id.* (arguing that any error as to elements of kidnapping was

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[124] Resp. at 39 (citing *Johnson*, 133 Nev. at 581, 402 P.3d at 1277).

[125] Resp. at 37.

harmless). This Court must review the instructional errors cumulatively and determine, beyond a reasonable doubt, the errors did not contribute to the verdict complained of. *See Cortinas v. State*, 124 Nev. 1013, 1027, 195 P.3d 315, 324 (2008). So, too, with the deficient performance of counsel: this Court must consider the cumulative effect of counsel's deficient performance. *See Williams v. Filson*, 908 F.3d 546, 570 (9th. Cir. 2018) ("We have long recognized . . . that the prejudice resulting from ineffective assistance must be considered collectively, not item by item . . . ." (internal quotation marks and citations omitted)).

e. Claim Five: prosecutorial misconduct during the guilt-phase

The State correctly notes that Johnson's claims regarding the State's intestinal fortitude, future dangerousness, and inconsistent theories were raised in prior proceedings.[126] But the State is wrong that these claims are barred by law of the case because the Nevada Supreme Court's prior determinations were clearly erroneous. The Nevada Supreme Court rejected the intestinal fortitude claim because it was not "plain error." *Johnson*, 133 Nev. 571, 578, 402 P.3d at 1275. It plainly was: the Nevada Supreme Court disapproved this language in *Castillo v. State*, 114 Nev. 271, 279, 956 F.2d 103, 109 (1998). Moreover, the Nevada Supreme Court failed to address the State's improper references to future dangerousness. *See Castillo*, 114 Nev. at 280, 956 F.2d at 109. But, even if the underlying claims of misconduct are barred by law of the case, trial counsel's ineffectiveness for failing to

[126] *See* Resp. at 40; *see also* Ex. 37 at 63–65 (raising intestinal fortitude and future dangerousness); Ex. 8 at 40–41 (raising inconsistent theories).

object—a predicate of the Nevada Supreme Court's prior denial—has not been decided by the Nevada Supreme Court. Additionally, the Nevada Supreme Court rejected the misconduct based on the State's inconsistent theories on the basis that this Court had rejected the State's theory that Johnson was not living there. *Johnson*, 118 Nev. at 799, 59 P.3d at 458. But this misstates this Court's order, which explicitly noted that Johnson had not yet developed enough contact to be "a legitimate co-tenant."[127]

Regardless, the doctrine of law of the case does not apply, since prejudice from prosecutorial misconduct must be considered cumulatively. *See Sipsas v. State*, 102 Nev. 119, 125, 716 P.2d 231, 235 (1986).

As to the claims of prosecutorial misconduct that have not been previously alleged, the State argues that it merely recited facts about the victims, defendants, and the evidence.[128] The State ignores the fact that its use of photos and gang names appealed to the racial prejudice of the jury. Moreover, the State does not respond to Johnson's argument that the State took inconsistent positions about Johnson as a leader, the State's vouching for witnesses and the investigation, the improper remarks during closing argument.[129] The State offers that referring to the evidence as "overwhelming" was justified because the Nevada Supreme Court would later describe it as overwhelming.[130] But, as noted, the evidence was not

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[127] *See* Ex. 221.

[128] Resp. at 42.

[129] Resp. at 42.

[130] Resp. at 42.

overwhelming: the guilt-phase instructions coupled with the jury's questions about who the shooter cast great doubt on the strength of the evidence here.

Finally, the State claims that its discovery violation does not implicate *Brady v. Maryland* because defense counsel eventually received the information in the report.[131] This is not the test for *Brady* claims. *See, e.g.*, *Milke v. Ryan*, 711 F.3d 998, 1017 (9th Cir. 2013) (noting that just because records were publicly available "doesn't diminish the state's obligation to produce them under *Brady*"). The State had this evidence before trial and failed to turn it over. Had the State done so, the defense could have incorporated it into their case and undercut the State's arguments about the forensic evidence.

f. Claim Six: trial court error during the guilt-phase

Claim Six raises a number of errors related to this Court's rulings during the guilt-phase.[132] The State argues that Claim Six(A)–(E) are barred by the law of the case doctrine.[133] However the Nevada Supreme Courts' prior determinations were clearly erroneous, thus the doctrine cannot bar consideration of these claims here. Additionally, these errors need to be considered both individually and cumulatively, thus, this Court must, at minimum, consider the cumulative effect of all these errors. The State further claims that Claim Six(F) is "without merit" because the expert was merely "offering explanation as to how a particular blunt-force wound

[131] Resp. at 43.
[132] Pet. at 121–35.
[133] Resp. at 43–44.

was inflicted, based on his expertise as a forensic pathologist . . . ."[134] The State fails to acknowledge that the particular testimony includes the expert opining that a number of different objects *could* have caused the wound, and one of those objects *could* have been a gun.[135] That is speculation. The State repeats its arguments that the racially charged photos of the victims and the defendants is a meritless claim.[136] These photos were highly prejudicial and not probative, thus their admission was error.

Finally, the State argues that any error related to this Court's questioning of the jury during the 2000 penalty phase is moot because Johnson eventually received a new penalty.[137] Here, however, absent the Court's improper questioning, the jury could have returned a sentence less than death. Thus, Johnson should be ineligible for the death penalty.

g. Claim Seven: State suppression of evidence

As discussed above, Johnson's *Brady* claims are meritorious.[138] The State refers back to its argument that certain kinds of claims are not "suitable for a habeas petition."[139] However, that argument does not apply to the new allegations of suppressed evidence found in this claim.

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[134] Resp. at 44.

[135] *See* 6/7/00 TT at III-289.

[136] *See* Resp. at 44 (arguing Claim Six(G) is without merit).

[137] *See* Resp. at 45.

[138] *See* § A.1.b above.

[139] Resp. at 46 (referring to argument found at Resp. 7–8).

h. Claim Eight: double-jeopardy violations

In Claim Eight, Johnson made two arguments based on the Double Jeopardy Clause.[140] First, Johnson argued that, because underlying felonies are the "same offense" as felony murder, some of his convictions are invalid under the Double Jeopardy Clause.[141] As the State points out in its response—and Johnson acknowledged in his petition—the Nevada Supreme Court rejected this argument in *Talancon v. State*, 102 Nev. 294, 721 P.2d 764 (1986).[142] But *Talancon* is wrongly decided. Although this Court cannot overrule precedent from the Nevada Supreme Court, Johnson included this claim in his petition in order to preserve the argument for later review.

Second, Johnson argued 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.[143] 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, the Nevada Supreme Court has never addressed this argument. The State waived any challenge to this argument by not addressing it in the response. *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).

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[140] Pet. at 141–46.
[141] *Id.* at 143–44.
[142] *Id.* at 144; Resp. at 46–47.
[143] Pet. at 144.

i. Claim Nine: confrontation clause

In Claim Nine, Johnson argues that his convictions and death sentence are invalid because of Confrontation Clause violations during the guilt phase and penalty phase.[144] The State first responds by pointing out that the Nevada Supreme Court has held the Confrontation Clause inapplicable during the penalty phase.[145] The Nevada Supreme Court's caselaw is wrongly decided. Although this Court cannot overrule the Nevada Supreme Court, Johnson raises the claim now to preserve it for future proceedings.

As for the guilt-phase portion of this claim, the State contends that it is foreclosed by caselaw from the United States Supreme Court: *Williams v. Illinois*, 567 U.S. 50 (2012). The State is wrong. "The Supreme Court's fractured decision in *Williams* provides little guidance and is of uncertain precedential value because no rationale for the decision—not one of the three proffered tests for determining whether an extrajudicial statement is testimonial—garnered the support of a majority of the Court." *State v. Dotson*, 450 S.W.3d 1, 68 (Tenn. 2014) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 66 (1996), and *United States v. Pink*, 315 U.S. 203, 216 (1942), in questioning precedential value of *Williams*); *see State v. Michaels*, 95 A.3d 648, 666 (N.J. 2014) (describing *Williams*'s precedential value as, "at best unclear"); *see also Stuart v. Alabama*, 139 S. Ct. 36, 36–37 (2018) (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of cert.) (citing with approval

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[144] *Id.* at 147–48.

[145] Resp. at 47.

cases explaining *Williams*'s uncertain precedential value). And, even if the opinion had garnered a majority of the Supreme Court, the facts of Johnson's case are distinguishable: unlike in *Williams*, Johnson had already been arrested and charged when Cellmark tested the DNA evidence. *See Williams*, 567 U.S. at 84. As Justice Gorsuch later explained, eight of the nine justices on the Supreme Court when *Williams* was decided would have agreed that "a forensic report qualifies as testimonial . . . when it is 'prepared for the primary purpose of accusing a targeted individual' who is 'in custody [or] under suspicion.'" *Stuart*, 139 S. Ct. at 37 (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of cert.) (quoting *Williams*, 567 U.S. at 84) (alternation in *Stuart*); *see State v. Hutchison*, 482 S.W.3d 893, 911 (Tenn. 2016); *Dotson*, 450 S.W.3d at 69; *Young v. United States*, 63 A.3d 1033, 1043–44 (D.C. 2013).

j. Claim Ten: violation of Fourth Amendment

In Claim Ten, Johnson argues that evidence was seized in violation of his Fourth Amendment rights.[146] This Court denied this claim before trial on the basis that Todd Armstrong was "the primary and only permanent resident of the Everman home" and that "his consent was sufficient to justify the search." *See Johnson v. State*, 118 Nev. 787, 794–95, 59 P.3d 450, 455 (2002).[147] From this, the Nevada Supreme Court concluded that "[t]he record supports the district court's determination that Armstrong had common authority over the master bedroom. *Id.*

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[146] *See* Pet. at 154–57.

[147] *See also* Ex. 218.

at 795, 59 P.3d at 455. This was clearly erroneous because this Court did not simultaneously find that Armstrong was the "primary and only permanent resident" and that Armstrong had "common authority." Rather, this Court's prior order treated Armstrong as the only resident of the home, and Johnson as having no standing whatsoever.[148] The Nevada Supreme Court invented the idea that this Court found common authority.

Thus, law of the case cannot bar this claim. And, because the State conceded that Johnson lived in the home, this Court's prior order was erroneous. *See United States v. Issacs*, 708 F.2d 1365, 1368 (9th Cir. 1983).

k. Claim Eleven: multiple theories and non-unanimity

In Claim Eleven, Johnson argues that his convictions and death sentences are invalid because the trial court instructed the jurors that they did not need to be unanimous when they decided the theories of first-degree murder and conspiracy.[149] The State responds by asserting that Johnson cites no cases extending *Schad v. Arizona* to theories of first-degree murder.[150] But Johnson is not arguing for an extension of *Schad*, as *Schad* explicitly covers this situation: in *Schad*, the United States Supreme Court held that a jury must be unanimous when differences between two theories of an offense "become so important 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."

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[148] Ex. 218.

[149] Pet. at 158–62.

[150] Resp. at 48.

Schad v. Arizona, 501 U.S. 624, 633–34 (1991). The Court concluded that the statute at issue in *Schad* defined different means, not different offenses, because that was what the Arizona legislature explicitly intended. *Id.* at 636–37. Despite the State's conclusory statements to the contrary, there is no explicit intention by the Nevada legislature for the statutes at issue here to be treated as the same crime.

The State did not address Johnson's argument concerning conspiracy to commit robbery and/or kidnapping and/or murder.[151]

l. Claim Twelve: venue

In Claim Twelve, Johnson argues that his convictions and death sentences were invalid because the publicity surrounding his case infected the jurors and rendered his trial unfair.[152] The State has two responses to this claim, both incorrect.[153]

First, the State argues that Johnson's venue claim as it relates to the guilt phase is barred by law of the case.[154] The Nevada Supreme Court denied Johnson's claim previously because he could "point[] to nothing in the record suggesting that the empaneled jurors were not impartial." *Johnson v. State*, 133 Nev. at 579, 402 P.3d at 1275. The 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,

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[151] Petition at 161.

[152] *Id.* at 163–69.

[153] *See* Resp. at 49–50.

[154] *See* Resp. at 49.

423 P.3d at 1094, 1097–1100, and the facts included in Johnson's current petition substantially change this claim. *See Bejarano*, 122 Nev. at 1074, 146 P.3d at 271. Alternatively, the Nevada Supreme 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.

Second, for both the guilt-phase and penalty-phase parts of this claim, the State argues that Johnson has presented no evidence that the impaneled juries were biased. But 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.[155] 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); *Daniels v. Woodford*, 428 F.3d 1181, 1212 (9th Cir. 2005); *Coleman v. Kemp*, 778 F.2d 1487, 1538–39 (11th Cir. 1985); *contra Murray v. Schriro*, 882 F.3d 778, 802–06 (9th Cir.), *cert. denied sub nom. Murray v. Ryan*, 139 S. Ct. 414 (2018).

In addition, the jurors were actually biased against Johnson because of the media exposure. *See Murray*, 882 F.3d at 802–03. 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

[155] Ex. 86.

violate petitioner's constitutional rights). During the guilt phase, two jurors were exposed to media accounts about juror deliberations.[156] And during jury selection for the penalty rehearing, the eventual foreperson revealed to other potential jurors that Johnson had previously received a death sentence.[157] 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. *See id.*

m. Claim Thirteen: retrial after hung jury

In Claim Thirteen, Johnson argues that his death sentences are unconstitutional for two reasons.[158] First Johnson argues that his death sentences are unconstitutional under the Double Jeopardy Clause because the trial court improperly caused a mistrial during the first penalty hearing.[159] The State responds that the trial court's actions do not reach the level of coerciveness required for the retrial to violate the Double Jeopardy Clause.[160] But the cases the State relies on are strikingly similar to the facts of Johnson's case.[161] After hearing about a holdout juror, the trial judge questioned both the foreperson and the holdout about the deliberations. The jurors then quickly reported they were unable to reach a decision. This is at least as coercive as the situation in *Saletta v. State*, 127 Nev. 416, 418,

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[156] Ex. 70.

[157] 4/21/05 TT at III-AM-3–5, 146, 186, 190, 289–90.

[158] Pet. at 170–74.

[159] *Id.* at 170–72.

[160] Resp. at 51.

[161] *Id.*

254 P.3d 111, 112 (2011), where the trial court questioned a dissenting juror in an unduly coercive manner. *See also Ransey v. State*, 95 Nev. 364, 367, 594 P.2d 1157, 1158 (1979); *Redeford v. State*, 93 Nev. 649, 652, 572 P.2d 219, 220 (1977).

Second, Johnson argues that his death sentences are invalid under the Due Process Clause.[162] The State responds in a conclusory manner, saying only that the State did not benefit from the successive hearings because Johnson was sentenced to death in both the second and the third.[163] The State does not address Johnson's examples of those benefits, including that the State was able to introduce evidence that an individual shot by Johnson had died years after the shooting.

n. Claim Fourteen: ineffective assistance during penalty phase

Donte Johnson's parents abused drugs, alcohol, and cigarettes, even as Donte's mother was pregnant.[164] As a child, Johnson ate out of trash cans, faced physical abuse at home, and was often left in a shack where he and other children had a bucket for a toilet.[165] Had trial counsel effectively presented this evidence, Johnson would not have received a death sentence.

Trial counsel was deficient in a number of ways.[166] The State argues that these claims lack merit. The State is wrong.

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[162] Pet. at 172–74.

[163] Resp. at 50–51.

[164] *See, e.g.*, Ex. 131 at ¶4.

[165] *See* Ex. 135 ¶3; Ex. 130 ¶7; 6/14/2000 TT at III-47–III-51.

[166] The State asserts a number of the subclaims of Claim Fourteen are barred by law of the case. *See* Resp. at 52 (arguing Claim Fourteen(B)(2), (4)–(9), & (17) are barred by law of the case). The prior determination of these claims was clearly

Fourteen(A): The State argues that Fourteen(A) "has already been rejected in all but name" and thus is barred by law of the case.[167] The State is mistaken. Though prior post-conviction counsel presented a number of ineffective assistance of counsel claims, post-conviction counsel failed to present Johnson's life as mitigation.[168] The Nevada Supreme Court, thus, did not have the opportunity to review, as a whole, the prejudice of any deficient performance. However, had trial counsel acted effectively, all of the facts presented in Fourteen(A) would have been before the jury, and there is a reasonable probability the outcome of the proceedings would have been different.

Fourteen(B)(1): Counsel failed to formulate a theory for the penalty phase, as indicated by the inconsistency between the two counsel during the penalty phase. As discussed, counsel took inconsistent positions with regard to Johnson's level of involvement. During the eligibility-phase opening statement, the defense called into question Johnson's level of involvement; during the selection-phase opening statement, the defense implied Johnson was the triggerman by calling him a "cold blooded killer."[169] During the opening argument, counsel focused on family love for Johnson, without previewing the evidence of substance abuse, physical abuse, poverty, and extreme violence in the neighborhood; during closing argument,

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erroneous, and failing to consider these claims would result in a miscarriage of justice. Thus, this Court should not apply law of the case to these claims.

[167] Resp. at 53.

[168] *See* Ex. 37 at 92–100.

[169] *Compare* 4/27/05 TT at 52 *with* 4/28/05 TT at 12.

counsel did focus on these themes.[170] The State argues that these are "disingenuous attempts to mischaracterize counsel's words."[171] But counsel's inconsistent approach confused the jury, and prevented it from properly weighing Johnson's mitigating evidence.

Fourteen(B)(3): Trial counsel should have moved to strike the multiple murder aggravating circumstance because, as described in Claim Four, the improper jury instructions prevented a proper guilt conviction for murder. The State argues that counsel was not deficient because the guilt convictions were already final, and thus penalty-phase counsel could not challenge the guilt convictions.[172] This misreads the claim. Here, Johnson is not suggesting that penalty-phase counsel challenge the convictions, but the applicability of the aggravating circumstance. Because the aggravating circumstance necessarily was predicated on improper guilt-phase theories, the aggravating circumstance cannot apply to make Johnson death eligible.

Fourteen(B)(10): Trial counsel failed to present testimony of Johnson's father, who had relevant mitigating evidence.[173] The State argues that Johnson cannot avoid law of the case merely by asserting additional evidence.[174] Here, however, application of law of the case is inappropriate because Johnson presents the

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[170] *Compare* 4/25/05 TT-AM at 25, 28, 32–33 *with* 5/04/05 TT at 69, 83.
[171] Resp. at 54.
[172] Resp. at 54.
[173] *See* Ex. 136.
[174] Resp. at 55.

declaration of his father. Thus, where post-conviction counsel presented a bare allegation, Johnson offers actual evidence to support that trial counsel was deficient.[175] And post-conviction counsel's ineffective assistance—in failing to secure a declaration from Johnson's father—establishes good cause and prejudice to overcome any procedural default.

Fourteen(B)(11): The State argues that this is a "bare" or "naked" claim for relief, citing for support *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).[176] However, *Hargrove* does not stand for this proposition, but rather entitlement to an evidentiary hearing. *Id.* Additionally, a trauma expert could have provided the jury with important context and analysis of the trauma Johnson suffered, and how that trauma affected Johnson's functioning.

Fourteen(B)(12): Trial counsel was deficient in calling Johnson a "cold-blooded killer," conceding that Johnson was the triggerman.[177] The State argues "cold-blooded killer" is not the same as conceding that someone is a triggerman.[178] This is belied by how most would understand the word "killer," which is not normally understood to encompass theories of vicarious liability of felony-murder liability.[179] The State argues that this was a strategic decision, but this is

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[175] *Compare* Ex. 37 at 98–99 *with* Ex. 136.

[176] *See* Resp. at 55.

[177] *See* 4/28/05 TT at 12; *see also* Ex. 214 ¶8.

[178] Resp. at 55.

[179] *Killer*, *Merriam-Webster*, http://merriam-webster.com/dictionary/killer ("one that kills").

contradicted by the declaration of counsel, which states, "I had no strategic reason for conceding that Johnson was a 'cold blooded killer.' This is especially so in light of the serious problems with the State's guilt-phase theories."[180]

Claim 14(B)(13): Trial counsel failed to object to the admission of "other matter" evidence during the eligibility phase. Here, only one aggravating circumstance was presented—that Johnson had been convicted of more than one offense of murder in the first or second-degree.[181] Only one piece of evidence was relevant to this aggravating circumstance: the guilt-phase verdict as to these charges. The State does not dispute that the rest of the State's presentation was improperly admitted.[182] Rather, the State argues that Johnson "does not explain how a different outcome would have been likely had the jury received the evidence he complains [of] only during the selection phase."[183] The difference is that the State was able to present aggravating evidence that it was not supposed to present as part of the outweighing determination. But, the weighing of aggravating and mitigating circumstances is not supposed to include the other matter evidence. *See Holloway v. State*, 116 Nev. 732, 746, 6 P.3d 987, 997 (2000); *see also* NRS 175.552(3). Thus, there is a reasonable probability of a different outcome because, for the outweighing determination, the jury would have had only the fact of the other murders.

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[180] Ex. 214 ¶ 8.

[181] *See* Ex. 75 (Inst. 7).

[182] Resp. at 56.

[183] *Id.*

Claim Fourteen(B)(14): Trial counsel failed to show that a VCR was present at the crime scene and failed to object to the State's arguments related to the VCR found where Johnson was living. For all the reasons stated above, the State is wrong to assert that the VCR issues are meritless.[184]

Claim Fourteen(B)(15): Trial counsel failed to object to leading questions.[185] The State argues that these are not leading questions.[186] They are. "A question is leading when it suggests the answer desired." 2 Wharton's Criminal Evidence § 8.15 (15th ed. Oct. 2018 Update). A question such as "Did he ultimately identify three guns that he had seen with the defendant?" suggests its own answer—so much so that a mere "Yes, he did," was a sufficient, grammatical response. This question is also suggestive:

> They were a .380--.380 caliber pistol, black in color with gold diamonds on it; a revolver, medium-sized, appeared to be a six-shot revolver; and a .22 caliber rifle that was new, looked like a sawed off shotgun with a folding stock and a banana clip?

4/25/05 TT-PM at 57. It suggests, with great specificity, what the three guns were. Here, there is prejudice because the State de facto testified, with affirmations from the witnesses. None of this evidence should have been admissible in this form. *See* NRS 50.115(3) ("Leading questions may not be used on the direct examination of a witness without permission of the court.").

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[184] *See* § II.A.2.c(4) above.

[185] *See generally* 4/25/05 TT V-PM at 21–116; 4/26/05 TT VI-AM at 2–3; VI-Am at 27–120; 4/26/05 TT VI-Pm at 42–51, VI-PM at 57–116.

[186] Resp. at 56.

Fourteen(B)(16): Trial counsel should have objected to the admission of gruesome photographs; these photographs unduly inflamed the passions of the jury.

Fourteen(B)(18): For the same reasons that guilt-phase counsel were ineffective in failing to present evidence of blood splatter and police coercion, penalty phase counsel were ineffective.[187]

Fourteen(B)(19): for all the same reasons that guilt-phase counsel were ineffective in failing to cross-examine expert and lay witnesses, penalty-phase counsel were ineffective.[188]

Fourteen(B)(20): Trial counsel failed to request that Dr. Kinsora perform a formal evaluation of Johnson; trial counsel also retained Dr. Kinsora despite a conflict of interest. In both ways counsel were deficient. The State asserts that Dr. Kinsora indicated there were no signs of brain damage, and thus there was no reason to conduct a formal evaluation.[189] However, the prior report indicated there were signs of brain damage, and without collecting his own data, Dr. Kinsora lacked a basis for his conclusion. Trial counsel had an obligation to request an evaluation and provide Dr. Kinsora with all relevant documentation to assist Dr. Kinsora in reaching an accurate result. *See* American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hoftsra L. Rev. 913, 1056 (Feb. 2003) (Guideline 10.11(F)(2). Counsel failed to do this, and thus, was deficient.

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[187] *See* § II.A.2.c(1).

[188] *See* § II.A.2.c(3).

[189] Resp. at 57–58.

Because substantial mitigation evidence was available, counsel's deficient performance was prejudicial. *See* Claim 14(A). There is a reasonable probability of a different result.

o. Claim Fifteen: unconstitutional penalty-phase jury instructions

Fifteen(A): The trial court failed to instruct the jury that any one juror could find a mitigating circumstance.[190] The State argues that this claim is barred by the law of the case doctrine because the claim was previously considered.[191] *See Johnson*, 133 Nev. at 585–86, 402 P.3d at 1280. However, because this prior determination was clearly erroneous, law of the case does not bar consideration of this claim.

Fifteen(B): The trial court failed to instruct the jurors that if they found the aggravating and mitigating circumstances to be in equipoise, then they could not impose a death sentence.[192] The State argues that the instructions "explicitly gave the option for the jury to note that they found the aggravator to outweigh the mitigators or vice versa."[193] This is the point. The instruction only gives guidance on two of three possibilities: (1) the aggravating circumstances outweigh the mitigating circumstances or (2) the mitigating circumstances outweigh the aggravating circumstances. Absent is guidance about the third possibility, the circumstances not outweighing each other.

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[190] *See* Ex. 75 (Inst. 3).

[191] Resp. at 58.

[192] *See* Ex. 75 (Inst. 6).

[193] Resp. at 59.

Fifteen(C): Claim Fifteen(C) challenges the reasonable doubt instruction. The State argues that this claim is barred by law of the case because "the Nevada Supreme Court has twice rejected counsel's challenge to the reasonable doubt instruction: once in substance on direct appeal and once in affirming that counsel was not deficient in this respect on post-conviction appeal."[194] However, these prior challenges were to the guilt-phase reasonable doubt instructions.[195] On direct appeal, the challenge was only to the guilt-phase because the three-judge panel did not receive instructions for the penalty phase.[196] During the post-conviction proceedings, counsel cited to the guilt-phase instructions; the Nevada Supreme Court addressed this claim in its section addressing other guilt-phase instructions.[197] Thus, this claim has not been previously addressed. Post-conviction counsel was deficient in failing to raise this claim. And, because this is structural error, there is a reasonable probability of a different result.

Fifteen(D): Johnson concedes that the Nevada Supreme Court has upheld the equal and exact justice instruction. *See, e.g.*, *Leonard v. State*, 114 Nev. 1196, 1209,

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[194] Resp. at 58.

[195] Though the instructions are the same, and challenged for the same reason, Johnson specifically challenges both instructions separately. *Compare* Claim Four(A) *with* Claim Fifteen(C); *compare* Ex. 67 (Inst. 5) *with* Ex. 75 (Inst. 4).

[196] *See* 7/26/00 TT at II-90

[197] *See* Ex. 37 at 88 (citing Inst. 5); *see also* Ex. 67 (Guilt Phase Inst. 5, reasonable doubt instruction); Ex. 75 (Penalty Phase Inst. 5, hearsay instruction); Ex. 75 (Inst. 4, reasonable doubt instruction); *Johnson*, 133 Nev. at 582, 402 P.3d at 1277.

969 P.2d 288, 296 (1998). Nonetheless, Johnson raises the claim here to preserve it for appeal.

p. Claim Sixteen: prosecutorial misconduct at the 2005 penalty phase

In Claim Sixteen, Johnson argued that his death sentences are constitutionally invalid because of prosecutorial misconduct during the penalty phase.[198] As the State points out (and Johnson acknowledged in his petition), portions of this claim have previously been rejected by the Nevada Supreme Court. During his second direct appeal, the Nevada Supreme Court decided that the prosecutors had made some improper comments, but denied relief concluding those improper comments were not prejudicial: (1) comparison of Johnson to others from South Central Los Angeles; (2) referring to the victims as "boys" and "kids"; (3) incorrectly saying victim Mathew Mowen sold pizza; and (4) referring to an inadmissible letter concerning a "hit." *Johnson v. State*, 122 Nev. 1344, 1355–58, 148 P.3d 767, 775–77 (2006). Then, on appeal from denial of Johnson's initial post-conviction petition, the Nevada Supreme Court rejected an argument that Johnson's death sentences were invalid because the prosecutors commented on facts not in evidence, made a "golden rule" argument, failed to disclose witness benefits, and used the term "guilt phase." *Johnson v. State*, 133 Nev. 571, 580–81, 402 P.3d 1266, 1276–77 (2017), *reh'g denied* (Jan. 19, 2018). But the doctrine of law of the case does not apply, since prejudice from prosecutorial misconduct must be considered cumulatively. *See Sipsas v. State*, 102 Nev. 119, 125, 716 P.2d 231, 235 (1986).

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[198] Pet. at 230–58.

Alternatively, the Nevada Supreme Court's denial of portions of this claim was 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.

Turning to the merits, the State first argues that the prosecutor made a "permissible 'deduction or conclusion from the evidence'" when he labeled Johnson as the triggerman during his opening statement.[199] The State is miscomprehending Nevada Supreme Court caselaw. In *Parker*, the Nevada Supreme Court explained that deductions or conclusions are permissible during *closing* argument. 109 Nev. at 392, 849 P.2d at 1068. The statement at issue here was during the prosecutor's *opening*.[200] Since there was not yet any evidence for the prosecutor to make deductions or conclusions from, *Parker* does not apply. The State's two additional arguments concerning this portion of the claim are similarly unavailing.[201] It is immaterial that the Nevada Supreme Court made the same mistake the prosecutor did in characterizing Johnson as the shooter—this mistake is not protected by the doctrine of law of the case. *See Bejarano*, 122 Nev. at 1074, 146 P.3d at 271. Nor does it matter that defense counsel at different times attempted to cast doubt on the State's theory that Johnson was the triggerman, as they did not object to the improper statement at the outset of the State's case.

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[199] Resp. at 60 (quoting *Parker v. State*, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1993)).

[200] 4/25/05 TT V-AM at 8–10.

[201] Resp. at 60–61.

The State next argues that the prosecution did not commit misconduct by introducing evidence showing Johnson's gang affiliation, since, the State points out, Johnson himself introduced evidence about gangs in mitigation.[202] But that is irrelevant. The trial court forbid the State from introducing evidence about gangs in its case-in-chief, and the State's failure to abide by that order constituted misconduct.

The State then addresses Johnson's argument concerning other-matter evidence, asserting in a conclusory manner that the State did not commit misconduct and referring to a different section of its pleading.[203] It is not clear what the relevance of that other section is, as different standards apply to claims of ineffective assistance of counsel and prosecutorial misconduct.

Next, the State contends that the prosecution did not commit misconduct by displaying inflammatory pictures of the defendants.[204] But the State ignores Johnson's argument for *why* these pictures are inflammatory: mugshots of the defendants, along with their aliases, juxtaposed against portraits of the victims, improperly appealed to the passions and biases of the jurors.

Turning to the argument that the prosecution improperly disparaged Johnson's mitigation strategy, the State repeats the same problematic conduct in its motion to dismiss: arguing that mitigation evidence must be connected to the

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[202] *Id.* at 61.

[203] *Id.*

[204] *Id.* at 61–62.

offense and contending that no mitigation could outweigh the killing of four young men.[205] The State is wrong on both accounts. It is unconstitutional to require mitigation evidence to relate to the crimes. *See Poyson v. Ryan*, 879 F.3d 875, 890–91 (9th Cir.), cert. denied, 138 S. Ct. 2652 (2018). And "it would be difficult to find a capital case at the sentencing phase that does not have strong aggravating circumstances." *Avena v. Chappell*, 932 F.3d 1237, 1252 (9th Cir. 2019). That does not mean that prosecutors are free to commit misconduct or that mitigation evidence is unnecessary. *See id.* Indeed, despite the State presenting the same four murders in the first trial, Johnson's first jury could not decide unanimously that he deserved the death penalty.

The State next insists that Johnson's argument about impeachment is "bare and naked," and, thus, not worthy of this Court's consideration.[206] In his petition, Johnson gave both the facts and law to support this argument: the prosecutor cross-examined Johnson's brother-in-law about misdemeanor convictions, which is not a proper source of impeachment material. *See* NRS 50.095; *contra Hargrove*, 100 Nev. at 502, 686 P.2d at 225.[207]

The State also points out that the Nevada Supreme Court decided that the death sentences were not excessive and not imposed under the influence of passion, prejudice, or any arbitrary factor.[208] The Nevada Supreme Court's language,

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[205] *Id.* at 62.

[206] *Id.*

[207] Pet. at 250.

[208] Resp. at 60–61.

repeated in every capital direct appeal, does not insulate the State from every post-conviction claim that prosecutors improperly appealed to the passions and prejudices of the jury. *See Bejarano*, 122 Nev. at 1074, 146 P.3d at 271 (explaining that law of the case only applies if the facts are "substantially the same").

Finally, the State fails to respond to some portions of Johnson's claim: (1) saying during opening statement of the eligibility phase, without evidence, that Johnson "pistol whipped" one of the victims; (2) saying, without support, that "[q]uadruple homicides are almost unheard of"; (3) telling the jurors that the defendants had not worn masks, and thus had intended to kill the victims from the beginning; and (4) incorrectly saying that people who commit single homicides receive life in prison without the possibility of parole. The State has waived any challenge to these portions. *Cf. Francis*, 127 Nev. at 671 n.7, 262 P.3d at 715 n.7; *Weaver*, 121 Nev. at 502, 117 P.3d at 198–99.

q. Claim Seventeen: trial court errors during the penalty phase

Claim Seventeen alleged numerous errors committed by this Court during the penalty-phase. The State argues that all but Claim Seventeen(B)(2) entire claim is barred by the law of the case doctrine.[209] However, because the Nevada Supreme Court's prior determinations were clearly erroneous, the law of the case doctrine does not bar consideration here. Moreover, this Court must evaluate prejudice arising from errors cumulatively, and must consider these errors as part of Johnson's cumulative error claim.

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[209] Resp. at 63–64.

Claim Seventeen(B)(2) alleges that the Court incorrectly admitted evidence of an offense committed against an inmate at the Clark County Detention Center while Johnson was there. This evidence was highly prejudicial and not probative. Moreover, the evidence implicating Johnson was undercut by other witnesses. Thus, this evidence should not have been admitted, and the State is wrong to argue otherwise.[210]

r. Claim Eighteen: juror misconduct during penalty-phase

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.[211] This juror also indicated she was taking notes so that she could write a book about Johnson's case.[212] The State argues that this claim is barred by law of the case. It is not. Though this Court previously considered the claim, this Court failed to ever rule on trial counsel's post-hearing brief on it.[213] This issue has not been presented to the Nevada Supreme Court, and thus law of the case does not apply to this issue. *See, e.g.*, *Hsu*, 123 Nev. at 629–30, 173 P.3d at 728 ("Under the law of the case doctrine, '[w]hen an *appellate* court states a principle or rule of law necessary to a decision, the principle or rule becomes the law of the case . . . .'" (first modification in original,

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[210] Resp. at 64.

[211] Pet. at 275–79.

[212] Ex. 209.

[213] *See* Post-Evid. Hr'g Supp. Points & Authorities (June 22, 2005). This Court had previously denied the motion for new trial in open court. *See* 6/14/05 TT at 70–74.

emphasis added, internal citation omitted)). This issue was also not raised as a claim during the post-conviction proceedings. 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.

s. Claim Nineteen: no jury finding that Johnson was the triggerman

In Claim Nineteen, Johnson argues that his death sentences are unconstitutional because the jury did not find that he was the triggerman in the four killings.[214] The State points out in response that the Nevada Supreme Court made an "actual finding that Johnson was 'the triggerman.'"[215] That is exactly the problem: the Nevada Supreme Court, *not* the jury, found that Johnson shot the four victims. Although that might have been proper in 1986 when the United States Supreme Court decided *Cabana v. Bullock*, 474 U.S. 376 (1986), the rationale of *Cabana* has been eviscerated by the Supreme Court's *Apprendi* line of cases, holding that any factors increasing a potential sentence must be found by a jury beyond a reasonable doubt. *See, e.g.*, *Hurst v. Florida*, 136 S. Ct. 616 (2016). The findings required by *Enmund* and *Tison*, just like the finding of an aggravating factor, increases a potential sentence from life imprisonment to death. Consequently, *Cabana*, along with *Browning v. State*, 124 Nev. 517, 533, 188 P.3d 60, 71 (2008), is no longer good law.

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[214] Pet. at 280–90.

[215] Resp. at 66 (quoting Nevada Supreme Court decisions in Johnson's three previous appeals).

Johnson recognizes, though, that this Court cannot overrule the United States Supreme Court or the Nevada Supreme Court. Nor does it have to in order to grant Johnson relief. The Nevada Supreme Court did not make the statements it did in Johnson's previous appeals in the context of a claim under *Enmund* and *Tison*, so it did not explicitly find the *Enmund/Tison* factors. *Contra Browning*, 124 Nev. at 533, 188 P.3d at 71–72 (explicitly making "determination of culpability under *Enmund*"). And the Nevada Supreme Court did not consider the new evidence Johnson presents in this petition, so law of the case does not bar this Court's review. *See Bejarano v. State*, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006) (explaining that law of the case only applies if the facts are "substantially the same").

t. Claim Twenty: the State's penalty-phase presentation of Johnson's juvenile record violated his constitutional rights

In Claim Twenty, Johnson argued that the State's reliance on his juvenile misdeeds during the penalty phase violated the Eighth Amendment.[216] The State responds to this claim by pointing out that Johnson raised a similar claim in his direct appeal from the third penalty hearing.[217] But 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.[218]

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[216] Pet. at 291–98.

[217] *See* Resp. at 67.

[218] Ex. 18 at 29–31.

Although Johnson cited *Roper v. Simmons*, he did so as part of the prejudice analysis, not as a separate Eighth Amendment claim.[219] 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.

u. Claim Twenty-One: death penalty is unconstitutional

In Claim Twenty-One, Johnson argues that the capital sentencing scheme in Nevada is unconstitutional.[220] Johnson raised subsections (C) through (F) of this claim in his initial state post-conviction proceedings. But the Nevada Supreme Court did not address these arguments on the merits, instead concluding that they should have been raised on direct appeal. *Johnson*, 133 Nev. at 577 n.3, 402 P.3d at 1274 n.3. Appellate counsel was ineffective for not raising this claim. In addition, the Nevada Supreme Court's consideration of parts of this claim does not prevent this Court's consideration of the entire challenge to the death penalty in Nevada, as pled in Claim Twenty-One. Finally, to the extent that law of the case does apply to any portion of this claim (despite a lack of a decision on the merits), the Nevada Supreme Court's denial was 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.

v. Claim Twenty-Two: inadequate theory of kidnapping

Trial and appellate counsel failed to challenge the kidnapping in this case as incidental to the robbery. The Nevada Supreme Court denied this claim on the basis

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[219] *Id.* at 30–31.

[220] Pet. at 299–323.

that post-conviction counsel "fail[ed] to explain how the kidnappings were incidental to the robberies." *Johnson*, 122 Nev. at 581, 402 P.3d at 1277. Post-conviction counsel was deficient in failing to provide greater elaboration; that deficiency was prejudicial because this claim is meritorious. Because the Nevada Supreme Court's prior determination was clearly erroneous, and because failing to consider this claim on the merits would result in a miscarriage of justice, the law of the case does not bar consideration of this claim.

In fact, considerable evidence suggested that the kidnappings were incidental. As explained in *Mendoza v. State*, 122 Nev. 267, 275, 130 P.3d at 181, there are three circumstances where kidnapping and robbery can arise from the same course of conduct any movement or restraint must: (1) stand alone with independent significance from the act of robbery itself; (2) create a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or (3) involve movement, seizure, or restraint substantially in excess of that necessary to its completion.[221]

None of these circumstances apply here. Though the crime scene reflected that the victims were bound, the evidence of moving them was limited. Tod Armstrong testified that Johnson said "when they got there that there was somebody outside and that they went inside."[222] Charla Severs added to this by

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[221] As described above, the jury was not properly instructed on kidnapping. *See* Claim Four(H)–(I); *see also* § II.A.2.d above.

[222] 6/6/00 TT at II-184.

testifying that Johnson told this person "[t]o get his fucking ass in the house."[223] Armstrong also testified, "One person showed up, and then they brought him inside, and then another person showed up, I guess, later, somebody said."[224]This testimony does not establish kidnapping because it does not establish movement that stands alone from the robbery, create an enhanced risk of danger, or movement substantially in excess of the movement required for robbery.

Bryan Johnson testified about binding the victims in duct tape:

> He said that once they got up to the house, there was somebody standing outside drinking a beer and they continued to go towards the person with guns. They told him to go inside the house. Once they got in, there was two other people inside the house. They started to duct tape 'em, ask 'em where money was. Someone knocked at the door. They brought him in the house, duct taped him also . . .[225]

But, here, too, none of the three *Mendoza* circumstances apply because restraining the victims was part of the robbery.

Only one instance arguably qualifies: Armstrong and Bryan Johnson testified that Johnson took one person to another room to shoot him.[226] But here, the movement was no longer related to the robbery.[227]

And this error was not harmless. The State's theory of kidnapping was mere restraint:

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[223] 6/7/00 TT at III-55.

[224] 6/6/00 TT at II-185.

[225] 6/7/00 TT at III-144.

[226] 6/6/00 TT at II-186; *see also* 6/7/00 TT at III-145.

[227] As discussed above, the kidnapping-murder theory is invalid because kidnapping cannot serve as the predicate to murder while murder serves as the predicate to kidnapping. *See* § II.A.2.d above.

> Count VII through X, kidnapping with a deadly weapon. Instruction Number 26 tells us that kidnapping is simply confining or concealing somebody for the purpose of committing robbery or the purpose of committing murder. And you'll gather—you'll glean from the instructions that you must find the victims were physically restrained. Were these four boys confined in the Terra Linda household so that Donte and his partners could rob and murder them? And is there physical restraint when you see the duct tape at their wrists and at their ankles? The overwhelming evidence in this case is that Donte and his partners entered that home to rob these boys, and they were taped, they were physically restrained for that purpose.[228]

Under *Mendoza*, this theory of kidnapping is not sufficient as a matter of law. *Mendoza*, 122 Nev. at 181, 130 P.3d at 181.

Additionally, appellate counsel was ineffective in failing to seek reversal of Johnson's conviction because the jury improperly heard evidence of a witness's misdemeanors. The Nevada Supreme Court denied this claim during the prior post-conviction proceedings because "the trial court alleviated any prejudice when it sustained a defense objection and instructed the jury to disregard the exchange." *Johnson*, 133 Nev. at 585, 402 P.3d at 1279. But, as the Nevada Supreme Court has recognized, a curative instruction is not always sufficient. *See Emmons v. State*, 107 Nev. 53, 60, 807 P.2d 718, 722 (1991) *overruled on other grounds by Harte v. State*, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000). Here, the curative instruction was not sufficient because the State elicited information that was clearly not admissible. Nor was this error harmless because it undermined an important defense witness. Thus the Nevada Supreme Court's prior determination was clearly erroneous.

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[228] 6/8/00 TT at IV-201.

w. Claim Twenty-Three: elected judges, fair appellate review, and judicial bias

Claim Twenty-Three raises allegations that Judge Sobel, Justice Becker, and Judge Gates suffered judicial bias.[229] The claim also alleged that the Nevada Supreme Court's mandatory appellate review and the state's use of elected judges is unconstitutional.[230]

First, Judge Sobel suffered from bias because he, at least once, made clear that an attorney was "'f***ed' because he hadn't contributed while others had" to the judge's re-election bid. *In the Matter of Honorable Jeffrey Sobel* at 2 (Comm. on Jud. Discipline, July 19, 2005). The judge also asked an attorney to have to explain why that attorney attended a campaign fundraiser for another candidate. *Id.* at 2–3. These behaviors, for which the Commission on Judicial Discipline permanently barred Judge Sobel from ever serving as a judicial officer, reflect bias against individuals who could not contribute to his campaign. The State argues that this claim fails to specify bias against Johnson.[231] However, as the Supreme Court has recognized, campaign contributions can create judicial bias. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009). Here, Johnson's inability to contribute to Judge Sobel, and Judge Sobel's established bias against litigants who cannot contribute, evidences both actual and an unconstitutional potential for bias.

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[229] Pet. at 326–30.

[230] *Id.* at 330–34.

[231] Resp. at 69.

Second, Justice Becker was negotiating for employment with the Clark County District Attorney's office at the same time she was serving as a Nevada Supreme Court Justice on Johnson's case. The State argues that this Court has no supervisory power over the Nevada Supreme Court, relying on *Evans v. State*, 117 Nev. 609, 641–43, 28 P.3d 498, 519–21 (2001).[232] But *Evans* is about a different issue: namely, a challenge to the Nevada Supreme Court's internal operating procedures. *Id.* The issue here is a due process claim long recognized in Constitutional law. *See, e.g.*, *Tumey v. Ohio*, 273 U.S. 510 (1927); *see also Caperton*, 556 U.S. at 873 (regarding bias of appellate judge). Thus, the State is wrong to assert that this Court cannot decide this claim.

Third, Judge Lee Gates's law clerk had served as an intern at the Clark County District Attorney's office and brainstormed on Johnson's case with the prosecutors.[233] The State argues that this is a bare, unsupported allegation, but it was the State that first moved to disqualify Judge Gates.[234] That Judge Gates's clerk worked assisting the State in prosecuting this case creates too high a probability of bias to be constitutionally tolerable. *See Caperton*, 556 U.S. at 877.

Fourth, the Nevada Supreme Court's review of Johnson's sentence was unconstitutional. Both NRS 34.177.055(2) and *Gregg v. Georgia*, 428 U.S. 153, 195

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[232] Resp. at 70 (citing *Evans v. State*, 117 Nev. 609, 641–43, 28 P.3d 498, 519–21 (2001) *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015).

[233] *See* Ex. 219 (Aff. Of Robert J. Daskas, ¶¶6–11); *see also* Ex. 220. Trial counsel was ineffective for failing to join the State's motion.

[234] *See* Ex. 219.

(1976) require appellate review of death sentences. However, the Nevada Supreme Court has never explained the standards it applies to conduce this review. The State cites the statute and faults Johnson for failing to explain what additional standards are required.[235] But, the statute itself fails to explain how the Nevada Supreme Court reviews for "passion, prejudice, or any arbitrary factor" or "whether the sentence of death is excessive." NRS 177.055(2).

Fifth, the use of elected judges is unconstitutional. The State argues that "[a]ny finding made by this Court about the merits of Johnson's claims would thus be tainted by what he alleges is the inherent bias of an elected judiciary."[236] However, even in suffering this inherent bias, this Court can recognize that inherent bias and hold that elected judges are unconstitutional.

x. Claim Twenty-Four: wrong standard for outweighing determination

Claim Twenty-Four has two parts. In the first part, Johnson argued that his death sentences were unconstitutional because the trial court failed to instruct the jury that it could only find Johnson eligible for the death penalty if the mitigating evidence did not outweigh the aggravating evidence beyond a reasonable doubt.[237] Johnson acknowledges that the Nevada Supreme Court has rejected this claim. *See Castillo v. State*, 135 Nev. Adv. Op. 16, 442 P.3d 558 (2019). Nevertheless, Johnson raises the argument now to preserve the challenge for later review.

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[235] Resp. at 70.

[236] Resp. at 71.

[237] Pet. at 335–36.

The State does not actually address the arguments in the second part of Claim Twenty-Four—that defense counsel were ineffective for failing to request an instruction requiring a standard of beyond a reasonable doubt for the outweighing determination.[238] The State instead says that this part fails for the same reason the first part fails: the Nevada Supreme Court's recent decisions concerning *Hurst v. Florida*.[239] But the Nevada Supreme Court has never considered this argument, and, indeed, Johnson is in a relatively unique position. During his direct appeal from his second penalty hearing, the Nevada Supreme Court held that the outweighing determination in Nevada "is in part a factual determination, not merely discretionary weighing," and as a result must be done by a jury beyond a reasonable doubt. *Johnson v. State*, 118 Nev. 787, 802–03, 59 P.3d 450, 460 (2002), *overruled by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011). The Nevada Supreme Court retracted this statement a few years later. But during the third penalty phase in 2005, the Nevada Supreme Court's caselaw required outweighing beyond a reasonable doubt. Indeed, the holding is the law of the case. Counsel's failure to request this instruction constituted ineffective assistance.

y. Claim Twenty-Five: unrecorded bench conferences

The State argues that this claim is barred by the law of the case. But because the Nevada Supreme Court's prior determination was clearly erroneous, that doctrine cannot apply here.

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[238] Pet. at 337.

[239] Resp. at 71–72.

z. **Claim Twenty-Six: violation of international law**

The State argues that this claim is barred by the law of the case. But the Nevada Supreme Court's prior determination failed to consider whether trial and direct appeal counsel were ineffective for failing to raise these challenges. *See Johnson*, 133 Nev. 571, 577 n.3, 402 P.3d 1266, 1274 n.3 (2017). They were.

aa. **Claim Twenty-Seven: implicit bias in jury**

Death-qualified jurors harbor greater racial biases than jurors eliminated by death qualification.[240] The State does not dispute this. Because Johnson's jury was death-qualified, its jurors harbored greater racial biases than the rest of the juror pool. This violates the Eighth Amendment requirement of reliability in death penalty cases. *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) ("if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."). The State argues that Johnson has failed to cite any facts to support this, but this is irrelevant because the State has not disputed the more fundamental point that death qualified jurors are more likely to be racially biased.[241] Post-conviction counsel was deficient for failing to raise this claim, and because the claim is meritorious, there is a reasonable probability of a different result.

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[240] Justin D. Levinson, Robert J. Smith, Danielle M. Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Death Penalty States*, 89 N.Y.U. L. Rev. 513, 521 (2014).

[241] Resp. at 73.

bb. Claim Twenty-Eight: violation of Johnson's right to freedom of association.

In Claim Twenty-Eight, Johnson argued that his death sentences are invalid because of unconstitutional references during the penalty phase to his gang affiliation.[242] The State responds by pointing out Johnson's references to gangs during his case in mitigation.[243] But that is irrelevant. The trial court forbid the State from introducing evidence about gangs in its case-in-chief, and the State's failure to abide by that order was structural error and prejudicial per se. *See Dawson v. Delaware*, 503 U.S. 159, 167 (1992); *Flanagan v. State*, 109 Nev. 50, 56, 846 P.2d 1053, 1058 (1993).

cc. Claim Twenty-Nine: Johnson is ineligible for the death penalty

In Claim Twenty-Nine, Johnson argued that he is categorically ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002), and *Roper v. Simmons*, 543 U.S. 551, 569 (2005).[244] The State first argues that this claim is barred in part by law of the case.[245] The State is incorrect. On direct appeal, Johnson argued that the trial court improperly allowed evidence of juvenile convictions that was more prejudicial than probative.[246] Although Johnson cited *Roper v. Simmons*, he did so as part of the prejudice analysis, not as a separate

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[242] Pet. at 345–46.
[243] Resp. at 67.
[244] Pet. at 347–52.
[245] Resp. at 74.
[246] Ex. 18 at 29–31.

Eighth Amendment claim.[247] He never before this petition argued that impaired intellectual functioning, youth at the time of the offenses, or a combination of those factors exempted him from the death penalty. Thus, law of the case does not bar this Court's consideration of Claim Twenty-Nine.

The State also argues that Johnson loses on the merits of his claim. According to the State, Johnson has to establish he is intellectually disabled to succeed. The State miscomprehends Johnson's claim. It is the *rationale* of *Atkins* and *Roper* that exempt him from the death penalty. Though the immediate consequence of the decisions in *Atkins* and *Roper* was to establish a categorical ban on executing certain classes of individuals, the rationale driving these decisions was to bring the imposition of capital punishment in line with a properly individualized assessment of moral culpability. Deficits in reasoning, judgment, and impulse control—which both juveniles and people who are intellectually disabled possess, through no fault of their own—necessarily affect the degree to which they can be held morally culpable for their actions. Pointing to scientific and sociological studies, the Court in *Roper* explained that "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young," often leading to "impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 554. Similarly, in *Atkins*, the Court focused on the cognitive deficits that diminish the culpability of people with intellectual disabilities. *Atkins*, 536 U.S. at 305.

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[247] *Id.* at 30–31.

The same concerns underlying *Roper* and *Atkins* are present here. Johnson was twenty-one years old at the time of the crimes. As the Court in *Roper* acknowledged, "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns age of 18." *Roper*, 543 U.S. at 574. Indeed, what science tells us is that full development of the brain is not achieved until about the age of twenty-five. *See Gall v. United States*, 552 U.S. 38, 58 (2007). And, when Johnson's young age is combined with his borderline intellectual functioning, he becomes the exact person the Eighth Amendment—as interpreted in *Atkins* and *Roper*—protects from the death penalty. Johnson simply does not fall within the narrow category of the worst offenders for whom the death penalty is reserved.

dd. Claim Thirty: cumulative error

In Claim Thirty, Johnson argues his convictions and death sentences are invalid because of the cumulative errors in his case.[248] The State contends that law of the case bars this claim because Johnson raised cumulative error in his initial post-conviction petition.[249] But the claim in this petition is different because it relies on the cumulative effect of a larger number of errors. Johnson's initial post-conviction counsel should have raised all of the underlying claims Johnson raises now. But, because counsel was ineffective, this Court has never considered the cumulative effect of these claims. Thus, law of the case does not prevent this Court's review. *See Bejarano*, 122 Nev. at 1074, 146 P.3d at 271 (explaining that law of the

[248] Pet. at 354–56.

[249] Resp. at 75.

case only applies if the facts are "substantially the same"). The State does not address the merits of Claim Thirty.

B. Procedurally Barring Johnson's Claims Will Result in a Fundamental Miscarriage of Justice

Procedural default is excused if barring a claim "amounts to a fundamental miscarriage of justice." *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537 (internal quotation marks omitted). "[T]his standard can be met where the petitioner makes a colorable showing he is . . . ineligible for the death penalty." *Id.* And the petitioner shows he is ineligible for the death penalty by establishing a reasonable probability that he is actually innocent of the death penalty. *See Leslie v. Warden*, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002). Johnson can make this showing for several reasons.

First, the jury failed to make either of the showings required by the United States Supreme Court for death eligibility—that (1) Johnson actually killed, attempted to kill, or intended to kill the victim, or (2) that Johnson was a major participant in the offense and displayed a reckless indifference to human life. *See Tison v. Arizona*, 481 U.S. 137, 151 (1987); *Enmund v. Florida*, 458 U.S. 782, 797 (1982); *see also Hurst v. Florida*, 136 S. Ct. 616 (2016) (holding that factors making defendant eligible for death penalty must be proven to jury beyond a reasonable doubt).[250] And, for the reasons provided in Johnson's petition, he has shown by clear and convincing evidence that no reasonable juror would have made this finding.

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[250] *See* Pet. at 280–90.

Second, because of errors with the guilt-phase jury instructions, no valid aggravating factor supports Johnson's death sentence.[251] For example, the court instructed the jury on five different theories for first-degree murder: (1) conspiracy, (2) aiding and abetting, (3) willful, deliberate, and premeditated murder as a principal (4) felony-murder kidnapping as a principal, and (5) felony-murder robbery as a principal. However, all but one of these theories, as described in Johnson's petition, suffers from a constitutional defect, leaving only one "valid" theory of first-degree murder: killing in the perpetration of a robbery, as a principal. This lone theory does not cure the plethora of errors infecting the rest of the jury instructions. *See Hedgpeth v. Pulido*, 555 U.S. 57, 61 (2008); *Neder v. United States*, 527 U.S. 1, 11 (1999).

Third, Johnson has made a colorable showing that, in light of the compelling mitigating evidence presented in the petition, no reasonable juror would have found him death eligible, especially had they been instructed on the correct burden of proof under *Hurst*.[252] Johnson recognizes that the Nevada Supreme Court has refused to consider new mitigating evidence when determining whether there has been a fundamental miscarriage of justice. *See Lisle v. State*, 131 Nev. 356, 362–68, 351 P.3d 725, 730–34 (2015). *Lisle* is wrongly decided.

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[251] *See id.* at 88–104.

[252] *See id.* at 175–223, 335–37.

Fourth, because of his young age and borderline intellectual functioning, separately and in combination, Johnson is ineligible for the death penalty.[253] This is the only aspect of Johnson's innocence that the State addresses.[254] But the State miscomprehends the argument. Johnson does not argue that the explicit holdings of *Roper* and *Atkins* apply; he argues that the rationale of *Roper* and *Atkins* apply. The United States Supreme Court in those cases forbid the death penalty for people who, as a class, are less culpable and, consequently, less deserving of execution—a punishment that would do little to serve the purposes behind the death penalty. The same reasons that make intellectually disabled people and minors less culpable support Johnson's argument that he is categorically exempt from the death penalty.

C. The Doctrine of Law of the Case does not Bar this Court's Review of Johnson's Claims

The State argues that the doctrine of law of the case bars a number of claims.[255] This is incorrect. "The doctrine of law of the case provides that the law or ruling of a first appeal must be followed in all subsequent proceedings, both in the lower court and on any later appeal." *Hsu v. County of Clark*, 123 Nev. 625, 629, 173 P.3d 724, 728 (2007); *see also Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) ("The law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same.").

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[253] *See id.* at 347–53.

[254] Resp. at 13–15.

[255] *See, e.g., id.* at 8, 14, 21.

But this rule is not absolute. *Nika v. State*, 124 Nev. 1272, 1298–99, 198 P.3d 839, 857 (2008) ("The doctrine, however, is not absolute, and this court has the discretion to revisit the wisdom of its legal conclusions if warranted."). Law of the case is not jurisdictional. *Hsu*, 123 Nev. at 630, 173 P.3d at 728. The Nevada Supreme Court has recognized exceptions where a prior determination was "clearly erroneous," where applying the doctrine would result in a miscarriage of justice, or where there is a change of law. *Id.* at 631–32, 173 P.3d at 729–30. Additionally, the Nevada Supreme Court has indicated that where there is "new or different evidence" law of the case is not appropriate. *Lisle*, 131 Nev. at 360, 351 P.3d at 729

Here, law of the case cannot apply because, as indicated above, Johnson's claims are meritorious. Thus, the courts' prior determinations of these issues were clearly erroneous. And applying the law of the case doctrine would result in a fundamental miscarriage of justice.[256]

D. Laches does not Bar Consideration of Johnson's Claims

The laches doctrine, found in NRS 34.800, does not bar Johnson's claims for three reasons.[257] NRS 34.800 does not apply if delay in filing a petition cannot be attributable to petitioner. *State v. Powell*, 122 Nev. 751, 758–59, 138 P.3d 453, 457 (2006). In *Powell*, the Nevada Supreme Court noted that petitioner's judgment was entered in 1991; his direct appeal was not resolved until 1997 because the Nevada Supreme Court "erroneously decided that a new rule of criminal procedure

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[256] The specific claims where there is new or different evidence are noted in the discussion above.

[257] Resp. at 4–5 (raising laches).

announced by the Supreme Court after Powell's trial did not apply to his case." *Id.* Nev. at 758, 138 P.3d at 458. The Nevada Supreme Court noted other delays in Powell's case, including Powell's supplements, a Nevada Supreme Court reversal, and an evidentiary hearing. *Id.* at 759, 138 P.3d at 458. All of these, the court concluded, "indicate[d] that Powell has not inappropriately delayed this case." *Id.* Thus, laches could not apply. *Id.*

Johnson's case is indistinguishable. This Court first entered judgment on October 3, 2000.[258] The Nevada Supreme Court reversed and remanded for a new penalty phase. *See Johnson v. State*, 118 Nev. 787, 59 P.3d 450 (2002) *overruled on other grounds by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011). After the remanded penalty phase, Johnson was, again, sentenced to death in 2005.[259] The Nevada Supreme Court decided his second direct appeal in December of 2006. *Johnson v. State*, 122 Nev. 1344, 148 P.3d 767 (2006). Like, *Powell*, this Court allowed Johnson to supplement his post-conviction petition.[260] The Nevada Supreme Court decided the appeal from that petition in 2017. *Johnson v. State*, 133 Nev. 571, 402 P.3d 1266 (2017). Johnson filed the instant petition within a year of the issuance of remittitur from that appeal. Thus, none of the delay that has occurred in this case is attributable to Johnson; applying *Powell*, the laches doctrine cannot bar this petition.

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[258] *See* Ex. 6. This judgment was amended six days later. *See* Ex. 7.

[259] Ex. 17.

[260] *See* Ex. 24; Ex. 28.

Regardless, a party seeking to invoke an equitable defense must do so with clean hands. *See, e.g.*, *Truck Ins. Exchange v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 637–38, 189 P.3d 656, 662 (2008) ("he who comes into equity must come with clean hands."). The State lacks clean hands here because of its *Brady* violation and the extensive prosecutorial misconduct that has occurred throughout the case.[261]

Finally, even if laches did apply to Johnson's petition, Johnson can overcome the presumption of prejudice. Johnson's original trial was in 2000; he was tried again in 2005, and this Court allowed testimony to be read into the record where witnesses were unavailable.[262]

E. None of the Procedural Bars Raised by the State Can Be Constitutionally Applied

This Court cannot constitutionally apply procedural default to Johnson's claims because these defaults are inconsistently applied.[263] Refusing to consider these claims on the basis of these default rules would violate Johnson's due process right to adequate notice and his equal protection right to consistent treatment of similarly situated litigants. *See, e.g.*, *Village of Willowbrook v. Olech*, 528 U.S. 562, 564–65 (2000) (per curiam); *Myers v. Ylst*, 897 F.2d 417, 421 (9th Cir. 1990) (equal protection clause requires consistent application of state law to similarly situated litigants); *see also* U.S. Const. amend. XIV: Nev. Const. art. 1 § 8, ¶5.

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[261] *See* § II.A.1.b above; *see also* § II.A.2.e above; § II.A.2.p above.

[262] *See* 4/26/05 (AM) TT at 30.

[263] Johnson acknowledges that the Nevada Supreme Court has rejected similar arguments. *See, e.g.*, *State v. Eighth Jud. Dist. Ct.*, 121 Nev. 225, 236, 112 P.3d 1070, 1077 (2005). However, these cases were wrongly decided and Johnson raises the issue here to preserve it for appeal.

For example, NRS 34.726 does not contain an express limitations period for the time during which an otherwise "untimely" state petition must be filed, and the Nevada Supreme Court has not imposed any time frame. *See Riker*, 121 Nev. at 235, 112 P.3d at 1076, *State v. Bennett*, 119 Nev. 589, 597, 81 P.3d 1, 6-7 (2003); *Bennett v. State*, 111 Nev. at 1103, 901 P.2d at 679. Rather, such petitions must be filed within a "reasonable" time after the claim becomes available. *See, e.g.*, *Rippo v. State*, 134 Nev. 411, 420, 423 P.3d 1084, 1095–96 (2018).[264] This lack of clarity results in inconsistent application.

Moreover, the Nevada Supreme Court has disregarded default rules and addressed constitutional claims, in the exercise of its complete discretion to do so, in a multitude of cases. *See, e.g., Rippo v. State*, 122 Nev. 1086, 1095, 146 P.3d 279, 285 (2006) (issue raised by Nevada Supreme Court sua sponte in 2006, when conviction and sentence final in 1998); *Hill v. State*, 114 Nev. 169, 178-79, 953 P.2d 1077, 1084 (1998) (addressing merits claims raised for first time on appeal from denial of third post-conviction petition because claims "of constitutional dimension which, if true, might invalidate Hill's death sentence and the record is sufficiently developed to provide an adequate basis for review."); *Bejarano v. Warden*, 112 Nev. 1466, 1471 n.2, 929 P.2d 922, 926 n.2 (1996) (addressing claim on merits despite default rules); *Bennett*, 111 Nev. at 1103, 901 P.2d at 679 (addressing claims asserted to be barred by default rules; "[w]ithout expressly addressing the

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[264] *Rippo* clarified that for claims of ineffective assistance of post-conviction counsel, a reasonable time was one year; *Rippo* offered no clarification for other kinds of claims. *Rippo*, 134 Nev. at 422, 423 P.3d at 1097.

remaining procedural bases for the dismissal of Bennett's petition, we therefore choose to reach the merits of Bennett's contentions"); *Ford v. Warden*, 111 Nev. 872, 886-87, 901 P.2d 123, 131-32 (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules); *Lane v. State*, 110 Nev. 1156, 1168, 881 P.2d 1358, 1366-67 (1994) (vacating aggravating factor finding based on instructional error on mandatory review without noting issue not raised at trial or on appeal); *Powell v. State*, 108 Nev. 700, 705-06, 838 P.2d 921, 924-25 (1992) (addressing issue of delay in probable cause determination without indicating that issue not raised at trial or on appeal); *Lord v. State*, 107 Nev. 28, 38, 806 P.2d 548, 554 (1991) ("Normally a proper objection is a prerequisite to our considering the issue on appeal. However, since this issue is of constitutional proportions, we elect to address it now.") (citation omitted); *Bejarano v. State*, 106 Nev. 840, 843, 801 P.2d 1388, 1390 (1990) (on appeal from denial of collateral relief, "[w]e consider sua sponte whether the failure to present such [mitigating] evidence constitutes ineffective assistance"); *Grondin v. State*, 97 Nev. 454, 455-57, 634 P.2d 456, 457-58 (1981) (entertaining allegation of ineffective assistance of post-conviction counsel raised for the first time on appeal of denial of post-conviction relief and remanding for an evidentiary hearing without requiring allegations of "cause" in a successive petition); *Krewson v. Warden*, 96 Nev. 886, 887, 620 P.2d 859, 859 (1980) (court obligated to consider constitutional issues raised for the first time on appeal); *Gunter v. State*, 95 Nev. 319, 320, 594 P.2d 708, 709 (1979) (court "obligated" to

consider constitutional issues raised for the first time on appeal); *Stocks v. Warden*, 86 Nev. 758, 760-61, 476 P.2d 469, 470 (1978) (court "choose[s] to entertain" second post-conviction petition which could have been barred); *Warden v. Lischko*, 90 Nev. 221, 222-23, 523 P.2d 6, 7 (1974) (trial court's "choice" to rule on barred claim "within its discretionary power"); *Hardison v. State*, 84 Nev. 125, 128, 437 P.2d 868, 870 (1968) ("[S]ince appellant's contentions are grounded on constitutional questions this court is obligated to consider them on appeal.").

The Nevada Supreme Court's inconsistent application of the procedural default rules in habeas cases renders them unconstitutional and this Court should decline to apply them.

F. This Court Must Consider all Errors Cumulatively, Including Those Previously Rejected by the Nevada Supreme Court

Constitutional errors that may be harmless in isolation can have the cumulative effect of rendering the petitioner's trial fundamentally unfair. *See Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985); *Parle v. Runnels*, 505 F.3d 922, 927–28 (9th Cir. 2007). Thus, this Court must consider the cumulative effect of all the errors listed above as an independent claim for relief. Additionally, this Court must consider the cumulative effect of multiple errors in assessing whether any particular error has been prejudicial in combination with other errors infecting the trial. *Id.* at 927; *see Chambers v. Mississippi*, 410 U.S. 284, 298, 302–03 (1973).

The Nevada Supreme Court has long engaged in cumulative error analysis in habeas cases. *See, e.g.*, *Evans v. State*, 117 Nev. 609, 647–48, 28 P.3d 498, 524 (2001) ("The cumulative effect of multiple errors may violate a defendant's

constitutional right to a fair trial even though errors are harmless individually.") *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015). Thus, this Court must consider each error in its analysis of Johnson's petition.

III. CONCLUSION

For all the above reasons, Johnson urges the Court to deny the State's Motion and grant Johnson's Petition. Alternatively, if this Court is not in a position to grant the Petition without further factual development, it should deny the State's Motion and grant Johnson's separately filed Motion for Discovery and Motion for an Evidentiary Hearing.

DATED this 13th day of December, 2019.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

/s/ Randolph M. Fiedler
RANDOLPH M. FIEDLER
Assistant Federal Public Defender

/s/ Ellesse Henderson
ELLESSE HENDERSON
Assistant Federal Public Defender

Attorneys for Petitioner

CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(4) and 7.26(b)(5), the undersigned hereby certifies that on December 13, 2019 a true and accurate copy of the foregoing REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

Steven S. Owens
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

/s/ Celina Moore
An Employee of the
Federal Public Defenders Office

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Steven D. Grierson
CLERK OF THE COURT

EXH

RENE L. VALLADARES
Federal Public Defender
Nevada Bar No. 11479
RANDOLPH M. FIEDLER
Assistant Federal Public Defender
Nevada Bar No. 12577
Randolph_Fiedler@fd.org
ELLESSE HENDERSON
Assistant Federal Public Defender
Nevada Bar No. 14674C
Ellesse_Henderson@fd.org
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577

Attorneys for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

DONTE JOHNSON, Petitioner, v. WILLIAM GITTERE, Warden of Ely State Prison, and AARON FORD, Attorney General of the State of Nevada, Respondents.	Case No. A-19-789336-W Dept. No. 6 **EXHIBITS IN SUPPORT OF REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** **(DEATH PENALTY CASE)**

EXHIBITS 215 – 222

215. *Holloway v. Baldonado*, No. A498609, Plaintiff's Opposition to Motion for Summary Judgment, District Court of Clark County, August 1, 2007

216. *Holloway v. Baldonado*, No. A498609, Opposition to Motion for Summary Judgment Filed by Defendants Stewart Bell, David Roger, and Clark County, District Court of Clark County, filed January 16, 2008

217. Letter from Charla Severs, dated September 27, 1998

218. Decision and Order, *State of Nevada v. Johnson*, Case No. C153154, District Court of Clark County, filed April 18, 2000

219. State's Motion to Disqualify the Honorable Lee Gates, *State of Nevada v. Johnson*, Case No. C153154, District Court of Clark County, filed April 4, 2005

220. Affidavit of the Honorable Lee A. Gates, *State of Nevada v. Johnson*, Case No. C153154, District Court of Clark County, filed April 5, 2005

221. Motion for a New Trial (Request for Evidentiary Hearing), *State of Nevada v. Johnson*, Case No. C153154, District Court of Clark County, filed June 23, 2000

222. Juror Questionnaire of John Young, *State of Nevada v. Johnson*, Case No. C153154, District Court of Clark County, dated May 24, 2000

CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(4) and 7.26(b)(5), the undersigned hereby certifies that on December 13, 2019 a true and accurate copy of the foregoing EXHIBITS IN SUPPORT OF REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

Steven S. Owens
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

/s/ Celina Moore
An Employee of the
Federal Public Defender
District Of Nevada

EXHIBIT 215

EXHIBIT 215

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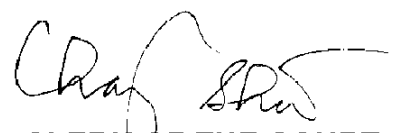

CLERK OF THE COURT

Richard A. Harris, Esq.
Nevada State Bar No. 505
RICHARD HARRIS LAW FIRM
801 S. Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 385-1400
William C. Jeanney, Esq.
Nevada State Bar No. 1235
BRADLEY, DRENDEL & JEANNEY, LTD.
401 Flint Street
Reno, Nevada 89501
Telephone: (775) 335-9999
Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

LOVE HOLLOWAY, Plaintiff, vs. PETER BALDONADO, individually and in his official capacity as former investigator for the Office of the Clark County District Attorney; STEWART BELL, individually and in his capacity as former Clark County District Attorney; DAVID ROGER, individually and in his official capacity as Clark County District Attorney; BILL YOUNG, individually and in his official capacity as Sheriff of the Las Vegas Metropolitan Police Department; CLARK COUNTY, a political subdivision of the State of Nevada, on relation of its Office of the Clark County District Attorney, and on relation of its Las Vegas Metropolitan Police Department; CITY OF NORTH LAS VEGAS, a municipal corporation existing under the laws of the State of Nevada in the County of Clark ex rel. its North Las Vegas Police Department; DOES I through X; inclusive; and ROES I through X, inclusive, Defendants	Case No. A498609 Dept. No. XVI

PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiff, above named, acting by and through her counsel of record, and hereby opposes "Sheriff Bill Young's Motion for Summary Judgment," filed herein on June 25, 2007. This opposition is made pursuant to NRCP 56 and is based on the accompanying

Memorandum of Points and Authorities, together with all other matters properly of record.

DATED this 1st day of August, 2007.

BRADLEY, DRENDEL & JEANNEY, LTD.

By _____
William C. Jeanney, Esq.
401 Flint Street
Reno, Nevada 89501
Telephone: (775) 335-9999
Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

FACTUAL BACKGROUND

As explained below, Young has failed to comply with NRCP 56(c) (as amended effective 01/01/05). To facilitate consideration of motions for summary judgment, movants are required to list each and every material fact that allegedly is not in dispute and to support the enumeration with appropriate references to the summary judgment record. This has the laudatory effect of forcing the movant to 'think through' his position before presenting it. It also narrows the issues for all parties, as well as the Court. When this requirement is met, the nonmovant can readily determine which parts of the summary judgment record to cite in his or her own list of material issues claimed to be in genuine dispute. As a result of Young's resort to the prior 'scatter gun' approach, these goals have been thwarted. Nevertheless, Ms. Holloway will list each fact she deems significant to her opposition.

1. In preparing a news story for the Las Vegas Review-Journal, reporter Glenn Puit interviewed, among others, Defendant Stewart Bell. *See* Affidavit of Glenn Puit, annexed as Exhibit 2.

2. In the resulting article (hereinafter "Article," a true copy of which is annexed as to Puit's affidavit), Bell confirmed the basics of certain allegations of one, Crystal Chipman, also reported in Puit's news story. Article, p. 1.

3. The basics of Chipman's allegations consisted of the following:

a. That she and one, Crystal Brooks, met with Bell in 2001 and

complained that Peter Baldonado had been "fixing warrants in return for sexual favors."

b. That Chipman and Brooks were thereafter interviewed by police detectives;

c. That Chipman and Brooks volunteered to participate in a sting operation in any investigation of Baldonado's nefarious conduct; and

d. That Chipman and Brooks were never thereafter contacted concerning their complaints.

Article, pp. 1-2.

4. Bell also acknowledged that he contacted the police to investigate the allegations made by Chipman and Brooks. Article, p. 2.

5. Puit, in his own affidavit, attests that it is his habit and practice, when reporting on the content of other persons' statements, to do so accurately. Ex. 2.

6. Ms. Holloway has retained a private investigator in an effort to locate the other females who reportedly were victimized by Baldonado and, although the investigator is optimistic concerning the prospects, he has not yet been able to contact any of these women. Affidavit of William C. Jeanney, annexed as Exhibit 3.

7. The Discovery Commissioner's Scheduling Order was not entered in this case until late last year, on October 3, 2006. Declaration of David Boehrer, annexed as Exhibit 1.

8. The discovery period in this case does not end until September 28, 2007. Ex. 1.

9. No depositions have yet been taken in this case. Ex. 1.

10. The parties have until October 12, 2007, within which to filed dispositive motions. Ex. 1.

11. Knowledge concerning the role Baldonado played in the investigation of the criminal case he used as a pretext for raping Ms. Holloway, as well as his conduct in other cases, is within the exclusive possession of the Defendants. Ex. 1.

ARGUMENT

I. CONSIDERATION OF YOUNG'S SUMMARY JUDGMENT MOTION SHOULD BE DEFERRED

There are significant procedural difficulties with Young's summary judgment motion. Among other problems, he has failed to comply with Rule 56(c)'s requirement that he list, and support with specific citations to the summary judgment record, each and every fact he contends is not genuinely in issue. As will be shown, this failure makes opposition to, and the Court's consideration of, Young's motion unduly burdensome. Additionally, Young's motion is premature. It is based, in substantial part, on contentions that no evidence exists to support certain aspects of Ms. Holloway's claims. Yet, no depositions have yet been taken and the discovery cut-off is still two months away. For these and other reasons that will be discussed, *infra*, Ms. Holloway will demonstrate that consideration of Young's summary judgment motion should be continued until he complies with Rule 56(c) and until after the close of discovery. Because this is only about two months from now, there can be no serious contention that Young will be prejudiced in any way.

A. Young Has Not Complied with NRCP 56(c) and Consideration of His Motion Should Be Deferred Until He Separately Lists Each Fact He Contends Is Not In Dispute And Supports Each Item With References To The Summary Judgment Record

Effective January 1, 2005, NRCP 56(c) was amended to include a requirement similar to Local Rule 56-1 of the U.S. District Court, District of Nevada. NRCP 56(c) now requires the movants and nonmovants to set forth "each fact the party claims is or is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence upon which the party relies." The clear purpose of this requirement is to focus the issues in an organized way. Young's "Statement of Facts" does not follow the required format and he thwarts the purpose of Rule 56(c). Neither Ms. Holloway nor this Court should be required to sift through Young's 30-page filing to do his work for him.

The problem is exacerbated by Young's reliance on conclusory statements in his affidavit. For example, Young purports to attest that "Defendant Peter Baldanado has never been an employee of the Las Vegas Metropolitan Police Department." Young's Ex. D, ¶ 6. However, the Court can take judicial notice that the Clark County District Attorney's Office and Metro work closely on the investigation and prosecution of criminal cases. NRS 47.130. And whether a particular investigator of one agency became the loaned or shared employee of another is ordinarily a question of fact. *See, e.g., Campbell v. State of Washington*, 118 P.3d 888, 892 (2005).

Conclusory statements in affidavits may not be considered summary proceedings. *Clauson v. Lloyd*, 103 Nev. 432, 434, 743 P.2d 631, 633 (1987). Rule 56(e) requires that such affidavits must set forth facts, rather than mere conclusions. And District Court Rule 13(5) mandates that affidavits "shall contain only factual, evidentiary matter . . . and shall avoid mere general conclusions . . .." Affidavits that do not meet these requirements may be stricken (*id.*) and reliance on an affidavit that is defective in this respect is reversible error. *Havas v. Hughes Estate*, 98 Nev. 172, 643 P.2d 1220 (1982).[1]

B. <u>Young's Motion For Summary Judgment Is Premature And Its Consideration Should Be Deferred For That Reason As Well</u>

Defendant Young accurately points out that, in *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005), the Nevada Supreme Court recently adopted the federal summary judgment standards enunciated in a well-known constellation of U.S. Supreme Court cases, *i.e.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986); and *Matsushita Electrical Industrial Co. v. Zenith Radio*, 477 U.S. 574, 106 S.Ct. 1348 (1986). Under these standards, the movant adequately supports his summary judgment motion "by 'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325, 106 S.Ct. at 2554.

However, a necessary corollary is that the nonmovant must first have adequate opportunity to conduct discovery on the particular issue. *Id.* at 322, 106 S.Ct. at 2552. This is especially critical when the information needed to oppose the motion is in the hands of the nonmovant's opponents. 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, <u>Federal Practice and Procedure</u> § 2741 (2007). In fact, some state courts have gone further, holding that any motion for summary judgment made before the close of discovery is "precipitous." *Payne's Hardware & Building Supply, Inc. v. Apple Valley Trading Co. of West Virginia*, 490 S.E.2d 772, 778 (W.Va. 1997).

The Discovery Commissioner's Scheduling Order was not entered in this case until late last

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[1]It should also not go unnoticed that Young's affidavit is not in cognizable form. *See, generally, White v. State*, 102 Nev. 153, 717 P.2d 45 (1986).

year, on October 3, 2006. Declaration of David Boehrer, annexed as Exhibit 1, ¶ 3. The discovery cut-off does not occur until another two (2) months, on September 28, 2007. Ex. 1, ¶ 4. Not a single deposition has yet been taken. Ex. 1, ¶ 5. And dispositive motions, such as Young's request for summary judgment, may be filed a full six (6) weeks after the discovery cut-off, until October 12, 2007. Ex. 1, ¶ 6. Moreover, the evidence that is essential to fleshing out Young's role is clearly in the possession of Young and other Defendants. Ex. 1, ¶ 7.

Ms. Holloway's counsel are informed and believe that Defendant Baldonado's conduct was widespread and occurred over a substantial period of time. *See* Affidavit of Glenn Puit, annexed hereto as Exhibit 2. Puit authored the newspaper article that is attached to his affidavit "Article"). In the Article, Puit quoted Young's Co-Defendant, Stewart Bell, as having "confirmed the basics" of a complainant's factual recitation. Article, p. 1. The complainant, Crystal Chipman, stated that she and another woman, Crystal Brooks, personally met with Bell in 2001 when he was the Clark County District Attorney. *Ibid.* During such meeting, the two women informed Bell that Baldonado had been "fixing warrants in return for sexual favors." *Ibid.* This was in excess of two (2) years before Baldonado raped Ms. Holloway.

It is anticipated that the Defendants will contend that this news account is hearsay. While this is undoubtedly true as to much of the material contained in the Article, it is not true insofar as Bell confirms Chipman's statements. Because Bell is a Defendant, his statements are excluded from the definition of hearsay. NRS 51.035(3) provides, in relevant part, as follows:

> "Hearsay" means a statement offered in evidence to prove the truth of the matter asserted unless:
>
> . . ..
>
> 3. The statement is offered against a party and is:
>
> a. His own statement, in either his individual or a representative capacity.

And, while Puit does not wish to directly reveal his sources, his report of Bell's statement is admissible under NRS 48.059(1), which provides as follows:

> Evidence of the habit of a person or the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

In his affidavit, Puit states that it is his habit to attribute to those he interviews only the statements

those individuals actually make. Therefore, Puit's statement concerning Bell's confirmation of Chipman's account is admissible.

Puit also attributes to Bell his recollection that he asked the "Las Vegas police to investigate the matter." Article, p. 2. This can legitimately be viewed as a reference to the Las Vegas Metropolitan Police Department. It is admissible evidence (*see, again*, NRS 51.035(3)), and, at a minimum, warrants a continuance of the summary judgment motion until further discovery can be accomplished.

Counsel for Ms. Holloway have been reasonably diligent in their efforts to obtain more information. The Affidavit of William C. Jeanney, annexed as Exhibit 3, reflects that a private investigator has been attempting for some time to locate three of the women mentioned in the Article. Ex. 3, ¶ 9. While the investigator's efforts have not yet yielded positive results, he remains optimistic at the prospects of locating some or all of these witnesses. Ex. 3, ¶ 10.

In summary, Baldonado's conduct occurred over a substantial period of time. Because his direct employer clearly works hand-in-glove with Metro, it is entirely conceivable that Baldonado became the loaned servant to Metro at times, and thus became subject to that agency's supervision. Certainly, nothing that Young has presented forecloses such a possibility. And even at this juncture it is possible to draw an inference that Bell asked Metro to investigate the 2001 charges that Chipman and Brooks leveled against Baldonado. The further discovery that Ms. Holloway's counsel intend to conduct is set forth in Mr. Boehrer's Declaration, at ¶ 8. In these circumstances, Young's motion for summary judgment is premature. *See, e.g., Dulany v. Carnahan,* 132 F.3d 1234 (8th Cir. 1997).

III. <u>YOUNG HAS FAILED TO NEGATE ANY ELEMENT OF MS. HOLLOWAY'S INDIVIDUAL CAPACITY CLAIM</u>

Young's argument concerning Ms. Holloway's individual capacity § 1983 claim is rife with unsworn statements that are devoid of the requisite evidentiary support. For example, he states that "[h]e has [*sic*, had] no ability and had no opportunity to select or supervise Pete Baldonado in his employment as an investigator in the Clark County District Attorney's Office." Motion, p. 10, ll. 26-27. This is not shown, even by the self-serving conclusory affidavit tendered by Young. Merely

because Baldonado may have been actually employed by the District Attorney's Office, this does not preclude the possibility that he may have been subject to supervision and control by Young, especially given the close working relationship between the two entities.

Young precedes this assertion with another naked statement, *i.e.*, that he is only the policy maker for Metro. (Elsewhere Young contends, in equally undocumented fashion, that Ms. Holloway "mistakenly contends that Sheriff Young 'was acting as a policymaker for Defendant CLARK COUNTY.'" Motion, p. 3, ll. 7-9.) Whether a sheriff is the policymaker for the county he serves requires more analysis than Young has undertaken. *See Brewster v. Shasta County,* 275 F.3d 803 (9th Cir. 2001) (holding that sheriff was the final policymaker for the county in the particular context there considered).

Young also repeats his error of relying on an alleged lack of evidence, when he has not yet even been deposed, *see* Motion, p. 10, l. 9 ("nor is there any evidence"); p. 10, l. 28 ("[t]here is not even slight evidence"), and seeking to take refuge in his self-serving affidavit that is conveniently conclusory and has not be subject to cross examination. Motion, p. 11, l. 2.[2]

IV. THE COURT HAS ALREADY REJECTED THE NOTION THAT MS. HOLLOWAY'S § 1983 CLAIM IS GOVERNED THE "*DeSHANEY* DOCTRINE"

Late last year, on November 29, 2006, this Court entered its order denying the City of North Las Vegas' motion to dismiss. Like Young, the City of North Las Vegas relied heavily on the doctrine enunciated in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998 (1989). In denying the City's motion to dismiss, the Court clearly found *DeShaney* and its progeny to be inapposite. This is not a case in which a "private actor" caused Ms. Holloway's constitutional injury. Thus, Young's long-winded discussion of *DeShaney* and its progeny is simply

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[2]Young also takes a glancing shot at the sufficiency of Ms. Holloway's individual capacity allegations against him. Motion, p. 10, l. 8 ("Plaintiff has not averred any valid claim against Sheriff Young in his individual capacity as to any of his [*sic*, her] federal claims . . . ."). A review of the complaint reveals this statement to be false. Moreover, Young has not utilized the correct procedural tool to challenge the sufficiency of Ms. Holloway's allegations against him. *See* NRCP 12(b)(5).

off the mark.

As was pointed out in Ms. Holloway's prior opposition, the instant case can readily be viewed as one in which the "state-created danger" doctrine applies. *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989). Baldonado gained access to Holloway's home by wielding the authority conferred upon him by the state. On the basis of several complaints that had previously been made against Baldonado by African-American women, the Defendants (including, according to Bell's recollection when he was interviewed in 2004, Metro) undertook to "investigate" him. Fairly construed, Holloway's complaint alleges that due to a lack of employee training and supervision, the need for which was obvious, the "investigation" of Baldonado was so grossly inadequate that it amounted to a *de facto* policy of condonation, or at least deliberate indifference. In these circumstances, *DeShaney v. Winnebago Cy. Dept. of Social Serv.*, 498 U.S. 189, 109 S.Ct. 998 (1989), and its progeny are inapposite. *Cf. Amnesty America v. Town of West Hartford*, 361 F.3d 113, 129 (2nd Cir. 2004) (where policymaking official had actual notice of a potentially serious problem of unconstitutional conduct, such that the need for corrective action was obvious, the policymaker's failure to investigate or rectify the situation evidences deliberate indifference).

V. SUMMARY JUDGMENT CANNOT PROPERLY BE ENTERED ON MS. HOLLOWAY'S § 1983 CLAIMS BASED ON POLICY AND CUSTOM

Young begins this portion of his argument by suggesting that an single constitutional deprivation is ordinarily insufficient to establish a longstanding practice or custom. Motion, p. 16, ll. 26-28, citing and quoting *Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999).

In the first place, it can hardly be contended that there was only a single constitutional deprivation in this case. If Bell's admission is credited, Baldonado was engaging in his nefarious activity for at least two years before he raped Ms. Holloway.

Secondly, it is well-established that "ordinarily" does not mean "always" in this situation. As the Ninth Circuit teaches in *Christie*, there are three exceptions to "ordinarily." *Ibid.* Young has addressed none of them. Particularly apropos is the exception for cases in which the a policy maker exhibited deliberate indifference. *Id.*, at 1240 (and cases cited therein). Indeed, in *Christie* the Ninth Circuit reversed an entry of summary judgment on that basis.

VI. YOUNG IS NOT ENTITLED TO SUMMARY JUDGMENT ON MS. HOLLOWAY'S § 1981 CLAIM

Contrary to Young's assertions, 42 U.S.C. § 1981 has been utilized to enforce civil rights beyond the realm of contracts. In *March v. Carrasquillo*, 782 F.Supp. 593, 599 (M.D.Fla. 1992), for example, utilization of the statute against law enforcement officials was approved to redress a racially motivated arrest and consequent denial of "equal benefit of the laws." And, in *National Association for the Advancement of Colored People v. Levi*, 418 F.Supp. 1109 (D.D.C. 1976), the Court refused to dismiss an action based on § 1981, where it was alleged that racial motives of criminal investigators led them to undertake only a token investigation of a crime against a black man.[3] This is closely analogous to Ms. Holloway's allegations.

V. MS. HOLLOWAY AGREES THAT MOST OF HER STATE-LAW TORT CLAIMS AGAINST YOUNG ARE BARRED BY NRS 41.0335

To the extent her state-law tort claims against Young rest on principles of *respondeat superior*, Ms. Holloway agrees that they are barred by NRS 41.0335. Ms. Holloway does not concede, however, that the other statutes cited by Young also insulate him and Metro from liability. Given Ms. Holloway's concession concerning NRS 41.0335, Young's other arguments are moot and need not be considered.

Additionally, Young is incorrect in his assertion that Baldonado could not have been Young's employee. As shown above, the evidence to be uncovered during the remainder of the discovery period may establish facts from which a reasonable jury could infer that Baldonado was a loaned servant. Young is also incorrect in his related contention that Baldonado's rape of Ms. Holloway could not have occurred within the course and scope of his employment. *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005).

VI. PUNITIVE DAMAGES ARE NOT PRECLUDED ON MS. HOLLOWAY'S INDIVIDUAL-CAPACITY FEDERAL CLAIMS AGAINST YOUNG

While Young artfully skirts the issue in his Motion, punitive damages may be awarded

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[3] *Levi* has been superceded by statute on another point. *See Williams v. Glickman*, 936 F.Supp. 1 (D.D.C. 1996).

against him in Ms. Holloway's individual-capacity federal claim. *See, e.g., City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748 (1981). Because Young's claim concerning the availability of punitive damages is based solely on the law rather than the facts, this aspect of his request for summary judgment on the punitive damages issue should be denied.

CONCLUSION

Young invites this Court to be 'penny wise and pound foolish,' when he exhorts the Court as follows:

> Plaintiff in sum has developed no facts after having well over a year to conduct discovery and cannot develop any facts in the short time left in the discovery phase to resist summary judgment.

Motion, p. 15, ll. 25-27. In the interest of saving the minimal expenses that will be incurred by permitting continued discovery during the two months remaining during such period, he asks the Court to risk piecemeal appeal, possible reversal, and the expense of an additional trial. Respectfully, the interests of judicial economy militate strongly in favor of postponing consideration of Young's summary judgment motion until discovery has closed. At such time, Young should be permitted to resubmit his motion with instructions that he comply strictly with NRCP 56(c).

DATED this 1st day of August, 2007.

BRADLEY, DRENDEL & JEANNEY, LTD.

By _____
William C. Jeanney, Esq.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of BRADLEY, DRENDEL & JEANNEY, LTD., and that on this 1st day of August 2007, I served a true and correct copy of the foregoing document by:

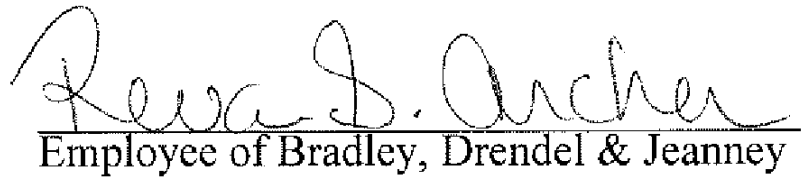
Placing an original or true copy thereof in a sealed envelope placed for collecting and mailing in the United States mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

Richard A. Harris, Esq.
Harris Law Firm
801 South Fourth Street
Las Vegas, NV 89101
Attorney for: Love Holloway

Peter Baldonado
2923 Matese Drive
Henderson, NV 89052
Attorney for: Peter Baldonado

Robert W. Freeman, Jr., Esq.
Law Offices of Robert Freeman
375 Stephanie Street, Building 8
Henderson, NV 89014
Attorney for: City of North Las Vegas

Tom Dillard, Esq.
Olson, Cannon, Gormley & Desruisseaux
9950 West Cheyenne Avenue
Las Vegas, NV 89129
Attorney for: David Roger,
Bill Young,
Clark County,
Stewart Bell



Employee of Bradley, Drendel & Jeanney

EIGHTH JUDICIAL DISTRICT COURT
COUNTY OF CLARK, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document filed in case number A498609 does not contain the social security number of any person.

Dated this 1st day of August, 2007.

William C. Jeanney, Esq.
Attorney for Plaintiff

EXHIBIT 1

DECLARATION OF DAVID BOEHRER IN OPPOSITION TO "SHERIFF BILL YOUNG'S MOTION FOR SUMMARY JUDGMENT"

I, David Boehrer, make this declaration pursuant to § 53.045 of the Nevada Revised Statutes:

1. I am an attorney duly admitted to practice law in the State of Nevada and I represent the Plaintiff in the case entitled *Love Holloway v. Peter Baldonado, et al.*, pending in Department XVI of the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, as Case No. A498609.

2. This Declaration is made upon my personal knowledge and is tendered in opposition to "Sheriff Bill Young's Motion for Summary Judgment, filed in the above-mentioned action on June 25, 2007.

3. The Discovery Commissioner's Scheduling Order was entered in the above-mentioned action on October 3, 2006.

4. Such Order sets the close of the discovery period at September 28, 2007.

5. No depositions have yet been taken in the above-referenced action.

6. The Order provides that dispositive motions are to be filed by October 12, 2007.

7. All knowledge of the role played by Baldonado in the criminal case he used as a pretext for raping Ms. Holloway, as well as his conduct in other cases, is within the exclusive possession of the Defendants.

8. At a minimum, the further discovery that counsel for Ms. Holloway intend to conduct within the next two months includes taking the depositions of Bill Young, Stewart Bell, and Peter Baldonado to determine the working relationships between the Las Vegas Metropolitan Police Department, the Office of the Clark County District Attorney, and Peter Baldonado's

RICHARD HARRIS LAW FIRM

specific role in relation to these two entities.

FURTHER DECLARANT SAYETH NAUGHT.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 1st day of August, 2007.

David Boehrer

RICHARD HARRIS
LAW FIRM

EXHIBIT 2

AFFIDAVIT

I, Glenn Puit. hereby attest as follows:

1. I was a reporter for the Las Vegas *Review-Journal* (the "Newspaper") from 1996 to 2007.

2. I have been a professional news reporter since 1994.

3. I authored the attached article entitled "District Attorney's Office: Baldonado subject of complaint" which appeared in the Newspaper on April 18, 2004 (the "Article").

4. It is my habit and practice to quote persons named in news articles accurately and fairly. I believe I quoted all the persons in the attached Article accurately and fairly.

5. Pursuant to NRS 49.275, I was employed as an editorial employee of the Newspaper. I am not required to disclose, pursuant to NRS 49.275, the sources of any information. See, *Diaz v Eighth Judicial District.* I do not waive my privilege pursuant to NRS 49.275 in executing this affidavit.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated: 7/27/07

Glenn Puit

Glenn Puit
Affiant

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DISTRICT ATTORNEY'S OFFICE: Baldonado subject of complaint

But charges were never pursued against investigator

By GLENN PUIT
REVIEW-JOURNAL

Peter Baldonado
Investigator with district attorney's office charged with bribery, sexual assault

An investigator who was recently charged with bribery and sexual assault was the subject of a detailed complaint to the district attorney's office in 2001, but no charges were ever pursued.

Peter Baldonado, an investigator with the district attorney's office, was arrested this year amid accusations he demanded sex from women in return for quashing warrants. In addition, Baldonado has been charged with raping a witness in a Clark County murder case.

But according to federal reports and interviews conducted by the Review-Journal, the district attorney's office was warned that Baldonado might be a problem employee as early as 2001.

One woman, Crystal Chipman, told the Review-Journal that she and another woman, Crystal Brooks, personally met with then-District Attorney Stewart Bell in 2001 to tell him about questionable behavior by Baldonado.

Chipman said during the 2001 meeting, the women told Bell that Baldonado was fixing warrants in return for sexual favors. Bell promised he would investigate the matter, and as a result, Chipman said she and Brooks eventually met with two police detectives at a North Las Vegas restaurant.

Chipman said she and Brooks told the detectives they would be willing to help the police investigate Baldonado,

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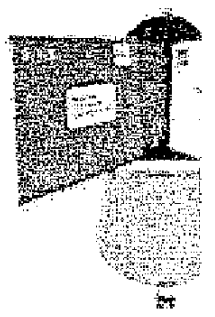

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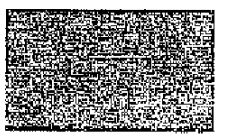
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