IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 83796

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

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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

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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

William C. Jeanney, Esq.
Nevada State Bar No. 01235
BRADLEY, DRENDEL & JEANNEY
401 Flint St.
Reno, Nevada 89501
Telephone No. (775) 335-9999
Facsimile No. (775) 335-9993
Attorneys for Plaintiff

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

LOVE HOLLOWAY,

Plaintiff,

Case No. 05-A-496609-C

v.

Dept. No. 18

PETER BALDONADO, et al.

Defendants.

AFFIDAVIT OF WILLIAM C. JEANNEY, ESQ. IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS STEWART BELL, DAVID ROGER, AND CLARK COUNTY'S MOTION FOR SUMMARY JUDGMENT

I, William C. Jeanney, hereby declare as follows:

1. I am an attorney of record for plaintiff Love Holloway.

2. Exhibit 1 hereto is a true and correct copy of the transcript of the deposition of plaintiff Love Holloway, taken on September 19, 2007.

3. Exhibit 2 hereto is a true and correct copy of the April 20, 1993 Investigative Report produced in discovery in this case by defendant Stewart Bell.

4. Exhibit 3 hereto is a true and correct copy of the April 20, 1993 Interview Report of interviewee Candace Lee Williams produced in discovery in this case by defendant Stewart Bell.

5. Exhibit 4 hereto is a true and correct copy of the April 20, 1993 Interview Report of interviewee Darcy Brown produced in discovery in this case by defendant Stewart Bell.

6. Exhibit 5 hereto is a true and correct copy of the April 20, 1993 Interview Report of interviewee Carol Mercer produced in discovery in this case by defendant Stewart Bell.

7. Exhibit 6 hereto is a true and correct copy of the April 20, 1993 Interview Report of

LAW OFFICE OF
BRADLEY, DRENDEL
& JEANNEY
401 FLINT STREET
RENO, NV 89501
(775) 335-9999

interviewee Josie Padua produced in discovery in this case by defendant Stewart Bell.

8. Exhibit 7 hereto is a true and correct copy of the April 27, 1998 Memorandum from L. Patrick Markovich, Chief Investigator of the Office of the District Attorney to File I-93-8 produced in discovery in this case by defendant Stewart Bell.

9. Exhibit 8 hereto is a true and correct copy of July 30, 1998 e-mail from Candy Byrd to District Attorney Stewart Bell produced in discovery in this case by defendant Stewart Bell.

10. Exhibit 9 hereto is a true and correct copy of the transcript of the deposition of Stewart Bell taken on September 27, 2007.

11. Discovery closed in this case on November 27, 2007, and discovery has revealed no evidence that the Clark County District Attorney's office ever pursued the sexual harassment claim of Denise Robinson against Peter Baldonado as stated in Exhibit 8 hereto.

12. Discovery in this case has revealed no evidence that defendant Baldonado was ever confronted with the two or three women's allegations to defendant Bell concerning Baldonado's relationship with Gillard.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated this 16th day of January 2008.

BRADLEY, DRENDEL & JEANNEY

William C. Jeanney

LAW OFFICES OF
BRADLEY, DRENDEL
& JEANNEY
401 FLINT STREET
RENO, NV 89501
(775) 335-9999

EXHIBIT 217

EXHIBIT 217

[redacted]

To Whom It May Concern: 09-27-98

Thanks a whole lot! I did exactly what B-Loduce told me Even though it tore me apart. But I did not want to come up missing in action (MIA). I

Wish I would of never did that shit. I should of let him fuck me off! Instead of lying on Deke, like that. They all hate him and I did this shit like I hate him [redacted] too. I can't even face him, because I feel like I betrayed him, how could I tell him he is going to be fucked because I was scared. B-lo was going to do me in. My Baby still don't know I said anything. I just wish shit would of went differently. Now I have to hideout from this punk bitch! So if you find me I hope I aint looking like those 4 white boys you all found. I hope you all find him too So now I guess you could perjure me because I lied about some other shit too But Im not a liar, just scared!

EXHIBIT 218

EXHIBIT 218

ORIGINAL

DECS
JUDGE JEFFREY D. SOBEL
District Court Dept. V
200 South Third Street
Las Vegas, Nevada 89155
(702) 455-4655

FILED
APR 18 2 24 PM '00
Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON,

Defendant.

Case No. C153154
Dept No. V
Docket No. H

Exhibit "7"

DECISION AND ORDER

Defendant has moved to suppress evidence seized by police in a warrantless search of premises at 4815 Everman in August 1998.

The residence was owned by Todd Armstrong's mother and primarily but not exclusively occupied by Todd (Transcript of Hearing pp8-10; hereinafter "T"). The resolution of whether movant, Donte Johnson, was a person with an expectation of privacy with respect to the living room and master bedroom at Everman is dispositive of this motion.

Todd consented to the search in writing. T pp42-43. Johnson

EXHIBIT "7"

had apparently spent parts of at least two to four weeks immediately preceding the search, visiting and sometimes sleeping at Everman. Compare T p84 with 103. Sometimes Johnson would sleep in the master bedroom, sometimes on a couch. T p84, 87. Usually the bedroom was a place other people would come in and out of; several people had clothes in it. T p92.

Todd had the only key to Everman and Johnson and his girlfriend would usually gain entry through a rear window. T pp12;58;94;104.

No rent was paid by Johnson for his contact with Everman, though he may have contributed drugs directly for the privilege of using Everman as a place to chill and sleep. T p89.

When asked immediately prior to the search whether he lived at Everman, he told two police detectives, unequivocally, that he did not live at Everman. T p6;p65 Johnson appears not to recall that question being posed, though he did not deny it could have been. T p102.

The detectives testified if Johnson claimed to reside there they would have gotten a search warrant for the already secured premises. T pp19; 64.

If the law required a warrant to search premises where police have consent to search from the only permanent resident, in

circumstances where the person now insisting on such a warrant was first asserting his expectation of privacy in a motion to suppress, after having denied living there when asked before the search, and with reference to premises where that person usually climbed in a window, over a very short period of time, paid no rent (only occasionally contributing drugs) it would be a very peculiar law.

I think Johnson's contacts with Everman are on the extreme low end of a continuum one could construct. Surely, given the passage of time and the different facts that time might have brought, Johnson might have eventually moved along the continuum to a point where he was a legitimate co-tenant (perhaps with a key of his own). Those facts were not present here on August 18, 1998.

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Where the facts are as I find them, and Todd Armstrong consents to a search of premises Johnson disclaims an interest in, the police acted properly and the Motion to Suppress should be and is denied. See United States v. Matlock, 415 US 164 (1974); United States v. Sanders, 130 F3d 1316 (8th Cir.1998); United States v. Mangum, 100 F3d 164 (CADC Cir. 1996); People v. Welch, 20 Cal 4th 701, 976 P2d 754 (1999); Snyder v. State, 103 Nev 275, 738 P2d 1303 (1997).

DATED and DONE this 16th day of April, 2000.

DISTRICT COURT JUDGE JEFFREY D. SOBEL

DECLARATION OF MAILING

DONNA POLLACK, an employee with the Clark County Special Public Defender's Office, hereby declares that she is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interested in, the within action; that on the 9th day of May, 2000, declarant deposited in the United States mail at Las Vegas, Nevada, a copy of the Petition for Writ of Mandamus in the case of State of Nevada vs. Donte Johnson, Case No. C153154, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to Frankie Sue Del Papa, Attorney General, 100 North Carson Street, Carson City, Nevada 89701-4717, that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on the 9th day of May, 2000.

DONNA POLLOCK

RECEIPT OF A COPY of the foregoing Petition for Writ of Prohibition is hereby acknowledged this 9th day of May, 2000.

JEFFREY R. SOBEL
DISTRICT COURT JUDGE, DEPARTMENT V

By Elana Pearl

RECEIPT OF A COPY of the foregoing Writ of Prohibition is hereby acknowledged this 9th day of May, 2000.

STEWART L. BELL
CLARK COUNTY DISTRICT ATTORNEY

By Nadine Wilkey

. PUBLIC
NDER

COUNTY
NDA

EXHIBIT 219

EXHIBIT 219

481

ORIGINAL

0001
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
ROBERT J. DASKAS
Chief Deputy District Attorney
Nevada Bar #004963
200 South Third Street
Las Vegas, Nevada 89155-2212
(702) 455-4711
Attorney for Plaintiff

FILED IN OPEN COURT
APR 04 2005
SHIRLEY B. PARRAGUIRRE, CLERK
BY Sharon Coffman DEPUTY
SHARON COFFMAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
DONTE JOHNSON,
Defendant.

CASE NO: C153154
DEPT NO: VIII

STATE'S MOTION TO DISQUALIFY THE HONORABLE LEE GATES

DATE OF HEARING:
TIME OF HEARING:

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through ROBERT J. DASKAS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Support of the State's Motion to Disqualify the Honorable Lee Gates.

This Motion 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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RECEIVED
APR 04 2005
COUNTY CLERK

S11
H:\Johnson, Donte\Disqualify.doc

STATEMENT OF FACTS

On or about September 16, 1998, Donte Johnson (Defendant) was charged in a Superseding Indictment with one count of Burglary While in Possession of a Firearm, four counts of Murder with Use of a Deadly Weapon, four counts of Robbery with Use of a Deadly Weapon, and four counts of First Degree Kidnapping with Use of a Deadly Weapon. The case was prosecuted by Deputy District Attorneys Gary Guymon and Robert Daskas of the Clark County District Attorney's Office.

On or about June 09, 2000, a jury returned guilty verdicts on all thirteen counts of the Superseding Indictment, including four counts of First Degree Murder with Use of a Deadly Weapon. At a subsequent penalty hearing, the State sought the death penalty.

On or about June 16, 2000, a hung jury was declared in Defendant's penalty hearing.

On or about July 28, 2000, a three-judge panel imposed a sentence of death on each of the four first degree murder convictions.

On December 18, 2002, the Nevada Supreme Court vacated the sentences of death and remanded the case for a new penalty hearing based on Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002).

The penalty hearing is scheduled to be heard before the Honorable Lee Gates on April 19, 2005, in District Court VIII of the Eighth Judicial District Court, Clark County, Nevada. There are motions in the instant matter pending before the Honorable Lee Gates which are scheduled to be heard on April 04, 2005.

///

Ms. Nancy Bernstein is currently the law clerk employed by the Honorable Lee Gates; she will be the law clerk in District Court VIII during the hearing on April 04, 2005, and during the penalty hearing in the instant matter which is scheduled to commence on April 19, 2005.

Prior to her employment with Judge Gates, Ms. Bernstein was employed as a legal intern by the Clark County District Attorney's Office between June 01, 2003, and August 26, 2003; Ms. Bernstein was assigned to work with Chief Deputy District Attorney Gary Guymon. *See* Affidavit of Robert J. Daskas (attached hereto as Exhibit A). During her tenure, Ms. Bernstein worked, *inter alia*, on the Donte Johnson case with Deputy District Attorneys Gary Guymon and Clark Peterson. Id. As a result of her employment, Ms. Bernstein had access to work-product of the District Attorney's Office, as well as police reports, witness statements, photographs, autopsy reports and other material germane to the Donte Johnson prosecution. Id. Ms. Bernstein completed research and/or similar assignments on the case on behalf of both prosecutors Guymon and Peterson. Id. Ms. Bernstein also had numerous, extensive, detailed discussions about the Donte Johnson case with Chief Deputy District Attorney Gary Guymon; some of these discussions involved prosecution strategies in the instant matter. Id. Ms. Bernstein also had conversations with Chief Deputy District Attorney Robert Daskas, the current prosecutor assigned to the case, about the Donte Johnson prosecution while employed by the Clark County District Attorney's Office. Id.

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INTRODUCTION

The State of Nevada is seeking the death penalty against convicted quadruple murderer Donte Johnson. The penalty hearing is scheduled to be heard in the courtroom of the Honorable Lee Gates. The judge's current law clerk, however, was previously employed by the Clark County District Attorney's Office and personally worked on Defendant Johnson's case. This creates a conflict that mandates disqualification of Judge Gates.

DISCUSSION

APPLICATION OF THE NEVADA CODE OF JUDICIAL CONDUCT, STATUTORY LAW AND CASELAW MANDATES DISQUALIFICATION OF THE HONORABLE LEE GATES

The Preamble to the Nevada Code of Judicial Conduct states: "[J]udges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system."

Canon 2 of the Nevada Code of Judicial Conduct provides that a "judge shall avoid ... the appearance of impropriety in all of the judge's activities." The Commentary to this Canon states that this proscription is "necessarily cast in general terms" because it is not possible to list all prohibited acts.

Canon 3 of the Nevada Code of Judicial Conduct provides that a "judge shall perform the duties of judicial office impartially..." The Code places an *affirmative duty* on judges to prevent his or her staff from acting impartially. *See* Canon 3(B)(5) of the NCJC (a judge ... shall not permit staff, court officials and others subject to the judge's discretion and control to do so).

///

Canon 3E of the Nevada Code of Judicial Conduct provides, in relevant part:

> (1) A judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality *might reasonably be questioned* including but not limited to instances where:
>
> > (a) the judge has … *personal* knowledge of disputed evidentiary facts concerning the proceeding.

(Emphasis added.); *see also* NRS 1.230(3) (a judge, upon his own motion, may disqualify himself from acting in any matter upon the ground of actual or implied bias). The Commentary to Canon 3E(1) states that a judge is disqualified under this rule "whenever the judge's impartiality might reasonably be questioned, *regardless of whether any of the specific rules in Section 3E(1) apply*." (Emphasis added.) The United States Supreme Court has held that 28 U.S.C. §455(a), a similar provision, is designed to "avoid even the appearance of partiality." Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860, 108 S.Ct. 2194 (1988).

In Turner v. State, 114 Nev. 682, 962 P.2d 1223 (1998), the Nevada Supreme Court relied upon, *inter alia*, the Canons of the Nevada Code of Judicial Conduct to declare that a trial judge's failure to recuse himself based merely on *implied bias* mandates *automatic reversal*. In that case, the trial judge was previously employed by the district attorney's office and was present at the defendant's initial arraignment. Id. at 685. The judge disclosed his participation in the case to the defendant, and the defendant waived the potential conflict. Id. Later, however, the defendant attempted to withdraw his waiver. Id. at 687. The case proceeded to trial, the defendant was convicted, and the Nevada Supreme Court overturned the conviction.

///

> We … conclude that this error mandates automatic reversal. The Preamble to the NCJC states: "[J]udges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system."
>
> * * *
>
> We conclude that it would be inconsistent with these goals to apply a harmless error analysis to a judge's failure to recuse himself. Therefore, we conclude that such failure mandates automatic reversal.

Id. at 688; *see also* Ham v. Eighth Judicial District Court, 93 Nev. 409, 566 P.2d 420 (1977) (court recognized that there may exist a number of circumstances over and above those which simply go to bias or prejudice toward a party which could require disqualification).

In the instant matter, the basis for disqualification of the Honorable Lee Gates is stronger than the basis for disqualification of the judge in the Turner case. *Cf.* NRS 1.230(2) (a judge shall not act as such in a proceeding where implied bias exists in any of the following respects: (c) when he has been attorney or counsel for either of the parties in the particular action or proceeding before the court). In Turner, the judge simply appeared at the defendant's arraignment and the defendant waived the conflict. Here, it is undisputed that Ms. Bernstein, the judge's law clerk, *acquired information* about the Donte Johnson case during her employment with the Clark County District Attorney's Office; indeed, she was assigned to work - - and did work - - on the Donte Johnson prosecution itself. During her tenure with the District Attorney's Office, Ms. Bernstein had numerous discussions about the case with various prosecutors, including Clark Peterson, Gary Guymon and Robert Daskas, the prosecutor who will try the case before the Honorable Lee Gates; some of these discussions involved prosecution strategies. Ms. Bernstein is now the law clerk to the judge who will preside over the Donte Johnson penalty hearing. Undoubtedly, Ms. Bernstein will

be called upon in her role as law clerk to complete legal research, offer advice, and render her opinion on issues that arise before and during Donte Johnson's penalty hearing. It would be virtually impossible for Ms. Bernstein to eradicate the knowledge she gleaned from her employment with the District Attorney's Office in completing the tasks required in her role as law clerk. This knowledge could potentially prejudice the State or, more likely, the Defendant if the case remains before the Honorable Lee Gates. At the very least, this creates a situation in which the judge's impartiality might reasonably be questioned. *See* Commentary to Canon 3E(1)(a judge is disqualified under this rule "whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply.").

THE INFORMATION ACQUIRED BY THE JUDGE'S LAW CLERK MAY BE IMPUTED TO THE JUDGE THEREBY REQUIRING DISQUALIFICATION

Significantly, the Commentary to Canon 3E(1)(b) of the NCJC provides that "a judge formerly employed by a government agency ... should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association." In the instant matter, the judge's law clerk, not the judge, was formerly employed by the government agency; however, the knowledge that Ms. Bernstein obtained during her tenure with the Clark County District Attorney's office could very well be imputed to the Honorable Lee Gates. A law clerk, after all, is an extension of the judge. *See* Vaska v. State, 955 P.2d 943 (Alaska 1998). This is particularly evident in many of the Canons and the Commentary to the NCJC which place an affirmative duty on judges to ensure that their staff does not violate the Canons of the NCJC. For example, the

Commentary to Canon 3B(7) of the NCJC provides that a judge "must make reasonable efforts … to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff. *See also* NCJC Canon (5) (a judge "shall not permit staff, court officials and other subject to the judge's direction and control to do so."); Commentary to NCJC Canon 3B(5) (a judge "must require the same standard of conduct of others subject to the judge's direction and control."); NCJC Canon 3(9) (the judge "shall require similar abstention on the part of court personnel subject to the judge's direction and control).

Law clerks play a significant role in judicial decision-making; they are not merely the judge's errand runners. Vaska, 955 P.2d at 945. They are sounding boards for tentative opinions and they are legal researchers who seek the authorities that affect decisions. Id. Codes of judicial conduct have long recognized the principle that it is not enough for judicial officers to be untainted by bias; judicial officers must, in addition, conduct themselves so as to avoid engendering reasonable suspicions of bias. Id. Because of the close working relationship between judges and their law clerks, there comes a point where a law clerk's bias for or against a particular party or attorney rises to an intolerable level - - a level where the judicial decision-making process comes under reasonable suspicion. Id.

In addition to the concerns outlined above, the information acquired by the judge's law clerk could constitute a violation of Canon 3E of the Nevada Code of Judicial Conduct if the case remains with the Honorable Lee Gates. That section provides, in relevant part:

> (2) A judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality *might reasonably be questioned* including but not limited to instances where:
>
> > (a) the judge has … *personal* knowledge of disputed evidentiary facts concerning the proceeding.

(Emphasis added.) As outlined above, Ms. Bernstein was actively involved in the preparation of Donte Johnson's penalty hearing while employed with the District Attorney's Office. She had access to the entire case file and was privy to conversations involving prosecution strategies. If Ms. Bernstein shares any of the information she acquired during her employment with the District Attorney's Office with Judge Gates, even *unknowingly*, a violation of Canon 3E would arguably result. This is not a chance either party can afford to take, particularly since the instant case potentially involves multiple death sentences.

The only remedy to cure the conflict that has arisen in this case is to disqualify the Honorable Lee Gates and randomly reassign the matter to a different judge. Even if Defendant Johnson waived the conflict that now exists, there is nothing to prevent Defendant Johnson from withdrawing his waiver during the penalty hearing; the withdrawal would then result in the judge's disqualification in any event. *See* Turner v. State, 114 Nev. 682 (error for judge to remain on case after defendant sought to withdraw his waiver of conflict). Moreover, defense counsel's advice to Defendant Johnson to waive any conflict would, undoubtedly, result in a claim of ineffective assistance of counsel at a later date. Consequently, any such waiver would be defective. Thus, no remedy exists other than disqualification and reassignment.

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CONCLUSION

The State of Nevada is seeking the death penalty against convicted quadruple murderer Donte Johnson. The penalty hearing is scheduled to be heard in the courtroom of the Honorable Lee Gates. The judge's law clerk was previously employed by the Clark County District Attorney's Office and personally worked on Defendant Johnson's case. This creates a conflict that mandates disqualification of Judge Gates. Based on the foregoing, the State of Nevada respectfully requests that this Court grant the instant Motion to Disqualify the Honorable Lee Gates.

DATED this 04 day of April, 2005.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY
ROBERT J. DASKAS
Chief Deputy District Attorney
Nevada Bar #004963

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of STATE'S MOTION TO DISMISS THE HONORABLE LEE GATES was made this 4th day of April, 2005, by facsimile transmission to:

SPECIAL PUBLIC DEFENDER'S OFFICE
FAX #455-6273

Secretary for the District Attorney's Office

RJD/ddm

AFFIDAVIT

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

ROBERT J. DASKAS, being first duly sworn, deposes and says:

1. That I am a Deputy District Attorney employed by the Clark County District Attorney's Office and have been so employed since September 18, 1995.

2. In June 2000, Deputy District Attorney Gary Guymon and I prosecuted Donte Johnson in Case C153154. Donte Johnson was convicted of one count of Burglary While in Possession of a Firearm, four counts of Murder with Use of a Deadly Weapon, four counts of Robbery with Use of a Deadly Weapon, and four counts of First Degree Kidnapping with Use of a Deadly Weapon. Following Johnson's convictions, a jury was unable to reach a unanimous verdict on Johnson's penalty and a hung jury was declared.

3. In July 2000, a three-judge panel imposed a sentence of death against Johnson on each of his four first degree murder convictions. Deputy District Attorney Gary Guymon and I prosecuted Johnson before the three-judge panel. Those sentences of death were subsequently vacated by the Nevada Supreme Court.

4. A penalty hearing is scheduled in Case C153154 before the Honorable Lee Gates in Department VIII of the Eighth Judicial District Court, Clark County, Nevada, on April 19, 2005. Donte Johnson faces four possible death sentences. Deputy District Attorney David Stanton and I are assigned the prosecution of Johnson at the upcoming penalty hearing.

5. There are motions in the Donte Johnson case pending before the Honorable Lee Gates which are scheduled to be heard on April 04, 2005.

6. Ms. Nancy Bernstein is currently the law clerk employed in Department VIII of the Eighth Judicial District Court, Clark County, Nevada, by the Honorable Lee Gates.

7. Prior to her employment with Judge Gates, Ms. Bernstein was employed as a legal intern by the Clark County District Attorney's Office between June 01, 2003, and August 26, 2003; Ms. Bernstein was assigned to work with Chief Deputy District Attorney Gary Guymon.

EXHIBIT "A"

8. During her tenure with the Clark County District Attorney's Office, Ms. Bernstein worked on the Donte Johnson case with Deputy District Attorneys Gary Guymon and Clark Peterson.

9. Ms. Bernstein had access to work-product of the District Attorney's Office, as well as police reports, witness statements, photographs, autopsy reports and other material germane to the Donte Johnson prosecution.

10. Ms. Bernstein completed research and/or similar assignments on the Donte Johnson case on behalf of Deputy District Attorneys Gary Guymon and Clark Peterson.

11. Ms. Bernstein had numerous discussions about the Donte Johnson case with Chief Deputy District Attorney Gary Guymon while employed by the Clark County District Attorney's Office; some of these discussions involved prosecution strategies in the Donte Johnson case.

12. Ms. Bernstein had conversations with Chief Deputy District Attorney Robert Daskas, the current prosecutor assigned to the case, about the Donte Johnson prosecution while employed by the Clark County District Attorney's Office.

13. This Affidavit and the accompanying Motion to Disqualify the Honorable Lee Gates are filed in good faith and not interposed for the purpose of delay.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on April 04, 2005

ROBERT J. DASKAS
Chief Deputy District Attorney

****
*** TX REPORT ***
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RESULT	OK

0001
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
ROBERT J. DASKAS
Chief Deputy District Attorney
Nevada Bar #004963
200 South Third Street
Las Vegas, Nevada 89155-2212
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,

Defendant.

CASE NO: C153154

DEPT NO: VIII

STATE'S MOTION TO DISQUALIFY THE HONORABLE LEE GATES

DATE OF HEARING:
TIME OF HEARING:

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through ROBERT J. DASKAS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Support of the State's Motion to Disqualify the Honorable Lee Gates.

EXHIBIT 220

EXHIBIT 220

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DISTRICT COURT

CLARK COUNTY

FILED

2005 APR -5 P 2:55

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON,

Defendant.

CASE NO. C153154

DEPT. NO. VIII

AFFIDAVIT

State of Nevada)
)ss:
County of Clark)

Judge Lee A. Gates, being duly sworn, deposes and says:

I am the presiding Judge in the case entitled State of Nevada vs. Donte Johnson.

I have presided over this case for approximately three (3) years.

I am not bias or prejudiced in this case.

I have never worked on this case other than as a Judge.

My law clerk, Nancy Bernstein has never been employed by the Clark County District Attorney's Office. Nancy Bernstein was a law student in 2003 and interned at the Clark County District Attorney's Office for approximately two months. Nancy Bernstein has not worked on this case while employed as my law clerk. I have not received any information about the case from Nancy Bernstein.

///

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APR - 5 2005
COUNTY CLERK

LEE A. GATES
DISTRICT JUDGE DEPT. VIII
200 SOUTH THIRD STREET
LAS VEGAS, NEVADA 89155

SII

Moreover, Nancy Bernstein is not working on this case and will not be working on this case.

That this motion to disqualify was filed a few hours before the hearings on motions and less than twenty days before trial, consequently, the State's motion is untimely.

There are no conflicts between the Court and the Clark County District Attorney's Office.

There are no conflicts between the Court and the defendant.

That the defendant and his lawyer have waived any conflict on the record, if any existed and does not object to this Court hearing the case.

LEE A. GATES
DISTRICT COURT JUDGE

SUBSCRIBED and SWORN before me on this 5 day of April, 2005.

Notary Public

DEBBIE WILLIAMS
Notary Public State of Nevada
No. 99-[illegible]-1
My Appt. exp. Mar. 18, 2007

LEE A. GATES
DISTRICT JUDGE, DEPT. VIII
200 SOUTH THIRD STREET
LAS VEGAS, NEVADA 89155

EXHIBIT 221

EXHIBIT 221

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FILED

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CLERK

0031
PHILIP J. KOHN
SPECIAL PUBLIC DEFENDER
Nevada Bar #0566
JOSEPH S. SCISCENTO
DEPUTY SPECIAL PUBLIC DEFENDER
Nevada Bar #4380
DAYVID J. FIGLER
Nevada Bar # 4264
309 South Third Street, 4th Floor
Las Vegas, Nevada 89155-2316
(702) 455-5265

Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON,

Defendant.

Case No. C153154

Dept. No. V

Hearing Date: 7-6-00
Hearing Time: 9AM

MOTION FOR NEW TRIAL
(Request for Evidentiary Hearing)

COMES NOW, Defendant, DONTE JOHNSON, by and through his attorneys, PHILIP J. KOHN, Special Public Defender, JOSEPH S. SCISCENTO, Deputy Special Public Defender, and DAYVID J. FIGLER, Deputy Special Public Defender, and requests this Honorable Court to conduct an evidentiary hearing and thereafter order a new trial pursuant to **NRS 176.515.**

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COUNTY CLERK

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This Motion is made and based upon the attached Points and Authorities, pleadings and papers on file herein, together with any such oral or documentary evidence which this court may adduce at the hearing on this matter.

DATED this 23rd day of June, 2000.

PHILIP J. KOHN
CLARK COUNTY SPECIAL PUBLIC DEFENDER

By _____
JOSEPH S. SCISCENTO
DEPUTY SPECIAL PUBLIC DEFENDER
NEVADA BAR #4380
309 SOUTH THIRD STREET, 4TH FLOOR
LAS VEGAS, NEVADA 89155-2316

NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff; and

TO: STEWART L. BELL, District Attorney, Attorney for Plaintiff

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above and foregoing **MOTION FOR A NEW TRIAL** on the 10 day of July, 2000, at the hour of 9 M., in Department No. V of the above-entitled Court, or as soon thereafter as counsel may be heard.

DATED this ___ day of June, 2000.

PHILIP J. KOHN
CLARK COUNTY SPECIAL PUBLIC DEFENDER

By _____
JOSEPH S. SCISCENTO
DEPUTY SPECIAL PUBLIC DEFENDER
NEVADA BAR #4380
309 SOUTH THIRD STREET, 4TH FLOOR
LAS VEGAS, NEVADA 89155-2316

POINTS AND AUTHORITIES

Donte Johnson was convicted by a jury of four counts of murder as well as burglary, robbery and conspiracy counts on or about June 9, 2000. The prosecutor

proceeded upon multiple theories of criminal liability and it will never be known which theory was the prevailing one, nor if there was unanimous belief the Donte Johnson (aka John White) was, beyond a reasonable doubt, even proven to be the shooter. Prior to trial, Defendant had filed motion to suppress the contents of a search done in his residence, that being the master bedroom in at the Everman address. That Motion was denied by Order of this Court. (See Decision and Order of District Court, April 18, 2000). Subsequent to that ruling, however, the prosecutors conceded through multiple reference that contrary to the position taken in their Opposition to Motion to Suppress, that the Everman address was the residence of Defendant. (See Transcript, June 8, 2000, pp. 213, 214, 215, 216, 217).

During the penalty phase two additional items came to the court's attention. First, Juror Kathleen Bruce sent a note to the court which related an incident which was reported to have occurred during the guilt phase where she encountered an African-American individual and became quite afraid. (See Transcript, June 16, 2000, pp. 73-74). Second, it was brought to the Court's attention that a victim's family member was in the restricted jury lounge at least once. (See Transcript, June 16, 2000, pp. 68-70). Finally, after the jury was dismissed and while discussing the case with counsel, Juror Kathleen Bruce also indicated that she was discussing the case with an outside party while still empaneled on this jury and that she was also aware of news accounts of this highly publicized trial. Juror Connie Patterson also implied that she had been discussing the matter and was aware of the media accounts. (See attached affidavit of Kristina M. Wildeveld).

These four points are the grounds for Defendant's motion for a new trial.

ARGUMENT

Nevada Revised Statutes provides for the granting of a new trial as follows:

> **NRS 176.515 New trial: Grounds; time for filing motion.**
>
> 1. The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence.

2. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment.

3. A motion for a new trial based on the ground of newly discovered evidence may be made only within 2 years after the verdict or finding of guilt.

4. A motion for a new trial based on any other grounds must be made within 7 days after verdict or finding of guilt or within such further time as the court may fix during the 7-day period.

In Oliver v. State, 85 Nev. 418, 456 P.2d 431 (1969) the Nevada Supreme Court set out the criteria granting a new trial:

> . . . Consideration by the trial court in granting or denying a new trial has been clearly set down in several recent cases. Pacheco v. State, 81 Nev. 639, 408 P.2d 715 (1965); Burton v. State, 84 Nev. 191, 437 P.2d 861 (1968); State v. Crockett, 84 Nev. 516, 444 P.2d 896 (1968). The statute governing the granting of new trials was amended by the 1967 legislature and appears as NRS 176.515. Appellant contends, and we agree, that in seeking a new trial the newly-discovered evidence must be (1) newly discovered, (2) material to movant's defense, (3) such that it could not with reasonable diligence have been discovered and produced for the trial, (4) not cumulative, and (5) such as to render a different result probable upon retrial. To which we add (6) that it does not attempt only to contradict a former witness or to impeach or discredit him, unless witness impeached is so important that a different result must follow, Whise v. Whise, 36 Nev. 16, 131 P. 967 (1913); and (7) that these facts be shown by the best evidence the case admits, People v. Sutton, 15 P. 86 (Cal. 1887); People v. Beard, 294 P.2d 29 (Cal. 1956).

Id. At 424.

In the instant matter, counsel orally made Motion for A New Trial based on the new position taken by the State that the Everman residence was "Donte's house and room." (See Transcript June 8, 2000, page 221). The oral motion was denied by the court. The Defendant raises this Motion anew with the following written points and authorities and asks the Court to take it in consideration cumulatively with the juror and witness misconduct issues in ruling on the present motion.

"It is well established that when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime." Thompson v. Calderon, 120 F.3d 1045 (9th

Cir. 1997) reversed on other grounds 523 U.S. 538 (1998). In United States v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993), the 9th Circuit stated: "While lawyers representing private parties may - indeed, must - do everything ethically permissible to advance their clients' interests, lawyers representing the government in criminal cases serve truth and justice first. The prosecutor's job isn't just to win, but to win fairly, staying well within the rules." citing United States v. Kattar, 840 F.2d 118, 127 (1st Cir. 1988) (stating that the function of the prosecutor "is not merely to prosecute crimes, but also to make certain that the truth is honored to the fullest extent possible"). In the present case, it is improper to allow prosecutors to change position within the SAME TRIAL in contravention of the truth by advancing that Donte Johnson after the Motion to Suppress had been denied to then take the position that Donte Johnson was actually living in the Everman residence. Such should allow the Defendant a new trial.

Juror misconduct raises serious concerns in evaluating Motion for a New Trial. First, a Juror who admits an unreasonable fear of black men would not be properly seated in the jury. The fact that this Juror harbored this fear for a week and only revealed it to the Court after guilt deliberations, and then only when she thought that the information may help unseat a consclentious juror who did not want to impose the death penalty is highly prejudicial to the Defendant in the present matter. Second, this same juror admitted that she, despite the admonition to the contrary, was discussing the trial with her husband and was additionally discussing news accounts especially those relating to the debate over a hung penalty jury. Third, Juror Connie Petterson indicated that she "heard" that people (obviously not the jurors) were postulating that she was "the hold out since she was emotional." This clearly implies that Juror Patterson was aware of media accounts and discussions about such.

To serve on a jury, a juror must be free of all bias, including racial bias. See N.R.S. 175.036. The right of a citizen accused to challenge jurors for actual bias is axiomatic. See Darbin v. Nourse, 664 F.2d 1109 (9th Cir. 1981), State v. McClear, 11 Nev. 39 (1876). Juror Bruce was not free of bias, and was not forthright with this tribunal in a

timely fashion when an obvious incident occurred.

Compounding the error, this Juror admitted to discussing the matter with others in contravention of statute and gaining knowledge of media accounts. N.R.S. 175.401.

The Nevada Supreme Court has established a review procedure for juror misconduct, to wit:

> We have established certain considerations which are relevant to the decision of whether the error is harmless or prejudicial. These include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.

Hui v. State, 103 Nev. 321 (1987) citing Big Pond v. State, 101 Nev. 1, 3 (1985).

In the present case, it cannot be disputed that the gravity of the crime charged could be no more serious under any circumstances. This alone should be the decisive factor in determining prejudice. Additionally, however, the jury did deliberate for a substantial period of time on the issue of guilt and since the case was greatly covered in the media, especially with regard to the horrific impact on the victims, any exposure to the media is necessarily grounds for a new trial.

Finally, there can be no justification for family members of the victim to be in the restricted area of the jury lounge. Irrespective of a family member's belief that they are allowed to go "wherever they wish" the jury must be free from this prejudicial encounter in the jury-only designated areas. The fact that one instance was revealed is sufficient to question whether there were more unreported instances, and since the gravity of the charges and the other misconduct was apparent, the mere fact of one transgression by the victim's family with regard to jury room contamination must give the Court pause to evaluate the propriety of the entire proceeding in light of the Federal and State due process rights of the Defendant in addition to the standards set forth in Big Pond, supra.

In the case at bar, the new position of prosecutor coupled with the juror and victim's family misconduct supports that a different result would have occurred if the trial was free from these errors.

...

...

WHEREFORE, Defendant prays that this Honorable Court conduct an evidentiary hearing on this matter for new a trial.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY SPECIAL PUBLIC DEFENDER

By _____
JOSEPH S. SCISCENTO
DEPUTY SPECIAL PUBLIC DEFENDER
NEVADA BAR #4380
309 SOUTH THIRD STREET, 4TH FLOOR
LAS VEGAS, NEVADA 89155-2316

AFFIDAVIT OF KRISTINA M. WILDEVELD

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

KRISTINA M. WILDEVELD, being first duly sworn according to law, deposes and states as follows:

1. I am an attorney duly licensed to practice law in the State of Nevada and am a Deputy Special Public Defender with the Office of the Special Public Defender. I make this Affidavit based upon my own personal knowledge except as to those matters stated upon information and belief, and as to those matters I believe them to be true.

2. That on June 16, 2000, I was present immediately after the jury in the Donte Johnson trial was discharged and was present when the jury spoke with counsel regarding the deliberations on both penalty and guilt phase.

3. That I was present in the Courtroom when Juror Kathleen Bruce indicated that she had a fear of an African-American in an elevator during the course of the trial.

4. That I noted that the same Juror, Kathleen Bruce, had asked both the State and the Defense attorneys if the media was referring to her on last night's news account when it was related that a "hold-out" juror was a woman.

5. That I watched the evening news the night before and in fact there was an account that the jury was hung and that the "hold-out" was a woman juror.

6. That Juror Bruce brought this fact out on her own without any prompting or previous discussion from anyone in the room.

7. That upon asking the question, Mr. Dayvid Figler, counsel for Donte Johnson, inquired how she would know what was on television regarding this matter, and that Juror Bruce nervously responded that she had discussed the matter with her husband, however, it appeared to me that she had full and complete personal knowledge of the entirety of the news account. Juror Bruce also indicated that she felt that she was being singled out by the media as the "hold out."

8. At that time, another female juror, number 11, Connie Patterson, indicated "Really, I heard everyone thought it was me since I was emotional during the return of the verdict."

Further Affiant sayeth naught.

KRISTINA M. WILDEVELD

SUBSCRIBED AND SWORN to before me
this 23rd day of June, 2000.

PATRICIA S. FLOOD
Notary Public - Nevada
My appt. exp. Sep. 1, 2000
No. 92-3703-1

Patricia S. Flood
NOTARY PUBLIC, In and for the
County of Clark, State of Nevada

do that, logically we might as well take up whatever you have to tell us. And I'm in receipt of a note that's signed by you -- you are Kathleen Bruce?

JUROR BRUCE: Right.

THE COURT: It says, "I have an incident that occurred last week that I need to bring to your attention as soon as possible." So we've cleared the courtroom, there's no one else around, the cameras are off. Don't worry about it, just tell us what you felt you have to tell us.

JUROR BRUCE: Okay. A week ago last Wednesday when we all were dismissed, we all left for the evening, we went to the normal parking garage. Most of the group went to the first elevator; my car was on the other side, so I went to the other elevator. I was standing there, didn't realize somebody was standing behind me. I got startled, I turned around, it was Tim, Juror Number 7. I said, oh, you scared me. He says, oh, I -- he says, I sneak up on people a lot, and he laughed.

Okay. We were waiting for the elevator to come down from the roof, we were talking a little bit. It finally came down to the first floor, everybody got out of the elevator except one African -- African-American man; he had some kind of a bag with him. It was the day of the duffel bag and the guns and everything, so it kind of startled me at first, that he was on the elevator, did not get off at 1. But I thought for a second, Tim's here, okay, I'll get in -- I'll get in the

elevator.

At that point I asked -- I pushed number 3, for the third floor, I asked Tim what floor he was on. He said, I'm on 3. I said, oh, you're on 3, too. And he said, yeah. And I said, okay.

Well, it got to 3, I got off. My car was right in the handicapped spot right there. He didn't get off, he stayed on the elevator. I was rifling around in my purse for stuff, I called my husband to let him know I was coming home. About a minute later the elevator opened again, and he got off.

I don't know, it just was very odd --

THE COURT: Okay.

JUROR BRUCE: -- that he said he was on 3 and then he stayed on the elevator with the other gentleman and then got off on 3 later.

THE COURT: Okay. Thank you very much. We'll see you in a minute or two.

JUROR BRUCE: Okay.

THE COURT: Matter of fact, just stay there in your seat. And just --

JUROR BRUCE: Oh, okay.

THE COURT: -- bring the other jurors in.

(Off-record colloquy)

MR. SCISCENTO: Don't we have another note?

Point number seven, Donte's fingerprint at the crime scene. We've alluded to this, the Black and Mild cigar box. Charla told us, Bryan told us that Donte smokes Black and Milds. 100 percent positive that is Donte Johnson's fingerprint. Corroboration, scientific evidence that the witnesses who testified are telling the truth.

Point number eight, Matt's VCR at Donte's house. The VCR was found at the Everman home shortly after Donte was arrested. The VCR didn't appear there until August 14th, 1998, the morning following the murders. And what do we know about that VCR? The remote control that is kept by Matt's father turned on that VCR, proof that that is Matt's VCR in the defendant's home. And we know that Donte's co-conspirator, Sikia Smith, held that VCR, you recall the testimony again of Ed Guenther. And we also have corroboration of LaShawnya's testimony, she told us that Sikia bought -- I'm sorry, Sikia sold the VCR to Donte for twenty dollars ($20). We know Sikia's palm print is on there, we know the VCR turned up at Donte's home. Scientific evidence that corroborates LaShawnya Wright.

Point number nine, Pete's pager at Donte's house. Pager found buried in the backyard of the Everman home where Donte Johnson stayed. You heard the stipulation that that Peter [sic], in fact, belonged to Peter Talamantez. Corroboration of all the witnesses in this case when they told

you Donte confessed to committing these crimes, to killing Peter Talamantez because he doesn't like Mexicans. Scientific corroboration. Physical corroboration when the pager is buried in the defendant's backyard.

Point number nine, gun in Deco's car. You saw the enforcer rifle that Sergeant Honea impounded after he stopped Donte and Terrell just three days after the quadruple murders. Charla, Tod and LaShawnya all identified that gun as a gun that was commonly kept in the tote bag, and we know that the tote bag left the Everman home shortly before Donte committed the crimes. Corroboration.

Point number nine, gun in Deco's room. When Sergeant Hefner searched the Everman home after arresting Donte Johnson he found the collapsible Ruger rifle that everybody described in this case. Just three days after the murder it's recovered. And Charla and Tod described that gun as the gun that was commonly kept in the tote bag, and the tote bag left the Everman home the night that Donte Johnson killed these boys.

Point number twelve, duct tape in Deco's room. All four victims in this case restrained with duct tape. You saw the photographs. And isn't it interesting that there's a partial roll of duct tape recovered from the room where Donte Johnson's stays, sitting in the duffel bag that everybody testified about in this case. And doesn't that evidence

corroborate the testimony you heard from the witness stand, the witnesses who said Donte told them about the victims being taped up with duct tape.

Twelve points, if you will, that establish Donte Johnson's guilt.

Now, I suppose it's possible we can take each one of these points and explain it away. I guess Charla Severs is lying, perhaps Tod Armstrong is lying, Bryan Johnson he must be lying too.

MR. FIGLER: Your Honor, they objected during the course as to that terminology, we would have to object at this time for that as well.

THE COURT: I think he's saying in terms of argument what might be anticipated, as such it's overruled.

MR. DASKAS: And if Donte Johnson is not guilty then LaShawnya Wright must be lying too. So Charla is lying, Tod is lying, Bryan is lying and LaShawnya Wright is lying. And apparently somehow the victims' blood just turned up on Donte Johnson's pants. Somebody -- the true killer apparently wore Donte Johnson's pants to the crime scene and then returned those pants to Donte Johnson's bedroom before the police showed up. And let's not forget that somebody must have deposited Donte Johnson's semen on his own pants.

Deco's DNA at the murder scene. Apparently somebody, for Donte Johnson to be found not guilty, took a

cigarette butt that Donte Johnson had smoked and placed it at the crime scene. Unlucky for Donte Johnson.

Deco's fingerprint at the murder scene. For Donte Johnson to be found not guilty you must conclude that somebody took the cigar box holding his fingerprint, and they planted it at the crime scene. Unlucky Donte Johnson.

Matt's VCR at Deco's house. For Donte Johnson to be found not guilty, apparently somebody took Matt's VCR from the Everman home -- from the Terra Linda and placed it in the home where Donte Johnson stayed. Is that reasonable to believe?

Peter's pager at Deco's house. For Donte Johnson to be found not guilty you must conclude, speculate that somebody else buried the pager in Donte's backyard, along with all these other speculations you must conclude.

The Ruger in Deco's room. Isn't it interesting that all these witnesses described the guns that Donte had possession of, and sure enough we find the Ruger rifle in his -- in his room. I guess somebody planted that. The Enforcer rifle in Donte's car, you heard the testimony about the fact that that gun was kept in the duffel bag, the duffel bag left the night of the murders, and it just happened to be found in his room -- in his car rather, three nights after the homicides.

And the duct tape in Deco's room. Apparently the true killer, for you to find Donte Johnson not guilty, placed

a partial roll of duct tape in Donte Johnson's room before the police showed up.

I suppose it's possible to explain away each of these points, but the thing about reasonable doubt is, it must be reasonable. And is it reasonable to conclude that all these witnesses are lying, that the evidence was planted, that the guns were planted in his car. Is it reasonable to conclude that Donte Johnson is not guilty?

This evidence does not point to Ace Hart, and the evidence does not point to Bryan Johnson as having committed these crimes, and no, the evidence does not even point to Tod Armstrong in this case. The evidence points to one person and only one person, Donte Johnson. And you must find him guilty of all the crimes with which he's charged, including four counts of first degree murder with use of a deadly weapon.

Thank you.

THE COURT: Thank you.

Would counsel approach the bench please.

MR. FIGLER: Can we pull the screen down?

THE COURT: Why don't we do it in the order -- this order that I'm going to suggest.

MR. FIGLER: Note for the record, it's still up.

(Off-record bench conference)

THE COURT: Okay. Take the screens out and turn them off please.

Figler?

MR. SCISCENTO: We'll submit it, Your Honor. I don't know what you're asking. We've provided --

THE COURT: What I'm asking you is, I indicated to you that I'd appreciate some assistance with reference to the Allen charge. Yesterday, I believe around 3 o'clock, my question is very simple is, do you have anything that might assist me if this comes up. Not submitted.

MR. FIGLER: No, Judge, there's nothing --

THE COURT: I'm asking you, did you do any research?

MR. FIGLER: -- there's nothing further. If an Allen charges does come forward.

THE COURT: I want to ask you is --

MR. FIGLER: Our research is the same as theirs.

THE COURT: Okay . Thank you.

MR. GUYMON: Judge, being that we all agree, do you want any of the cases? I didn't --

THE COURT: No. No. That's my thinking too.

ATTORNEYS: Thank you, Judge. Thank you, Your Honor.

(Court recessed)

THE COURT: And before we start them deliberating, let's go back on the record.

The final issue, which to me is a non-issue, it is my understanding that, at some point late in the day, the

victim -- some member of the one of the victim's families found themselves in the jury lounge where this magazine was sitting. Now, Stony has represented to me they -- they sit in the jury lounge where they are all assembled and then they start deliberating, that he didn't see this, whatever that's worth, in the morning. To me it's a non-issue.

I mean there is (a), no doubt that for the last six months at least, there's been a pretty raging controversy in this country about the propriety of the death penalty if you have a -- any degree in the news -- of interest in news at all, you know that the State of Illinois has a moratorium on the death penalty now and you know that it's an issue in the presidential campaign with Bush. And you know that there's been daily newspaper articles for the last week, not concerning Mr. White, but concerning the death penalty practice in Nevada and if people are exposed to this it has nothing to do with this case particularly, of course. In part, because the major emphasis is cases can be a bad result because they didn't use DNA evidence. We had, at least according to the State positive DNA evidence in this case, to me it's a non-issue. Does anybody wish to pursue it?

MR. DASKAS: No, Judge.

MR. FIGLER: No, Judge, I mean I'm curious as to why a victim's family member would be in the jury lounge, but.

THE COURT: Well, I would say Mr. Figler, because if

you've been around this courthouse longer, you would form the perception that his courthouse has many problems with it. One of them is that there's no real segregation of the jurors, from the witnesses, from the family members, from the lawyers and in the new courthouse it's gonna be remedied. But that is a problem. People are free, thinking that they are taxpayers to wander almost anywhere in this building.

They should be deliberating.

(Court recessed at 10:10 a.m., until 11:35 a.m.)

(Jury is not present)

THE COURT: All right. As you know, we have a note -- well, we have two.

"We find ourselves stalemated. There does not appear to be any possibility of movement by either side." That came out about 11:00 o'clock.

And about the same time we get from Juror Number 1, Kathleen Bruce, "I have an incident that occurred last week that I need to bring to your attention as soon as possible." I have no idea what Kathleen Bruce, it's signed Juror Number 1, wants to tell us, but I would assume, as long as we're doing everything on the record, I'm -- I have the feeling it's nothing that's going to in any way impact on this, but I gather we should hear from her before we hear from the others. Don't you think?

MR. GUYMON: I would think that'd be appropriate,

EXHIBIT 222

EXHIBIT 222

Has pretrial
Keep
Know DP more expensive

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,	)	CASE NO: C153154
	)	DEPT. NO: V
Plaintiff,	)	
	)	
vs.	)	
	)	
DONTE JOHNSON	)	
	)	
Defendant.	)	
	)	

JURY QUESTIONNAIRE

1170028 — JUROR NUMBER

586 — BADGE NO.

John C. Young — PRINT NAME

[redacted] — DATE OF BIRTH

Dear Prospective Juror:

You have been placed under oath. Please answer all questions truthfully and completely as though the questions were being asked of you in open court. You may be asked additional questions in open court during the jury selection process. Some of the questions asked in court may be similar to the questions included in the questionnaire. Every effort will be made to keep duplication of questions to a minimum.

All questions asked, either by way of this questionnaire or by way of oral examination, are intended to facilitate the selection of a fair and impartial jury to hear this case. The answers provided in response to the written questions will be made available to counsel for both the State and the defense. Your answers will also become part of the Court's permanent record and therefore, a public document. If you cannot answer a question, please leave the response area blank. During regular questioning by the court and the attorneys you will be given an opportunity to explain or expand upon any answers, if necessary.

To assist the Court and counsel in evaluating any knowledge you may have concerning this case, please read the brief synopsis of this case provided with this questionnaire. The State has the burden of proving these allegations beyond a reasonable doubt. Because this questionnaire is part of the jury selection process, you must answer the questions under penalty of perjury and you must fill out the questionnaire by yourself. After you have completed filling out the questionnaire, please leave it with a jury assistant.

If you wish to make further comments regarding any of your answers, please do so on the last page of this questionnaire. If you need additional pages, please ask a jury assistant and they will be provided to you. As you answer the questions that follow, please keep in mind that every person is fully entitled to his or her own opinions and feelings, and that there is no right or wrong answers, only complete and incomplete answers. Complete answers are far more helpful than incomplete answers because they make long and tiresome questioning unnecessary, therefore, shortening the time it takes to select a jury.

Your answers will be used solely in the selection of a jury and for no other purpose.

DISTRICT COURT JUDGE JEFFREY SOBEL
DEPARTMENT V

SYNOPSIS OF CASE

On or about the 14th day of August, 1998, it is alleged that DONTE JOHNSON, TERREL YOUNG, and SIKIA SMITH entered a home at 4825 Terra Linda, Las Vegas, Nevada, wiht the intent to commit a robbery. During the robbery, it is alleged that MATTHEW MOWEN, TRACEY GORRINGE, JEFFREY BIDDLE, and PETER TALMENTEZ, were tied up with duct-tape and shot and killed.

PROCEDURE

Donte Johnson is charged by way of Indictment with:

1 Count of BURGLARY WHILE IN POSSESSION OF A FIREARM

1 count of CONSPIRACY TO COMMIT ROBBERY AND/OR KIDNAPING AND/OR MURDER

4 counts of ROBBERY WITH USE OF A DEADLY WEAPON

4 counts of FIRST DEGREE KIDNAPING WITH USE OF A DEADLY WEAPON

4 counts of MURDER WITH USE OF A DEADLY WEAPON

An indictment is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt.

PLEASE REMEMBER THESE ARE ONLY ALLEGATIONS AND THE STATE ALWAYS HAS THE BURDEN OF PROVING, BEYOND A REASONABLE DOUBT, THAT THE DEFENDANT COMMITTED THE CRIMES AS ALLEGED.

DEMOGRAPHICS

1. Your full name: John Carl Young

2. Your age: 51

3. Your place of birth: Detroit, Michigan

4. Your parents' place of birth:

Mother: Feasonton, North Dakota
Father: Detroit, Michigan

5. Your marital status (married, divorced, single, separated): Married

How long: 29 years

6. Children:

	Age	Sex	Education	Occupation
a.	[redacted]	[redacted]	[redacted]	[redacted]
b.	[redacted]	[redacted]	[redacted]	[redacted]
c.	[redacted]	[redacted]	[redacted]	[redacted]
d.				
e.				

PLACE OF RESIDENCE

7. In what area of town do you live?

[redacted]

How long have you lived in that location? 9 years

8. How long have you lived in the Las Vegas Metropolitan area: 9 years

EDUCATION

9. What is the highest grade you have completed? PhD degree

10. Did you attend College or University? yes If so, please complete the following:

College/ Major/

University	Year	Degree	Concentration
[redacted]			

11. Have you received any other special training or schooling?

If so, explain: Washington University St. Louis, School of Medicine post-doctoral fellowship in exercise biochemistry

12. What is the education level of your spouse or person you are living with?

B.S. Nursing, M.S. Nursing

13. Did he/she attend college or university? yes Graduate school? yes
If either, what was his/her degree and major area of concentration?

B.S. Nursing, R.N., MS. Nursing

14. Has he/she received any special training? yes - If so, please explain:

post graduate work in workforce education - teacher certification

15. If you have taken courses or had training in any of the behavioral sciences (e.g. psychology, sociology, counseling or similar areas), please identify such courses/training by title and subject matter:

undergraduate introductory courses in psychology & sociology

16. If you have taken courses or had training in any of the legal fields, (i.e. law, administration of justice, corrections, law enforcement), please identify such courses/training by title and subject matter:

None

17. If you have taken courses or had training in any of the medical sciences, and in particular the medical specialty of psychiatry, please identify such courses/training by subject matter or title:

Minor in physiology as part of doctoral program

PRE-TRIAL PUBLICITY

Based upon the synopsis of the case attached to this questionnaire:

18. Do you recall hearing or seeing anything about this case prior to today?
Yes ✓ No _____

If yes, describe what you saw or heard?

Reports on television news and newspapers

19. How many times, in the last two years, have you heard something about this case?
5-6.

20. How would your prior knowledge of the case affect your ability to sit as an impartial juror?

Would not have an effect

21. As a result of what you have seen or heard, have you formed any opinion as to the guilt or innocence of the defendant(s)? Yes _____ No ✓

22. Do you subscribe to any local newspaper? If yes which one(s) _____

L.V. Review Journal

23. Do you watch local newscast? If so which one(s) _____

Channel 3, channels 8 & 5 sometimes

24. Other than what you have learned today what information do you know about this case? only the details provided by the media at the time the event occurred

ATTITUDES REGARDING THE DEATH PENALTY

The defendant(s) in this case has been charged with First Degree Murder. The Nevada State Legislature has determined that if a person is convicted of First Degree Murder, then a jury must further decide which of four possible punishments provided by law should be imposed. For each count of First Degree Murder a Defendant can be sentenced to four possible punishments which are:

A. The death penalty,

B. Life imprisonment without the possibility of parole,

C. Life imprisonment with the possiblity of parole,

D. Definite term of 50 years with the possibility of parole after 20 years.

The law requires that whenever the District Attorney seeks death as a possible punishment for a charge, prospective jurors must be asked to express their views on both the death penalty and the penalty of life in prison with or without the possibility of parole, and a term of years. Asking about your views at this time is a routine part of the procedure to be followed in all cases in which death is sought as a possible punishment. By asking these questions, the court is not implying that the defendant is guilty or that you will necessarily need to decide the penalty in this case.

This trial will be divided into two phases.

During the first phase the jury will determine if the defendant is guilty or not guilty of First Degree Murder. You will not be concerned with the punishment to be imposed at this phase of the trial. If the defendant is found not guilty, or is found guilty of any offense other than First Degree Murder, the trial will end and you will not be involved in any further proceedings.

If, after listening to all of the evidence presented in the first phase, you and your fellow jurors should find the defendant guilty of first degree murder, then under the laws of the State of Nevada, you would be involved in a second phase of the trial to determine if the penalty will be:

A. Life imprisonment with the possibility of parole,

B. Life imprisonment without the possibility of parole,

C. The imposition of the death penalty,

D. Definite term of 50 years with the possibility of parole after 20 years.

25. Will asking questions concerning your views about the death penalty and the penalty of life in prison with or without the possibility of parole suggest to you that the defendant(s) must be guilty? Yes _____ No ✓ If yes, please explain:

_____

_____

26. Do you understand that there may never be a penalty phase in this case, and that the asking of these questions is only done to prepare for that possibility?
Yes ✓ No _____

27. Do you belong to any organization that advocates the abolition of the death penalty? Yes ____ No ✓ If yes, what organization:

_____

_____

28. Do you belong to any organization that agrees with the death penalty?
Yes ____ No ✓ If yes, what organization:

_____

_____

29. How do you feel the legal system treats persons accused of crimes? _____

persons accused are treated fairly the majority of the time

30. As a juror, would you feel an obligation to reach a verdict because that was the vote of the majority? Yes _____ No ✓

31. How would you feel if the jury you sat on was unable to reach a verdict?

that depends on the reasons for the disagreement and the relative strength of the case presented for or against the defendant

32. Would you vote a certain way solely because you wanted to see a unanimous verdict reached in this case? Yes _____ No ✓

33. Would you say that you are generally: (circle one)

a. in favor of the death penalty,
b. generally opposed to it,
(c.) would consider it in certain circumstances,
d. never thought about it.

34. Do you believe that you personally could vote to impose the death penalty, if you believed that it was warranted in a particular case? Yes ✓ No _____

35. Are you open to considering all four forms of punishment in a capital case, depending on the evidence presented at the trial and what you learn about the defendant in a penalty phase, should you find him guilty of first degree murder? Yes ✓ No ___

36. In your present state of mind, can you, if selected as a juror, consider all four possible forms of punishment, with out giving preference to one over the other and select the one that you feel is the most appropriate depending upon the facts and the law? Yes ✓ No _____ If no, please explain:

37. What do you think of the saying "an eye for an eye":

The correct interpretation is "no more than an eye for an eye, no more than a tooth for a tooth" - the punishment must be appropriate for the crime

38. Do you feel that one convicted of murder should be sentenced to death without consideration of background information?

Always ____ Probably ____ Possibly ____ Never ____ Unsure ✓

Please explain:

It would depend on the nature of the background information and/or the type of mitigating circumstances

39. Overall, in considering general issues of punishment, which do you think might be worse for a defendant:

Death ____ Life in prison without possibility of parole ✓

Please explain:

The thought of spending 60-70 years in an 8x10 foot space for 22-23 hours a day is mind numbing.

40. Without having heard any evidence in this case, what are your general thoughts about the benefit of imposing a death sentence on a person convicted of murder in the first degree?

Although a death sentence may satisfy society's need for revenge, given the cost of legal appeals in these cases, I believe it is actually cheaper or more cost effective to sentence someone to life in [redacted] prison.

However, for particularly heinous crimes, death penalty is appropriate punishment

41. Without having heard any evidence in this case, what are your general thoughts about the benefit of imposing a sentence of life without the possibility of parole on a person convicted of murder in the first degree?

Probably cheaper in the long run than legal appeals that accompany the death penalty - loss of freedom for 60-70 years is scary

42. Without having heard any evidence in this case, what are your general thoughts about the benefit of imposing a sentence of life with the possibility of parole, or a term of years with the possibility of parole on a person convicted of murder in the first degree?

Incarceration for 60-70 yrs would seem to have diminishing returns. Danger to society is probably less likely in a 70-80 year old - Parole after 40-50 yrs may be reasonable

43. Do you feel that life in prison without the possibility of parole is a severe punishment? Yes ✓ No _____ Please explain:

Giving up freedom - control of your life - for the rest of your life seems pretty severe to me

44. Indicate your opinion of the following statements:

A. If the prosecutor goes to the trouble of bringing someone to trial, the person is probably guilty.

Strongly Agree _____ Agree _____ Disagree _____

Strongly Disagree _____ No opinion ✓

B. A defendant in a criminal trial should be required to prove his or her innocence.

Strongly Agree _____ Agree _____ Disagree _____

Strongly Disagree ✓ No opinion _____

C. A person is entitled to a fair and thorough investigation by law enforcement officers before he/she is arrested and charged with a serious crime.

Yes ✓ No _____ No Opinion _____

45. If you were convinced beyond a reasonable doubt that the defendant was guilty of first degree murder, would you say that:

A. Your beliefs about the death penalty are such that you would ALWAYS vote for the punishment of life imprisonment and NEVER vote for the death penalty regardless of the facts and circumstances of the case.

Yes _____ No ✓

B. Your beliefs about the death penalty are such that you would ALWAYS vote for the death penalty and NEVER vote for life imprisonment regardless of the facts and circumstances of the case.

Yes _____ No ✓

OCCUPATIONAL/VOLUNTEER WORK

46. Have you performed any volunteer work in the last five (5) years; if yes please provide the name of the agency, organization or charity, and the description of the work performed. _____

US Youth Soccer Nevada, and USSF Far West Regional Youth Soccer Tournament - referee

MILITARY

47. Have you ever had military experience? No

48. If so, indicate branch of service, dates of service, position/rank held, and duties:

Branch	Dates	Position/Rank	Duties

49. Were you ever a member of the military police or shore patrol? Yes _____ No ✓

50 Were you ever involved in a military court martial? Yes _____ No ✓
If yes, please describe your role in the proceedings?

PARTICIPATION IN CLUBS, ORGANIZATIONS, COMMUNITY ACTIVITIES

51. Do you belong to any group or organization active in political matters (e.g. Mothers Against Drunk Drivers, The American Civil Liberties Union, The John Birch society, Amnesty International, etc.) ? no If yes, please explain:

52. Do you attend religious services? Yes ✓ No _____ If yes, how often? Infrequently last 2 yrs - weekly prior to that

53. Are you active in church activities of any kind? Yes _____ No ✓

LEGAL SYSTEM

54. Do you have any relatives or close friends who are judges or attorneys? yes
If yes, please state your relationship to that person(s) and indicate how often you communicate with them regarding law-related subjects:

We have friends who attorneys but do not talk often about legal issues

55. Do you have any acquaintances who are practicing criminal lawyers? yes
If yes, please give the names and the relationship you have with them:
[redacted] friend - city attorney - Henderson
[redacted] sons play on same HS soccer team

56. Do you have any relatives or close friends who are now, or have been in the past, involved in law enforcement (police officers, security guard, military police, etc.)? yes If yes, please state your relationship to that person(s) and indicate how often you communicate with them regarding law-related subjects:
[redacted] - don't often talk about legal issues

57. Do you believe that your relationship with any of the above persons would affect your ability to be fair and impartial to both sides in this case? no If yes, please explain:

JURY SYSTEM/JUROR ROLE

58. If you have ever been a juror before, please state for each case:

Year	Civil or Criminal	Nature of Case	Submitted to Jury	Did you Reach a Verdict
1993	Criminal	Assault/battery	yes	Y ✓ N
				Y N
				Y N

59. Did you find your experience as a juror to be:

Positive ✓ Negative

60. If you have ever been a juror before, did you talk with the Judge, Prosecutor or Defense Attorney after returning your verdict? no

61. What types of opinions do you have that could affect your judgment in a criminal law trial?
Nature of Crime

62. Are you taking any medication regularly that might make it difficult for you to pay attention or concentrate for long periods of time? no If yes, please specify the medication, the purpose for which you are taking it, and describe its effects upon your ability to concentrate:

63. Do you have any difficulty with your hearing? no If so, might it affect your performance as a juror?

64. Do you have a problem with your vision? no If yes, please specify the nature of that difficulty and how it might affect your performance as a juror:

CRIME AND VIOLENCE

65. In general, what are your opinions and feelings about how the criminal justice system works?
System works well most of the time - however, number of criminalized behaviors could be reduced - constitutional rights must be respected

66. Have you or any family member or close friend ever been arrested and/or charge with a crime? no If yes, please explain (what happened, when did it happen):

67. If you or any family member or close friend has ever been arrested and/or charged with a crime, how has this affected your feelings about the criminal justice system?

Not Applicable

68. Have you or any family member or close friend ever been the victim of a crime?

yes If yes, please explain (who was the victim, what happened, and when did it happen):

I was mugged when I was in high school in Detroit - wallet stolen

69. Was there a conviction? No report was filed -

70. How has this experience affected your feelings about the criminal justice system?

No effect whatsoever

71. Have you or any family member or close friend ever been a witness to a crime? If yes, please explain (what type of crime, when did it happen, did you have to testify in a court proceeding):

yes - I witnessed a shooting in Detroit - never called as a witness - simply gave information to police and never heard from them again

72. Do you own any firearms (guns, rifles)? Yes _____ No ✓

If yes, what type(s)?

73. If you have ever used a weapon for any purpose other than target, skeet shooting or hunting, please explain:

No

LEGAL EXPERIENCE

74. Have you had any experience working in any legal field? No If yes, please explain:

75. Have you ever testified as a witness in any type of matter in a court of law? yes If yes, please explain?

Witness in trial of Danny Too against UNLV over wrongful termination, 1998

76. Whether or not you have had any experience with the, what is your opinion of:

a. Defense Attorneys do their jobs well

b. Public Defenders over worked, under prepared

c. Prosecutors respect their performance

77. Would you have tendency to give more weight or credence to the testimony of a police officer simply because he/she is a police officer? Yes _____ No ✓
Why? _____

78. How do you feel the crime problem is handled in your community?

Adequately ✓ Inadequately _____ No opinion _____

Please explain: I feel our community / neighborhood is safe for everyone

79. Do you belong to a crime prevention group in your neighborhood? No
If yes, what is the nature of your participation?

80. Generally what is your opinion of the punishment that convicted criminals receive?
generally they get what they deserve

81. If you had your choice, would you give the police more or less power than they have now? Yes _____ No ✓
If yes, please explain:
Property confiscation laws without conviction of crime appear to violate constitutional prohibitions as do illegal searches and seizures

82. When a defendant is charged with a crime, do you think he should have to prove his innocence? Yes _____ No ✓

If yes, please explain:
our system of jurisprudence is based on principle of innocent until proven guilty - therefore burden of proof is on prosecution

RACIAL OR ETHNIC BIASES

83. Do you have some biases of some sort against a young African-American man?
Yes ✓ No ____
Please explain your answer: In general NO, but have strong belief that ~~they~~ some need to embrace value of education + adopt middle class values of hard work, respect for property and persons etc to get ahead. I don't agree with ostracizing peers who try to ahead by accusing them of "being white".

A. Do you think that some biases exist, in our society, against an African-American male ?
Yes ✓ No ___
Please explain: perception of being irresponsible, gangbanger, etc. persists, but similar biases exist against many teenage males regardless of race

B. Would you say that you were raised in an atmosphere free of biases?
Yes ✓ No ___
Please explain your answer: my parents were not overtly judgemental of people of other races or nationalities

C. Have you been exposed to persons who exhibit, or have exhibited, racial, sexual, religious, and/or ethnic prejudice?
Yes ✓ No ___
Please explain your answer: I grew up in Detroit in the 50's & 60's Such attitudes were common, especially around the time of the 1967 riots

D. Please list any biases you might have: I am biased against those who do nothing to help themselves, who won't take advantage of the educational & vocational opportunities available to them, who feel that they are somehow owed an existence by the government, who don't show respect for other persons & property

E. Would you say you have some racist or ethnic attitudes?
Strong ___ Moderate ___ Mild ✓ None ___

84. Do you think an African-American man can receive a fair trail, in Clark County Nevada, free of racial biases? Please Explain.

Racial attitudes here are no better or worse than elsewhere - I would like to believe that case will be decided on its merits.

85. Can you think of any reason(s) you might be biased or prejudiced either for or against a young African-American male?
Yes ___ No ✓
Please explain your answer: Case should be decided on the facts presented -

86. What is it about yourself that makes you feel you can be an impartial juror on this case? I believe as a ~~is~~ scientist I am trained to evaluate the data objectively before making a decision or reaching a conclusion. It is the essence of the scientific process -

87. Given what you know about the nature of this case, please list any biases you may have which could interfere with your ability to be an impartial juror, if selected to sit on this case: _____

None

88. Can you think of any reason you might not be an impartial juror, if selected to serve on this case? Yes ___ No ✓

If "Yes", please explain: _____

89. Please state why you might like or not like to sit on this case? _____

~~My Family Time~~

I have a committment in Northern California from June 17 to June 26 and ~~have~~ promised to ~~[redacted]~~ travel to Michigan with my wife the following week for 2 weeks.

I would be greatly inconvenienced if asked to serve on a jury should the trial extend beyond June 16th.

EXPLANATION SHEET

I swear or affirm that the responses given are true and accurate to the best of my knowledge and belief.

John C Young
Signature

5/24/00
Date

You are instructed not to discuss this questionnaire or any aspect of this case with anyone, including other prospective jurors. You are further instructed not to view, read or listen to any media account of these proceedings.

JEFFREY SOBEL, District Judge

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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

MOTION AND NOTICE OF MOTION FOR LEAVE TO CONDUCT DISCOVERY (HEARING REQUESTED)

(DEATH PENALTY CASE)

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff

PLEASE TAKE NOTICE that the MOTION FOR EVIDENTIARY HEARING filed in this Court on December 13, 2019, will come on for hearing before this Court in Department No. 6 on _____ at the hour of _____ located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89101.

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

POINTS AND AUTHORITIES

I. INTRODUCTION

Peter Baldonado, an investigator for the Clark County District Attorney's office, was accused of raping a witness in another case before Johnson's conviction became final.[1] As early as 2001, the district attorney's office knew there was a problem, namely that Baldonado had a practice of sexually assaulting and harassing female witnesses.[2]

Charla Severs was a female witness in Johnson's case.[3] Baldonado took a statement from Severs, memorialized in a transcription that is undated, without detail of its location, or indication of context.[4] Later, Severs left a letter with the prosecutor in this case indicated that she should have let a "B-lodeuce" "fuck me off" rather than provide a statement incriminating Johnson.[5]

Johnson seeks leave of Court to conduct discovery related to the State's suppression of evidence.

II. ARGUMENT

During post-conviction proceedings, after a hearing has been set, a party may conduct discovery "to the extent that the judge or justice for good cause shown grants leave to do so." NRS 34.780(2).[6] There appear to be no cases defining good

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[1] *See* Pet. Ex. 80 at 21–22.

[2] *See* Reply Ex. 215.

[3] *See* 6/7/00 TT at III-2.

[4] *See* Pet. Ex. 60.

[5] *See* Reply Ex. 217; *but see* 06/06/00 TT at III-79.

[6] Contemporaneous with the filing of this motion, Johnson files a Motion for Evidentiary Hearing.

cause or what circumstances constitute "good cause." The federal analogue of NRS 34.780, Rule 6 of the Rules Governing Section 2254 Cases, however, requires "good cause" for the court to allow discovery. In federal habeas cases, "[g]ood cause exists 'where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief . . . ." *Smith v. Maloney*, 611 F.3d 978, 996 (9th Cir. 2010) (omissions in original) (quoting *Bracy v. Gramley*, 520 U.S. 899, 908–09 (1997)). "Where good cause exists, 'it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.'" *Id.* at 996–97 (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)). Federal courts also grant discovery when it is needed to establish good cause and prejudice to excuse any procedural default. *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 684–85, 692–92 (2004) (petitioner established cause to overcome procedural default based on documents obtained during discovery); *Strickler v. Greene*, 527 U.S. 263, 285–86 (1999) (referencing federal discovery).

Johnson has shown good cause under NRS 34.780 because Johnson has provided specific allegations that, if fully developed, will establish good cause and prejudice to overcome any applicable procedural default.

A. The State suppressed evidence related to Peter Baldonado.

The State's violation of *Brady v. Maryland*, 373 U.S. 83 (1963) establishes good cause and prejudice to overcome a procedural default. *See, e.g.*, *Rippo v. State*, 134 Nev. 411, 431, 423 P.3d 1084, 1103 (2018). Here, the State suppressed evidence of Baldonado's misconduct. That evidence is favorable both because it could serve as

impeachment of Charla Severs's testimony and because it would undermine the integrity of the State's investigation. *See United States v. Mincoff*, 574 F.3d 1186, 1199 (9th Cir. 2009) ("*Giglio* [*v. United States*, 405 U.S. 150 (9 th Cir. 2008)] requires that the government disclose "any promises, inducements, or threats made to witnesses to gain cooperation in the investigation or prosecution."). In addition, suppression of the evidence was prejudicial because Severs offered critical testimony—that Johnson confessed to being the triggerman for all four killings.

These specific allegations, if fully developed, will establish good cause and prejudice to overcome any procedural default. Thus, Johnson requests leave of Court to conduct the following discovery.

1. Discovery from the Las Vegas Metropolitan Police Department.

Johnson seeks leave of Court to serve a subpoena duces tecum on the Las Vegas Metropolitan Police Department for all records referencing Baldonado's participation in Johnson's case, records related to investigations of Baldonado, and records related to allegations of misconduct by Baldonado.[7] These records are necessary to demonstrate that the State knew of Baldonado's misconduct, the extent of Baldonado's misconduct, and that the State suppressed this evidence.

2. Discovery from the Federal Bureau of Investigation.

Johnson seeks leave of Court to serve a subpoena duces tecum on the Federal Bureau of Investigation for all records related to investigations of Baldonado,

[7] Ex. 3.

allegations of Baldonado's misconduct, and communications related to Baldonado between the FBI and other entities.[8] These records are necessary to demonstrate that the State knew of Baldonado's misconduct, the extent of Baldonado's misconduct, and that the State suppressed this evidence.

3. Discovery from the United States Attorney's Office for the District of Nevada.

Johnson seeks leave of Court to serve a subpoena duces tecum on the United States Attorney's Office for the District of Nevada for all records related to investigations of Baldonado, allegations of Baldonado's misconduct, and communications related to Baldonado between the United States Attorneys' Office and other entities.[9] These records are necessary to demonstrate that the State knew of Baldonado's misconduct, the extent of Baldonado's misconduct, and that the State suppressed this evidence.

4. Discovery from the United States Department of Justice.

Johnson seeks leave of Court to serve a subpoena duces tecum on the United States Department of Justice for all records related to investigations of Baldonado, allegations of Baldonado's misconduct, and communications related to Baldonado between the United States Department of Justice and other entities.[10] These records are necessary to demonstrate that the State knew of Baldonado's misconduct, the extent of Baldonado's misconduct, and that the State suppressed this evidence.

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[8] *See* Ex. 4.

[9] *See* Ex. 5.

[10] *See* Ex. 6.

5. Discovery from the Clark County District Attorney's office.

Johnson seeks leave of Court to serve a subpoena duces tecum on the Clark County District Attorney's office for all records related to investigations of Baldonado, allegations of misconduct by Baldonado, references to Baldonado's participation in the investigation of Johnson's case, Baldonado's personnel records, and records related to any lawsuits related to Baldonado.[11] These records are necessary to demonstrate that the State knew of Baldonado's misconduct, the extent of Baldonado's misconduct, and that the State suppressed this evidence.

6. Discovery from the Nevada Attorney General's office.

Johnson seeks leave of Court to serve a subpoena duces tecum on the Nevada Attorney General's office for all records related to investigations of Baldonado, allegations of Baldonado's misconduct, and communications related to Baldonado between the Nevada Attorney General's Office and other entities.[12] These records are necessary to demonstrate that the State knew of Baldonado's misconduct, the extent of Baldonado's misconduct, and that the State suppressed this evidence.

B. The State suppressed evidence related to Tod Armstrong.

The fact that Armstrong was not prosecuted for these homicides, despite evidence inculpating him, raises an inference he received undisclosed benefits. Additionally, Armstrong received assistance clearing a warrant. Benefits received by Armstrong would be favorable or impeaching evidence. *See Jimenez v. State*, 112 Nev. 610, 621, 918 P.2d 687, 693 (1996). Because the State has not disclosed any

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[11] *See* Ex. 7.

[12] *See* Ex. 8.

benefits, the State has suppressed this evidence. And this evidence is material because Armstrong testified against Johnson.

These specific allegations, if fully developed, will establish good cause and prejudice to overcome any procedural default, thus Johnson requests leave of Court to conduct the following discovery.

1. Discovery from the Las Vegas Metropolitan Police Department.

Johnson seeks leave of Court to serve a subpoena duces tecum on the Las Vegas Metropolitan Police Department for all records related to Tod Armstrong.[13] These records are necessary to demonstrate that the State provided benefits to Armstrong in exchange for his testimony.

2. Discovery from the Clark County District Attorney's Office.

Johnson seeks leave of Court to serve a subpoena duces tecum on the Las Vegas Metropolitan Police Department for all records related to Tod Armstrong.[14] These records are necessary to demonstrate that the State provided benefits to Armstrong in exchange for his testimony.

[13] Ex. 9.

[14] Ex. 10.

III. CONCLUSION

Johnson requests that this Court grant leave to conduct discovery.

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 MOTION AND NOTICE OF MOTION FOR LEAVE TO CONDUCT DISCOVERY (HEARING REQUESTED) was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

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/s/ Celina Moore
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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 PETITIONER'S MOTION FOR LEAVE TO CONDUCT DISCOVERY** **(DEATH PENALTY CASE)**

1. *Holloway v. Baldonado*, No. A498609, Plaintiff's Opposition to Motion for Summary Judgment, District Court of Clark County, Nevada, filed August 1, 2007
2. Handwritten letter from Charla Severs, dated September 27, 1998
3. Subpoena Duces Tecum to the Las Vegas Metropolitan Police Department for all records referencing Peter Baldonado
4. Subpoena Duces Tecum to the Federal Bureau of Investigation
5. Subpoena Duces Tecum to the United States Attorney's Office in Las Vegas, Nevada
6. Subpoena Duces Tecum to the United States Department of Justice
7. Subpoena Duces Tecum to the Clark County District Attorney's Office for all records referencing Peter Baldonado
8. Subpoena Duces Tecum to the Attorney General's Office of the State of Nevada
9. Subpoena Duces Tecum to the Las Vegas Metropolitan Police Department for all records referencing Tod Armstrong
10. Subpoena Duces Tecum to the Clark County District Attorney's Office for all records referencing Tod Armstrong

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 PETITIONER'S MOTION FOR LEAVE TO CONDUCT DISCOVERY was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

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/s/ Celina Moore
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EXHIBIT 1

EXHIBIT 1

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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. YOUNG HAS FAILED TO NEGATE ANY ELEMENT OF MS. HOLLOWAY'S INDIVIDUAL CAPACITY CLAIM

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
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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.

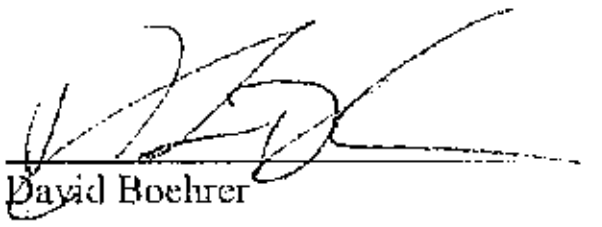
8. At a minimum, the further discovery that counsel for Ms. Holloway intend to conduct within the next two months includes taking the depositions of Bill Young, Stewart Bell, and Peter Baldonado to determine the working relationships between the Las Vegas Metropolitan Police Department, the Office of the Clark County District Attorney, and Peter Baldonado's

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

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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Sunday, April 18, 2004

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 Brocks, 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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and there was even talk of a sting operation targeting Baldonado. But Chipman said after the meeting with police, she and Brooks were never contacted again.

Three years later, when the FBI took up the matter, they organized a sting operation in which Baldonado talked to a confidential informant about quashing warrants in exchange for sex.

"To me, with an issue as serious as this, it should have been looked into," Chipman said.

Bell, who is now a district judge, confirmed the basics of Chipman's account. Bell said when the Baldonado complaint was reported to him, he took the matter very seriously and asked police to initiate an investigation.

However, he said he was subsequently told by police that the allegations against Baldonado could not be proven.

"They looked into it and could not substantiate it," Bell said.

It was unclear exactly who investigated Baldonado and to what extent. Bell said he believes he asked Las Vegas police to investigate the matter, but he can't be sure. Chipman said the detectives she met with were from the North Las Vegas Police Department.

Regardless, Baldonado was free to continue his work as an investigator with the district attorney's office. Nearly two years after Chipman and Brooks reported their suspicions, a woman said Baldonado raped her while he was working in his capacity as an investigator.

The alleged sexual assault victim is a potential witness in the Las Vegas Valley murder case of Kenneth Curtis, who is accused of killing his girlfriend in 1997. The woman said Baldonado showed up at her house and raped her in 2003.

District Attorney David Roger, who took office in January 2003, said he was not aware of the allegation that Chipman and Brooks made against Baldonado in 2001. "Absolutely not," he said Friday.

Roger said he also was not aware, before Baldonado's arrest, that the investigator had a prior conviction for stealing thousands of dollars from Caesars Palace, where he worked as a floorman in a blackjack pit.

The Review-Journal has previously reported that Baldonado was granted a pardon by the Nevada Pardons Board in 1989, and went to work as an investigator with

the district attorney's office in 1991.

He was promoted to a senior investigative position in 1996, and was assigned to several major cases in recent years. Investigators with the district attorney's office carry a gun and a badge, and perform investigations on behalf of prosecutors.

"I had no idea about his background. I didn't know about his prior conviction," Roger said. "All I knew was that he was a hardworking investigator and apparently a good employee."

Baldonado's defense attorney, Bill Terry, declined comment on this story.

The FBI, Henderson police and the Nevada attorney general's office charged Baldonado this year with sexual assault and asking for or receiving a bribe by a public officer or employee. He immediately resigned from his position as an investigator.

The charges were filed after another woman, a confidential informant for the FBI, told authorities Baldonado promised to quash traffic warrants for her if she had sex with him. The FBI and Henderson police caught Baldonado discussing such an arrangement during a tape-recorded sting.

On April 1 in Henderson Justice Court, prosecutors from the attorney general's office announced Baldonado had accepted a plea agreement. Baldonado agreed to waive his right to a preliminary hearing and indicated he will plead guilty before District Judge Donald Mosley on April 22 to one count of coercion and one count of misconduct by a public employee.

Baldonado faces a potential sentence ranging from probation to 10 years in prison if Mosley accepts the negotiation. Part of the negotiation dictates that he will not be prosecuted for any other crimes that investigators are currently aware of.

According to federal documents obtained by the Review-Journal, multiple witnesses have told authorities that Baldonado has been quashing warrants in exchange for sex for years.

Desiree Gillard told the FBI she first met Baldonado in the early 1990s when he was serving a subpoena to one of her friends. According to an FBI report, Gillard said she was working at an escort service at the time. She told agents she "had been receiving help with warrants from Baldonado in exchange for sex since 1994," the FBI report

said.

When contacted, Gillard said much of what she told the FBI is not true. She said she told the FBI "what they wanted to hear" because they intimidated her.

"I spoke to them because of other problems," Gillard said. "They called my cousin, making her believe if I didn't meet with them, a warrant would be issued for my arrest."

Gillard denied ever having sex with Baldonado. She said Baldonado did, however, help her with several outstanding traffic warrants.

Gillard also doubts Baldonado is capable of sexual assault.

"I would bet my life that is a complete lie," she said. "Peter is not that type of person. He's passive and quiet."

According to the FBI reports, Gillard told the FBI that Baldonado would help her and others fix warrants if they found someone who was willing to have sex with him.

The report states that Gillard told agents Baldonado helped one woman's boyfriend with "tons of stuff" when the man's girlfriend "paid a girl $50 to have sex with Baldonado."

Gillard told the FBI that she lost contact with Baldonado for a couple of years, but then one day he suddenly reappeared in her life.

"When she asked him how he had located her, Baldonado replied, 'I'm an investigator, I saw that you applied for food stamps,' " the report states.

According to the FBI, Gillard told agents she was arrested on traffic warrants in May or June 2003. She called Baldonado, and he said he would get her out of jail.

But Gillard said she didn't immediately get out of jail. She told the FBI she called Baldonado from jail the next day to ask why she hadn't been released.

"Baldonado became very angry and said, 'Everything should have been taken care of already. ... I spoke to the judge the other day.' "

Gillard told the FBI that Baldonado called a judge's chambers and then called the jail back with the unnamed judge on the other line.

"Gillard advised that, within minutes of the phone call, her name was called over the intercom system to be released,"

the FBI report states.

The report goes on to say that Gillard told the FBI that Baldonado "had taken care of a `material witness warrant for $10,000.' "

In addition, Gillard told the FBI Baldonado had helped out another woman who "was involved in a robbery at an Albertson's store."

In addition, the FBI reports state Gillard knows two individuals who once tried to blackmail Baldonado by recording him as he talked about trying to exchange warrants for sex.

The blackmail plot eventually fell through.

The FBI asked Gillard if she knew anything about Baldonado being involved in fraudulent identifications, check-cashing schemes or insurance fraud.

"Gillard stated that she had never known Baldonado to be involved in anything like that, and that it `would completely go against his character,' " the report said.

In a statement to the FBI, Crystal Brooks said she knew of a man who had a robbery case pending, and that the individual was denied a release from jail on his own recognizance during a court appearance.

"Brooks said that Baldonado called a North Las Vegas judge and got (the man) released from jail," an FBI report states.

Another person who gave a statement to the FBI, Tony Dodson, told the FBI that he knew several women who dealt with Baldonado. He said none of them "liked Baldonado but that they all used him to get things done."

Review-Journal writer Carri Geer Thevenot contributed to this report.

EXHIBIT 3

William C. Jeanney, Esq.
Nevada State Bar No. 01235
BRADLEY, DRENDEL & JEANNEY
401 Flint St.
Reno, Nevada 89501
Telephone No. (775) 335-9999
Facsimile No. (775) 335-9993
Attorneys for Plaintiff

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

LOVE HOLLOWAY,

Plaintiff,

v.

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 official 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. 05-A-498609-C

Dept. No. 16

AFFIDAVIT OF WILLIAM C. JEANNEY, ESQ.

I, William C. Jeanney, being first duly sworn, under penalty of perjury, depose and say:

1. I am the attorney of record for plaintiff LOVE HOLLOWAY;

2. That, based upon information and belief, that there are three witnesses to the facts alleged in plaintiff's Complaint as against these defendants;

3. That based upon information and belief believes that these three witnesses reside in

LAW OFFICE OF
BRADLEY, DRENDEL
& JEANNEY
401 FLINT STREET
RENO, NV 89501
(775) 335-9999

Las Vegas, Nevada;

4. That these three witnesses are known as Crystal Chipman, Crystal Brooks and Desiree Gillard;

5. That based upon information and believe, these three witnesses will testify that they personally met with defendant then District Attorney BELL in 2001 and informed him in regards to inappropriate sexual behavior by defendant BALDONAD while an employee of the District Attorney's Office;

6. That based upon information and belief, that defendant BELL informed these witnesses that he would have this information investigated by the North Las Vegas Police Department;

7. That based upon information and belief these witnesses will testify that they were then interviewed by detectives from the North Las Vegas Police Department;

8. That based upon information and belief, defendant BELL then told them that North Las Vegas Police Department had investigated and could not substantiate the allegations;

9. That counsel for the plaintiff has retained the services of a private investigator in Las Vegas, Nevada who is attempting to locate these individuals, but as of this date has been unable to do so.

10. That the investigator hired by plaintiff's counsel has stated his optimism in locating these witnesses.

11. That discovery is ongoing, no depositions have been taken and are now being scheduled, and the locating and deposing/interviewing these witnesses will all greatly impact the factual tenor of this case.

Dated this 31 day of July 2007.

BRADLEY, DRENDEL & JEANNEY

William C. Jeanney

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BRADLEY, DRENDEL
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401 FLINT STREET
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EXHIBIT 2

EXHIBIT 2

[redacted]

To Whom It May Concern: 09-27-98

Thanks a whole lot! I did exactly what B-Loduce told me Even though it tore me apart. But I did not want to come up missing in action (MIA). I

Wish I would of never did that shit. I should of let him fuck me off! Instead of lying on Deke, like that. They all hate him and I did this shit like I hate him too. I can't even face him, because I feel like I betrayed him, how could I tell him he is going to be fucked because I was scared. B-lo was going to do me in. My Baby still don't know I said anything. I just wish shit would of went differently. Now I have to hideout from this punk bitch! So if you find me I hope I aint looking like those 4 white boys you all found. I hope you all find him too So now I guess you could perjure me because I lied about some other shit too But Im not a liar, just scared!

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DISTRICT COURT
CLARK COUNTY, NEVADA
****

Donte Johnson, Plaintiff(s) vs. William Gittere, Defendant(s)	Case No.: A-19-789336-W Department 6

NOTICE OF HEARING

Please be advised that the Motion and Notice of Motion for Leave to Conduct Discovery in the above-entitled matter is set for hearing as follows:

Date: January 16, 2020

Time: Chambers

Location: RJC Courtroom 10C
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Kadira Beckom
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Kadira Beckom
Deputy Clerk of the Court

MOT

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Federal Public Defender
Nevada Bar No. 11479
RANDOLPH M. FIEDLER
Assistant Federal Public Defender
Nevada Bar No. 12577
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Attorneys 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

MOTION AND NOTICE OF MOTION FOR EVIDENTIARY HEARING (HEARING REQUESTED)

(DEATH PENALTY CASE)

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff

PLEASE TAKE NOTICE that the MOTION FOR EVIDENTIARY HEARING filed in this Court on December 13, 2019, will come on for hearing before this Court in Department No. 6 on _____ at the hour of _____ located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89101.

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

POINTS AND AUTHORITIES

I. INTRODUCTION

Johnson in his second post-conviction petition pled several claims for relief, supported by specific factual allegations not belied by the record. In addition, in the concurrently filed Reply to the State's Response, Johnson argued that he can overcome procedural default of these claims. Johnson requests an evidentiary hearing to develop the factual record for the merits of his claim and for cause and prejudice, and to show that denying him relief will result in a fundamental miscarriage of justice.

II. ARGUMENT

A petitioner is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief. *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). This is the appropriate standard to be applied when evaluating a request for an evidentiary hearing to establish good cause to overcome procedural defaults. *Berry v. State*, 131 Nev. Adv. Op. 96, 363 P.3d 1148, 1155 (2015). A claim is not "belied by the record" just because a factual dispute is created by the pleadings or affidavits filed during the post-conviction proceedings. A claim is "belied" when it is contradicted or proven to be false by the record as it existed at the time the claim was made.

The Nevada Supreme Court has held "[w]here . . . something more than a naked allegation has been asserted, it is error to resolve the apparent factual dispute without granting the accused an evidentiary hearing." *Vaillancourt v.*

Warden, 90 Nev. 431, 432, 529 P.2d 204, 205 (1974). The Court "has consistently recognized a habeas petitioner's statutory right to have factual disputes resolved by way of an evidentiary hearing." *Mann*, 118 Nev. at 356, 46 P.3d at 1231. An evidentiary hearing is appropriate to resolve substantive claims, to demonstrate good cause to overcome a procedural bar, and to show a fundamental miscarriage of justice to overcome a procedural bar. *Pellegrini v. State*, 117 Nev. 860, 883-87, 34 P.3d 519, 535-37 (2001). Johnson is entitled to an evidentiary hearing for all of these reasons.

A. Johnson has met the standard for this Court to order an evidentiary hearing so he can establish cause and prejudice

A showing of good cause and prejudice overcomes the procedural bars in NRS 34.716, NRS 34.810, and NRS 34.800, and NRS 34.800. *See State v. Powell*, 122 Nev. 751, 756–59, 138 P.3d 453, 456–58 (2006); *Clem v. State*, 119 Nev. 615, 620–21, 81 P.3d 521, 525–26 (2003). To show good cause, Johnson must show that any delay in raising claims was not his fault, i.e., that an "impediment external to the defense" prevented him from raising his claims sooner. *Powell*, 122 Nev. at 756–59, 138 P.3d at 456–58; *see Clem*, 119 Nev. at 620–21, 81 P.3d at 525–26. And Johnson must additionally show that dismissal of the petition would be unduly prejudicial. *See Powell*, 122 Nev. at 756–59, 138 P.3d at 456–58; *Clem*, 119 Nev. at 620–21, 81 P.3d at 525–26. Johnson has raised specific factual allegations not belied by the record that, if true, would establish cause and prejudice to overcome procedural bars. Johnson is consequently entitled to an evidentiary hearing.

1. Johnson is entitled to an evidentiary hearing to prove his claims that initial post-conviction counsel were ineffective

Johnson, as a capital petitioner, had the right to effective assistance of counsel during his prior state post-conviction proceeding. *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). As a result, prior counsel's ineffectiveness, if proven, would constitute good cause to overcome procedural bars. *See Rippo*, 134 Nev. at 418, 423–27, 423 P.3d at 1094, 1097–1100; *Crump*, 113 Nev. at 293, 93 P.2d at 302–05, 252–54. Johnson has alleged ineffective assistance of initial post-conviction counsel, and he is entitled to an evidentiary hearing to prove this allegation.

Johnson is entitled to an evidentiary hearing to establish the deficiency of initial post-conviction counsel's performance. Contrary to well-established professional norms, Johnson's counsel treated his 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.[1] Instead, counsel raised primarily record-based claims, which, without support from outside investigation and experts, he pled in a deficient, conclusory manner. *See Hargrove 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

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

factual allegations").[2] 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*, 566 U.S. at 13 ("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).

Johnson is also entitled to an evidentiary hearing to establish prejudice from post-conviction counsel's deficient performance, which "is intricately related to the merits of his claims." *Bennett v. State*, 111 Nev. 1099, 1103, 901 P.2d 676, 679 (1995); *see Rippo*, 134 Nev. at 422, 423 P.3d at 1097. In order to establish prejudice,

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

Johnson needs to present evidence that post-conviction counsel failed to raise meritorious claims. For example, to establish that post-conviction counsel were ineffective for failing to challenge statements from witnesses and codefendants, Johnson will need to present testimony from an expert in police coercion.[3] And, in order to establish that post-conviction counsel were ineffective for failing to investigate mitigating evidence, Johnson will need to present testimony from people familiar with Johnson's life history. Johnson is entitled to an evidentiary hearing to prove the merit of this claim, along with the other fact-based claims in his petition.

2. Johnson is entitled to an evidentiary hearing to demonstrate good cause based on the State's failure to disclose material exculpatory and impeachment evidence

The State's violation of *Brady v. Maryland*, 373 U.S. 83 (1963) establishes good cause and prejudice to overcome a procedural default. *See, e.g.*, *Rippo v. State*, 134 Nev. 411, 431, 423 P.3d 1084, 1103 (2018). Here, the State suppressed evidence of Baldonado's misconduct. That evidence is favorable both because it could serve as impeachment of Charla Severs's testimony and because it would undermine the integrity of the State's investigation. *See United States v. Mincoff*, 574 F.3d 1186, 1199 (9th Cir. 2009) ("*Giglio* [*v. United States*, 405 U.S. 150 (9 th Cir. 2008)] requires that the government disclose "any promises, inducements, or threats made to witnesses to gain cooperation in the investigation or prosecution."). In addition, suppression of the evidence was prejudicial because Severs offered critical testimony—that Johnson confessed to being the triggerman for all four killings.

[3] *See* Pet. at 62–66.

These specific allegations are not belied by the record and, if true, would establish good cause and prejudice to overcome any procedural default. Thus, Johnson is entitled to an evidentiary hearing to show that the State's violation of *Brady v. Maryland* establishes good cause and prejudice to overcome procedural default.

Additionally, the fact that Armstrong was not prosecuted for these homicides, despite evidence inculpating him, raises an inference he received undisclosed benefits. Additionally, Armstrong received assistance clearing a warrant. Benefits received by Armstrong would be favorable or impeaching evidence. *See Jimenez v. State*, 112 Nev. 610, 621, 918 P.2d 687, 693 (1996). Because the State has not disclosed any benefits, the State has suppressed this evidence. And this evidence is material because Armstrong testified against Johnson. These specific allegations are not belied by the record and, if true, would establish good cause and prejudice to overcome any procedural default, thus Johnson requests an evidentiary hearing.

B. Johnson has met the standard for this Court to order an evidentiary hearing so he can establish a fundamental miscarriage of justice

Procedural default is excused if procedurally barring a claim "amounts to a fundamental miscarriage of justice." *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (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 "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible." *Id.* Johnson is entitled to an evidentiary hearing to make this showing.

Specifically, Johnson has alleged that he is ineligible for the death penalty because of a lack of evidence that he was the triggerman personally responsible for the four deaths,[4] because no valid aggravating factor exists,[5] because compelling mitigating evidence outweighs any aggravating evidence,[6] and because his young age and borderline intellectual functioning render him eligible for capital punishment.[7] Johnson is entitled to an evidentiary hearing to prove these arguments by, for example, introducing expert testimony that he was not the triggerman and presenting evidence in mitigation that trial counsel failed to uncover.

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[4] *See* Pet. at 280–90.

[5] *See id.* at 88–104.

[6] *See id.* at 175–223, 335–37.

[7] *See id.* at 347–53.

III. CONCLUSION

For the foregoing reasons, Johnson requests that this Court grant him an evidentiary hearing to show cause and prejudice to overcome the procedural default bars raised by the State and to establish the merits of his claims.

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 MOTION AND NOTICE OF MOTION FOR EVIDENTIARY HEARING (HEARING REQUESTED) was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

Steven S. Owens
Chief Deputy District Attorney
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/s/ Celina Moore
An Employee of the
Federal Public Defenders Office

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DISTRICT COURT

CLARK COUNTY, NEVADA

DONTE JOHNSON,

Petitioner,

v.

WILLIAM GITTERE, Warden of Ely State Prison, and AARON FORD, Attorney General of Nevada,

Respondents.

Case No. A-19-789336-W
Dept. No. 6

NOTICE OF SUPPLEMENTAL EXHIBIT

(DEATH PENALTY CASE)

Johnson, through counsel, files this supplemental exhibit, which supports Claims Three(A)(1) and Thirty-Three(A).

DATED this 11th day of February, 2020.

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

CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 11th day of February, 2020, a true and correct copy of the foregoing NOTICE OF SUPPLEMENTAL EXHIBIT, 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 B. Wolfson
Clark County District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

/s/ Celina Moore
An Employee of the
Federal Public Defenders Office

EXHIBIT 223

EXHIBIT 223

Declaration of Dayvid J. Figler

I, Dayvid J. Figler, hereby declare as follows:

1. My name is Dayvid J. Figler. I have been a lawyer admitted to the Nevada bar since September 1991. I represented Donte Johnson during his 2000 trial, for the guilt phase, the two penalty phases the followed, and, in part, his direct appeal. I did not represent Mr. Johnson during the third penalty phase.

2. I began the criminal aspect of my legal career working for Dominic Gentile beginning in or around 1995. When the Clark County Special Public Defender opened in 1997, led by now retired Justice Michael Cherry, I began working there. It was during my work for the Special Public Defender that I came to be assigned to Mr. Johnson's case. Now-Judge Joseph S. Sciscento was lead counsel.

3. I recall that Judge Jeffrey D. Sobel presided over this case. We were initially pleased to have Judge Sobel assigned to this case because of our perception that he tended to be better for the defense. However, throughout the course of the trial, Judge Sobel was acting in unusual ways, both during bench conferences and in calls to my home land line.

4. Specifically, Judge Sobel would call me in an apparent attempt at a prank call. He would say things like, "your client is going to die," then hang up. I remember that these phone calls would occur late at night, and that they took place while the trial was happening.

DJF

5. Later, I learned that Judge Sobel was suffering from stomach cancer. I could not help wondering if his bizarre behavior was related to the medication he was taking to alleviate his condition.

6. Current counsel for Mr. Johnson has provided me with a Report by Dehorah Davis about coerced witness statements. I have reviewed this Report. We did not pursue the possibility of witness coercion in our investigation or presentation of Mr. Johnson's defense during the trial. We did not have a tactical reason for not pursuing this line of defense. Reviewing this report, I believe presenting evidence of witness coercion would have been helpful to our defense theory.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on February 10th, 2020, in Las Vegas, Nevada.

Dayvid J. Figler

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus | **COURT MINUTES** | **February 13, 2020**

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

February 13, 2020 **09:00 AM** **All Pending Motions**

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

COURT CLERK: Reed, Keith

RECORDER: Takas, De'Awna

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

PETITION FOR WRIT OF HABEAS CORPUS...SETTING OF 1. MOTION FOR LEAVE & 2.0 MOTION FOR EVIDENTIARY HEARING

Present on behalf of the State, Deputy's Alex Chen and Skylar Sullivan, and on behalf of the Defendant, Federal Public Defender's Randy Fiedler and Elise Henderson. Mr. Fiedler advised the Defendant's presence was waived. Argument in support of Petition For Writ of Habeas Corpus by Ms. Henderson in regards to the procedural bars, ineffectiveness of counsel and requested an Evidentiary Hearing. Argument in opposition of petition and Evidentiary Hearing by Mr. Chen; nothings been heard to overcome the procedural bar. COURT ORDERED, a written decision will be issued and if it's determined an Evidentiary Hearing is necessary, it will be included in the order or minutes.

Electronically Filed
1/11/2022 8:54 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

DONTE JOHNSON, Plaintiff, vs. WILLIAM GITTERE, Defendant.	CASE NO. A-19-789336-W DEPT. VI

BEFORE THE HONORABLE JACQUELINE M. BLUTH, DISTRICT COURT JUDGE

THURSDAY, FEBRUARY 13, 2020

RECORDER'S TRANSCRIPT OF PROCEEDINGS: PETITION FOR WRIT OF HABEAS CORPUS and SETTING OF 1. MOTION FOR LEAVE & 2. MOTION FOR EVIDENTIARY HEARING

APPEARANCES:

For the Plaintiff: RANDY FIEDLER, ESQ.
ELLESSE D. HENDERSON, ESQ.
Federal Public Defender's Office

For the Defendant: ALEXANDER G. CHEN, ESQ.
Chief Deputy District Attorney
SKYLER LINDELL SULLIVAN, ESQ.
Deputy District Attorney

RECORDED BY: DE'AWNA TAKAS, COURT RECORDER

Case Number: A-19-789336-W

Thursday, February 13, 2020, Las Vegas, Nevada

[Proceedings began at 9:16 a.m.]

THE COURT: State of Nevada versus Donte Johnson, A789336.

All right if the parties could state their appearances for the record, please?

MR. FIEDLER: Randy Fiedler with the Federal Public Defender, and --

MS. HENDERSON: And Ellesse Henderson with the Federal Public Defender.

THE COURT: Thank you.

MR. CHEN: Alex Chen on behalf of the State with Skylar Sullivan.

THE COURT: All right. And Mr. Johnson -- I recognize that he's not here, but that was agreed upon --

MR. FIEDLER: Correct. He would -- waive his presence Your Honor.

THE COURT: Okay, great.

All right, so, this is the time and date set for argument on the petition. So I'll let you start defense. I take notes during arguments, so don't think I'm not paying attention. I'm just -- it's easier for me if I have to go back and look at everything to look at my notes as well as the -- court record.

MS. HENDERSON: Okay.

THE COURT: All right?

MS. HENDERSON: All right. Good morning Your Honor.

THE COURT: Good morning.

MS. HENDERSON: Unless you have any specific questions to start?

THE COURT: Well -- thank you. I think that probably where we should start, right; is the procedural bars because if you can't get over the procedural bars then we're really in a place where we don't have -- we don't go any further.

MS. HENDERSON: Sure.

THE COURT: So I think that that's where, I mean, the State brought up procedural bars, they brought up laches, so let's go there.

MS. HENDERSON: Okay. So we can overcome the procedural bars here for a few different reasons that are in our opposition to the motion to dismiss, but I'm gonna focus on -- in effective assistance of post-conviction counsel.

THE COURT: Okay.

MS. HENDERSON: So post-conviction counsel failed to do any extra record investigation and raise certain meritorious claims that we've now raised in his second counseled post-conviction petition. So post-conviction counsel's deficient performance provides the cause, and the merits of the underlying claim provide prejudice to overcome all three procedural bars. And I wanna focus on a couple of the issues on the petition --

THE COURT: Okay.

MS. HENDERSON: -- today. First is Mr. Johnson's *Batson* claim. During the 2000 trial the State dropped the only potential black juror using a peremptory challenge. And the State, in an unrecorded bench conference, gave some reasons for that strike. The trial judge, in that unrecorded bench conference, said that the reasons were not pretextual. Everyone moved on. And then the next day the reasons were put on the record. The reasons that the State gave apply to a large number of the other jurors -- the other potential jurors who are not struck by the State, many of whom actually served on the jury. For example, the State

gave as a reason for striking the black potential juror that she said she would be able to consider life with the possibility of parole for somebody who had been convicted of four murders. But that was asked of almost every potential juror. It was a requirement for serving on the jury that they could consider all four potential punishments, which included life with the possibility of parole. And when the defense tried to strike jurors for cause, because they were hesitant about the life with the possibility of parole option, the trial judge asked everybody in the room, all the potential jurors, whether they could consider all four options. And no jurors said that they could not consider life with the possibility of parole as an option for Mr. Johnson as he was convicted. So that was given just as a reason to strike Ms. Fuller the black potential juror.

The State also gave as a reason that her step-son was in jail, but the State didn't actually ask her any questions about that and she didn't know any details about her step-son's arrest that would've made it seem like she was -- personally involved in that arrest and that it would've affect her ability to serve as a fair juror. There were other potential jurors who also had close family members in jail. Mr. Lockinger who actually served on the jury, his brother was in prison for a bank robbery. And then there are a couple of other examples of potential jurors not being struck even though they have family members in prison.

She -- the State also gave as a reason Ms. Fuller's demeanor. But the trial court did not put on the record that -- it agreed with the State's assessment of her demeanor. And the Nevada Supreme Court said in *Williams* recently that it's not enough for the State just to point to demeanor, they could point to demeanor for anybody. The trial judge has to sanction that reason by putting on the record the ways in which her demeanor justified the preemptory strike.

There were three other reasons given that -- that were insufficient for the same reasons. She didn't answer a question on the questionnaire about the death penalty but a lot of other jurors skipped questions on the questionnaire and the State was able to get the answer to that question during jury selection. She said it would be difficult to pass judgment -- she agreed with the prosecutor that it would be difficult to pass judgment on somebody in this case, but that question was asked of almost everybody and many people said that it would be difficult to pass judgment in a capital case. And the State said that she had no comment when asked about her thoughts on holding people responsible for their crimes, but that's just a misstatement of what happened. She was asked a question about holding people responsible. She said she didn't really have any thoughts about it, but then she -- she was asked more specific questions she was able to answer that people should be held responsible for their crimes.

The defense attorneys at trial did raise a *Batson* objection. It was denied. Mr. Johnson's appellate attorneys did not raise the issue on direct appeal. It was raised in post-conviction as a claim of ineffective assistants of appellate counsel. And the Nevada Supreme Court decided the case by saying that trial counsel should've put the pretextual arguments on the record and because they didn't the appellate counsel -- wouldn't have exceeded on direct appeal, even had they raised the argument. So now we're raising this argument as one of ineffective assistance of trial counsel.

So the State in its motion to dismiss said that law of the case controlled this, but it doesn't. The Nevada Supreme Court has never -- decided this in the context of ineffective assistance of trial counsel. And they in fact said that trial counsel made a mistake by not putting the reasons on the record -- not

putting the pretextual arguments on the record.

THE COURT: Okay.

MS. HENDERSON: The second area I wanted to talk about is juror bias during the guilt phase. There was a juror, juror Bruce, who in between the guilt phase and the penalty phase went to the Court and said that during the guilt phase she had a freighting encounter with a black man in an elevator of the courthouse. She said the black man has a duffle bag, and she was afraid to get in the elevator until another juror came and joined her. She was then suspicion of this other juror who remained in the elevator with this black man with the duffle bag even though juror Bruce believed that they should've both gotten off on the same floor. So she admitted to the trial court that she was actually bias in this case because of race. This is a case with a black man accused of killing three young white men and a Latino man. And she's admitting that while the guilt phase is going on she has become so afraid of black men that she cannot get in the elevator with this man with the duffle bag.

And to show actual bias the Nevada Supreme Court has said that -- the test is whether the jurors views either prevent or substantially impair the jurors ability to follow the district court's -- or the trial court's instructions and apply the law and come to a just verdict. And her admission of her bias against black men because of the trial satisfies this test. And juror bias is a structural error so there's no harmless analysis, and that's why law of the case doesn't apply to this claim. There was a claim of juror bias raised on direct appeal involving juror Bruce. It was a little bit different. It was juror Bruce's exposure to external sources, media sources, while she was deliberating. And that is analyzed with a Hardest [phonetic] Error Test, which the Nevada Supreme Court did and said her exposure

to these external sources was harmless. But that ruling doesn't apply to this claim about juror Bruce and that elevator.

And then the last area is Mr. Johnson's defense counsel who did not adequately challenge the State's -- charges and theory of the case. So the State charged a lot of different theories of first degree murder, conspiracy, felony murder, premediated, and deliberate murder, aiding and abating. The jurors were told that they didn't need to be unanimous with respect to those theories, but trial counsel did not ensure that the jurors received the correct jury instructions for several of those theories because the jurors were told they didn't no need to be unanimous and, because there was no special verdict, we can't be sure whether they -- found Mr. Johnson guilty of first degree murder under a valid theory or an invalid theory. Several of the instructions were missing essential elements of the charges, like specific intent for aiding and abating.

The defense attorneys also failed to consult with experts in areas like coerced statements by witnesses. We have a lot of witnesses who told police one thing when they were first interviewed and then over the following two years substantially changed their stories once they were -- pressured by police. Some even threated with being charged themselves and may be receiving the death penalty. Mr. Johnson's co-defendants both confessed in interviews with police where an expert could have explained to the jury that the methods of the police used in those interviews often lead to false confessions and false statements implicating other people, in this case, Mr. Johnson.

And there is also evidence about blood spatter. The defense attorneys did consult an expert in blood spatter but they didn't use the information that they got from that expert, perhaps because they heard back from the expert in the

middle of trial. The State's implication throughout this, and made more explicit in one of the co-defendant's trial, was that some blood on the back of Mr. Johnson's pants was there because he was the trigger man. An expert could have explained that the blood on the back of the pants did not get there from spatter from a gunshot it was transfer blood. And also the lack of the blood on the front pants supports the arguments that Mr. Johnson was not actually the trigger man.

THE COURT: Does it? I don't mean to be -- isn't that though kind of common sense, right? Like if you shot somebody you're not getting the blood on the back of your pants. I don't know if we need an expert to explain that, unless you're shooting someone backwards.

MS. HENDERSON: I don't know if that was made clear to the jurors, because the State's theory was that the gun was held very close to the victim's heads. And I think it makes -- more sense that the blood would get on the front of the pants in that scenario.

THE COURT: Right.

MS. HENDERSON: But I don't think it's impossible for the blood to get on the back of pants, especially when the State is telling the jurors through the people that they are putting on the State's experts that the blood is spatter from the gunshot.

So with these claims we're asking for an evidentiary hearing to put on testimony from post-conviction counsel and trial counsel, along with testimony from our experts for -- the claim about coerced statements and the claim about the blood splatter. Thank you.

THE COURT: You're welcome.

Mr. Chen.

MR. CHEN: Thank you, Your Honor.

Generally what I would say to address what the Court kind of started with is I haven't heard anything to overcome the procedural bars in this particular case. I think defense puts forth a great argument in terms of if they had been first counsel to file a petition, they raise claims that would be heard in a first petition, but we're on our third petition here, and the one that I think counsel fails to mention is that's there's nothing external to their claims right now that couldn't have been raised in the first or second petition. They had Mr. Oram who thoroughly examined the record, who thoroughly filed a first petition in this case. There was an extensive evidentiary hearing base upon Mr. Oram representing him in that case and I think that that's sufficient. The things they are claiming are all things that have been either ferreted out on direct appeal or in a post-conviction petition. And so I do think that pursuant to *State vs. Eighth Judicial District Riker*, the Court believes in finality of these post-convictions petition. They can't live on forever. And that's the reason that we have these procedural bars. So I still think that there's nothing that they've listed that has overcome those procedural bars. I haven't heard a single thing that they've learned that wasn't known at the time that these other petitions or appeals were raised.

I just wanna say a little bit, I know she focused a lot on the fact that there were these juror issues. I would point out that even with regards to the *Batson* challenge and to that whole issue, which I still think was ferreted out from the other courts, all the record is still -- everything that had to do with a juror, the reasons that they were dismissed, the reasons that the preemptory were used, they were all put on the record. So even if the Court were to look at the record today and look back and to see why this juror was released, even if it almost

sounds like defense wants magical words to be placed in the record as to how they overcome the bars, but if you look at what was said, all the race natural reasons were put on the record. Everything that if this trial would have happened today is still in the record and was argued and I think that we overcome it that there's no reason to have an evidentiary hearing on that because at the end of the day nothing would be gained from it. The record is clear. Everyone can look at the reasons that those jurors were kicked, or that that particular juror was released. And then I don't think that there's any reason to have an evidentiary hearing to expand the record with regards to that.

And the other thing that they also mention was juror bias of one juror. And she didn't say that she in general had a fear of black men, or black individuals, because of what happened, she was talking about a very specific incident of walking to the parking garage. She felt that there was a strange situation and she brought that to the attention of the court. But there was nothing in her statement, that I've reviewed, that said well I just in general can't be fair to an entire race of people. She was talking about a very specific incident of walking by herself and then with another juror to the parking garage. It wasn't something where she says she couldn't be fair and impartial to an individual who was sitting in trial. So I think that there's distinction to be made there as well.

But ultimately I just haven't heard anything that overcomes these procedural bars. So I think that an evidentiary hearing isn't necessary, because it wouldn't -- it's not necessary to expand the record. And I believe that these things have all been ferreted out in past petitions Your Honor.

THE COURT: Okay.

So -- that's kind of where I am struggling here. I'm not really hearing

what is getting -- what -- there's a lot of successive issues here, and I'm not, you know, I had a similar situation in Gurry about three or four months, I don't know, maybe it was like 6 months, I don't know, but in this last year right, where I found that the delay was not the fault of Mr. Gurry because I felt that his access to certain paperwork had not -- that he wasn't -- he didn't have access to it until a certain period of time. So I'm looking -- I'm not saying every case has to be like Gurry's right, but I'm still looking for this good cause for the delay or how it's not successive and I'm just not seeing that here.

And, you know, I appreciate the issues that you brought up and why you think those are issues, but before I even get to those issues I'm not seeing why there was good cause for the delay and how -- these aren't successive. And then we have right, the over the five years so then it's the presumption that -- let's see, I wrote it my notes, it says [indiscernible] can only be overcome by showing that the 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 demonstration that a fundamental mischarge of justice has occurred. So I need you to address those two things in more detail so I can find an avenue or vehicle to get to the actual issues.

MS. HENDERSON: Sure Your Honor. So the cause argument in Gurry and also the cause argument that Mr. Chen has referred to is separate from the cause argument that we're -- relying on here. We're not saying that there was evidence out there that Mr. Johnson didn't have. We agree that this was in the record -- a lot of it was in the record, not that new experts stuff of course, but *Crump* says that if post-conviction counsel was ineffective for not taking those red flags in the record and not doing something with it, not raising the claims that they

should have, then that establishes good cause. It doesn't matter that post-conviction counsel should have known about this, and that actually supports the argument that post-conviction counsel was deficient that they just ignored these facts and the record and would have supported claims like -- ineffective assistance of counsel for not arguing on the record the *Batson* pretextual reasons, or for not raising this claims about juror bias that should've been clear from the trial transcript.

THE COURT: So sorry, so let's get more specific. So you're saying that -- let me see, was it Oram? Is that what we're talking about?

MS. HENDERSON: Yes.

THE COURT: Saying that Oram didn't raise the ineffectiveness of Ms. Jackson in regards the *Batson* claim?

MS. HENDERSON: It was not Ms. Jackson it was --

THE COURT: Oh it was --

MS. HENDERSON: -- Mr. Figler and Mr. Sciscento.

THE COURT: Okay --

MS. HENDERSON: Judge Sciscento.

THE COURT: -- sorry. So that Mr. Oram didn't raise the ineffectiveness in regards to the *Batson* claim, the juror misconduct?

MS. HENDERSON: Right, yes.

THE COURT: And the experts; all three of those?

MS. HENDERSON: Right, yeah. So Mr. Oram didn't see in the record the issue with the statements changing overtime, and didn't base on that consult with expert in police coercion and the same with the blood spatter evidence.

THE COURT: And that's specifically was never -- has not been

brought up before?

MS. HENDERSON: Right, yes.

THE COURT: For those -- there have been other incidences that have been brought up of what -- how you believed or whoever believed him to be ineffective, but you're saying these three, four, things have never been addressed --

MS. HENDERSON: Right.

THE COURT: -- is that what you're saying?

MS. HENDERSON: Right. And Mr. Oram didn't bring it up. And this is our first -- Mr. Johnson's first opportunity to allege cause under *Crump* to say that Mr. Oram was ineffective, because the petition that was filed when Mr. Oram's petition was on appeal, what's been referred to in the pleadings as Mr. Johnson's second petition, that was a pro se petition he wasn't given counsel for that, so this is his first opportunity with counsel to raise a claim under *Crump*. And he did do that in a timely manner under the rules that the Nevada Supreme Court explained in *Rippo*.

THE COURT: Mr. Chen do you want to respond to that claim in regards to *Crump* and these four specific issues?

MR. CHEN: What counsel had just said is that there are these things out there, I mean, in terms of ineffective assistance, in *Strickland*, you have to show prejudice. And what they're saying is there is a lot of mays here that if they would've done certain things maybe somethings would've been different. But still I don't hear any specifics in terms of how you overcome these procedural bars.

With regards to -- I mean, what I would say -- excuse me.

THE COURT: It's okay.

MR. CHEN: I think what I'm hearing about the differences that defense has not put in a petition versus the original claims by Mr. Oram is that these issues in general were raised, but they have kind of carved out small little niches within a subsection and then they've parsed it out to make it so that, oh well they didn't raise this exact subsection of what the issues should've been and therefore Mr. Oram was ineffective for not having raised these things.

And I think overall again when considering *Strickland* standard and considering whether there's prejudice, Mr. Oram did what he was hired to do in this case. He examined the record. He did a petition. He raised the relevant issues. Just because he didn't raise all these small minor issues I don't think you can overcome the bar to say that somehow this defendant was prejudice by it simple because Mr. Oram didn't raise everything, which even with *Eddis vs. State* he's not suppose to file anything frivolous but Mr. Oram looked at the large picture, he looked at specific things, he had a hearing on it, so I think that all of these issues have been raised. They're successive. Even if counsel has found smaller subsects of the larger issue to argue it now.

So with that I still don't see a way to get over these procedural bars, Your Honor.

THE COURT: Okay. I'll give you the last word, if you have one?

MS. HENDERSON: What Mr. Chen just said supports our argument for an evidentiary hearing so Mr. Oram can come here and testify about why he did and did not raise certain claims. It's not enough to raise an ineffective assistance of counsel claim if you miss an instance of ineffective assistance of counsel that would have resulted in a new trial or in a new penalty hearing for Mr. Johnson.

THE COURT: Okay. All right so I would like the opportunity to explore the record a little bit more in regards to the issues that Mr. Oram raised and then the State's argument, or point that look these were raised, but now you're kind of carving out and getting like really nitty gritty or the little niches. So I'd like the opportunity to do that. So I will issue a written decision after my opportunity to do that. And then if I feel like an evidentiary hearing is necessary that will obviously be at the end of my order or in the minutes letting you guys know. Okay?

Is there anything anyone else would like to put on the record?

MR. CHEN: No, thank you, Your Honor.

THE COURT: All right, thank you. It was nice --

MS. HENDERSON: Thank you.

THE COURT: -- to see you.

[Proceedings concluded at 9:44 a.m.]

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

De'Awna Takas
Court Recorder/Transcriber

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**May 15, 2020**

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

May 15, 2020 **3:00 AM** **Minute Order**

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

COURT CLERK: Keith Reed

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- After review of the petition and the response, and hearing argument on February 13, 2020, Petitioner's Post-conviction Writ of Habeas Corpus is hereby DENIED. The Court finds the petition to be procedurally barred as both untimely pursuant to NRS 34.726 and successive pursuant to NRS 34.810.

NRS 34.726 requires [u]nless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the appellate court issues its remittitur. Here, the remittitur on the appeal of the second penalty phase issued on January 28, 2008. The instant petition was filed in February 13, 2019, which is more than eleven years and therefore well beyond the one year time bar. The State, in its opposition, also plead laches under NRS 34.800(2) which states [a] period exceeding 5 years between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction creates a rebuttable presumption of prejudice to the State. The prejudice can only be overcome if the petitioner shows that the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence, or the petitioner

demonstrates that a fundamental miscarriage of justice has occurred. NRS 34.800(1). No such showing has been made.

NRS 34.810 states a second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ. The instant petition is the third petition in this matter. The first petition was filed on February 13, 2008. Counsel was appointed for Petitioner and extensive briefing commenced. An evidentiary hearing was conducted over three days in June 2013. The Court denied the petition and the findings of fact and conclusions of law was entered on March 17, 2014. Petitioner filed a second petition on October 2, 2014 which was denied and a findings of fact and conclusions of law was filed on February 4, 2015. Subsequently, Petitioner initiated federal habeas proceedings on April 23, 2018 and while those were still pending, the federal public defender filed the instant petition on his behalf. The grounds in the instant third petition are not new and the prior determination was on the merits as shown through the evidentiary hearing and findings of fact/conclusions of law resulting from his first petition. Therefore, the petition is successive.

The procedural bars can be overcome if the petitioner can prove good cause and prejudice. Here, the petitioner has failed to do so. Additionally, if the Petitioner is entitled to counsel in his first petition, he may assert an ineffective assistance of counsel claim in a second petition. Crump v. Warden, Nevada State Prison, 113 Nev. 293, 302, 934 P.2d 247, 253 (1997) (holding that ineffective assistance of post-conviction counsel could constitute the cause necessary to prevent procedural default). Here, Petitioner claims that post-conviction counsel s deficient performance provides the cause and the merits of the underlying claim provide the prejudice required to overcome all three procedural bars. Petitioner claims that counsel's failure to do any extra investigation beyond the record and raise certain meritorious claims was ineffective and thus the bars do not apply. This court disagrees with Petitioner s analysis to overcome the procedural bars as detailed below.

First, upon review of the record, this Court finds that the Batson claims, juror conduct, and the jury instructions have been addressed in previous petitions where they were decided on the merits. While certain claims regarding expert testimony on why individuals may change their testimony, coerced statements and blood spatter may not have been raised previously, this Court does not find post-conviction counsels deficient for failing to raise them. In order to show ineffective assistance of counsel, the Petitioner must show that counsel's representation fell below an objective standard of reasonableness and that prejudice resulted. Strickland v. Washington, 466 U.S. 668, 686 (1984). Prejudice results when, but for counsel s error, there is a reasonable probability that the result of the proceedings would have been different. Id. Here, Petitioner has not shown that the failure to raise those additional claims would have changed the result of the proceedings.

Second, the failure to conduct additional investigations in this case does not raise to the level of

ineffective assistance of counsel. A defendant who contends that his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004). Strickland states that a fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight.... Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (internal citation omitted). Here, Petitioner does not assert with specificity what an additional investigation would have uncovered and how it would have changed the outcome.

Based on the ruling above, Petitioner's Motion for Discovery and Motion for an Evidentiary Hearing are also hereby DENIED.

Counsel for the Defense to promptly submit an order.

CLERK'S NOTE: The above minute order has been distributed via e-mail to: Federal Public Defender Randolph M. Fiedler and Chief Deputy District Attorney Alexander G. Chen. kar 5/18/20

OBJ
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DISTRICT COURT

CLARK COUNTY, NEVADA

DONTE JOHNSON,

Petitioner,

v.

WILLIAM GITTERE, Warden of Ely State Prison, and AARON FORD, Attorney General of Nevada,

Respondents.

Case No. A-19-789336-W
Dept. No. 6

NOTICE OF OBJECTIONS TO PROPOSED ORDER

(Death Penalty Habeas Corpus Case)

POINTS AND AUTHORITIES

On January 26, 2021, the State provided to counsel for Mr. Johnson a Proposed Findings of Fact, Conclusions of Law, and Order.[1] Counsel noted two objections to the Proposed Order.[2] The State indicated it would not modify the order, but agreed to include Petitioner's objections. Counsel formally notes these objections for the Court. *See Byford v. State*, 123 Nev. 67, 69–70, 156 P.3d 691, 692 (2007).

- On a number of occasions, the Proposed Order refers to "mischaracterizations," and in one particular place refers to "several other mischaracterizations of prior claims in this Third Petition."[3] This commentary, itself a mischaracterization, is neither necessary nor appropriate for an order of the Court. Counsel for Johnson requests that the language be removed.
- The Proposed Order greatly expands the scope of the district court's minute order.[4] However, a proposed order must "accurately reflect[] the district court's findings."[5] Indeed, this Court was required to provide "sufficient

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[1] *See* Ex. 1.

[2] *See* Ex. 2.

[3] *See, e.g.*, Ex. 1 at 55 ("disingenuous attempts to mischaracterize counsel's words"); *id.* at 56 ("Johnson again mischaracterizes his penalty-phase counsel's words . . . ."); *id.* at 65 ("However, as with several other mischaracterizations in his Third Petition . . . .").

[4] *Compare* Ex. 1 (76 pages long) *with* Minutes (May 15, 2020 (3 pages long); *compare, e.g.*, Minutes (May 15, 2020) (denying all claims on basis of procedural default without ruling on individual claims' merits) *with* Ex. 1 at 29–76 (discussing merits of individual claims).

[5] *See Byford*, 123 Nev. at 69, 156 P.3d at 692.

specificity to provide guidance to the prevailing party in drafting a proposed order."[6] Nothing in this Court's minutes provided a basis for the expansion in the State's Proposed Order. The Nevada Supreme Court has noted that it is inappropriate for a district court to adopt a proposed order that includes determinations for which the court did not make express findings.[7] Counsel for Johnson requests that the proposed order be reduced to the ruling for which this Court provided specific guidance.

Based on the foregoing, Johnson respectfully requests that this Court modify the State's proposed order.

DATED this 2nd day of February, 2021.

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

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[6] *Id.* at 70, 156 P.3d at 693.

[7] *State v. Greene*, 129 Nev. 559, 565, 307 P.3d 322, 325–26 (2013).

CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 2nd day of February 2021, a true and correct copy of the foregoing Notice of Objections to Proposed Order, 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:

Alexander G. Chen
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

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

EXHIBIT 1

EXHIBIT 1

FFCO
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ALEXANDER G. CHEN
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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

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATE OF HEARING: FEBRUARY 13, 2020
TIME OF HEARING: 9:00 AM

This cause having come on for hearing before the Honorable JACQUELINE M. BLUTH, District Judge, on February 13, 2020, the Petitioner being represented by RANDOLPH M. FIEDLER and ELLESSE HENDERSON, Assistant Federal Public Defenders, the Respondent being represented by STEVEN B. WOLFSON, District Attorney, through ALEXANDER G. CHEN, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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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 filed its Response on May 29, 2019. Johnson filed his Reply to the State's Response on December 13, 2019. On February 13, 2020, this matter came before the Court for argument and the Court took the matter under advisement. On May 15, 2020, the Court issued a Minute Order denying Johnson's Third Petition. The Court now rules as follows:

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.

ANALYSIS

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). As demonstrated below, Johnson has demonstrated neither good cause nor prejudice to overcome the procedural bars and the Petition is denied.

The State also affirmatively pled 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 (13) years after the Nevada Supreme Court affirmed Johnson's guilt, and eleven (11) years after the Court affirmed Johnson's final penalty. Because these time periods exceed five (5) 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). The Court finds that no such showing has been made and, thus, the doctrine of laches applies.

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). The Petition is procedurally barred and is, thus, denied.

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 fails.

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 are 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.

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 postconviction 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 postconviction 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. Therefore, Petitioner's claim fails.

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 postconviction 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. Therefore, Johnson's claim fails.

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, II241-50. 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 and Johnson's claim fails.

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 fails.

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.

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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 postconviction petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur. Rippo v. State, 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 postconviction 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 the 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. Johnson's claim fails.

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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 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. Johnson's claim fails.

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 postconviction 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 and his Petition is denied.

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.

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 postconviction 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 and Johnson's claim fails.

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 is 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 postconviction 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 guiltphase 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 trialstrategy issues, Mr. Oram was not ineffective for not raising these issues in the first

postconviction 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 guiltphase 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 codefendants 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 at 1028; 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 at 1028. 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 postconviction 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 is 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.

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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.

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.

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 is 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)).

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.

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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 postconviction 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.

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 is summarily dismissed. Third Petition at 12.

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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 appellate counsel for not challenging the kidnapping or the impeachment in his postconviction 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 is 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.

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.

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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 (2002), and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (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 postconviction 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 is 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 is 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 postconviction 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 postconviction 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 is summarily dismissed. Third Petition at 12.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this _____ day of January, 2021.

DISTRICT JUDGE

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

BY Jalen Pandukht (for)
ALEXANDER G. CHEN
Chief Deputy District Attorney
Nevada Bar #10539

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Findings of Fact, Conclusions of Law and Order, was made this 26th day of January, 2021, by Electronic Filing to:

RANDOLPH M. FIEDLER
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By: /s/ E.Davis

Employee for the District Attorney's Office

AC/Skyler Sullivan/ed

EXHIBIT 2

EXHIBIT 2

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February 1, 2021

Alexander G. Chen
Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155-2212

Re: *State v. Johnson*
Case No: A-19-789336-W

Dear Mr. Chen:

We are in receipt of your proposed Findings of Fact, Conclusions of Law, and Order in this case, e-mailed to us on January 26, 2021 by Eileen Davis. We have the following objections:

- On a number of occasions, the proposed order refers to "mischaracterizations," and in one particular place refers to "several other mischaracterizations of prior claims in this Third Petition."[1] This commentary, itself a mischaracterization, is neither necessary nor appropriate for an order of the Court. We request this language be removed.
- The proposed order greatly expands the scope of the district court's minute order.[2] The proposed order must "accurately reflect[] the district court's

[1] *See, e.g.* Proposed Order at 55 ("disingenuous attempts to mischaracterize counsel's words"); *id.* at 56 ("Johnson again mischaracterizes his penalty-phase counsel's words . . . ."); *id.* at 65 ("However, as with several other mischaracterizations of prior claims in his Third Petition . . . .").
[2] *Compare* Proposed Order (76 pages long) *with* Minutes (May 15, 2020) (3 pages long); *compare,, e.g.,* Minutes (May 15, 2020) (denying all claims on basis of procedural default without ruling on individual claims' merits) *with* Proposed Order at 29–76 (discussing merits of individual claims).

findings."[3] Indeed, district courts are required to provide "sufficient specificity to provide guidance to the prevailing party in drafting a proposed order."[4] Nothing in the district court's minutes provided a basis for expansion of the court's findings in the Proposed Order. The Nevada Supreme Court has noted that it is inappropriate for a district court to adopt a proposed order that includes determinations for which it did not make express findings.[5] We request that the proposed order be reduced to the rulings for which the court provided specific guidance.

I thank you in advance for your consideration of these matters. If you have any questions, please do not hesitate to reach out: (702) 388-6577 or randolph_fiedler@fd.org.

Very truly yours,

/s Randolph M. Fiedler
Assistant Federal Public Defender

[3] *See Byford v. State*, 123 Nev. 67, 69, 156 P.3d 691, 692 (2007).
[4] *Id.* at 70, 156 P.3d at 693.
[5] *State v. Greene*, 129 Nev. 559, 565, 307 P.3d 322, 325–26 (2013).

FFCO
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant..

CASE NO: A-19-789336-W /
98-C-153154-1

DEPT NO: VI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: FEBRUARY 13, 2020
TIME OF HEARING: 9:30 AM

THIS CAUSE having come on for hearing before the Honorable JACQUELINE BLUTH, District Judge, on the 13th day of February, 2020, the Petitioner not being present but represented by the Federal Public Defender's Office, by and through RANDOLPH FIEDLER and ELISE HENDERSON, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through ALEXANDER CHEN, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

NRS 34.726 requires [u]nless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the appellate court issues its remittitur. Here, the remittitur on the appeal of the second penalty phase issued on January 28, 2008. The instant petition was filed on February 13, 2019, which is more than eleven years and therefore well beyond the one year time bar. The State, in its opposition, also plead laches under NRS 34.800(2) which states [a] period exceeding 5 years between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction creates a rebuttable presumption of prejudice to the State. The prejudice can only be overcome if the petitioner shows that the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence, or the petitioner demonstrates that a fundamental miscarriage of justice has occurred. NRS 34.800(1). No such showing has been made.

NRS 34.810 states a second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ. The instant petition is the third petition in this matter. The first petition was filed on February 13, 2008. Counsel was appointed for Petitioner and extensive briefing commenced. An evidentiary hearing was conducted over three days in June 2013. The Court denied the petition and the findings of fact and conclusions of law was entered on March 17, 2014. Petitioner filed a second petition on October 2, 2014 which was denied and a findings of fact and conclusions of law was filed on February 4, 2015. Subsequently, Petitioner initiated federal habeas proceedings on April 23, 2018 and while those were still pending, the federal public defender filed the instant petition on his behalf. The grounds in the instant third petition are not new and the prior determination was on the merits as shown

through the evidentiary hearing and findings of fact/conclusions of law resulting from his first petition. Therefore, the petition is successive.

The procedural bars can be overcome if the petitioner can prove good cause and prejudice. Here, the petitioner has failed to do so. Additionally, if Petitioner is entitled to counsel in his first petition, he may assert an ineffective assistance of counsel claim in a second petition. Crump v. Warden, Nevada State Prison, 113 Nev. 293, 302, 934 P.2d 247, 253 (1997) (holding that ineffective assistance of post-conviction counsel could constitute the cause necessary to prevent procedural default). Here, Petitioner claims that post-conviction counsel's deficient performance provides the cause and the merits of the underlying claim provide the prejudice required to overcome all three procedural bars. Petitioner claims that counsel's failure to do any extra investigation beyond the record and raise certain meritorious claims was ineffective and thus the bars do not apply. This court disagrees with Petitioner's analysis to overcome the procedural bars as detailed below.

First, upon review of the record, this Court finds that the Batson claims, juror conduct, and the jury instructions have been addressed in previous petitions where they were decided on the merits. While certain claims regarding expert testimony on why individuals may change their testimony, coerced statements and blood spatter may not have been raised previously, this Court does not find post-conviction counsel deficient for failing to raise them. In order to show ineffective assistance of counsel, the Petitioner must show that counsel's representation fell below an objective standard of reasonableness and that prejudice resulted. Strickland v. Washington, 466 U.S. 668, 686 (1984). Prejudice results when, but for counsel's error, there is a reasonable probability that the result of those additional claims would have changed the result of the proceedings.

Second, the failure to conduct additional investigations in this case does not raise to the level of ineffective assistance of counsel. A defendant who contends that his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004). Strickland states that a fair assessment of an attorney's performance requires

that every effort be made to eliminate the distorting effects of hindsight. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989)(internal citation omitted). Here, Petition does not assert with specificity what an additional investigation would have uncovered and how it would have changed the outcome.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief be DENIED.

THEREFORE, IT IS HEREBY ORDERED that the Petitioner's Motion for Discovery be DENIED.

THEREFORE, IT IS HEREBY ORDERED that the Petitioner's Motion for an Evidentiary Hearing be DENIED.

DATED this _____ day of September, 2021. Dated this 8th day of October, 2021

DISTRICT JUDGE

NH
kj

C79 0B5 012C DE6B
Jacqueline M. Bluth
District Court Judge

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

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #0010539

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Findings of Fact, Conclusions of Law and Order, was made this 1st day of September, 2021, by Electronic Filing to:

RANDOLPH M. FIEDLER
Assistant Federal Public Defender
Email: randolph_fiedler@fd.org

ELLESSE HENDERSON
Assistant Federal Public Defender
Email: ellesse_henderson@fd.org

By: */s/ E.Davis*

Employee for the District Attorney's Office

AC//ed

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Donte Johnson, Plaintiff(s)	CASE NO: A-19-789336-W
vs.	DEPT. NO. Department 17
William Gittere, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Finding of Fact and Conclusions of Law was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 10/8/2021

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Electronically Filed
10/11/2021 8:02 AM
Steven D. Grierson
CLERK OF THE COURT

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

DONTE JOHNSON,

Petitioner,

vs.

WILLIAM GITTERE; ET AL.,

Respondent,

Case No: A-19-789336-W

Dept No: XVII

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that on October 8, 2021, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on October 11, 2021.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 11 day of October 2021, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Donte Johnson # 66858
P.O. Box 1989
Ely, NV 89301

Rene L. Valladares,
Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, NV 89101

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk

Case Number: A-19-789336-W

FFCO
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #0010539
200 Lewis Avenue
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(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 /
98-C-153154-1

DEPT NO: VI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: FEBRUARY 13, 2020
TIME OF HEARING: 9:30 AM

THIS CAUSE having come on for hearing before the Honorable JACQUELINE BLUTH, District Judge, on the 13th day of February, 2020, the Petitioner not being present but represented by the Federal Public Defender's Office, by and through RANDOLPH FIEDLER and ELISE HENDERSON, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through ALEXANDER CHEN, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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