Case No. 83796

Supreme Court of Nevada

Donte Johnson

Appellant,

vs.

State of Nevada, *et al.*,

Appellee.

DEATH PENALTY CASE

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

Appellant's Reply Brief

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INTRODUCTION

The State's case during the guilt phase was based on a confusing conglomeration of principal and vicarious liability and primary and predicate offenses. The overlap and inconsistencies between these theories would have been difficult enough for a jury to sift through, but the jury in this case also received erroneous instructions—affecting every theory of liability for first-degree murder. *See* § I.B.4 below. The State does not contest many of these errors, instead arguing harmlessness based on this Court's statements that the guilt evidence was "overwhelming." *See, e.g.*, Ans. Br. at 143–44. But that evidence had significant problems. Evidence of witness coercion and blood spatter undercut the idea that Johnson himself was the shooter, in turn undercutting the State's theory that Johnson was liable as a principal. And the vicarious theories of liability do not save the principal liability because the State relied, in closing argument, on the idea that it did not matter who did what. *See* 7AA1709–10; 7AA1712; 7AA1715. Because the instructions did not require proof of specific intent for specific intent crimes, the jury could find Johnson guilty without the requisite actus reus or mens rea.

Trial counsel failed to present an expert on witness coercion and an expert on blood spatter. Trial counsel also failed to object to the plethora issues in the jury instructions. This, and other errors described below, was ineffective.

Additionally, postconviction counsel, who had an obligation to review the record for meritorious claims and to investigate Johnson's case, failed to raise these meritorious claims of ineffective assistance of trial counsel. This, too, was ineffective. Thus, good cause and prejudice exists, permitting the consideration of these claims.

ARGUMENT

I. Johnson has established cause and prejudice to excuse procedural bars on several claims due to initial state postconviction counsel's ineffectiveness.

Ineffective assistance from initial state postconviction counsel provides cause to overcome procedural bars on several of Johnson's claims, and, because those claims are meritorious, he can also establish prejudice. *See Rippo v. State*, 134 Nev. 411, 416, 423 P.3d 1084, 1093, *amended on denial of rehearing*, 432 P.3d 167 (Nev. 2018); *Crump v. Warden*, 113 Nev. 293, 304–05, 934 P.2d 247, 254 (1997).

A. Johnson did not waive his right to challenge the effectiveness of initial state postconviction counsel.

The State acknowledges that Johnson was entitled to effective counsel for his first petition, but the State contends that claims challenging counsel's effectiveness should have been brought in Johnson's pro per second petition. Ans. Br. at 10–11. The State is incorrect.

While his initial state postconviction petition was on appeal, Johnson filed a pro per petition raising one claim based on a letter from his codefendant recanting statements he made against Johnson. 18AA6795–806. The State filed a response, 28AA6810–14, but the clerk's office rejected Johnson's reply, explaining he could not file pleadings pro per while still represented by counsel, 28AA6816–21; *see* EDCR 3.70 ("[A]ll motions, petitions, pleadings or other papers delivered to the clerk of the court by a defendant who has counsel of record will not be filed but must be marked with the date received and a copy forwarded to that attorney for such consideration as counsel deems appropriate."). The district court denied relief, and this Court in

February 2018 affirmed. *Johnson v. State*, No. 67492, 2018 WL 915534 (Nev. Feb. 9, 2018) (unpublished disposition).

Johnson had one year from remittitur on his initial state postconviction proceedings to challenge postconviction counsel's ineffectiveness. *See Rippo*, 134 Nev. at 416, 423 P.3d at 1093. At the time he filed his pro per petition, those proceedings were still ongoing—Johnson was still represented by his initial state postconviction counsel. It is not practical to require a litigant to attack an attorney's effectiveness in a proceeding that is not yet complete; counsel still could have obtained a favorable result at the time Johnson filed his pro per petition.[1] In addition, as this Court has explained, counsel could not have been expected to "defend [his] own conduct" while also representing Johnson, as that would place him and Johnson "in an untenable position." *Nika v. State*, 120 Nev. 600, 606–07, 97 P.3d 1140,

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[1] The State quotes out of context a comment from oral argument to support its argument Johnson could have challenged postconviction counsel's effectiveness in his pro per petition. Ans. Br. at 10 (quoting 49AA12259–60). Counsel clarified much—but not all—of the documents were already in the record yet ignored by counsel. 49AA12259–60. And the State provides no mechanism whereby Johnson could have challenged his counsel's representation during proceedings that had not yet concluded, even if he had access to the same material.

1145 (2004). And to the extent the State is arguing Johnson should not have filed the pro per petition knowing he could not yet include claims of postconviction counsel's ineffectiveness, Johnson was not provided any information to make a knowing, voluntary, and intelligent waiver of his right to effective postconviction counsel. *See Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (explaining waiver of right to counsel must be knowing, intelligent, and voluntary); *Hooks v. State*, 124 Nev. 48, 55–56, 176 P.3d 1081, 1085–86 (2008) (similar); *see also* NRS 34.820(1)(a) (providing right to postconviction counsel after death sentence).

In *Chappell*, this Court weighed finality interests against complications arising from parallel pro per and counseled proceedings. *Chappell v. State*, 137 Nev. Adv. Op. 83, 501 P.3d 935, 948 (2021), *cert. denied*, 143 S. Ct. 377 (2022). Performing that same weighing here should result in the opposite outcome. There is no more "passage of time, erosion of memory, and dispersion of witnesses" than in any case involving ineffectiveness claims against postconviction counsel, so long as brought within one year of remittitur. *Id.* (cleaned up). On the other side of the scale is a pro per litigant who was not warned his second petition could waive any arguments his *current* counsel was performing

ineffectively. Thus, where, as here, a pro per litigant files a second petition for writ of habeas corpus before his first proceedings have concluded, the balance tips in favor of allowing argument of postconviction counsel's ineffectiveness to overcome procedural bars.

B. Initial state postconviction counsel performed ineffectively by failing to raise numerous meritorious claims.

1. Claim One

In Claim One(A) Johnson raised a new claim the State violated *Batson* during jury selection. 24AA5787. Johnson relied on the ineffective assistance of trial, appellate, and first postconviction counsel, coupled with the structural nature of the error, to overcome the procedural default. The State's answering brief confuses the issues by creating a false equivalence between this Court's analysis of appellate counsel's performance under *Strickland* and the yet-to-be undertaken analysis of the substantive claim under *Batson v. Kentucky*, 476 U.S. 79 (1986. *See Johnson v. State (Johnson III)*, 133 Nev. 571, 578, 402 P.3d 1266, 1275 (2017). This Court should consider the merits of the *Batson* violation.

The State argues that Johnson's *Batson* claim was fully litigated at trial. Ans. Br. at 66–67. The State rests on the assertion that all the facts were squarely before the trial court and that the decision of that court represented a full exploration of the government's peremptory strikes. *Id.* at 67. That is not the case. Trial counsel failed to fully present evidence or argue that: (1) Prospective Juror Fuller's answer about "passing judgement" was taken out of context; (2) Fuller believed the criminal justice system holds people accountable; (3) Fuller would consider all forms of punishment; (4) comparative juror analysis would have revealed a white venireperson had a similarly incarcerated family member; and (5) Fuller was subjected to elevated scrutiny during voir dire. *See* 4AA815–18 (noting elevated scrutiny for the record but failing to litigate it fully); *see also Miller-El v. Dretke*, 545 U.S. 231, 241 (2005); *Williams v. State*, 134 Nev. 687, 694, 429 P.3d 301, 308 (2018). Because these facts were never fully before the trial court, the State cannot dismiss the current petition as trying to "find the facts differently." Ans. Br. at 66. Trial counsel was ineffective for failing to properly litigate the *Batson* claim when all the factual material was available at the time of trial, and not simply because "the court ruled against him." Ans. Br. at

67. Appellate counsel, likewise, could have raised the substantive claim, as the entirety of the record was available. Given that the State's reasons for striking Fuller are belied by the record, appellate counsel had no strategic reason not to raise the *Batson* issue in favor of a "more meritorious" issue.

Johnson's *Batson* claim is meritorious because it follows a well-defined blueprint set forth in *Dretke* and *Currie v. McDaniel*, 825 F.3d 603, 605 (9th Cir. 2016). The record clearly shows that Fuller was both impartial and competent to serve on the jury. None of the reasons the State proffered to support the peremptory strike are true, and there can be little doubt, based on Lockinger's inclusion on the jury, that race was a motivating factor for Fuller's exclusion.

In Claim One(B), Johnson argued the jury venire was not a fair cross-section of the community. The State relies on a narrow and incorrect reading of *Valentine v. State*, 135 Nev. 463, 465, 454 P.3d 709, 713 (2019); *see* Ans. Br. at 68–69. This Court held in *Valentine* that "an evidentiary hearing is warranted on a fair-cross-section challenge when a defendant makes specific allegations that, if true, would be sufficient

to establish a prima facie violation of the fair-cross-section requirement." *Id.* at 466, 714.

The State incorrectly interprets *Valentine* to mean that a petitioner must adduce evidence that the government's internal mechanisms are designed to systematically exclude certain classes of jurors. Ans. Br. at 69. *Valentine* does not require such searching proof to establish a *prima facie* case, only specific allegations are necessary. Johnson has established a high likelihood of the exclusion of African Americans based on the disparities calculated in accordance with *Williams* and *Evans*. *See* Opening Br. at 90. The district court erred by failing to grant an evidentiary hearing based on these allegations.

In Claim One(C), Johnson argued he was improperly forced to use excessive peremptory strikes to correct the district court's erroneous denial of for-cause challenges. *See* Opening Br. at 91–93. The State fails to respond to the merits of this claim. Johnson reasserts the merits of the claim here, underscoring that the error skewed the jury composition, and that the jury questionnaires clearly evidence that the jurors were not impartial.

2. Claim Two

In Claim Two, Johnson argued that juror bias violated his constitutional rights. Opening Br. at 93–96; *see also* 24AA5803–11. The State confuses juror misconduct harmless error analysis with juror bias, which is structural. Ans. Br. at 70. Juror Kathleen Bruce, who sat during the guilt and first penalty-phase, stated that she had a pervasive fear of young black men and told trial counsel that she had viewed reports of the trial in the news. 10AA2449–53. This type of bias cannot be subject to harmless error analysis. *See Estrada v. Scribner*, 512 F.3d 1227, 1240 (9th Cir. 2008) (bias exists where the juror is apprised of prejudicial information and is unlikely to exercise independent judgement).

This Court should adopt the view set forth by Justices Cherry and Saitta: that jury errors are structural and represent a manifest injustice affecting the fundamental fairness of the proceeding. As such, it is sufficient to overcome both procedural default and the law-of-the-case doctrine. *Doyle v. State*, No. 62807, 2015 WL 5604472, at *6 (Sept. 22, 2015) (Cherry, J., joined by Saitta, J., dissenting).

3. Claim Three(A)–(D)

In Claim Three(A)–(D), Johnson argued trial counsel performed ineffectively during the guilt phase. 24AA5812–54.

a) Claim Three(A)

The State during trial introduced damaging evidence that could have been rebutted by two types of experts: an expert in police coercion and an expert in blood spatter and crime scene reconstruction.

Turning first to police coercion, the State makes several unpersuasive arguments. The State notes that neither Johnson nor the testifying witnesses confessed. Ans. Br. at 39. But Johnson's claim does not turn on any distinction between confessions and implicatory statements; whether the interview subject implicates themselves or someone else, the effect is the same—a false statement.
See 42AA10385–435. The State also contends that presentation of this evidence could have harmed Johnson's credibility. Ans. Br. at 40. But the State relies on exactly the assumption that this evidence would have rebutted in jurors—that police using coercive techniques is a "conspiracy theory," and that witnesses and suspects never lie during interrogations. *See, e.g.*, Kate Storey, *'When They See Us' Shows the*

Disturbing Truth About How False Confessions Happen, ESQUIRE (June 1, 2019).[2]. And the State asserts counsel had a strategic reason for not consulting a coercion expert, Ans. Br. at 40, but nothing in the record supports the State's assertion that counsel made a strategic choice or that counsel thoroughly investigated the law and facts. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984). And without that thorough investigation or strategic decision, inadequate cross-examination is as susceptible to an ineffectiveness claim as any other deficient action during trial. *See Richey v. Bradshaw*, 498 F.3d 344, 362–63 (6th Cir. 2007); *Fisher v. Gibson*, 282 F.3d 1283, 1298–99 (10th Cir. 2002). Finally, the State argues that Johnson cannot show prejudice because the Nevada Supreme Court described the evidence against him as "overwhelming." Ans. Br. at 40. The State ignores that the coerced statements represent a significant portion of that "overwhelming" evidence, and that the statements provide the only evidence that Johnson was the triggerman (and thus eligible for the death penalty

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[2] Available at https://www.esquire.com/entertainment/a27574472/when-they-see-us-central-park-5-false-confessions/

without additional showings by the State). *See Johnson v. State (Johnson I)*, 118 Nev. 787, 797, 59 P.3d 450, 457 (2002) (providing first in list of "overwhelming evidence" statements from Johnson's former girlfriend and other witnesses), *overruled no other grounds by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011).

The State repeats many of these arguments in response to the second part of Johnson's claim, involving an expert in crime scene reconstruction, again asserting without support that counsel made a strategic decision and the evidence was otherwise overwhelming. Ans. Br. at 41–42. And the State adds that, "even if the blood did not get on Johnson's pants when he shot the victim, it does not exonerate Johnson as the shooter." *Id.* at 41. But evidence does not need to conclusively prove innocence to be useful for the defense. *See Rippo*, 134 Nev. at 424, 423 P.3d at 1098 (explaining that *Strickland* prejudice standard requires a "reasonable probability" of a different result). Because this expert testimony undermined the State's theory of the case, counsel were ineffective for failing to present it during the guilt phase. *See Duncan v. Ornoski*, 528 F.3d 1222, 1235 (9th Cir. 2008).

b) Claim Three(B)

In Claim Three(B), Johnson argued trial counsel were ineffective for failing to adequately impeach the State's fact witnesses.[3] 24AA5837–43. The State argues counsel's cross-examination was the type of "strategic choice" that is "virtually unchallengeable." Ans. Br. at 47 (quoting *Strickland*, 466 U.S. at 691). But the State's own quote notes this rule applies only when choices are "made after thorough investigation of law and facts relevant to plausible options." *Strickland*, 466 U.S. at 691. Without that thorough investigation here, counsel's failure to adequately impeach the witnesses could not be strategic.

The State also complains Johnson did "not actually explain what questions counsel failed to ask—or even what questions counsel did ask and how they were deficient." Ans. Br. at 47–48. But the State cites nothing requiring postconviction petitioners to script the cross-examination of effective counsel. It is sufficient that Johnson provided in detail the inconsistencies that effective counsel would have examined. *Contra Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222,

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[3] The opening brief incorrectly labeled this Claim Three(C). Opening Br. at 41–46.

225 (1984). The State lastly argues law of the case bars this claim, quoting the facts section of this Court's decision on Johnson's first direct appeal—where ineffective assistance claims were not, and could not have been, raised. Ans. Br. at 48–49 (quoting *Johnson*, 118 Nev. at 793, 59 P.3d at 454).

c) Claim Three(C)

In Claim Three(C), Johnson argued trial counsel were ineffective for failing to adequately impeach the State's expert witnesses.[4] 24AA5844–52. The State repeats cross-examination is a strategic decision not susceptible to attack through a claim of ineffective assistance of counsel. Ans. Br. at 42–43. Again, nothing in the record supports the State's assertion that counsel made a strategic choice or that counsel thoroughly investigated the law and facts. *See Strickland*, 466 U.S. at 691. And without that thorough investigation or strategic decision, inadequate cross-examination is as susceptible to an ineffectiveness claim as any other deficient action during trial. *See Richey*, 498 F.3d at 362–63 (6th Cir. 2007); *Fisher*, 282 F.3d at 1298–99.

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[4] The opening brief incorrectly labeled this Claim Three(B). Opening Br. at 30–41.

And the State again complains Johnson did not include a script of proper cross-examination, despite no authority saying this is necessary. Ans. Br. at 43–47.

The State also generally disputes that counsel's ineffective cross-examination was prejudicial. Ans. Br. at 43–47. But the State ignores that undermining portions of the experts' testimony would have gone a long way towards undermining their ultimate harmful conclusions. In addition, the State's closing argument relied heavily on this testimony. For example, the State several times during closing argument referenced the forensic pathologist's testimony—which conflicted with previous testimony—that the gunshot wounds showed that the victims were shot at close range (within a couple of inches). First, the prosecutor referenced the testimony to support his argument that Johnson was guilty of robbery:

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

7AA1713–14. Then to support his argument that Johnson intentionally killed the victims: "You recall the evidence, what the physical evidence suggests, that the gun placed two inches, no more than two inches from the skull of each one of these boys as he fired a fatal shot. Certainly that evidence is an intent to kill on Donte Johnson's part." 7AA1715. And premeditation: "As quickly as he placed the gun to the back of each of their heads, is as quickly as he could form premeditation." 7AA1717. And deliberation: "As each one of those acts being deliberate and being calculated, the pulling of a trigger, a deliberate act, but within inches from each boy." 8AA1761. And, lastly, to argue the cigar box with Johnson's fingerprints was dropped during the killings: "Is it a coincidence that that box is lying there at the feet of one of the decedents? Or someone would have had to stand over it, or Donte Johnson would have to stand over as he puts that gun within two inches and shoots and kills him." 8AA1759.

The State similarly questions the prejudice from counsel's failure to cross-examine the DNA expert. Ans. Br. at 46. But, again, the prosecutor relied on the DNA expert's testimony to argue in closing that DNA conclusively matched Johnson. 7AA1724–25; 8AA1763. If this

testimony had not been prejudicial, the prosecutor would have had no reason to rely on it to establish elements of the charged offenses.

The State next says that Johnson has not established what difference proper cross-examination of the fingerprint expert would have made. Ans. Br. at 43–44. In his petition, Johnson pointed out specific problems with the testimony from the State's fingerprint examiner. 24AA5844–46. For example, the expert testified misleadingly that he was 100 percent sure that the fingerprint found at the crime scene matched Johnson—a certainty level impossible to actually meet. 42AA10491–93. Had counsel performed effectively, they would have undermined this testimony, poking holes in one of the few pieces of physical evidence placing Johnson at the crime scene.

Turning next to the firearms expert, the State contends that the questions defense counsel did ask were sufficient. Ans. Br. at 45. All counsel asked about, however, was the absence of the murder weapon in evidence. 7AA1570–71. The damaging aspect of this testimony was not related to any comparison with the murder weapon. The testimony was damaging because the expert told the jury that all four bullets came from the same gun—wherever that gun might be—and, consequently,

were probably fired by the same person. 7AA1719–20. A theory that Johnson alone had fired four different bullets from four different guns would not have been credible. Effective counsel would have undermined this testimony.

d) Claim Three(D)

The State repeatedly told the jury Johnson and his codefendants had stolen a VCR from the victims, 4AA848, 856, 861–62, 864–65; 7AA1705, 1709, 1711–12, 1723, 1726, 1729, 1743–44; 8AA760, despite the presence of that VCR in a crime scene photograph, 38AA9500–01; *see also* 38AA9491–99 (noting VCR at crime scene). In response to this claim, the State asserts "ample evidence" was presented at trial to support Johnson stealing the VCR. Ans. Br. at 74–75. But the evidence the State cites does not support its assertion. The State points to evidence that someone had rummaged through the victims' belongings and that the entertainment center had an open compartment, but there was no evidence a second VCR had ever been in that open compartment. And the State complains "Johnson makes no showing that the 'VCR compact disk' in the photo was the same VCR Johnson stole," not acknowledging this showing would be impossible. To the

extent the State is claiming that the victims owned two VCRs, one of which Johnson stole, there is absolutely no evidence this is the case.

Most importantly, however, the State ignores the premise of Johnson's claim—not that competent counsel would prove the VCR in the photograph was the only VCR in existence at the victims' home, but that the VCR in the photograph was useful evidence to undermine the State's theory of the offense. Counsel's failure to present the photograph and police report thus constituted deficient performance. *See Jones v. Shinn*, 943 F.3d 1211, 1229 (9th Cir. 2019), *rev'd on other grounds sub nom. Shinn v. Ramirez*, 142 S. Ct. 1718 (2022); *Hardy v. Chappell*, 849 F.3d 803, 818–24 (9th Cir. 2016); *Thomas v. Clements*, 789 F.3d 760, 768–71 (7th Cir. 2015).

4. Claim Four

Claim Four asserts a number of errors related to instructions given to the jury during the guilt-phase of Johnson's trial. *See* 24AA05858–73; *see also* Opening Br. at 47–77. The State argues that Johnson "fails to adequately plead the procedural bars" because "Johnson makes no effort to tie this claim to one of ineffective assistance of counsel, much less of Oram's ineffectiveness." Ans. Br. at

64. The opening brief categorized the guilt-phase instructional errors into two groups: previously unraised challenges and previously raised challenges.

For the previously unraised challenges, Johnson argued that trial and appellate counsel were deficient for failing to raise these challenges because they had an obligation to raise them. *See* Opening Br. at 49. Similarly, Johnson argued that postconviction counsel had an obligation to raise these challenges but failed to, and thus, he was deficient. *See* Opening Br. at 47–49. In support of these arguments, Johnson cited the Nevada Indigent Defense Standards, the ABA standards, a treatise on ineffective assistance of counsel, and persuasive authority from other jurisdictions finding ineffective assistance of counsel based on a failure to challenge erroneous jury instructions. *See* Opening Br. at 47–50.

The State argues that Johnson "does not state if trial counsel objected to the instructions." Ans. Br. at 64. But Johnson did: the challenges to the felony murder instruction, the burglary instruction, the kidnapping and murder instruction, the elements of kidnapping instruction, and robbery instruction all were within a subheading titled, "Previously unraised challenges." *See* Opening Br. at 47–67. This

subsection asserted, "trial . . . counsel had an obligation to raise challenges to these instructions." Opening Br. at 49.

The State raises a similar point for pos-conviction counsel, writing that "Johnson does not allege Oram should have raised the issue in the First Petition because any effective attorney would have done so . . . ." Ans. Br. at 65. But Johnson wrote, "Post-conviction counsel had an obligation to raise these claims, but failed to." Opening Br. at 48. The State's argument implies that raising these claims necessarily required cutting other claims out. Ans. Br. at 65. But this is not so, and particularly in a death penalty case, where postconviction counsel has an obligation to "litigate all issues, whether or not previously presented, that are arguably meritorious." Nev. Def. Standards 2-19(c), (e).

Finally, the State argues that postconviction counsel cannot have been deficient for failing to raise unpreserved, waived claims. *See* Ans. Br. at 64–65. But this is wrong. First, trial counsel's failure to preserve the objection is the claim of ineffective assistance of counsel that Johnson asserts; this claim, in turn, is a claim that postconviction counsel should have raised. Similarly, this is the case with appellate counsel's waiver-by-omission of Johnson's jury instruction claims, and

postconviction counsel's failure to raise the ineffective assistance of appellate counsel. Second, the ineffective assistance of trial counsel (in failing to object) and of appellate counsel (in failing to raise the issues on appeal), establish good cause and prejudice as to any procedural default that attached during Johnson's trial and appeal. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) ("A claim of ineffective assistance of counsel may also excuse procedural default if counsel was so ineffective as to violate the Sixth Amendment."); *see also Edwards v. Carpenter*, 529 U.S. 446, 452 (2000). Postconviction counsel's ineffectiveness, in turn, establishes good cause and prejudice for his failure to raise prior counsel's ineffectiveness. *See Crump*, 113 Nev. at 304–05, 934 P.2d at 254.

More fundamentally, though, the State fails to answer Johnson's argument that effective counsel has an obligation to raise meritorious instructional error. Thus, if there was error in the jury instructions, and counsel failed to raise that error, counsel was deficient. And if those errors were not harmless, then counsel's deficient performance was prejudicial.

a) Previously unraised errors in guilt-phase jury instructions

(1) Felony murder instruction (Claim Four(F))

Claim Four(F) asserts that the felony murder instruction was erroneous because it instructed the jury that felony murder carried "conclusive evidence" of "premeditation." 34AA8483. This erroneous statement of law conflated two different theories for first-degree murder, allowing felony murder to reduce the burden of proof for willful, deliberate, and premeditated murder. *Compare* NRS 200.030(1)(a), *with* NRS 200.030(1)(b).

The State misunderstands the issue. The error in the felony-murder instruction did not affect the felony-murder theory of first-degree murder: premeditation is not an element of felony murder, and thus, in saying felony murder carried "conclusive evidence" of premeditation, felony murder is unaffected. Indeed, the State makes this point in arguing that "it is unclear how instructing the jury that for felony murder, it did not need to find premeditation and malice aforethought was error." Ans. Br. at 52.

But this error did affect the willful, deliberate, premeditation theory of first-degree murder, an effect the State fails to address altogether. As the State put it, "The jury had to find *either* murder with premeditation and malice *or* find felony murder." Ans. Br. at 52 (emphasis in original). But here, the jury was instructed that *if* it found felony murder, then it automatically found an element for premeditated murder. This was error for the willful, deliberate, premeditation theory of murder. And this error is particularly problematic in this case because of the plethora of problems in the felony murder theories.

(2) Burglary instruction (Claim Four (G)).

Claim Four(G) challenges the burglary instruction for improperly creating a presumption, and further, for doing so without the required remedial language governing presumptions. 24AA5865–66. The State does not contest that, under *Hollis v. State*, 96 Nev. 207, 209, 606 P.2d 534, 535–36 (1980), and NRS 47.230, the court was required to give an instruction consistent with NRS 47.230(3). The State also does not contest that the district court failed to give such an instruction. Instead, the State appears to argue that any error is harmless because "[t]he

State still had to prove Johnson's intent beyond a reasonable doubt" and because this Court "held Johnson had the appropriate intent for burglary." Ans. Br. at 53 (citing *Johnson v. State (Johnson II)*, 122 Nev. 1344, 1347, 148 P.3d 767, 770 (2006)). But, as to the first point, the entire issue is that the given instruction suggests the finding does *not* need to be beyond a reasonable doubt; NRS 47.230(3) resolves this problem by requiring a specific clarifying instruction. As to the second, this Court, as an appellate court, does not find facts in the first instance, so the State is wrong to suggest that this Court independently found Johnson's intent. *See* Nev. Const. art. 6, § 4; *see also* NRS 177.025; *Hosier v. State*, 121 Nev. 409, 412, 117 P.3d 212, 213 (2005) ("This court is not a fact-finding tribunal.").

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

Claim Four(H) challenges the jury instructions because they allowed the jury to rely on murder as a predicate for kidnapping while also allowing the jury to rely on kidnapping as a predicate for murder. *See* 24AA5866–68. The State does not contest that this is legal error, but argues it was harmless because of Johnson's robbery conviction,

which independently could serve as a predicate to both kidnapping and felony murder. *See* Ans. Br. at 53–54. However, as described below, the robbery conviction, itself, suffers legal defect, and thus cannot serve to render this error harmless. *See* Opening Br. at 63–66; *see also* § (5) below. Moreover, even assuming the viability of the robbery conviction, as discussed below, the sheer volume of instructional error in this case requires the errors, collectively, to be treated as structural. *See Cortinas v. State*, 124 Nev. 1013, 1025, 195 P.3d 315, 323 (2008) (recognizing that some instructional error can defy "harmless-error review").

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

Claim Four(I) argues that the trial court failed to instruct the jury it needed to find the movement or restraint "substantially increase[d] the risk of harm over and above that necessarily present in the crime of robbery itself." *Wright v. State*, 94 Nev. 415, 417–18, 581 P.2d 442, 443–44 (1978); *see also Mendoza v. State*, 122 Nev. 267, 275–76, 130 P.3d 176, 181 (2006) (requiring instruction). The State does not contest that this was error. *See* Ans. Br. at 54–55. Instead, the State points out that *Mendoza* was decided "six years after [Johnson's] conviction." Ans. Br.

at 54. The State does not respond to Johnson's point that his conviction was not final until *after* the *Mendoza* decision. *Compare* Ans. Br. at 54, *with* Opening Br. at 62 n.11. Moreover, *Wright*, which stated the "substantially increase" in the risk of harm standard, was decided in 1978.

The State appears to argue that the error was harmless, citing this Court's earlier decision that the kidnapping charge could not be "successfully challenged" because Johnson bound the victims. *See* Ans. Br. at 55 (citing *Johnson*, 133 Nev. at 581, 402 P.3d at 1277).[5] But the record is unclear about who bound the victims, and the State's heavy

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[5] This Court's prior decision relied on *Hutchins v. State*, 110 Nev. 103, 867 P.2d 1136 (1994), as being the "prevailing caselaw at the time" of Johnson's trial. *See Johnson*, 133 Nev. at 581, 402 P.3d at 1277. Though an accurate statement of chronology, it misapplied *Hutchins* because Johnson's conviction was not final until *after* the *Mendoza* decision. In *Mendoza* this Court held, "we retreat somewhat from the statement in *Hutchins* that physical restraint per se satisfies" the increased danger element. *Mendoza*, 122 Nev. at 275, 130 P.3d at 181. This rule would apply "to all cases on direct appeal," subject only to the condition that the issue was "preserved for appeal." *Richmond v. State*, 118 Nev. 924, 929, 59 P.3d 1249, 1252 (2002). If this issue were not preserved for appeal, then trial counsel was ineffective; if the issue were preserved, appellate counsel were ineffective. In any case, post-conviction counsel was ineffective for failing to raise this issue because *Mendoza* applied to Johnson's case.

reliance on vicarious liability is unhelpful because those instructions also contained error. *See* Opening Br. at 66–67, 69–72; *see also* 24AA5860–62.

(5) Elements of robbery

The jury was not instructed that "the State must show that the victim had possession of or a possessory interest in the property taken." *Valentine*, 135 Nev. at 468, 454 P.3d at 715–16; *see also* 34AA8463. The State does not contest this error. Rather, the State appears to argue that this error was harmless because "Johnson cites to nothing in the record to show one or more of the victims did not have a possessory interest in the cash in his pocket." Ans. Br. at 56–57. But the absence of a citation is because the State failed to provide evidence of any victim having a possessory interest in the cash. Tod Armstrong testified that two of the victims "didn't have anything I guess for them," suggesting those victims had no money at all. 4AA994. Armstrong testified that he heard Johnson say they received some money, but not from whom. *See* 4AA997. Charla Severs testified that Johnson said he did not get as much money as he wanted, but he "didn't tell [Severs] where" the money came from, or from whom. 5AA1163. Bryan Johnson testified

that he heard Johnson mention receiving some money, but, again without any testimony about from whom any money came. *See* 6AA1263. Thus, no evidence established which victims had a possessory interest in any of the cash received.[6]

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

Claim Four(D) challenges the instruction for aiding and abetting liability because they failed to inform the jury that it needed to find an aider/abettor had the same specific intent as the principle to be liable for a specific intent crime. *See* Opening Br. at 66–67; *see also* 24AA5862. In *Sharma v. State*, 118 Nev. 648, 656, 56 P.3d 868, 873 (2002), this Court made clear that jury instructions needed to make the specific intent requirement clear for aiding and abetting theories of liability. Thus, in *Sharma*, the defect was a failure to instruct that attempt murder required "the specific intent to kill." *Id.*

The State argues the instruction is consistent with *Sharma* because the instruction requires the jury to find that the aider/abettor

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[6] The State fails to respond to Johnson's arguments as to the other items, and thus Johnson refers the Court to the arguments made in the Opening Brief. *See* Opening Br. at 64–66.

"knowingly and with criminal intent" aided the principal offender. *See* Ans. Br. at 57–58. But the State overlooks the fact that a general criminal intent fails to require specific intent. Thus, the given instruction is inconsistent with *Sharma*.

b) Previously raised errors in guilt-phase jury instructions.

(1) Conspiracy (Claim Four(C)).

Claim Four(C) alleges that the conspiracy instructions were erroneous because they failed to instruct the jury that, for specific intent crimes, the jury needed to find the defendant himself possess specific intent. *See* Opening Br. at 69–72; *see also* 24AA5860–62. This violates *Bolden v. State*, 121 Nev. 908, 921, 124 P.3d 191, 200 (2005).[7] The State argues that conspiracy to commit robbery that results in murder is sufficient to establish murder, without having to separately prove the specific intent to commit murder. Ans. at 62–63 (no citation to statute or caselaw). The State's theory ostensibly relies on the natural and probable causes language in Instruction 12, but this Court

[7] This Court later overruled the harmless error analysis used in *Bolden*, but otherwise left the holding intact. *See Cortinas*, 124 Nev. at 1026, 195 P.3d at 324.

explicitly rejected this doctrine in *Bolden*. *See* 121 Nev. at 923, 124 P.3d at 201. The State also criticizes Johnson's argument that the State relied on conspiracy liability to support burglary because Johnson's citation "does not show conspiracy as a theory of liability." Ans. Br. at 61 (referring to 7AA1711). But in closing, the State argued that specific intent for burglary was shown because "what other intentions did Donte Johnson have when he entered the household carrying these two weapons?" 7AA1711. And then, on the next page, the State continues: "there's no evidence, it's true, that Donte Johnson held any one of these guns when he walked into the Terra Linda household, but let me remind you, in the eyes of the law the act of one is the act of all." 7AA1712. This language was a call-back to the State's explanation of vicarious liability under conspiracy: "there's an important consequence, as I said, once you find a conspiracy . . . . The act of one is the act of all." 7AA1709–10. Other than relying on the natural and probable consequences theory—which to repeat, was explicitly rejected in *Bolden*, 121 Nev. at 921, 124 P.3d at 200—the State does not defend the conspiracy instruction for murder. The State does not address kidnapping at all.

(2) Malice aforethought (Claim Four(E)).

Claim Four(E) challenges the trial court's failure to instruct on the element of malice aforethought. *See* Opening Br. at 72; *see also* 24AA5862–63. The State does not dispute the error, but relies on this Court's prior holding that "the evidence produced at trial overwhelmingly shows that Johnson was guilty of first-degree murder . . . ." Ans. Br. at 63 (quoting *Johnson*, 133 Nev. at 582, 402 P.3d at 1277–78). But as the numerous jury instructional errors show, what the jury found is far from clear because of the error-ridden instructions as to primary and vicarious liability. And, as noted in the Opening Brief, the error of omitting a malice aforethought instruction was particularly harmful because of the erroneous felony murder instruction, which incorrectly created a presumption of express malice. *See* § I.B.4(a)(1) above. [8]

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[8] The opening brief also challenged the reasonable doubt instruction and the premeditation and deliberation instruction. *See* Opening Br. at 67–69. Johnson submits those on the arguments contained in the opening brief.

c) Cumulative error (Claim Four(J))

Claim Four(J) argues that the cumulative effect of the jury instructional errors violated Johnson's constitutional rights. 24AA5869–73. The State argues that there is no "cumulative" error for jury instructions because "[i]f the jury is properly instructed after hearing all the instructions, no error can exist." But this argument only works in instructions without error. The problem here is that after hearing all the instructions, nothing but error existed.

First, the State either explicitly or implicitly concedes error to nearly all of instructional error described above. The State does not challenge that under *Hollis* and NRS 47.230, the trial court failed to give the required presumption instruction in NRS 47.230(3): the State does not challenge that the jury instructions erroneously allowed the jury to both rely on kidnapping as a predicate for murder and murder as a predicate for kidnapping; the State does not contest that the jury was not instructed that, for kidnapping, movement or restraint needed to substantially increase the risk of harm over and above the robbery itself; the State does not contest that it was error to not instruct the jury that it needed to find the victim had a possessory interest in

property taken; the State does not contest that the court failed to instruct the jury about malice aforethought. *See* Ans. Br. at 49–66. And where the State does contest error, with the aiding and abetting instruction and the conspiracy instruction, it does so in the face of controlling and clear precedent demonstrating the error.

And, second, the State relies almost exclusively on harmlessness. But the cumulative effect of the erroneous jury instructions vitiates any attempt at harmlessness. For example, the State responds to the error in the felony murder instruction by arguing that Johnson cannot show prejudice, "especially as he was found guilty beyond a reasonable doubt of robbery and kidnapping." Ans. Br. at 52. In light of the errors in the robbery and kidnapping instructions, however, robbery and kidnapping cannot save the felony-murder instruction. For the error related to kidnapping as predicate for murder and murder as predicate for kidnapping, the State responds "due to [the] robbery conviction, a rational jury would have convicted Johnson of kidnapping and murder even without this alleged error . . . ." Ans. Br. at 54. But, here, again, the robbery conviction is undermined by the error in the robbery instruction. And these errors are exacerbated by the State's heavy

reliance on vicarious theories of liability (themselves supported by erroneous jury instructions), which allowed the State to argue that it did not have to prove specific acts or mental states as to Johnson himself, so long as the jury believed someone performed those acts or possessed the mental state.

This was harmful error.[9]

5. Claims Five and Sixteen

In Claims Five and Sixteen, Johnson raised several instances of prosecutorial misconduct. Opening Br. at 108–10, 131–34; 24AA5874–90, 6000; 25AA6001–28. The State generally disputes each of these instances constitutes misconduct, Ans. Br. at 76–79, 99–101, but Johnson cited caselaw in his opening brief criticizing prosecutors for similar actions. Opening Br. at 108–10 (citing *Berger v. United*, 295 U.S. 78, 85–86 (1935); *Valdez v. State*, 124 Nev. 1172, 1188–89, 196 P.3d 465, 476–77 (2008); *People v. Vance*, 116 Cal. Rptr. 3d 98, 102 (Cal. App. 2010)); Opening Br. at 131–34 (citing *Darden v. Wainwright*, 477

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[9] Instructional errors, relying on precedent from this Court, are neither "imagined technicalities" nor inconsistent with society's "duty to protect its citizens." *See* Ans. Br. at 139.

U.S. 168, 181 (1986); *United States v. Leon-Reyes*, 177 F.3d 816, 822 (9th Cir. 1999); *Lisle v. State*, 113 Nev. 540, 552, 937 P.2d 473, 480 (1997); *Boyde v. California*, 494 U.S. 370, 384 (1990); *Earl v. State*, 111 Nev. 1304, 1311, 904 P.2d 1029, 1033 (1995)).

The State additionally complains Johnson did not include in his opening brief each excerpt from the guilt phase transcript showing misconduct. Ans. Br. at 77. But Johnson included those excerpts in his petition, where he was not constrained by the word limits of a Nevada Supreme Court opening brief. 24AA5874–90.

The State argues there was no "golden rule" violation, as the prosecutor "rephrased" his argument concerning fear. Ans. Br. at 78. But the prosecutor's rephrasing did not solve the problem—he still asked the jurors to place themselves in the minds of the jurors:

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

7AA1713–14; *see Vance*, 116 Cal. Rptr. At 102.

Finally, the State argues it was proper for the prosecutor to tell the jurors Johnson wore no mask, since there was no evidence of a mask admitted. Ans. Br. at 79. But the prosecutor did more than tell the jurors that there was no evidence of a mask; he told the jurors the lack of a mask proved Johnson "knew he was going to shoot and kill each one of these boys before he left." 8AA1761.

6. Claim Six(C), (F)–(H)

In Claim Six(C), (F)–(H), Johnson argued trial court error during the guilt phase deprived him of a fair trial. 24AA5896–97, 5900–05.

a) Claim Six(C)

In Claim Six(C), Johnson argued his due process rights were violated by a videotaped deposition of a key witness that took place before trial. 24AA5896–97. The State characterizes the claim as a complaint that the district court improperly chose the deposition over "imprisoning Severs for nine months or forcing the State to forego her testimony." Ans. Br. at 80–81. But those were not the only options. The court, in accordance with Nevada statutes, could have ordered an ordinary deposition, not in open court with media present. *See* NRS 174.175(2).

b) Claim Six(F)

A State expert, Dr. Robert Bucklin, speculated that a laceration on one of the victim's foreheads could have been made with a gun. 6AA1406–07. The State insists this testimony was proper, Ans. Br. at 82, but experts cannot speculate as to the cause of an injury. *See Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 158–59, 111 P.3d 1112, 1116 (2005). The trial court thus erred allowing this testimony, and the error deprived Johnson of a fair trial.

c) Claim Six(G)

In Claim Six(G), Johnson argued the use of inflammatory photographs violated his right to a fair trial. 24AA5901–02. The State focuses its argument on distinguishing this case from *Watters v. State*, 129 Nev. 886, 889–91, 313 P.3d 243, 247 (2013), because the photographs here did not include the word "guilty." Ans. Br. at 84–85. But *Watters* is just one example of the general rule forbidding overly prejudicial or inflammatory images. *See Watters*, 129 Nev. at 890, 313 P.3d at 247. And here the photographs did more than simply portray Johnson and his codefendants in an unflattering light—they contrasted Johnson's mugshot and gang alias with the victims' school photographs.

And there was no need for those photographs during the guilt phase—identity was never an issue. The display was improper and intended only to inflame the jury, and the trial court consequently erred by overruling the objection.

d) Claim Six(H)

The trial court improperly questioned a holdout juror during the 2000 penalty phase deliberations. 10AA2414–22. Johnson acknowledged in his opening brief that he was advocating for a position adopted by two dissenting Justices. Opening Br. at 118–19 (citing *Eden v. State*, 109 Nev. 929, 930, 860 P.2d 169, 170 (1993) (Young, J., joined by Rose, C.J., dissenting)). But there are good reasons to adopt that position here.

As the dissent explained in *Eden*, this Court's caselaw "implies that it is improper for a judge to single-out a minority juror without reminding those individual holdout jurors not to surrender consciously held opinions for the sake of judicial economy." *Eden*, 109 Nev. at 936, 860 P.2d at 173 (Young, J., joined by Rose, C.J, dissenting) (citing *Ransey v. State*, 95 Nev. 364, 594 P.2d 1157 (1979)). The same is true of "*Allen* charges," with this Court affirming only when trial courts

"inform jurors that each member has a responsibility to adhere to his or her own honest opinion." *Id.* Although, like in *Eden*, the discussion between the trial court and holdout juror "does not fit neatly into the traditional definition of an *Allen* charge," the same principles should control. *Id.*

The State also insists that, even if error occurred, Johnson received all the benefit he was due. Ans. Br. at 86–87. True enough, the ordinary remedy for similar errors is a new trial. *See, e.g.*, *Ransey*, 95 Nev. at 368; 594 P.2d at 1159. But this is not an ordinary case with a guilty verdict; the trial court's interference in penalty phase deliberations implicates different concerns. Penalty phase deliberations include factual determinations, but also abstract considerations like mercy for a defendant. *See Thomas v. State*, 138 Nev. Adv. Op. 37, 510 P.3d 754, 765 (2022). A judge's interference in that process can thus not be easily rectified with a new trial, with different jurors who will weigh different considerations during the penalty phase. This Court should therefore vacate Johnson's death sentence and decline to order a new penalty hearing.

7. Claim Eight

In Claim Eight, Johnson raised two separate double jeopardy violations, challenging his convictions for (1) felony murder and the underlying felonies, and (2) substantive conspiracy and conspiracy to commit first-degree murder. 24AA5911–16. The State makes three unpersuasive arguments in response.

First, the State points to this Court's caselaw holding underlying felonies are not the "same offense" as felony murder for purposes of the Double Jeopardy Clause. Ans. Br. at 87 (citing *Talancon v. State*, 102 Nev. 294, 721 P.2d 764 (1986)). But the State ignores Johnson's reasons for overturning this caselaw: *Talancon* improperly assumed what the Nevada Legislature intended, instead of searching for the "clear indication" the United States Supreme Court requires. *Compare Whalen v. United States*, 445 U.S. 684, 692 (1980) ("[W]here two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent."), *with Talancon*, 102 Nev. at 300, 721 P.2d at 768 (presuming legislature intended multiple

punishment because statutes concerning felony murder and underlying felonies "protect against two separate societal interests").

Second, the State argues substantive conspiracy is a separate crime from conspiracy to commit murder because "[o]ne requires an agreement, the other a murder conducted in tandem." Ans. Br. at 88–89. But this argument was waived. *See* Opening Br. at 121. And even if this Court entertains the State's argument, the State's contention they are separate offenses is unpersuasive. Both substantive conspiracy and conspiracy to commit murder include as elements an agreement and at least two participants acting in tandem. *See Bolden*, 121 Nev. at 922–23, 124 P.3d at 200–01; *Thomas v. State*, 114 Nev. 1122, 1143, 967 P.2d 1111, 1122 (Nev. 1998).

Third, the State relies on *Jackson v. State*, 128 Nev. 598, 291 P.3d 1274 (2012), and *United States v. Felix*, 503 U.S. 378 (1992), arguing the cases established a rule that substantive crimes and conspiracies to commit those crimes are not the "same offense." Ans. Br. at 89–90. Both cases are distinguishable. In *Jackson*, this Court repeated the Supreme Court's two-part test for analyzing cumulative punishment under the Due Process Clause, explaining courts must determine whether two

statutes "proscribe the same offense and, if so, whether they nonetheless authorize cumulative punishment." *Jackson*, 128 Nev. at 601, 291 P.3d at 1276. And this Court looked to the statutory text and held the legislature had *explicitly* authorized cumulative punishment. *Id.* at 606–07, 291 P.3d at 1279–80. As for *Felix*, the United States Supreme Court held that conspiracy to commit a crime and a *non-conspiracy* substantive crime are not the same offense for double jeopardy purposes, because the "essence" of both offenses is different. *Felix*, 503 U.S. at 389–91. In cases where the substantive crime is itself conspiracy, and thus both statutes are aimed at agreements to commit an offense, *Felix* does not control. *See Rutledge v. United States*, 517 U.S. 292, 300 n.12 (1996) (distinguishing *Felix* because case "involve[d] *two* conspiracy-like offenses directed at largely identical conduct").

In no case has this Court or the United States Supreme Court established a blanket rule that substantive crimes and conspiracies to commit those crimes are separate offenses. Instead, courts must consider whether, under a specific statutory scheme applied in a specific case, "each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Because here

the elements of the underlying felonies and substantive conspiracy are subsumed within felony murder and conspiracy to commit murder, punishing Johnson for both violated the Double Jeopardy Clause.

8. Claim Nine

In Claim Nine, Johnson argued the State violated his Confrontation Clause rights during both the guilt phase and the penalty phase. Opening Br. at 121–24; 24AA5917–23.

The State argues there was no Confrontation Clause problem during the guilt phase because, like in *Williams v. Illinois*, 567 U.S. 50 (2012), the State's DNA expert reviewed Cellmark's testing, created a chart, and testified to his opinion. Ans. Br. at 90. The State is wrong. "The Supreme Court's fractured decision in *Williams* provides little guidance and is of uncertain precedential value because no rationale for the decision—not one of the three proffered tests for determining whether an extrajudicial statement is testimonial—garnered the support of a majority of the Court." *State v. Dotson*, 450 S.W.3d 1, 68 (Tenn. 2014) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 66 (1996), and *United States v. Pink*, 315 U.S. 203, 216 (1942), in questioning precedential value of *Williams*); *see State v. Michaels*, 95

A.3d 648, 666 (N.J. 2014) (describing *Williams*'s precedential value as, "at best unclear"); *see also Stuart v. Alabama*, 139 S. Ct. 36, 36–37 (2018) (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of cert.) (citing with approval cases explaining *Williams*'s uncertain precedential value). And, even if the opinion had garnered a majority of the Supreme Court, the facts of Johnson's case are distinguishable: unlike in *Williams*, Johnson had already been arrested and charged when Cellmark tested the DNA evidence. *See Williams*, 567 U.S. at 84. As Justice Gorsuch later explained, eight of the nine justices on the Supreme Court when *Williams* was decided would have agreed that "a forensic report qualifies as testimonial . . . when it is 'prepared for the primary purpose of accusing a targeted individual' who is 'in custody [or] under suspicion.'" *Stuart*, 139 S. Ct. at 37 (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of cert.) (quoting *Williams*, 567 U.S. at 84) (alternation in *Stuart*); *see State v. Hutchison*, 482 S.W.3d 893, 911 (Tenn. 2016); *Dotson*, 450 S.W.3d at 69; *Young v. United States*, 63 A.3d 1033, 1043–44 (D.C. 2013).

As for the second part of his claim, the State complains that Johnson has cited no authority applying Confrontation Clause

protections during the penalty phase. Ans. Br. at 91–93. As Johnson said in his opening brief, he is asking this Court to reconsider its precedent on this issue. Opening Br. at 123. This is warranted because *Apprendi*, 530 U.S. 466 (2000, and its progeny clarify what facts must be found using the procedures prescribed by the Sixth Amendment. *See*, 530 U.S. 494 n.19. This includes the facts necessary to find an aggravating circumstance. *See Ring v. Arizona*, 536 U.S. 584, 609 (2002). The U.S. Supreme Court has recognizes that *Apprendi* and *Ring* applies to all "the procedure requirements the Constitution attaches to trial of elements." *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004).

9. Claim Eleven

In Claim Eleven Johnson argued that his convictions are unconstitutional because the jury was not required to be unanimous as to a specific theory of liability. *See* Opening Br. at 124–25; *see also* 24–25AA5752–6129. The State, citing no authority, responds, "Because a Nevada jury is not required to agree on a theory of liability, trial and appellate counsel were not ineffective for failing to raise the issue." Ans. Br. at 94. This, presumably, is based on *Evans v. State*, 113 Nev. 885, 894, 944 P.2d 253, 259 (1997), which relied on *Schad v. Arizona*, 501

U.S. 624 (1991), to conclude that "We hold that the Constitution does not require specific instructions or jury unanimity on the alternative theories of premeditated and felony murder in this case because actual intent to kill during the commission of a kidnapping can reasonable be considered the 'moral equivalent of premeditation.'" But, as the pening brief argued, *Schad* was decided before *Apprendi v. New Jersey*, 530 U.S. at 490 (2000), which held that proof beyond a reasonable doubt found by a jury, and suggested a unanimous jury, undermined the continued vitality of *Schad*. *See Apprendi*, 530 U.S. at 477. Indeed, in *Edwards v. Vanoy*, the Supreme Court noted that an underpinning of *Schad*—that there was no federal right to a unanimous jury verdict—had been overruled. *Edwards*, 141 S. Ct. at 1556 n.4.

10. Claim Thirteen

Postconviction counsel was obligated to raise the claim that Johnson's death sentence violated Double Jeopardy and the Due Process Clause. A prisoner may not be retried at the penalty phase for a sentence of death once he has been "acquitted" of that punishment in a trial-type sentencing procedure. *Sattazhan v. Pennsylvania*, 537 U.S. 101, 106 (2003) (citing *Bullington v. Missouri*, 451 U.S. 430 (1981)). In

Johnson's case, the penalty phase jury was deadlocked. The trial judge had a face-to-face meeting with one juror, Lockinger, who was the source of the deadlock. 10AA2428. Lockinger stated in no uncertain terms that he was not convinced the death penalty was appropriate in Johnson's case. 10AA2430. After the trial judge questioned Lockinger, the jury remained deadlocked, and the first death sentence was ultimately imposed by a three-judge panel.

Interactions between a judge and a juror are inherently coercive. *Lowenfield v. Phelps*, 484 U.S. 241, 250 (1988). The Supreme Court has recognized that the coerciveness of an interaction should be measured by the totality of the circumstances. *Id.* at 250. This Court should consider that the State failed to make their case to convince the jury that death was the appropriate sentence because the jury was deadlocked *before* Lockinger met with the trial judge. It is possible that but for the judge's interference the jury may have "acquitted" on the sentence of death. The added ingredient of improper judicial interference muddies the waters further. Lockinger may have carried the judge's questions back to the deliberations, and there is no way to tell the permutations of who remained steadfast and who may have

changed their minds. This is *per se* prejudicial error. *See Riggins v. Nevada*, 504 U.S. 127, 137–38 (1992) (error is prejudicial when trial rights are impacted but outcome is too difficult to measure); *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017). This Court should extend the holding in *Sattazhan* and interpret these facts—a jury with serious doubts combined with judicial interference—as a bar to penalty phase retrial as to the sentence of death.

The State's response to Johnson's due process claim ignores the foundational principle that criminal defendants have a right not to be subject to the ordeal of repeated trials, whether during the penalty phase or guilt phase. Johnson now restates that he has a right to be free from repetitive prosecution, and asks this court to extend that principle to his penalty phase proceedings. *See Abbate v. United States,* 359 U.S. 187, 196–201 (1959) (Brennan, J., concurring) (characterizing as "disturbing" government insistence that it be allowed to bring successive prosecutions).

11. Claim Fourteen(A), (B)(1), (B)(3), (B)(10)–(21)

Trial counsel were deficient for failing to challenge Johnson's culpability during the penalty phase. Specifically, penalty phase counsel

failed to challenge the multiple-murder aggravating circumstance based on the errors in the guilt-phase jury instructions, conceding that Johnson was the triggerman, failing to object to "other matter" evidence, failing to note the VCR still at the scene of the crime, and failing to present expert testimony about blood spatter and police coercion. *See* Opening Br. at 160–62; *see also* 24AA5973, 5981–86, 5991.

The State argues that a new penalty phase cannot function as a new guilt phase. Ans. Br. at 115. But this misses the point: because of the issues and errors in the guilt phase, the jury convicted Johnson of the crimes charged without having to find that Johnson himself performed any of the acts or possessed any of the states of mind required for the offenses. Thus, defense counsel could have argued that the penalty phase jury should not find the aggravating circumstances.

Trial counsel were deficient for failing to formulate and present a consistent theme, failing to interview Johnson's father, failing to retain and present a trauma expert, and failing to properly utilize Dr. Kinsora. *See* Opening Br. at 162–65; *see also* 24AA5967–69, 5980–81, 5991–93. The State responds by arguing that trial counsel's presentation was sufficient, and the new information Johnson proffers is cumulative. *See*

Ans. Br. at 115–18. But there can be no justification for co-counsel arguing against each other or for failing to conduct a thorough investigation.

Trial counsel were also deficient for failing to object to the injection of "other matter" evidence, failing to object to leading questions, and failing to object to gruesome photographs. Opening Br. at 165–67; *see also* 24AA5981–84, 5986–88. The State criticizes Johnson for taking inconsistent positions regarding the relevance of the guilt phase evidence. But trial counsel neither challenged the guilt phase evidence nor the State's presentation of it; and trial counsel could have pursued both paths, first by objecting to the State's presentation, and then, if the objection were rejected, seeking to undermine the strength of that evidence. In doing neither, counsel were ineffective.

Trial counsel were also deficient in failing to ask the court to instruct the jury, consistent with *Johnson I*, 118 Nev. at 802, 59 P.3d at 460 (2002), that the jury had to find the aggravating circumstances were not outweighed by mitigating circumstances beyond a reasonable doubt. Opening Br. at 167–68. The State relies on *Nunnery* to argue this was not required under Nevada law, but *Nunnery* was not decided until

2011, long after Johnson's conviction was final. *See Johnson II*, 122 Nev. 1344, 148 P.3d 767 (2006).

Postconviction counsel were ineffective for failing to raise these claims. *See* 2003 ABA Guideline 10.15.1(C); *see also* Nev. Def. Standard 2-19(c). And, because the claims are meritorious, failure to raise them was prejudicial.

12. Claim Fifteen

In response to Claim Fifteen(A) the State erroneously equates the instruction that a mitigating circumstance "need not be found unanimously" with the instruction that a mitigating circumstance "is found if any one juror believes it exists." Ans. Br. at 96; *see also Lockett v. Ohio*, 438 U.S. 586, 603–05 (1978). The 2005 sentencing jury found seven mitigating circumstances before sentencing Johnson to death. The State argues that the "any one juror" instruction was clearly before the jury by relying on this Court's holding in *Johnson III*, 133 Nev. at 585–86, 43 P.3d at 1279. This Court cited "other sources, as well as the special verdict forms" to support the conclusion that a lay juror would derive that he had the power to find a mitigating circumstance from a constellation of instructions. This approach casts doubt on whether a

lay juror would conclude that "any one juror" could find a mitigating circumstance. Had the jury been clearly instructed that any one juror could add to the count of mitigation circumstances, there is a reasonable probability the sentence would have been different.

In response to Claim Fifteen(B), the State restates the existing rule in *Nunnery*, 127 Nev. at 777, 263 P.3d at 254. This Court should abandon the rule that the death penalty is still available in cases in which the mitigating and aggravating circumstances are in equipoise. This Court is free to adopt more stringent protections for capital defendants under the Nevada Constitution, and it should do so. Justice Blackmun in dissent argued that statutes in which the sentencer is free to impose the death penalty when the aggravating and mitigating circumstances are equally balanced runs afoul of Supreme Court precedent. *Walton v. Arizona*, 497 U.S. 639, 688–689 (1990) (Blackmun, J., dissenting), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002). In his dissent, Justice Blackmun noted that because of the heightened need for reliable sentencing in capital cases, a sentencing

scheme in which close cases may be resolved in favor of death is unconstitutional.[10] *Id.* at 690.

In Claim Fifteen(D), the State relies on *Thomas v. State*, 120 Nev. 37, 46, 83 P.3d 818, 824 (2004), and *Leonard v. State*, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998). Both cases summarily dismiss the argument that the phrase "equal and exact justice" negatively impacts the defendant in a capital case. While a separate instruction may inform the jury of the burden of proof and presumption of innocence, "equal and exact" justice implies a retributive "eye-for-an-eye" model of sentencing. Such instruction is unconstitutional in a capital sentencing phase where an individualized determination about the penalty is required. *Lockett*, 438 U.S. 586, 605 (1978). It is precisely because a capital defendant, who has already been found guilty of murder, may himself be spared, that "equal and exact justice" misdirects the jury during the sentencing phase.

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[10] The opening brief also challenged the Reasonable Doubt Instruction. *See* Opening Br. at 130 (incorporating arguments at Opening Br. at 67–68). Johnson submits that challenge on the arguments contained in the opening brief.

13. Claim Eighteen

In Claim Eighteen, Johnson argued juror misconduct and bias based on separate incidents: (1) prospective jurors telling the court the eventual juror foreperson informed them of Johnson's previous death sentence, (2) another report the foreperson had made up her mind before deliberations, and (3) the foreperson's plans to write a book about her experience.[11] 25AA6045–49. The State address only the third part of the claim, speculating "[a]ppellate and habeas counsel made the strategic decision not to raise this issue at the expense of other, potentially more meritorious claims." Ans. Br. at 101–02. Without an evidentiary hearing, it is improper to speculate whether counsel had a strategic reason for omitting this claim. *See Mann v. State*, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002) (recognizing "habeas petitioner's statutory right to have factual disputes resolved by way of an evidentiary hearing"); *Vaillancourt v. Warden*, 90 Nev. 431, 432, 529 P.2d 204, 205 (1974) ("Where . . . something more than a naked

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[11] The opening brief mistakenly cites to an attachment to trial counsel's post-hearing brief on juror bias, not the brief itself. Opening Br. at 137 (citing 46AA11576–77). The full brief is at 22AA5472–91.

allegation has been asserted, it is error to resolve the apparent factual disputes without granting the accused an evidentiary hearing.").

14. Claim Nineteen

Claim Nineteen challenges Johnson's death sentences because the penalty proceedings did not conform to the requirements of *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). The State does not claim that the *Enmund*/*Tison* findings were directly submitted to the jury. *See* Ans. Br. at 102–04. Instead, the State points to the four counts of first-degree murder as sufficient evidence that Johnson himself performed the killings or was a major participant in a violent felony and displayed reckless disregard to human life. *See* Ans. Br. at 102. The problem with the State's argument is it ignores the serious defects in the jury instructions, which collectively undermine every theory of first-degree murder, and it ignores the fact Johnson could have been convicted under vicarious liability theories, which themselves suffered instructional defect. Thus, the fact of conviction of first-degree murder in this case is unhelpful in curing the *Enmund*/*Tison* defect.

The State also relies on witness testimony about Johnson's confessions. However, as noted above, these statements were the result of coercive interrogation techniques. *See* § I.B.3 above.[12]

15. Claim Twenty

In Claim Twenty, Johnson raised a new Eighth Amendment claim concerning the State's reliance on his juvenile misdeeds during the penalty phase. 25AA6061–68. The State argues this claim is barred by law of the case, Ans. Br. at 104–05, but this Court has not yet considered the argument Johnson raises—whether the jury's consideration of those misdeeds violates the Constitution (as opposed to violating state evidentiary rules because they were unduly prejudicial). *See Johnson II*, 122 Nev. at 1353–54, 148 P.3d at 773–74. The State notes that both claims cited *Roper v. Simmons*, 543 U.S. 551 (2005), Ans. Br. at 104–05, but they were for different reasons. In his previous

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[12] The State asserts, without citation, that Johnson's "mens rea for the robbery alone allows for the presumption that he had the intent for willful, premeditated, deliberate murder." Ans. Br. at 103. This misstates the felony murder rule. *See State v. Contreras*, 118 Nev. 332, 334, 46 P.3d 661, 662 (2002) (explaining that felonious intent for felony supplies "the malicious intent necessary to characterize the killing as a murder" and contrasting felony murder from "the traditional factors of willfulness, premeditation, or deliberation").

appeal, Johnson cited *Roper* for an example of unfair prejudice from juvenile actions. *Johnson*, 122 Nev. at 1353, 148 P.3d at 773–74. And this Court analyzed the claim by weighing the prejudice against the evidence's probative value. *Id.* at 1354, 148 P.3d at 774. Here, in contrast, Johnson uses *Roper* as an example of a constitutional violation. 25AA6061–68. This is not simply a more detailed rendition of the same claim, thus the doctrine of law of the case does not apply. *See Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 42, 223 P.3d 332, 333 (2010) ("When an appellate court explicitly or by necessary implication determines an issue, the law-of-the-case doctrine provides that the determination governs *the same issue* in subsequent proceedings in the same case." (emphasis added)).

16. Claim Twenty-One(A) and (B)

The State argues that a lethal injection methods challenge is not cognizable in state postconviction following the United States Supreme Court's decision in *Nance v. Ward*, 142 S. Ct. 2214, 2223 (2022). *Nance* concerns federal habeas corpus and federal civil rights statutes.

This Court has previously considered this issue. In *McConnell*, this Court noted that a state postconviction petitioner's only remaining

remedy was to bring suit under the federal civil rights statute, 28 U.S.C. § 1983. *McConnell*, 125 Nev. 243, 250 n.5, 212 P.3d 307, 312 n.5 (2009). However, Johnson respectfully urges this Court to reconsider this holding of *McConnell*.

17. Claim Twenty-Three

In Claim Twenty–Three the State attempts to diminish Judge Sobel's risk of bias. There can be little doubt that Judge Sobel, while Johnson's case was pending, exhibited behavior before several attorneys which indicate he was biased towards those who would contribute to his reelection, and against those who he may view unfavorably. These incidents are part of the public record. *See In the Matter of Honorable Jeffrey Sobel* at 2–4 (Comm. On Jud. Discipline, July 19, 2005). During an in-chambers meeting, Judge Sobel told one attorney he was "fucked" because the attorney had not contributed to Judge Sobel's campaign. *Id.* at 2. Judge Sobel pressed another attorney to explain his presence at the campaign function of a rival candidate. *Id.* at 3. Johnson need only show an objective "risk of bias" to prevail, and there can be no question that any judge with Judge Sobel's tendencies ran a high risk of bias. *See Hurles v. Ryan*, 752 P.3d 768, 789–790 (9th Cir. 2014).

Likewise, it is impossible to ignore other instances of risk of judicial bias. Justice Becker accepted a highly paid position with the Clark County District Attorney's Office shortly after Johnson's appeal was finalized. Justice Becker was negotiating that position while Johnson's appeal was pending. Judge Gates, in turn, employed a law clerk who interned with the district attorney's office at the same time that Johnson's case was pending. *See* Opening Br. at 155. Both Justice Becker's risk of bias and Judge Gates's risk of bias are archetypal non-pecuniary bias. *Hurles*, 752 F.3d at 789–90 (explaining "judge must withdraw" after becoming "enmeshed in matters involving a litigant" (quoting *Johnson v. Mississippi*, 403 U.S. 212, 215–16 (1971) (cleaned up)).

The State attempts to frame the risk of bias in the terms of harmless error analysis. Ans. Br. at 108. This is incorrect, as fair adjudication is a bedrock principle of our criminal justice system, and any form of judicial bias is *per se* prejudicial. *Hurles*, 752 F.3d at 788–89.

Nevada's mandatory review statute does not include any criteria upon which a reviewing court may assess the appropriateness of a

sentence of death. As such, it fails to comport with due process. For example, in *Harris ex rel. Ramseyer v. Blodgett*, 853 F. Supp. 1239, 1286–90 (1994), the United States District Court for the Western District of Washington discussed the factors that must be considered on mandatory appellate review. The District Court found that the Washington mandatory review statute was deficient on due process grounds because it failed to define the criteria or standards by which to conduct its review; failed to notice the parties as to which cases or types of cases the court may consider in its review, and failed to establish fact finding procedures when the Washington Supreme Court's holding amounted to findings of fact. *Id.* at 1286–89. The District Court noted that the Washington Supreme Court's affirmance of a death sentence rested on a cursory and superficial review, stating it was "satisfied the imposition of the death penalty was not wantonly and freakishly imposed." *Id.* at 1289–90. The District Court found that the *ad hoc* process of mandatory appellate review deprived the petitioner of meaningful review and violated his rights under the Due Process Clause, noting that sentence review must be "reliably and constitutionally" carried out with established rules and standards. *Id.*

at 1291. This Court's mandatory review process is vulnerable to the same criticisms.

Setting aside the State's hyperbole, the answering brief offers nothing to rebut the facts, history, or case law concerning elected judges in Nevada. 25AA6101. This court should reexamine whether judicial elections can produce fair outcomes for capital defendants. *See Beets v. State*, 107 Nev. 957, 973–78, 821 P.2d 1044, 1055–59 (1991) (Young, J., dissenting).

18. Claim Twenty-Seven

In Claim Twenty-Seven, Johnson argued that his convictions and death sentences are unconstitutional because the trial court did not take steps to screen out jurors who suffered from implicit bias and did not instruct seated jurors about the dangers of implicit bias. *See* Opening Br. at 157–58; *see also* 25AA6113–14. The State argues that Johnson fails to show that his jurors specifically suffered from implicit bias and that Johnson fails to articulate what the trial court should have done. Ans. Br. at 110–11. However, Johnson offered authority that showed death qualified jurors are more likely to possess racial biases, suggesting that Johnson's jury—which was death qualified—itself

suffered from implicit bias. *See* Justin D. Levinson, Robert J. Smith, & Danielle M. Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513, 521 (2014). Moreover, screening and instructing about implicit bias are acts the court could have taken. *See* Opening Br. at 157–58.

19. Claim Twenty-Eight

In attempting to impugn Johnson's character based on his purported gang affiliation, the State overlooks the critical distinction between Johnson's membership in a gang and bad acts connected to that membership. *See Dawson v. Delaware*, 503 U.S. 159, 167 (1992) (gang membership is not relevant character evidence when presented as morally reprehensible but unrelated to the instant case). A sentencing phase fundamentally concerns the defendant's character. *Lockett*, 438 U.S. at 605. The State may introduce evidence of a defendant's bad acts but may not introduce evidence of a constitutionally protected membership in a group deemed objectionable in isolation of those acts. Here, the State offered no nexus between Johnson's gang membership and the instant case. As defense counsel explained,

> They want to bring in, from what I understand from clarification by counsel, a gang officer from L.A. to talk about Donte's gang affiliation when we don't think it's relevant. This is not a gang killing. It's not alleged to be a gang killing. This is in Las Vegas, Nevada. The gang that he is alleged to have been a member of is in L.A.

12AA2921. The State was attempting to use Johnson's gang affiliation to inflame the passions of the jury without providing a nexus between gang membership and Johnson's bad acts. Absent articulating a nexus, referencing Johnson's gang involvement infringed on his First Amendment rights and was structural error. *Flanagan v. State*, 109 Nev. 50, 57 846 P.2d 1053, 1059 (1993).

II. The laches doctrine does not bar review of Johnson's claims.

The State argues the district court properly applied laches to Johnson's petition. There are two reasons this Court should not rely on NRS 34.800 to bar Johnson's claims. First, any delay in bringing these claims is not attributable to Johnson. Second, Johnson can rebut the presumption of prejudice.

NRS 34.800 does not apply if delay in filing a petition cannot be attributed to the petitioner. *State v. Powell*, 122 Nev. 751, 758–59, 138

P.3d 453, 457 (2006). In *Powell*, this Court noted that petitioner's judgment was entered in 1991; his direct appeal was not resolved until 1997 because the Court "erroneously decided that a new rule of criminal procedure announced by the Supreme Court soon after Powell's trial did not apply to his case." *Id.* at 758, 138 P.3d at 458. This Court noted other delays in Powell's case, including Powell's supplements, a reversal, and an evidentiary hearing. *Id.* at 759, 138 P.3d at 458. All of these, this Court concluded, "indicate[d] that Powell has not inappropriately delayed this case." *Id.* Thus, laches could not apply. *Id.*; *see also Thomas v. State*, 510 P.3d at 775–76 (noting that if petitioner exercised reasonable diligence in pursuing claims, petitioner "will have rebutted the presumption of prejudice under NRS 34.800(1)(a)").

Johnson's case is indistinguishable. The district court first entered judgment on October 3, 2000. 25AA6147, 6153. This Court reversed and remanded for a new penalty phase. *Johnson I*, 118 Nev. 787, 59 P.3d 450. After the remanded penalty phase, Johnson was again sentenced to death in 2005. 26AA6299. This Court decided his second appeal in December 2006. *Johnson II*, 122 Nev. 1344, 148 P.3d 767. As in *Powell*, the district court allowed Johnson to supplement his postconviction

petition. 26AAA6344, 6373. This Court decided the appeal from that petition in 2017. *Johnson III*, 133 Nev. 571, 402 P.3d 1266. Johnson filed the instant petition within a year of issuance of remitter from that appeal. Thus, none of the delay that occurred in this case is attributable to Johnson; applying *Powell*, the laches doctrine cannot bar this petition.

Moreover, the district court erred by applying the presumption of prejudice in this case. First, the State failed to plead laches with specificity, as required by NRS 34.800(2). Rather, the State relied solely on the amount of time that had passed since Johnson's conviction. *See* 47AA1632–33. Second, Johnson can overcome the presumption because the State had no difficulty responding to this petition and because there is no indication in the record that retrying Johnson would pose any difficulty over and above any other case that goes to trial.

III. The State's suppression of evidence both excuses procedural default and warrants habeas relief.

In Claim Seven, Johnson argued the State violated *Brady v. Maryland*, 373 U.S. 83 (1963). Claim Seven is not subject to procedural default because the suppression and prejudice prongs parallel good

cause and prejudice. *See Huebler v. State*, 128 Nev. 192, 198, 275 P.3d 91, 95–96 (2012).

The State argues that this claim was not brought within a year of its discovery; however, Johnson has not had an opportunity to develop these facts, as both discovery and an evidentiary hearing were denied below.

As to Peter Baldonado, the State raises a number of unhelpful points. For example, the State points out that the appendix only contains one page of the letter, and suggests that Johnson should disclose the rest of the letter to "clarify that Johnson is not attempting to mislead this Court." Ans. Br. at 72. The State has a full copy of this letter, as it was originally left with the trial prosecutor in this case. 5AA1194. Thus, the State should know this is the only page—if it's not, the rest of the letter, as far as undersigned is aware, has never been disclosed to defense counsel and would itself be the object of a *Brady* violation given its likely relevance to Baldonado's improprieties.

Moreover, as Johnson stated in the opening brief, even without the letter, Baldonado's improprieties were impeaching evidence of the State's investigation, and thus subject to disclosure. The State responds

by saying that it is not required to "disclose crimes its witnesses commit years *after* trial." Ans Br. at 73. There are two problems with this argument. First, the State is required to disclose crimes of its witnesses if those crimes are impeaching—as they clearly are here. Baldonado eventually pled guilty to one count of misconduct by a public officer and one count of coercion.[13] But evidence of coercing Charla Severs is also exculpatory. Second, Johnson's trial was still pending because he had not yet been retried. The jury returned its guilt verdict on June 9, 2000. 34AA8497. In 2001, while Johnson's case was still pending on direct appeal, the Clark County District Attorney learned of the impropriety. 48AA11867. The *Review-Journal* did not break the story until 2004, when Johnson's third penalty phase was in pretrial. *See* 35AA8687.

Finally, the State argues that it could not have suppressed this evidence because the information was publicly available. Ans. Br. at 73. However, the State had at least some of this information as early as 2001, 48AA11867, and more importantly the public availability of

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[13] *See* Carri Geer Thevenot, *Ex-investigator for district attorney sent to prison for sexual coercion*, Las Vegas Rev. J. 1B (June 18, 2004), available at 2004 WLNR 893509.

information does not excuse the State from its disclosure obligations. *See Milke v. Ryan*, 711 F.3d 998, 1006 (9th Cir. 2013) (inquiry is not about discoverability of evidence but of "asking whether the evidence is favorable, whether it should have been disclosed and whether the defendant suffered prejudice").

IV. Structural errors are not procedurally barred.

In his opening brief, Johnson relied on a dissent from Justice Cherry, joined by Justice Saitta, to argue a failure to remedy a structural error is an "impediment external to the defense" for purposes of overcoming procedural bars. Opening Br. at 97–98 (quoting *Doyle*, 2015 WL 5604472 at *6 (Sept. 22, 2015). The State dismisses this argument, saying only that Johnson cited no "authority" in support of his position. Ans. Br. at 66. The State's argument misses the point—as Johnson argued in his opening brief, Justice Cherry gave persuasive reasons in *Doyle* for adopting this rule. Structural errors, by definition, "affect[] the framework within which the trial proceeds," and a trial with structural errors cannot "be regarded as fundamentally fair." Opening Br. at 97–98 (quoting *Doyle*, 2015 WL 5604472, at *7).

V. Procedurally barring Johnson's claims would result in a fundamental miscarriage of justice.

In his petition and opening brief, Johnson argued capital punishment is inapplicable to individuals whose maturity and ability place them in proximity to the recognized ineligibility limits for capital punishment. Opening Br. at 171–73; 25AA6117–22. The State urges this Court to adhere to the existing bright-line rules and execute those who are barely mature and of borderline intellectual ability. Ans. Br. at 122.

In *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001)[14], this Court held that a colorable showing of ineligibility for the death penalty satisfies the fundamental miscarriage of justice exception. To satisfy this requirement, the petitioner must show "by clear and convincing evidence . . . no reasonable juror would have found him death eligible." *Id.* This test does not rely on the bright line rule in *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002), or *Roper*, 543 U.S. at 568. While *Atkins* and *Roper* are informative as to how this Court

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[14] *Pellegrini* was "disavowed" on an unrelated basis in *Rippo*, 134 Nev. at 423 n.12, 423 P.3d at 1097 n.12.

should approach the lack of culpability in those with intellectual challenges and those who are not fully mature, they are not dispositive. This Court is free to adopt more protective standards which incorporate modern scientific evidence.

VI. Johnson's previously raised claims justify release.

In § VIII of the opening brief, Johnson argued that his previously raised claims warranted relief. *See* Opening Br. at 173–92 (arguing Claims Five; Six (A)–(B), (D), (E); Ten; Twelve; Fourteen; Sixteen; Seventeen; Twenty-One(C)–(E); Twenty-Five; Twenty-Six). Without conceding the State's answering brief is correct on facts or law, Johnson submits these claims on the arguments in the opening brief.

The State raises a number of arguments against considering the errors cumulatively. None have merit. First, the State argues that Johnson cites no authority to support the proposition that the deficient performance of counsel must be considered cumulatively. Ans. Br. at 140. This is untrue. *See* Opening Br. at 168, 185 (citing *Williams v. Filson*, 908 F.3d 546, 570 (9th Cir. 2018)). The State complains that *Gunera-Pastgrana v. State*, 137 Nev. 295, 490 P.3d 1262 (2021), applies to trial errors, but not ineffective assistance of counsel or jury

instruction errors. Ans. Br. at 140. But the State does not explain why instructional error is not "trial error," and there is no principled basis for treating instructional error differently from any other trial error. But more fundamentally, cumulative error has its root in due process and fair trial claims: that is, cumulative error is simply another form the due process right to a fair trial found in both the U.S. and the Nevada Constitution. *See Gunera-Pastrana*, 137 Nev. at 304, 490 P.3d at 1271. The State argues that cumulative error is not part of the postconviction analysis, citing *Rippo*, 134 Nev. at 436, 423 P.3d at 1107. However, this analysis related to claims that were previously raised; most of the claims raised in Johnson's opening brief have not been previously raised or are otherwise exempt from procedural default. Thus, this Court should consider any errors it finds cumulatively.

VII. This Court can consider the merits of Johnson's *Hurst* claim.

Johnson, in Claim Twenty-Four, argued the district court violated his constitutional rights by failing to instruct the jury that the State was required to prove beyond a reasonable doubt the mitigating evidence did not outweigh the aggravating. 25AA6105–06. The State

argues Johnson cannot overcome procedural bars because the case he relies on was decided in 2016. Ans. Br. at 144. But Johnson raised the claim within one year of remittitur after denial of his initial state postconviction petition. *See Rippo*, 134 Nev. at 416, 423 P.3d at 1093. To the extent prior counsel should have raised this claim within one year of the *Hurst* decision, counsel performed ineffectively. *See Crump*, 113 Nev. at 304–05, 934 P.2d at 254.

The State additionally asks this Court to reaffirm its decisions rejecting this argument. Ans. Br. at 145. As Johnson said in his opening brief, these cases were wrongly decided, and Johnson urges this Court to revisit the holdings.

VIII. Chappell does not bar this Court's consideration of Johnson's claims.

The State argues that Johnson's opening brief "focuses the vast bulk of his brief on the merits of his perceived errors, with only conclusory claims related to Oram's performance in the First Petition." Ans. at 15. This, the State continues, "does not satisfy this Court's admonishment to address good cause and prejudice for *every* procedurally barred issue." Ans. at 15 (citing *Chappell*, 501 P.3d at 949;

Thomas, 510 P.3d at 763; *Evans v. State*, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001)). But the State oversimplifies. Johnson presented good cause and prejudice arguments as standalone sections, to explain how specific claims could be excused from procedural default. *See, e.g.*, Opening Br. at 11–15 (arguing ineffective assistance of postconviction counsel for Claim Three(A)–(C)); *id.* at 47–51 (arguing ineffective assistance of postconviction counsel for Claim Four); *id.* at 97–98 (arguing miscarriage of justice for Claim One); *id.* at 102–03 (arguing *Brady* for Claim Seven); *id.* at 103–05 (arguing ineffective assistance of postconviction counsel for all claims within § V); *id.* at 170–71 (arguing ineffective assistance of postconviction counsel for Claim Fourteen); *id.* at 173 (arguing miscarriage of justice for Claim Twenty-Nine). Thus, the State's argument that Johnson's brief is inconsistent with *Chappell* is without merit.

CONCLUSION

Based on the foregoing, Johnson requests that this Court reverse, order the district court to grant habeas corpus relief, and remand for proceedings consistent with such relief.

Dated this 21st day of December, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Century Schoolbook.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 14,774 words.

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

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

Dated this 21 day of December, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2022, I electronically filed the foregoing document with the Nevada Supreme Court by using the appellate electronic filing system. The following participants in the case will be served by the electronic filing system:

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

/s/ Lisa Keller
An Employee of the
Federal Public Defender