ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

DALE EDWARD FLANAGAN,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

Case No. 40232

RESPONDENT'S ANSWERING BRIEF

Appeal From Order Denying Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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STATEMENT OF THE ISSUES

1. Whether the district court properly denied discovery and an evidentiary hearing on the issues of alleged innocence, prosecutorial misconduct, and ineffective assistance of counsel, and denied relief on all claims.

2. Whether the district court properly denied discovery and relief on the issue of ineffective assistance of counsel arising out of an alleged conflict between co-counsel for Defendant during his third penalty hearing.

STATEMENT OF THE CASE

On February 25, 1985, an information was filed that charged Dale Edward Flanagan ("Defendant") with one (1) count each of Conspiracy to Commit Burglary, Conspiracy to Commit Robbery, Conspiracy to Commit Murder, Burglary, Robbery With Use of a Deadly Weapon and two (2) counts of Murder With Use of a Deadly Weapon. Volume 1 Appellant's Appendix (hereinafter "A.A."), p. 4, 19, 237. After he was found guilty by a jury on all counts of the information, Defendant was sentenced on November 27, 1985 to death by lethal injection.

The Defendant filed a timely notice of appeal and was appointed appellate counsel. On May 18, 1988, the Nevada Supreme Court affirmed Defendant's conviction, but reversed and remanded the case to the District Court based on improper prosecutorial argument during the penalty hearing. Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988)(Flanagan I). After the second penalty hearing in District Court, Defendant was again sentenced to death by legal injection. Defendant appealed this second death sentence to the Nevada Supreme Court which affirmed Defendant's sentence. Flanagan v. State, 107 Nev. 243, 810 P.2d 759 (1991)(Flanagan II).

Defendant petitioned the United States Supreme Court with a writ of certiorari which the Supreme Court granted vacating Defendant's death sentence and remanding the case for reconsideration consistent with the holding of Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093 (1992)(To be admissible at a penalty hearing, constitutionally suspect evidence must somehow be "tied" to the defendant's crime). Flanagan v. Nevada, 503 U.S. 931, 112 S.Ct. 1464 (1992). On remand, the Nevada Supreme Court agreed that during the second penalty hearing the State had impermissibly offered evidence of Defendant's involvement in satanic worship in violation of the First Amendment and that the case should be remanded for another penalty hearing. Flanagan v. State, 109 Nev. 50, 846 P.2d 1053 (1993)(Flanagan III). Prior to the third penalty hearing, Defendant filed a petition for writ of habeas corpus raising issues from the guilt phase of his trial in 1985. This petition was denied by Order filed July 28, 1995.

Following a third penalty hearing in which he was yet again sentenced to death by lethal injection, Defendant appealed his sentence and the denial of post-conviction relief to the Nevada Supreme Court. The Nevada Supreme Court then affirmed the order denying habeas corpus relief and affirmed the sentence of death. Flanagan v. State, 112 Nev. 1409, 930 P.2d 691 (1996)(Flanagan IV). Defendant petitioned the United States Supreme Court again with a writ of certiorari, but that petition was denied. Flanagan v. State, 523 U.S. 1083, 118 S.Ct. 1534 (1998).

On May 28, 1998, Defendant filed the present Petition for Writ of Habeas Corpus (Post-Conviction). 26 A.A., p. 6323. On June 5, 1998, counsel was appointed, who filed a Supplemental Petition on November 30, 1999. 26 A.A., p. 6345.

On August 16, 2000, the district court denied Defendant's motion for discovery (30 A.A., p. 7282), and on February 14, 2002, the district court held an evidentiary hearing. 30 A.A., p. 7314. By Order, dated June 19, 2002, the district court denied the petition. 31 A.A., p. 7521. On August 8, 2002, Findings of Fact, Conclusions of Law and Order denying the petition was filed. 31 A.A., p. 7530. On August 16, 2002, the district court mailed notice of entry of decision and order. 31 A.A., p. 7564. Defendant filed his Notice of Appeal on September 12, 2002. 31 A.A., p. 7568. The State responds as follows.

STATEMENT OF THE FACTS

Defendant, with the help of five (5) co-conspirators, shot and killed his grandmother and grandfather in the early morning hours of November 6, 1984 with the express purpose of obtaining insurance proceeds and an inheritance. Defendant and his co-conspirators broke a window to gain entry to his grandparents' house, and Defendant shot his grandmother three (3) times at close range and Randy Moore shot Defendant's grandfather multiple times. Their bodies were found in the afternoon hours of November 6, 1984. See Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988)(Flanagan I); Flanagan v. State, 107 Nev. 243, 810 P.2d 759 (1991)(Flanagan II); Flanagan v. State, 109 Nev. 50, 846 P.2d 1053 (1993)(Flanagan III); and Flanagan v. State, 112 Nev. 1409, 930 P.2d 691 (1996)(Flanagan IV).

ARGUMENT

The State submits that all of Defendant's claims in this appeal are procedurally barred except for the ineffective assistance of counsel claims pertaining solely to the third penalty hearing. Remittitur from affirmance of Defendant's conviction issued in 1988 and Defendant has had ample time and opportunity to raise his guilty phase issues. Any claims of ineffective assistance of counsel arising from the final penalty hearing are timely filed, however, they are belied by the record and are without merit.

Defendant's appeal herein challenges a denial of his second post-conviction petition for writ of habeas corpus. In 1995, Defendant filed his first petition for writ of habeas corpus prior to his third penalty hearing. See 25 A.A., p. 6037, 6040, 6076, 6144-6145. The 1995 petition for writ of habeas corpus attacked the validity of the guilt phase from 1985. See 25 A.A., p. 6064-6065. On June 6, 1995, the district court denied Defendant's petition (Order filed on July 28, 1995). 25 A.A., p. 6036-6037. On June 23, 1995, the jury returned a death sentence for the third time. 25 A.A., p. 5966. Defendant appealed both (25 A.A., p. 6064-6065), and this Honorable Court affirmed Defendant's conviction and sentence on December 20, 1996. 25 A.A., p. 6040-6062. Thus, to the extent Defendant's 1998 petition raising guilt phase issue, it is procedurally barred and successive in violation of NRS 34.810. NRS 34.810(1)(b)(2) provides in pertinent part: "The court shall dismiss a petition if the court determines that ... [t]he petitioner's conviction was the result of a trial and the grounds for the petition could have been ... [r]aised in a direct appeal or a prior petition for a writ of habeas corpus or post conviction relief...". Under NRS 34.810(2), a second or successive petition *must* be dismissed if it fails to allege new or different grounds, or the failure to assert new or different grounds in a prior petition for writ of habeas corpus constitutes an abuse of the writ.

Furthermore, NRS 34.726 provides:

> (1) Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
> (a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

On May 18, 1988, the Nevada Supreme Court affirmed Defendant's conviction, but reversed and remanded the case to the District Court based on improper prosecutorial argument during the penalty hearing. Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988)(Flanagan I). Remittitur for Defendant's guilt phase issued in 1988. Defendant's present petition for writ of habeas corpus (post-conviction) was filed approximately ten (10) years later on May 28, 1998. This is well in excess of the one year time bar established by

the statute. Due to the fact that Defendant filed his petition more than one year after Remittitur, and has failed to show good cause for his failure to abide by the statute, his petition must be dismissed. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519, 525 (2001). In the event Defendant attempts to argue that this instant appeal was his first opportunity to attack the guilt phase with a post-conviction petition for writ of habeas corpus, this is belied by the record because he previously filed such a petition in 1995. See 25 A.A., pp. 6037, 6040, 6076, 6144-6145. Thus, Defendant's petition filed in 1998 was untimely as it was not filed within one (1) year of the 1988 Remittitur. The State also asserts the 5 year time bar for any guilt phase issues pursuant to NRS 34.800 and alleges prejudice in responding to the writ and conducting a retrial some twenty years later.

The Nevada Supreme Court has addressed similar issues in dealing with petitioners that have not filed their petitions within the statutorily prescribed range. This Honorable Court has said that to establish good cause, a defendant must demonstrate that some impediment external to the defense prevented him from complying with the procedural bar that has been violated. Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). The Court reaffirmed this holding in Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997). The Court went on to say that once the State has raised procedural grounds for dismissal, the burden then falls on the defendant "to show that good cause exists for his failure to raise any grounds in an earlier petition and that he will suffer actual prejudice if the grounds are not considered." Id. at 302, 934 P.2d at 253, citing Phelps v. Director of Prisons, *infra*, at 659, 764 P.2d 1305. The Court explained that in order to establish prejudice, the defendant must show "not merely that the errors of trial created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions." Id. citing Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993).

In Gonzales v. State, 118 Nev. 590, 53 P.3d 901, 902 (2002), the Nevada Supreme Court rejected a habeas petition, pursuant to the mandatory provisions of NRS 34.726(1) that was filed two days late. Gonzales reiterated the importance of filing the petition within the

mandatory deadline, absent a showing of "good cause" for the delay in filing. Gonzales, 53 P.3d at 902.

"In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 30, 71 P.3d 503, 506 (2003); *citing* Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi v. Director, 105 Nev. 63, 769 P.2d 72 (1989); *see also* Crump v. Warden, 113 Nev. 293, 295, 934 P.2d 247, 252 (1997); Phelps v. Director, 104 Nev. 656, 764 P.2d 1303 (1988).

Such an external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable". Hathaway, 71 P.3d at 506; *quoting* Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986); *see also* Gonzalez, 53 P.3d at 904; *citing* Harris v. Warden, 114 Nev. 956, 959-60 n. 4, 164 P.2d 785 n. 4 (1998). Clearly, the delay in filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

To find good cause there must be a "substantial reason; one that affords a legal excuse". Hathaway, 71 P.3d at 506; *quoting* Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), *quoting* State v. Estencion, 625 P.2d 1040, 1042 (Haw. 1981).

The lack of the assistance of counsel when preparing a petition, and even the failure of trial counsel to forward a copy of the file to a petitioner, have been found to not constitute good cause. *See* Phelps v. Director Nevada Department of Prisons, 104 Nev. 656, 660, 764 P.2d 1303 (1988); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995). Also, the failure of counsel to inform the petitioner of his right to direct appeal did not rise to good cause for overcoming the time bar. Dickerson v. State, 114 Nev. 1084, 967 P.2d 1132 (1998).

Defendant's petition was untimely filed, and Defendant does not demonstrate good cause to overcome the procedural bar. This appeal should be dismissed as untimely.

This Honorable Court has previously held that Defendant was convicted by overwhelming evidence.

> Here, there was overwhelming evidence of Flanagan's involvement in the planning and execution of the murders. Given the strength of the State's case, we hold that the prosecutor's conduct did not render the determination of Flanagan's guilt fundamentally unfair.

Flanagan v. State, 104 Nev. 105, 107, 754 P.2d 836, 837 (1988)(Flanagan I).

> We characterized the evidence against Flanagan and Moore as "overwhelming" in our first opinion in this case. There is no reason to change that characterization now, nor has either appellant disputed the weight of the evidence against him. The evidence included eyewitness testimony regarding meetings held prior to the murders where appellants planned to kill the Gordons and statements made after the murders in which Flanagan admitted to killing his grandmother, Mrs. Gordon, and Moore admitted to killing Mr. Gordon. We conclude beyond a reasonable doubt that the jury looked to this evidence in convicting appellants and that the prosecutor's improper remarks did not contribute to the verdict.

Flanagan v. State, 112 Nev. 1409, 1420, 930 P.2d 691, 698 (1996)(Flanagan IV).

Contrary to the assertions by Defendant, he was not automatically entitled to an evidentiary hearing. A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). "The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required." NRS 34.770(1). However, "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record." Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984); *citing* Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981).

"If a judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition *without a hearing*." NRS 34.770(2) (*emphasis added*). The district court properly granted an evidentiary hearing solely for the alleged conflict regarding counsel during Defendant's third penalty phase. The district court properly ruled that an evidentiary hearing was not required for the other issues for the following reasons: Attorney Pike was not ineffective, some claims were bare and naked allegations, other claims were barred by the law of the case, and the subsequent penalty hearings rendered the first two moot. 30 A.A., p. 7283-7284.

Defendant alleges that the district court improperly deprived him of the funds necessary to investigate and present his claims for relief. Defendant fails to advise this Honorable Court that the district court did in fact authorize $16,000.00 for investigative fees in the instant underlying petition for writ of habeas corpus.

> In this matter, Petitioner Flanagan's counsel obtained two Orders dated July 7, 1998 and February 24, 1999 granting investigative fees not to exceed $1,000 and $15,000, respectively. Despite the fact that no further request was made until December 1999, some 10 months later, investigation fees were incurred during that time in the amount of $128,774.89, which Petitioner Flanagan's counsel sought reimbursement in December 1999. Additionally, since the December 1999 motion and through May 2000, another $105,275.38 was expended as investigation fees. The total reimbursement through May 2000 that counsel seeks is $234,050.27. The expenditure of these funds is considered by the Court to be excessive and would not have been granted had they been requested prior to being incurred. In Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996), the Nevada Supreme court held that although the defendant was entitled to attempt to prove his theory of defense, the law does not require an unlimited expenditure of resources in an effort to find professional support for his theory. As such, in this case, both of Petitioner Flanagan's requests for investigative fees (December 1999 in the amount of $128,774.89 and August 2000 in the amount of $105,275.38) must be denied. The Court modifies these requests and grants total investigative fees in the amount of $16,000, which was previously authorized by the Court.

30 A.A., p. 7290 (August 28, 2000 Order by District Judge Mark Gibbons).

Counsel for Defendant sought ***Reimbursement*** of investigation expenses already incurred. 30 A.A., p. 7289. To imply that Defendant was denied an adequate investigation is disingenuous. The fact that Counsel for Defendant did not seek prior approval and receive full reimbursement for investigation expenses is of no consequence to this appeal. The pertinent fact is that an investigation occurred on behalf of Defendant with the price tag of $234,050.27. Few defendants in Nevada history have had the investigative efforts and review of four (4) sets of counsel and a quarter of a million dollars in expenses.

Defendant also asserts that the district court improperly denied his discovery requests. "*After* the writ has been granted and a date set for the hearing, a party *may* invoke any method of discovery available under the Nevada Rules of Civil Procedure *if*, and to the extent that, *the judge or justice for good cause shown grants leave to do so*." NRS. 34.780(2). (*emphasis added*). The district court granted an evidentiary hearing regarding the alleged conflict regarding counsel during Defendant's third penalty phase, but did not

find good cause to grant discovery. 30 A.A., p. 7282. Furthermore, the district court concluded that Defendant's discovery requests – including depositions of Nevada Supreme Court Justices and staff – were overbroad. 30 A.A., p. 7282; 27 A.A., p. 6541. Defendant erroneously argues the standards of review for civil procedure summary judgment motions. In Beets v. State, 110 Nev. 339, 871 P.2d 357 (1994), this Honorable Court held that the district court erred in entertaining a motion for summary judgment in the context of a post conviction petition for writ of habeas corpus.

Defendant also alleges that the district court abdicated its responsibility as an impartial and fair decision-maker by adopting the State's proposed findings of fact and conclusions of law. The local rules for the Eighth Judicial District Court permit the prevailing party to draft the order. See EDCR 7.21. "...[E]ven when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." Anderson v. City of Bessemer, N.C., 470 U.S. 564, 572, 105 S.Ct. 1504, 1510-1511 (1985) (citations omitted). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Id. at 573-574. Defendant has failed to show that the district court's ruling was clearly erroneous.

I

DEFENDANT'S FIRST CLAIM SHOULD BE DENIED BECAUSE IT IGNORES THE "LAW OF THE CASE" DOCTRINE AND CONSISTS OF BARE/NAKED ALLEGATIONS

Defendant's first claim is a combined allegation of prosecutorial misconduct and an alleged failure by the State to disclose exculpatory evidence. Although he acknowledges the doctrine of "law of the case," Defendant selectively applies it to his allegations while ignoring its full effect on his petition/this appeal. While Defendant makes a number of allegations, which include an irrelevant synopsis of the views of former Deputy District Attorneys Mel Harmon and Dan Seaton on discovery, Defendant fails to offer any type of

substantiation for these claims. Moreover, Defendant's argument neglects to include any analysis pursuant to Strickland to illustrate how trial and/or appellate counsel was ineffective. Instead, Defendant launches into a lengthy dissertation on issues previously raised and decided on appeal.

A. Prosecutorial Misconduct

In the present case, Defendant asserts that the State coached, coerced and intimidated various State's witnesses while also proffering false and prejudicial testimony before the District Court. Defendant acknowledges that the issue of prosecutorial misconduct was addressed by the Nevada Supreme Court, but fails to acknowledge the full extent to which "law of the case" applies to this petition. "The law of first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." Bejarano v. State, 106 Nev. 840, 841, 801 P.2d 1388, 1389 (1990). "The doctrine of law of the case cannot be avoided by a more detailed and precisely focused argument substantially made after reflection upon previous proceedings." Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 798-99 (1975). Upon review of Defendant's trial and initial penalty hearing, the Nevada Supreme Court ruled that:

> there was overwhelming evidence of Flanagan's involvement in the planning and execution of the murders. Given the strength of the State's case, we hold that the prosecutor's conduct did not render the determination of Flanagan's guilt fundamentally unfair.

Flanagan I, 104 Nev. at 107. The Court did identify five (5) areas of prosecutorial misconduct during Defendant's first penalty hearing. Id. at 108. However, subsequent appeals regarding further alleged prosecutorial misconduct were summarily rejected by the Nevada Supreme Court under the "law of the case" doctrine as set forth in Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797 (1975). Flanagan IV, 112 Nev. at 1422. Thus, despite his attempt to inflame this court with stories of past misconduct and unsupported allegations of witness coercion, Defendant yet again raises issues that have already been decided and thus require no further review. As such, Defendant's claim lacks merit and should be denied. To the extent Defendant is adding new or altered claims of prosecutorial misconduct made after

reflection upon previous proceedings, they are barred by the law of the case. Furthermore, the specific claims lack merit as stated in I.B. through I.F. herein.

B. Allegation Of Intimidating And Bribing Witnesses.

Angela Saldana stated at trial that she was to be paid $2,000.00 from the secret witness program. 8 A.A., p. 1787, 1821, 1826; See also 4 A.A., p. 858. She also stated at trial that it was her idea to elicit information from Defendant. 8 A.A., p. 1842-1843. Angela Saldana testified that it was her Uncle and not a police officer that instructed her to get additional information. 8 A.A., p. 1822. Even in Angela Saldana's declaration in 2000 it is clear that she decided to investigate on her own and get information from Defendant. In paragraph 5 of her declaration she states "I decided I would try to solve the crime because I wanted to be a police officer ...". 30 A.A., p. 7194. During Saldana's testimony it was brought out that a previous boyfriend of hers was a metro police officer. 8 A.A., p. 1796. Angela Saldana was not a police agent and her potential bias or monetary motives were brought to the attention of the jury at trial.

Defendant's allegation about intimidation of Wayne Wittig is without merit. Mr. Wittig was not called as a witness by the State. Instead, Mr. Wittig was called as a witness by counsel for a co-defendant. 9 A.A., p. 2062.

During trial, John Lucas informed the jury that he had already received $1,000.00 through the secret witness program and that he expected to receive an additional $1,000.00. 7 A.A., p. 1708. Defense counsel effectively cross-examined Mr. Lucas regarding his inconsistent statements, including changing his story regarding whether he actually was present when the guns were thrown into Lake Mead. It is interesting to note that the declaration of John Lucas in 2000 includes statements that there was a plan for burglary that included guns. "But I do know that once the idea to burglarize the Gordon's was on the table there was no choice but for everyone to support the idea. 23. While the 'plan' was to bring guns...." 30 A.A., p. 7143.

The Declaration of Rusty Havens states that during each meeting with the prosecutor "I was pressed to recount my knowledge of what happened to Mr. and Mrs. Gordon." 30

A.A., p. 7147. There is no indication therein that Havens was intimidated into testifying to something false. He was just requested to state what he knew ("recount my knowledge").

The Declarations of Debora L. Samples Smith and Michelle Gray Thayer do not include any allegation that they were intimidated or bribed by the police. See 30 A.A., p. 7168, 7191. The Declaration of Roy McDowell regarding alleged intimidation of him is irrelevant as he did not ever testify in any of the trials. Furthermore, his Declaration states that he believed Randolph Moore could have, and should have, stopped it. 30 A.A., p. 7160.

This Honorable Court has previously determined that there was overwhelming evidence of Defendant's guilt. See Flanagan I & IV. The claims by Defendant are belied by the record, but even if they were true there is no reasonable likelihood that the judgment of the jury would have been affected.

C. Failure to Disclose Exculpatory Evidence.

Defendant alleges that the State withheld statements of Robert Ramirez that allegedly provide proof of Defendant's innocence. However, the declaration of Robert Ramirez clearly states that he did not tell the police any information he knew. "I got a lot of heat from the police because I would not give them the information they needed. They continually wanted to know what information I knew." 30 A.A., p. 7189. Mr. Ramirez did not give the police any information, thus the State did not have any information from him to disclose to the defense. Defendant's claim is contradicted by the declaration and is without merit.

Defendant alleges that law enforcement withheld John Lucas's statement that the killings were not planned. It is interesting to note that the declaration of John Lucas in 2000 includes statements that there was a plan for burglary that included guns. "But I do know that once the idea to burglarize the Gordon's was on the table there was no choice but for everyone to support the idea. 23. While the 'plan' was to bring guns...." 30 A.A., p. 7143.

Defendant's assertion regarding the alleged failure to disclose exculpatory evidence from Wayne Wittig's statements is without merit. Wayne Wittig testified at trial that "Dale's not a very violent person at all." 9 A.A., p. 2082. Mr. Wittig testified that Dale

could not have done it by himself and that Dale acquiesced to Randy Moore's request to do things. 9 A.A., p. 2083, 2084. Furthermore, Mr. Wittig testified at trial that Dale Flanagan did not have the conscious capabilities of taking someone's life. 9 A.A., p. 2089.

Defendant also alleges that the State withheld the existence of Defendant's own will and his planned involvement in a group "to discourage youth from participation in witchcraft." Yet both of these pieces of allegedly withheld evidence were products of Defendant's own doing and readily available to defense counsel at the time. See Thompson v. State, 93 Nev. 342, 565 P.2d 1011 (1977). Furthermore, Defendant's first penalty phase was overturned on appeal and he has had subsequent penalty phases with this information disclosed and available to him.

Nevertheless, because Defendant's allegations are so threadbare and meritless, appellate counsel was correct not to file an appeal regarding this issue and risk detracting from other more meritorious appellate issues. See, Hollenback v. United States, 987 F.2d 1272 (7th Cir. 1993); (In order to be effective, appellate counsel need not raise every conceivable issue); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

D. Improper Use of Peremptory Challenges.

Defendant contends that the State utilized their peremptory challenges in a racially discriminatory manner during the second penalty hearing. Obviously this alleged Batson violation is moot given that Defendant received a third penalty hearing. Thus appellate counsel cannot be held to have been ineffective since there cannot be any prejudice arising from what transpired at the second of three penalty hearings.

E. Introduction of Evidence Regarding Witchcraft/Satanic Worship and Prejudicial Information.

This claim is barred by the law of the case because it was raised in the first post-conviction petition for writ of habeas corpus which was denied and then affirmed on appeal in Flanagan IV.

Furthermore, Defendant inaccurately claims that the State sought to introduce at trial evidence of Defendant's involvement in witchcraft and satanic worship. However, the

record of Nevada Supreme Court decisions shows that a co-defendant actually introduced said satanic evidence. The Nevada Supreme Court found that counsel for co-defendant, Johnny Ray Luckett, called a witness in Luckett's defense to testify regarding Defendant's involvement in witchcraft/satanic worship. Flanagan IV, 112 Nev. at 1412. Defendant's trial counsel objected to the evidence at the time it was offered, but the testimony was admitted. Id. Notwithstanding its admission, the fact remains that the State did not offer the evidence, and thus appellate counsel astutely did not raise this non-issue on appeal. Moreover, the Nevada Supreme Court already addressed the State's use of that evidence during the second penalty hearing and remanded the case for a third penalty hearing. Therefore, the law of the case doctrine would necessarily preclude any further review. See Hall, *supra*.

This Honorable Court has previously held that Defendant was convicted by overwhelming evidence.

> Here, there was overwhelming evidence of Flanagan's involvement in the planning and execution of the murders. Given the strength of the State's case, we hold that the prosecutor's conduct did not render the determination of Flanagan's guilt fundamentally unfair.

Flanagan v. State, 104 Nev. 105, 107, 754 P.2d 836, 837 (1988)(Flanagan I). 1

> We characterized the evidence against Flanagan and Moore as "overwhelming" in our first opinion in this case. There is no reason to change that characterization now, nor has either appellant disputed the weight of the evidence against him. The evidence included eyewitness testimony regarding meetings held prior to the murders where appellants planned to kill the Gordons and statements made after the murders in which Flanagan admitted to killing his grandmother, Mrs. Gordon, and Moore admitted to killing Mr. Gordon. We conclude beyond a reasonable doubt that the jury looked to this evidence in convicting appellants and that the prosecutor's improper remarks did not contribute to the verdict.

Flanagan v. State, 112 Nev. 1409, 1420, 930 P.2d 691, 698 (1996)(Flanagan IV).

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1 This Honorable Court also held "[w]e have examined Flanagan's other assignments of error and find them to be without merit. 104 Nev. at 112.

These additional scattershot allegations of prosecutorial misconduct, including commenting on the right to remain silent and biblical dogma, do not warrant relief for Defendant due to the overwhelming evidence of Defendant's guilt and law of the case.

F. Failure of Trial Court to Exercise Authority.

The alleged failure of the trial court to properly exercise its authority is without merit as is based on underlying meritless claims. Defendant was convicted by overwhelming evidence and 36 jurors believe he should die.

II

DEFENDANT'S SECOND CLAIM SHOULD BE DENIED BECAUSE IT CONSISTS OF BARE/NAKED ALLEGATIONS, IS BELIED AND REPELLED BY THE RECORD AND ATTEMPTS TO SUPPLANT JURY EVALUATION OF WITNESS CREDIBILITY

Defendant next alleges that the State unlawfully induced and fashioned witness testimony by offering them leniency and paying them money. Even though he recognizes that the State may bargain for witness testimony, Defendant erroneously presumes that such bargained-for testimony was "inherently incredible and rendered the trial and sentencing fundamentally unfair." In fact, Defendant again makes unsupported allegations in an attempt to supplant his assessment of witness credibility for that of the jury's deliberations. Such allegations can only be described as falling under the rubric of "bare" or "naked" allegations as set forth in Hargrove.

Defendant's assertions are simply a *de facto* analysis that because some State's witnesses (Rusty Havens ("Havens"), John Lucas ("Lucas") and Angela Saldana ("Saldana")) were offered inducements to testify that their testimony was therefore scripted to conform to the State's theory of Defendant's guilt. Because the witnesses mentioned by Defendant in this claim were extensively cross-examined about the inducements for their cooperation in testifying, Defendant's assertions are simply belied and repelled by the record. See Sheriff, Humboldt County v. Acuna, 107 Nev. 664, 819 P.2d 197 (1991).

"A defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record." Hargrove, 100 Nev. at 503. Saldana

and Lucas were thoroughly questioned about the inducements they received or were to receive upon completion of their testimony. 8 A.A., p. 1787, 1821, 1826; 7 A.A., p. 1679, 1708; 4 A.A., p. 858. The declaration of Rusty Havens does not even state that he received money or other consideration from the State. See 30 A.A., p. 7146-7147. Reviewing the cross-examination of Lucas highlights the flaw in Defendant's argument. Lucas was directly questioned:

> DEFENSE COUNSEL: And that thousand dollars, nobody gave you that thousand dollars and told you you better sit there and give incriminating or bad statements against any of the defendants here, did they?
>
> LUCAS: No, they didn't.

7 A.A., p. 1703.

Thus, Defendant's allegations that the testimony of these three (3) was somehow scripted is simply refuted by the record.

> [w]e now conclude that bargaining for specific trial testimony, i.e. testimony that is essentially consistent with the information represented to be factually true during negotiations with the State, and withholding the benefits of the bargain until after the witness had testified, is not inconsistent with the search for truth or due process. ... In accordance with the foregoing, we now embrace the rule generally prevailing in both state and federal courts, and hold that any consideration promised by the State in exchange for testimony affects only the weight accorded the testimony, and not its admissibility.

Acuna, 107 Nev. at 669. (Emphasis added). This Court plainly ruled that any inducement for testimony merely affects the weight of that testimony, but does not preclude its introduction in evidence. See also Leslie v. State, 114 Nev. 8, 952 P.2d 966 (1998).

Furthermore, Defendant's contention ignores the fact that the jury heard all this impeaching evidence regarding inducements for testimony and obviously chose to believe the witnesses' testimony. See Doyle v. State, 112 Nev. 879, 921 P.2d 901, 910 (1996) ("It is the jury's function, not the reviewing court, to assess the weight of the evidence and determine the credibility of witnesses. Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 438-39 (1975)").

III

DEFENDANT'S THIRD CLAIM SHOULD BE DENIED BECAUSE IT IS GOVERNED BY THE "LAW OF THE CASE" DOCTRINE

The third claim of Defendant's petition asserts that the State impermissibly used evidence of Defendant's affiliation with witchcraft and satanic worship in violation of his Constitutional rights. While he claims that such action by the State creates a *per se* prejudicial violation of his rights, Defendant fails to specifically allege how trial or appellate counsel was ineffective. In fact, appellate counsel raised this same claim during the appeal of Defendant's third penalty hearing. In light of that failed appeal, Defendant's contention simply disregards the doctrine of "law of the case" as this issue has already been reviewed and decided by the Nevada Supreme Court.

After the United States Supreme Court reviewed and remanded his case, the Nevada Supreme Court also remanded Defendant's case for a new penalty hearing because the State had improperly argued evidence of Defendant's religious beliefs in satanic worship during the second penalty hearing. Flanagan III, 109 Nev. at 55-57.

The Nevada Supreme Court noted that due process prohibited a harmless error analysis when the review concerns admission of evidence during a death penalty sentencing hearing. Id. However, the Court did rule in Flanagan IV that a harmless error analysis was appropriate when considering the admission of such evidence during the trial. Flanagan IV, 112 Nev. at 1418-1421. The Court held that:

> [w]e characterized the evidence against Flanagan and Moore as "overwhelming" in our first opinion in this case. There is no reason to change that characterization now, nor has either appellant disputed the weight of evidence against him. ...We conclude beyond a reasonable doubt that the jury looked to this evidence in convicting appellants and that the prosecutor's improper remarks [about satanic worship] did not contribute to the verdict.

Flanagan IV, 112 Nev. at 1420. Based on the "law of the case" set forth in Hall, *supra*, the Nevada Supreme Court has already decided this issue, and therefore, this court need not review Defendant's third claim.

IV

DEFENDANT'S FOURTH CLAIM SHOULD BE DENIED BECAUSE IT CONSISTS OF BARE/NAKED ALLEGATIONS AND IS BELIED AND REPELLED BY THE RECORD

The United States Supreme Court has set forth the standard for determining the merits of a claim of ineffective assistance of counsel:

First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). The Nevada Supreme Court has similarly held that a valid ineffective assistance of counsel claim must demonstrate both that "counsel's performance fell below an objective standard of reasonableness, and that [the Defendant] was prejudiced as a result of counsel's performance." Riley v. State, 110 Nev. 638, 646, 878 P.2d 272, 277-78 (1995). Prejudice is shown only by a demonstration that trial counsel's "errors were so severe that they rendered the jury's verdict unreliable." Pertgen v. State, 110 Nev. 554, 558, 875 P.2d 361, 363 (1994).

In considering whether trial counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information... pertinent to his client's case." Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996) citing Strickland, 466 U.S. at 690-691. Once this decision is made, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 848 citing Strickland, 466 U.S. at 690-691. Finally, counsel's

strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 848; see also, Howard v State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691; State v. Meeker, 693 P.2d 911, 917 (Ariz. 1984).

Based on the above law, the court begins with the presumption of effectiveness and then must determine whether or not the Defendant has demonstrated, by "strong and convincing proof," that counsel was ineffective. Homick v. State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996) citing Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981). The role of a court in considering allegations of ineffective assistance of counsel, is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675 citing Cooper, 551 F.2D at 1166. In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Kirksey v. State, 112 Nev. 980, 987-988, 923 P.2d 1102, 1107 (1996).

Defendant's fourth claim specifically alleges that counsel at the guilt phase and at each of the penalty hearings was ineffective for a whole plethora of reasons. However, Defendant engages in exactly the kind of "second guessing" discouraged by the Nevada Supreme Court when assessing allegations of ineffective assistance of counsel. See Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978); Kirksey v. State, 112 Nev.

980, 987-988, 923 P.2d 1102, 1107 (1996). Furthermore, Defendant's allegations embody either bare/naked allegations or are belied and repelled by the record of the case. See Hargrove, *supra*. For the ease of consideration, the State will respond to Defendant's numbered assertions in three (3) separate sections -- one section for the trial and first penalty hearing and one section for each of the subsequent penalty hearings.

A. Trial and First Penalty Hearing

Defendant's allegations that trial counsel (Atty. Randall Pike) was ineffective span a number of claims including failure to conduct adequate pre-trial investigation, failure to effectively cross examine State witnesses and failure to adequately prepare for the penalty hearing. However, as previously noted, most of Defendant's assertions consist of bare/naked allegations or are simply belied and repelled by the record.

As noted earlier, claims of ineffective assistance of counsel during the guilt phase could have been raised during Defendant's first petition for writ of habeas corpus in 1995. Defendant has failed to allege good cause and prejudice for the failure to bring such claims in the prior proceeding as required by NRS 34.810.

Defendant's first substantial allegation of ineffective assistance of counsel is that Atty. Pike failed to conduct any investigation to prepare for trial. An entirely bare/naked allegation unto itself, Defendant's contention is also belied and repelled by the record of Atty. Pike's cross examination of State's witnesses. Atty. Pike competently highlighted the inconsistencies surrounding the testimony of State witnesses and other credibility issues during cross examination. 6 A.A., p. 1263; 7 A.A., p. 1538, 1539, 1542, 1547, 1550, 1674, 1676, 1677, 1679; 8 A.A., p. 1821, 1822, 1826, 1829-1830, 1914; 9 A.A., p. 2158; 10 A.A., p. 2297. Moreover, any allegations surrounding Atty. Pike's preparation for the penalty hearing are moot as Defendant was granted a new penalty hearing by the Nevada Supreme Court. See Flanagan I.

Defendant next contends that Atty. Pike was ineffective for not investigating or presenting a defense based on diminished capacity. Yet again, this allegation merely

claims that Defendant was on a "three-day drug and alcohol binge...immediately preceding the crimes." Without an affidavit or any more specific offer of proof, this allegation can only be described as bare/naked and unworthy of the court's consideration. Moreover, the witnesses that testified at trial did not indicate that Defendant was on a drug and alcohol binge immediately preceding the crimes.

Defendant also alleges that Atty. Pike neglected to conduct any investigation into some of the details of the crime itself. Defendant particularly points to inconsistencies between testimony and physical evidence; furthermore, Defendant also emphasizes that no fingerprints of any defendant were found at the crime scene. Yet, Defendant doesn't explain what inconsistencies were allegedly present nor does he acknowledge that the Nevada Supreme Court already found the quantum of evidence against Defendant was "overwhelming." Flanagan IV, 112 Nev. at 1420.

Defendant next asserts that Attorney Pike was ineffective for not determining that Defendant was incompetent due to psychotropic medication he was taking at the time of trial. Such a claim is simply belied and repelled by the record of Defendant's appearance in court. See also State's Argument below in Section V. During the Petrocelli hearing conducted by the District Court, Defendant clearly and coherently was able to answer the required series of questions illustrating his mentally clarity. See also 9 A.A., p. 2122-2125. Furthermore, Defendant was able to read a coherent unsworn statement to the jury in the penalty phase which occurred shortly after the guilt phase. 12 A.A., p. 2774-2775.

Defendant then alleges that Attorney Pike was ineffective for not moving to continue the case in order to better prepare for trial. Once again Defendant's claim is belied and repelled by the record in that he conducted a thorough cross-examination of the State's witnesses as previously stated.

Defendant also accuses Atty. Pike of being ineffective for failing to challenge the complaint, for failing to file a motion *in limine* to preclude any witchcraft evidence and for failing to object to the court-designed exercise of peremptory challenges. Yet such claims are both belied and repelled by the record and are subject to the doctrine of "law of the case"

(See Hall, *supra*). A simple check of the record of the case shows that the complaint, amended complaint and information all charged Defendant with two (2) counts of murder. 1 A.A., p. 4-6, 19-24, 237-243. Furthermore, as previously argued in **Section III** above, the doctrine of "law of the case" governs Defendant's claim regarding the witchcraft evidence. Similarly, Defendant's objection to the court-designed exercise of peremptory challenges has already been considered by the Nevada Supreme Court during Defendant's first appeal and deemed to be without merit. See 13 A.A., p. 3108-3109; Flanagan I.

Defendant next makes a repeat argument that Atty. Pike was ineffective because he failed to request investigative funds from the court. Again, such a contention is repudiated by the "overwhelming" evidence against Defendant and consists of substantially a bare/naked allegation. See Hargrove, *supra*.

Defendant also asserts that Atty. Pike was ineffective because he "failed to press for a change of venue." However, this assertion ignores the fact that Atty. Pike did file a Motion for Change of Venue. 2 A.A., p. 388-390. Moreover, Atty. Pike did argue before the District Court that a change of venue would be necessary if the jury pool was too small after the jury *voir dire*. 4 A.A., p. 856. Atty. Pike's approach was in compliance with Nevada law that requires such a motion to be made after *voir dire*. Ford v. State, 102 Nev. 126, 717 P.2d 27 (1986); Cutler v. State, 93 Nev. 329, 566 P.2d 809 (1977). Thus, Defendant's assertion is belied and repelled by the record of Atty. Pike's work. See Hargrove, *supra*.

In the next claim, Defendant repeats an argument claiming that Atty. Pike failed to effectively cross examine State's witnesses regarding inconsistencies in their testimony. This claim too is belied and repelled by the record as Atty. Pike had highlighted the inconsistencies and challenged the credibility of several State's witnesses. 6 A.A., p. 1263; 7 A.A., p. 1538, 1539, 1542, 1547, 1550, 1674, 1676, 1677, 1679; 8 A.A., p. 1821, 1822, 1826, 1829-1830, 1914; 9 A.A., p. 2158; 10 A.A., p. 2297. Defendant then alleges that Atty. Pike failed to cross examine witnesses "on certain key factual issues" such as why there were no glass shards found near where the defendants broke into the victims' home. Again, the "law of the case" would make this alleged error irrelevant in light of the "overwhelming"

evidence. Moreover, assuming *arguendo* that an error had occurred, any error was harmless at best in light of such substantial evidence against Defendant. See Flanagan I.

Furthering the cross examination allegations, Defendant contends that Atty. Pike was ineffective for not sufficiently cross-examining Wayne Wittig ("Wittig") to portray the weaknesses of Wittig's testimony. Yet after some fifteen (15) years of hindsight to second-guess, Wayne Wittig's declaration provides no proof to support these bare/naked allegations that Wittig lacked personal knowledge concerning the facts to which he testified. Mr. Wittig's declaration does not state that he lied or did not have any personal knowledge. It merely states that he believed defendant did not commit the crime and he would have liked to have been able to testify more favorably for Defendant. See 30 A.A., p. 7170-7183. Defendant simply claims that Wittig's testimony had the same errors as newspaper articles about the trial without any substantiation.

The State previously addressed the declaration of Robert Ramirez in Section I.C. herein. Furthermore, the declaration of Ramirez constitutes hearsay within hearsay.

Defendant's ensuing contention is that Atty. Pike was ineffective for not investigating Angela Saldana's ("Saldana") criminal record for cross examination purposes. However, Atty. Pike thoroughly covered inconsistencies in Saldana's testimony during cross examination. 8 A.A., p. 1821, 1822, 1826, 1829-1830. Atty. Pike elicited testimony regarding Saldana's potential receipt of $2,000 for the information she provided to the police. (Id.).

Defendant erroneously asserts that Atty. Pike failed to object to the witchcraft evidence that Luckett proffered. However, Atty. Pike repeatedly preserved objections for the record and moved for a mistrial. See 6 A.A., p. 1231; 9 A.A., p. 2061-2062, 2118. Furthermore, Atty. Pike filed a motion for severance from Luckett. 2 A.A., p. 401-410. It should also be noted that Defendant raised the issue alleging the trial court erred in denying Defendant's motion for severance on direct appeal in 1986. See 13 A.A., p. 3065. This Honorable Court denied that claim when it held "[w]e have examined Flanagan's other assignments of error and find them to be without merit." 104 Nev. at 112 (Flanagan I).

Additionally, Defendant's claim is that Atty. Pike failed to object to the presence of armed guards in the courtroom or to the jury allegedly having seen Defendant in shackles. This argument is refuted by the holding of McKenna v. State, 114 Nev. 1044, 968 P.2d 739, 743 (1998) in which the Nevada Supreme Court concluded that no actual prejudice to the defendant had been shown by the presence of SWAT officers in the courtroom.

Defendant next maintains that Atty. Pike was ineffective for not conducting an adequate mitigation investigation. This claim is simply moot given that Defendant was granted two (2) more penalty hearings.

Defendant's last set of allegations against Atty. Pike are that he was ineffective for not objecting to and for not offering any jury instructions during the penalty hearing. Defendant specifically suggests that an objection to the "great risk" factor should have been made and an instruction to require a "nexus between the burglary and robbery" should have been requested. Yet again, Defendant fails to consider the history of this case and to acknowledge that the Nevada Supreme Court has already ruled upon these frivolous issues. The Nevada Supreme Court previously held that the great risk factor was appropriate and that sufficient evidence was presented to support that aggravating factor. Flanagan IV, 112 Nev. at 1421. Addressing previous arguments about the jury instructions, the Court also ruled that "[w]e see no merit to Flanagan's argument anyway." Id. at 1422. Moreover, Defendant's assertion that a "nexus" should have been required between the burglary and robbery has no legal basis or justification whatsoever. Thus the "law of the case" doctrine nullifies any claim that Atty. Pike was ineffective for failing to object or request such jury instructions.

B. Second Penalty Hearing

All of Defendant's allegations regarding the second penalty hearing are moot as Defendant was granted a third penalty hearing. In addition, Defendant makes more of the same bare/naked allegations that cannot support a need for an evidentiary hearing. As such no evidentiary hearing is required to rule on Defendant's petition. See Rippo v. State, 113 Nev. 1239, 946 P.2d 1017, 1024 (1996)(Court held that "absent factual grounds which

would allow for a reasonable inference" of ineffective assistance, petitioner was not entitled to an evidentiary hearing).

C. Third Penalty Hearing

Defendant claims that poor communication between Ms. Blaskey and Mr. Wall led to ineffective representation. Defendant supports this assertion with examples gleaned from the testimony of Rebecca Blaskey. However, the testimony of David Wall is not consistent with the testimony of Ms. Blaskey. As such, Defendant has failed to present strong and convincing proof that poor communication between his attorneys resulted in ineffective assistance.

Ms. Blaskey claims that the strained relationship between her and Mr. Wall prevented them from engaging in planning sessions for Defendant's case. 30 A.A., p. 7340. However, Mr. Wall testified that he and Ms. Blaskey did have discussions regarding strategy in the Flanagan case. 31 A.A., p. 7388. According to Mr. Wall, their offices were very close and there were frequent informal discussions regarding the case in addition to more formal strategy sessions. 31 A.A., p. 7389. Defendant also cites to Ms. Blaskey's testimony that Mr. Wall went golfing rather than meeting his client at Ely State Prison. 30 A.A., p. 7349. Mr. Wall categorically denied that he canceled his trip to Ely so he could play golf. 30 A.A., p. 7383.

Finally, Defendant claims that poor communication between Ms. Blaskey and Mr. Wall led to the delayed examination of Defendant and to the State's devastating cross-examination of Dr. Etcoff. In Bean v. Calderon, 163 F.3d 1073, 1078 (1998), the attorneys had not prepared for the penalty phase, had ignored recommendations from experts for further examinations of the defendant, and had failed to furnish experts with requested information regarding the social, medical and educational history of the defendant. Id. This behavior is easily distinguishable from the attorneys' efforts in the instant case.

David Wall testified that Dr. Etcoff's examination of Defendant was delayed because Defendant was not transported from state prison as early as the District Court order requested. 31 A.A., p. 7394. As a result, the examination was delayed and Dr. Etcoff did not

have time to prepare a report. 30 A.A., p. 7369. Thus, the Court ordered defense counsel to turn over Dr. Etcoff's raw data because he did not have enough time to prepare a report. 30 A.A., p. 7381.

Ms. Blaskey also testified that due to lack of communication, there was confusion regarding the preparation of Dr. Etcoff for trial. 30 A.A., p. 7369. However, David Wall testified that he was responsible for communicating with and preparing Dr. Etcoff for trial. 31 A.A., p. 7393. David Wall also testified that he did prepare Dr. Etcoff for trial prior to the third penalty hearing. 31 A.A., p. 7393. In addition, Ms. Blaskey indicated that she did not have any idea how much time Mr. Wall spent preparing Dr. Etcoff for trial. 30 A.A., p. 7346. David Wall testified that he did not believe that the tension between him and Ms. Blaskey affected the quality of representation that Defendant received in his third guilt phase. 31 A.A., p. 7395. Defendant has not proven that his attorneys provided ineffective assistance of counsel due to an alleged lack of communication.

Even if this Court finds that Defendant's trial attorneys provided deficient representation due to their personal conflicts, Defendant's appeal should not be granted. According to the Supreme Court, "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. Defendant has failed to demonstrate that the conflict between his trial attorneys, Rebecca Blaskey and David Wall, prejudiced him.

In his petition, Defendant claims that he is exempt from proving the prejudice requirement under Strickland because of the conflict between his two attorneys. In support of this assertion, Defendant cites to Strickland v. Washington, 466 U.S. at 687 and Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708 (1980). Defendant's reliance on these cases is misguided. Strickland indicates that a defendant need not demonstrate he was prejudiced by his attorney's actions where there is a true conflict of interest; in such a circumstance the defendant need only demonstrate that conflict had an adverse effect on his case. The Supreme Court cites United States v. Cuyler, in making this determination. United State v.

Cuyler, describes a professional conflict of interest where the attorney represented multiple co-defendants in the same criminal case. It does not discuss personality conflicts between two attorneys representing the same Defendant. Defendant has presented no evidence of an actual conflict as envisioned by the Supreme Court in Strickland. As such, Defendant must demonstrate he was prejudiced by his attorneys' actions in order to demonstrate he received ineffective assistance of counsel.

Ms. Blaskey testified that if communication between her and David Wall had been better, she would have insisted on a continuance of the penalty hearing so Defendant's grandmother and other witnesses could be present at the penalty hearing. 30 A.A., p. 7358. Defendant has failed to demonstrate that the presence of his grandmother and other witnesses during his third penalty hearing would have created a different outcome in the case. One of the witnesses, Gary Hoffman, was deceased and could not be at the hearing. 30 A.A., p. 7359. Both of the other witnesses, the prison guard and Defendant's grandmother, had testified at Defendant's second penalty hearing. 30 A.A., p. 7359-7360. The transcript of both of these witnesses was read into the record during the third penalty hearing. 30 A.A., p. 7361, 7384. Ms. Blaskey testified that she could not say that Defendant would have received less than the death penalty if these two witnesses had testified, in person, at the penalty trial. 30 A.A., p. 7361.

> As I sit here, I cannot say if we only had more time we would have gotten this or that or that I would have thought that at the time because I don't have any recollection of thinking that.

30 A.A., p. 7384. Ms. Blaskey and Mr. Wall testified that when all three of the witnesses had testified in person during the second penalty hearing, the jury still returned a death verdict. 30 A.A., p. 7361; 31 A.A., p. 7385. As such, Defendant cannot demonstrate that he was prejudiced by the reading of transcript of his grandmother and the prison guard.

In addition, Defendant was not prejudiced by the lack of communication regarding Ms. Blaskey's filing of a Motion for a New Trial without consulting Mr. Wall. Because Mr. Wall believed the motion was incorrectly filed, Ms. Blaskey's prior motion was withdrawn and the motion was redrafted. 30 A.A., p. 7348, 7365. After the motion was redrafted, it was

addressed by the Nevada Supreme Court. 30 A.A., p. 7365. Because the motion was ultimately reviewed by the Supreme Court, Defendant cannot demonstrate that he was prejudiced.

Defendant claims that he was most prejudiced by lack of communication with respect to Dr. Etcoff's testimony. Ms. Blaskey testified that she believed that had there been better communication, Dr. Etcoff's testimony would have been better and Defendant would not have received the death penalty. 30 A.A., p. 7370-7371. Ms. Blaskey testified that she believed that the fact that the prosecutor had the raw data allowed them to conduct a damaging cross-examination. 30 A.A., p. 7369.

As a result of the prison's delay in transporting Defendant to Las Vegas, Dr. Etcoff had a shortened amount of time to conduct his examination of defendant. 31 A.A., p. 7394. Dr. Etcoff was not able to prepare a report and was ordered by the District Court to turn over his raw data. 30 A.A., p. 7381. Prior to the penalty hearing, Mr. Wall prepared Dr. Etcoff for the hearing. 31 A.A., p. 7393. David Wall testified that they didn't get the outcome they were hoping for, but he didn't recall being disappointed with his testimony. 31 A.A., p. 7381.

What was contained in that raw data was in no way affected by the alleged strained relationship between Ms. Blaskey and Mr. Wall. The fact that the State was able to conduct an effective cross-examination has nothing to do with Defendant's representation. Defendant's attorneys had no control over his late transport from prison to Las Vegas. Dr. Etcoff conducted an examination of Defendant and was ordered to turn the raw data over to the State. After David Wall prepared Dr. Etcoff for trial, the State conducted a damaging cross-examination. Ms. Blaskey admitted that the data used by the State to conduct cross-examination would have been the same regardless of the communications between her and Mr. Wall. 30 A.A., p. 7370. As such, Defendant cannot demonstrate that he was prejudiced by his attorney's strained relationship. Defendant has failed to meet the burden of demonstrating his counsel was ineffective. The trier of fact was present to observe the

demeanor of the two attorneys at the evidentiary hearing and resolved the inconsistencies between their testimonies in favor of Mr. Wall's version.

Essentially, Defendant is now second guessing what Defense counsel might have done differently or better. As Ms. Blaskey admitted, trial lawyers who do not achieve a favorable result often think in hindsight. 30 A.A., p. 7371. This approach is specifically rejected as a means of determining whether counsel was effective in Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065 (1984).

Defendant alleges, via the declaration of Julie A. Kriegler, Ph.D. (30 A.A., p. 7207), that he was abused by his grandparents (victims) and his father. On page 38 of Defendant's Opening Brief he alleges severe physical abuse at the hands of his grandparents. However, Dr. Kriegler's declaration does not support this allegation of physical abuse by the Gordons (victims/grandparents), but indicates that Defendant was punished by "forcing him to perform senseless tasks such as digging ditches or raking rocks in the pasture." 30 A.A., p. 7222-7223. Of greater significance is that Defendant told Dr. Etcoff that the Gordons (victims/grandparents) had not physically abused him and had treated him well.

> Surprised in the sense that from what Mr. Flanagan had told me, his grandparents had taken him over the summers, for weeks and weeks at a time most every summer, and had treated him well. He hadn't been hurt by his grandparents; he hadn't been molested by his grandparents; he hadn't been beaten by his grandparents; he had nothing against his grandparents.

24 A.A., p. 5774 (1995 trial testimony / third penalty hearing). See also 24 A.A., p. 5764.

Contrary to Defendants assertions, counsel for the 1995 penalty hearing were effective in presenting evidence of the terrible childhood he endured, that he was not typically violent, and that he had changed since the murders into a religious and helpful person. Coreen McWhorter, Defendant's sister, testified in the 1995 penalty hearing that Defendant's family life growing up was "terrible" and that he was physically and mentally abused by his father. 24 A.A., p. 5671, 5675. Defendant's sister also testified that Defendant moved out of the family home when he was 15 years old and got a job and took care of himself. 24 A.A., p. 5686.

Dr. Louis Etcoff, a licensed psychologist, testified during the 1995 penalty trial that there is an excellent chance that Defendant would be nonviolent in the future. 24 A.A., p. 5828. Dr. Etcoff spent six (6) hours with Defendant interviewing him and conducting tests at his office. 24 A.A., p. 5741-5742. Dr. Etcoff testified regarding the physical abuse that Defendant received at the hands of his father. 24 A.A., p. 5745, 5758. Dr. Etcoff testified regarding Defendant's drug and alcohol use. 24 A.A., p. 5763. Dr. Etcoff also testified that Defendant had detached himself from his family because of some traumatic experience as a child. 24 A.A., p. 5757.

Janelee Hoffman testified in 1995 regarding Defendant's Bible studies after being incarcerated as well as the positive letters he had written to other troubled teenagers. 23 A.A., p. 5585, 5587. Ms. Hoffman testified how Defendant sent her a big envelope of stamps from prison one time when she was having financial problems. 23 A.A., p. 5589. Chaplain Dean M. Haywood testified that he Baptized Defendant after he was incarcerated. 23 A.A., p. 5644. Chaplain Haywood testified regarding Defendant's Bible studies and Defendant's ministering to others. 23 A.A., p. 5645, 5651-5652. The testimony of Defendant's other grandmother, Mary Howard, was read into evidence which included Bible certificates and how Defendant is a completely different person now. 24 A.A., p. 5694, 5696.

Warden Sherman Hatcher and Bud Hlavaty testified regarding Defendant's good conduct in prison (with the exception of one minor write-up) during his ten years of incarceration. 23 A.A., p. 5609, 5620.

Counsel for Defendant were not ineffective in their representation of Defendant in the third penalty trial (1995). Evidence was presented of the terrible childhood and how Defendant was now a better person in an effort to spare him from the death penalty. Defendant's new contention that his grandparents physically abused him is belied by the record. Defendant's claim that his counsel were ineffective is without merit.

VI

DEFENDANT'S FIFTH CLAIM SHOULD BE DENIED BECAUSE IT IS BELIED AND REPELLED BY THE RECORD

Defendant's fifth claim is that Attorney Pike was apparently ineffective for not seeking an evaluation as to Defendant's competency to stand trial. Not only does Defendant fail to offer any affidavit that documents the "substantial doses of psychotropic medications which may have rendered him incompetent to stand trial" but he also overlooks the fact that his allegation is belied and repelled by the record. On May 29, 1985, Psychiatrist Ivan Aralica, M.D. rendered the opinion that Defendant "is fully competent to stand trial." 29 A.A., p. 7110. During the Petrocelli hearing conducted by the District Court, Defendant was able to coherently answer all of the questions posed to him. See also 9 A.A., p. 2122-2125. Furthermore, Defendant was able to read a coherent unsworn statement to the jury in the penalty phase which occurred shortly after the guilt phase. 12 A.A., p. 2774-2775. Such clear communication with the court refutes Defendant's contention that he was unable "to fully comprehend the nature of the charges against him and the magnitude of the penalty he faced." Thus, Defendant's claim did not merit an evidentiary hearing in light of Hargrove, *supra*.

Defendant's trial commenced on September 26, 1985 and testimony closed in the guilt phase on October 9, 1985. The penalty phase commenced on October 14, 1985. Defendant included in his Appendix medical records from the Clark County Detention Center. 29 A.A., p. 7082-7134. However, in his brief he fails to identify the specific psychotropic medication(s) that were allegedly given to him involuntarily. Furthermore, a review of the Appendix indicates that no psychotropic medications were given to Defendant from the middle of September 1985 through the beginning of October 1985. Regardless, Defendant's claim that any medical treatment and medication he received was involuntary is belied by the record. On May 25, 1985, Defendant asked for assistance because he had "developed a condition wich (sic) could led (sic) me to my self destruction." 29 A.A., p.

7090. Defendant was placed on suicide watch on more than one occasion during his incarceration prior to trial.

> A court need not consider whether to allow forced medication for that kind of purpose (interest in rendering the defendant competent to stand trial), if forced medication is warranted for a *different* purpose, such as the purposes set out in Harper related to the individual's dangerousness, or purposes related to the individual's own interests where refusal to take drugs puts his health gravely at risk. 494 U.S., at 225-226, 110 S.Ct. 1028. There are often strong reasons for a court to determine whether forced administration of drugs can be justified on these alternative grounds *before* turning to the trial competence question.

Sell v. United States, 539 U.S. 166, 181-182, 123 S.Ct. 2174, 2185 (2003).

Defendant has made general allegations without specifying the particular medication and where evidence thereof can be found in the record. Defendant has failed to show that he was medicated involuntarily during the relevant time period in September and October of 1985. Defendant's claim is a bare and naked allegation that was properly dismissed.

VI

DEFENDANT'S SIXTH CLAIM SHOULD BE DENIED BECAUSE IT IS BELIED AND REPELLED BY THE RECORD

In his sixth claim of error, Defendant asserts that his conviction and sentence are invalid because of the prejudicial atmosphere of the Eighth Judicial District Court and because of the failure of the District Court to permit a change of venue. Defendant assigns error to Atty. Pike as ineffective counsel for not forcing the District Court to allow a change of venue. Yet again this allegation is belied and repelled by the record and is discredited by Defendant's own speculation regarding prospective jurors.

While he recognizes that Atty. Pike filed a motion *in limine* for a change of venue, Defendant fails to carefully read the record and the sound reasoning behind Atty. Pike's action. At a pre-trial hearing, Atty. Pike specifically agreed with the District Court to delay ruling on the motion in the event that an impartial jury was not attained from the jury venire as was required by Nevada case law. See Ford, *supra*; Cutler, *supra*. In doing so, Atty. Pike gave Defendant a preview of what the prospective jurors were thinking about the case without losing the right to argue for a change of venue; in essence, Atty. Pike gave

Defendant "two bites of the apple" on the issue of juror bias and impartiality. Moreover, Defendant's own examples illustrate Atty. Pike's strategy and the effective safeguards of jury *voir dire*. Both prospective jurors candidly answered that they had pre-trial knowledge of Defendant's case through the media and that they had formed an opinion about the case. However, neither prospective juror mentioned any specifics facts about the case nor can Defendant assert beyond mere speculation that any other potential juror heard these innocuous remarks. Once again, Defendant fails to offer any affidavit or offers of proof to support his claim that the jury was somehow tainted by these *voir dire* statements. As such, this claim is unworthy of review by the court.

VII

DEFENDANT'S SEVENTH CLAIM SHOULD BE DENIED BECAUSE IT CONSISTS SOLELY OF A BARE/NAKED ALLEGATION

Defendant's seventh allegation, simply a recitation of what he believes the jury selection process in Clark County to be, does not support a claim of ineffective assistance of counsel. Moreover, despite his citation to Census statistics and his belief about what the Jury Commissioner's Office does upon receipt of jury summonses, Defendant's bare/naked allegation fails to make any analysis under the Strickland standard for ineffective assistance of counsel. Defendant has failed to provide any support in the record for his claim that there were no African Americans present in the jury pools for all of his trials. Furthermore, Defendant neglects to show how he was prejudiced by the alleged all-white jury that convicted the Caucasian Defendant.

Notwithstanding his constitutional entreaties to the court, Defendant's allegations are without merit upon close examination.

VIII

DEFENDANT'S EIGHTH CLAIM SHOULD BE DENIED BECAUSE IT FAILS TO MEET THE STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL UNDER STRICKLAND

Defendant next contends that his conviction is invalid because Atty. Pike was forced to jointly exercise peremptory challenges with counsel for the co-defendants and because the District Court failed to grant him an additional peremptory when there was a disagreement about the last challenge to be used. Defendant cites to United States v. McClendon, 782 F.2d 785 (9th Cir. 1986) in support of his argument, but fails to correctly apply the holding of that case. In McClendon, two (2) co-defendants were on trial for a series of bank robberies. McClendon, 782 F.2d at 786. After a disagreement arose over the exercise of the last two (2) peremptory challenges, the defendants objected because the trial court refused to grant additional challenges. Id. at 787. The Ninth Circuit Court of Appeals held that:

> there is no "right" to additional peremptory challenges in multiple defendant cases...[and that]...[d]isagreement between co-defendant on the exercise of joint peremptory challenges does not mandate a grant of additional challenges unless defendants demonstrate that the jury ultimately selected is not impartial or representative of the community. Id. at 787-88.

In the present case, Defendant has failed to show that the jury selected was not impartial or representative of the community. In fact, Defendant points out that seven (7) of eight (8) challenges were agreed upon by counsel for all the defendants. Claiming that the exercise of one (1) challenge creates a non-representative jury is tenuous at best. Furthermore, besides making a sweeping unsupported statement that the jury was not representative, Defendant neglects to make any analysis under the Strickland standard regarding this alleged error of the District Court. Defendant has not shown how he was prejudiced either in light of Strickland or McClendon.

Additionally, Defendant's argument is contrary to longstanding case law in Nevada on this very subject. In White v. State, 83 Nev. 292, 296, 429 P.2d 55 (1967), the Nevada Supreme Court upheld such joint exercise of peremptory challenges based upon NRS

175.015[2]. See also Doyle v. State, 82 Nev. 242, 415 P.2d 323 (1966); Anderson v. State, 81 Nev. 477, 406 P.2d 532 (1965). Therefore, Defendant's allegation does not warrant an evidentiary hearing.

IX

DEFENDANT'S NINTH CLAIM SHOULD BE DENIED BECAUSE IT LACKS MERIT AS A BARE/NAKED ALLEGATION

Defendant maintains that his conviction is invalid because the District Court required certain objections and motions to be made to the court reporter out of the presence of the jury. Defendant claims that this process somehow impaired his ability to present a defense "because the jury was given the mistaken impression that [Defendant] had no meaningful defense to certain evidence, eliminating possible bases for reasonable doubt." Defendant evidently is claiming that the jury has a right to hear meritless objections, and he cites no case law to support this novel proposition. In fact, this entire argument is utterly devoid of any authority to support his claim that the trial judge somehow violated a constitutional right. Defendant fails to consider that any contemporaneous objections made at trial would be subject to a bench conference out of the presence of the jury anyway. Moreover, the objection process instituted by the District Court in no way prevented Defendant from cross examining witnesses or from putting on his own case-in-chief.

X

DEFENDANT'S TENTH CLAIM SHOULD BE DENIED BECAUSE IT LACKS MERIT AS A BARE/NAKED ALLEGATION AND INCORRECTLY APPLIES THE SECOND PRONG OF THE STRICKLAND STANDARD

The same benchmark of review applies to cases of alleged ineffectiveness of appellate counsel. In order to be effective, appellate counsel need not raise every conceivable issue. Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Mann

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[2]NRS 175.015(now 175.041) reads in pertinent part:
When several defendants are tried together, they cannot sever their peremptory challenges, but must join therein.

v. State, 856 P.2d 992, 994 (Okla.Crim.App. 1993), cert. denied, 511 U.S. 1100, 114 S.Ct. 1869 (1994). In fact, appellate counsel does not even have to raise every nonfrivolous issue. Chief Justice Burger, writing for the majority in Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983), quoted Justice Jackson:

> Legal contentions, like currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one ... [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good cause and will not save a bad one. (Citations omitted).

Id at 752, 103 S.Ct. at 3313.

In Jones, the Court reversed a lower court which had held that appellate counsel must raise every nonfrivolous issue requested by the defendant and found that "a brief that raises every colorable issue runs the risk of burying good arguments." Id at 753, 103 S.Ct. at 3313. The Court emphasized that "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible or at most a few key issues." Id at 751-52, 103 S.Ct. at 3313. The Court continued, "for judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies Anders v. California, 368 U.S. 738, 87 S.Ct. 1396 (1967)]." Id at 754, 103 S.Ct. at 3314. Thus, a truly effective appellate counsel raises only meritorious issues on appeal.

Defendant's tenth claim addresses the alleged ineffectiveness of all three (3) appellate counsel that worked on each of Defendant's appeals following conviction and sentence. Defendant alleges that all three (3) appellate counsel were ineffective for not raising on appeal many of the claims that he now makes in this petition. Once again, Defendant's petition makes baseless allegations while employing the incorrect standard for review under Strickland.

Defendant primarily faults appellate counsel with lacking the resources and time to effectively prepare his case for appeal on three (3) separate occasions. Utilizing the "distorting effects of hindsight," Defendant blames appellate counsel for not raising certain issues which were, in fact, raised on appeal. The United States Supreme Court and the Nevada Supreme Court both ruled on Defendant's First Amendment rights in light of the witchcraft evidence introduced at trial and argued during the penalty hearings. See Flanagan II; Flanagan III. Moreover, Defendant's first appellate counsel did raise the issue of prosecutorial misconduct during closing arguments as part of Defendant's first appeal to the Nevada Supreme Court. See Flanagan I. Not only is such an argument disingenuous to this court, but it simply ignores the long appellate history of Defendant's case. Beyond that, appellate counsels' tactical decisions not to raise every possible issue on appeal, as Defendant now suggests, would have worked to enhance the likelihood of success for those meritorious claims that were appealed. See Hollenback, 987 F.2d 1272, 1275 (7th Cir. 1993); Jones, 463 U.S. 745, 103 S.Ct. 3308 (1983). As such, Defendant's unfounded contentions are rejected by the "law of the case" doctrine. See Hall, *supra*.

Additionally, Defendant's allegations incorrectly apply the Strickland standard for review of counsel's effectiveness. Under the second prong of the Strickland standard, Defendant must show that counsel's performance was so deficient that it "rendered the jury's verdict unreliable." Pertgen v. State, 110 Nev. 554, 558, 875 P.2d 361, 363 (1994). Clearly, Defendant's allegations fail to make a showing that any of the three (3) jury verdicts were unreliable.

XI

DEFENDANT'S ELEVENTH CLAIM SHOULD BE DENIED BECAUSE IT HAS PREVIOUSLY BEEN DECIDED

As stated by Defendant, this Honorable Court has rejected Defendant's arguments in Evans v. State, 28 P.3d 498 (2001). Defendant proffers no good reason to revisit these issues.

XII

DEFENDANT'S TWELFTH CLAIM SHOULD BE DENIED BECAUSE ITS ARGUMENTS HAVE BEEN PREVIOUSLY REJECTED BY THE NEVADA SUPREME COURT

Defendant next alleges that the jury instructions regarding reasonable doubt, premeditation/deliberation, "equal and exact justice" and the "guilt or innocence of any other person" were constitutionally invalid and that both trial and appellate counsel were ineffective for not challenging these instructions at trial and on appeal. What Defendant's argument fails to recognize is that these same issues have been previously addressed by the Nevada Supreme Court, and thus the trial and appellate counsels could not be ineffective for failing to challenge instructions that have been upheld by the Nevada Supreme Court.

For the reasonable doubt instruction, the Nevada Supreme Court has consistently ruled that the instruction quoted by Defendant does not minimize the State's burden of proof. The Court has held that there was no reasonable likelihood that a jury applied the instruction defining reasonable doubt in an unconstitutional manner where the instruction was accompanied by other instructions regarding the State's burden of proof and the presumption of the defendant's innocence. Bollinger v. State, 111 Nev. 1110, 1114, 901 P.2d 671, 674 (1995). Similarly, in the case at bar, the instruction defining reasonable doubt was accompanied by an instruction regarding the State's burden of proof and another instruction regarding the presumption of innocence. The pertinent instructions were:

> The defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that a defendant is a person who committed the offense.

12 A.A., p. 2743 (Emphasis added). As such, there is no reasonable probability that the jury believed the instruction allowed the conviction of Defendant based on a lesser quantum of evidence than is required by the Constitution. See Bollinger, 111 Nev. at 1114.

Defendant also argues that other portions of the reasonable doubt instruction are defective (i.e. "weighty affairs of life"). However, the Nevada Supreme Court has approved

the "weighty affairs" language contained in Nevada's reasonable doubt jury instruction, disregarding the defendant's argument in Bollinger, which is similar to that argued by Defendant in the instant case. Bollinger, 111 Nev. at 1114. The Court held that although it elected not to scrutinize such language, the "proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it." Id. at 674 (quoting Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239 (1994)).

Regarding the murder instruction, Defendant assigns error for the premeditation/deliberation and implied malice instructions given by the District Court. However, such instructions have been formerly upheld by the Nevada Supreme Court. The Court dealt with this issue in Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992) when it was asked to rule on whether the premeditation instruction was distinct from the malice instruction. In holding that the premeditation instruction was distinct, the Nevada Supreme Court found the same instruction for premeditation used in Defendant's case to be appropriate:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing. Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. If the jury believes from the evidence that the act constituting the killing has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is wilful, deliberate, and premeditated murder.

Id. at 75; 12 A.A., p. 2726.

Moreover, the Court in Kazalyn specifically noted that the murder instructions adequately met the premeditation/deliberation and malice criteria as set forth in Payne v. State, 81 Nev. 503, 508-509, 406 P.2d 922 (1965). Thus, the murder instructions used in the instant case embodied the standard for such instructions over the nearly twenty (20) years before Defendant's trial in 1985.

Since Kazalyn, the Court has continually reviewed this type of instruction and upheld it throughout the remaining part of the decade. See Powell v. State, 108 Nev. 700, 838 P.2d

921 (1992) vacated on other grounds, 511 U.S. 78 (1994) and citing to Depasquale v. State, 106 Nev. 843, 803 P.2d 218 (1990) and Briano v. State, 94 Nev. 422, 51 P.2d 5 (1978); Greene v. State, 113 Nev. 157, 931 P.2d 54 (1997); Williams v. State, 113 Nev. 1008, 945 P.2d 438 (1997); Doyle v. State, 112 Nev. 879, 921 P.2d 901 (1996). Clearly, the giving of the Kazalyn instruction of premeditation and deliberation was not plain error, and neither trial nor appellate counsel can be held to have been ineffective for not challenging an instruction that had been consistently endorsed by the Nevada Supreme Court.

However, in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), the Court reviewed the Kazalyn instruction. In that opinion, the Nevada Supreme Court changed the instructions in all cases in the future. However, at the time that the trial court in the instant case gave the murder instructions, the premeditation instruction was clearly good law. Moreover, in Byford, the Court recognized that it had expressly informed the district courts in prior opinions that the Kazalyn instruction was proper. Byford. Therefore, the District Court's reliance on the express holdings of the Nevada Supreme Court cannot be viewed as plain error.

In addition, the Court's new instruction is not retroactive as indicated by the language of the opinion itself:

> Because deliberation is a distinct element of mens rea for first-degree murder, we direct the district courts to cease instructing juries that a killing resulting from premeditation is "willful, deliberate, and premeditated murder." Further, if a jury is instructed separately on the meaning of premeditation, it should also be instructed on the meaning of deliberation.

Id at 23 (Emphasis added). Furthermore, the Byford decision never held that the Kazalyn instruction was erroneously given, but only that it should not be given in the future and that new instructions are to be used in future cases.

"Consistent with Byford, the jury instructions in the instant case do not constitute reversible error. Bridges was tried prior to our decision in Byford; consequently, additional instruction as articulated in that decision was not required." Bridges v. State, 116 Nev. 752, 762, 6 P.3d 1000, 1008 (2000).

Where a new rule of criminal procedure is not constitutionally based, that new rule is only to apply prospectively. Gier v. Ninth Judicial District Court, 106 Nev. 208, 212, 789 P.2d 1245, 1248 (1990). The new rule announced in Byford is not a constitutional rule. The Nevada Supreme Court was concerned that the instructions given may have blurred the distinction between first and second degree murder as set forth in the Nevada Revised Statutes. Byford, supra. As such, the Court has determined that the statutory definition of deliberate is different from that of premeditated, and giving an instruction defining "premeditated" and not "deliberate" may emphasize one element over another. Id. The Court never stated in Byford that the new rule was based on any constitutional consideration. Therefore, this new "rule" is only based on the Court's concern that the old instructions did "not do full justice to the phrase 'willful, deliberate, and premeditated,'" and set forth new instructions the Court felt would more clearly define the phrase. Id.

The conclusion that Byford should not be held retroactive is supported by the case law underlying the decision. In Byford, the Court heavily relied on State v. Brown, 836 S.W.2d 530 (Tenn. 1992). The Tennessee courts have had repeated opportunities to review the application of Brown and have unanimously determined that the decision is not retroactive. See e.g., State v. Hall, 958 S.W.2d 679 (Tenn. 1997); Harris v. State, 947 S.W.2d 156 (Tenn.Crim.App. 1996); Lofton v. State, 898 S.W.2d 246 (Tenn.Crim.App. 1994). Not only did the Tennessee Supreme Court hold that Brown is not retroactive to post-convictions proceedings, but, additionally, it is not retroactive to direct appeals or motions for new trials. State v. Hall, 958 S.W.2d 679, 711 (Tenn. 1997), cert. denied, Hall v. Tennessee, 524 U.S. 941 (1998)(finding the defendant could not base a motion for a new trial on Brown because Brown was decided two months after the jury verdict).

Tennessee's state rule on retroactivity is similar to that in Nevada. In Tennessee, a new rule which does not implicate a constitutional right is not to be applied retroactively. See State v. Hall, 958 S.W.2d 679, 711 (Tenn. 1997)(citing Meadows v. State, 849 S.W.2d 748, 754 (Tenn. 1993)). The Court then held that the unanimous opinion of the courts that have reviewed the Brown decision have determined that it did not create a constitutional

rule, either state or federal. Id. The Court held that the Brown decision did not find the old premeditation instruction had violated a constitutional right, but rather that it would be prudent to abandon the old instruction and give new instructions because of the potential for confusion (the same ruling that was made by this Court in Byford.) Hall, 958 S.W.2d at 711 (citing Lofton, 898 S.W.2d at 249-50). Tennessee's determination that it did not create a new constitutional rule was concurred with by the United State's Court of Appeals Sixth Circuit. Houston v. Dutton, 50 F.3d 381, 384 (6th Cir.1995).

As such, there is no authority for the proposition that Byford should be held to apply retroactively. For over a century, first degree murder in Nevada has been defined as murder which is willful, premeditated and deliberate. See State v. Wong Fun, 22 Nev. 336, 341, 40 P. 95, 96 (1895). In the intervening time, that definition has not changed. Byford, 116 Nev. Adv. Op. 23 at 23. The only difference is the manner in which the jury is to be instructed. Moreover, instructions defining deliberation and premeditation are not even required because they mean nothing "other than in their ordinary sense." Id at n. 3 (quoting Ogden v. State, 96 Nev. 258, 263, 607 P.2d 576, 579 (1980)). As such, any change in instructions is a state law decision not implicating the Constitution. Houston v. Dutton, 50 F.3d 381, 384 (6th Cir.1995). Therefore, Byford is not to be retroactively applied and gives no further support to Defendant's meritless claim.

Similarly, the Nevada Supreme Court has held that the "equal and exact justice" instruction used by the District Court is valid. In Leonard v. State, 114 Nev. 1196, 969 P.2d 288, 296 (1998), the Nevada Supreme Court ruled on allegations that:

> the district court denied him the presumption of innocence by instructing the jury to do "equal and exact justice between the Defendant and the State of Nevada." This instruction does not concern the presumption of innocence or burden of proof. A separate instruction informed the jury that the defendant is presumed innocent until the contrary is proven and that the state has the burden of proving beyond a reasonable doubt every material element of the crime and that the defendant is the person who committed the offense. Appellant was not denied the presumption of innocence.

See also McKenna v. State, 96 Nev. 811, 618 P.2d 348 (1980). The District Court in Defendant's case also instructed the jury separately on the issues of burden of proof and presumption of innocence. Therefore, Defendant's assertion that the jury did not give him the benefit of the presumption of innocence or that they convicted him based on a lesser standard of proof is simply wrong.

Finally, regarding the "guilt or innocence by any other person" instruction used by the District Court, once again the Nevada Supreme Court has concluded that such an instruction is constitutionally sound. In Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992), the Court considered the exact same language that Defendant now disputes as having been used to convict him with a "lesser quantum of evidence than the constitution requires." In Guy, the Court rejected the defendant's argument that:

> this instruction tended to confuse the jury by leading it to "an erroneous conclusion that [appellant] was a moving party in causing the death of Evans and override [sic] any doubts the trier of fact may had [sic] as to [appellant's] knowledge of an/or participation in the events which led to Evans [sic] death.

Id. at 778. Moreover, the Court went on to find that the challenged instruction sufficiently directed the jury to ignore the co-defendant's culpability when determining whether the defendant was guilty as charged. Id. Thus, Defendant's nearly identical argument likewise misfires because the jury instruction satisfactorily maintains the burden of proof and quantum of evidence necessary to convict Defendant beyond a reasonable doubt.

XIII

DEFENDANT'S THIRTEENTH CLAIM SHOULD BE DENIED BECAUSE IT IS INVALIDATED BY THE "LAW OF THE CASE" DOCTRINE

Defendant next argues that his conviction is invalid because insufficient evidence existed to support the jury's finding that the aggravating circumstance that the killing was committed by someone who "knowingly created a great risk of death to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person." The Nevada Supreme Court has already heard this argument from Defendant in 1996 when the Court ruled that "substantial evidence existed to

support the finding that [Flanagan and Moore] knowingly created a great risk of death to more than one person by means of a weapon and course of action which would normally be hazardous to the lives of more than one person." Flanagan IV, 112 Nev. at 1421. Thus, Defendant is precluded from having this court re-hear this same flawed argument under the "law of the case" doctrine. See Hall, *supra*.

Moreover, Defendant's thirteenth allegation, maintains that prejudicial error occurred because "the courts have not afforded [Defendant] a new sentencing proceeding or re-weighing or other correction under applicable state procedures." This claim is disingenuous at best given that Defendant was granted three (3) different penalty hearings during the appellate history of his case. Furthermore, such an allegation is the type that should have been raised in any one of Defendant's direct appeals to the Nevada Supreme Court. Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994). Thus, Defendant's claim, which is precluded by the law of the case, is also improperly before this court and was properly denied without an evidentiary hearing.

XIV

AND

XV

DEFENDANT'S FOURTEENTH AND FIFTEENTH CLAIMS SHOULD BE DENIED BECAUSE THEIR ARGUMENTS HAVE BEEN PREVIOUSLY REJECTED BY THE NEVADA SUPREME COURT AND THEY ARE IMPROPERLY BEFORE THIS COURT

Defendant's ensuing two (2) arguments, which practically mirror his previous argument, have also been rejected by the Nevada Supreme Court. Defendant's efforts to suggest that there is a difference between murders that occur indoors and murders that occur outdoors during the commission of a felony is absurd at best. The Nevada Supreme Court has already held that such a narrow construction that Defendant proposes is untenable and illogical.

In Bennett v. State, 106 Nev. 135, 787 P.2d 797 (1990), the Court addressed an analogous situation in which the defendant shot and killed a store clerk without provocation

before attempting to rob the store. Rejecting the defendant's claim that the aggravating factor of "in the commission of a burglary" was not supported by the evidence, the Court ruled that:

> NRS 200.033(4) only requires that, for burglary to be an aggravating circumstance, the murder must be committed while the person was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit burglary or robbery. This was clearly the case here. Were it otherwise, burglary could be used as an aggravating circumstance only upon the rare occasion of a killing which occurs while the defendant is entering the building.

Id. 106 Nev. at 142. In the instant case, there was uncontroverted evidence that Defendant killed his grandmother during the commission of the burglary while his co-defendants killed his grandfather.

Additionally, the same line of argument applies to Defendant's contention regarding the aggravating factor for "in the commission of a robbery." See also Leslie v. State, 114 Nev. 8, 952 P.2d 966, 975-76 (1998). Defendant would have the court distinguish the robbery from the rest of the murderous scheme he and his cohorts executed that night. Such rationale is misplaced, and even assuming *arguendo* that the court accepts Defendant's theory, any error that may have occurred was harmless in light of the other three (3) aggravating factors found by the jury. Accordingly, the aggravating factors were appropriately applied and supported by evidence introduced at trial and the penalty hearings.

Furthermore, as mentioned beforehand, Defendant's allegations are the type that should have been raised in any one of Defendant's direct appeals to the Nevada Supreme Court. Franklin, *supra*. Thus, Defendant's claims are also improperly before this court and should be denied without an evidentiary hearing.

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XVI

DEFENDANT'S SIXTEENTH CLAIM SHOULD BE DENIED BECAUSE ITS ARGUMENT HAVE BEEN PREVIOUSLY REJECTED BY THE NEVADA SUPREME COURT

Defendant next contends that his conviction is invalid because the District Court permitted the State to use the same facts to convict him under a felony murder theory and to support one of aggravating factors for the death sentence. At the time of trial, the state of the law clearly allowed this. The Nevada Supreme Court has held on several occasions "that the U.S. Supreme Court has implicitly approved the use of the underlying felony in felony murder cases as a valid aggravating circumstance to support the imposition of the death sentence." Atkins v. State, 112 Nev. 1122, 1134, 923 P.2d 1119 (1996) quoting Petrocelli v. State, 101 Nev. 46, 53, 692 P.2d 503 (1985); accord Miranda v. State, 101 Nev. 562, 707 P.2d 1121 (1985), cert. denied 475 U.S. 1031 (1986); Farmer v. State, 101 Nev. 419, 705 P.2d 149 (1985) cert. denied 476 U.S. 1130 (1986). Furthermore, the jury at the guilt phase and each of the penalty hearings was bound to find evidence beyond a reasonable doubt; therefore, Defendant's contention that "two separate increments of culpability" exist is simply without merit and was properly denied without an evidentiary hearing.

Defendant's reliance on McConnell v. State, 120 Nev. ----, 102 P.3d 606 (2004) is misplaced.

The issue of the retroactivity of McConnell was not briefed in the Defendant's petition for writ of habeas corpus in the district court below. In fact, it could not have been briefed because the findings of fact, conclusions of law and order from Defendant's petition was filed on August 8, 2002. The McConnell decision was not reached until December 29, 2004. Therefore, the retroactivity of the McConnell decision is not properly before this

court.[3] Because the district court did not look at the issue, this Court should not consider the issue.

Even in the event that this Court decides to look at the retroactivity issue, applying the McConnell decision retroactively is something this Court appears to be unwilling to do. In McConnell, this Court stated:

> . . . in cases where the State basis a first-degree murder conviction in whole or in part on felony murder, to seek the death sentence the State **will have to prove** an aggravator other than the one based on the felony murder's predicate felony. **We advise the State**, therefore, that if it charges alternative theories of first-degree murder intending to seek a death sentence, jurors in the guilt phase should receive a special verdict form that allows them to indicate whether they find first-degree murder based on deliberation and premeditation, felony murder, or both. Without the return of such a form showing that the jury did not rely on felony murder to find first-degree murder, the State cannot use aggravators based on felonies which could support the felony murder. McConnell, 606 P.3d at 624.

First, this Court's prospective language ("will have to prove" and "we advise the State") strongly indicates this Court's intent for its decision to **not** be applied retroactively. Moreover, in its published opinion denying rehearing, this Court clarified this intent by stating, "[o]ur case law makes it clear that new rules of criminal law or procedure apply to convictions which are **not final**." [Emphasis added] McConnell, 107 P.3d at 1290 (citing Clem v. State, 119 Nev. 615, 627-628, 81 P.3d 521, 530-531 (2003)).

A conviction is final when judgment has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the Supreme Court has been denied or the time for the petition has expired. Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002). In the instant case, remittitur from direct appeal of Flanagan's last and final penalty hearing issued

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3 "Before deciding retroactivity, we prefer to await the appropriate post-conviction case that presents and briefs the issue." *McConnell v. State,* 107 P.3d 1287, 1290 (2005). Here, Defendant did not brief the retroactivity issue below, therefore his is not the appropriate post-conviction petition this Court is waiting for.

in 1998. Thus, Flanagan's death sentence was final in 1998 and the "new rule" set forth in McConnell does not apply to this case.

Even if the decision applied to this case, it still would not afford relief as there is ample evidence of premeditation and deliberation, just as there was in McConnell. In charging McConnell with first-degree murder, the State alleged two theories: deliberate, premeditated murder and felony murder during the perpetration of a burglary. McConnell, 102 P.3d at 620. This Court noted that during his testimony, McConnell admitted that he had premeditated the murder. Id. Therefore, his conviction for first-degree murder was soundly based on a theory of deliberate, premeditated murder. Id.

In the present case, Flanagan planned the murders with his co-defendants and there was overwhelming evidence of premeditation and deliberation as this Court noted on direct appeal from his conviction in Flanagan I:

> The record contains overwhelming evidence that nineteen year old Flanagan and his co-defendants ***planned*** to kill the Gordons in an effort to obtain insurance proceeds and an inheritance. With the express purpose of killing the Gordon's, Flanagan and the others broke into the Gordon residence and accomplished their deadly objective. Flanagan I, 104 Nev. at 107.

XVII

DEFENDANT'S SEVENTEENTH CLAIM SHOULD BE DENIED BECAUSE ITS ARGUMENTS HAVE BEEN PREVIOUSLY REJECTED BY THE NEVADA SUPREME COURT, ARE BELIED AND REPELLED BY THE RECORD AND THEY ARE IMPROPERLY BEFORE THIS COURT

Defendant's seventeenth claim actually contained no claim of ineffective assistance of counsel in the district court (27 A.A., p. 6428), and thus is precluded from review because it is the type of claim that could have been raised in Defendant's direct appeal. Franklin, *supra*. The claim was properly summarily dismissed. Nevertheless, the claim discussed below illustrates that the issues lack merit and failing to pursue them could not form the basis of an ineffective assistance of counsel claim. Defendant's seventeenth claim is that his conviction is invalid because the District Court improperly instructed the jury during

Defendant's three (3) penalty hearings. Defendant alleges, *inter alia*, that the instructions precluded the jury from considering any type of sympathy during deliberations, incorrectly required jury unanimity regarding the aggravating and mitigating circumstances, and improperly instructed the jury about possible commutation of his sentence. However, Defendant's allegations have either been previously rejected by the Nevada Supreme Court, are belied and repelled or are so purely speculative in nature that they do not warrant review.

Defendant's first sub-claim is that the District Court precluded the jury's consideration of any type of sympathy when it gave the "Anti-Sympathy Instruction." Yet, the District Court followed established jury instructions regarding sympathy which have been endorsed as constitutional by the Nevada Supreme Court. The same argument Defendant now sets forth in his petition has already been rejected by the Court in Sherman v. State, 114 Nev. 998, 965 P.2d 903 (1998). The Court in Sherman decided that as long as the jury is given instruction to consider mitigating circumstances, the anti-sympathy instruction is proper. Id. The mitigating circumstances instruction was given in Defendant's trials. 25 A.A., p. 5952, 5954; 17 A.A., p. 4077; 13 A.A., p. 2977. Therefore, Defendant's contention is without merit.

Defendant goes on to assert that the District Court failed to properly instruct the jury about unanimity regarding their findings of aggravating and mitigating circumstances. Once again, this assertion contravenes existing case law. The Nevada Supreme Court has clearly ruled that during a penalty hearing, the jury instructions considered in their totality would not have instilled a unanimity requirement to find mitigating circumstances, but would have preserved a unanimity requirement for the finding of aggravating circumstances. Jiminez v. State, 112 Nev. 610, 624, 918 P.2d 687 (1996). The Court in Jiminez held that:

> In the end, each juror must have evaluated the juxtaposition of aggravating circumstances and mitigating circumstances in reaching the conclusion that the latter were not sufficient to outweigh the former. ... There was no constraint on the right of individual jurors to find mitigators, such as a requirement of unanimity or proof by a preponderance of the evidence or any other standard.

Id. See also Geary v. State, 114 Nev. 100, 952 P.2d 431 (1998); Hill v. State, 114 Nev. 169, 953 P.2d 1077 (1998). Defendant is not challenging his third penalty trial as the lack of unanimity for mitigating circumstances instruction was given to the jury in 1995. See 25 A.A., p. 5953. Defendant was given a second and third penalty trial, thus his contentions regarding the 1985 and 1989 instructions are moot. Therefore, Defendant's argument is not worthy of review by this court.

Defendant's next sub-claim is that the District Court failed to instruct the jury that there was no requirement to impose the death penalty. In this regard, Defendant's contentions are simply and directly contradicted by the case precedent addressing this issue. In Bennett v. State, 111 Nev. 1099, 1109, 901 P.2d 676 (1995), the case Defendant cites in his own petition, the Nevada Supreme Court upheld the nearly identical language present in this case (13 A.A., p. 2973; 17 A.A., p. 4075; 25 A.A., p. 5950) as adequately informing the jury that there was no requirement to impose the death penalty.[4] The Court very distinctly stated that:

> we conclude that the above jury instruction accurately informed the jury of their statutorily endowed prerogative to decide whether [defendant] would live, regardless of whether aggravating circumstances outweighed mitigating circumstances. "May" is clearly permissive in the context of NRS 175.554(3) and the instruction submitted to the jury.

Id. Only then did the Court go on to state that the gravity of the death penalty compelled the district courts to provide as much specificity to a jury as possible, but the Court never deemed the instruction given in Bennett to be inadequate. Thus, Defendant's argument is not only wrong, but any claim that "[t]he Nevada Supreme Court has acknowledged that the [aforementioned] instruction did not adequately convey to the jurors their ability to render a

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[4]The jury instruction in Bennett read in pertinent part:

> The jury may impose a sentence of death only if it finds at least one aggravating circumstance has been established beyond a reasonable doubt and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.
> Otherwise, punishment imposed shall be imprisonment in the state prison for life with or without the possibility of parole.

life sentence under any set of circumstances, and urged trial courts to 'henceforth provide instructions that will satisfy the concerns expressed herein...'" substantially misrepresents the holding of Bennett. Defendant is not challenging his third penalty trial as the no requirement to impose a sentence of death instruction was given to the jury in 1995. See 25 A.A., p. 5955. Defendant was given a second and third penalty trial, thus his contentions regarding the 1985 and 1989 instructions are moot.

Defendant further challenges the commutation instruction given to the jury as inadequate. See 13 A.A., p. 2972; 17 A.A., p. 4074; 25 A.A., p. 5949. This claim rests solely upon Defendant's machinations and speculations that the jury was too ignorant to understand the plain language of the instruction. Defendant's claim does not merit an evidentiary hearing and should be denied.

Lastly in this string of alleged errors, Defendant maintains that the District Court failed to appropriately instruct the jury regarding the application of the aggravating factors. This argument is repetitious of Defendant's claims fourteen and fifteen above. As such, the State would incorporate its response to those claims here, and Defendant's claims should be denied without an evidentiary hearing.

XVIII

AND

XIX

DEFENDANT'S EIGHTEENTH AND NINETEENTH CLAIMS SHOULD BE DENIED BECAUSE THEY ARE MOOT

Defendant next alleges in his following two (2) claims that errors occurred during the jury selection of the second penalty hearing. First he claims that the District Court forced him to use a peremptory challenge and that the District Court improperly removed a juror that was inclined not to impose the death penalty. However, even assuming that he is correct, the only remedy available to Defendant is that he would be granted a new penalty hearing. Defendant was in fact granted a third penalty hearing; thus, any allegations of error

regarding the jury selection during the second penalty hearing are moot and not deserving of review.

Defendant has not put forth any legal support for why Mr. Jacintho should not have been dismissed for cause in the third penalty hearing. This claim is without merit.

XX

DEFENDANT'S TWENTIETH CLAIM SHOULD BE DENIED BECAUSE IT LACKS MERIT AS A BARE/NAKED ALLEGATION, IS BELIED AND REPELLED BY THE RECORD AND IS MOOT

Defendant's ensuing claim is a mixed bag of allegations regarding the impartiality of the judges who presided over his trial and penalty hearings. While Defendant lists a number of grievances, the thrust of his complaints are against the trial judge, Judge Donald Mosley, for his alleged bias against Defendant. However, Defendant also attempts to indict Judge Addeliar Guy for his alleged bias during the third penalty hearing. Nevertheless, Defendant's argument is simply a collection of bare/naked allegations that lack merit and are moot to the extent that they refer to the first and second penalty hearings.

Defendant's allegations that "Judge Mosley was ultimately removed from the case because of his bias against [Defendant]" again smacks of ill-considered, imprudent claims by Defendant. The record of the case is crystal clear that Judge Mosley was found not to be biased or prejudiced against the defendants. After hearing oral arguments, then Chief District Court Judge Nancy Becker ruled that:

> [r]eview of the transcript of the proceedings of June 24, 1991 and the Affidavit of Judge Mosley shows that there is no actual prejudice or bias against any of the parties to this case. The comments of Judge Mosley only evidenced a dissatisfaction with the overall slowness of the appellate process in capital cases. The challenged comments, while not showing actual prejudice or bias, could be construed to give an appearance of prejudice. While appearance of prejudice is usually insufficient to require the disqualification of a District Court Judge, the history of this case and the fact that it is a capital case requires that an abundance of caution be exercised.

Thus, Defendant's careless allegation is clearly belied and repelled by the record. Hargrove, *supra.*

Furthermore, the comment asserted by Defendant regarding Judge Mosley was not in the presence of a jury, and was during the second penalty phase which was reversed.

Lastly, Defendant's claim that Judge Addeliar Guy was somehow biased against Defendant is again without merit and to a large extent moot. Defendant impugns Judge Guy for having a congenial manner with Deputy District Attorney Dan Seaton. Apparently Defendant would have every judge sterilize himself/herself from any type of personal contact with counsel that appears in court or any other court personnel for that matter. Regardless, Defendant fails to show how Judge Guy's disposition prejudiced him during the third penalty hearing, and therefore his claim is moot.

XXI

DEFENDANT'S TWENTY-FIRST CLAIM SHOULD BE DENIED BECAUSE ITS ARGUMENTS HAVE BEEN PREVIOUSLY REJECTED BY THE NEVADA SUPREME COURT

Defendant's next claim alleges that his death sentence is invalid because the Nevada capital punishment system operates in an arbitrary and capricious manner. However, the Nevada Supreme Court has long held that Nevada's use of the death penalty meets both federal and state constitutional requirements.

In Ybarra v. State, 100 Nev. 167, 174, 679 P.2d 797 (1984), the Court reviewed Nevada's death penalty statutes in light of United States Supreme Court opinions regarding similar statutes from Florida and Georgia. Citing Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976) and Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976), the Nevada Supreme Court ruled that:

> [s]ince our procedure for weighing aggravating and mitigating circumstances provides the sentencer with adequate information and guidance and the accused with sufficient guarantees that the penalty of death will not be imposed arbitrarily and capriciously, the challenged statute passes constitutional muster.

Id. 100 Nev. at 176. See also Hill v. State, 102 Nev. 377, 724 P.2d 734 (1986); Middleton v. State, 114 Nev. 1089, 968 P.2d 296 (1998). Thus, despite his impertinent assertions that "the Nevada capital punishment system provides no rational method for distinguishing

between who lives and who dies," Defendant's allegations are simply refuted by reasoned decisions of both the Nevada Supreme Court and the United States Supreme Court.

XXII

DEFENDANT'S TWENTY-SECOND CLAIM SHOULD BE DENIED BECAUSE IT IS BELIED AND REPELLED BY THE RECORD

Defendant, searching for the something that has not been previously reviewed in the fifteen (15) years after he was convicted, now claims that his conviction and sentence are invalid because the amended complaint did not fully apprise him of the charges against him. Defendant now contends that the amended complaint was "a masterpiece of generalities." Surprisingly, Defendant managed to go through a preliminary hearing in Justice Court, an entire trial, three (3) different penalty hearings, four (4) appellate reviews by the Nevada Supreme Court and two (2) writs of certiorari to the United States Supreme Court without ever knowing what crimes he had allegedly committed.

Clearly Defendant's allegations are belied and repelled by the record in this case where the amended complaint filed in open court on February 11, 1984 put him on notice of the charges against him. 1 A.A., p. 19-24; Hargrove, *supra*. Furthermore, at the subsequent preliminary hearing, Defendant heard all the evidence which was found sufficient to bind him up to the District Court on the charges in the amended complaint. Any problems with the complaint needed to be addressed in a pre-trial writ; Defendant has not presented any reason why this court should ever entertain this issue in a post-conviction writ. Defendant's claim is wholly without merit and completely devoid of any need for review by this court.

XXIII

DEFENDANT'S TWENTY-THIRD CLAIM SHOULD BE DENIED BECAUSE IT LACKS MERIT AS A BARE/NAKED ALLEGATION

Defendant next claims that his conviction and sentence are defective because he wasn't present during critical court proceedings. Notwithstanding his list of citations to the record, Defendant's assertions can only be described yet again as bare/naked allegations. Hargrove, *supra*. Moreover, Defendant does not demonstrate how his alleged absence

prejudiced him or his counsel who represented him. As has become commonplace, Defendant merely makes a blanket allegation with the hopes of gaining some type of judicial review. However, even assuming that Defendant's claim is true, a defendant's absence from preliminary matters or hearings does not necessarily prejudice him. See Thomas v. State, 114 Nev. 1127, 967 P.2d 1111 (1998). Defendant also failed to make any claim of ineffective assistance of counsel with the district court in his petition that would even make this a proper claim for a post-conviction writ. Therefore, Defendant's claim was properly denied without the need for an evidentiary hearing.

XXIV

DEFENDANT'S TWENTY-FOURTH CLAIM SHOULD BE DENIED BECAUSE IT LACKS MERIT AS A BARE/NAKED ALLEGATION

Defendant's twenty-fourth claim is that his conviction and sentence are invalid because the District Court precluded public access to the trial by failing to have all the proceedings recorded or reported. Specifically, Defendant faults the District Court for conducting bench conferences that were not recorded because "substantial actions" were taken during these conferences. Still again, Defendant fails to provide any affidavit or offer of proof to support these allegations. Moreover, Defendant overlooks the fact that it is counsel's responsibility to make a record of all matters that may be future appellate issues. Nothing precluded counsel from making a record, outside the presence of the jury, of any decision or action taken by the District Court during a bench conference. In fact, the appellate record is replete with instances in which Atty. Pike and counsel for the co-defendants created such a record. Thus, Defendant's unsubstantiated allegations were properly denied without an evidentiary hearing.

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XXV

DEFENDANT'S TWENTY-FIFTH CLAIM SHOULD BE DENIED BECAUSE IT IS REPETITIOUS OF ARGUMENTS ALREADY ANSWERED BY THE STATE

Defendant's next claim is a conglomeration of all the previous allegations set forth in his petition. Defendant asserts that even if the individual claims themselves are not compelling enough to justify some type of relief, the whole collection of allegations had a "cumulative effect" to merit some remedy. Having previously answered Defendant's individual claims, the State would direct the court to those responses and maintain that either individually or collectively, Defendant's allegations do not merit relief and were properly denied without an evidentiary hearing. As Chief Justice Gunderson observed in his dissenting opinion in LaPena v. State, 92 Nev. 1, 14, 544 P.2d 1187 (1976), "nothing plus nothing plus nothing is nothing."

XXVI

AND

XXVII

DEFENDANT'S TWENTY-SIXTH AND TWENTY - SEVENTH CLAIMS SHOULD BE DENIED BECAUSE THEIR ARGUMENTS HAVE BEEN PREVIOUSLY REJECTED BY THE NEVADA SUPREME COURT

Defendant's next two (2) claims allege that his death sentence is invalid because it violates both the federal and state constitutional guarantees against cruel and unusual punishment. However, despite Defendant's recitation of death sentences poorly carried out in other jurisdictions, none of those cases stand for the proposition that death by lethal injection violates constitutional guarantees against cruel and unusual punishment. Moreover, his claims have already been heard and rejected by the Nevada Supreme Court.

In Bishop v. State, 95 Nev. 511, 517-18, 597 P.2d 273 (1979), the Court ruled that the Nevada death penalty statutes were in conformance with other death penalty statutes that had been upheld by the United States Supreme Court. Moreover, the Court specifically held that "[t]he imposition of the death penalty...offends neither the United States Constitution nor the

Nevada Constitution." Id. at 518. See also Colwell v. State, 112 Nev. 807, 919 P.2d 403 (1996); Bennett v. State, 106 Nev. 135, 787 P.2d 797 (1990); Rogers v. State, 101 Nev. 457, 705 P.2d 664 (1985).

Additionally, while the Nevada Supreme Court has not specifically ruled on whether death by lethal injection, as opposed to other forms of capital punishment, violates state and federal constitutional guarantees against cruel and unusual punishment, nearly all the jurisdictions that Defendant cited in his petition to the district court have ruled that death by lethal injection is not cruel and unusual punishment. See Fairchild v. State, 286 Ark. 191, 690 S.W.2d 355 (1985)(Defendant actually chose to be executed by lethal injection instead of by electrocution); Ex Parte Granviel, 561 S.W.2d 503 (Tex.Crim.App. 1978)(Appeals Court held lethal injection does not violate Eighth Amendment); Romano v. State, 917 P.2d 12 (Okla.Crim.App. 1996)(same); People v. Stewart, 121 Ill.2d 93, 520 N.E.2d 348 (1988) (same); Harrison v. State, 644 N.E.2d 1243, 1258 (Ind. 1995)(Court recognizes "the strong national trend toward lethal injection as the most appropriate form of capital punishment"); McConnell v. State, 120 Nev. ----, 102 P.3d 606 (2004). Accordingly, Defendant's claims of cruel and unusual punishment regarding the death penalty and lethal injection should be denied.

XXVIII

DEFENDANT'S TWENTY-EIGHTH CLAIM SHOULD BE DENIED BECAUSE THE ARGUMENT IS PREMATURELY RAISED

Defendant alleges next that his sentence is invalid because he may become incompetent to be executed even though he is not presently incompetent nor does he evidence any indication of pending incompetence. In support of his argument, Defendant cites to Martinez-Villareal v. Stewart, 118 F.3d 628 (1997) for the proposition that "a claim anticipating incompetence to be executed must be raised in an initial petition for writ of habeas corpus." However, Defendant's reliance upon Martinez-Villareal is misplaced.

In Martinez-Villareal, the Ninth Circuit Court of Appeals held that a defendant's competency claim had to be raised in his first federal habeas petition. Id. at 634. The claim

would then be considered premature due to the automatic stay that's issued when a first federal petition is filed. Id. The Ninth Circuit then opined that once the state issues a second warrant of execution, then the state court could consider the ripe competency claim which could be followed by federal review of the same issue and only that issue. Id. Thus, Defendant's competency claim, designed only to protect it against any later waiver argument by the State, is acutely premature and misinterprets the holding of Martinez-Villareal.

XXIX

DEFENDANT'S TWENTY-NINTH CLAIM SHOULD BE DENIED BECAUSE IT IS GOVERNED BY THE "LAW OF THE CASE" DOCTRINE

Defendant's following claim is that his conviction and sentence are unreliable because of the District Court's failure to sever Defendant's case from his co-defendants which resulted in the admission of inadmissible evidence. Defendant again refers to the so-called "witchcraft evidence" introduced by a co-defendant and referenced by the State. However, Defendant also again fails to recognize that this issue has already been decided by the Nevada Supreme Court. Moreover, Defendant's essentially repeating the same argument made in **Section III** of this petition to which the State has already responded.

In Flanagan IV, the Nevada Supreme Court held that a harmless error analysis was appropriate when considering the admission of the so-called "witchcraft evidence" during the trial. Flanagan IV, 112 Nev. at 1418-1421. The Court ruled that because there was "overwhelming evidence" against Defendant, any admission of such evidence was harmless at best. Flanagan IV, 112 Nev. at 1420. It should be noted that severance was one of the other issues determined to be without merit in Flanagan I without a detailed analysis. Thus, based on the "law of the case" doctrine set forth in Hall, *supra*, the Court has already decided this issue, and therefore, this Honorable Court need not review Defendant's claim.

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XXX

DEFENDANT'S ARGUMENT HAS BEEN PREVIOUSLY REJECTED BY THE NEVADA SUPREME COURT AND IS IMPROPERLY BEFORE THIS COURT

Defendant contends next that his sentence is defective because Nevada has no effective mechanism for clemency in capital cases. Defendant alleges that because the State Board of Pardons Commissioners has not commuted a death sentence since 1973 the entire Nevada capital punishment system is unconstitutional. Yet again, Defendant's argument has been previously made to and rejected by the Nevada Supreme Court. Furthermore, such a claim is not appropriate for a petition for writ of habeas corpus.

In Colwell v. State, 112 Nev. 807, 812-13, 919 P.2d 403 (1996), the Nevada Supreme Court addressed a related issue when it considered whether NRS 213.085[5] rendered the Nevada death penalty scheme unconstitutional by denying clemency. Finding that clemency encompassed the powers to commute a sentence or to pardon a defendant, the Court ruled that "NRS 213. 085 does not completely deny the opportunity for 'clemency' ....but rather modifies and limits the power of commutation." Id. Therefore, Defendant's "no mechanism for clemency" argument lacks merit as it did in Colwell.

Furthermore, as mentioned beforehand, Defendant's allegation is the type that should have been raised in any one of Defendant's direct appeals to the Nevada Supreme Court. Franklin, *supra*. Consequently, Defendant's claims are improperly before this court and should be denied.

XXXI

DEFENDANT'S THIRTY-FIRST CLAIM SHOULD BE DENIED BECAUSE ITS ARGUMENT CONSISTS OF BARE/NAKED ALLEGATIONS

Defendant now contends that his conviction and sentence are invalid because jurors allegedly saw him in shackles, and the District Court permitted the presence of armed guards in the courtroom. Neither of these claims warrants judicial review, much less an evidentiary hearing, based on existing Nevada case law and even the Ninth Circuit case cited by the Defendant. Moreover, Defendant's claims once again lack any substantiation, and therefore consist solely of bare/naked allegations that do not merit an evidentiary hearing.

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[5]NRS 213.085 reads in pertinent part:

> 1. If a person is convicted of murder of the first-degree before, on or after July 1, 1995, the board shall not commute:
>
> (a) A sentence of death;
>
> (b) A sentence of imprisonment in the state prison for life without the possibility of parole, to a sentence that would allow parole.
>
> 2. If a person is convicted of any crime other than murder of the first degree on or after July 1, 1995, the board shall not commute:
>
> (a) A sentence of death;
>
> (b) A sentence of imprisonment in the state prison for life without the possibility of parole, to a sentence that would allow parole.

Defendant claims that a juror saw him briefly in shackles once when he entered the courtroom before his shackles had been removed. 30 A.A., p. 7137. Even if true, a brief glimpse such as this during the trial in 1985 does not warrant relief for Defendant. The issue is procedurally barred and no prejudice can be shown.

Furthermore, Defendant's reliance upon Rhoden v. Rowland, 172 F.3d 633 (9th Cir. 1999) is inaccurate. In Rhoden, the Ninth Circuit Court of Appeals considered whether a defendant who "was shackled during the entire course of his trial...[where] the shackles were visible from the jury box" violated his rights to an impartial jury. Id. at 634. (Emphasis added). Clearly, Defendant's alleged shackling is vastly different from that of the defendant in Rhoden. Moreover, the prejudice arising from one supposed instance of a juror viewing him in shackles is refuted by the Rhoden opinion itself. Citing to United States v. Olano, 62 F.3d 1180, 1190 (9th 1995) and other Ninth Circuit cases, the Court of Appeals in Rhoden noted that "[a] jury's brief or inadvertent glimpse of a defendant in physical restraints outside of the courtroom has not warranted habeas relief." Rhoden 172 F.3d at 636.

Additionally, Defendant's argument that the presence of armed guards in the courtroom impermissibly influenced the jury is the same contention he had in **Section IV(a)**. This argument is refuted by the holding of McKenna v. State, 114 Nev. 1044, 968 P.2d 739, 743 (1998) in which the Nevada Supreme Court concluded that no actual prejudice to the defendant had been shown by the presence of SWAT officers in the courtroom. Thus, Defendant's claims are meritless and were properly denied without an evidentiary hearing.

XXXII

DEFENDANT'S THIRTY-SECOND CLAIM SHOULD BE DENIED BECAUSE ITS ARGUMENT IS IRRELEVANT TO A PETITION FOR WRIT OF HABEAS CORPUS AND IS IMPROPERLY BEFORE THE COURT

Defendant's next groundless claim is that his conviction and sentence are invalid because he was denied an impartial tribunal due to the fact that trial and appellate judges in Nevada are elected and not appointed. Not only does this claim lack merit and implicitly

condemn the entire Nevada judicial system, but it also is an inappropriate matter to be raised in a post-conviction petition. See Franklin, *supra.*

Defendant argues his sentence violates the constitutional guarantees of due process of law, equal protection of the laws and a reliable sentence because his trial and review were conducted by popularly elected judges. However, this Court has found that a defendant in a capital murder prosecution is not prejudiced by having a popularly elected trial judge. Haberstroh v. Warden, Nevada State Prison, 119 Nev. 173, 182, 69 P.3d 676, 685 (2003). Judges who are elected are not per se hostile to the defense. Id. In addition, a judge is presumed to be not biased and the burden is on the party making the challenge to show that a judge will not be fair in carrying out their duties. Goldman v. Bryan, 104 Nev. 644, 764 P.2d 1296 (1988). The mere general allegation that judges are impartial based on the fact that they are elected does not come anywhere close to overcoming the presumption that judges are unbiased.

Moreover, this Court's impartiality is easily demonstrated by the fact that it has vacated numerous sentences of death. See, e.g., Servin v. State, 117 Nev. 775, 32 P.3d 1277 (2001)(sentence of death vacated); Geary v. State, 112 Nev. 1434, 930 P.2d 719 (1996)(death sentence vacated and remanded for a new penalty hearing); Jones v. State, 101 Nev. 573, 707 P.2d 1128 (1985). Defendant's claim is meritless and must be denied.

XXXIII

DEFENDANT'S THIRTY-THIRD CLAIM SHOULD BE DENIED BECAUSE IT FAILS TO MAKE AN ANALYSIS PURSUANT TO STRICKLAND

Defendant next contests his sentence as invalid because counsel failed to challenge for cause jurors in the second and third penalty hearings. To the extent that Defendant refers to any alleged errors regarding the second penalty hearing, these assertions are moot as Defendant was granted a third penalty hearing. With regard to the rest of his allegations pertaining to jurors in the third penalty hearing, Defendant fails to conduct any sort of analysis in light of the Strickland standard to show that he was prejudiced.

Defendant cites to the record during jury *voir dire* and selection to illustrate that some jurors had distinct feelings and views about the death penalty. However, while he notes that nearly all of these jurors were removed via peremptory challenge, Defendant neglects to include any analysis which explains how the exercise of these peremptory challenges prejudiced him during the third penalty hearing. Instead, Defendant merely presumes that he could have selected a more favorable jury had these jurors been excused for cause. Such "tactical" decisions have been held to be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 848. Furthermore, this court should seek to avoid "the distorting effects of hindsight" when reviewing claims of ineffective assistance of counsel. Kirksey, 112 Nev. at 987-988. Thus, Defendant's claim was properly denied without an evidentiary hearing.

XXXIV

AND

XXXV

AND

XXXVI

DEFENDANT'S THIRTY-FOURTH, THIRTY-FIFTH AND THIRTY-SIXTH CLAIMS SHOULD BE DENIED BECAUSE THEIR ARGUMENTS ARE IRRELEVANT TO A PETITION FOR WRIT OF HABEAS CORPUS AND ARE IMPROPERLY BEFORE THE COURT

Finally, Defendant makes allegations in his last three (3) claims that his conviction and sentence are invalid because the State has allegedly violated international law and has egregiously detained Defendant for a period of more than twenty (20) years. To the extent that Defendant claims the State violated international law, the treaties cited by Defendant are not controlling authority in Nevada and are therefore irrelevant to a post-conviction petition. Furthermore, Defendant fails to acknowledge that when ratifying the International Covenant on Civil and Political Rights in 1992, the United States' Senate reserved the right to impose capital punishment on any person (other than a pregnant woman) including persons below eighteen years of age. See Servin v. State, 117 Nev. 775, 787, 32 P.3d 1277, 1286 (2001).

A Defendant will not be heard to complain of delays that he has caused. Woods v. State, 94 Nev. 435, 581 P.2d 444 (1978); Williams v. State, 93 Nev. 405, 566 P.2d 417 (1977); Stabile v. Justice Court, 83 Nev. 393, 432 P.2d 670 (1967). Similarly, Defendant's allegation that the State's pursuit of justice over the past twenty (20) years, largely because Defendant has sought to exhaust every conceivable remedy under state and federal law, has somehow been cruel and unusual punishment obviously ignores the overwhelming evidence of his guilt in the murder of his grandparents in 1984. Such outrageous claims by a convicted murderer insult the Nevada judicial system and the citizens of the State of Nevada who have paid for Defendant's remorseless behavior time and again.

CONCLUSION

For the foregoing reasons, this Honorable Court should deny Defendant's appeal and affirm his conviction and sentence of death.

Dated this 31st day of October 2005.

DAVID ROGER
Clark County District Attorney
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BY _____
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CERTIFICATE OF COMPLIANCE

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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 31st day of October 2005.

DAVID ROGER
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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief to the attorney of record listed below on October 31, 2005.

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