IN THE SUPREME COURT OF THE STATE OF NEVADA

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MARLO THOMAS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 40248

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

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STATEMENT OF THE ISSUES

1. Whether the Defendant received effective assistance of counsel during the trial and penalty phase.
2. Whether the Defendant received effective assistance of counsel during the appellate phase.
3. Whether the Nevada Supreme Court conducted a proper and adequate appellate review.
4. Whether the Defendant was tried by an impartial jury.
5. Whether the District Court properly denied the Defendant a full evidentiary hearing on his Petition for Writ of Habeas Corpus (Post-Conviction).

STATEMENT OF THE CASE

Marlo Thomas, hereinafter "Defendant," was charged by way of Information filed July 2, 1996, with Conspiracy to Commit Murder and/or Robbery; Murder with Use of a Deadly Weapon; Robbery with Use of a Deadly Weapon; Burglary While in Possession of a Firearm; and First Degree Kidnaping with Use of a Deadly Weapon in connection with the April 15, 1996, stabbing deaths of Matthew Gianakis and Carl Dixon. (Appellant's Appendix (AA), pg. 1-7). The State filed a Notice Of Intent To

Seek Death Penalty setting forth numerous aggravating circumstances on July 3, 1996. (AA, pg. 8-10).

Defendant entered a plea of not guilty to all charges on July 10, 1996. (AA, pg. 265). Subsequently, on June 16, 1997, trial commenced before the Honorable Joseph T. Bonaventure, District Court Judge. (AA, pg. 273). The jury returned on June 18, 1997, with a verdict of guilty of Count I: Conspiracy to Commit Murder and/or Robbery; Count II: Murder of the First Degree with Use of a Deadly Weapon; Count III: Murder of the First Degree with Use of a Deadly Weapon; Count IV: Robbery with Use of a Deadly Weapon; Count V: Burglary While in Possession of a Firearm; Count VI: First Degree Kidnaping with Use of a Deadly Weapon. (AA, pg. 274).

A penalty hearing was held on June 25, 1997, and the jury returned with a verdict of death on Count II: Murder of the First Degree with Use of a Deadly Weapon and a verdict of death on Count III: Murder of the First Degree with Use of a Deadly Weapon. (AA, pg. 275).

On August 25, 1997, Defendant was sentenced to Count I: a term of one hundred twenty (120) months maximum with a minimum of forty-eight (48) months; Count II: death; Count III: death; Count IV: one hundred eighty (180) months maximum with a minimum of seventy-two (72) months with an equal and consecutive term of one hundred eighty (180) months maximum with a minimum of seventy-two (72) months for weapon enhancement, consecutive to Count I; Count V: one hundred eighty (180) months maximum with a minimum of seventy-two (72) months, consecutive to Count IV; Count VI: life without the possibility of parole with an equal and consecutive life without the possibility of parole for weapon enhancement consecutive to Count V. (AA, pg. 276-277). A Judgment of Conviction was filed on August 27, 1997. (AA, pg. 33-35).

Defendant filed his timely Notice of Appeal on September 9, 1997. The Defendant's direct appeal was denied on November 25, 1998, and the conviction and sentence of death was affirmed. (AA, pg. 43-70); *see also* Thomas v. State, 114 Nev.

1127, 967 P.2d 1111 (1998). A Petition for Writ of Certiorari was filed with the United States Supreme Court and denied on October 4, 1999. *See* Thomas v. Nevada, 528 U.S. 830, 120 S.Ct. 85 (1999).

On January 6, 2000, the Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction) alleging that he had been denied effective assistance of trial and appellate counsel. (AA, pg. 36-42). On July 16, 2001, the Defendant filed a Supplemental Petition for Writ of Habeas Corpus and Points and Authorities in Support Thereof. (AA, pg. 71-147). After hearing argument on the issues raised, the District Court granted the Defendant a limited evidentiary hearing. (AA, pg. 283-284).

On August 21, 2002, the Court announced its decision on the record. (AA, pg. 252-254). On September 10, 2002, the Findings of Fact, Conclusions of Law, and Order Denying the Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) were filed. (AA, pg. 234-249).

The Defendant filed a Notice of Appeal on September 18, 2002. (AA, pg. 250-251).

STATEMENT OF THE FACTS

A. Overwhelming Evidence of Guilt

On April 15, 1996, two employees of the Lone Star Steakhouse were working in the pantry area of the restaurant preparing the meals when Defendant with his Smith & Wesson revolver entered the restaurant, robbed the manager and murdered two kitchen workers. Defendant, a former employee of the restaurant, approached Stephen Hemmes, another pantry worker, as he was exiting the restaurant. (4 RA 558-562)[1]. Fortunately, Stephen Hemmes was sent home shortly before the murders by the manager of the restaurant to change his open-toed shoes to more appropriate kitchen attire. (4 RA 557). After minimal conversation was exchanged, Defendant and fifteen

[1] Respondent's Appendix, which consists of the trial transcript and was not designated by the Appellant.

year old Kenya Hall, hereinafter "Hall", entered the restaurant going past the pantry area directly to the manager's office. (4 RA 562). Thereafter, Defendant pointed the barrel of the gun at Vincent Oddo, the manger, and demanded he open the safe. (4 RA 581-584). After the manager began to comply, Defendant handed the gun to his young accomplice, and instructed him to kill Mr. Oddo after the safe was opened. (4 RA 845).

The evidence at trial revealed that Defendant then entered the kitchen area, grabbed a large meat-cutting knife and stabbed Matthew Gianakes once in the left back, striking his left lung. (4 RA 722-724). As the victim turned around, he received a second stab wound, striking the heart. (4 RA 722-724). Subsequent to the attack, Mr. Gianakes ran from the restaurant to a nearby gas station where he eventually collapsed stating, "I work at the Lone Star. I've just been stabbed." (4 RA 618).

During Mr. Gianakes' attack, the manager had turned over the money in two Bank of America bags to Kenya Hall. (4 RA 586). Fortunately, Kenya Hall failed to abide by Defendant's instructions; the manager was permitted to leave the restaurant. (4 RA 589). Vince Oddo took off running after he turned over all the money and immediately ran to a nearby shopping center to telephone the police. (4 RA 589).

Meanwhile, Defendant, taking the same knife that he used to kill Matthew Gianakes, entered the men's restroom and confronted Carl Dixon, the other kitchen worker. Carl Dixon fought for his life. In total, he received nineteen stab wounds to his upper torso. (4 RA 710). Mr. Dixon bled to death and died in the men's bathroom. (4 RA 713).

Following the attack, Defendant, his wife, and Hall immediately drove to their relative's house. As he spoke to his aunt (Emma Nash) and his cousin (Barabra Smith), Defendant had blood smeared across his pants. (4 RA 685). He told his cousin that he had to "get rid of two people." (4 RA 686). In addition, after the money had been counted, he gave his cousin a thousand dollars, indicating that he should give the money to his mother. (4 RA 689). He also gave the Smith & Wesson revolver

to his aunt and instructed her to give it to her son Matthew. (4 RA 674). Thereafter, the bloody clothes and a knife were thrown into the desert area located in Emma Nash's backyard. (4 RA 688). Defendant, his wife, and Hall immediately took off for Hawthorne, Nevada. (4 RA 833, 859).

Meanwhile, a criminalist and police detectives responded to the Lone Star restaurant. (4 RA 624-632). A small pool of blood was found near the freezer in the pantry area. (4 RA 634). In addition, bloody smear marks were observed in the men's restroom on the walls and the partitions of the urinal. (4 RA 637). Carl Dixon was on his back, dead at the scene. (4 RA 637). Later that afternoon, Nevada Highway patrolmen spotted Defendant, Angela-Love Thomas and Hall near Hawthorne, Nevada. (4 RA 737). Their vehicle was pulled over and all three individuals were placed under arrest. (4 RA 738).

Vincent Oddo testified at trial that after being robbed as he was exiting the office, he heard Matthew Gianakis screaming in the pantry area of the restaurant. (4 RA 587). He further identified the knife confiscated from the desert outside Defendant's aunt's home as the same knife he used to trim tenderloins in the Lone Star kitchen on the morning of the murders. (4 RA 603). It had a black handle, about a six-inch blade, and possessed similar markings. (4 RA 603-604). Additionally, Mr. Oddo identified the revolver confiscated from the desert as the same gun Defendant used to rob him. (4 RA 601).

Stephen Hemmes additionally testified at trial that when he came into contact with Defendant outside of the restaurant he asked him what he was doing back at the Lone Star. (4 RA 560). Defendant replied that he was going to attempt to get his old job back. (4 RA 560). Defendant further asked Mr. Hemmes who was the manger working that morning. (4 RA 561). After Mr. Hemmes said Vince Oddo was the manager, Defendant called him a "dickhead". (4 RA 562). After Mr. Hemmes returned to the restaurant, he informed the police that Defendant had been at the restaurant a short time earlier. (4 RA 565).

Emma Nash testified that at around 7:00 a.m., she saw Defendant, his wife, and Kenya Hall at her daughter's house where she was staying. (4 RA 664). Thereafter, they left and returned at approximately 9:00 a.m. (4 RA 664). During this encounter, Defendant told Ms. Nash on two occasions, "You haven't seen me." (4 RA 665). Ms. Nash also observed her daughter counting a lot of money that appeared "bloody". (4 RA 666). Moreover, she stated at trial that Defendant told her that he was in trouble. (4 RA 673). When Nash asked Defendant if anybody was hurt, he responded that one got away and that he hoped that he died. (4 RA 674). Defendant also showed Ms. Nash the gun and instructed her to give the weapon to her son Matthew. (4 RA 674). Ms. Nash also observed Defendant throw a bag into the desert area behind her house. (4 RA 676).

Barbara Smith testified that Defendant changed his clothes in the bathroom of her house. (4 RA 687). Ms. Smith also noted that as Defendant exited the bathroom he carried a bundle of clothes with him and took them to her backyard. (4 RA 688). She later learned that Defendant had given money to her son Patrick to switch shoes with him. (4 RA 690). Ms. Smith also informed the jury that Defendant instructed her on the day of the murders that if anyone asked her any questions she was supposed to say that she had not seen Defendant. (4 RA 690).

Wade Spoor, senior crime scene analyst at the Las Vegas Metropolitan Police Department, testified that he recovered several items from the desert area behind Smith's residence including: a pair of blood stained denim shorts; a pair of blood stained white Nike athletic shoes; and a blood stained steak knife with about a five and a half inch blade. (4 RA 694). Moreover, Detective Michael Jefferey Bryant testified that he recovered a revolver from Emma Nash's nephew. (4 RA 757). Bryant further testified that Emma Nash acknowledged that this was the gun Defendant gave to her. (4 RA 757).

David Lee Bailey, a trooper with the Nevada Highway Patrol, testified that after the Defendant's automobile was stopped close to Hawthorne, Nevada, and all three

passengers were arrested, he subsequently interviewed Kenya Hall. (4 RA 740). Trooper Bailey knew Hall personally from coaching the track team at the local high school. (4 RA 740). At trial, the Preliminary Hearing transcript of Hall's testimony was read into the record. (4 RA 792). The testimony revealed the following: that he observed Defendant loading the gun prior to entering the Lone Star restaurant (4 RA 814); that Defendant instructed him to shoot Vincent Oddo in the back of the head after he had taken all the money (4 RA 845); that as he exited the manager's office after the robbery, he observed Defendant fighting with one of the restaurant employees (4 RA 823); that Defendant told his wife after the fleeing from the scene of the crime that he had "killed a guy" with a knife and had been in a fight with a second guy using the same weapon (4 RA 828-829); that he told Patrolman Bailey that Defendant confessed to stabbing one of the men in the bathroom and that he stabbed the other man in the heart (4 RA 849); that Defendant instructed Hall to throw the knife in the desert behind Smith's house, and he complied (4 RA 831); and that Defendant told Hall that he had thrown his blood stained clothes out into the desert area. (4 RA 831).

Detective David Meisner testified that he videotaped an interview with Defendant where Defendant admitted the following facts: that he and Hall entered the Lone Star restaurant on April 15, 1996 with two loaded revolvers; that he pointed a gun at Vincent Oddo and subsequently robbed him; that he handed the gun to Hall and left the office to quiet Gianakis and Dixon; that he found the victims in the bathroom and prevented them from leaving the area; that he stabbed Carl Dixon at least five or six times; and that he stabbed Matthew Gianakis once in the stomach. (Videotaped Confession, State's Exhibit No. 82).

Yolanda McClary, a crime scene analyst for the Metropolitan Police Department, testified that a search of Defendant's vehicle revealed that a pillowcase filled with money was recovered from the trunk of the car. (4 RA 750). Moreover, Criminalist Terry Cook testified that the blood on the recovered shoes was consistent

with that of victim Carl Dixon. (4 RA 770). He also testified that the blood on the knife was consistent with victim Michael Gianakis. (4 RA 776).

Chief Medical Examiner Giles Sheldon Green and Deputy Medical Examiner Robert Jordan first performed the autopsy on Carl Dixon. (4 RA 707). They noted that the victim had close to fifteen defensive wounds to his arms, his forearms and his hands. (4 RA 711). These were cutting wounds that Mr. Dixon received when he was attempting to fend off his killer. There were a total of nineteen stab wounds to the victim's body. (4 RA 710). Dr. Green determined that Mr. Dixon died from the multiple stab wounds to his upper torso. (4 RA 713).

Shortly thereafter, Dr. Jordan performed the autopsy on Matthew Gianakes which revealed that the victim had suffered a stab wound to the back. (4 RA 722-724). In addition, Mr. Gianakes' cause of death resulted from stab wounds to the chest and back. (4 RA 724).

B. Jury Trial

1. Empaneling of the Jury

On June 16, 1997, the Court empaneled a jury for the trial of Marlo Thomas. Among those citizens who were prospective jurors were Fellton Cross, Willie Luster, Frankie Sheppard, and Kevin Evans. These four prospective jurors were all of African-American descent.

During voir dire, Mr. Cross told the Court, "Even if I was selected as a juror, I wouldn't pass judgment. I wouldn't even comment on it." (5 RA 1032). Mr. Cross explained that the Bible states that people are not to judge other people, and stated that he could not vote for the death penalty. (5 RA 1032). Accordingly, the State challenged the juror for cause, and the Defendant did not object. (5 RA 1033). Based on this challenge, Fellton Cross was dismissed from being a member of the jury.

A short time later, prospective juror Willie Luster was questioned by the Court. Mr. Luster stated that he would not be able to consider sentencing a man that took two lifes to a sentence of life with the possibility of parole. (5 RA 1083). Specifically,

Mr. Luster stated "Because I think he – once he's taken a life he – he shouldn't be free again." (5 RA 1083). After having the law regarding sentencing explained to him by the Court, Mr. Luster declared, "I don't agree with the law." (5 RA 1083). Upon hearing these statements, Mr. LaPorta, the Defendant's attorney, challenged the juror for cause. (5 RA 1084). The State did not oppose this challenge, and the juror was dismissed. (5 RA 1084).

Frankie Sheppard was also called to be a prospective member of the jury in this case. After being questioned by the District Court, Mr. Sheppard explained, "I have a little hard time with the death penalty.... I just don't want to see – be responsible of anyone's death." (5 RA 1138). The State challenged the juror for cause, and the Defendant's attorneys had no objection. (5 RA 1138). Accordingly, this juror was dismissed.

Prospective juror Kevin Evans was called a short time later. After responding to the voir dire questions, Mr. Evans was retained as a member of the jury. (5 RA 1161). However, the State elected to utilize one of its peremptory challenges to exclude Mr. Evans. (5 RA 1162). At this time, the Defendant's attorneys argued that using this challenge on the only African-American jury member constituted a Batson violation. (5 RA 1162-1163).

Pursuant to the court's directive, the State clarified its race-nuetral reasons for seeking to exclude Mr. Evans from service on the jury. (5 RA 1163). The State explained that Kevin Evans was a twenty-two year old man who lived at home and had not had to face the very significant decision that he would be required to make in this case. (5 RA 1164). Additionally, the State felt that Kevin Evans had expressed a very cavalier attitude in the courtroom, demonstrated by his chewing gum during the entire proceeding. (5 RA 1164). The State further explained that Mr. Evans hesitated when he was asked if he could vote for the death penalty. (5 RA 1164). After hearing argument from the Defendant's attornies, the Court allowed the peremptory challenge,

determining that many times prosecutors want to exclude young men and want to have older people on the jury. (5 RA 1167).

2. The State's Opening Statement

During the prosecution's initial statements, the State explained to the jury the nature of the crimes it was going to prove during the trial. In describing the horrific details of this event, the State offered the following background description:

> Monday, April 15th, 1996, was a very dark day for two young men. Carl Dixon, twenty-three years of age, Matthew Gianakes, age twenty-one, were prep room workers at the Lone Star Steakhouse. This is located at 3131 North Rainbow at the corner of Cheyenne and Rainbow in the northwest area of town. There two young men went to work at 8:00 a.m. in order to prepare the meals for that day. They worked in the pantry area where they carved up the steaks and other meals which were supposed to be prepared ahead of time for that day. Little did these two young men know that something evil was lurking out in the parking lot, this evil person who is the defendant, Marlo Thomas.

(3 RA 542). Defense counsel did not object to this statement at the time it was made.

On September 26, 2001, the District Court reviewed this statement during the argument and decision on the Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). In regard to this statement, the Court determined,

> We as lawyers have been told to have all of our trial flow as a story and tell a story, and I would say that that's less inflammatory than colorful.

(AA, pg. 260). The Court also stated that defense counsel probably should have objected to the statement, but ruled that the failure to object did not reach the magnitude of an error that would require a new trial. (AA, pg. 261).

3. Defense Counsel's Opening Remarks

After the State concluded its opening argument, the District Court allowed the Defendant's counsel to make an opening statement. (3 RA 549). At that time, Mr. LaPorta waived the opportunity to make an opening statement, and decided to "reserve our opening for our case in chief." (3 RA 549).

4. Witness Emma Nash's "Back in Jail" Comment

During the presentation of its case in chief, the State called the Defendant's aunt, Emma Nash, to testify. (4 RA 662). During her testimony, she described a conversation that she had with the Defendant and her daughter on April 15, 1996. (4 RA 666). Specifically, Ms. Nash testified that:

> Marlo was sitting on the foot of the bed. My daughter was sitting at the head of the bed and when I got there, I noticed my daughter was also crying. So I asked her what was wrong with here. And she just started to continue crying and so I turned to Marlo and asked him to tell me what's wrong with her. Then I turned – then I asked – I said to him, 'Marlo, have you did something that would put you back in jail?'

(4 RA 667). After this comment, the parties held a conference at the bench. (4 RA 667).

After the jury was dismissed, defense counsel made a motion for a mistrial based upon the fact that Ms. Nash told the jury that the Defendant had been in jail. (4 RA 667). Additionally, defense counsel explained that the jury could infer from the statement that the Defendant served prior prison terms, and such an inference would be extremely prejudicial to the Defendant. (4 RA 668).

Upon questioning from the District Court, Ms. Nash stated that she had been warned by the District Attorneys not to mention anything about jail. (4 RA 670). After admonishing Ms. Nash not to discuss prior jail time, the Court decided to deny the motion for mistrial on the basis that the statement was inadvertent. (4 RA 671). However, the District Court informed defense counsel that it would be willing to provide an instruction to the jury if the defense requested that one be given. (4 RA 672).

In addition, the State asked whether the jury should be admonished when they returned to the courtroom. (4 RA 672). The Court allowed the defense counsel to decide if they wanted the admonishment. After consulting with co-counsel, Mr. LaPorta stated, "We don't ask for a curative instruction at this point." (4 RA 672).

5. Defense Counsel's Decision Not to Call Witnesses in its Case in Chief

After the State concluded its presentation of witnesses, the Court allowed the defense to present witnesses. (6 RA 1208). At that time, outside the presence of the jury, defense counsel informed the court, that with the exception of the Defendant, the defense had no witnesses to present. (6 RA 1208). Additionally, the Defendant told the Court that he did not want to testify on his own behalf. (6 RA 1208-1209).

The jury was returned to the courtroom, and the Court asked the defense if they were ready to proceed. (6 RA 1213). Defense counsel stated that would not be presenting any witnesses and rested their case. (6 RA 1213). The Court confirmed the Defendant's wishes by asking, "So you waive your opening statement and you rest at this time?" (6 RA 1213). Defense counsel responded affirmatively. (6 RA 1213).

6. Defense Counsel's Objection to Jury Instructions

At the conclusion of the testimony, the Court inquired if the parties objected to any of the instructions that the Court indicated would be given to the jury. (6 RA 1209). The State did not object to any of the instructions; however, defense counsel objected to all of the instructions. (6 RA 1209). In doing so, defense counsel explained:

> Your Honor, the defense objects to the instructions as a package, based upon the defendant's constitutional rights that we believe, that as a whole, the instructions violate the defendant's due process rights under the United States and the State of Nevada's constitution. That's the only objection we'll make, Your Honor.

(6 RA 1209). The State did not respond to the objection. (6 RA 1209). The District Court denied the Defendant's objection. (6 RA 1210).

During the argument and decision on the instant Petition for Writ of Habeas Corpus (Post-Conviction), the District Court noted that blanket objections do not constitute ineffective assistance of counsel, nor require a new trial or penalty phase. (AA, pg. 260).

7. Defense Counsel's Decisions Regarding Additional Jury Instructions

In settling the jury instructions, the District Court asked defense counsel if they requested the giving of any instructions in addition to those the Court had already indicated would be given. (6 RA 1210). In response to this question, defense counsel responded, "No, Your Honor, not outside of those that have already been accepted." (6 RA 1210).

In addition, defense counsel confirmed that that they did not want an instruction to be given which would explain that the law does not compel a defendant in a criminal case to testify. (6 RA 1210). Further, defense counsel explained to the court that they specifically did not request either voluntary or involuntary manslaughter to be included in the instructions. (6 RA 1210-1211).

C. Penalty Phase

On June 23, 1997, the District Court held a penalty hearing to allow the jury to determine the sentence for the two counts of murder with use of a deadly weapon that the Defendant committed. (6 RA 1324). In support of the six aggravating factors alleged, the State called a total of twenty (20) witnesses. In mitigation, defense counsel cross-examined the majority of these witnesses; called an additional five (5) witnesses; and had the Defendant provide an unsworn statement.

1. Defendant's Past Criminal Behavior

In support of the aggravating circumstances alleged, the State called numerous witnesses to demonstrate the Defendant's past criminal behavior. Officer Carlson was the first witness called to testify, and he explained his contact with the Defendant when the Defendant was age eleven. (6 RA 1341). The officer recounted an incident where the Defendant was engaged in a physical altercation with another student. (6 RA 1339). As the Defendant's teacher tried to separate the two individuals, the Defendant turned toward her and kicked her in the leg. (6 RA 1339). As a result of the battery, Officer Carlson arrested the Defendant. (6 RA 1340).

Richard Staley, a Las Vegas Metropolitan Police Officer, was also called. (6 RA 1484). Officer Staley testified that on June 4th, 1987, the Defendant stole bicycles from two different junior high schools. (6 RA 1486).

The State called Cathy Barfuss-Frazier, who was employed as an undercover security guard at a local mall on August 12, 1988. (6 RA 1343). On that date, a group of six juveniles, including the Defendant, were caught shoplifting. (6 RA 1344). When Ms. Barfuss-Frazier approached the Defendant, he punched her in the face. (6 RA 1344). The Defendant also punched a store manager who was nearby, knocking out one or two of his teeth. (6 RA 1344). After striking the two individuals, the Defendant fled to the parking lot. (6 RA 1345).

Ms. Barfuss-Frazier followed the Defendant on foot, and mall security approached in their vehicle. (6 RA 1345). The Defendant took control of the vehcicle and started driving erracticly through the parking lot and lodged the vehicle against a tree. (6 RA 1345). The Defendant escaped without being arrested on that occasion, but returned to the store two weeks later. (6 RA 1345). At that time, the Defendant was taken into custody. (6 RA 1346).

Next, the State called Alkareem Hanifa. (6 RA 1348). Mr. Hanifa testified that he was staying in a local hotel room when two individuals knocked on his door. (6 RA 1348). The individuals asked Mr. Hanifa if he was interested in purchasing crack cocaine. (6 RA 1348). Mr. Hanifa declined the offer, and attempted to close the door. (6 RA 1349). At that time, the Defendant and the other individual kicked the door open and began to beat up Mr. Hanifa. (6 RA 1350). While Mr. Hanifa was fighting with the other individual, the Defendant ran outside, grabbed a boulder, and threw it at Mr. Hanifa's head. (6 RA 1350). As a result of the brutal attack, Mr. Hanifa suffered a broken wrist, missing teeth, and bumps on his head. (6 RA 1350). Additionally, the Defendant stole Mr. Hanifa's wallet, which contained $350.00. (6 RA 1354).

The State also called Charles Hank, a sergeant with the Las Vegas Metropolitan Police Department. (6 RA 1355-1356). Sergeant Hank related an incident that

occurred on March 8, 1990. (6 RA 1356). While on patrol, Sergeant Hank noticed three individuals seated in a vehicle. (6 RA 1357). After running the license plate, Sergeant Hank determined that the vehicle was stolen. (6 RA 1357). As the officer approached the vehicle, the Defendant fled. (6 RA 1357). The Defendant was taken into custody by two other police officers, who removed a set of keys that fit the vehicle from the Defendant's pocket. (6 RA 1358).

As its next witness, the State called Officer Michael Holly from the North Las Vegas Metropolitan Police Department. (6 RA 1359). Officer Holly recounted an incident from August 10th, 1990, when he was dispatched to a local convenience store in response to a robbery. (6 RA 1359-1360). Upon arriving at the scene, Officer Holly spoke with an individual with a surname of Beltrane, who informed the officer that he had been robbed by two individuals at knifepoint. (6 RA 1361). While talking with the victim, the Defendant walked by, and the victim identified the Defendant. (6 RA 1360). The Defendant refused to stop and talk to the officer, and ran off. (6 RA 1360-1361). After a ten minute foot pursuit, the officer found the Defendant and arrested him for the robbery. (6 RA 1361).

As a result of this event, the Defendant was charged by way of Information with robbery with use of a deadly weapon. (6 RA 1366). As a plea negotiation in that case, the Defendant pled guilty to a reduced charge of attempted robbery and was given a six year sentence. (6 RA 1366).

Margaret Wood, an employee of the Nevada Department of Prisons, was the next witness called. (6 RA 1367). Ms. Wood recounted her experiences with the Defendant, while the Defendant was housed in Ely State Prison. (6 RA 1368). The majority of the incidents centered on the Defendant calling Ms. Wood disparaging names and exposing his penis to her. (6 RA 1369). During one particularly disturbing event, Ms. Wood gave the Defendant some cleaning supplies to clean his cell, including a cleaning brush. (6 RA 1369). When the Defendant finished cleaning his cell, Ms. Wood returned to retrieve the cleaning items. (6 RA 1369). The

Defendant placed the scrub brush in the food slot, and additionally placed his penis under the brush, in hopes that when Ms. Wood grabed the cleaning brush, she would grab his genetalia. (6 RA 1369). Ms. Wood filed a Notice of Charges against the Defendant for his actions. (6 RA 1369).

Additionally, the State called Officer Richard Johnson, a correctional officer at the Ely State Prison to recount his contacts with the Defendant. (6 RA 1396). Officer Johnson testified about an event that occurred on August 9th, 1993. (6 RA 1397). On this date, the Defendant was being uncooperative and began making threats towards the correctional officers. (6 RA 1397). The Defendant was placed in restraints and in an isolation cell to cool down. (6 RA 1397-1398). As the officers removed the restraints, the Defendant tried to punch the officers. (6 RA 1398).

Officer Johnson testified about other incidents involving the Defendant while he was incarcerated in prison. One event centered on the Defendant's attack of another inmate, and another was based on the Defendant's statements to a correctional officer to perform fellatio on him. (6 RA 1404-1405).

The State called another correctional officer from the Ely State Prison to describe several more occurrences involving the Defendant. Officer Roger Edwards testified about an event from April 27th, 1992, when the Defendant threatened a female correctional officer by stating, "I'm getting out and I'm coming to Ely and I'm going to kick your motherfucking whore ass, and you'll call me daddy." (6 RA 1426). Officer Johnson also discussed an event from April 3rd, 1993, where the Defendant hit another inmate with a chair. (6 RA 1427). Officer Johnson also discussed an incident where the Defendant filled a sock with five rocks and assaulted another inmate. (6 RA 1429). Finally, Officer Johnson related threats that the Defendant had made towards him. (6 RA 1435).

Next, the State called Officer Gina Morris from the Ely State Prison to testify. Ms. Morris recalled her experiences with the Defendant, and specifically remembered one disgusting event. (6 RA 1452). On April 12, 1994, Ms. Morris served the

Defendant food while he was in his cell. While she was handing the Defendant his food, the Defendant threw a cup of urine at Ms. Morris, hitting her in the face. (6 RA 1454).

As the next witness, Sergeant Marty Neagle was called to testify about yet another event at the Ely State Prison. (6 RA 1455). She testified that some other inmates had gotten into a fight while in the recreation yard. (6 RA 1459). As officers were attempting to gain control of the situation, she stated that the Defendant kept making comments attempting to entice the other inmates to assault the correctional officers. (6 RA 1461).

The State also called correctional officer Robert Sedlacek. (6 RA 1474). Officer Sedlacek recounted an event that occurred on December 30, 1994, involving the Defendant. (6 RA 1475). The officer testified that the Defendant began making threats towards the correctional officers and threw a punch at the officers. (6 RA 1476-1478).

As another witness at the penalty hearing, the State called a police officer for the Division of Family Youth Services, Alyse Hill. (6 RA 1379). Mrs. Hill told the jury about the Defendant's juvenile records, including an evaluation that was prrformed on July 25, 1990. (6 RA 1386). The evaluation form described the Defendant and stated that he "exhibited a total lack of commitment to changing his negative lifestyle, in that he lacks respect for authority, he's aggressive, he lacks impulse and temper control, and is perceived as being a threat to both himself and the community." (6 RA 1388).

The State then called Loletha Jackson, who became subject to the wrath of the Defendant on March 5th, 1996. On that date, the Defendant came to her residence and began arguing with another person in the house about missing rings. (6 RA 1493). Ms. Jackson testified that when she heard a gunshot during the argument, she took her five year old son and ran for cover in the bedroom of her house. (6 RA 1489). The Defendant came down the hallway toward the room and aimed the gun at her. (6 RA

1489-1490). Once he approached her, the Defendant beat Ms. Jackson unconscious and knocked out some of her teeth. (6 RA 1490). Upon regaining conciousness, Ms. Jackson recalled the Defendant stomping her chest. (6 RA 1490).

The State also called Mike Rodrigues, the North Las Vegas Metropolitan Police Officer who responded to this incident. (6 RA 1494-1495). Officer Rodrigues testified that the Defendant fired a shot into the room where Ms. Jackson and her five year son were hiding. (6 RA 1497). Additionally, the officer described the injuries suffered by Ms. Jackson as a result of this beating. (6 RA 1496).

As the next witness, the State called Department of Parole and Probation Officer Michael Compton. (6 RA 1502). Mr. Compton testified about the Defendant's 1984 juvenile conviction for battery. (6 RA 1505). Additionally, Officer Compton indicated that the Defendant had pled guilty to a charge of Attempt Robbery in 1990. (6 RA 1504). The Defendant received a sentence of six years in the Nevada State Prison for this crime. (5 RA 1509). In addition, Officer Compton testified that the Defendant pled guilty to the crime of battery with substantial bodily harm, and received a sentence of a maximum of sixty (60) months with a minimum parole eligibility of thirteen (13) months on July 12, 1996 (5 RA 1510, 1513). The witness also testified that on April 15, 1996, the date of the murder, the Defendant was a convicted felon for attempted robbery. (5 RA 1511).

Next, the State called Southern Desert Correctional Officer Paul Wheslock. (6 RA 1516). Mr. Wheslock recounted his experience with the Defendant on August 1, 1996. (6 RA 1516). At that time, the Defendant was incarcerated and became screaming racial obscenities toward Mr. Wheslock and his inmate work detail. (6 RA 1517). Mr. Wheslock attempted to discuss the incident with the Defendant, at which time the Defendant tried to punch the officer. (6 RA 1518).

As the final witness called to testify about the Defendant's prior criminal history, the State called Wendy Cecil. Ms. Cecil was a very close family friend of Carl Dixon. (6 RA 1521). Ms. Cecil recounted a conversation she had with Carl a

week before he was murdered. During the conversation, Carl informed Ms. Cecil that he had seen the Defendant stealing money from the steakhouse. (6 RA 1524). Carl stated that when the Defendant saw Carl watching him take the money, the Defendant he grabbed a knife and placed it against Carl's back. (6 RA 1524). The Defendant told Carl he would kill him if he told anyone about the theft. (6 RA 1524).

2. Victim Impact Testimony

As the final two witnesses the State introduced during the penalty hearing, the State called Fred Dixon and Alexander Gianakis to testify about the effect that the murders have had on their family.

Fred Dixon read a written statement from Carl's mother, describing wonderful memories she had of her son. (6 RA 1531 – 1533). She recounted his numerous academic achievements, and expressed the enourmous amount of pain she feels daily because of the actions of the Defendat. (6 RA 1531- 1533). Mr. Dixon described his son as his best friend and shared some stories about Carl with the jury. (6 RA 1533 – 1536).

Alexander Gianakis described the void left in his family's life by the senseless death of his twenty-one year son Matthew. (6 RA 1536 - 1538). Mr. Gianakis urged the jury to force the Defendant to face the consequences for his actions. (6 RA 1538).

3. Defense's Mitigation Witnesses

The first witness called by the defense was Linda McGilbra, the Defendant's aunt. (6 RA 1540). Ms. McGilbra told a story of her son Partick's experiences with the Defendant. When her son was in high school, the Defendant convinced Patrick to skip school with him. (6 RA 1541). As the two were walking through a neighborhood, a drive-by shooting occurred, and the bullet barely missed striking Patrick. (6 RA 1541). After this incident, the Defendant told Patrick to go back to school and to end his friendship with the Defendant. (6 RA 1542). Ms. McGilbra testified that these statements assisted her son in staying away from the problems that the Defendant encountered. (6 RA 1542).

As the next witness, the defense called the Defendant's mother, Georgia Thomas. (6 RA 1544). Ms. Thomas described the problems that her son encountered as a youth, including his problem with wetting himself. (6 RA 1546). Ms. Thomas additionally pled for her son's life, asking the jury to allow him to spend the rest of his life in prison. (6 RA 1548).

The defense also called the Defendant's older brother, Darrell Thomas. (6 RA 1549). Mr. Thomas offered a description of his younger brother's childhood and emotional problems. (6 RA 1550 – 1552). Additionally, Mr. Thomas asked the jury to look at the Defendant and realize that imposing a sentence of death would not help anybody. (6 RA 1555).

Next, the defense called Doctor Thomas Kinsora, a doctor in clinical psychology with a speciality in clinical nueropsychology. (7 RA 1566). Doctor Kinsora testified that he performed an assessment on the Defendant, reviewing information related to his education, prior problems with the law, family relations, and his early development. (7 RA 1574). The doctor explained to the jury the problems that the Defendant encountered as a young child, dealing with an alcoholic, abusive mother and a father who was incarcerated. (7 RA 1574 – 1575). Additionally, he described the Defendant's bladder control problems, and his difficulty dealing with authority. (7 RA 1576). The doctor also testified that the Defendant exhibited nuerocognitive deficits consistent with fetal alcohol syndrome. (7 RA 1577).

Doctor Kinsora provided details of his five meetings with the Defendant. (7 RA 1578). Doctor Kinsora conducted over thirty tests on the Defendant, to gain an insight into his personality functioning. (7 RA 1579 – 1580). Among the results gathered, Doctor Kinsora testified that the Defendant had a very poor IQ score. (7 RA 1582). Furthermore, the Defendant does not have good attention or concentration skills. (7 RA 1585). The doctor concluded that his findings were consitstent with emotionally and behaviorally disturbed youths. (7 RA 1583).

Another group of the tests involved personality tests. (7 RA 1587). The doctor explained the results of these tests to the jury, including informing the jury that the Defendant can become very angry when he perceives that things are not going the way he would like. (7 RA 1590). Additionally, the doctor described the Defendant as being anti-social. (7 RA 1592).

The doctor offered a full diagnosis of the Defendant. (7 RA 1595). The diagnosis included that the Defendant suffered from an attention deficit hyper-activity disorder; a reading disorder; a mathematics disorder; an anti-social personality disorder and an intermittent explosive disorder. (7 RA 1595 – 1596).

As the final witness, defense counsel called Linda Overby, a school psychologist with the Clark County School District. (7 RA 1631). Ms. Overby remembered dealing with the Defendant while the Defendant was in a middle school program for emotionally disturbed youngsters. (7 RA 1633). She testified that the Defendant was very impulsive and failed to consider the consequences of his actions. (7 RA 1635).

4. Defendant's Unsworn Statement

During the penalty hearing, the Defendant requested an opportunity to make an unsworn statement to the jury. (7 RA 1563). The Defendant briefly described his criminal history before being reminded by the court that such statements are not permitted in an unsworn statement. (7 RA 1563 – 1564). At that point, the Defendant apologized for the incident, and stated that if he could bring back the victims, he would. (7 RA 1564).

5. Jury Instructions Presented at the Penalty Hearing

Near the conclusion of the evidence at the penalty hearing, outside of the presence of the jury, the Court asked both the State and defense counsel if they had any objection to any of the instructions that the Court had indicated would be given. (7 RA 1618). Both parties stated they had no objections. (7 RA 1618 – 1619). In addition, the Court asked if either party requested any other instructions be given. (7

RA 1619). Defense counsel answered, "No, Your Honor, our requested instructions were included." (7 RA 1619).

ARGUMENT

I

THE DISTRICT COURT WAS PROPER IN FINDING THAT THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE TRIAL AND PENALTY PHASE OF HIS PROCEEDINGS

A. Standard of Review

A district court's findings of fact, when considering a claim of ineffective assistance of counsel, are entitled to deference upon appellate review. Hill v. State, 114 Nev. 169, 175, 953 P.2d 1077, 1082 (1998), *cert. denied,* 525 U.S. 1042, 119 S.Ct. 594 (1998), *citing* Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994), *cert. denied,* 514 U.S. 1052, 115 S.Ct. 1431 (1995). However, a claim of ineffective assistance of counsel is a mixed question of law and fact and may be subject to the Supreme Court's independent review. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (2000).

In Nevada, the appropriate vehicle for review of whether counsel was effective is a post-conviction relief proceeding. Pellegrini v. State, 117 Nev. Adv. Op. No. 71, 18, 34 P.3d 519, 533-4 (2001), McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258, n.4 (1996). In order to assert a claim for ineffective assistance of counsel the defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-687, 104 S.Ct. 2052, 2063-2064 (1984); State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-688 and 694, 104 S.Ct. at 2065 and 2068. Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504,

505 (1984) (adopting Strickland two-part test in Nevada). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970)).

In considering whether trial counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information that is pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Once such a reasonable inquiry has been made by counsel, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280; citing, Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Finally, counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

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

This analysis does not 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, 584 P.2d at 711. In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S.Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); citing Strickland, 466 U.S. at 690, 104 S. Ct. at 2066; see also Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., (citing Strickland, 466 U.S. at 687-89, 694).

The merits of Defendant's numerous claims of ineffective assistance of counsel will be evaluated per the Strickland test below.

B. Trial Counsel's Alleged Failure to Make Contemporaneous Objections on Valid Issues

1. The District Court Properly Determined that Cumulative Evidence of Prior Bad Acts Was Not Presented During the Penalty Phase

NRS 175.552 states, in pertinent part: "In the hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense,

defendant or victim on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible." Pursuant to NRS 175.552, the questions of admissibility during the penalty phase of a capital murder trial are largely left to the discretion of the trial judge. In addition, the United States Supreme Court in Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976), determined that the relevant factors to be considered by a jury in imposing a penalty for a capital crime are "the character and record of the individual offender and the circumstances of the particular offense."

The State introduced testimony of eighteen (18) witnesses who testified regarding the the defendant's prior criminal history and character. (6 RA 1341 – 1524). Additionally, the State called one of the parents of each murder victim to provide "victim impact" statements to the jury. (6 RA 1529- 1538). A jury considering the death penalty may consider victim impact evidence as it relates to the victim's character and the emotional impact of the murder on the victim's family. Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997); *citing* Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597 (1991). In Hornick v. State, 108 Nev. 127, 825 P.2d 600 (1992), this Court adopted the holding in Payne, and found it comported fully with the intendment of the Nevada Constitution. It is well established in Nevada that evidence of prior convictions is admissible at penalty hearings when relevant and credible and not dubious and tenuous. Jones v. State, 101 Nev. 573, 707 P.2d 1128 (1985).

Trial counsel did not act unreasonably in not objecting to the testimony concerning the prior criminal history of the Defendant as well as his character. As stated *supra*, pursuant to NRS 175.552, the questions of admissibility during the penalty phase of a capital murder trial are largely left to the discretion of the trial judge. The Defendant has not shown strong and convincing proof that counsel was ineffective. Nor has the Defendant shown that but for counsel's alleged errors, there

is a reasonable probability that the result at sentencing would have been different. Therefore, the Defendant failed to satisfy the Strickland standard.

Accordingly, the district court's determination that there was no merit to the defendant's contention that his trial counsel was ineffective for failing to object to cumulative bad act evidence was correct and should not be disturbed.

2. The District Court Properly Determined that Presentation of Victim Impact Statements Was Constitutional and Defense Counsel Was Not Ineffective for Failing to Object to the Victim Impact Statutory Scheme

In this argument, the Defendant asserts that the Nevada statutory scheme which imposes no limits on the presentation of victim impact testimony is unconstitutional and that trial counsel's failure to object to that scheme was ineffective assistance of counsel. The District Court determined that the failure to object did not amount to ineffective assistance of counsel. (AA, pg. 258).

In Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529 (1987), the Supreme Court held that the Eighth Amendment of the United States Constitution prohibits a jury from considering victim impact evidence at the sentencing of a capital trial. The Supreme Court further held that victim impact evidence is inadmissible in a capital case because it creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner.

The Defendant, in the instant case, seems to make an analogous argument. However, Booth has been overruled by Payne v. Tennessee, 501 U.S. 808, 830, 111 S.Ct. 2597, 2611 (1991). As stated *supra*, a jury considering the death penalty may consider victim-impact evidence as it relates to the victim's character and the emotional impact of the murder on the victim's family. Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997); *citing* Payne, 501 U.S. 808, 827, 111 S.Ct. 2597 (1991).

In the instant case, Fred Dixon and Phyllis Dixon, Carl Dixon's parents, provided statements that showed an emotional impact on their family. (6 RA 1531 –

1536). Similarly, Alexander Gianakis, Matthew's father, testified at the penalty hearing what life would be like without his son. (6 RA 1536 – 1538). The three victim impact witnesses (including Phyllis Dixon's written statement) were each related to the two murder victims. They testified about the quality of Matthew and Carl's lives and the impact of their deaths upon themselves and their family members. (6 RA 1531 – 1538). This testimony did not violate the Defendant's constitutional rights. *See* Wesley v. State, 112 Nev. 503, 916 P.2d 793 (1996); Castillo v. State, 114 Nev. 271, 956 P.2d 103 (1998). In addition, the admission of Phyllis Dixon's out of court hand written statement does not violate the Defendant's right to due process. *See* Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079 (1949). Therefore, trial counsel did not have a good faith basis to object to the penalty hearing testimony.

As stated *supra*, the court begins with the presumption of effectiveness and then must determine whether or not 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).

In addition, the Defendant has failed to show that "but for" trial counsel's ineffectiveness, the result would have been different. *See* Strickland, 466 U.S. 668, 104 S.Ct. 2052. The Defendant failed to allege or provide support for his contention that trial counsel would have been successful in arguing that the statute was unconstitutional. Therefore, the Defendant's argument should be denied, and the District Court's determination should be upheld.

3. The District Court Properly Decided That No Prosecutorial Misconduct Occurred During Closing Argument of Penalty Phase and that Trial Counsel Was Not Ineffective for Failing to Object to the Prosecutor's Comments.

In this argument, Defendant alleges that the prosecutor committed misconduct during the closing argument of the penalty phase of the Defendant's trial. The Defendant specifically complains about the following statements:

> A killer should forfeit his life to live in a civilized society or in prison for the rest of his life when he kills two people.
>
> ....
>
> The murders were committed by a person with an IQ of 79. The murders were committed by a person who had suffered as a child and young adult with learning disabilities. The murders were committed by a person who had suffered as a child and young adult with emotional disabilities. The murders were committed by a person who had bladder incontinent until age 12. I don't mean to belittle these problems. But the fact of the matter is that many people in society come from broken homes, they come from homes where perhaps they have been neglected. They have learning disabilities. But is that sufficient to mitigate a double murder? A person who had been given many, many breaks by the criminal justice system?
>
> ....
>
> With regard to mitigating circumstances or mitigating factors that have been alleged by the defense, as you heard about half of those mitigating factors come from our statutes. But the ones that seem to deal with this particular case, like the IQ, mercy, bladder control, bladder difficulties, those were submitted by defense counsel. They are not statutory mitigating circumstances.
>
> ....
>
> There was testimony regarding certain problems he had with his bladder as a child, twelve or thirteen years ago. Millions and millions of people,

> children, go through life with problems at an early age. Some of then outgrow them, some continue on to teenage years, even later. People have visual problems, people are hearing impaired, people have difficulty walking. Millions of people. And the list goes on. These people do not go out and premeditate and kill two living breathing human beings. His bladder condition, the fact that he may have been teased as a child, which many of us probably were exposed to growing up, that can serve as no excuse for what he did on April the 15th.
>
> ....
>
> The defendant has already been convicted twice of two violent felonies. He's already victimized many people, both inside and outside the prison. The defendant took the lives of two innocent men in a horrific manner. Where does he go from there? What does he do for an encore? The shorter the sentence, the sooner this community will find out.

(7 RA 1657 - 1688).

The Defendant further alleges that trial counsel's failure to object to this alleged misconduct was ineffective. The District Court determined that the Defendant's trial counsel did not have a good faith basis to object to the prosecutor's comments, and thus was not ineffective for failing to object. (AA, pg. 242).

The standard of review for prosecutorial misconduct rests upon the defendant showing "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (citing Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). The relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness as to make the result a denial of due process. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). The Defendant must show that the statements violated a clear and unequivocal rule of law, he was denied a substantial right, and as a result, he was materially prejudiced. Libby, 109 Nev. at 911, 859 P.2d at 1054.

In the instant case, trial counsel did not have a good faith basis to object to the prosecutor's comments. The Defendant was unable to show that the statements violated a clear and unequivocal rule of law, that he was denied a substantial right, or

that he was materially prejudiced. *See* Libby, 109 Nev. at 911, 859 P.2d at 1054. The District Court properly ruled that the prosecutors were allowed to argue that the mitigators advanced by the Defendant were not sufficient to mitigate two murders. (AA, pg. 258).

The role of the court 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). The Defendant failed to show that counsel acted unreasonably. Accordingly, the District Court's order should be upheld, as the defense counsel can not be shown to be ineffective for failing to object to the prosecutor's statements.

4. Defense Counsel Was Not Ineffective for Failing to Object to Constitutional Jury Instructions Used During the Guilt and Penalty Phases of the Defendant's Trial and the Nevada Supreme Court Properly Declined to Consider this Argument on Direct Appeal.

In this argument, the Defendant asserts that the jury instructions that were furnished both at trial and at the penalty hearing were unconstitutional and that counsel was ineffective for failing to object to the instructions.

At the conclusion of the trial testimony, the Court questioned the parties if they objected to any of the instructions that the Court indicated would be given to the jury. (6 RA 1209). Defense counsel objected to all of the instructions, arguing that they violated the Defendant's due process rights under the United States and Nevada's constitution. (6 RA 1209). The District Court denied the Defendant's objection. (6 RA 1210).

During the argument and decision on the instant Petition for Writ of Habeas Corpus (Post-Conviction), the District Court noted that blanket objections do not

constitute ineffective assistance of counsel, nor require a new trial or penalty phase. (AA, pg. 260).

Near the conclusion of the evidence at the penalty hearing, outside of the presence of the jury, the Court asked defense counsel if they had any objection to any of the instructions that the Court had indicated would be given. (7 RA 1618). Defense counsel stated they had no objections. (7 RA 1618 – 1619). In addition, the Court asked if defense counsel requested any other instructions be given. (7 RA 1619. Defense counsel answered, "No, Your Honor, our requested instructions were included." (7 RA 1619).

Initially, it must be noted that Defendant failed to properly preserve this issue for appeal. Where a defendant fails to preserve an issue, this Court will review that issue only if it is patently prejudicial or constitutes plain error. *See* Hewitt v. State, 113 Nev. 387, 392, 936 P.2d 330, 333 (1997), overruled in part on other grounds by Martinez v. State, 115 Nev. 9, 12, 974 P.2d 133, 135 (1999). Plain error has been defined as that which is " '...so unmistakable that it reveals itself by a casual inspection of the record.' " Patterson v. State, 111 Nev. 1525, 1529, 907 P.2d 984, 987 (1995) *citing* Torres v. Farmers Insurance Exchange, 106 Nev. 340, 345 n.2, 793 P.2d 839, 842 (1990) (*quoting* Williams v. Zellhoefer, 89 Nev. 579, 580, 517 P.2d 789, 789 (1973)). "[A]n improper instruction rarely justifies a finding of plain error." United States v. Still, 857 F.2d 671, 671 (9th Cir. 1988) (*quoting* United States v. Glickman, 604 F.2d 625, 632 (9th Cir. 1979)). "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736 (1977).

The District Court has broad discretion to settle jury instructions and decide evidentiary issues. Jackson v. State, 117 Nev. 116, 17 P.3d 998, 1000 (2001). As such, this Court will review the District Court's decision to give a particular instruction for an abuse of discretion. Id. An abuse of discretion occurs if the district

court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. Id. A jury instruction will be presumed valid unless Defendant can show that a "different result would have been obtained had the proposed instruction been given." Barron v. State, 105 Nev. 767, 777, 783 P.2d 444, 451 (1989).

A. Premeditation and Deliberation Instruction

Here, the Defendant contends that the court improperly instructed the jury on the concepts of premeditation and deliberation. Before closing arguments in the trial phase, the Court read instructions to the jury. Instruction number twenty-four (24) specifically stated:

> 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. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willfull, deliberate and premeditated murder.

(5 RA 906); (6 RA 1226).

The Defendant bases his argument on this Court's decision in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). However, Defendant filed his brief on September 9, 1997. This Court did not render the Byford decision until February 28, 2000. The trial court in 1997 obviously did not use the new instructions set out in Byford. Instead, the court in this case properly instructed the jury with the law which was in existence at the time of the trial; and the Byford decision is not retroactive. Moreover, even if the court applied Byford retroactively, any instructional error was harmless beyond a reasonable doubt in this case.

In Byford, this Court reviewed the Kazalyn instruction, and concluded that it "blurs the distinction between first and second degree murder." Notwithstanding, this Court upheld Byford's first degree murder conviction concluding that the evidence was clearly sufficient to establish premeditation and deliberation. In the case at bar, where the evidence showed that the Defendant enticed or attempted to entice the two

victims into the bathroom, the evidence was clearly sufficient to establish premeditation and deliberation.

Before Byford, there was a long line of precedent upholding the existing instruction given in this case. *See* Kazalyn v. State, 108 Nev. 67, 75, 825 P.2d 578, 583 (1992); Powell v. State, 108 Nev. 700, 838 P.2d 921 (1992) vacated on other grounds by 511 U.S. 79 (1994); Doyle v. State, 112 Nev. 879, 921 P.2d 901 (1996); Williams v. State, 113 Nev. 1008, 945 P.2d 438 (1997). In Byford, this Court recognized that it had expressly informed the district courts in prior opinions that the Kazalyn instruction was proper. 116 Nev. at 234, 994 P.2d at 713. In light of this Court's prior rulings, it is clear that the Court did not intend a retroactive application of the case.

In addition, the language of the opinion reveals that the Court did not intend its opinion to be applied retroactively:

> 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.

Byford, 116 Nev. at 235-236, 994 P.2d at 714. This language clearly implies a prospective application only.

Moreover, the decision in Byford never holds that the Kazalyn instruction was improper. It only holds that the instruction "does not do full justice to the phrase 'willful, deliberate and premeditated . . ." and that the instruction should not be given in future cases. Id. Thereafter, the Court in Byford set out new instructions to be used in future cases.

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. In its opinion in Byford, this Court expressed concern that the

instructions in question may have blurred the distinction between first and second degree murder, as set forth in the Nevada Revised Statutes. Byford, 116 Nev. at 233-238, 994 P.2d at 712-715.

This Court determined that the statutory definition of "deliberate" is different from that of "premeditated," and that giving an instruction defining "premeditated" and not "deliberate" may emphasize one element over another. Byford, 116 Nev. at 234-235, 994 P.2d at 713. The Court never stated in Byford that the new rule was based on any constitutional consideration. Therefore, this new "rule" is only based on this Court's concern that the old instructions did "not do full justice to the phrase 'willful, deliberate, and premeditated.'" Id. Since the new rule announced in Byford is not constitutionally based, its application should be prospective only.

As such, there is no authority for the proposition that Byford should be applied 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. at 235, 994 P.2d at 714. 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 retroactive and the trial court did not err in giving the instructions approved by the Supreme Court opinions at the time they were given. Accordingly, trial counsel did not have a good faith basis to argue that the jury instruction was improper, thus, the District Court properly ruled that counsel was not ineffective for failing to properly challenge this instruction.

B. Felony Murder Instruction

In this argument, Defendant claims that the District Court erred in failing to adequately instruct the jury on felony murder, and alleges that counsel was deficient for not objecting to preserve the issue for appellate review. The Defendant argues that the robbery was an aforethought to the homicide - i.e.- he did not form the intent to rob until after the deaths; therefore, the felony murder rule should not have provided a basis for finding first degree murder.

In Jury instruction 25, the district court instructed the jury that:

> There is a kind of murder which carries with it conclusive evidence of premeditation and malice aforethought. This class of murder is murder committed in the perpetration of Burglary or Robbery. Therefore, a killing which is committed in the perpetration or attempted perpetration of the felony of Burglary or robbery is deemed to be Murder of the First Degree, whether the killing was intentional, unintentional or accidental. This is called the Felony-Murder rule.

(5 RA 907); (6 RA 1227).

The language of Jury Instruction 25 clearly states that the murder must take place in the perpetration or attempted perpetration of the felony of Burglary, Robbery, and Kidnaping. The jury convicted the Defendant of Robbery With Use of a Deadly Weapon as well as Murder of the First Degree With Use of a Deadly Weapon. There is no indication that the jury based its decision on the Felony-Murder rule. However, if it did, there is sufficient evidence in the record to support such a conviction. This jury instruction properly defined Nevada law on felony murder. *See* Payne v. State, 81 Nev.. 503, 505, 406 P.2d 922 (1965). Therefore, the Defendant has failed to show that trial counsel acted unreasonably.

Furthermore, the Defendant fails to allege that "but for" trial counsel's errors, there is a reasonable probability that the result would have been different. The Defendant states: "Based on the foregoing arguments and authorities, it is respectfully asserted that the court erred in the instructions to the jury on the robbery charge and therefore the felony-murder allegations and trial counsel was deficient in not objecting thereto to preserve the issue for appellate review." *See* Defendant's Supplemental Petition for Writ of Habeas Corpus, p. 32, lines 11-15 (AA, pg. 102); Appellant's

Opening Brief, p. 29, lines 10-14. The Defendant is not only required to show that counsel acted deficiently, but also that there is a reasonable probability that but for counsel's errors the result would have been different. As stated *supra*, the Defendant fails to satisfy the second prong.

Trial counsel did not have a good faith basis to argue that the jury instruction was improper. Accordingly, the District Court properly ruled that counsel was not ineffective for failing to properly challenge this instruction.

C. The "Equal and Exact Justice" Instruction.

The Defendant argues that the "equal and exact justice" instruction, jury instruction number 45, created a reasonable likelihood that the jury would not apply the proper presumption of innocence in favor of the Defendant. *See* Defendant's Supplemental Petition for Writ of Habeas Corpus, p. 32, lines 24-28 (AA, pg. 102-103); Appellant's Opening Brief, p. 29, lines 23-27. The Defendant alleges that trial counsel was ineffective for failing to object to this instruction.

Jury Instruction 45 specifically states:

> Now you will listen to arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence, and by showing the application thereof to the law. But whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be, and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the defendant and the State of Nevada.

(5 RA 927); (6 RA 1234 – 1235).

Once again, the Defendant fails to satisfy the second prong of the Strickland test. As stated *supra*, in order to assert a claim for ineffective assistance of counsel the defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-687, 104 S.Ct. 2052, 2063-2064 (1984); *see*, State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and

second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. *See* Strickland, 466 U.S. at 687-688 & 694, 104 S.Ct. at 2065 & 2068. Thus, a defendant must show that particular errors "had an actual effect on the defense," not merely that the errors had "some conceivable effect on the outcome of the proceeding." Id. at 693, 104 S.Ct. at 2067. The Defendant fails to assert that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different.

Moreover, a juror has a duty to weigh and consider all of the facts and circumstances shown by the evidence for the purpose of doing equal and exact justice between the State and the accused. If not, they should not be allowed to decide the case. McKenna v. State, 96 Nev. 811, 813, 618 P.2d 348 (1980). Since the jurors have a duty to do "equal and exact justice," it is proper for a District Court to inform them of that duty in a jury instruction. Thus, trial counsel did not have a good faith basis to argue that the jury instruction was improper.

Accordingly, the District Court properly ruled that counsel was not ineffective for failing to properly challenge this instruction.

D. The "Anti-Sympathy" Instruction.

The Defendant alleges that jury instruction 19, given at the penalty hearing, was improper, and, therefore, trial counsel was ineffective for failing to object to that instruction.

Jury instruction 19 states in pertinent part: "A verdict may never be influenced by sympathy, prejudice, or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law." (7 RA 1647).

This Court has stated: "[a] district court may instruct the jury not to consider sympathy during a capital penalty hearing, as long as the court also instructs the jury to consider mitigating factors. Wesley v. State, 112 Nev. 503, 916 P.2d 793 (1996), *see also* Lay v. State, 110 Nev. 1189, 1193, 886 P.2d 448, 450-51 (1994). The court

further stated: "[i]n the present case, the district court instructed the jury to consider 'any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Wesley, 112 Nev. at 519.

In the instant case, the district court gave the mitigating circumstances instruction, jury instruction 10, which stated: "[y]ou must consider any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffer as a basis for a sentence less than death." (7 RA 1643). This instruction is identical to the instruction given in Wesley, 112 Nev. 519, and upheld by this Court. The district court instructed the jury to consider mitigating circumstances and also gave an anti-sympathy instruction. Thus, trial counsel did not have a good faith basis to challenge the jury instruction, and, therefore, the Defendant has failed to show that trial counsel acted unreasonably.

In addition, the Defendant fails to satisfy the second prong of Strickland. The Defendant fails to show that the death sentence the Defendant received was due to counsel's ineffectiveness and but for counsel's ineffectiveness, there is a reasonable probability that the result of the proceedings would have been different.

Accordingly, the District Court properly ruled that counsel was not ineffective for failing to properly challenge this instruction, and this claim should be denied.

E. The "Reasonable Doubt" Instruction.

The Defendant alleges that the reasonable doubt instructions given at trial and at the penalty phase were improper because they suggested a higher degree of doubt than is required for acquittal under the reasonable doubt standard.

During the jury instructions of the trial, the Court defiend reasonable doubt for the jury and informed the jury:

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

(6 RA 1231). Reasonable doubt was defined in instruction thrity-eight (38) as:

> A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

(6 RA 1231). Instruction number fourteen during the penalty hearing addressed this issue. The instruction stated, in pertinent part,

> The burden rests upon the prosecution to establish any aggravating circumstance beyond a reasonable doubt, and you must be unanimous in your finding as to each aggravating circumstance.

(7 RA 1645). Instruction number fifteen defined reasonable doubt, using the same definition provided to the jury in the trial phase. (7 RA 1645).

The Defendant opposes the language "proof beyond a reasonable doubt."

The Defendant alleged that trial counsel was deficient but failed to allege that but for counsel's errors, there is a reasonable probability that a different outcome would have resulted. As such, the Defendant failed to satisfy the second prong of Strickland which the Defendant must satisfy to prevail on an ineffective assistance of counsel claim. 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). Counsel's actions in the instant matter were not unreasonable and the Defendant fails to allege what would have occurred differently had a different instruction been given.

Additionally, the instructions on "reasonable doubt" challenged by Defendant are mandated by NRS 175.211. This Court has upheld the above instruction in Bollinger v. State, 111 Nev. 1110, 901 P.2d 671 (1995), and Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991).

Moreover, in order to establish that the "reasonable doubt" instruction is unconstitutional, the Defendant must establish that the jury applied the instruction in an unconstitutional manner. Wesley v. State, 112 Nev. 503, 916 P.2d 793, 800 (1996).

Defendant has failed to establish that the jury misapplied the "reasonable doubt" instruction. Accordingly, the District Court properly denied this ineffective assistance of counsel claim.

F. The "Unanimous" Instruction.

In this argument, the Defendant argues that jury instruction 26 allowed the jury to convict the Defendant of first degree murder without being unanimous. This instruction states:

> Although your verdict must be unanimous as to the charge, you do not have to agree on the theory of guilt. Therefore, even if you cannot agree on whether the facts establish premeditated murder or felony murder, so long as all of you agree that the evidence establishes the defendant's guilt of murder in the first degree, your verdict shall be murder of the first degree.

(6 RA 1227). The Defendant alleges that this instruction was given in violation of his right to due process of law. However, the Defendant fails to cite to any legal authority in support of his argument.

In Evans v. State, 113 Nev. 885, 944 P.2d 253 (1997), this Court stated that "whether or not everyone would agree that the mental state that precipitates death in the course of a robbery is the moral equivalent of premeditation, it is clear that such equivalence could reasonable be found, which is enough to rule out the argument that this moral disparity bars treating them as alternative means to satisfy the mental element of a single offense."

This ruling in Evans is dispositive of the issue and the District Court properly determined that counsel's failure to adequately object to this instruction did not amount to ineffective assistance of counsel. The District Court ruled that the Defendant's claim is nothing more than a naked and unsubstantiated claim belied by the record. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Accordingly, the

District Court properly ruled that counsel was not ineffective for failing to properly challenge this instruction, and this claim should be denied.

5. Defense Counsel Was Not Ineffective For Failing to Request the Jury Be Admonished.

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).

In this argument, the Defendant argues that trial counsel was ineffective for failing to ask that the jury be admonished concerning a "back in jail" comment that the Defendant's aunt, Emma Nash, made in court. Specifically, during the direct examination, Ms. Nash stated, "Then I turned – then I asked – I said to him, 'Marlo, have you did something that would put you back in jail?'" (4 RA 667).

After the jury was dismissed, defense counsel explained that the jury could infer from the statement that the Defendant served prior prison terms, and such an inference would be extremely prejudicial to the Defendant. (4 RA 668). Thus, defense counsel made a motion for mistrial. (4 RA 667).

After admonishing Ms. Nash not to discuss prior jail time, the Court decided to deny the motion for mistrial on the basis that the statement was inadvertent. (4 RA 671). However, the District Court informed defense counsel that it would be willing to provide an instruction to the jury if the defense requested that one be given. (4 RA 672). Additionally, the Court asked defense counsel if they wanted the Court to issue an admonishment to the jury. (4 RA 672). Defense counsel decided that a curative instruction was not needed. (4 RA 672).

In the instant petition, with the benefit of hindsight, Defendant contends that counsel should have requested an admonition in addition to the motion for a mistrial.

Trial counsel does not have to make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711; *citing*, Cooper, 551 F.2d at 1166 (9th Cir. 1977). Additionally, where there is a reasonable, tactical explanation for counsel's decision, the court may not second guess counsel's decision. Strickland, *supra*; Riley v. State, 110 Nev. 638, 653, 878 P.2d 272, 281-282 (1994).

Here, there was a reasonable tactical reason for counsel's decision not to request such curative measures: counsel likely did not want to draw undue attention to the witness's comment (and, hence, Appellant's previous criminal history) by requesting an admonition. Since there is a reasonable tactical decision for counsel's decision, the District Court properly ruled that no error occurred. Thus, this claim of ineffective assistance of counsel was properly denied and that decision should be upheld.

6. Trial Counsel Was Not Ineffective For Failing to Object to Overlapping Aggravating Circumstances

The Defendant asserts that overlapping and multiple use of the same facts as separate aggravating circumstances resulted in the arbitrary and capricious imposition of the death penalty. Specifically, the Defendant claims that it was improper for the State to use robbery, burglary, and avoiding lawful arrest as aggravating factors because they were all based on the same set of operative facts. Additionally, Defendant claims that using all three charges as aggravating factors violated the Double Jeopardy clause.

This Court has previously dismissed this argument. *See* Bennett v. State, 106 Nev. 135, 142, 787 P.2d 797, 801 (1990). In Bennett, the defendant argued that the State had improperly used burglary and robbery as two separate aggravating factors even though the charges arose out of the same indistinguishable course of conduct. Id. In disagreeing with the defendant, this Court reasoned that because the defendant could be prosecuted for both crimes separately and because convictions of both

burglary and robbery do not violate the double jeopardy clause as they are separate and distinct offenses they could both be used separately as aggravating factors. Id. *See also* Wilson v. State, 99 Nev. 362, 376, 664 P.2d 328, 336 (1983) (where the court found that any enumerated felonies that are committed during the course of a murder can be aggravating factors).

Additionally, this Court addressed this exact issue in Sherman v. State, 114 Nev. 998, 965 P.2d 903 (1998). In Sherman, the defendant broke into his girlfriend's father's home, stole some personal affects, and killed his girlfriend's father. The defendant was charged with murder, robbery and burglary. The jury returned guilty verdicts on all counts. At the conclusion of the penalty hearing, the jury found four aggravating circumstances: 1) that the defendant has committed this murder while under sentence of imprisonment; 2) that the defendant had been previously convicted of another murder; 3) that the defendant committed the murder while engaged in the commission of a burglary; and 4) that the defendant committed the murder while engaged in the commission of a robbery. The jury also found three mitigating circumstances. After weighing the aggravators and the mitigators, the jury imposed the sentence of death.

On appeal, the defendant argued that his death sentence was imposed in an arbitrary and capricious manner because the jury found separate aggravating circumstances, under NRS 200.033, based on the same underlying facts. Sherman, 114 Nev. at 998. More specifically, the defendant alleged that the aggravating circumstances of "committed by a person engaged in a robbery" and "committed by a person engaged in a burglary" were based upon the same facts: the looting of the girlfriend's father's house. This court held that the defendant's contention was meritless, and stated: "the use of both robbery and burglary as aggravating factors does not infringe upon a defendant's due process or double jeopardy rights." Id. at 1012; *citing* Homick v. State, 108 Nev. 127, 825 P.2d 600 (1992); *citing* Wilson v. State, 99 Nev. 362, 664 P.2d 328 (1983).

In the instant case, trial counsel did not have a basis to argue that the jury improperly sentenced the Defendant. Accordingly, the District Court properly determined that that the aggravating circumstances presented by the State were not overlapping and counsel was not ineffective for failing to object to these circumstances.

7. Defense Counsel Was Not Ineffective for Failing to Object to the State's Opening Statement

In this argument, the Defendant argues that his counsel provided ineffective assistance in failing to object to a comment made by the prosecutors during the opening statements of the trial. Specifically, the Defendant argues that his attorney should have objected to the District Attorney'statement, "Little did these two young men know that something evil was lurking out in the parking lot, this evil person who is the defendant, Marlo Thomas." (3 RA 542).

On September 26, 2001, the District Court reviewed this statement during the argument and decision on the Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). In regard to this statement, the Court determined that defense counsel probably should have objected to the statement, but ruled that the failure to object did reach the magnitude of an error that would require a new trial. (AA, pg. 261).

The prosecutor may outline his case and propose facts he intends to prove. Rice v. State, 113 Nev. 1300, 1308, 949 P.2d 262, 270 (1997). Even if the prosecutor overstates what he is later able to prove, misconduct is not present unless he does so in bad faith. Id. In Browne v. State, 113 Nev. 305, 311, 933 P.2d 187, 190-91 (1997), this Court held that reference to a defendant as a "selfish and cruel man" did not rise to the level requiring reversal. *See* People v. Benson, 802 P.2d 330, 353-54 (Cal. 1990) (holding prosecutor's comment "this crime is perhaps the most brutal, atrocious, heinous crime," was merely a comment on the nature of the offense and was permissible).

In State v. Runningeagle, 859 P.2d 169, 173 (Ariz. 1993), defendant Runningeagle was found guilty of two counts of first degree murder, two counts of theft, and one count of first degree burglary, second degree burglary, and third degree burglary. On appeal, defendant Runningeagle alleged that statements made by the prosecutor during opening statement were an appeal to passion and prejudice, entitling him to a new trial. The prosecutor, in opening statement, stated: "The Williams went out of the kitchen area, started a pot of coffee, turned the radio on, and sat down at the kitchen table. What happened in the next 10, 15, 20 minutes can only be described as unspeakable horror. It was evil. What happened in that next 10, 15, 20 minutes ended everything for Jackie and Herbert Williams. And the cause and the reason that it ended is right here in the courtroom. Evil is among us." Id. at 173-174. The trial court sustained a defense objection, but denied the defendant's motion for mistrial.

The Supreme Court of Arizona held: "The words were a mere characterization of the evidence. The evidence would show horror. The evidence would show evil behavior. These were reasonable inferences to be drawn from the evidence. That inferences were made at the beginning of the case, rather than at the end of the case where they belonged, does not warrant a new trial." Runningeagle, 859 P.2d at 174.

In comparison, in the instant case, the prosecutor commented regarding the defendant in opening statement that "Little did these two young men know that something evil was lurking out in the parking lot, this evil person who is the defendant, Marlo Thomas." (3 RA 542).

The prosecutor's statement was a reasonable inference to be drawn from the evidence. The Defendant murdered two young men without provocation, stabbing one of the victims repeatedly. The evidence showed evil behavior on the Defendant's part.

Even if these statements are considered to be made in error, any error that occurred was clearly harmless error. NRS 178.598 states that any error which does not affect substantial rights shall be disregarded. Error is harmless if it appears,

beyond a reasonable doubt, that the error complained of did not contribute to the verdict obtained. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967). The question is whether the jury would have returned a verdict of guilty if it had not been exposed to the error. United States v. Hastings, 461 U.S. 499, 510-11, 103 S.Ct. 1974, 1981 (1983).

Here, even if the defense counsel would have objected and the remarks of the prosecutor had been stricken, it would not have made any difference on the outcome of the trial. There was so much overwhelming evidence of guilt that the inclusion of this statement was merely harmless error. Thus, the District Court properly determined defense counsel was not ineffective for refraining from objecting. Additionally, the Court appropriately ruled that the comments were not of such a nature as to require a mistrial. Accordingly, Defendant's claim must be denied.

8. Trial Counsel Was Not Ineffective For Failing to Object to the State's Closing Argument

In this argument, the Defendant alleges that the prosecutor committed misconduct during the closing argument of the penalty phase of the Defendant's trial. The Defendant further alleges that trial counsel's failure to object to this alleged misconduct was ineffective.

The standard of review for prosecutorial misconduct rests upon the defendant showing "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (*citing* Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). This is based on a defendant's right to have a fair trial, not necessarily a perfect one. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). The relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness as to make the result a denial of due process. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). The Defendant must show that the statements violated a clear and unequivocal rule of

law, he was denied a substantial right, and as a result, he was materially prejudiced. Libby, 109 Nev. at 911, 859 P.2d at 1054.

A. "Mercy" Comment

In this argument, the Defendant argues that the prosecutor improperly argued:

> The defendant is deserving of the same sympathy and compassion and mercy that he extended to Carl Dixon and Matt Gianakis. Don't let justice be robbed in the name of mercy.

(7 RA 1682).

The Defendant believes that his counsel was ineffective for failing to object to this comment and failing to advance this argument in his direct appeal.

The United States Supreme Court has determined that a prosecutor may respond to comments made by defense counsel if those comments "invited a reply." United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044 (1985). If the comments did invite a reply, defense counsel's opening comments must also be taken into consideration. Moreover, a prosecutor's comments should be considered in context, and "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." Id.

Here, defense counsel argued that his client should receive life in prison, not the death penalty. (6 RA 1337). The prosecutor then responded that Defendant is deserving of the same sympathy, compassion and mercy as he extended to the victims. (7 RA 1682).

This exact issue has been considered by this Court in Williams v. State, 113 Nev. 1008, 945 P.2d 438 (1997) (overruled on other grounds). In that case, during the State's penalty phase rebuttal closing argument, the prosecutor stated:

> [Counsel for the defense] talks about mercy and leniency for the defendant. He suggest[s] that is a mitigating circumstance as well. Perhaps it is. But if the punishment is supposedly to mete out justice then the punishment must fit the crime. *When Antoine Williams asks you for mercy and he says that he throws himself at the mercy of the Court, consider the mercy that he gave his two victims.* (Emphasis added.)

113 Nev. at 1018-1019, 945 P.2d at 444 – 445.

Defense counsel's objection to the argument was overruled by the trial court.

On appeal, Williams argued that it is improper for a prosecutor to ask a jury to show the defendant the same sympathy that he showed his victim, citing Lesko v. Lehman, 925 F.2d 1527, 1545 (3d Cir. 1991). (A prosecutor who implores a jury to make a death penalty determination in the cruel and malevolent manner shown by defendant goes beyond the bounds of permissible advocacy.) This Court determined that the Lesko case is inapplicable to the facts of the case, and found no impropriety in the State response. Williams, In this case, the Defendant's attorney raised the issue of mercy. During closing argument, defense counsel stated "and at this time, I would ask you to spare his life and to impose the severe punishment of imprisonment without the possibility of parole." (7 RA 1676). The prosecution's comments were simply made in response to this argument.

Accordingly, the District Court properly ruled that defense counsel was not ineffective for failing to object to this comment.

B. Message to the Community

The Defendant argues that the prosecutor improperly referenced that the jury should send a message to society. The Defendant contends that the following statement was inappropriate.

> By your verdict you will be sending a message to the community. You will be sending a message to other people who might consider going into establishments to rob at gunpoint, at knifepoint. You will send a message to other criminals that when you go out to commit crimes, you do it at your own risk, and that if you kill during your crimes, the community is looking at the most absolute and final punishment you can receive.

(7 RA 1662 – 1663). Defense counsel did not object to this statement at the time it was made.

In support of his arguments, the Defendant cites Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985). In this case, the defendant shot and killed a convenience store clerk and robbed the store. Following his arrest and indictment, a jury convicted the

defendant of first degree murder with use of a deadly weapon, and robbery with use of a deadly weapon. After a penalty hearing, the jury returned a death sentence.

On appeal, the defendant argued that the prosecutor made improper comments. Id. The prosecutor commented that rehabilitation does not work and based his argument that the defendant deserved to die upon references to the criminal history of one of Nevada's most notorious criminals, Patrick McKenna. This court held that the prosecutor's remarks in promoting a conclusion that the defendant's rehabilitation was improbable, that he might well kill again while in prison, and that he should therefore be put to death were highly inappropriate. This court stated: "Comments of this sort divert the jury's attention from its proper purpose, which is the determination of the proper sentence for the defendant before them, based upon his own past conduct." Id. at 478, 1129. This court also considered the remarks the prosecutor made regarding the community's duty to sentence the Defendant to death. This court held that a prosecutor cannot blatantly attempt to inflame the jurors by urging that if they wished to be deemed "moral" and "caring" then they must approach their duties in anger and give the community what it needs. *See also* Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988).

In the instant case, the Defendant cites statements made by the prosecution. None of the statements were patently prejudicial, nor did the prosecution attempt to inflame the jury. As stated *supra*, the role of the court 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).

On January 22, 2002, the District Court held a evidentiary hearing and considered defense counsel's reasoning for failing to object to such statements. During the hearing, Mr. LaPorta agreed that there are tactical reasons why a defense attorney might not object to arguments that were arguably objectionable. (AA, pg.

217). On August 21, 2002, the District Court ruled that defense counsel's failure to object to these statements did not constitute ineffective assistance of counsel. (AA, pg. 253).

Additionally, in Witter v. State, 112 Nev. 908, 921 P.2d 886, (1996), this Court concluded that the following remarks, which were very similar to comments made in the instant case, were appropriate. In that case, the prosecutor stated:

> What message does this punishment send today? Will we tell would[-]be murders, will we tell this community, that you can kill a man, thrust a knife into his skull 16 times, one time through his skull, 16 times into his body, that you can perpetrate unspeakable, despicable deeds upon his wife in her own car and that you, the husband, can drive upon that crime scene and witness your wife bleeding to death, struggling for your life, what message does it send to say the man that perpetrates those crimes can live his life in prison, can write his family, see his family, speak to his family?

Id. at 924-925, 921 P.2d at 921. This Court concluded,

> These statements properly focus on what would be an appropriate punishment under the facts and circumstances of this case, as well as what would be necessary to deter others from committing such a brutal act. These are entirely proper areas for comment. Accordingly, we conclude that these statements did not constitute an improper plea to a duty to society at large.

Id.

Based upon the above case law, the District Court correctly ruled that the prosecutor did not improperly argue that the jury should send a message to society.

C. Facts Not Appearing in Evidence

Here, the Defendant contends that his trial counsel was ineffective for failing to object to the prosecutor's comments regarding facts outside of the record. In general, factual matters outside the record are irrelevant and are not proper subjects for argument to the jury. State v. Kassabian, 69 Nev. 146, 149, 153-154, 243 P.2d 264 (1952).

The Defendant has presented three comments by the prosecutor in support of his argument. The specific comments are:

> As I mentioned earlier, Mr. LaPorta talked about a secured prison environment, the most secure way in which an individual can be housed in the prison system in the State of Nevada. The vast majority of those individuals, as I said earlier, who are on death row, have only killed once, not twice, such as this defendant.
>
> ....
>
> I submit to you, ladies and gentlemen, the vast – the vast majority of people who are on death row in the State of Nevada, the worst of the worst, have killed one – one single human being. Where does the defendant go, Marlo Thomas, who has committed two, two brutal murder of the first degree?
>
> ....
>
> This is not a rehabilitation hearing. There is no program that we know of that rehabilitates killers. It's a special type of mentality, a special type of person who can plunge a knife into a human being thirty-four, thirty-six times. This is a penalty hearing. And your decision will be what punishment is appropriate for a double murder.

(7 ROA 1663 – 1693).

This Court has consistently held that prosecutors may argue the different theories of penology in death penalty cases. Witter v. State, *supra*; Pellegrini v. State, 104 Nev. 625, 764 P.2d 484 (1988); Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985). Specifically, this Court stated in Collier that "It may be proper for counsel to go beyond the evidence to discuss general theories of penology such as the merits of punishment, deterrence and the death penalty." Collier at 478, 705 P.2d at 1129.

Accordingly, defense counsel did not have a substantial basis for objecting to the prosecutor's comments, thus, the District Court properly determined that defense counsel was not ineffective.

D. State's Comment Regarding the Death Penalty

In this argument, the Defendant complained that his counsel was ineffective for failing to object to the prosecution's comment equating the death penalty with an act of self-defense. The exact comment that the Defendant contests is:

> "The return of a death sentence is society's way of – or act of self defense. A return of a death verdict is the enforcement of society's right

to be free from murder. By denying Matt Gianakis and Carl Dixon their right to live, he has forfeited his right to live.

(7 RA 1692). The Defendant interprets the prosecutor's remarks as an improper comment on community standards as a rationale for returning a sentence of death, and believes his counsel was ineffective for failing to object to the statement.

The United States Supreme Court has stated, "A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044 (1985). The relevant inquiry when reviewing a prosecutor's comments is whether the comments were so unfair that they deprived the defendant of due process. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471-72 (1986). In addition, this Court has noted that the Constitution guarantees a fair trial, not necessarily a perfect trial. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104 (1990).

In Witter v. State, *supra*, this Court noted that the statements properly focused on what would be "an appropriate punishment under the facts and circumstances of this case, as well as what would be necessary to deter others from committing such a brutal act. Witter, 921 P.2d at 898. This court found that the complained of areas were entirely proper for comment and that the statements did not constitute an improper plea to a duty to society at large. Id.

Accordingly, the State submits that the prosecutor's statements were merely offered in an effort to convey the loss and the legitimacy of deterrence as a purpose of punishment; not to incite nor inflame the jury, and as such, the State's closing argument was proper. Thus, the District Court was correct in determining that the Defendant's counsel was not ineffective for failing to object to these comments.

9. Trial Counsel's Decision to Acknowledge that Defendant Had a Extensive Criminal Record and Committed Atrocious Crimes

During Statements of the Penalty Hearing Was a Strategic Decision to Establish Credibility With the Jury

In an attempt to gain credibility with the jury, defense counsel made the following statements in their opening argument of the penalty hearing.

> My client stands convicted of a terrible, awful, senseless and brutal crimes; two murders. This is an unforgivable crime, and we're not asking for forgiveness. What we're doing here over the next day or two is what we talked to you about during the jury selection process. And that was, after the conviction you would look at the big picture, you would look at Mr. Thomas' life.
>
> ....
>
> I'm not going to sit here and pretend that Marlo is a good guy, because he certainly is not. We wouldn't be standing here, or I wouldn't be standing here talking to you if he didn't have a lot of significant bad things that he did in his life. That's a foregone conclusion.
>
> ....
>
> He has, as I've already alluded to, severe emotional disabilities or disturbances. He's always had those, since day one. He has trouble controlling his behavior. You're going to hear evidence of a young man that's totally out of control, from early on.
>
> ....
>
> This was a horrible crime. A crime that Marlo needs to be severely punished for. He needs to be removed from society permanently, make no doubt about that. But this big guy over here that you see behaves as a 14-year-old because of this defective wiring. The evidence will show you he wasn't dealt a full hand at birth, and he wasn't given a full hand to play in life.
>
> ....
>
> When all is said and done here, we're going to ask you to severly punish this defective human being. We're going to ask you to imprison him for the rest of his life and not to kill him.

(6 RA 1332 - 1337).

In this argument, the Defendant alleges that his counsel was ineffective for trying to establish credibility with the jury during the penalty hearing. The Defendant

contends that his counsel's statements demonstrated an abandonment of counsel's duties to his client. Defendant's contentions are meritless, and the District Court properly determined that counsel was not ineffective.

Counsel's strategy decisions are "tactical" decisions and such decisions will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; *see also* Howard v State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066; State v. Meeker, 693 P.2d 911, 917 (Ariz. 1984). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. Once trial counsel makes a decision on how to proceed, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280; *citing* Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066.

On January 22, 2002, the District Court held an evidentiary hearing and considered defense counsel's reasoning for making such statements. During the hearing, Mr. LaPorta agreed that defense credibility is best served by acknowledging that the Defendant's record was terrible, and that the Defendant had problems in his past. (AA, pg. 216). On August 21, 2002, the Court accepted Mr. LaPorta's logic and determined that counsel's strategy decision was reasonable and did not constitute ineffective assistance of counsel. (AA, pg. 253).

The Defendant's attorneys were faced with the very difficult task of convincing jurors to spare Defendant's life. The jury heard testimony concerning the brutal slaying of two innocent young men. Moreover, the jury received evidence establishing Defendant's extensive criminal history and his poor behavior while in prison.

Trial counsel's main objective was to convince the jury to spare Defendant's life. The attorneys presented psychiatric testimony concerning Defendant's

childhood, physical and mental disabilities and Defendant's prognosis for behaving in prison. (7 RA 1566 – 1592). Additionally, the defense presented emotional testimony from Defendant's mother and brother who is a minister. (7 RA 1544 – 1555). Defense counsel's decision to acknowledge that Defendant was a bad person and to accentuate the mitigating circumstances was sound trial strategy. Accordingly, defense counsel's actions were clearly reasonable, and do not approach the level of ineffective assistance of counsel.

10. Defense Counsel Was Adequately Prepared For Trial

Defendant alleges that his trial counsel was not prepared to proceed to trial and had not adequately prepared for critical stages of the proceedings. Additionally, the Defendant further alleges that counsel was unprepared for the preliminary hearing and penalty hearing.

More specifically, the Defendant argues that his counsel was ineffective for failing to be prepared to adequately cross-examine Kenya Hall at the preliminary hearing. Before the preliminary hearing began on July 27, 1996, a plea bargain was agreed upon between the State of Nevada and the co-defendant in this case, Kenya Hall. As a portion of the negotiations, Kenya Hall signed an agreement to testify. (1 RA 22).

Upon learning of the plea bargain, the Defendant's counsel, Mr. LaPorta, addressed the Justice Court. Specifically, Mr. Laporta stated,

> Obviously, this plea bargain comes as a surprise to me this morning. This was a co-defendant, still is a co-defendant. The State's going to offer him – his testimony against my client, Mr. Thomas. Obviously, there is a plea bargain that has been struck.
>
> The only discovery that I have received from any statements that he has made to the district attorney or Metropolitan Police Department were the original statement that he had made. I have received nothing in the past two or three weeks when I suspect that this deal was cut.
>
> What I'm asking for, Judge, is a short continuance or at least a continuance for that portion of Mr. Hall's testimony until such time as I can make the proper, make the proper motions for discovery, review some files, any possible testimony or statements that he's made. In

addition to that, there may be some potential or possible motions that I may wish to file that regard his testimony.

(1 RA 73-74). The Justice Court denied this request stating, "If after the State has rested their case in chief, then if you feel like you need a continuance, you can make a motion then and I will decide." (1 RA 75).

As the final witness to testify at the preliminary hearing, the State called Kenya Hall. (1 RA 152). The State had Mr. Hall describe the events that took place in the Lone Star Steakhouse on April 15, 1996. (1 RA 152 – 190). Mr. Hall testified that after they left the steakhouse, the Defendant told him that gotten into a fight with one man and had killed another man by stabbing him with a knife. (1 RA 184).

After the direct examination was completed, the Defendant's counsel cross-examined Mr. Hall. (1 RA 190 – 201). During the cross examination, Mr. LaPorta had Mr. Hall describe his actions inside the steakhouse, including a detailed description of how he and the Defendant robbed the manager at gunpoint. (1 RA 196-199).

After the cross-examination had ended, the State conducted a re-direct examination of Mr. Hall. (1 RA 201-209). In response to the issues raised in this questioning, the Defendant's counsel followed up with a re-cross examination. (1 RA 209- 212). Defense counsel adequately cross-examined Kenya Hall.

Additionally, the Defendant asserts that his counsel did virtually nothing to prepare for the penalty hearing until the weekend before the penalty hearing. (Defendant's Opening Brief, pg. 55). This claim is clearly belied by the record. At the penalty hearing, the Defendant called five separate witnesses in mitigation. (6 RA 1540 – 7 RA 1635). One of the witnesses, Doctor Kinsora, testified as to five separate meetings he held with the Defendant over a period of months. (7 RA 1578). Another witness, Ms. Overby, testified about her dealing with the Defendant while he was in middle school. (7 RA 1633).

The District Court held an evidentiary hearing to determine if the Court felt that the Defendant was provided ineffective assistance of counsel. (AA, pgs. 202-233). After reviewing the testimony elicited at the evidentiary hearings and the briefs provided by both parties, the Court properly determined that trial counsel was effectively prepared and did not provide ineffective assistance of counsel. (AA, pg. 253).

An ineffective assistance of counsel claim premised upon a theory of a failure to investigate requires that "'[a] defendant who alleges [a] failure to investigate ... must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial.'" United States v. Porter, 924 F.2d 395, 397 (1st Cir. 1991) (*quoting* United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989). Furthermore, it is well established that a claim of ineffective assistance of counsel alleging a failure to properly investigate will fail where the evidence or testimony sought does not exonerate or exculpate the defendant. Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989). In examining Defendant's numerous allegations of failures to investigate, the relevant inquiry is whether counsel's decisions were reasonable under the circumstances at the time the decision was made.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065 (*citing* Engle v. Issac, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-75 (1982)).

In the instant case, the Defendant fails to allege what the investigation would have revealed and how it would have altered the outcome of the trial. Additionally, the Defendant fails to state that the preparation that trial counsel should have done would have exonerated the Defendant. A thorough review of the record clearly shows that defense counsel was not ineffective. Defense counsel thoroughly prepared for

this case and presented an effective defense. Counsel was adequately prepared for trial and rendered more than adequate professional assistance to Petitioner.

The defense was faced with a very compelling case of murder in the first degree. The State had eyewitnesses who knew the Defendant and physical evidence, provided by Defendant's family members, that linked Defendant to the crime scene. (4 RA 618); (4 RA 688). Moreover, Defendant made admissions to his family members. (4 RA 686). Finally, Defendant provided a video taped statement admitting to killing the victims albeit in self-defense. (Videotaped Confession, State's Exhibit No. 82).

Based upon the overwhelming evidence the jury would hear during the guilt phase, the only viable strategy was to present a strong case of mitigation in the penalty phase. Defense counsel obtained the inmate file, met personally with the Defendant's family members, and prepared Dr. Kinsora and the psychologist who worked with the Defendant when he was a child for testimony. (6 RA 1540 – 7 RA 1635). The defense presented a respectable mitigation argument during the penalty phase.

The Supreme Court has created a strong presumption that defense counsel's actions are reasonably effective:

> Every effort [must 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. . . .A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland, at 689-690.

The defense provided Defendant with the effective of counsel as guaranteed by the United States Constitution. Defense counsel was adequately prepared for trial and, thus, no error occurred. Therefore, the District Court properly determined that this claim should be summarily rejected.

11. Defense Counsel Was Not Ineffective For Failing to Offer Jury Instructions

The Defendant alleges that trial counsel failed to offer a jury instruction that properly set forth the theory of mitigation for the defense and excluded non-applicable statutory aggravating circumstances and failed to object to argument by the prosecutor that minimized the concept of mitigation by highlighting non-applicable statutory mitigating circumstances.

Before the instructions were given to the jury, the District Court asked defense counsel if they requested the giving of any instructions in addition to those the Court had already indicated would be given. (6 RA 1210). In response to this question, defense counsel responded, "No, Your Honor, not outside of those that have already been accepted." (6 RA 1210).

Again, defense counsel's decisions regarding the instructions to be presented to the jury are tactical decisions which cannot be overturned absent extraordinary circumstances. See, Doleman, 112 Nev. at 846, 921 P.2d at 280; *see also*, Howard, 106 Nev. at 722, 800 P.2d at 180; Strickland, 466 U.S. at 691, 104 S.Ct. at 2066. A jury instruction will be presumed valid unless Defendant can show that a "different result would have been obtained had the proposed instruction been given." Barron v. State, 105 Nev. 767, 777, 783 P.2d 444, 451 (1989).

In the instant case, the Defendant does not allege that a different result would have been obtained. The Defendant argues that the prejudicial effect of such an argument is proven by the fact that the jury found no mitigating circumstances. NRS 200.030(4)(a) states:

> A person convicted of murder of the first degree is guilty of a category A felony and shall be punished: (a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances.

The jury found six aggravating circumstances, and, therefore, the result would have been the same even if defense counsel created some new jury instruction. (7 RA 1694 - 1699). The Defendant did not state what jury instruction should have been

offered. Nor did the Defendant show that a different result would have been reasonably probable.

Accordingly, the District Court properly determined that defense counsel was not ineffective for failing to present the jury instructions.

12. Defense Counsel Was Not Ineffective For Failing to Object at the Penalty Hearing

The Defendant argues that trial counsel failed to object to the jury at the penalty hearing being instructed that the sentence could be commuted. The Defendant relies on Sonner v. State, 114 Nev. 321, 955 P.2d 673 (1998), for the proposition that all language in a jury instruction which discusses modification by the Pardons Board should be eliminated. The Defendant suggests that the jury in the instant case could have been mislead into believing that they either had to impose the death penalty or choose a sentence that could be commuted to a possibility of parole.

During the penalty phase, the jury was instructed: "Although under certain circumstances and conditions the State Board of Pardons Commissioners has the power to modify sentences, you are instructed that you may not speculate as to whether the sentence you impose may be changed at a later date." (7 RA 1639). This same instruction was given in Sonner, 114 Nev. 321.

In Sonner, this Court held that the identical instruction given in this case did not mislead the jury or prejudice the defendant. Sonner argued that the instruction implied that if the jury sentenced him to life without the possibility of parole, it could be modified to life with the possibility of parole, and this was misleading because NRS 213.1099(4) prevented him from receiving parole. To support his argument, Sonner cited Geary v. State, 112 Nev. 1434, 1439-1444, 930 P.2d 719, 723-726 (1996).

Despite the Geary decision, this Court refused to reverse Sonner's death sentence on the same rationale because the facts of Geary were distinguishable where:

> [N]either the prosecutor nor defense counsel assumed or implied that Sonner would ever be eligible for parole if sentenced to life in prison without possibility of parole; the jury did not hear any evidence that Sonner received parole after receiving a sentence of life without the possibility of parole; and the prosecutor did not argue to the jury that Sonner posed a future danger.

Sonner, 114 Nev. at 323, 955 P.2d at 676.

For the same reasons, the instruction given here did not mislead the jury and did not prejudice Defendant. The State did not argue that the Defendant would ever be eligible for parole if sentenced to life in prison without the possibility of parole. The State did not argue that the Defendant posed a future danger to the community. Instead, the prosecutor argued that the death penalty fit the crime, as the crimes were committed while the Defendant was engaged in the commission of a Burglary, Robbery, and avoiding lawful arrest. (7 RA 1662 – 1663). Under the facts of this case, it cannot be said that the jury was misled that Defendant would ever be released, or that Defendant was prejudiced by the portion of the instruction complained of here.

In addition, the Defendant failed to satisfy the second prong of Strickland. The Defendant failed to show that the death sentence the Defendant received was due to counsel's ineffectiveness and but for counsel's ineffectiveness, there is a reasonable probability that the result of the proceedings would have been different. Consequently, the District Court properly ruled that counsel was not ineffective.

13. Trial Counsel Was Not Ineffective For Failing to Request an Instruction Defining Character Evidence.

The Defendant argues that trial counsel failed to request an instruction during the penalty phase that correctly defined the use of character evidence for the jury. Defense counsel was given an opportunity to request an instruction defining character evidence, however, defense counsel stated that all of their requested instructions were included. (7 RA 1619).

Again, defense counsel's decisions regarding the instructions to be presented to the jury are tactical decisions which cannot be overturned absent extraordinary circumstances. *See*, Doleman, 112 Nev. at 846, 921 P.2d at 280; *see also*, Howard, 106 Nev. at 722, 800 P.2d at 180; Strickland, 466 U.S. at 691, 104 S.Ct. at 2066. A jury instruction will be presumed valid unless Defendant can show that a "different result would have been obtained had the proposed instruction been given." Barron v. State, 105 Nev. 767, 777, 783 P.2d 444, 451 (1989).

The Defendant failed to argue that had a character instruction been given, a different result would have been obtained. The jury found six aggravating circumstances and did not find any mitigating circumstances. Two of the six aggravating circumstances were found at trial because the Defendant was found to have committed the killings during a burglary and during a robbery. (7 RA 1696; 7 RA 1698). Pursuant to NRS 200.030(4)(a), the jury was to weigh the aggravating circumstances with any mitigating circumstances.

Therefore, a character instruction would not have changed the result of the penalty hearing. As such, the Defendant failed to show that trial counsel acted unreasonably and also failed to allege that the result of the penalty hearing would have been different had a character instruction been given.

Therefore, the District Court made the proper ruling that the Defendant's trial counsel was not ineffective for failing to request a "character" evidence jury instruction.

14. Trial Counsel Failed to Make an Opening Statement

The Defendant argues that trial counsel was ineffective for failing to make an opening statement and failing to call any witnesses that would testify for the Defendant at trial.

Defense counsel was provided an opportunity to make an opening statement by the District Court. However, defense counsel decided to "reserve our opening for our case in chief." (3 RA 549).

After the State concluded its presentation of witnesses, the Court allowed the defense to present witnesses. (6 RA 1208). At that time, defense counsel stated that would not be presenting any witnesses and rested their case. (6 RA 1213). The Court confirmed the Defendant's wishes by asking, "So you waive your opening statement and you rest at this time?" (6 RA 1213). Defense counsel responded affirmatively. (6 RA 1213).

In the instant petition, the Defendant states that his affidavit attached to his Petition spells out the witnesses that should have been called and who were not interviewed by trial counsel. However, the Defendant fails to state what these witnesses would have testified and how their testimony would have changed the result at trial. Furthermore, the decision of whether or not to give an opening statement is a trial tactic. Once the decision on how to proceed to trial 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 846, 921 P.2d at 280; *citing*, Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Finally, counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; *see also* Howard v State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066; State v. Meeker, 693 P.2d 911, 917 (Ariz. 1984).

The Defendant failed to show that counsel was unreasonable and that but for counsel's errors the result would have been different. Thus, the District Court properly determined that trial counsel was not ineffective.

II.

THE DISTRICT COURT WAS PROPER IN FINDING THAT THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE APPELLATE PHASE OF HIS PROCEEDINGS

A. Standard of Review

The federal courts have held that in order to claim ineffective assistance of appellate counsel the defendant must satisfy the two-prong test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) by demonstrating that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there was a reasonable probability that the result of the proceedings would have been different. See Strickland, 466 U.S. at 687-688 & 694, 104 S.Ct. at 2065 & 2068; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

Further, there is a strong presumption that counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See, United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. This Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). Finally, in order to prove that appellate counsel's alleged error was prejudicial, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

Counsel is not required to assert frivolous claims on appeal. Defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). However, Defendant does not have the constitutional right to "compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. In reaching this conclusion, the Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most, on a few key issues." Jones, 463 U.S. at 751-752, 103 S.Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying the good arguments ... in a verbal mound made up of

strong and weak contentions." Id. at 753, 3313. The Court has, therefore, held that 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." Id. at 754, 3314.

Similar to the standards of ineffective assistance regarding trial counsel, appellate counsel has the right and discretion to employ his professional knowledge and tactics in construing a defendant's appeal. Unless Defendant can demonstrate that counsel did not provide "reasonably effective assistance," appellate counsel's professional conduct will be upheld as effective. See Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of counsel, Defendant must prove that but for counsel's unprofessional errors, a different result is reasonably probable. Strickland, supra. The United States Supreme court further refined the prejudice component of their Strickland holding in Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838 (1993) to focus on the question of whether the attorney's deficient performance deprived a defendant of a fair trial or a trial whose result was suspect since the "but for" test might give a defendant a windfall to which he was not entitled.

B. Appellate Counsel's Failure to Raise Issues on Direct Appeal

The Defendant argues throughout his appeal that appellate counsel failed to raise several claims on direct appeal. The Defendant alleges that appellate counsel was ineffective because appellate counsel failed to raise an objection to the malice instruction and the commutation instruction was not proper.

The Defendant failed to properly preserve these issues for appeal. *See* Thomas v. State, 114 Nev. 1127, 1149, 967 P.2d 1111, 1125 (1999). In order to preserve appellate review, objections to alleged errors must be lodged at trial. McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983); *see also* State v. Taylor, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998), Emmons v. State, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991). "When an appellant fails to specifically object to questions asked or

testimony elicited during trial, but complains about them, in retrospect upon appeal, we [the Supreme Court of Nevada] do not consider his contention a proper assignment of error." Greene v. State, 113 Nev. 157, 931 P.2d 54, 65-6 (1997) (reversed on other grounds) (*quoting* Wilson v. State, 86 Nev. 320, 326, 468 P.2d 346, 350 (1970)). Trial counsel failed to preserve the issues stated *supra*. Therefore, appellate counsel could not have raised these issues unless appellate counsel argued plain error. The trial counsel errors alleged in the Defendant's Petition for Writ of Habeas Corpus clearly do not constitute plain error. *See Arguments Supra.*

Trial counsel failed to object to these issues at trial. The alleged misconduct of trial counsel was not plain error. See the discussion above under Argument I. Additionally, the Defendant fails to satisfy the Strickland standard in the instant case, and, therefore, the District Court properly determined that counsel was not ineffective.

III.

THIS COURT CONDUCTED A PROPER AND ADEQUATE APPELLATE REVIEW

In the Defendant's Petition for Writ of Habeas Corpus (Post-Conviction), the Defendant argues that this Court's review of cases in which the death penalty has been imposed is constitutionally inadequate. The Defendant further alleged that the opinions rendered by this court have been consistently arbitrary, unprincipled and result oriented.

In effect, the Defendant asked the district court to exercise supervisory and appellate review over the functioning and decisions of the Supreme Court of Nevada, in contravention of the order of the judicial system. Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001). The Nevada Supreme Court "'possesses inherent power to prescribe rules necessary or desirable to handle the judicial functioning of the courts' and is charged with the governance of the district courts, not vice versa." Id.; *citing* State v. District Ct., 116 Nev. 953, 963, 11 P.3d 1209, 1215 (2000)

The District Court properly refused to oversee and review the decisions of this court.

IV.

DEFENDANT WAS TRIED BY AN IMPARTIAL JURY

In this argument, the Defendant alleges that his conviction is invalid because he was tried by a jury that was under-represented of African Americans.

This court has held that a jury selection process violates a defendant's due process and equal protection rights only if it can be shown that "members of appellant's race were excluded systematically from jury duty." Bishop v. State, 92 Nev. 510, 515, 554 P.2d 266, 270 (1976). Purposeful discrimination may not be assumed or merely asserted, it must be proved. Bishop, 92 Nev. at 515, 554 P.2d at 270; see also, Batson v. Kentucky, 476 U.S. 79, 93-100, 106 S.Ct. 1712, 1721-1725 (1986). Further, the court has stated that "[t]he absence of members of one's race on a petit jury may occur. If so, it is not error. It is the systematic exclusion of members of a race or class that spoils the makeup of the jury." Bishop, 92 Nev. at 515, 554 P.2d at 270; *citing*, Collins v. State, 88 Nev. 9, 13, 492 P.2d 991, 993 (1972).

During jury selection, three African-American potential jurors were excused from the venire panel for cause because they were not "death qualified." (5 RA 1033, 5 RA 1084, 5 RA 1138). One African-American male, Kevin Evans, remained on the panel, and was excluded via a peremptory challenge. (5 RA 1167). This would not indicate any type of "systematic exclusion" of a race by the state selection process, especially considering the fact that the pool was selected through a random drawing from the Nevada Department of Motor Vehicles containing those individuals who possess either a Nevada driver's license or a DMV identification card. Thus, Defendant's statistical arguments do not surpass the burden of showing purposeful discrimination and the State's selection of the jury pool at the time of Defendant's trial was constitutionally legitimate.

Additionally, this issue is procedurally barred. *See* Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001).

Accordingly, the District Court properly denied this argument.

V.

THE DISTRICT COURT DID NOT ERR WHEN IT DENIED DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) WITHOUT CONDUCTING A FULL EVIDENTIARY HEARING

Defendant claims that the court erred when it did not conduct a full evidentiary hearing before it denied his petition for writ of habeas corpus (post-conviction).

The district court does not need to hold an evidentiary hearing to be in position to properly rule on the validity of the defendant's claims. A defendant who files for post-conviction relief is entitled to an evidentiary hearing if his petition is supported by specific factual allegations that, 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 Nevada Legislature has given the District Court the ability to make such a determination without holding a full evidentiary hearing. NRS 34.770(1) provides that, in post-conviction habeas corpus proceedings, the judge "shall determine whether an evidentiary hearing is required." The statute also provides that "[i]f the 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." *See* NRS 34.770.

In Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983), this Court held that there should be a hearing on the allegation of ineffective assistance of counsel if the defendant 1) presents an affidavit, 2) which presents factual allegations of the attorney's misconduct, and 3) which is outside of the record and thus not reviewable by this Court on appeal. In Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), this Court held that to the extent that a defendant advances merely naked

allegations, he is not entitled to an evidentiary hearing. State v. Runningeagle, 859 P.2d 169 (Ariz. 1993), cited by this court with approval in Browne v. State, 113 Nev. 305, 311, 933 P.2d 187, 190-91 (1997) stands for the proposition that a defendant is only entitled to an evidentiary hearing when he presents a colorable claim. 859 P.2d at 173. A colorable claim is one that, if the allegations are true, might have changed the outcome. Id.

Here, the Defendant contends that all of the claims within the petition for writ of habeas corpus (post-conviction) should have been considered in an evidentiary hearing. In support of his argument, the Defendant relies upon Drake v. State, 108 Nev. 523, 836 P.2d 52 (1992). In Drake, the defendant was convicted of three counts of sexual assault, and filed a petition for writ of habeas corpus (post-conviction). The district court denied the defendant's petition without conducting an evidentiary hearing. The defendant filed an appeal to the Supreme Court of Nevada. Specifically, the defendant alleged that his counsel failed to adequately oppose a State's motion in limine to exclude the victim's criminal record because it was of no relevance because the defendant planned to use an alibi defense, thus making consent irrelevant.

This Court held that the defendant was entitled to an evidentiary hearing on the issue of whether he received ineffective assistance of counsel. Id. This Court stated, "Appellant's petition for post-conviction relief plainly contained contentions, supported by specific allegations of fact which, if true, would entitle appellant to relief." Id. at 528, 826 P.2d at 55. This Court found that Drake's trial counsel failed to raise an appropriate defense which could have exonerated the defendant. Id.

The Court properly ruled that Drake does not apply to the instant case. In the instant case, the evidence presented against the defendant was overwhelming. Defense counsel did not fail to set forth an appropriate defense nor did defense counsel act unreasonably. Additionally, the defendant did not present any colorable claims against trial counsel. Even so, the District Court granted a limited evidentiary hearing on certain issues before making a final determination on the merits of the

arguments presented in the Petition for Writ of Habeas Corpus (Post-Conviction). (AA, pg. 222-233).

The defendant was not entitled to a full evidentiary hearing, thus, the district court decision not to grant an evidentiary hearing on every issue presented was proper. Accordingly, the district court's decision should be upheld.

CONCLUSION

Based upon the above and foregoing Points and Authorities, the State respectfully requests this Honorable Court affirm the District Court's denial of the Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

Dated this 2nd day of July, 2003.

DAVID ROGER
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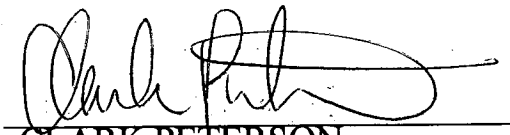
BY 
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CERTIFICATE OF COMPLIANCE

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 2nd day of July, 2003.

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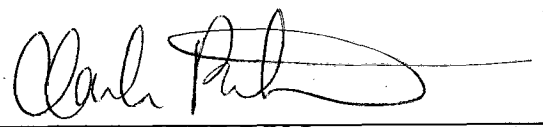
BY 
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CERTIFICATE OF MAILING

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 this 2nd day of July, 2003.

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