ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN JAMES NASBY,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

Case No. 47130

FILED
JAN 0 3 2007
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

RESPONDENT'S ANSWERING BRIEF

Appeal From District Court's Denial of Post-Conviction Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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07-00123

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STATEMENT OF THE ISSUES

1. Whether Defendant's Claims Of Prosecutorial Misconduct And Trial Court Error Are Barred Because They Were Not Raised At Trial Or On Direct Appeal.

2. Whether Defendant Received Effective Assistance Of Trial And Appellate Counsel.

STATEMENT OF THE CASE

Brendan Nasby (hereinafter "Defendant"), was charged by an Amended Criminal Complaint, filed on August 27, 1998, with Conspiracy To Commit Murder and Murder With Use Of A Deadly Weapon. An Information, filed on November 9, 1998, charged Defendant with Conspiracy To Commit Murder and Murder With The Use Of A Deadly Weapon.

On October 19, 1999, a jury found Defendant guilty of Conspiracy To Commit Murder and First Degree Murder With Use Of A Deadly Weapon. On November 29, 1999, Defendant was sentenced to a maximum of one hundred twenty (120) months, with a minimum parole eligibility of forty-eight (48) months, in the Nevada

Department of Prisons on the Conspiracy to Commit Murder count. On the First Degree Murder count, Defendant was sentenced to a consecutive term of Life with the possibility of parole, with a consecutive term of Life with the possibility of parole for the deadly weapon enhancement. A Judgment of Conviction was filed on December 2, 1999.

Defendant appealed his conviction to the Nevada Supreme Court. Defendant's conviction was affirmed on February 7, 2001. Remittitur issued on March 6, 2001. Defendant filed a pro per petition for writ of habeas corpus post-conviction on February 1, 2002. This matter was never litigated. On March 1, 2004, the district court set a new briefing schedule. Defendant was granted an extension to file his petition for writ of habeas corpus post-conviction on November 10, 2004. Defendant filed his instant petition for writ of habeas corpus post-conviction on November 17, 2004. The State filed its response on February 4, 2005. The court held an evidentiary hearing regarding Defendant's claims of ineffective assistance of counsel on November 9, 2005. Thereafter, the court allowed both parties time to file briefs on the issues. The court denied Defendant's petition on March 27, 2006, and entered its notice of entry of order on April 27, 2006. Defendant filed the instant notice of appeal on May 24, 2006.

STATEMENT OF THE FACTS

During its case-in-chief, the State presented overwhelming evidence of Defendant's guilt. This evidence included testimony that Defendant had murdered Michael Beasley execution style, that Defendant made admissions to two (2) different people and that Defendant voluntarily, and without provocation, led police to the location of the murder weapon within Defendant's house. Furthermore, the State offered evidence from Defendant's accomplices to detail the premeditated manner in which the homicide took place.

The State called the three (3) accomplices that joined Defendant in killing Michael. The first accomplice, Jeremiah Deskin ("Jeremiah"), testified that he knew

Defendant as a member of the gang L.A. Crazy Riders and that Defendant was the gang leader. AA Vol. 2, pp. 0361-0362. Jeremiah told the jury that Tommie Burnside ("Tommie") and his brother Jotee Burnside ("Jotee") were also members of the gang. AA Vol. 2, p. 0363. Jeremiah said that one (1) month prior to the July 16, 1998 killing of Michael, Defendant met with Jeremiah, Tommie, Jotee and another male gang member to discuss whether Michael should be killed. AA Vol. 2, pp. 0363-0364. Jeremiah specifically recalled that Defendant was soliciting opinions as to whether Michael should be killed because Michael was allegedly trying to take Defendant's role in the gang. AA Vol. 2, pp. 0363-0364. Jeremiah also related that the general consensus from the other gang members at that meeting was that Michael should not be killed. AA Vol. 2, p. 0364.

Jeremiah further testified that on the night of the murder he was at Defendant's house when Defendant called him into the garage. AA Vol. 2, p. 0364. There inside the garage with Tommie, Defendant told Jeremiah to go pick up Michael so that they could take him to the desert and shoot him. AA Vol. 2, p. 0364. Jeremiah then went with Tommie and Jotee to Michael's residence. AA Vol. 2, pp. 0364-0367. Upon returning to Defendant's home, Defendant displayed his Browning 9mm handgun that he had purchased from an individual named David. AA Vol. 2, p. 0367. Jeremiah explained that the "plan" was to go to the desert to shoot guns and smoke weed, but that no one had any weed on them. AA Vol. 2, p. 0368.

After driving out into the desert, Jeremiah recalled that he stopped his car near the edge of a wash. AA Vol. 2, pp. 0368-0369. Jeremiah told the jury that all five (5) men got out of the car to look amongst the garbage and debris for something to use as a target. AA Vol. 2, p. 0368. He also said that he kept the lights of his car on to illuminate the area. AA Vol. 2, p. 0368. At this time Defendant asked Jeremiah to move his car closer to the edge to brighten the area of the wash where old refrigerators were strewn about. AA Vol. 2, p. 0369. After he got out of the car, Jeremiah observed Defendant approach Michael from behind as Michael continued looking into

the wash for something to use as a target. AA Vol. 2, p. 0369. From closer than ten (10) feet away, Defendant then raised the handgun and shot Michael in the upper back. AA Vol. 2, pp. 0369-0370. Having never seen Defendant approach him from behind, Michael grabbed his neck/shoulder area while dropping down onto one (1) knee. AA Vol. 2, p. 0370. Defendant then stepped forward and fired another shot at Michael's neck/head area which caused Michael to fall forward and roll over onto his back. AA Vol. 2, p. 0370.

Jeremiah testified that Tommie, Jotee and Defendant then ran back to the car after Defendant had shot Michael for the second time. AA Vol. 2, p. 0370. Before Jeremiah was able to start the car to leave, Defendant jumped out, ran over to Michael and shot once more at Michael's head as Michael lay there on his back. AA Vol. 2, pp. 0370-0371. Jeremiah recalled that when Defendant returned to the car, he muttered something like, "Try to take me off my own set" which Jeremiah understood to mean that Defendant believed Michael was trying to remove Defendant from the gang. AA Vol. 2, p. 0371.

Jeremiah further testified that on the way back to Las Vegas, Defendant threatened Jeremiah and the Burnside brothers if any of them spoke of the killing. AA Vol. 2, p. 0371. Jeremiah explained to the jury that he had also been charged in the death of Michael, but agreed to plead to a lesser charge in exchange for his testimony against Defendant. AA Vol. 2, p. 0373. The Burnside brothers, Tommie and Jotee, testified that they had been at Defendant's house on the night of the murder and that Defendant had shot Michael out in the desert. AA Vol. 3, pp. 0542-0543; 0550-0552. They also explained that they too had been charged with the death of Michael, but had agreed with the State to testify against Defendant. AA Vol. 3, pp. 0543; 0552.

Two women next testified for the State -- Tanesha Banks ("Tanesha") and Crystal Bradley ("Crystal"). Tanesha related that she was the mother of Michael's son and had been involved in a three (3) way conversation over the telephone with Crystal and Defendant on July 17, 1998. AA Vol. 3, pp. 0446-0447. Tanesha stated

that Defendant sounded "panicky" when she incorrectly mentioned that she had seen Michael earlier in the morning of July 17, 1998. AA Vol. 3, pp. 0446-0447. Tanesha also told the jury that she had been beaten by a friend of Defendant purportedly because Tanesha had been telling people she believed Defendant was responsible for Michael's death. AA Vol. 3, pp. 0448-0449. Tanesha later explained that once Defendant had been arrested, she received a threatening call from him when he was being held at the Clark County Detention Center ("CCDC"). AA Vol. 3, p. 0449.

Crystal next testified that she had been familiar with Defendant from the L.A. Crazy Riders gang and that she had stayed in contact with the gang. AA Vol. 3, p. 0453. She also recalled the three (3) way telephone conversation with Tanesha and Defendant in which Defendant abruptly told her that he needed to speak with only Crystal. AA Vol. 3, p. 0453-0454. Crystal then testified that during this conversation, Defendant admitted to murdering Michael, and he planned on attempting to make it look like another gang had committed the killing. AA Vol. 3, pp. 0454; 0455. Crystal revealed that while she didn't believe Defendant at first, she later called Secret Witness when she confirmed that Michael was indeed dead. AA Vol. 3, p. 0455.

Brittney Adams ("Brittney") testified that she had talked to Defendant about Michael's death and that she thought Defendant was "covering something up." AA Vol. 3, pp. 0558-0559. Brittney also said that Defendant had told her Crystal and Tanesha were involved in Michael's death and that he wanted Brittney to kill Tanesha because Tanesha was blaming him for the death. AA Vol. 3, p. 0559. Brittney explained that she drove over to Tanesha's house with her cousin and Defendant to get Tanesha's side of the story. AA Vol. 3, p. 0559-0560. Defendant offered Brittney a hammer to use in the assault of Tanesha telling her, "You can just hit her between the eyes and kill her; just kill her, cuz; just kill her." AA Vol. 3, p. 0560. Brittney told the jury that she refused Defendant's offer to use the hammer, but did get into a fight with Tanesha while Defendant remained inside the car. AA Vol. 3, p. 0560-0561. Brittney recalled that when they left Tanesha's house, Defendant repeatedly

said to her, "You should have killed her, cuz, you should have killed her." AA Vol. 3, p. 0561.

Jomeka Beavers ("Jomeka"), Michael's aunt, testified that she was living with Michael on the day he was murdered. AA Vol. 2, p. 0400. She related that Michael had received a telephone call early in the evening on the night he was killed. AA Vol. 2, pp. 0400-0401. Michael then asked Jomeka to watch his infant son while he went out with his friends. AA Vol. 2, p. 0401. Jomeka specifically remembered that Michael got into a car with Jeremiah, whom she knew as Woodpecker, but that Charles Damion Von Lewis a.k.a. Sugar Bear was not present. AA Vol. 2, p. 0401.

Dr. Robert Jordan ("Jordan") testified that he performed the autopsy on Michael who had three (3) bullet wounds, two (2) to the chest and one (1) to the head. AA Vol. 2, pp. 0385-0386. Jordan explained that the Michael had one entrance wound to the back, one exit wound to the chest and one entrance wound above the left eye. AA Vol. 2, p. 0386. Jordan also testified that the only projectiles he recovered during the autopsy were bullet fragments from Michael's skull. AA Vol. 2, p. 0386.

Las Vegas Metropolitan Police Department ("Metro") homicide detectives James Buczek ("Buczek") and Thomas Thowsen ("Thowsen") testified that they had been the lead investigators into Michael's death. AA Vol. 3, pp. 0477-0478; 0577. Buczek related that he had developed Defendant as a suspect in the murder of Michael after he spoke with Tanesha who told him about the three (3) way telephone conversation she had with Crystal and Defendant. AA Vol. 3, pp. 0478-0479. Buczek confirmed this information by speaking with Crystal and then proceeded to have a search warrant drawn up to search Defendant's house for evidence. AA Vol. 3, pp. 0478-0479. Defendant was placed under arrest after the execution of the search warrant and was advised of his Miranda rights. AA Vol. 3, pp. 0479-0480. As Buczek was transporting him to the police station, Defendant immediately referred to a 9mm handgun as the murder weapon even though Buczek never told Defendant what kind of weapon was used to kill Michael. AA Vol. 3, p. 0480. Defendant also

told Buczek that the 9mm handgun was back at his house. AA Vol. 3, p. 0480. Metro found the 9mm handgun in a bag under Defendant's bed. AA Vol. 3, p. 0480. Thowsen testified that he had investigated a September 23, 1998 phone call from CCDC to Tanesha and confirmed that it had come from a phone line within CCDC. AA Vol. 3, pp. 0577-0579. Further investigation by Thowsen revealed that two (2) phone calls had been placed from the section of CCDC where Defendant was being held. AA Vol. 3, p. 0584. The jury then heard from another inmate of CCDC, John Holmes ("Holmes"), who testified that Defendant had admitted to killing Michael. AA Vol. 3, p. 0573. Holmes stated that Defendant told him he murdered Michael because Michael was trying to take his leadership spot in the gang. AA Vol. 3, p. 0573.

A number of Metro crime scene analysts testified for the State as well. Kelly Neil ("Neil") testified that he recovered four (4) shiny, new-looking shell casings from the crime scene amidst "hundreds" of expended shell casings. AA Vol. 2, p. 0350. Neil also recovered three (3) Winston brand cigarette butts and took photographs of footprints. AA Vol. 2, pp. 0350, 0351. Neil explained that three (3) of the four (4) shell casings he retrieved were 9mm cartridges. AA Vol. 2, p. 0351. Randall McPhail ("McPhail") testified that he collected evidence from Defendant's house after the search warrant had been executed. AA Vol. 3, pp. 0460-0461. McPhail explained that he recovered a 9mm handgun, took pictures of seven (7) pairs of shoes and collected cigarette butts bearing the brands Kool, Benson & Hedges and a generic brand. AA Vol. 3, pp. 0460-0461. A further check on the 9mm handgun revealed that it had been reported stolen from a residence in North Las Vegas. AA Vol. 3, pp. 0463.

Fred Boyd ("Boyd") next testified that he had run fingerprint analysis on the recovered shell casings and 9mm handgun, but was unable to get any tangible latent prints. AA Vol. 3, p. 0471. Boyd also explained that he could not find a match amongst the photographs of footprint impression at the crime scene and the

photographs of the seven (7) pairs of shoes from Defendant's house. AA Vol. 3, p. 0473. Firearms expert Torrey Johnson ("Johnson") testified that he conducted a test fire on the 9mm handgun recovered from Defendant's house and that the shell casings discovered at the crime scene were three (3) 9mm casings and one (1) .45 casing. AA Vol. 3, p. 0525. Johnson also told the jury that while he could not positively find that the shell casings had been fired from the 9mm handgun seized at Defendant's house, the casings bore marks consistent with that conclusion. AA Vol. 3, p. 0525. Moreover, Johnson explained that based on the assumption that the coroner removed bullet fragments from Michael's skull which were the resulting cause of death, the 9mm handgun examined by Jordan was the murder weapon. AA Vol. 3, pp. 0526-0527.

Before the Defendant's trial began, an evidentiary hearing was held to determine the admissibility of evidence regarding intimidation of State's witnesses. AA Vol. 2, pp. 0233-0343. The State called witnesses Tanesha, Brittney, Holmes, Thowsen and hand-writing expert Jan Seaman-Kelly ("Seaman-Kelly"). AA Vol. 2, pp. 0235, 0241, 0247, 0285, 0289. The hearing was suspended so that jury selection and opening statements could be done. AA Vol. 2, p. 0249. Once opening statements were completed, defense counsel filed a motion for mistrial to which the State responded that the hearing was not a Petrocelli hearing, but one designed to determine the admissibility of intimidation evidence pursuant to Lay v. State, 110 Nev. 1189, 886 P.2d 448 (1994). AA Vol. 2, p. 0283. Only during argument did defense counsel shift the focus of the hearing away from introduction of intimidation evidence to an alleged Fifth Amendment violation. AA Vol. 2, pp. 0283-0284. Nevertheless, the trial court noted that a ruling had not yet been made on this matter when opening statements were given and that both counsel were free to state what they believed the evidence would be at trial. AA Vol. 2, p. 0285. Finding that the prejudice outweighed the probative value, the trial court did ultimately exclude evidence of two (2) documents that Defendant had written to establish an alibi defense and to

potentially intimidate State's witnesses. AA Vol. 3, pp. 0567-0570. Accordingly, the prosecutor never referred to these documents during the State's case-in-chief or closing arguments. AA Vol. 3, pp. 0637-0642, 0647-0651.

ARGUMENT

I.

DEFENDANT'S VARIOUS CLAIMS OF PROSECUTORIAL MISCONDUCT AND TRIAL COURT ERROR ARE NOT COGNIZABLE.

An appellant is procedurally barred from asserting claims in post-conviction habeas corpus proceedings if he could have raised the claims either at trial or in his direct appeal. NRS 34.810(1)(b)(2) provides that the court shall dismiss a petition if:

> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:. . .
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief;

See also Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). Claims of prosecutorial misconduct are appropriate only in a direct appeal, and courts will not entertain them in post-conviction habeas corpus proceedings. Lara v. State, 120 Nev. 177, 179, 87 P. 3d 528, 529 (2004).

To overcome the procedural bar raised by failing to include arguments in the direct appeal, the Defendant must prove specific facts that 1) demonstrate good cause for Defendant's failure to present these claims in an earlier proceeding and 2) show that Defendant was actually prejudiced in the manner in which his trial and or direct appeal was conducted. NRS 34.810(3). A Defendant can show good cause only in those rare situations where a failure to entertain the issue would result in "a fundamental miscarriage of justice...resulting from a failure to entertain the claim." Hogan v. Warden, 109 Nev. 952, 959, 860 P. 2d 710, 715 (1993) (quoting McClesky v. Zant, 499 U.S. 467 (1991)). Further, beyond showing a mere possibility of prejudice, the Defendant must show that actual prejudice "worked to his actual and

substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions." Id. (quoting United States v. Frady, 456 U.S. 152, 170 (1982)). See also Kimmel v. Warden, 101 Nev. 6, 692 P.2d 1282 (1985); Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983).

Defendant asserts in his petition there was prosecutorial misconduct because the prosecutor: prevented a defense witness from testifying; improperly vouched for the credibility of a state witness; improperly referred to things not in evidence; misstated the law in closing argument; presented false testimony; led the Defendant to believe Mr. Von Lewis would be a witness; and placed a jail house informant in close proximity to Defendant. Appellant's Opening Brief pp 11-20. Defendant also asserts that there was trial court error because the court delayed ruling on a letter and improperly allowed the evidence of prior bad acts. Appellant's Opening Brief pp. 20-22. Both claims should have been raised in Defendant's direct appeal.[1]

Here, Defendant has not set forth any reason for failing to raise these issues in his direct appeal. As such, he has failed to meet his burden of proof to show good cause not to have raised these issues earlier. Therefore, Defendant's claims stated above are waived and should be dismissed.

II.

DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL.

Defendant alleges that he received ineffective assistance of trial and appellate counsel. The Nevada Supreme Court has held that "claims of ineffective assistance of counsel must be reviewed under the 'reasonably effective assistance' standard

[1] Defendant raised five issues in his direct appeal: 1)that the stte used coerced testimony, 2) that there was no corroborating evidence, 3)that the trial court should have offered an instruction regarding accomplice testimony, 4) that the trial court erred in failing to instruct the jury regarding "willfulness, deliberation, and premeditation, and 5) that the State improperly referred to inadmissible evidence in the opening statement. This Court denied all five of Defendant's claims in its Order of Affirmance issued February 7, 2001. AA 0121-0127.

articulated by the U.S. Supreme Court in Strickland[2], requiring a defendant to show that counsel's assistance was 'deficient' and that the deficiency prejudiced the defense." Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). Strickland laid out a two-pronged test to determine the merits of a defendant's claim of ineffective assistance of counsel:

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

Id. at 687, 104 S.Ct. at 2064. In addition, Defendant must show that the representation of Defense counsel was not within the range of competence demanded of attorneys in criminal cases. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985). There is a presumption that trial counsel was effective and fully discharged their duties. Homick v. State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996), citing Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991). "This presumption can only be overcome by strong and convincing proof to the contrary." Homick, 112 Nev. at 310, 913 P.2d at 1285.

The Nevada Supreme 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). In order to claim ineffective assistance of appellate counsel, the defendant must satisfy the two prong test set forth by Strickland. See 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

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[2] Strickland v. Washington, 466 U.S. 668 (1984).

F.2d 1126, 1130 (11th Cir. 1991). 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 v. Jones, 941 F.2d, 1126, 1132 (11th Cir. 1991).

The 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, the defendant does not have a constitutional right to "compel appointed counsel to press 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." Id. at 751 752, 103 S.Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S.Ct. at 3313. The Court noted 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, 103 S.Ct. at 3314. Accord Hernandez v. State, 117 Nev. 463, 465-468, P.3d 767, 768-770 (2001).

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, citing Cooper, 551 F.2d at 1166. In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

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.

A. Defendant's Claims

Defendant argues that trial counsel was ineffective for failing to call any witnesses and failing to offer any evidence. The Nevada Supreme Court held in Thomas v. State, 120 Nev. 37, 83 P.3d 818 (2004), that allegations that counsel did not call any witnesses during the guilty phase did not state a claim for ineffective assistance of counsel. See also, State v. Love, 109 Nev. 1136, 865 P.2d 322 (1993)(holding that counsel's tactical decision not to call alibi witnesses at trial was made after adequate investigation and was based upon counsel's reasonable determination that damage to the defendant's case could be avoided). In addition, the Nevada Supreme Court has stated that it will not second guess counsel's trial tactics. Donovan, 94 Nev. at 675, 584 P.2d at 711. The decision of which witnesses to call is left to the professional judgment of trial counsel.

Furthermore, the Nevada Supreme Court has stated that a criminal defendant is not denied effective assistance of counsel when a defense attorney "refuses to cooperate with the defendant in presenting perjured testimony. Young v. Ninth Judicial District Court, 107 Nev. 642, 649, 818 P.2d 844, 848 (1991) (adopting Nix v.

Whiteside, 475 U.S. 157 (1986). NRS 199.120 states that anybody who suborns perjury shall be guilty of a category D felony.

In the present case, the State was able to recover information which indicated that Defendant was coaching witnesses with false testimony. Two of these exhibits were presented in Defendant's case. AA Vol. 1, p. 0059-0084. Additionally, defense counsel was notified of Defendant's attempts to suborn perjury. AA Vol. 4, pp. 0670:4-20; 0671:14-24; 0672:7-25; 0689:10-14; 0690:14-25; 0692:21-0693:16. As such, defense counsel was prohibited from putting on witnesses that he knew would commit perjury. As defense counsel had originally filed a list of witnesses, and as Defendant states that his case was proceeding on an alibi defense, defense counsel cannot be deemed ineffective under the Strickland standards for failing to present witnesses whom he knew would perjure themselves. As it is the Defendant's own actions which required that his counsel proceeded without calling his alibi witnesses, Defendant cannot now claim that counsel was ineffective.

Defendant asserts that trial counsel (Joseph Sciscento) had a conflict of interest for accepting employment at the Special Public Defender's Office. At Defendant's sentencing on November 29, 1999, counsel informed the court that he thought there would be a conflict of interest for the appeal and the court appointed new counsel. However, no conflict of interest existed during trial. Mr. Sciscento had an agreement with the Special Public Defender's Office that he would be allowed to finish up his pending cases. AA Vol. 4, p. 0685. Mr. Sciscento was effectively screened from the Special Public Defender's Office during his representation of Defendant. AA Vol. 4, p. 0686:2-6. Mr. Sciscento did not discuss Defendant case with anyone from the Special Public Defender's Office; no one in the Special Public Defender's Office had access to Mr. Sciscento's notes or files concerning the Defendant; none of the Special Public Defender's resources were used by Mr. Sciscento in the preparation of Defendant's case; and all preparation for Defendant's case was done at Mr. Sciscento's prior office. AA Vol. 4, p. 0685-0686. Therefore, no conflict of interest

existed in the representation of Defendant.

Furthermore, affiliation with the Special Public Defender's Office while the case was pending does not automatically constitute a legal conflict. A court is granted broad discretion in determining whether an attorney should be disqualified from a case. Brown v. Eighth Judicial Dist. Ct., 116 Nev. 1200, 1205, 14 P.3d 1266, 1270 (2000); Collier v. Legakes, 98 Nev. 307, 646 P.2d 1219 (1982). Screening, also referred to as an ethical wall or Chinese wall, is appropriate to prevent confidential information from the quarantined attorney to the other members of the law firm or visa versa. Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (7th Cir. 1983). In determining whether a conflict exists, a court looks to whether counsel's functions "could be carried out impartially and without breach of any privileged communication." Collier, 98 Nev. at 310, 646 P.2d at 1221. Contrary to Defendant's contention, merely working for the Special Public Defender's Office does not equate to a conflict of interest. Mr. Sciscento stated that he was effectively screened from the Special Public Defender's Office. Defendant has failed to show that counsel's representation was carried out impartially or that any breach of privileged communication occurred from counsel's employment with the Special Public Defender's Office.

Defendant contends that counsel failed to sufficiently investigate Defendant's case. Again, Defendant merely makes an unsupported bare allegation that counsel failed to sufficiently investigate and Defendant re-alleges that counsel failed to call any witnesses. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Defendant fails to show what additional facts could have been discovered upon additional investigation. Furthermore, Defendant has not met the prejudice prong of Strickland, because Defendant has not shown that but for the alleged error, the outcome of the trial would have been different.

Defendant contends that counsel was ineffective for failing to make several objections at trial. The Nevada Supreme Court has held it will not second guess

counsel's trial tactics. Donovan, 94 Nev. at 675, 584 P.2d at 711. If each non-objection was analyzed on appeal, defense counsel would be forced, in order to protect himself, to make every conceivable motion and objection no matter how remote the possibilities were of success. Id. Which objections to raise or not to raise at trial are left to the professional judgment of counsel and should not be second-guessed. Jones, 463 U.S. at 751. Therefore, trial counsel was not ineffective for failing to raise every objection at trial.

Next, Defendant asserts that counsel did not permit Defendant to testify at trial. However, Defendant fails to cite to any inference in the record which indicates that counsel refused to allow Defendant to testify. Defendant is merely alleging, with the benefit of hindsight, that he wanted to testify. "Hindsight speculation regarding a tactical decision is not tantamount to proof that the result of the trial was unreliable or that the trial was fundamentally unfair." State v. Edward, 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993).

Finally, Defendant claims that his appellate counsel was ineffective for failing to raise issues pursued in the instant appeal. Defendant fails to show how appellate counsel's choice to pursue the claims that were the most meritorious prejudiced his case. The record shows that appellate counsel prepared and submitted a well-reasoned and thorough direct appeal. Appellate counsel was entitled to present valid claims, and this Court has warned attorneys against presenting every colorable issue in an appeal. As Defendant cannot show that appellate counsel's performance was deficient, or that it prejudiced Defendant's case, this claim must also fail.

The evidence presented against the Defendant was overwhelming. The evidence included testimony that Defendant had murdered the victim execution style, that Defendant made admissions to two different people, and Defendant voluntarily led police to the location of the murder weapon within Defendant's house. Furthermore, there was evidence presented at trial which detailed the premeditated manner in which the murder took place.

Defendant has failed to show strong and convincing evidence to overcome the presumption that counsel was effective and fully discharged his duties. In view of the compelling evidence of Defendant's guilt, as noted above, even if trial counsel was in anyway deficient, Defendant has not met the prejudice prong of Strickland that but for counsel's alleged deficiencies a more favorable result was reasonably probable if trial counsel had done as Defendant contends he should have. Defendant received effective assistance of trial and appellate counsel and thus, relief should not be granted relief on these grounds.

CONCLUSION

Based on the above arguments of law and fact, the State respectfully requests that the district court's denial of the post-conviction writ of habeas corpus be affirmed.

Dated this 28th day of December, 2006.

Respectfully submitted,

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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 28th day of December, 2006.

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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 28th day of December, 2006.

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