ORIGINAL

Anthony Douglas Echols, No. 75531
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, NV 89701
Petitioner in Propria Persona

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

3:10-cv-00340

ANTHONY DOUGLAS ECHOLS,

Petitioner,

vs.

JAMES BENEDETTI, in his official capacity only as the Warden of the Northern Nevada Correctional Center; HOWARD SKOLNIK, in his official capacity only as the Director of the Nevada Department of Corrections;

Respondents.
_____/

CATHERINE CORTEZ MASTO, Attorney General of the State of Nevada,

Additional Respondent.
_____/

Case No.

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY (NOT SENTENCED TO DEATH)

1. Name and location of Court, and name of judge, that entered the Judgment of Conviction you are challenging: First Judicial District of Nevada, Carson City, the Honorable William A. Maddox (now retired).

2. Full date Judgment of Conviction was entered: January 16, 2003.

3. Did you appeal the Conviction? Yes. Date appeal

decided: Order of Affirmance filed September 3, 2004; Remittitur issued December 7, 2004.

4. Did you file a Petition for Post-Conviction Relief or Petition for *Habeas Corpus* in the state court? Yes. On December 29, 2004, or within 2 years of the return of the guilty verdict and sentence, Petitioner filed a Motion for a New Trial. The "newly discovered evidence" consisted of the sworn statements of friends and family members of the Petitioner, indicating statements made in the courtroom and outside the courtroom, but within the confines of the Carson City Courthouse, in the presence of the jurors, made by family members and friends of the victim, and with the intent to influence the jury into returning the verdicts which they in fact returned. The trial court denied the Motion on December 5, 2005, and Petitioner appealed. The Nevada Supreme Court filed its Order of Affirmance on March 2, 2007, and issued the Remittitur therefrom on April 24, 2007.

In order to avoid the potential bar of NRS 34.726, Petitioner filed also a Petition for Writ of *Habeas Corpus* (Post-Conviction) on December 1, 2005. I.e., he filed the same while litigation was pending on the Motion for New Trial. Due to the pendency of the new trial appeal, Petitioner did not file a Supplemental Petition for Writ of *Habeas Corpus* until July 24, 2006. Therein, he raised four grounds for relief, with the second ground having three sub-issues. The trial court filed its written notice of entry of decision on December 8, 2008, and Petitioner filed a Notice of Appeal therefrom on December 11,

2008. The Nevada Supreme Court entered its Order of Affirmance on May 10, 2010, and issued the Remittitur therefrom on June 4, 2010.

5. Date you are mailing or handing to correctional officer this Petition to this Court: Not applicable.

6. Is this the first federal Petition for Writ of *Habeas Corpus* challenging this conviction? Yes.

7. Do you have any petition, application, motion or appeal (or by any other means) now pending in any court regarding the conviction that you are challenging in this action? No.

8. Case Number of the Judgment of Conviction being challenged: First Judicial District: Case No. 00-01351. Supreme Court of the State of Nevada: Case No. 37993 (Order of Reversal and Remand of Grant of Pre-Trial Petition for a Writ of *Habeas Corpus*, filed July 22, 2002); Case No. 40913 (Order of Affirmance on Direct Appeal); Case No. 46455 (Order of Affirmance Re. Order Denying Motion for a New Trial); and Case No. 52903 (Order of Affirmance Re. Denial of Post-Conviction Petition for Writ of *Habeas Corpus*).

9. Length and term of sentence: Life without possibility of parole.

10. Start date and projected release date: Not applicable.

11. What was (were) the offense(s) for which you were convicted: First degree murder.

12. What was your plea? Not guilty.

13. Who was the attorney that represented you in the

proceedings in state court? Identify whether the attorney was appointed, retained, or whether you represented yourself pro se (without counsel): Trial and sentencing: Nathan Tod Young, Minden, Nevada, retained. Direct appeal: Richard F. Cornell, Reno, Nevada, retained. Motion for New Trial and Appeal from Denial Thereof: Richard F. Cornell, Reno, Nevada, retained. Post-Conviction Petition for Writ of Habeas Corpus and Appeal Therefrom: Richard F. Cornell, Reno, Nevada, retained.

State concisely every ground for which you claim the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this Petition all grounds for relief that relate to this conviction. Any grounds not raised in this Petition will likely be barred from being litigated in a subsequent action.

GROUND I

I allege that my state court conviction is unconstitutional, in violation of my Fifth, Sixth and Fourteenth Amendment rights to due process of law, to a fair trial, and to effective assistance of counsel.

My constitutional rights were violated, based upon counsel's eliciting numerous testimonial opinions from the venire, in front of the entire venire, that "two shots to the head cannot be accidental," without failing to object, failing to seek a cautionary instruction, failing to move for a mistrial, or

failing to seek individual voir dire beforehand.

The case at hand is indistinguishable from Mach v. Stewart, 129 F.3d 495, 497-98 (9th Cir. 1997). Accordingly, the Nevada Supreme Court's disposition of this issue constitutes an unreasonable application of Irwin v. Dowd, 366 U.S. 717, 722 (1961); Smith v. Phillips, 455 U.S. 209, 217 (1982), and Turner v. Louisiana, 379 U.S. 466, 472-73 (1965).

This ground is developed more extensively in the separate attachment.

EXHAUSTION OF STATE COURT REMEDIES REGARDING GROUND I:

Direct Appeal:

Did you raise this issue on direct appeal from the Convictions to the Nevada Supreme Court? No, as the issue concerns ineffective assistance of trial counsel. In Nevada, claims of ineffective assistance of counsel generally are not reviewed on direct appeal. The Nevada Supreme Court has consistently held that the proper vehicle for review of counsel's effectiveness is a post-conviction relief proceeding. See: Pellegrini v. State, 117 Nev. 860, 881-84, 34 P.3d 519 (2001); Corbin v. State, 111 Nev. 378, 381, 892 P.2d 580, 582 (1995); Gibbons v. State, 97 Nev. 520, 522-23, 634 P.2d 1214, 1216 (1981).

Did you raise this issue on appeal from the Denial of *Habeas Corpus* to the Nevada Supreme Court? Yes. This is issue no. 1 in Nevada Supreme Court Case No. 52903.

GROUND II

I allege that my state court conviction is unconstitutional, in violation of my Fifth, Sixth and Fourteenth Amendment rights to due process of law, to a fair trial, and to effective assistance of counsel, based upon these facts:

Petitioner was deprived of his constitutional rights when counsel failed to investigate and present psychological and psychiatric evidence regarding improper prescription of Paxil and medically improper withdrawal from Paxil, resulting in an inability to form a specific intent to kill and/or to make rational decisions. This information should have been presented at Petitioner's guilt phase, so as to defeat the State's burden of proving malice, premeditation, deliberation, and a specific intent to kill beyond a reasonable doubt.

The Nevada Supreme Court's contrary conclusion is an unreasonable application of Strickland v. Washington, 466 U.S. 668 (1984) and cases construing Strickland, such as Turner v. Duncan, 158 F.3d 449, 456-57 (9th Cir. 1998), Bloom v. Calderon, 132 F.3d 1267, 1277-78 (9th Cir. 1997), *cert. denied*, 523 U.S. 1145 (1998) and Seidel v. Merkle, 146 F.3d 750, 755-57 (9th Cir. 1998).

This ground is developed more extensively in the separate attachment.

EXHAUSTION OF STATE REMEDIES REGARDING GROUND II:

Direct appeal:

Did you raise this issue on direct appeal from the

Conviction to the Nevada Supreme Court? No, for the reasons cited in Ground I.

Did you raise this issue on appeal from the Denial of *Habeas Corpus* to the Nevada Supreme Court? Yes. This was issue or ground No. II (a) in Case No. 52903.

GROUND III

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Fifth, Sixth and Fourteenth Amendment rights to due process, to a fair trial, and to ineffective assistance of counsel based upon these facts:

Ground II is incorporated herein by this reference. Counsel should have presented this information, if not at Petitioner's guilt phase, then at the very least at his penalty phase. A reasonable jury, upon hearing this evidence, likely would not have imposed a sentence of life without the possibility of parole.

The Nevada Supreme Court's contrary conclusion constitutes an unreasonable application of Wiggins v. Smith, 539 U.S. 510 (2003), and cannot be reconciled with cases such as: Alcala v. Woodford, 334 F.3d 862, 870-72 (9th Cir. 2003) and Karris v. Calderon, 283 F.3d 1117, 1133-39 (9th Cir. 2002), *cert. denied*, 538 U.S. 950 (2003).

Moreover, to the extent that counsel settled on an unreasonable theory of defense at penalty, the disposition of the Nevada Supreme Court cannot be reconciled with United States v. Span, 75 F.3d 1383, 1389-90 (9th Cir. 1996) and Phillips v.

Woodford, 267 F.3d 966, 978 (9th Cir. 2001).

This ground is developed more extensively in the separate attachment.

EXHAUSTION OF STATE COURT REMEDIES REGARDING GROUND III:

Direct appeal:

Did you raise this issue on direct appeal from the Conviction to the Nevada Supreme Court? No, for reasons stated in Ground I.

Did you raise this issue on appeal from the Denial of Post-Conviction Habeas to the Nevada Supreme Court? Yes. This is issue no. II (b) in Case No. 52903.

GROUND IV

I allege that my state court conviction and/or sentence are unconstitutional in violation of my Fifth, Sixth and Fourteenth Amendment rights to due process and to a fair trial, based on these facts:

The trial court erred in denying Petitioner's Motion for a New Trial. This case involved the efforts of the victim's friends and family to intimidate the jurors, as they made loud, prejudicial comments in the presence of the jurors about the Petitioner during the jury trial.

The Nevada Supreme Court's disposition of this issue constituted an unreasonable application of Holbrook v. Flynn, 475 U.S. 560, 570 (1986), Moore v. Dempsey, 261 U.S. 86, 91 (1923) and Cox v. Louisiana, 379 U.S. 559, 562 (1965).

Moreover, placing the burden on Petitioner to prove

prejudice from the exjudicial contacts, once Petitioner proved that they occurred, constitutes an unreasonable application of Remmer v. United States, 347 U.S. 227, 229 (1954). As such, the Nevada Supreme Court's disposition of this issue cannot be reconciled with Dickson v. Sullivan, 849 F.2d 403, 405-06 (9th Cir. 1988), Marino v. Vasquez, 812 F.2d 499, 504 (9th Cir. 1987), Mancuso v. Olivariz, 282 F.3d 728, 737 (9th Cir. 2002), Smith v. Farley, 50 F.3d 659, 665 (7th Cir. 1995), Norris v. Risley, 918 F.2d 828, 831-33 (9th Cir. 1990), and Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. 1998) (en banc), *cert. denied*, 525 U.S. 1033 (1999).

This ground is developed more extensively in the separate attachment.

EXHAUSTION OF STATE COURT REMEDIES REGARDING GROUND IV:

Direct appeal:

Did you raise this issue on direct appeal from the Conviction to the Nevada Supreme Court? No, for the reason that the record supporting this ground was not known or developed until after the trial.

Petitioner raised this issue on direct appeal from the Order Denying the Motion for New Trial, Case No. 46455.

GROUND V

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process of law, to a fair trial, and to a sentence free from cruel and unusual punishment,

based upon these facts:

The trial court committed reversible error in allowing evidence to the penalty jury of specific sentencing recommendations made by angry members of the victim's family. While Nevada state law allows victims to do that in sentencings presided by a judge, per Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993), it does not allow that in death penalty sentencing proceedings before a jury per Witter v. State, 112 Nev. 908, 922, 921 P.2d 886 (1996).

The Nevada Supreme Court's disposition of this ground constitutes an unreasonable application of Payne v. Tennessee, 501 U.S. 808, 823-24 (1991).

This ground is developed more extensively in the separate attachment.

EXHAUSTION OF STATE COURT REMEDIES REGARDING GROUND V:

Direct appeal:

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court? Yes. This was issue no. 1 in Case No. 40913.

GROUND VI

I allege that my state court conviction and/or sentence are unconstitutional in violation of my Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process of law, to a fair trial, and to a sentence that is not cruel and unusual, based upon these facts:

The trial court gave an "executive clemency" instruction to

the penalty jury that was an improper statement of the law. The instruction given stated that in Nevada a sentence of life without the possibility of parole cannot be pardoned under the laws in effect in Nevada.

In fact, per NRS 213.085, a defendant sentenced to life without the possibility of parole cannot have his sentence commuted to life with the possibility of parole by the State Board of Pardons Commissioners. However, nothing in NRS 213.085 or any other statute prohibits the Board of Pardons Commissioners from granting a pardon or a commutation to time served to one so convicted and sentenced.

The Nevada Supreme Court's disposition of this issue constitutes an improper application of Caldwell v. Mississippi, 472 U.S. 320, 342 (1985), and cannot be reconciled with Hamilton v. Vasquez, 17 F.3d 1149, 1161-64 (9th Cir. 1994) or with Gallego v. McDaniel, 124 F.3d 1065, 1074-76 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 2299 (1998).

This ground is developed more extensively in the separate attachment.

EXHAUSTION OF STATE COURT REMEDIES REGARDING GROUND IV:

Direct Appeal:

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court? Yes. This was issue no. 2 in Case No. 40913.

GROUND VII

I allege that my state court conviction is unconstitutional,

in violation of my Fifth, Sixth and Fourteenth Amendment rights to due process of law and to a fair trial, based on these facts:

The trial court committed reversible error when it denied a challenge for cause to a prospective juror who had prejudicial knowledge of the case from extrajudicial sources and otherwise was biased.

The juror in question had not only read about the case in the newspaper, but her daughter was an acquaintance with the victim's sister. She testified her daughter liked the sister, had purchased a home from the sister, had spoken with the sister about the case, and her daughter had relied on the sister's "version." She said she had formed an opinion about the case, both from reading the newspaper and from what she had heard, and had made up her mind "basically then." She testified that she was not certain that she could set aside what she knew and adjudicate the case based on the in-court evidence. She testified that her knowledge made her presume that the Petitioner was guilty, not innocent, before she came to court.

The Court denied Petitioner's challenge for cause, and Petitioner exercised his second peremptory challenge on her. He exercised all 8 of his available challenges.

The victim's sister in question was one who advocated the maximum penalty imposable by law at penalty.

The Nevada Supreme Court's disposition of this issue constitutes an unreasonable application of Irvin v. Dowd, 366 U.S. 717 (1961), Morgan v. Illinois, 504 U.S. 719, 734-36 (1992),

and Ross v. Oklahoma, *post*.

This ground is developed more extensively in the separate attachment.

EXHAUSTION OF STATE REMEDIES REGARDING GROUND VII:

Direct appeal:

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court? Yes. This is issue no. 6 in Case No. 40913.

GROUND VIII

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Fifth, Sixth and Fourteenth Amendment rights to due process of law, to a fair trial, and to effective assistance of counsel, based upon these facts:

The trial prosecutor engaged in numerous incidences of forensic misconduct during the trial, and trial counsel failed and refused to object. The cumulative effect of the misconduct/ error deprived Petitioner of a fair trial within the meaning of the Sixth Amendment.

During the trial, the prosecutor engaged in forensic misconduct on 8 occasions. Consistently, the misconduct was geared towards the hoped-for finding that this homicide did not occur accidentally, but consistently with a design purpose to kill. However, there was no evidence supporting the particular assertions that the prosecutor continually argued.

The Nevada Supreme Court's disposition of this issue is inconsistent with Darden v. Wainwright, 477 U.S. 168 (1986) and

cannot be rectified with Sechrest v. Ignacio, 549 F.3d 789, 807-19 (9th Cir. 2008).

This ground is developed more extensively in the separate attachment.

EXHAUSTION OF STATE COURT REMEDIES REGARDING GROUND VIII:

Direct appeal:

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court? No, for reasons stated in Ground I.

Petitioner raised this issue on appeal from the denial of his post-conviction Petition for Writ of *Habeas Corpus*. See: Case No. 52903, issue no. 3.

GROUND IX

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Fifth and Fourteenth Amendment rights to due process of law, based upon these facts:

The evidence is insufficient to sustain the convictions on the murder and burglary counts as they were pleaded, even though the evidence would have been sufficient had the charges been plead differently. Because of the fatal variance between pleading and proof, the convictions must be reversed under the federal standard of Jackson v. Virginia, 443 U.S. 307 (1979).

The Nevada Supreme Court's disposition of this issue constitutes an unreasonable application of Griffin v. United States, 502 U.S. 46 (1991), Yates v. United States, 354 U.S. 298, 312 (1957) and Stromberg v. California, 283 U.S. 359 (1931).

That is, based upon the charge in the Information and General Verdict Form, as well as how the jury was instructed and how trial prosecutor argued the case to the jury, it is very possible - indeed, likely - that the jury (or at least some of the jurors) convicted the Petitioner on the theory that he entered the victim's residence with the intent to batter him or to assault him, when in fact there was no evidence of intent to assault or batter. Accordingly, the Nevada Supreme Court's disposition of the cause is an unreasonable application of Jackson v. Virginia, *supra*.

This ground is developed more extensively in the separate attachment.

EXHAUSTION OF STATE COURT REMEDIES REGARDING GROUND VIII:

Direct appeal:

Did you raise this issue on direct appeal from the conviction of the Nevada Supreme Court? Yes. This constituted issue no. 4 in Case No. 40913.

WHEREFORE, Petitioner prays that the Court will grant him such relief to which he is entitled in this federal Petition for Writ of *Habeas Corpus* Pursuant to 28 U.S.C. § 2254 by a Person in State Custody.

DATED this 15 day of MAY, 2010.

Respectfully submitted,

ANTHONY D. ECHOLS, NO. 75531

Prepared by:
LAW OFFICE OF RICHARD F. CORNELL
By:
Richard F. Cornell

INTRODUCTION

To summarize, Petitioner was convicted of first degree murder relative to the homicide of Rick Albrecht, after Petitioner shot Mr. Albrecht in the head twice, in Mr. Albrecht's home, with a semi-automatic .22 rifle on August 5, 2000. Petitioner was married to Karen Echols, nka Karen Kade. Petitioner and Ms. Kade hired Mr. Albrecht to build their home. By December of 1999, Petitioner perceived that Ms. Kade was having an extra-marital affair with Mr. Albrecht. Petitioner confronted Mr. Albrecht on December 5, 1999. Mr. Albrecht beat up Petitioner.

Thereafter, Ms. Kade utilized domestic violence restraining orders and violations thereof (resulting in jail) to keep Petitioner away from their son, A.J. Finally, on August 3, 2000, Petitioner gained a short visit with A.J. During that visit, young A.J. told Petitioner things to make Petitioner believe that Ms. Kade and Mr. Albrecht were about to act in concert to keep A.J. permanently away from Petitioner.

Thus, Petitioner went to Mr. Albrecht's home on August 5, 2000 to confront him about the "A.J. situation." He took the loaded gun with him due to the December 5, 1999 incident. They were having a calm conversation when Petitioner discharged 2 bullets into Mr. Albrecht's head. Petitioner testified at his jury trial that both discharges were accidental. By its verdict, the jury did not believe him.

GROUND I

Trial counsel, Nathan Tod Young, had many conversations pre-trial with colleagues and other people generally about the case, and received opinions that his "accident defense" would be very, very difficult to establish. He spoke to approximately 12 people; the majority of them stated that they simply couldn't see how an accident theory could fly. One judge relayed that he knew of an "accidental discharge" involving 6 discharges; but that case involved a deputy sheriff who had hung his service revolver on a public bathroom door, where nobody was hit.

Mr. Young approached voir dire, knowing that he had to put out there the theory of defense to ensure the jury wouldn't reject it out of hand. Mr. Young did not consider doing individual voir dire, as he didn't think the subject involved private confidential information. He did not consider seeking a cautionary instruction or a mistrial motion during the voir dire or after it but before the jury trial began.

Voir dire was not sequestered, but done in front of the entire venire. During voir dire, a prospective juror, Mr. M., testified that if the case at bar involved 2 gunshots to the head of the victim, he could not see how that could be accidental. He stated he could not see how that could be an involuntary manslaughter, and he was starting to form an opinion. Mr. M. was successfully challenged for cause and excused.

Later, Larry R. likewise stated his opinion under oath that he could not believe that 2 shots could be accidental, and would require the Defendant to prove "something." He stated that he

probably would follow the judge's instruction on burden of proof, but that would be hard to overcome. Trial counsel challenged Larry R. for cause. Larry R. changed his testimony, and the trial court denied the challenge for cause. Mr. R. actually sat on the jury.

A third prospective juror, Mr. C., stated that he agreed with Mr. M.'s opinion. Trial counsel challenged him for cause, and the trial court excused him.

A fourth prospective juror, Ms. T., stated, "Accidental with 2? I'm sorry, I don't think so." Trial counsel exercised his 8th peremptory challenge on her.

A fifth venire person, Mr. T. testified that he did not believe that one could have an accident with a firearm, based upon his training as a boy. Based upon trial counsel's questioning, Mr. T. indicated firearm training beginning at age 12. Mr. T. likewise did not serve on this jury.

Mr. Young admitted that he did not anticipate this degree of rebellion viz. the "accident theory" during voir dire.

EXHAUSTION

Petitioner clearly exhausted this ground to the Nevada Supreme Court. To exhaust a claim, the defendant must cite to the United States Constitution, a citation to a case that alerts the Court to the alleged federal nature of the claim, or utilizes explicit words that alerts the Court he is proceeding on a Federal Constitutional basis. Baldwin v. Reese, 541 U.S. 27, 33, 124 S.Ct. 1347, 1351, 158 L.Ed.2d 64 (2004).

Petitioner clearly cited to the Fifth, Sixth and Fourteenth of the Federal Constitution at p. 17 of the Opening Brief in Case No. 52903. He also cited to Irwin v. Dowd, 366 U.S. 717, 722 (1961) and Smith v. Phillips, 455 U.S. 209, 217 (1982) at p. 18 of the Opening Brief in Case No. 52903. He also cited to Turner v. Louisiana, 379 U.S. 466, 472-73 (1965) at p. 3 of the Reply Brief in Case No. 52903.

28 U.S.C. § 2254(d) CONSIDERATIONS

All Nevada courts have missed the thrust of this Ground, and thus have applied Federal Constitutional decisions of the U.S. Supreme Court unreasonably.

It is error for venire individuals to be permitted to make testimonial statements regarding information that should not come into evidence. State v. Strong, 196 N.E.2d 801, 803-05 (Ohio App. 1963) [first degree murder conviction reversed]. Per Mach v. Stewart, 129 F.3d 495, 497-98 (9th Cir. 1997), when prospective jurors hear prejudicial opinion information during voir dire that won't be coming into evidence, it is presumed that at least one juror was tainted and entered into jury deliberations with that prejudicial information in mind [reversal of denial of *habeas*].

Per Mach, the error (of the jury being exposed to extrinsically prejudicial information, before the trial has begun) is impossible to assess in the context of the evidence presented at trial, because all of the evidence was presented to an already tainted jury. Therefore, the error is structural,

requiring automatic reversal of the defendant's conviction. Mach, 129 F.3d at 498. Accord: Dyer v. Calderon, 151 F.3d 970, 973 n. 2 (9th Cir.) (en banc), *cert. denied*, 525 U.S. 1033 (1998) [guilty verdict imposed by jury with even one juror who was actually biased is structural error].

The State distinguished Mach to apply only when a prospective juror gives an "expert opinion," as opposed to a "lay opinion." However, that distinction is both unhelpful and nonsensical.

In the first place, in Nevada expert testimony as to the state of mind of the defendant at the time of a criminal act is clearly inadmissible per Winiarz v. State, 104 Nev. 43, 49, 752 P.2d 761 (1988). Likewise, a lay witness' opinion testimony regarding the veracity of the statement of another is inadmissible. This rule applies, whether or not the statement in question is an out-of-court statement, or constitutes a witness' testimony. See: Cordova v. State, 116 Nev. 664, 669-70, 6 P.3d 481 (2000) [harmless error]; DeChant v. State, 116 Nev. 918, 924-26, 10 P.3d 108 (2000) [reversal on cumulative error]; Sterling v. State, 108 Nev. 391, 397, 834 P.2d 400 (1992) [affirmed, where defense attempted to elicit such improper opinion testimony].

Secondly, in reviewing subsequent cases that have distinguished Mach, the issue is whether the extraneous venire person's remarks bore *directly* on the defendant's guilt or innocence. See: United States v. Lussier, 423 F.3d 833, 842 (8th Cir. 2005) [remarks there were not stated as "expert-like"

opinions re. guilt, and were cured by cautionary instructions; no error]. That is, did the extraneous "expert-like" remarks either directly relate to the defendant's guilt or innocence, or did they vouch for the credibility of the prosecution's key witnesses? See: United States v. Guzman, 450 F.3d 627, 631-32 (6th Cir. 2006); State v. Ploof, 141 P.3d 764, 774-75 (Ariz. App. 2006); Pavatt v. State, 159 P.3d 272, 284 (Okl. Cr. App. 2007).

Here, there is no question that the opinions of the 5 venire went directly to the Petitioner's state of mind at the time of the homicide, and were opinions to the effect that a person who shoots another twice in the head can never do so accidentally. Clearly, those opinions are "expert-like." One of them was more than that; that one came from a person trained in gun safety. As accident was the defense, and as there was no question that Petitioner twice discharged a bullet into the head of Mr. Albrecht, there simply is no question that those opinions bore directly on Petitioner's guilt or innocence.

In reviewing Mach carefully, there are two Constitutional concerns with allowing the venire to express opinion statements on critical issues during voir dire. First, as noted at 137 F.3d at 633, footnote 3, is this: When a juror communicates objective extrinsic facts regarding the defendant or the alleged crimes to other jurors, the juror becomes an unsworn witness within the meaning of the Confrontation Clause. See: Jeffries v. Wood, 114 F.3d 1484, 1490 (9th Cir.), *cert. denied*, 522 U.S. 1008 (1997). The Sixth Amendment guarantee of a trial by jury requires a jury

verdict to be based on the evidence produced at trial. This requirement goes to the fundamental integrity of all that is embraced in the Constitutional concept of trial by jury. Turner v. Louisiana, 379 U.S. 466, 472-73 (1965).

And the problem is magnified when the extraneous information that the venire states in open court is information that should not be before the jury in the first instance (as here). Absent correction by the trial court (as here), the trial is infected with error before the first witness is even sworn.

The second problem addressed by Mach, however, 137 F.3d at 632, is also present in this case. One of the five venire who expressed the "2 shots cannot be an accident" opinion, Larry R., actually sat on this jury. When that happens, the jury is necessarily biased. The error then becomes as structural as it would be if the cause were being decided by a biased and prejudiced judge.

Certainly, if trial counsel had objected, moved for a mistrial, and sought a cautionary instruction, all of which the trial court would have denied, this issue necessarily would have caused a reversal on direct appeal. The big issue, really, is whether trial counsel had a sound strategy for not objecting, not seeking a mistrial, and not seeking a cautionary instruction, once the opinionated venire "deep-sixed" Petitioner's cause before it began.

Petitioner doesn't quibble with trial counsel's strategy of facing this issue directly with the jury. But prior to trial,

counsel had discussed this issue with 12 respected members of the community, and the vast majority of them told counsel that "accident" did not sound plausible under the circumstances that he presented. Therefore, counsel knew, going in to trial, that there was at least a reasonable likelihood that someone in the venire would respond the same way. How could counsel have a "reasonably sound strategy" of infecting the rest of the venire with such an opinion?? And given that "accident" was the theory of defense, how can Petitioner not be prejudiced by that infection?

Trial counsel's response was that he did not consider doing individual voir dire, as he didn't think the subject at hand involved private confidential information. That decision fell below the standard of reasonably effective counsel as a matter of law.

It is true that there is no Constitutional right to individual, sequestered voir dire. See: People v. Diggs, 612 N.E.2d 83, 85 (Ill. App. 1993), citing Mu'Min v. Virginia, 500 U.S. 415 (1991). However, questioning whose answers could influence fellow venire persons in their ultimate determination should be done individually. See: Covarrubas v. Superior Court, 71 Cal. Rptr. 2d 91, 93 (Cal. Rptr. 1998), citing Hovey v. Superior Court, 616 P.2d 1301 (1980). So, for example, failure to grant individual sequestered voir dire relative to highly prejudicial pre-trial publicity can be reversible error. See: Kessler v. State, 752 So.2d 545, 551 (Fla. 1999).

And even if the strategy of raising the question before the entire venire and infecting the entire venire with inadmissible opinion-like testimony beforehand could be considered a "sound strategy," counsel's decision not to seek a mistrial or even a cautionary instruction simply cannot be credited to the actions of reasonable trial counsel. Trial counsel admitted that he did not consider seeking either; and both the State and Nevada's courts simply could not and cannot articulate any reason why a "hypothetical reasonable counsel" would not do so.

The Nevada Supreme Court's disposition at p. 2 of the May 10, 2010 Order of Affirmance simply did not address the question of how counsel's failure to seek a mistrial or even a cautionary instruction could be a "reasonable tactical decision," especially given counsel's inability to explain. To that extent, the Nevada Supreme Court unreasonably applied Strickland v. Washington, 446 U.S. 668 (1984).

Otherwise, the Nevada Supreme Court cited Mach, but overlooked the basic point of Mach: the error under the circumstances is structural. The Nevada Supreme Court stated "Appellant fails to demonstrate that the venire members' opinions and statements about experience with firearms amounted to expert opinion testimony or unduly biased the venire members." There is no authority that requires the venire's opinions to qualify as expert testimony under Fed.R.Evid. 702 to be prejudicial; what matters is whether they are stated as opinion that go to a matter at issue. Here, the opinions in each instance went straight to

the core of the issue being tried.

Clearly, counsel was prejudicially ineffective to this extent.

GROUND II

After the State filed its Answer to the Petition for Writ of *Habeas Corpus* (Post-Conviction), Petitioner filed a Motion for Appointment and Compensation of Dr. Thomas E. Bittker as an expert witness. Therein, Petitioner noted that attached to the Petition was the psychological evaluation of Jerry P. Nims, Ph.D., J.D. Dr. Nims noted therein that Petitioner had been taking Paxil when he stopped it abruptly, on his own, 2 to 3 weeks before Rick Albrecht's death. Dr. Nims indicated that there was considerable literature establishing that violence is a common side effect of Paxil and related drugs, and also that these effects are noted following abrupt withdrawal; but whether such side effects may appear 2 to 3 weeks after withdrawal is beyond Dr. Nims' area of expertise.

The trial court denied the Motion without prejudice.

Seven months later, Petitioner filed a Continued Motion for Appointment and Compensation of Dr. Bittker. There he presented the unsigned Affidavit of Mr. Young, indicating that Mr. Young did not consider a psychiatric or psychological angle to the case, because Petitioner's defense was that of "accident," so counsel could not see how Petitioner's psychiatric or psychological state would figure into that. Secondly, if the jury disagreed, it seemed plain to Petitioner that this case was

born out of anger and jealousy, and not out of a propensity on Petitioner's part to kill; accordingly, counsel honestly did not expect a life without parole verdict from the jury.

Again, the trial court denied the Motion to Appoint Dr. Bittker without prejudice.

Thus, Petitioner first filed an "Offer of Proof" approximately 5 months prior to the evidentiary hearing.

Petitioner first attached the medical records from Carson Medical Group, establishing that Dr. Edward Rose of that group, Petitioner's family physician, indeed prescribed Paxil to Petitioner in December of 1999, shortly after the altercation with Mr. Albrecht and Petitioner's hospitalization.

Next, Petitioner attached the Affidavit of Custodian of Records from Mary Kay Bryan, MFT, formerly Mary Kay Jenkins. These records established that Petitioner stopped taking Paxil on either May 16 or May 17, 2000; he indicated he "did not miss the Paxil" on July 11, 2000; and on June 22, 2000, Ms. Jenkins indicated that Petitioner was not in need of psychological stabilizing, evaluation or testing.

Petitioner also attached a letter from Francis Carpenter, now Petitioner's step-father. Therein Mr. Carpenter revealed that prior to trial he met with Mr. Young; stated his belief to Mr. Young that the "accident defense" would not work; gave information regarding Petitioner's severe depression prior to the homicide; and advised Mr. Young that Petitioner had "never been the same" since he had gotten off his anti-depressants. Mr.

Carpenter later so testified at the evidentiary hearing.

Petitioner also attached the report dated December 1, 2005 from Dr. Nims above-referenced.

Petitioner also attached a large variety of materials available off of the internet. Basically, these materials revealed that frequently reported symptoms of Paxil withdrawal are panic attacks, severe mood swings, specially heightened irritability or anger, extreme confusion, memory and concentration problems, and in extreme cases suicidal thoughts. Moreover, there certainly are those who believe that withdrawal from Paxil is much worse than the underlying depression ever was. The materials note that everyone has different and unique withdrawal symptoms from withdrawal of Paxil. A common effect is that described as "brain shivers," and "asymptomatic crying outbursts."

Petitioner also attached an article in the International Journal of Risks & Safety in Medicine, published in 2003, revealing the same type of information and establishing that these effects from Paxil withdrawal were known as early as May of 1990.

Petitioner also attached an anonymous faxed message to Mr. Young from someone who had read about the case in the newspaper, after the trial was over, and saw a psychiatric link to this case. That person assessed responsibility for this murder to the Community Counseling Center.

Approximately 2 months prior to the evidentiary hearing,

Petitioner filed his "First Supplement to Offer of Proof." There, Petitioner attached the medical records from Carson Tahoe Regional Medical Center from December of 1999, approximately 8 months prior to the homicide. These records reveal: 1) When Petitioner entered the hospital on December 8, 1999, he was not taking any medications; 2) The hospital started Petitioner on a prescription for Paxil, 10 miligrams, as well as Ambien, and had it set up to where Dr. Rose would continue prescribing the medication for Petitioner upon Petitioner's discharge. Petitioner was discharged on December 12, 1999; 3) While in the hospital, Petitioner denied homicidal ideations; Petitioner denied any intent to hurt Mr. Albrecht in his Psychosexual Assessment, even though Mr. Albrecht had beaten Petitioner up 3 days prior; and the professionals at Carson Tahoe Regional Medical Center assessed Petitioner as a low homicide risk but a high suicide risk.

In order to prepare this case as best as it could, in light of the trial court's orders, Petitioner family spent enough money on Dr. Bittker to obtain his report.

Thus, Petitioner filed as his Second Supplement to Offer of Proof, approximately 1 day prior to the evidentiary hearing, the "forensic Psychiatric Assessment" report of Dr. Bittker dated October 15, 2008.

The gist of Dr. Bittker's report is as follows:

> This case is conspicuous in the discrepancy between the severity of symptoms presented by the Petitioner in the immediate months prior to the instant offense and the absence of adequate psychiatric surveillance. First, as

mentioned in the Formulation, I believe that the Petitioner was inappropriately initiated on Paxil. A far better choice would have been a mood-stabilizing agent that would have better contained the Petitioner's anxiety, promoted sleep, and ultimately left him in a position to be better able to cope with his stress. Secondly, it is alarming that following a suicide attempt and after a brief hospitalization, no referral was made to a psychiatrist for surveillance. (Note, a similar lack of surveillance in a case where the attending psychiatrist was far more conscientious than Carson-Tahoe Center was in this case resulted in a very high-profile malpractice suit.) Thirdly, the Community Mental Center that was providing care for the Petitioner should have insisted on psychiatric consultation coincident to his increasing difficulties containing his anxiety and impulsivity surrounding the marital dissolution.

FORMULATION: The Petitioner reports in the time immediately prior to the instant offense experiences of auditory and visual hallucinations, racing thoughts, agitation, insomnia, and anxiety. These symptoms are consistent with those reported by others in Paxil withdrawal [cases]. In addition, the Petitioner presents with a constellation of prior symptoms consistent with an undiagnosed bipolar type II disorder that was exacerbated by severe emotional stress. Individuals with this disorder, often manifesting a constellation of symptoms not unlike those of post-traumatic disorder (agitation, anxiety, startled reactions, and explosive behavior), are best treated with mood-stabilizing agents rather than anti-depressants.

Paxil, because of its short half-life, has been associated with episodes of both suicidality and violence.

Although Mr. Echols in no way meets the criteria for an insanity plea in the State of Nevada, **the issue of his Paxil use and the impact of that Paxil use on his judgment and his ability to contain his behavior is relevant to this case.**

Consequently, I can state with a reasonable degree of medical certainty that both the initiation of Paxil and the abrupt withdrawal of Paxil contributed to the Petitioner's mental state at the time of the instant offense. Had he been more appropriately treated and followed closely by a psychiatrist, it is unlikely that these events would have culminated in such a tragic outcome. Certainly, Mr. Echols bears some responsibility in not pursuing treatment appropriately. Unfortunately, his judgment was already so clouded that he had limited insight, not only into his disturbance but also into reasonable courses of behavior coincident to that disturbance.

> Conclusions: In summary, I can state to a reasonable degree of medical certainty that the absence of adequate treatment of Mr. Echols' mood instability and the institution of an inappropriate drug for his disorder, Paxil, contributed to the profound emotional instability that ultimately led directly to the instant offense.

Petitioner testified at the evidentiary hearing that he had no knowledge, either from Dr. Rose or from literature Dr. Rose gave him, regarding the dangers of quitting Paxil "cold turkey." Petitioner went off Paxil twice in 2000, the second time about 2 weeks before he killed Mr. Albrecht. He went off Paxil because he could not sleep. After he did so, his sleep deprivation was even worse. He got to the point where he was hallucinating. He experienced the "electric jolt in the brain" sensation. On the day of Mr. Albrecht's homicide, Mr. Echols' anxiety was "indescribably high" because of his fear of losing his son.

Mr. Young testified that his theory of defense in this case was not that the case was a "whodunit," but that Petitioner accidentally killed Mr. Albrecht. That is, when Petitioner killed Mr. Albrecht, Petitioner did not act with express or implied malice. The evidence of lack of malice was to come from Petitioner's trial testimony.

Mr. Young knew the defense would be difficult to establish. The facts were that Petitioner went into Mr. Albrecht's home, armed with a semi-automatic rifle, and Mr. Albrecht was unarmed. Further, Mr. Albrecht had beaten up Petitioner approximately 8 months prior, and after that twice Petitioner had left some messages on Mr. Albrecht's answering machine. Petitioner discharged a semi-automatic rifle 2 times into Mr. Albrecht's

head. Mr. Young knew that "accident" would be a very difficult theory to proceed to trial upon. Mr. Young knew there was a high probability that a jury simply would not believe an accident defense based on those facts; he knew it would be an "uphill battle."

Prior to trial, Mr. Young knew that Petitioner had been prescribed Paxil and had withdrawn from its use "cold turkey" without medical supervision. He recalled receiving records from Carson Community Counseling that reflected that. Prior to trial, Mr. Young was aware generally that Paxil withdrawal impacted mood swings and some people had committed suicide as a result.

However, Petitioner was consistently adamant that the discharge was accidental. Because of that, Mr. Young determined that he was not going to present a defense different from what Petitioner would testify to.

However, Petitioner did not forbid Mr. Young from bringing on a "psychiatric defense."

Further, Mr. Young also knew that the fact that Petitioner entered Mr. Albrecht's home with a loaded rifle was a "bad fact." He knew he had to come up with evidence explaining away why Petitioner would do that, consistent with his "accident" defense.

Prior to trial, the prosecutor offered Petitioner a plea to second degree murder, possibly with the deadly weapon enhancement, i.e., either 10 years to life imprisonment, or 20 years to life imprisonment. Mr. Young strongly recommended that offer to Petitioner. Petitioner, however, rejected the offer,

insisting that the incident was an accident. Mr. Young expected, upon rejecting the offer, that the trial prosecutor would seek the maximum punishment, or life without parole. Mr. Young did not consider hiring a forensic psychiatrist or psychologist for purposes of attempting to persuade Petitioner to accept the offer.

Mr. Young admitted that he did not know why he didn't introduce the hospital records, indicating that Petitioner was a low homicide risk. He agreed that those records were consistent with his "accident defense."

However, Mr. Young testified that he would not have wanted to present evidence regarding Petitioner's depression, because "depressed people tend to do desperate things and dangerous propensities occur." Of course, Abraham Lincoln, Mike Wallace, and former U. Florida football coach Charlie Kell, among others, have suffered from chronic depression. Evidently, the situation is that people who live in Carson City, Nevada, do not understand chronic depression and could not care less.

The trial court's findings were:

> Trial counsel's decision not to employ a forensic psychiatrist or psychologist was a reasonable tactical decision and did not prejudice Petitioner. According to the testimony of trial counsel, Petitioner insisted, virtually from the moment of his arrest, that he accidentally shot his victim twice in the head. Petitioner's own testimony at the evidentiary hearing supports this assertion. Faced with Petitioner's insistence that the shooting was accidental, trial counsel employed sound trial strategy in deciding not to pursue a **conflicting** defense of psychiatric or psychological disorder that trial counsel believed would undermine or dilute Petitioner's primary theory of defense.

While those findings mirrored the trial court's findings in

denying the Writ Petition from the bench, however, the trial court also made these insightful comments:

> Just as an aside, completely, you might have been better off had you tried this case just to me, Mr. Echols, and you might have been better off if I had been the one to sentence you. I don't know if I would have given you life without the possibility of parole. But saying that, that's because of what Mr. Young did, he did I thought an excellent job of portraying the process by which you came to Mr. Albrecht's house.
>
> . . .
>
> Again, you know, Mr. Echols, and I probably would have come back with a different verdict, and I probably would have come back with a different sentence. But I wasn't the trier of fact and I wasn't the, I wasn't the person that sentenced you. It was the jury. And I have an infinite amount of respect for the process that we have.
>
> . . .
>
> So, you know, as much as, Mr. Echols, as I wish there was some other outcome that was reached here, there wasn't. And the Petition for Habeas is denied.

In that regard, trial counsel mirrored the trial court's feelings. Mr. Young likewise believed Petitioner should not have received the life without parole verdict, in light of Petitioner's lack of criminal history. For that matter, the State offered to Petitioner prior to trial a plea to second degree murder with the deadly weapon enhancement. That offer, if accepted, would not have resulted in a life without parole sentence.

EXHAUSTION

This ground is clearly exhausted per Baldwin. Petitioner cited directly to the Federal Constitutional rights to due process of law, a fair trial, and effective assistance of counsel per the Fifth, Sixth and Fourteenth Amendments to the Federal

Constitution at p. 20 of the Opening Brief in Case No. 52903. Further, he cited to a number of cases from the Ninth Circuit which in term cited to Strickland v. Washington, 466 U.S. 668, 694 (1984) at pp. 21-23 of said Opening Brief. Moreover, the "S.A.V.E. Project" (an acronym for "Stop Anti-Depressant Violence from Escalating) filed an Amicus Brief on April 14, 2009, and they cited to Strickland at pp. 13, 16 and 18 of their Amicus Brief.

28 U.S.C. § 2254(d) CONSIDERATIONS

Trial counsel and all Nevada courts have overlooked the obvious, even though it was spelled out at pp. 20-21 of the Opening Brief in Case No. 52903: "An accident defense" **is a mental defense**. That being so, it cannot be inconsistent with a psychiatric defense regarding Paxil and Paxil withdrawal, and the inability to form a specific intent to kill as a result by an otherwise law-abiding, non anti-social person (such as the Petitioner).

With an accident defense, a defendant's guilt or innocence hinges upon evidence of the defendant's *mens rea*. See: State v. Rowell, 467 S.E.2d 247, 249-50 (S.C. 1995), *superseded on other grounds*, 487 S.E.2d 185 (S.C. 1997). The term "accidental" is opposite of the term "willful." See: Bryan v. United States, 524 U.S. 184, 201 (1998), citing United States v. Murdock, 290 U.S. 389, 54 S.Ct. 223, 225 (1933). Thus, where one accidentally inflicts an injury, he does not intend to inflict injury and thus cannot be convicted of a crime that requires proof of general or

specific intent. See: McDonald v. Sheriff, 89 Nev. 326, 327 n. 1, 512 P.2d 774 (1973).

Accordingly, the situation at bar is that trial counsel's defense strategy rested on contesting the intent element of the crime; but he willfully chose not to investigate the psychiatric angle to the case that would have at the very least corroborated, and possibly established, the contested lack of intent element of the charged offense.

As such, this case simply cannot be meaningful distinguished from Turner v. Duncan, 158 F.3d 449, 456-57 (9th Cir. 1998) or Bloom v. Calderon, 132 F.3d 1267, 1277-78 (9th Cir. 1997), *cert. denied*, 523 U.S. 1145 (1998). Both of those cases involved the mandated grant of *habeas* for this very situation based upon application of Strickland.

In this case, counsel sought to present the mental defense of accident solely on the testimony of Petitioner. The jury had no clue that Petitioner's mental state on August 5, 2000 was severely impaired by the improper prescription of Paxil and the improper, non-medically monitored withdrawal from Paxil. Counsel knew from his colleagues that presenting the accident defense merely on the testimony of his client would be "an extreme uphill battle."

And part of what made the "uphill battle" so extreme was this: If Petitioner acted without a specific intent to kill or even with an impulsive intent to kill, then why did he carry a loaded semi-automatic rifle into the home of the victim - a

victim who had beaten up Petitioner during their last in-person confrontation? Unless and until counsel could explain that fact away, his "accident defense" had no prayer of success.

In this case, the inappropriate prescription of Paxil and the inappropriate self-withdrawal from Paxil was the clue to solving that puzzle. Per Dr. Bittker, that lethal combination of events severely compromised Petitioner's ability to think rationally. Put another way, Anthony Echols in his "right mind" would have known better than to go to into Mr. Albrecht's home with a loaded rifle, in order to speak with Mr. Albrecht about Petitioner's visitation rights with his son, and would not have done so. The "normal" Petitioner would have assessed the risks in doing that, and would have forborne. But because of the Paxil and Paxil withdrawal, Petitioner was incapable of such a rational thought process.

Petitioner had a low risk of homicide, as noted in the Carson Tahoe medical records; but the carrying of the loaded semi-automatic rifle was certainly consistent with a specific intent to kill. Trial counsel needed to explain that fact away in order to have any success with his accident defense. Dr. Bittker, <u>together with Petitioner</u>, would have so explained; and the "Paxil-riddled state of mind" defense was perfectly <u>consistent</u> with the "accident defense," <u>not</u> inconsistent with it.

Had the jury heard from Dr. Bittker and seen the Carson Tahoe medical records, and had they heard from Dr. Nims, there is a reasonable probability that a reasonable jury would have found

Petitioner's mental state was inconsistent with that of a first degree murderer. At worst, such a jury would have found his mental state to be consistent with an impulsively-created intent to kill, consistent with second degree murder. See: Byford v. State, 116 Nev. 215, 233-37, 994 P.2d 700 (2000).

And what is truly insightful about this case is that the trial prosecutor, defense counsel, and the trial judge at different times have been on the same page: This is not a life without case, nor is it really a first degree murder case. Yet, we are to assume that even though learned counsel and the learned trial judge feel that way, any learned jury from Carson City never would feel that way!

Again, the Nevada Supreme Court unreasonably applied Strickland at pp. 2-3 of the May 10, 2010 Order of Affirmance. They gave deference to counsel's "inconsistent defense" testimony, without analyzing whether "the accident defense" and the "Paxil withdrawal defense" are actually inconsistent. As shown above, they are not; and Paxil withdrawal is necessary to explain the damaging fact of why Petitioner would enter Mr. Albrecht's home with a loaded rifle, but without the intent to kill him.

GROUND III

Petitioner incorporates Ground II herein by this reference.

Counsel admitted that by its verdict the jury sent a message that it did not believe Petitioner's guilt phase testimony. At penalty, he knew he had to try to rehabilitate Petitioner to the

jury. He conceded that the tactics he used were unsuccessful in that regard.

Counsel knew that there was a high likelihood that if the jury rejected the accident defense, it would come back with a first degree murder verdict and the State, notwithstanding its prior plea negotiations, would advocate life without parole. He did not consider hiring a forensic psychologist or psychiatrist for the penalty phase. He did not know why he did not do that. But his strategy for the penalty hiring was the hope that one of the jurors would have a "lingering doubt." He knew, however, he could not get a jury instruction on "residual doubt." See: Homick v. State, 108 Nev. 127, 141, 825 P.2d 600 (1992).

EXHAUSTION

This ground is clearly exhausted within the meaning of Baldwin. Petitioner cited to the Fifth, Sixth and Fourteenth Amendment Constitutional rights to due process of law, a fair trial, effective assistance of counsel at p. 20 of the Opening Brief in Case No. 52903, both with respect to the guilt phase and with respect to the penalty phase of Petitioner's jury trial. He also cited to Wiggins v. Smith, 539 U.S. 510 (2003) at p. 26 of the Opening Brief.

28 U.S.C. § 2254(d) CONSIDERATIONS

Numerous cases hold that it is prejudicially ineffective for counsel to fail to investigate and then develop a mitigating psychological evidence at penalty. See: Alcala v. Woodford, 334 F.3d 862, 870-72 (9th Cir. 2003); Simmons v. Luebboss, 299 F.3d

929, 935-39 (8th Cir. 2002); and Karris v. Calderon, 283 F.3d 1117, 1133-39 (9th Cir. 2002), *cert. denied*, 538 U.S. 950 (2003).

Frankly, the fact that the Nevada courts would not grant *habeas* on this simple ground is incomprehensible. There is no question that counsel settled on an unreasonable theory of defense at penalty. The Nevada Supreme Court has been consistent in rejecting "residual doubt" as a theory of leniency following a conviction of first degree murder. Counsel who settles on a weak defense in lieu of an available, reasonable alternative defense, without investigating first, acts below the standard of reasonably effective counsel. See: e.g.: United States v. Span, 75 F.3d 1383, 1389-90 (9th Cir. 1996); McFarland v. Yukins, 356 F.3d 688, 705-10 (6th Cir. 2004); Phillips v. Woodford, 267 F.3d 966, 978 (9th Cir. 2001) [all mandating grants of *habeas corpus* for that reason].

But secondly, even if accident and "Paxil-riddled state of mind" were somehow inconsistent defenses, what trial counsel overlooked is that by finding Petitioner guilty of first degree murder, the jury found his testimony to be incredible. Given that, how could it be a reasonable strategy not to present psychiatric testimony at that point? How could Dr. Bittker's and Dr. Nims' testimonies have possibly hurt Petitioner at penalty? Obviously, they could not have.

In this case, Petitioner has no significant history of prior criminal activity. He also killed Mr. Albrecht while under the influence of an extreme mental or emotional disturbance. Those

two facts should have caused a reasonable jury not to impose a life without parole sentence; but this jury returned the maximum penalty. However, a reasonable jury who also knew that this homicide was the product of a "Paxil-riddled mind," and by one who had no reason to know about the lethal effects on the psyche of unmonitored Paxil withdrawal, likely would have returned a life with parole verdict.

The Nevada Supreme Court unreasonably applied Strickland and Wiggins at p. 3 of the May 10, 2010 Order of Affirmance. They gave deference to counsel's tactic as he testified not to present psychological evidence at penalty that would contradict Petitioner's trial testimony. For reasons stated above, it would not have done so. The Court also held there to be "a reasonable probability" that Paxil withdrawal would not have altered the outcome of the penalty hearing. To so conclude would be to conclude that both the trial judge and both trial counsel were unreasonable in their evaluations of this case.

GROUND IV

At the beginning of the January, 2003 jury trial, during pre-trial preliminaries, Mr. Young advised that two members of the victim's family, during the prior preliminary hearing, had stood in the hallway and attempted to obstruct his path. He stated his concerns that they may sit in the public gallery and "make faces or something like that." The Court admonished counsel that if the Court became aware of that, he would exclude such persons from the trial.

On the fourth day of the trial, Mr. Young indicated that he was hearing commentary from the public gallery, and the trial court responded that if he heard anyone from the audience say or do anything, the Court would eject that person from the trial.

On the fifth day of the trial, an incident occurred wherein one of the witnesses called by the defense, Margaret Orci, the ex-wife of the homicide victim, was accosted after her testimony by the victim's sister. She admitted stating to Ms. Orci, "Why do you hate my brother so?" Another person, evidently also a family member or friend of the victim, stated:

> I don't know what role I play in this. I left this room because I couldn't stand Mr. Echols making a mockery out of an intentional shooting. I left the room because I needed to compose myself. I walked out into the hall outside. And I saw another person that I saw lie through his teeth, Jim [referencing Jim Davis, another witness called by the defense]. So I had no privacy. So they were back in this section here, and there was nowhere to go. I sat there, and I tried to compose myself. And I, my good friend came out and brought me into the room over here where nobody was there. And we sat and we prayed, and we prayed for the truth in this courtroom.
>
> In the meantime I see [the sister] coming out looking for [the sister's daughter], exactly what she said took place. No f'ing this and that. I have seen more lies in this room today than I can -

The trial court admonished these people that:

> It's side stuff like this that gets reported on the record, and it gets taken up to the Nevada Supreme Court, and not to say that they do things without thinking, but it's stuff like this that causes cases like this to get reversed, and we're down here doing it all over again. And everybody is having to go through the emotion again.

The trial court then admonished the sister that the next time an event like that happened, he would deal with it "immediately and decisively."

Mr. Young testified that the two family members related to the victim had obstructed his path at the time of the preliminary hearing, and stated something about Mr. Young being "garbage." He wanted to let the trial court know at the beginning of the trial that there was potential for the victim's family behaving in a way in the courtroom that would attract attention to themselves and would be negative to the Petitioner.

During breaks in the trial, Mr. Young recalled seeing jurors in the public concourse area of the courthouse. He saw one juror in the Men's Room. It is common for jurors to take cigarette breaks outside of the courthouse building, but on the courthouse premises.

Mr. Young was not aware of any incident involving members of the victim's family, occurring in the public concourse, bathrooms or hallway areas where the jurors were or may have been present. Had he been made aware, he probably would have notified the Court and moved for a mistrial. He did not advise any member of the Petitioner's family or friends to report any such incidences to him if they occurred.

Debbie Maher, Petitioner's first cousin from Sacramento, came to Carson City to watch two days of the trial. She saw a juror on the front row, Juror No. 11, wink at the victim's father or step-father in open court. She did not report the incident to the Mr. Young.

The next court day, Karen Kade testified. At a break in the public concourse area, the victim's family was to the left of the

doors opening from Department 2. Three or four jurors were coming from the area to the left of the victim's family. Ms. Maher heard members of the victim's family say, "They're lying," "this wasn't an accident," and "we want the death penalty." The witness was closer to the victim's family than were the jurors. She did not tell Mr. Young about the incident.

Later that day, during the lunch break, the witness (Ms. Maher) was in the women's bathroom at the far end of the public concourse. Members of the victim's family were in the restroom, and were "ranting and raving" about what a "liar" Ms. Kade was and about how "we're going to get him." The witness (Ms. Maher) assumed that the family members were referencing how the defense was trying to discredit Ms. Kade's testimony. The witness came out of a stall and saw a juror standing and washing her hands. The juror in question was seated in the front row. She was standing at the sink at the time the victim's family member uttered the statements. She did not tell either Mr. Young or the bailiff of the incident. The first mention she made of it was while visiting the Petitioner in prison in the fall of 2003.

Ms. Maher saw jurors in the lobbyway or foyer outside of the main entrance of the Carson City Courthouse. She did not see any bailiffs in the same vicinity.

Lori Britton, a long-time friend of the Petitioner's family, attended the Petitioner's trial on January 10, January 13 and January 15, 2003.

On January 10, 2003, in the public concourse area she over-

heard the victim's sisters making comments near the public restroom. While passing a juror in the door of the restroom, she heard the victim's sisters, at the sink area, say: "We're not going to accept anything but first degree murder." Ms. Britton felt intimidated by the victim's family members, as they had followed her to her car during the trial. Thus, she did not advise either a bailiff or Mr. Young as to what had occurred.

While the Petitioner was testifying during the trial, she was seated in the courtroom across from Scott Burau. She heard Mr. Burau say, "Oh, come on, this guy is lying. I can't believe this," with the sound of disgust. She did not bring this incident either to Mr. Young's or to the bailiff's attention.

On January 15, during closing argument, Ms. Britton was seated on the bench outside of the courtroom. Another sister of the victim came storming out of the courtroom, crying and yelling, making derogatory comments about Mr. Young, and complaining about a jury instruction. A male member of the victim's family came out, comforted her and said, "Don't worry, we're getting first." When that sister stormed out of the courtroom, the door slammed. The witness did not advise the bailiff or Mr. Young about this incident.

During recesses, the jurors smoked outside near the newspaper rack, near the courthouse door. The victim's family smoked nearby, within 10 feet of the jurors. During the recesses in the smoking areas, the witness heard victim family members say, "He [meaning Mr. Echols] is a terrible father. We're

getting first degree." No bailiffs were nearby outside. She did not mention the incident to the bailiffs or to Mr. Young.

Judith Rask, a family friend of the Petitioner's family, attended the trial during the first week, and became familiar with the victim's family, who filled all the rows in the public gallery behind the prosecution.

During a break, in the concourse area of the courthouse by the bench, the prosecutor was talking to family members of the victim. The Petitioner's ex-wife (Ms. Kade) had just testified. She heard the prosecutor state that the testimony was "bullshit." [sic] She did not know if other jurors were present. However, she saw jurors in the public restroom, and rode up the elevators with some of them. On another occasion, she heard the prosecutor speaking with the victim's family members on the public concourse near the public restrooms. They were discussing the upcoming testimony of the victim's ex-wife. She did not know if any jurors were present at that time.

Francis Carpenter, the Petitioner's step-father (although not in January of 2003) was at the courthouse on January 6, January 10, January 13 and January 14. During a break during jury selection, the witness was seated in a room near the public bathroom. While in the men's room, he heard the victim's brother loudly speaking about how the Petitioner had gone into the victim's home, broke in and shot him. Someone who ultimately was on the jury, Robert G., was standing right next to the witness at the urinal while he made this statement.

Later at the lunch recess, everybody - including the jury - was walking down the stairwell of the courtroom to the public exit. The witness was as close to the victim's brother as were the jurors. The witness heard the victim's brother say that the Petitioner broke into the house and shot his brother.

On January 13, the witness heard one of the victim's family members, after the judge had admonished them over the Margaret Orci incident, rush out of the courtroom and say, "No motherfucking judge [sic] tells us what to do." He likewise heard Mr. Burau state, "Oh, he's lying" in reference to Petitioner's testimony during the trial in the courtroom.

After the preliminary hearing, the victim's brother stood outside the wall of the courtroom and called the witness and the Petitioner's mother "scum" and "white trash." The witness reported the incident to Mr. Young, but nothing came of it. Thus, he did not report any of the other incidences either to Mr. Young or to the bailiff.

On January 14, 2003, during a break, the witness saw the trial prosecutor talking to the victim's sisters in the public concourse. She was "pantomiming" the Petitioner's testimony, and stating" That's a line of bullshit." (sic) A juror, James G., was standing next to the witness.

Petitioner testified that during the trial, of all of the incidences above described, he was only aware of the "Margaret Orci" incident. After the jury verdict, he was put into isolation, and nobody was capable of communicating with him.

R.N. Stutsman, the chief bailiff in charge of security for the First Judicial District, testified that jurors are instructed to use the restrooms in the secured hallway, but it is possible for them to use the public restroom facilities before entering the secured hallway. During recesses, most of the jurors stay in the jury room, but jurors can walk to the front of the building, typically to smoke. When that happens, they are not always escorted. It is possible for a juror to end up on the public concourse, as well as to go to the stairs with members of the public.

Mr. Stutsman received no information during the Petitioner's trial that anyone in the victim's family had approached a juror or attempted to speak with a juror. He had no recollection of the Margaret Orci incident, and no recollection of any of his security officers reporting the incident.

The Court indicated that jurors in this trial were not told not to go into the public concourse. The Court also noted that there is one stall in each of the juror's bathrooms in the secured hallway.

Scott Burau, the former chief deputy of operations of the Carson City Sheriff's Office, testified that he sat with the victim's family and watched 90% of the trial. When the Petitioner testified, his personal opinion was that the Petitioner was not telling the truth. He admitted that that was how he reacted in his mind at the time of the testimony. However, he denied stating that the Petitioner was "lying" out

loud during the trial in the courtroom. He admitted that the trial was "emotionally charged," and that the victim's family had strong feelings about the case.

Jason Woodbury, the second chair prosecutor on the Echols' trial, recalled the trial prosecutor, Anne Langer, admonishing the victim's family after the Margaret Orci incident, but testified that that was the only time he recalled her doing that. He also recalled Ms. Langer doing the physical demonstration of the victim's family members after the Petitioner testified. He did not recall seeing a juror present at that time, but that does not mean that a juror wasn't present, but simply that he did not see one.

Craig Hoffecker, Presiding Judge Maddox' bailiff/law clerk in January of 2003, testified that on the first day of trial, before the jury is selected, potential jurors can be in the public concourse, near the jury assembly room and beyond. He testified that once the jury is sworn in, for jurors wanting to go outside, the bailiff would accompany them. He did not know where the jurors went, once they left the secured hallway area.

Robert Janda, the First Judicial District Court bailiff who was present during most of the Petitioner's trial, testified that he did not receive any complaints from jurors during the trial, and didn't give any warnings to anyone in the gallery. He was unaware of the Margaret Orci incident. He was in the courtroom when it happened. The incident was never reported to him. His primary focus during the trial was on the Petitioner. His job

was not to secure the jurors coming into the courtroom.

William Farris, a bailiff who relieved Mr. Janda during the trial, testified that the trial court did not give the bailiffs any special instructions regarding this case. He was unaware of the Margaret Orci incident, and did not know how it came to the Court's attention.

In the Court's Order from the bench, the trial court concluded that he did not believe the incidences occurring in the public concourse near the jury assembly room occurred before any juror. He also did not believe the alleged incidences occurring in the courtroom during the trial occurred.

However, the Court found that it had concerns about what occurred in the bathrooms, and noted that it was absolutely, positively possible that jurors could have used the public bathrooms. The Court also noted that it wouldn't be surprised that both the victim's and the trial prosecutor in fact made comments on the public concourse, in front of the courtroom. However, the Court was not convinced that the jurors heard the comments in question, as it could not believe that jurors hearing such comments wouldn't have brought them to the Court's attention. The Court noted that Petitioner could have called jurors as witnesses at the evidentiary hearing on his Motion for New Trial, and assumed from the fact that he didn't that the jurors had nothing to say. With respect to the commentary in the public stairway, the trial court found that if it happened, he didn't believe the jury heard it. Thus, the trial court denied

the Motion for New Trial.

In the written Order Denying Motion for New Trial, the Court adopted its factual findings on the record, and stated that based on those findings, there was insufficient evidence presented to establish improper third party contact with a juror, **and even if there was contact with jurors, it was not prejudicial to the Petitioner's case**. The Court expressly found that there was not an atmosphere at the trial in the case that eroded the presumption of innocence. The Court found that its admonitions and instructions directed to the jury during the trial not to discuss the case with other persons cured any prejudice that could otherwise have existed.

EXHAUSTION

This ground clearly is exhausted within the meaning of Baldwin. Petitioner cited Moore v. Dempsey, 261 U.S. 86 (1923) at p. 20 of the Opening Brief in Case No. 46455. He also cited Holbrook v. Flynn, 475 U.S. 560, 571 (1986) at p. 21 of the same brief. Moreover, Petitioner heavily stressed Meyer v. State, 119 Nev. 554, 80 P.3d 447 (2003), and that Court relied heavily on Remmer v. United States, 347 U.S. 227 (1954) and Remmer v. United States, 350 U.S. 377 (1956). See: Meyer, 119 Nev. at 564-65. And see: Opening Brief in Case No. 46455 at pp. 24-25. Petitioner also filed a Petition for Rehearing in Case No. 46455, wherein he cited Remmer at p. 3 thereof.

28 U.S.C. § 2254(d) CONSIDERATIONS

For purposes of the standard of review, Petitioner is not

questioning the trial court's findings of disbelieving the alleged incidences occurring in the courtroom and in the public concourse near the jury assembly room. Petitioner recognizes that the district court was in the best position to adjudge those incidences.

However, the "conduct" and "comments" being litigated herein truly transcend the mere "wearing of buttons" or "wearing of ribbons" designed to show some type of solidarity or sympathy to the victim. These comments consisted of hostile, derogatory comments about the Petitioner, and hostilely-delivered information contrary to Petitioner's sworn testimony, specifically designed to intimidate the jury into returning the verdict that the victim's family wanted. And, in fact, the jury did so - including a life without possibility of parole verdict relative to a middle-aged man with no criminal history who obviously was acting under extreme emotional distress due to his wife's affair with the victim, the breakup of his marriage, and his inability to see his son.

Those comments, which the district court did not disbelieve, are as follows:

1. In the presence of 3 or 4 jurors, victim's family members in the public concourse made statements "they're lying"; "this wasn't an accident"; and "we want the death penalty."

2. In the women's restroom during a break, while a juror was standing and washing her hands, a member of the victim's family "ranted and raved" about what "a liar" the Petitioner's

ex-wife was, and about how "we're going to get him."

3. In another "restroom incident," the victim's sister in the presence of a juror stated "we're not going to accept anything but first degree murder."

4. During a recess outside of the courtroom, victim family members stated in the presence of a juror(s), "He (meaning Petitioner) is a terrible father. We're getting first degree."

5. In the men's restroom during a break, the victim's brother loudly stated, in the presence of a juror, about how the Petitioner had gone into the victim's home, broke in, and shot him. Petitioner's version, of course, was much different.

6. During a lunch recess, while everyone including the jury was walking down the stairwell of the courtroom to the public exit, the victim's brother stated that the Petitioner broke into the house and shot his brother. Again, Petitioner's version was: no break-in; and accidental shooting.

7. During a recess, the trial prosecutor was observed speaking to the victim's sisters in the public concourse, "pantomiming" the Petitioner's testimony and stating "that's a line of bullshit" (sic) in the presence of a juror.

The trial court did not find or believe that none of that happened. For *de novo* review purposes, we must assume that all of it did.

Efforts by spectators at a trial to intimidate a judge, the jury or witnesses violate the most elementary principles of a fair trial. Smith v. Farley, 50 F.3d 659, 665 (7th Cir. 1995),

citing Moore v. Dempsey, 261 U.S. 86 (1923). When a courtroom arrangement is challenged as inherently prejudicial, the question to be answered is whether an unacceptable risk is presented of impermissible factors coming into play. Holbrook v. Flynn, 475 U.S. 560, 570 (1986). In other words, all a court may do in such a situation is to look at the courtroom scene presented to the jury and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to the defendant's right to a fair trial. Id. at 572.

The real issue here, and the unreasonable application of a federal Constitutional law here by the Nevada Supreme Court, concerns: who had the burden to present testimony of the jurors? The answer is: the State. By establishing that the victim's family members made the loud, prejudicial statements in the individual jurors' presences, the burden shifted to the State to call the jurors, to rebut the presumption of prejudice and establish that they did not hear that which was stated in their presence. The State failed and refused to do so.

The jury's exposure to extrinsic information relating to the facts at issue raises a presumption of prejudice. Remmer, 347 U.S. at 229. Thus, the prosecution bears the burden of proving that the jury's exposure to and consideration of extrinsic evidence did not contribute to the verdict. Dickson v. Sullivan, 849 F.2d 403, 405-06 (9th Cir. 1988) [reversing denial of *habeas corpus*]; Marino v. Vasquez, 812 F.2d 499, 504 (9th Cir. 1987); United States v. Prime, 431 F.3d 1147, 1157 (9th Cir. 2005).

Because the prosecution did not overcome the federally-mandated presumption of prejudice, the Nevada Supreme Court's disposition constitutes an unreasonable application of Remmer, and hence, of the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution. 28 U.S.C. § 2254(d)(1).

GROUND V

At the penalty hearing, the State presented 4 witnesses, Lori Albrecht Coombs, Patsy Correlli, Kathy Atchian and Steve Leonard. Ms. Coombs was the victim's daughter, Ms. Correlli was the victim's sister, Ms. Atchian was the victim's sister, and Mr. Leonard was the victim's brother. In each case, each family member made a specific recommendation of imposition of a sentence of life without the possibility of parole. Some of these recommendations were made in a very dramatic fashion. One family member expressed worry (with no supporting evidence) that the Petitioner might get out and attack the people closest to Mr. Albrecht "just for revenge." Another family member compared what the Petitioner did as creating a "no-parole sentence" for them.

Pre-hearing, Petitioner objected to the rendering of such opinions, but acknowledged that the case of Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993) was "against him." Accordingly, the trial court "noted" Petitioner's objection for the record.

During the penalty closing argument, the trial prosecutor argued for life without parole, in order to bring "peace" to the Albrecht family. Petitioner objected twice, the trial court finally acknowledged that the purpose of sentencing was not "for

the family herein," and the trial prosecutor then "spun her comments" to say that "we are sentencing for justice; so disregard the family; don't even take what I just said into consideration." Nevertheless, the trial prosecutor continued to advocate the verdict that the Albrecht family desired and the jury ultimately rendered, or life without possibility of parole.

Per Witter v. State, 112 Nev. 908, 922, 921 P.2d 886 (1996), the Nevada Supreme Court has interpreted Randell to mean that it is permissible for victims to give sentencing recommendations as part of their Victim Pact Testimony at sentencing in a non-capital case, albeit not in a capital case. But actually, Randell applies to a case wherein the death penalty is not involved and the court, not the jury, is the sentencing decision maker. And in fact, the Nevada Supreme Court in Randell somewhat created a rebuttable presumption of harmless error by receipt of such sentencing testimony. As the Nevada Supreme Court explained:

> Judges spend much of their professional lives separating the wheat from the chaff and have extensive experience in sentencing, along with the legal training necessary to determine an appropriate sentence. [cite omitted] The district court is capable of listening to the victim's feelings without being subjected to an overwhelming influence by the victim in making a sentencing decision. A sentencing judge is allowed wide discretion in imposing a sentence; absent an abuse of discretion, the district court's determination will not be disturbed on appeal. [cite omitted]
>
> Randell, 109 Nev. at 7-8.

Randell, of course, does not address the situation where the jury is the sentencer, and the jury hears emotional pleas

repeatedly from the victim's family to return the maximum sentence, viz. a defendant with no significant prior criminal history and one who clearly acted under an emotional disturbance at the time of the murder.

Petitioner argued that it violates the Fifth, Sixth, Eighth and Fourteenth Amendments to allow victims to make a sentencing recommendation at the time of a defendant's sentencing in any type of case, whether capital or non-capital, where the jury is the sentencer.

EXHAUSTION

This ground clearly is exhausted within the meaning of Baldwin. Petitioner cited to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution at p. 20 of the Opening Brief in Case No. 40913, and also cited to the key case of Payne v. Tennessee, 501 U.S. 808 (1991) at pp. 20-21 thereof.

28 U.S.C. § 2254(d)(1) CONSIDERATIONS

Per Payne v. Tennessee, Id., victim impact testimony is admissible at sentencing **when the testimony is relevant and unprivileged, and its weight is left to the factfinder who has the benefit of cross-examination and contrary evidence by the opposing party. However, victim impact evidence cannot be offered to encourage comparative judgments**; as long as the victim impact evidence is designed to show each victim's "uniqueness as a human being," whatever the factfinder might think the loss to the community resulting from his victimization might be, the

evidence is admissible. Payne, 501 U.S. at 823-24. Victim impact testimony cannot be used as a means to encourage comparative judgments, meaning that opinions regarding the appropriate sentence are not permitted as part of the victim impact evidence. Payne, 501 U.S. at 823, 826-27.

In the wake of Payne, courts throughout the country have held that victim sentencing recommendations do not constitute admissible evidence in a sentencing proceeding. See: State v. Hoffman, 851 P.2d 934, 941 (Idaho 1993), *cert. denied*, 511 U.S. 1012 (1994); State v. Taylor, 944 S.W.2d 925, 938 (Mo. 1997); People v. Caffey, 792 N.E.2d 1163, 1209 (Ill. 2001), *cert. denied*, 536 U.S. 944 (2002); Sexton v. State, 775 So.2d 923, 932-33 (Fla. 2000); State v. Spears, 908 P.2d 1062, 1077 (Ariz. 1996); People v. Brown, 705 N.E.2d 809, 822 (Ill. 1998); People v. Harris, 695 N.E.2d 447, 467 (Ill. 1998); Wright v. State, 962 S.W.2d 661, 663 (Tex. Cr. App. 1998); Gross v. State, 730 S.W.2d 104, 105-06 (Tex. App. 1987); People v. Greenwood, 667 N.Y. Supp.2d 131, 133 (N.Y. A.D. 1997).

Indeed, all of these authorities are consistent with *McCormick on Evidence*, § 12 at 30-31 (3d ed. 1984): Victim impact testimony in the form of an opinion as to the kind of sentence the defendant "should" serve does not meet the threshold test of relevant admissible evidence. Lay opinions as to the kind of sentence a defendant should receive suffer from a lack of foundation, because the witness is in no better position to form an opinion than the factfinder itself, and the allowance of such

an opinion in evidence constitutes an appeal to sympathy or prejudice, and tends to suggest that the factfinder shift his/her responsibility to those witnesses.

Moreover, in Randell, the Nevada Supreme Court construed NRS 176.015(3) to authorize a victim to express her view to the judge as to the amount of prison time to which a defendant should be sentenced. But not only does NRS 176.015(3) not say this, but the cases upon which the Nevada Supreme Court relied for that proposition, State v. Ross, 696 P.2d 706 (Ariz. App. 1989) and People v. Mockel, 276 Cal. Rptr. 559 (Cal. App. 1990), also do not so say. In Ross, the victim gave a lenient sentencing recommendation, thus obviating any claim of error by him on appeal; and the statute in Arizona allows victims to express opinions regarding the crime, the defendant or the need for restitution. Ross, 696 P.2d at 708-09. Moreover, the Ross court held that "the error" in having a separate "victim impact" hearing was harmless, in view of the fact that the victim urged leniency. Ross, 696 P.2d at 709. Nothing in Ross confuses "the need for restitution" with "the need for retribution"!

In Mockel, the published opinion does not say what sentencing views were expressed by the family and friends of the victim, but noted that the defendant did not object on grounds of relevance and prejudice, and therefore waived those issues on direct appeal. Mockel, 276 Cal. Rptr. at 562-63. As noted above, defense counsel did object to the sentencing views of the family and friends of the victim, thereby preserving issue for

direct appeal.

This testimony clearly had a substantial and injurious impact upon the sentencing jury's decision. See: Brecht v. Abrahamson, 507 U.S. 619 (1993). Until being admonished by the trial court, the prosecutor's whole theme at sentencing was to "do it for the family." Indeed, the prosecution didn't present any evidence to the sentencing jury other than the victim impact testimonies of the 4 family members. Secondly, each family member recommended the harshest available sentence, or life without the possibility of parole. Thirdly, this Petitioner had no significant prior criminal history and likewise was acting under the influence of extreme emotional disturbance, not only because of a divorce he did not want, but more importantly, because of the perceived loss of any rights to the great love of his life, his son, as a result of the legal system, and Mr. Albrecht's role in that situation. This was not a murder committed in connection with or in order to receive money or any other thing of monetary value. This was not a case where anyone other than Mr. Albrecht was at risk. Mr. Albrecht was likewise a middle-aged, adult male, and the case did not involve torture or mutilation. Finally, even to the trial jury it was clear that the Petitioner exhibited great remorse for what he did, and indeed seriously contemplated suicide as a "solution to the problem he had created" before being talked out of it.

Finally, even the trial judge acknowledged, at the end of the post-conviction hearing, that he would not likely have

imposed a sentence as harsh as life without the possibility of parole. Judge Maddox, a long-time criminal defense attorney but also a long-time prosecutor (indeed, the former United States Attorney for the District of Nevada) - had far greater experience in balancing issues of retribution versus rehabilitation than did this jury.

Thus, the Nevada Supreme Court's summary reliance upon Randell constituted an unreasonable application of Payne, and violated 28 U.S.C. § 2254(d)(1).

GROUND VI

Penalty Instruction No. 5 stated (in material part):

> The sentence of life without the possibility of parole means just that - the defendant will spend the rest of his life in prison. He cannot be paroled, nor can he be pardoned, under the laws in effect in Nevada at this time.
>
> The sentence of life with the possibility of parole means that the defendant must serve at least 20 calendar years, and will spend the rest of his life in prison unless he is paroled or pardoned. A parole may be granted to individuals who meet certain criteria established by the law, and the Parole Board has wide discretion in deciding whether to grant a parole.
>
> Whether to grant a pardon is up to the sole discretion of the Board of Pardons. If the defendant receives a life sentence with the possibility of parole, he should expect that he will serve up to the rest of his life in prison.

Before the commencement of the penalty hearing, the trial court read this Instruction in open court.

This Instruction clearly was inaccurate. Per NRS 213.085, a defendant sentenced to life without the possibility of parole cannot have his sentence **commuted** to life with the possibility of parole by the State Board of Pardons Commissioners. However, as

the Nevada Supreme Court explained in Colwell v. State, 112 Nev. 807, 812, 919 P.2d 403 (1996), nothing in NRS 213.085, or any other statute, prohibits the Board of Pardons Commissioners from granting a **pardon** to one convicted of first degree murder and sentenced to life without possibility of parole. Colwell, 112 Nev. at 812.

Thus, not only was this Instruction inaccurate, it left the jury with a chance to speculate as to whether a life without possibility of parole sentence could be commuted; and if the jurors "guessed" that it could, they guessed wrong. As Colwell well demonstrates, a consideration of pardon authority invites consideration of commutation authority, and vice versa.

EXHAUSTION

This ground is clearly exhausted within the meaning of Baldwin. Petitioner cited to the Fifth, Sixth, Eighth and Fourteenth Amendments to the Federal Constitution at p. 24 of the Opening Brief, No. 40913, and cited to the key case of Caldwell v. Mississippi, 472 U.S. 320, 342 (1985) at p. 26 thereof.

28 U.S.C. § 2254(d) CONSIDERATIONS

It is clear beyond doubt that, at least in a capital murder sentencing proceeding, the giving of an executive clemency instruction which is either inaccurate or misleading, is constitutional error. See: Hamilton v. Vasquez, 17 F.3d 1149, 1161-64 (9th Cir. 1994); Gallego v. McDaniel, 124 F.3d 1065, 1074-76 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 2299 (1998). The problem with such instructions is that they prevent a jury

from giving a reasoned moral response to mitigating evidence or create a risk that the harshest penalty will be imposed out of response to such instructions. See also: Caldwell v. Mississippi, *supra*.

The same rationale must apply to a jury's fundamental decision of whether petitioner should have a chance at parole at some time during his life, or whether he should abandon all hope.

Error based on an improper clemency instruction is reviewed for harmlessness. See: Calderon v. Coleman, 525 U.S. 141 (1998). When this error is considered in cumulation with the errors in Grounds III and VI, a grant of *habeas* must ensue. Truly, this is not a "life without parole" case.

Accordingly, the Nevada Supreme Court's disposition of this issue constitutes an unreasonable application of Caldwell and Coleman. It therefore violates 28 U.S.C. § 2254(d)(1).

GROUND VII

During the jury selection, a juror named Jacqueline "S" testified that she had not only read about the case in the newspaper, but her daughter was an acquaintance with the victim's sister, Kathy [Atchian; see Ground V]. She testified that her daughter liked Kathy, had purchased a home from Kathy, had spoken with Kathy about the case, and her daughter had relied on Kathy's "version." She said that the opinion she formed, both from reading the newspaper and from what she had heard, was that the Petitioner killed Mr. Albrecht because of the fact that he was having an affair with the Petitioner's wife. The prospective

juror stated: "Regardless, that is wrong. You don't go and kill somebody because of that." The trial court then did not allow the attorneys to go "much further" into the specifics of the case.

Earlier, prior to the individual voir dire, Ms. "S" volunteered that she had made up her mind "basically then," and the shooting happened near her daughter's other friend's home. She again stated that she had formed an opinion, based upon what she had read and everything she knew.

Ms. "S" testified that from what she had read and what she had heard, she formed the above opinion. She stated she would hear all of the evidence and make up her mind after that. The juror could not delineate how much of her opinion came from the newspaper, and how much came from her daughter. She testified that she was not certain that she could set aside what she knew and adjudicate the case based on the in-court evidence. She testified that her knowledge made her presume that the Petitioner was guilty, not innocent, before she came to Court. Ms. "S" candidly admitted that she would rather serve as a juror on a case where she didn't know anything about it (beforehand).

Based upon that, Petitioner challenged Ms. "S" for cause. The Court summarily asked Ms. "S" if she could set aside what she knew prior to the proceeding and fairly try the case based on the evidence presented in the courtroom. Ms. "S" responded in the affirmative. Based on that, the trial court denied the challenge for cause.

Petitioner exercised his second peremptory challenge on Ms. "S," and exercised all 8 of his available challenges.

EXHAUSTION

This ground clearly is exhausted within the meaning of Baldwin. Petitioner cited to the Sixth and Fourteenth Amendments of the Federal Constitution at p. 41 of the Opening Brief in Case No. 40913, and also cited there to a key case of Morgan v. Illinois, 504 U.S. 719, 734-36 (1992).

28 U.S.C. § 2254(d)(1) CONSIDERATIONS

Unquestionably, a juror who learns of prejudicial information from extrajudicial sources about a case cannot discharge a criminal defendant's Sixth Amendment right to a fair trial. See: Courtney v. State, 104 Nev. 267, 268, 756 P.2d 1182 (1988), citing Marshall v. United States, 360 U.S. 310 (1959).

Importantly, the issue as to Jacqueline "S" does not come merely from the fact of her exposure to the pre-trial media publicity in this case. There is no inference or presumption of bias which exists merely by virtue of exposure to pre-trial publicity, even when the same is wide and adverse. See: Beck v. Washington, 369 U.S. 541, 557-58 (1962). Accordingly, the mere fact that a prospective juror states that s/he has formed an impression or opinion of guilt merely from pre-trial media accounts, but states that s/he believes s/he can set that aside and judge the case on the evidence, does not create a mandated removal of such prospective juror.

Rather, the issue in this case concerns this prospective

juror receiving information about the case from her daughter, who was a friendly acquaintance with the victim's sister and had spoken with Ms. Atchian about the case. One cannot be certain about very many things in life, but one can be certain that Kathy Atchian would have told Ms. "S's" daughter "the facts of this case" in such a way that there would have been no doubt whatsoever but that the Petitioner committed a cold-blooded, calculated, very deliberated and very premeditated murder in the deceased's own home; and that is the "version" that would have been passed on to Ms. "S."

If a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must be impartial and indifferent to the extent commanded by the Sixth Amendment. Morgan v. Illinois, 504 U.S. 719, 727-28 (1992), and cases cited therein. The test of impartiality of a juror is whether the nature and strength of her opinions formed are such as in law necessarily raises a presumption of partiality. The question is one of mixed law and fact. Irvin v. Dowd, 366 U.S. 717, 723 (1961). A juror's assurances that she is equal to her task and can lay aside any preconceived impression or opinion and render a verdict on the evidence cannot be dispositive of the accused's rights; it remains open to the defendant to demonstrate the actual existence of such an opinion in the mind of the juror as will raise a presumption of partiality. Murphy v. Florida, 421 U.S. 794, 800 (1975). On habeas review, the proper standard for determining when a prospective juror may be excluded for

cause is whether the juror's views would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and oath. Wainwright v. Witt, 469 U.S. 412,424 (1985).

Finally, where a juror who should have been excused for cause was removed by a defendant's peremptory challenge, any claim that the jury was not impartial was required to focus, not on the excused juror, but on the jurors who actually sat. A loss of a peremptory challenge by itself does not constitute a violation of the constitutional right to an impartial jury. Ross v. Oklahoma, 487 U.S. 81, 86, 88 (1988).

This is not a case of "implied bias." A juror's implied bias may be found based on similarities between a juror's life experiences and the facts giving rise to the trial, even if the juror has no personal connection to the parties or circumstances of trial. Gonzales v. Thomas, 99 F.3d 978, 987 (10th Cir. 1996), *cert. denied*, 520 U.S. 1159 (1996). The implied bias doctrine is reserved for extreme and exceptional circumstances. See: United States v. Cerrato-Reyes, 176 F.3d 1253, 1260-01 (10th Cir. 1999); Fields v. Brown, 503 F.3d 755, 772 (9th Cir. 2007) (en banc). Rather, this is a case of "bias in fact" or "actual bias," i.e., one where the juror admits partiality due to her personal circumstances. Compare: United States v. Torres, 128 F.3d 38, 43-45 (2d Cir. 1997), *cert. denied*, 523 U.S. 1065 (1998).

Thus, where a juror states during voir dire that she would be unable to weigh a witness testimony equally with that of other

witnesses, the trial judge has the obligation to strike such a juror for cause right then and there. United States v. Howell, 231 F.3d 615, 627-28 (9th Cir. 2000), *cert. denied*, 534 U.S. 831 (2001). A state court's finding that a juror was impartial is not automatically entitled to the presumption of correctness. See: Dyer v. Calderon, 151 F.3d 970, 975-77 (9th Cir. 1998) (en banc); Green v. White, 232 F.3d 671, 675-76 (9th Cir. 2000).

The issue is whether Ms. "S," having expressed sincere reservations regarding her ability to be fair, could be completely rehabilitated on the trial judge's summary "canvass" to that effect. The United States Supreme Court answered that question in Morgan: Once bias is established, a subsequent general question, "answered correctly," regarding the prospective juror's ability to be fair and impartial and to follow the law, is not sufficient to overcome the inference of prejudice. Morgan, 504 U.S. at 734-36.

In this case, Ms. "S" admitted three times she had formed an opinion beforehand, which precluded an ultimate finding of accident; she admitted that she was not certain that she could set the opinion aside; she admitted she presumed Petitioner to be guilty; and she admitted that she would be more suitable as a juror for a case in which she knew nothing going in. Obviously, it would be unrealistic to expect this juror to return a verdict of guilty to involuntary manslaughter, or a not guilty verdict, and then explain to her own daughter how her friend, Kathy, was simply wrong. It was error not to strike this juror.

In terms of harmlessness of the error, had Petitioner not exercised a peremptory challenge on her, or had he not exercised all of his peremptory challenges, then the error would be deemed harmless per Ross v. Oklahoma, *supra*. However, he in fact exercised all of his peremptory challenges, including one on Ms. "S." When a defendant is forced to utilize peremptory challenges to correct a trial court's error in denying a challenge for cause, and thereafter exercises all available peremptory challenges on other prospective jurors, the effect of the trial court's erroneous ruling on the challenge for cause is to impair the defendant's ability to change the ultimate composition of the jury selected to try the case. People v. Prator, 856 P.2d 837, 840-42 (Colo. 1993). Accordingly, the exercise of peremptory challenges in that instance is rendered meaningless. Thompson v. State, 111 Nev. 439, 442-43, 894 P.2d 375 (1995).

And as noted in Ground I, this error is made even more reversible by the fact that during voir dire, four prospective jurors expressed the opinion in front of the entire venire that if the case involved two gunshots to the head of the victim, such a shooting simply could not be accidental. One of those jurors actually ended up on the jury. Thus, Petitioner was left with a Hobson's choice: "Do I peremptorily challenge the juror who does not believe that two shots to the head can ever be an accident; or do I peremptorily challenge the juror whose daughter has heard about this case from the victim's sister and therefore believes me to be guilty before I start?" Clearly, this Hobson's choice

is Constitutionally unacceptable; and the Nevada Supreme Court's ruling to the contrary constitutes an unreasonable application of United States Supreme Court law, per 28 U.S.C. § 2254(d)(1).

GROUND VIII

During the trial, the prosecutor engaged in forensic misconduct on **8 separate occasions**, as follows:

1. On January 10, 2003, trial counsel called Margaret Orci, Mr. Albrecht's ex-wife, as a witness to the altercation between Petitioner and Mr. Albrecht on December 5, 1999. Her testimony established that Mr. Albrecht refused to leave before the fight broke out, Mr. Albrecht punched Petitioner in the face continuously, and pounded his head into the concrete, and threatened to kill Petitioner on 3 occasions.

On cross-examination, the prosecutor sought to embarrass Ms. Orci by making it look like she broke up the marriage with Mr. Albrecht and that she made deeply, personally insulting comments to Mr. Albrecht's sister-in-law. The prosecutor then attempted to impeach Ms. Orci by bringing out an incident where she attempted to humiliate Mr. Albrecht over his habit of chewing tobacco.

Trial counsel did not recall receiving any discovery regarding the victim's habit of chewing tobacco, or Ms. Orci attempting to humiliate her ex-husband over his habit.

None of this had anything to do with the charges at hand or the specific relevant testimony of Ms. Orci. It was done basically to harass and embarrass the witness, in the hopes that

the jury would dislike her and therefore not believe her. The prosecutor had no evidence to support the assertions, which the witness denied in any event. Clearly, such incidents were irrelevant and inadmissible under NRS 48.035 and 50.085(3), and also brought out inadmissible hearsay as well. See: United States v. Sanchez, 176 F.3d 1214, 1221-22 (9th Cir. 1999) [using inadmissible hearsay statements to impeach constitutes prosecutorial misconduct; it is improper, under the guise of artful cross-examination, to tell the jury the substance of inadmissible evidence. Reversed and remanded]

2. Then, in cross-examining Petitioner, the prosecutor asked Petitioner if he told A.J. that he was going to kill Mr. Albrecht at a rifle range (prior to the homicide). Petitioner denied the allegation, and the prosecutor never called A.J. as a witness to establish such a fact.

Again, trial counsel did not recall any discovery from the State indicating the ability to prove such an allegation.

The prosecutor had no basis to ask this question, as she could not prove the truth of the assertion. See: United States v. Boyd, 131 F.3d 951, 955 (11th Cir. 1997) [prosecutorial comments calculated to inflame a jury are improper. Prosecutors have a responsibility not only to prosecute cases diligently, but also to refrain from using improper methods in doing so]; Sanchez, *supra*; NRS 50.085(3); Bluestone, *post*.

3. Additionally, during cross-examination of Petitioner, the trial prosecutor attempted to impeach him by claiming that he

told a police officer on December 7, 1999 (regarding the incident that Ms. Orci witnessed) that he intended to commit suicide that day. Petitioner denied doing so.

Again, trial counsel did not recall receiving any discovery indicating that the trial prosecutor could prove the assertion if Petitioner were to deny it.

Again, the evidence was irrelevant and inadmissible under NRS 48.035 and 50.085(3), and again the prosecution did not call the police officer in question to rebut Petitioner's testimony.

This examination was intended to convey the proposition that Petitioner was commenting on a police officer's lying, in order to cast disparagement on Petitioner - but with regard to a matter occurring 8 months prior to the homicide. See: United States v. Sullivan, 85 F.3d 743, 749 (1st Cir. 1996) [questions calling for opinions on the veracity of other witnesses are improper].

4. Again, during cross-examination of Petitioner, the prosecutor examined Petitioner on a statement he allegedly made on August 3, 2000, two days prior to the homicide. When Petitioner denied the statement, the prosecutor stated: "So, when Pastor Fleming comes in here he's just not telling the truth about that?"

Again, that style of cross-examination is absolutely forbidden per Daniel v. State, 119 Nev. 498, 517-19, 78 P.3d 890 (2003) [reversal]. The reason why is quite apparent in this case: Petitioner was not about to call his own pastor of his own church a liar, so Petitioner could not do so. Accordingly, the

prosecutor was able to play against that to try to create the appearance that Petitioner lied, and in fact intended to kill Mr. Albrecht before entering his residence.

5. Still later during the cross-examination of Petitioner, when examining Petitioner about the events inside of Mr. Albrecht's home right before his death, the prosecutor suggested that Mr. Albrecht was praying for his life before Petitioner shot him.

Trial counsel testified that the discovery that he had indicated that Mr. Albrecht's hands were in a "prayer position" at the time he was killed. However, there was nothing in the forensic evidence establishing that Mr. Albrecht actually was praying for his life. Again, this style of cross-examination is forbidden per Sanchez, *supra*.

6. Still later in the cross-examination, the trial prosecutor suggested that Mr. Albrecht had "the Colorado River of blood" running down his body.

Again, there was absolutely no evidence produced of any such "spectacular image." It is prosecutorial misconduct for a prosecutor to make comments on facts not in evidence. See: Mahan v. State, 104 Nev. 13, 16-17, 752 P.2d 208 (1988).

7. Then during closing argument, the trial prosecutor on several occasions stated: "Forensics don't lie; people do." It constitutes prosecutorial misconduct for a prosecutor to inject his or her personal beliefs and opinions regarding the superior credibility of the State's expert witnesses. In this case, the

defense did not call any forensic expert witnesses at trial. This error, coupled with other errors, can warrant reversal. Aesoph v. State, 102 Nev. 316, 322-23, 721 P.2d 379 (1986).

8. Further, the prosecution on 2 occasions during closing argument suggested that Petitioner, after shooting and killing Mr. Albrecht, was leaving to shoot and kill Karen Kade.

Trial counsel admitted that he received nothing in discovery to his memory that supported that allegation. Otherwise, there was absolutely not one wit of evidence introduced - whether at trial or at post-conviction - to suggest that as a fact. Those comments clearly constituted prosecutorial misconduct per Collier v. State, 101 Nev. 473, 480-81, 705 P.2d 1126 (1985) and Sipsas v. State, 102 Nev. 119, 125, 716 P.2d 231 (1986), as well as Mahan, *supra*.

To summarize, the basic problem is that continuously, the prosecutor either asked questions of witnesses in cross-examination, or made arguments, referencing alleged facts that were never presented either in discovery or in the State's rebuttal case. I.e., the prosecutor continuously asked questions or made comments with factual inferences that she knew she could not prove independently. There is no question that this is prosecutorial misconduct, per United States v. Blueford, 312 F.3d 962, 968-69 (9th Cir. 2002).

EXHAUSTION

This ground is clearly exhausted within the meaning of Baldwin. Petitioner cited to the Fifth, Sixth and Fourteenth

Amendment rights of the Federal Constitution at p. 30 of the Opening Brief in Case No. 52903, cited to the key prosecutorial misconduct case of Darden v. Wainwright, 477 U.S. 168 (1986) at p. 35 thereof, and cited to several ineffective assistance of counsel cases decided under Strickland, *supra*, also at p. 35 of the Opening Brief in Case No. 52903.

28 U.S.C. § 2254(d) CONSIDERATIONS

The key question is whether this cumulation of prosecutorial misconduct is sufficient to upset the guilty verdict. If so, trial counsel clearly in that instance was prejudicially ineffective in failing to object to any of this misconduct. Effective counsel's job includes ensuring that his client not be subjected to forensic misconduct. Washington v. Hofbauer, 228 F.3d 689, 702 (6th Cir. 2000); Burns v. Gammon, 260 F.3d 892, 897 (8th Cir. 2001). Moreover, because of the failure to object immediately and to give the trial court the opportunity to sustain the objection and admonish the prosecutor and the jury, the later generalized jury instruction reminding jurors that a lawyer's statements during closing argument do not constitute evidence cannot cure the misconduct as a matter of law. United States v. Weatherspoon, 410 F.3d 1142, 1151-52 (9th Cir. 2005).

In reversing the Nevada Supreme Court, the Ninth Circuit set forth the appropriate standard of review in Sechrest v. Ignacio, 549 F.3d 789 (9th Cir. 2008):

> A prosecutor's misleading and inflammatory arguments may violate a defendant's due process right to a fair trial. Darden v. Wainwright, 477 U.S. 168, 181-82, ... (1986). On federal habeas review, the narrow issue before us is whether

> the prosecutor's comments violated the defendant's due process rights to a fair trial, not whether the prosecutor's comments constituted misconduct while the prosecutor was under the court's "exercise of supervisory power." Id. at 181. . . .
>
> Thus, we must examine the "entire proceedings" to determine whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process. [Cites omitted] Before granting relief, we must also determine that any Constitutional error was not harmless. Specifically, we must find that the error had substantial and injurious effect or influence in determining the jury's verdict. Brecht v. Abrahamson, [supra]. Only if the record demonstrates that the jury's decision was substantially influenced by the error or there is a "grave doubt" about whether an error affected a "jury" will Sechrest be entitled to relief? [Cites omitted]

Sechrest, 549 F.3d at 807-08.

The Ninth Circuit then reviewed 3 statements made during voir dire and closing argument at the penalty phase by the trial prosecutor, and determined them all to be false and misleading. Sechrest, 549 F.3d at 809-11. The Court then noted that the prejudice focused on the totality of the effect of the errors based on the entire post-conviction record. Sechrest, 549 F.3d at 812. And ultimately, the Ninth Circuit held that the prosecutor violated the defendant's due process rights by repeatedly making false, inflammatory statements during the penalty phase of his capital murder trial, depriving him of his due process right to a fair penalty phase trial and requiring resentencing.

That is what we are talking about here. Did the totality of the misconduct deprive Petitioner of a fair trial? That is, did the totality of the misconduct guide the jury into its conclusion that this was not an accidental homicide? That question must be

answered in the affirmative. Consistently, the misconduct was geared towards the hope-for finding that this homicide did not occur accidentally, but consistently with a designed purpose to kill. But there was no evidence supporting the particular assertions the prosecutor argued, and she certainly presented none. And even the post-conviction prosecutor presented none.

The Nevada Supreme Court's contrary conclusion constitutes an unreasonable application of Darden, and therefore violates 28 U.S.C. § 2254(d)(1).

The Nevada Supreme Court's disposition also constituted an unreasonable application of a procedural bar. At pp. 3-4 of the May 10, 2010 Order of Affirmance, the Court held that the Appellant's Appendix contained "only portions" of the trial transcript and thus it had "an inadequate record for review." This was plainly incorrect. Appellant's Appendix, Vol. III, pp. 607-27, contained the entire Statement of Facts from the Opening Brief in Case No. 40913. Nobody - including the Nevada Supreme Court - ever claimed the Statement to be inaccurate, incomplete or misleading. Appellant's Appendix, Vol. III, pp. 669-745 contained the verbatim transcript of the entire penalty hearing. Appellant's Appendix, Vol. III, pp. 746-51, contained the transcript of the trial prosecutor's verbatim cross-examination of Ms. Orci of January 10, 2003. Appellant's Appendix, Vol. IV, pp. 752-814, contained the trial prosecutor's verbatim cross-examination of Petitioner. Appellant's Appendix, Vol. IV, pp. 815-920, contained counsel's entire verbatim guilt phase closing

arguments. The Court simply did not identify what transcripts were missing that precluded review, or why the record provided was inadequate. Nor did Respondents, in their Answering Brief filed June 3, 2009, contend at pp. 13-18 that the record presented was inadequate for review.

Federal courts cannot rely on a state court's procedural default ruling when the petitioner has followed state law adequately. Collins v. Dormire, 240 F.3d 724, 726-27 (8th Cir. 2001); Wells v. Maas, 28 F.3d 1005, 1008-09 n. 1 (9th Cir. 1994).

In post-conviction, the Nevada Supreme Court will admonish counsel for including "too much" material in an appendix. See: State v. Haberstroh, 119 Nev. 173, 179-80, 69 P.3d 676 (2003). But NRAP Rule 30(b) requires brevity, and Rule 30(b)(1) requires inclusion of transcripts only necessary to the Supreme Court's review of the issues. Further, Rule 30(b)(4) authorizes Respondents to file transcripts which "should have been but were not" included in the appellant's appendix.

Certainly the Nevada Supreme Court had the discretion to order the parties to file in additional transcripts (and impose sanctions), if it felt those were needed to adjudicate the issue. See: NRAP 30(g)(2). As such, this Court cannot rely on the Nevada Supreme Court's discretionary bar as an adequate and independent bar to relief. Wells v. Maass, *supra*; Williams v. Georgia, 349 U.S. 375, 389 (1955).

GROUND IX

The criminal information in this case read as follows:

COUNT I

That the said Defendant did willfully and unlawfully, and with malice aforethought, deliberation and premeditation kill Frederick Richard Albrecht, a human being, with use of a deadly weapon, to wit: a .22 caliber rifle, in the following manner: said Defendant shot Frederick Richard Albrecht two times in the head thereby inflicting mortal injuries upon Frederick Richard Albrecht from which he died on August 5th, 2000, all of which occurred at or near 1542 B Firebox Road, Carson City, Nevada.

As an alternative means of the commission of the crime of OPEN MURDER WITH THE USE OF A DEADLY WEAPON (INCLUDING FIRST DEGREE MURDER AND ALL LESSER INCLUDED OFFENSES), it is alleged that the said Defendant did, on or about August 5th, 2000, at Carson Township, in Carson City, State of Nevada, willfully and unlawfully kill FREDERICK RICHARD ALBRECHT, a human being, with the use of a deadly weapon, to wit: a .22 caliber rifle during the perpetration of the crime of BURGLARY, as defined by NRS 205.065, in the following manner: Said Defendant willfully and unlawfully entered a certain building, specifically 1-half of a duplex residence located at 1542 B Firebox Road, Carson City, Nevada, which was then and there lawfully occupied by FREDERICK RICHARD ALBRECHT, with the intent to commit assault and/or battery and/or MURDER, a felony as defined by NRS 200.010, NRS 200.020, and NRS 200.030, on the person of FREDERICK RICHARD ALBRECHT. The said Defendant entered the building described above armed with a .22 caliber rifle and, after gaining entry to the building, the said Defendant shot FREDERICK RICHARD ALBRECHT two times in the head thereby inflicting mortal injuries upon FREDERICK RICHARD ALBRECHT from which he died on August 5th, 2000, all of which occurred at or near 1542 B Firebox Road, Carson City, Nevada.

COUNT II

That the said Defendant did willfully and unlawfully enter a certain building, specifically 1-half of a duplex residence located at 1542 B Firebox Road, Carson City, Nevada, which was then and there lawfully occupied by FREDERICK RICHARD ALBRECHT, with the intent to commit assault and/or battery and/or MURDER, a felony as defined by NRS 200.010, NRS 200.020, and NRS 200.030, on the person of FREDERICK RICHARD ALBRECHT, and with the use of a deadly weapon, to wit: a .22 caliber rifle, all of which occurred in Carson City, Nevada.

The problem is that the State charged this not only as a "two theory" murder, but as a "three theory" burglary. That is,

the State charged that when Petitioner entered Mr. Albrecht's residence, he did so either with the intent to murder, the intent to commit a misdemeanor battery, or the intent to commit a misdemeanor assault; and then, if any one of those theories holds, he committed a felony murder.

Petitioner concedes that the State can lawfully charge alternate theories of first degree murder, and due process does not require the jury to agree unanimously on one theory. Schad v. Arizona, 501 U.S. 624 (1991). The issue is not that, but rather, whether the State proved that which it charged.

Likewise, Petitioner concedes that, per Nevada law, the State can charge alternate theories of open murder of premeditation and deliberation on the one hand, and burglary with the intent to commit a battery (only, with an unintended homicide thereafter occurring inside of the burglared residence). State v. Contreras, 118 Nev. 332, 46 P.3d 661 (2002). Again, the issue is not whether the State can lawfully charge such a theory, but rather, whether it proved what it charged to the Federal Constitutional standard.

Here, there simply was no evidence of any intent to assault or any intent to batter on Petitioner's part, when he entered Mr. Albrecht's residence.

The only evidence before the jury was to the clear effect that Petitioner entered Mr. Albrecht's residence while carrying a gun; there was no forced entry; Petitioner entered through the garage; Mr. Albrecht and Petitioner talked inside the residence

about A.J. Echols for approximately 1/2 hour before Petitioner twice discharged the gun; and during that 1/2 hour, Petitioner neither battered Mr. Albrecht nor threatened to do so.

The evidence is conflicting under the standard of Jackson v. Virginia, 443 U.S. 307 (1979), as to whether Petitioner entered Mr. Albrecht's residence with the intent to murder him, and unclear at best as to when Petitioner would have formed an intent to kill. See: State v. Adams, 94 Nev. 503, 505, 561 P.2d 868 (1978) [where defendant forms intent to steal after entering store, crime is larceny rather than burglary]. However, there is simply no evidence - whether circumstantial or direct - indicating that his intent when he entered the residence was either to assault or to batter Mr. Albrecht. Because of the fact that the offense occurred in August of 2000, the pre-2001 version of NRS 200.471 was in effect at that time, meaning that, to have entered with the intent to commit a misdemeanor assault, the evidence must show that Petitioner had the specific intent to commit a battery at that time. See: Wilkerson v. State, 87 Nev. 123, 125-26, 482 P.2d 314 (1971); Loretta v. Sheriff, 93 Nev. 344, 345, 565 P.2d 1008 (1977). As stated above, there is simply no evidence that Petitioner intended to commit a misdemeanor battery against Mr. Albrecht at any time on August 5, 2000.

Yet, during closing argument, the trial prosecutor pointed out three times that the jury should return a verdict of guilty, both as to burglary and as to first degree murder, on alternate theories; and specifically, if it found that some of them

believed that Petitioner broke and entered the residence with the intent to commit a battery, whereas others thought he broke and entered with the intent to commit an assault, whereas still others thought that he broke and entered with the intent to commit murder, he would be guilty as charged. And of course, the jury found Petitioner to be guilty as charged on a general verdict.

It is well settled that where a defendant is charged with a crime which alleges multiple objects per count, or manner or means of commission per count, or theories of culpability per count, one of which is theoretically impossible, and a general verdict is reached without the jury being instructed to disregard the theoretically impossible theory/object/means, the verdict must be set aside. Yates v. United States, 354 U.S. 298, 312 (1957); Stromberg v. California, 283 U.S. 359 (1931). Thus, the Ninth Circuit in more recent years has reversed three general verdicts on this principle of law. See: United States v. Barona, 56 F.3d 1087, 1097-98 (9th Cir. 1995), *cert. denied*, 516 U.S. 1092 (1996); United States v. Fulbright, 105 F.3d 443, 450-51 (9th Cir. 1997); United States v. Qualls, 140 F.3d 824, 829-30 (9th Cir. 1998).

Here, the verdict form was a general verdict, and the jury was not instructed to disregard the theoretically impossible theories of breaking and entry with intent to commit either a misdemeanor assault or a misdemeanor battery.

EXHAUSTION

Per Baldwin, this ground is clearly exhausted. Petitioner cited to Jackson at pp. 28, 29, and 32 of the Opening Brief in Case No. 40913, and cited to Yates and Stromberg at p. 30 thereof.

28 U.S.C. § 2254(d)(1) RECONSIDERATIONS

The State and the Nevada Supreme Court argued/held that this issue was foreclosed by Griffin v. United States, 502 U.S. 46 (1991) and, by implication, by Rhyne v. State, 118 Nev. 1, 38 P.3d 163, 169 (2002). Had the State argued only burglary based on a breaking and entry with intent to commit murder, Griffin would be fully applicable. The problem is that the State argued that the evidence was sufficient on all alternate theories, when in fact it was not. The problem is further exacerbated by a question posed by a juror during the State's case-in-chief, which went unanswered throughout the entire trial:

> Having listen[ed] to all of the testimony up to this point, I have not heard why Mr. Albrecht died with his hands clasp[ed] together as he was found on the couch. I have heard that Mr. Echols says that Mr. Albrecht let him into the duplex and that they talked for about a half hour. My question is - did Mr. Echols enter the home with his weapon drawn on Mr. Albrecht, and was Mr. Albrecht forced to sit down on the couch and listen to what Mr. Echols wanted to talk about? Did Mr. Echols have Mr. Albrecht clasp his hands together while sitting on the couch at gunpoint? Maybe these questions will be answered when Mr. Echols takes the stand. I would really like the issue address[ed] of what took place inside the home of Mr. Albrecht once Mr. Echols enter[ed] the home.

The theory of Griffin is that the reviewing court is allowed to **presume** that the jury rejected the factually inadequate theory and convicted on a ground in which the evidence was sufficient. United States v. Briscoe, 65 F.3d 576, 585 (7th Cir. 1995), citing

United States v. Self, 2 F.3d 1071, 1093 (10th Cir. 1993). That is, Griffin stands for the proposition that a jury may not be able to distinguish between valid and invalid legal theories, but can evaluate the sufficiency of the evidence under any valid theory. United States v. Palazzolo, 71 F.3d 1233, 1237-38 (6th Cir. 1995).

What happens when the record rebuts said presumption? Is it in fact a "rebuttable presumption?" The federal circuits suggests that it is in United States v. Alexius, 76 F.3d 642, 647 (5th Cir. 1996) [reversed] and United States v. Henning, 286 F.3d 914, 921 (6th Cir. 2002) [reversed]. That is, the reviewing court may analyze the situation de novo and determine whether the jury was in fact well equipped to analyze the evidence and reject the insufficient evidence, and whether there is anything in the record to show that the jury might have relied on the "bad theory" to convict.

The notion of a "rebuttable presumption" is even stronger in Nevada's sister state courts. Numerous state courts have adopted a "harmless error" component into Griffin. That is, if there is no reasonable possibility that the jury could have based its verdict on the unsupported theory, for example, where there is overwhelming evidence on one theory, no evidence on the alternate theory, and no argument presented on the alternate theory, there is no reversible error. But if there is something in the record such as prosecutorial argument [as here] or a juror's note [as here] to indicate that the jury may have convicted the defendant

on an unsupported theory, the verdict must be set aside; Griffin does not dictate a contrary result. See: Thomas v. United States, 806 A.2d 626, 630 (D.C. App. 2002) [reversed]; State v. Ice, 997 P.2d 737, 741 (Kan. App. 2000) [reversed]; State v. Jones, 29 P.3d 351, 371 (Haw. 2001) [vacated]; State v. Chapman, 643 A.2d 1213, 1221-22 (Conn. 1994).

Thus, this case is functionally indistinguishable from Pulido v. Chrones, 487 F.3d 669, 676 (9th Cir. 2007). Errors in the felony murder jury instructions left open the possibility that the jury convicted the defendant on a legally impermissible theory, i.e., that the defendant joined the underlying robbery only after the victim was killed. Thus, the grant of habeas corpus was affirmed.

Here, the State plainly "got cute" with the charging document on purpose. By charging an alternate theory of a felony murder on a theory of burglary viz. breaking and entering with the intent to commit an assault, the State by its charge intended to take away the accident theory. That is, if indeed one broke and entered the residence of another only with the intent to commit a misdemeanor assault, and then thereafter accidentally shot and killed the homeowner, that person would be guilty of first degree murder nevertheless. See: State v. Fouquette, 67 Nev. 505, 526-27, 529-30, 221 P.2d 404 (1950) [one who kills another in the perpetration or attempt to perpetrate an enumerated felony is guilty of murder in the first degree, regardless of any question whether the killing was intentional or

unintentional]. And again, that would have been permissible if there had been any evidence of Petitioner's intent to commit a misdemeanor assault or a misdemeanor battery at the time he entered Mr. Albrecht's residence. Again, however, there was none.

Accordingly, the Nevada Supreme Court's disposition of this issue was an unreasonable application of Griffin and Jackson on the one hand and Yates and Stromberg on the other, and cannot be afforded the legal presumption of correctness under 28 U.S.C. § 2254(d)(1).

WHEREFORE, Petitioner prays that he be granted all relief to which he may be entitled in this proceeding.

DATED this 15 day of MAY, 2010.

Respectfully submitted,

Anthony D. Echols, No. 75531
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, NV 89701

VERIFICATION

Anthony D. Echols, under penalty of perjury, swears and declares as follows:

He has read the foregoing Petition for Writ of *Habeas Corpus* Pursuant to 28 U.S.C. § 2254 by a Person in State Custody; that he is aware of its contents; that all allegations of fact stated therein are true and correct.

Executed on this 15 day of MAY, 2010 at the Northern Nevada Correctional Center, Carson City, Nevada.

ANTHONY D. ECHOLS, NO. 75531

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY DOUGLAS ECHOLS,
Appellant,
vs.
THE STATE OF NEVADA; E.K. MCDANIEL, IN HIS OFFICIAL CAPACITY AS WARDEN OF ELY STATE PRISON; AND GLEN WHORTON, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTIONS,
Respondents.

No. 52903

FILED

MAY 10 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. First Judicial District Court, Carson City; William A. Maddox, Judge.

Appellant argues that the district court erred in denying his claims of ineffective assistance of trial counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). Both components of the inquiry must be shown, Strickland, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings regarding ineffective

assistance of counsel, but review the court's application of the law to those facts de novo. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant argues that his trial counsel was ineffective for failing to question juror venire members in private and individually, seek a cautionary instruction, or move for a mistrial after the venire members gave their opinion on appellant's theory of defense. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel testified at the evidentiary hearing that, while questioning the venire members in private crossed his mind, he did not feel it was appropriate in this case and felt that he needed to begin to explain an accidental discharge of the rifle during voir dire, so the jurors would not be surprised by the topic during trial. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances," Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), and appellant fails to demonstrate any such circumstances here. Further, appellant fails to demonstrate that the venire members' opinions and statements about experience with firearms amounted to expert opinion testimony or unduly biased the venire members. Mach v. Stewart, 129 F.3d 495, 497-98 (9th Cir. 1997), superseded on other grounds, 137 F.3d 630 (9th Cir. 1998). Considering appellant's insistence that the shooting was accidental, appellant fails to demonstrate he was prejudiced by his counsel's decision to question the venire members together on their willingness to consider an accidental shooting defense rather than in private and individually. Therefore, the district court did not err in rejecting these claims.

Second, appellant argues that his trial counsel was ineffective for failing to investigate and present during the trial and penalty hearing psychological and psychiatric evidence regarding use of Paxil and

withdrawal from Paxil to show that appellant's thought processes were altered by Paxil. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. At the evidentiary hearing, trial counsel testified that appellant was insistent that the shooting was accidental and appellant rejected the idea that he acted under emotional distress. Trial counsel testified that using a defense of emotional distress caused by Paxil would have been inconsistent with appellant's testimony during trial. Counsel also testified that he made a tactical decision not to present any psychological evidence during the penalty hearing because he did not want to contradict appellant's testimony during trial. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances," Ford, 105 Nev. at 853, 784 P.2d at 953, and appellant fails to demonstrate any such circumstances here. Further, considering that appellant informed multiple people that the shooting was accidental, testified that it was accidental at trial, and testified it was accidental at the post-conviction evidentiary hearing, appellant failed to demonstrate a reasonable probability that a defense based on Paxil withdrawal or mitigation evidence concerning Paxil withdrawal would have a reasonable probability of altering the outcome of the trial or penalty hearing. Therefore, the district court did not err in concluding that trial counsel was not ineffective for failing to investigate and present evidence regarding Paxil use and withdrawal.

Third, appellant argues that his trial counsel was ineffective for failing to object to prosecutorial misconduct when the State made allegations it could not prove and made statements in closing arguments that were not supported by the evidence. The district court concluded that appellant failed to demonstrate prejudice from the alleged instances of misconduct. Appellant's appendix before this court includes only portions

of the trial transcripts and appellant did not call witnesses at the evidentiary hearing that could have supported these allegations. The documents before this court are insufficient to demonstrate that the district court erred in concluding that appellant was not prejudiced due to counsel's failure to object to prosecutorial misconduct. It is appellant's burden to provide this court with an adequate record for review. McConnell v. State, 125 Nev. ___, ___ n.13, 212 P.3d 307, 316 n.13 (2009). Therefore, appellant fails to demonstrate that the district court erred in denying this claim.

Fourth, appellant argues that his trial counsel was ineffective for failing to object when K. Kade, appellant's ex-wife, testified concerning incidents where appellant became angry and violent. Appellant cannot demonstrate his trial counsel's performance was deficient because the district court admitted this testimony over the objection of trial counsel. In addition, appellant cannot demonstrate prejudice because this evidence was properly admitted to show appellant's motive for the crime. NRS 48.045(2); Hogan v. State, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987). Therefore, the district court did not err in denying this claim.

Next, appellant argues that the district court erred by not granting expenses for expert witness testimony on the use of Paxil and withdrawal from Paxil. The district court concluded that, even assuming the evidence appellant presented at the evidentiary hearing on Paxil and possible complications stemming from Paxil withdrawal were true, appellant had failed to demonstrate that there was a reasonable probability of a different outcome at trial or sentencing. As such, the district court concluded that expert testimony on Paxil was not reasonably necessary as the expert would not have assisted the district court in determining a fact at issue. See NRS 50.275. Appellant fails to demonstrate the district court abused its discretion in refusing to grant

expenses for expert testimony on Paxil. NRS 34.750(2); Widdis v. Dist. Ct., 114 Nev. 1224, 1229, 968 P.2d 1165, 1168 (1998).

Having considered appellant's contentions and concluding they are without merit, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: First Judicial District Court Dept. 2, District Judge
Richard F. Cornell
Attorney General/Carson City
Carson City District Attorney
Karla K. Butko
Carson City Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY DOUGLAS ECHOLS,
Appellant,
vs.
THE STATE OF NEVADA; E.K. MCDANIEL, IN HIS OFFICIAL CAPACITY AS WARDEN OF ELY STATE PRISON; AND GLEN WHORTON, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTIONS,
Respondents.

Supreme Court No. 52903

District Court Case No. 0001351C

REMITTITUR

TO: Alan Glover, Carson City Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: June 4, 2010

Tracie Lindeman, Clerk of Court

By: A. Ingersoll
Deputy Clerk

cc (without enclosures):
First Judicial District Court Dept. 2, District Judge
Attorney General/Carson City
Carson City District Attorney
Karla K. Butko
Richard F. Cornell

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on _____.

_____
County Clerk

JUN - 7 2010

10-13140

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY DOUGLAS ECHOLS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46455

FILED

MAR 02 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's motion for a new trial. First Judicial District Court, Carson City; William A. Maddox, Judge.

On January 15, 2003, appellant Anthony Echols was convicted, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and burglary.[1] He was sentenced to serve two consecutive terms of life in prison without parole for the murder and a concurrent term of 24 to 120 months for the burglary. This court affirmed

[1]The judgment of conviction and this court's order affirming the judgment of conviction and sentence indicate that Echols was convicted of burglary with the use of a deadly weapon; however, the lack of a consecutive sentence under NRS 193.165 for the burglary indicates that Echols was actually convicted of and sentenced for burglary while in possession of a deadly weapon pursuant to NRS 205.060(4), not burglary with the use of a deadly weapon.

07-05115

the judgment of conviction and sentence on direct appeal.[2] The remittitur issued on December 7, 2004.

On December 29, 2004, Echols filed in the district court a motion for a new trial asserting that the victim's family tampered with the jury by making comments prejudicial to Echols outside the courtroom but within the hearing of the jurors. After holding an evidentiary hearing, the district court denied the motion. This appeal followed.

NRS 176.515 provides in relevant part:

> 3. Except as otherwise provided in NRS 176.0918, a motion for a new trial based on the ground of newly discovered evidence may be made only within 2 years after the verdict or finding of guilt.
>
> 4. A motion for a new trial based on any other grounds must be made within 7 days after the verdict or finding of guilt or within such further time as the court may fix during the 7-day period.

The State argues that the motion here should have been subject to the seven-day filing deadline rather than the two-year deadline and that the motion was therefore untimely filed. We disagree. Evidence of jury tampering can constitute newly discovered evidence sufficient to support a new trial motion. Several federal appellate courts, including the

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[2]Echols v. State, Docket No. 40913 (Order of Affirmance, September 3, 2004).

Ninth Circuit Court of Appeals, have so held.[3] This conclusion is also supported by our previous application of the statute. This court has indicated that prosecutorial interference with a defense trial witness could be newly discovered evidence subject to the two-year deadline.[4] Thus, we conclude that evidence of jury tampering can constitute newly discovered evidence sufficient to bring a new trial motion based pursuant to NRS 176.515(3), and Echols's motion was timely filed.

The general standard for a successful motion for a new trial based on newly discovered evidence is as follows:

> (1) the evidence must be newly discovered; (2) it must be material to the defense; (3) it could not have been discovered and produced for trial even with the exercise of reasonable diligence; (4) it must not be cumulative; (5) it must indicate that a different result is probable on retrial; (6) it must not simply be an attempt to contradict or discredit a former witness; and (7) it must be the best evidence the case admits.[5]

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[3]See, e.g., U.S. v. Medina, 118 F.3d 371, 373 (5th Cir. 1997); U.S. v. Endicott, 869 F.2d 452, 457 (9th Cir. 1989); Holmes v. U.S., 284 F.2d 716, 720 (4th Cir. 1960); see also Rubenstein v. U.S., 227 F.2d 638, 642 (10th Cir. 1955).

[4]D'Agostino v. State, 112 Nev. 417, 915 P.2d 264 (1996).

[5]Callier v. Warden, 111 Nev. 976, 988, 901 P.2d 619, 626 (1995).

We recently discussed motions for a new trial based on juror misconduct, which includes "attempts by third parties to influence the jury process," in Meyer v. State.[6] We held in Meyer that

> [a] denial of a motion for a new trial based upon juror misconduct will be upheld absent an abuse of discretion by the district court. Absent clear error, the district court's findings of fact will not be disturbed. However, where the misconduct involves allegations that the jury was exposed to extrinsic evidence in violation of the Confrontation Clause, de novo review of a trial court's conclusions regarding the prejudicial effect of any misconduct is appropriate.[7]

We conclude that Echols's case is distinguishable from the facts in Meyer, that the abuse of discretion standard is appropriate here, and that the district court did not abuse its discretion in denying Echols's motion.

The claim in Meyer involved one juror independently investigating the case by consulting the Physician's Desk Reference and informing her fellow jurors of what she learned there. We held that this constituted use of extrinsic evidence in violation of the Confrontation Clause and that de novo review of the district court's findings relating to prejudice was appropriate. This is not what happened in Echols's case,

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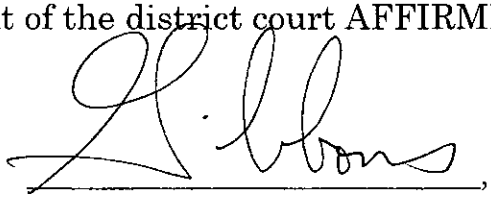
[6]Meyer v. State, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003).

[7]Id. at 561-62, 80 P.3d at 453 (internal citations omitted).

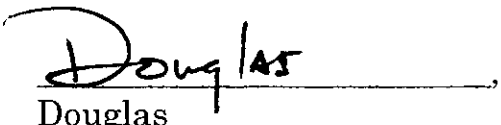
where the alleged misconduct was that jurors may have overheard comments by the victim's family about desired verdicts and trial witnesses' credibility. Echols presented no evidence that any jurors actually overheard any of these comments or took them into the jury room. We conclude that the district court acted within its discretion in finding that there was insufficient evidence of improper third-party contact with jurors and that, even assuming there was contact, it was not prejudicial to Echols.

Having reviewed Echols's arguments and concluded he is not entitled to relief, we

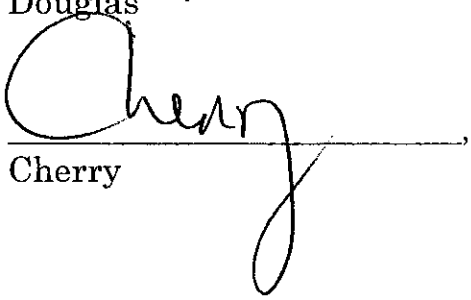
ORDER the judgment of the district court AFFIRMED.



_____, J.
Gibbons



_____, J.
Douglas



_____, J.
Cherry

cc: Hon. William A. Maddox, District Judge
Richard F. Cornell
Attorney General Catherine Cortez Masto/Carson City
Carson City District Attorney
Carson City Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY DOUGLAS ECHOLS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46455

FILED

MAR 27 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

, J.
Gibbons

, J.
Douglas

, J.
Cherry

cc: Hon. William A. Maddox, District Judge
Richard F. Cornell
Attorney General Catherine Cortez Masto/Carson City
Carson City District Attorney
Carson City Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY DOUGLAS ECHOLS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 46455

District Court Case No. 0001351C

REMITTITUR

TO: Alan Glover, Carson City Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: April 24, 2007

Janette M. Bloom, Clerk of Court

By: J. Richards
Chief Deputy Clerk

cc: Hon. William A. Maddox, District Judge
Attorney General Catherine Cortez Masto/Carson City
Carson City District Attorney
Richard F. Cornell

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the

REMITTITUR issued in the above-entitled cause, on _____.

_____
County Clerk

07-08178

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY DOUGLAS ECHOLS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40913

FILED

SEP 03 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and burglary with the use of a deadly weapon. First Judicial District Court, Carson City; William A. Maddox, Judge.

On August 5, 2000, after entering Rick Albrecht's residence, appellant Anthony Echols shot Albrecht twice in the head, killing him. The State charged Echols with open murder with the use of a deadly weapon and burglary with the use of a deadly weapon. Following a jury trial, the district court sentenced Echols to two consecutive terms of life imprisonment without the possibility of parole and one maximum concurrent term of one hundred twenty months.

On appeal, Echols first asserts that the district court abused its discretion in denying his challenge for cause to prospective juror Schwitters.

A district court has broad discretion in ruling on challenges for cause.[1] A party must show that there was cause to challenge the juror

[1]Walker v. State, 113 Nev. 853, 865, 944 P.2d 762, 770 (1997) (citing Wainwright v. Witt, 469 U.S. 412, 428-29 (1985)).

under NRS 175.036(1) and that the party was prejudiced by the district court's denial of the challenge.[2] "If the impaneled jury is impartial, the defendant cannot prove prejudice."[3]

In this case, Echols challenged Schwitters for cause based on her exposure to pre-trial publicity and her daughter being an acquaintance of the victim's sister. Schwitters indicated that she believed that she could fairly try the case based on the evidence and set aside any general opinion she had formed from reading the newspaper. She also stated that she understood that newspaper accounts may be inaccurate and that she could evaluate the case based upon the evidence presented at trial, not any general information she may have seen in the media. Schwitters also stated that she had only vague recollections from her prior exposure to the case and that she thought she could be fair. When asked if she was certain she could be fair, she replied that she could not be certain because she could not know for certain until she actually heard the evidence. Based upon this general statement, Echols challenged for cause. Given the totality of Schwitters' comments and placing this answer into context, we conclude that the district court did not err in denying the challenge.

Second, Echols argues that insufficient evidence was adduced to support his convictions under the specific theories charged by the State. We disagree.

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[2]See Thompson v. State, 102 Nev. 348, 350, 721 P.2d 1290, 1291 (1986).

[3]Wesley v. State, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996).

"[W]hen the sufficiency of the evidence is challenged on appeal in a criminal case, '[t]he relevant inquiry for this Court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime[s] beyond a reasonable doubt."'"[4] Moreover, it is for the jury to determine what weight, credibility and credence to give to witness testimony and other trial evidence.[5]

We conclude that sufficient evidence was presented from which the jury, acting reasonably and rationally, could have found the elements of first-degree murder with the use of a deadly weapon and burglary with the use of a deadly weapon beyond a reasonable doubt. Evidence was admitted that showed Echols had threatened to kill Albrecht; that Echols blamed Albrecht for the break-up of Echols' marriage, and that Echols believed Albrecht was interfering with Echols' relationship with his son. Echols took a rifle to confront Albrecht and Albrecht was shot twice. Although Echols asserts that the shooting was accidental, a reasonable jury could reject this defense and find that Echols intended to harm or kill Albrecht. Accordingly, we conclude that Echols' convictions were supported by substantial evidence.

Next, Echols asserts that the district court abused its discretion by allowing opinion testimony from various individuals. We disagree.

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[4]Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994) (emphasis in original) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); see also Jackson v. Virginia, 443 U.S. 307, 319 (1979).

[5]See Hutchins, 110 Nev. at 107, 867 P.2d at 1139.

The determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed unless manifestly wrong.[6] Additionally, the admission of expert testimony lies within the sound discretion of the district court.[7] "Expert opinion may not be the result of guesswork or conjecture."[8]

In this case, contrary to Echols' assertion, the alleged errors did not involve expert opinion testimony.[9] Individuals were asked to give lay opinions within the range of ordinary experience and their observations of specific events. For example, Deputy William Richards testified that based upon his observations of Echols and Echols' spontaneous statements, he did not think that Echols' statement that Echols didn't mean to kill Albrecht was an assertion that the shooting was an accident, because Echols also referred to himself as a murderer. We conclude that the district court did not abuse its discretion in allowing the lay opinion testimony.

Echols also contends that the district court erred in instructing the jury that a life sentence without the possibility of parole could not be pardoned.

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[6]Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985), superceded by statute as stated in Thomas v. State, 120 Nev. ____, 83 P.3d 818 (2004).

[7]Brown v. State, 110 Nev. 846, 852, 877 P.2d 1071, 1075 (1994).

[8]Wrenn v. State, 89 Nev. 71, 73, 506 P.2d 418, 419 (1973).

[9]Because Echols did not object to Deputy Gray's testimony, we conclude he did not preserve the issue for review on appeal.

NRS 213.085(1) prohibits the state board of pardons commissioners from commuting a life sentence without the possibility of parole, meaning that it cannot change the sentence to one allowing parole.[10] While NRS 213.085 modifies and limits the power of commutation, it does not address other forms of clemency, including the pardon power.[11] Because a life sentence without the possibility of parole can be pardoned, the jury instruction was an incorrect statement of the law.[12]

The State asserts that Echols did not preserve the issue for review on appeal because he did not object at trial. Echols argues that the error involves constitutional issues, including Echols' right to due process, and a reliable sentence and can be raised even if not objected to at trial. Even if we agreed the error was of a constitutional magnitude, it did not prejudice Echols or affect any substantial right. Accordingly, any error would be harmless beyond a reasonable doubt.

We said in Geary v. State,[13] that an improper commutation instruction that misleads a jury into believing a sentence of life without

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[10]See Colwell v. State, 112 Nev. 807, 812, 919 P.2d 403, 406 (1996) (noting that commutation is the changing of one sentence to another while a pardon absolves a defendant of the crime altogether).

[11]Id. at 812, 919 P.2d at 407.

[12]Id.

[13]112 Nev. 1434, 1440, 930 P.2d 719, 723-24 (1996) (determining that a sentence was not constitutionally reliable when an instruction improperly suggested, and counsels' arguments improperly presumed, that a life sentence without the possibility of parole could be modified, leaving

continued on next page . . .

the possibility of parole may be commuted to life with the possibility of parole is reversible error where the State argues that a defendant poses a future danger to society and a harsher sentence, the death penalty, should be imposed. This was not a capital case, and the State never argued future dangerousness. Moreover, the error was in telling the jury life without the possibility of parole could not be pardoned, so the jury could not have given a harsher sentence on a mistaken theory that Echols was eligible for parole or pardon, as occurred in Geary. Accordingly, we conclude any error was harmless because the jury instruction did not mislead the jury to Echols' deteriment or prejudice Echols.

Finally, Echols argues that the district court abused its discretion by allowing victims to recommend the maximum sentence possible. We disagree.

In Randall v. State, we held that a victim may express an opinion regarding a defendant's sentence in a non-capital case.[14] In this case, unlike Randall, the jury heard the victims' recommendations because the penalty hearing was conducted before the trial jury, as required by NRS 175.552(1)(a), for Echols' first-degree murder conviction. We conclude this fact alone is insufficient to deviate from the rule set forth in Randall. We conclude that the district court did not abuse its discretion

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. . . *continued*
the jury to speculate that the defendant was likely to be released on parole even if given a life sentence without the possibility of parole).

[14]Randall v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993) (holding that the district court did not abuse its discretion by sentencing the defendant after hearing the victim's sentencing recommendation).

by allowing victims to recommend the maximum sentence possible. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[15]

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. William A. Maddox, District Judge
Richard F. Cornell
Attorney General Brian Sandoval/Carson City
Carson City District Attorney
Carson City Clerk

[15]Having reviewed Echols' other argument requesting a sentence modification, we conclude it is without merit.

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY DOUGLAS ECHOLS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40913

FILED

NOV 0 9 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Rivarde
CHIEF DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. William A. Maddox, District Judge
Richard F. Cornell
Attorney General Brian Sandoval/Carson City
Carson City District Attorney
Carson City Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY DOUGLAS ECHOLS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 40913

District Court Case No. 0001351C

REMITTITUR

TO: Alan Glover, Carson City Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: December 7, 2004

Janette M. Bloom, Clerk of Court

By: J. Richards
Chief Deputy Clerk

cc: Hon. William A. Maddox, District Judge
Attorney General Brian Sandoval/Carson City
Carson City District Attorney
Richard F. Cornell

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the

REMITTITUR issued in the above-entitled cause, on _____.

_____
County Clerk

04-21131