No. _____

OCTOBER TERM, 2020

IN THE SUPREME COURT OF THE UNITED STATES

JAMES WALKER, Petitioner,

v.

WILLIAM GITTERE, et al., Respondent.

On Petition for Writ of Certiorari to the Nevada Supreme Court

PETITIONER'S APPENDIX

CAPITAL CASE

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APPENDIX

APPENDIX A

Order of Affirmance, *Walker v. State,*
Nevada Supreme Court
Case No. 75013 (June 19, 2020)

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES RAY EARL WALKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 75013

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant James Walker's postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Walker stabbed Christine Anziano to death as she exited a Las Vegas drug store and stole her purse and purchases. The next night, Walker slashed the throat of Kirk Cole and absconded with Cole's money. Cole survived his injuries. Walker's girlfriend, Myrdus Archie, assisted him in the incidents involving Anziano and Cole. Acting alone, Walker also stole Susan Simon's purse while she was sitting in her car in a store parking lot. A jury convicted Walker of conspiracy to commit robbery, burglary, two counts of robbery with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and murder with the use of a deadly weapon. The jury sentenced Walker to death for Anziano's murder. Walker unsuccessfully challenged the convictions and sentence on appeal, *see Walker v. State (Walker I)*, Docket No. 49507 (Order of Affirmance, March 3, 2010), *reh'g denied* Docket No. 49507 (Order Denying Rehearing but Clarifying Decision, May 17, 2010), and in a postconviction petition for a writ of habeas corpus, *see Walker v. State (Walker II)*, Docket No. 62838

(Order of Affirmance, November 25, 2014). Walker then filed a second postconviction petition for a writ of habeas corpus, which the district court denied. This appeal followed. Walker argues that the district court erred by denying his petition as procedurally barred. We affirm.[1]

Walker filed his petition over five years after the remittitur issued on his direct appeal. The petition therefore was untimely under NRS 34.726(1). The petition was also successive because he had previously filed a postconviction petition and constituted an abuse of the writ because he raised new claims that could have been litigated in prior proceedings. NRS 34.810(1)(b)(2), (2). To overcome those procedural bars, Walker had to demonstrate good cause and actual prejudice. NRS 34.726(1); NRS 34.810(1)(b)(2), (3). And because the petition was filed over five years after the remittitur issued on direct appeal, NRS 34.800(2) imposes a rebuttable presumption of prejudice to the State. To overcome that presumption, Walker had to show that (1) "the petition is based upon grounds of which [he] could not have had knowledge by the exercise of reasonable diligence," NRS 34.800(1)(a), or (2) the failure to consider his claims would result in a fundamental miscarriage of justice, NRS 34.800(1)(b). In addition, some of the claims raised in the petition have been addressed in prior appellate proceedings and therefore further consideration of them is barred by the

[1]We have considered Walker's argument that the district court erred by adopting the findings of fact and conclusions of law drafted by the State and conclude that a remand is not necessary under the circumstances presented, which are distinguishable from those presented in *Byford v. State*, 123 Nev. 67, 156 P.3d 691 (2007).

doctrine of the law of the case. *Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).[2]

Failure to disclose exculpatory evidence

Walker argues that the State's failure to turn over evidence related to a witness to the Anziano attack in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), provided good cause for the delay in filing the petition. *Brady* obliges a prosecutor to disclose evidence favorable to the defense when that evidence is material to guilt, punishment, or impeachment. *Mazzan v. Warden*, 116 Nev. 48, 66-67, 993 P.2d 25, 36-37 (2000). There are three components to a successful *Brady* claim: "the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material." *Id.* at 67, 993 P.2d at 37. The last two components parallel the cause and prejudice showings required to excuse the procedural bars to an untimely or successive petition. *State v. Huebler*, 128 Nev. 192, 198, 275 P.3d 91, 95 (2012) ("[E]stablishing that the State withheld the evidence demonstrates that the delay was caused by an impediment external to the defense."); *see also Banks v. Dretke*, 540 U.S. 668, 691 (2004) ("'[C]ause and prejudice' in this case 'parallel two of the three components of the alleged *Brady* violation itself.'" (quoting *Strickler v. Greene*, 527 U.S. 263, 282 (1999))). To overcome the presumption of prejudice when the State has pleaded laches, a petitioner must demonstrate that he could not have

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[2]Under the law-of-the-case doctrine, this "court may revisit a prior ruling when (1) subsequent proceedings produce substantially new or different evidence, (2) there has been an intervening change in controlling law, or (3) the prior decision was clearly erroneous and would result in manifest injustice if enforced." *Hsu v. County of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 728-29 (2007) (quotation marks omitted).

discovered the *Brady* evidence "by the exercise of reasonable diligence," NRS 34.800(1)(a), and that the evidence demonstrates a fundamental miscarriage of justice occurred, NRS 34.800(1)(b). *Cf. Rippo v. State*, 113 Nev. 1239, 1257, 946 P.2d 1017, 1028 (1997) ("[A] *Brady* violation does not result if the defendant, exercising reasonable diligence, could have obtained the information."). In considering whether a petitioner has exercised due diligence for purposes of NRS 34.800, the petitioner should not be penalized for failing to diligently uncover evidence that was in the sole possession of the State. *Strickler*, 527 U.S. at 287-88.

We conclude that the *Brady* claim lacks merit and therefore does not overcome the procedural bars. The State was not in sole possession of evidence about the witness's contacts with State investigators, her observations, and her possible familiarity with the defendants; rather, the witness's identity had been known since the preliminary hearing and she could have been interviewed at any time since. Additionally, nothing in her statement indicates that she ever relayed the more detailed account of her observations about the night of the murder and that she may have seen the defendants in the neighborhood on another occasion. Lastly, Walker did not demonstrate that any of the evidence was material. Even if he could cast doubt on the witness's identification, he failed to demonstrate that this information gave rise to a reasonable doubt or that there was a reasonable probability he would not have been convicted. In addition to this witness, another individual identified Walker as he ran from the scene and the jury viewed video of the attack on Anziano. Anziano's property was also found in the home Walker shared with Archie. Because Walker failed to establish the necessary elements of a *Brady* violation, the district court did not err in

concluding that this claim was insufficient to overcome the procedural bars.[3]

Limitations on first postconviction counsel

Walker next argues that the financial limits the district court placed on litigation of his first postconviction petition constitute good cause for filing a second, untimely petition because they prevented him from discovering the legal and factual bases for the claims raised in the second petition. We disagree. Arguments related to the district court's actions during the litigation of the first postconviction petition should have been raised in the related appeal. Thus, Walker's good-cause allegations constitute an abuse of the writ and are themselves procedurally barred. *See* NRS 34.810(1)(b)(2), (2); *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). To the extent Walker relies on issues decided in the prior appeal, those arguments are successive, and are similarly procedurally barred. *See* NRS 34.810(2).

Ineffective assistance of postconviction counsel

Because Walker's first postconviction counsel was appointed pursuant to a statutory mandate, NRS 34.820(1), he was entitled to the effective assistance of that counsel. *Crump v. Warden*, 113 Nev. 293, 304-05, 934 P.2d 247, 254 (1997). As Walker filed his petition within one year after this court issued remittitur from its decision affirming the denial of his first postconviction petition, his claims of ineffective assistance of

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[3]Walker also argues that postconviction counsel should have asserted that trial counsel was ineffective for failing to discover evidence related to this witness. As this evidence could not have reasonably affected the outcome of his trial, he failed to demonstrate that he was prejudiced or that the failure to consider this claim would result in a fundamental miscarriage of justice.

postconviction counsel were raised within a reasonable time after they became available. *See* NRS 34.726(1); *Rippo v. State*, 134 Nev. 411, 419-22, 423 P.3d 1084, 1095-97 (2018); *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005). A *meritorious* claim of ineffective assistance of postconviction counsel may establish the prejudice prong of the good-cause showing required under NRS 34.726(1), *Rippo*, 134 Nev. at 422, 423 P.3d at 1097, and the good cause and prejudice showings required under NRS 34.810(1)(b), *id.* at 425, 423 P.3d at 1099; *Crump*, 113 Nev. 304-05, 934 P.2d at 253-54.

To establish that his postconviction-counsel claims had merit, Walker had to demonstrate that postconviction counsel's performance was deficient and that but for counsel's deficient performance, he would have been granted relief. *See Rippo*, 134 Nev. at 423-25, 423 P.3d at 1098-99 (adopting *Strickland* analysis to determine whether postconviction counsel provided ineffective assistance).[4] And to the extent that Walker's postconviction-counsel claims are based on the omission of trial- or appellate-counsel claims, Walker had to prove the ineffectiveness of both attorneys. *Id.* at 424, 423 P.3d at 1098. An evidentiary hearing was warranted only if Walker's claims were "supported by factual allegations

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[4]Walker argues that the failure to consider the underlying claims would also result in a fundamental miscarriage of justice. For reasons discussed below, Walker failed to demonstrate that the underlying claims had merit or that he was prejudiced by the alleged errors. Accordingly, Walker failed to demonstrate that the errors resulted in a fundamental miscarriage of justice. *See Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (providing that a fundamental miscarriage of justice requires petitioner to show "that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation").

not belied by the record that, if true, would entitle him to relief." *Berry v. State*, 131 Nev. 957, 967, 363 P.3d 1148, 1154 (2015). For the reasons discussed below, we conclude that Walker has not demonstrated that postconviction counsel provided ineffective assistance.

Judicial bias

Walker argues that postconviction counsel should have asserted that the district court was biased against him during the litigation of the first postconviction petition based on its refusal to provide sufficient funding for investigation and its statements that the proposed investigation would be futile. We conclude that Walker cannot demonstrate deficient performance because the judicial bias claim lacks merit. During the litigation of the instant petition, Walker moved to disqualify the district court judge citing bias she expressed during the prior postconviction litigation. Chief Judge Barker denied the motion, and Walker challenged the decision in a mandamus petition filed with this court. In denying the petition, this court concluded that Walker failed to demonstrate that Chief Judge Barker manifestly abused his discretion in denying the motion to disqualify as he reviewed Judge Adair's comments from the transcripts related to the first postconviction litigation and concluded that she did not display deep-seated favoritism of, or antagonism toward, either side. *Walker v. Eighth Judicial Dist. Court*, Docket No. 70766, Order Denying Petition at 3 (September 16, 2016). Based on these rulings, Walker failed to demonstrate that postconviction counsel omitted a meritorious judicial bias claim. Therefore, the district court did not err in denying this claim without an evidentiary hearing.

Severance

Walker argues that postconviction counsel should have challenged the district court's decision not to sever the codefendants or the charges. We conclude that this argument lacks merit.

Trial counsel moved to sever both the codefendants and the charges. The district court denied the motions and this court affirmed. *Walker I*, Docket No. 49507, Order of Affirmance at 3-5. As trial and appellate counsel were unsuccessful in challenging the joinder of defendants and charges, Walker has not demonstrated that postconviction counsel acted unreasonably in omitting a successive claim that was also barred by the law-of-the-case doctrine. Walker did not allege what postconviction counsel could have argued to avoid these bars nor has he demonstrated that the law of the case should not be applied. To the extent that Walker asserts that postconviction counsel should have challenged trial and appellate counsels' performance in litigating the severance motions, he has not demonstrated that postconviction counsel acted unreasonably in omitting claims for which he could not demonstrate prejudice.

Batson objection

Walker argues that postconviction counsel should have argued that trial counsel did not adequately litigate an objection based on *Batson v. Kentucky*, 476 U.S. 79 (1986).[5] Walker failed to allege sufficient facts to

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[5]Walker also argues that postconviction counsel should have relitigated the *Batson* claim that was rejected on direct appeal, as opposed to challenging trial and appellate counsels' effectiveness. Our decision rejecting that *Batson* claim, *Walker I*, Docket No. 49507, Order of Affirmance at 2-3, constitutes the law of the case. Walker's assertion that

demonstrate deficient performance by postconviction counsel. The underlying *Batson* claim is partially based on a page from the district attorney's manual from seven years before Walker's trial, and nothing in the record of the jury selection proceedings suggests that the office still followed that manual's litigation strategies at the time of Walker's trial. Additionally, the manual page did not advise prosecutors to use peremptory challenges to remove veniremembers based on any impermissible criteria or to misrepresent the reasons for a peremptory challenge. As to Walker's contention that prior counsel should have provided a comparative juror analysis, Walker fails to demonstrate prejudice. This court concluded on direct appeal that asking the veniremember if he might face any ridicule were he to impose a death sentence "was not grounded in racial discrimination." *Walker I*, Docket No. 49507, Order of Affirmance at 2-3. This is the only way in which Walker alleges the prosecutor's questioning of the challenged veniremember differed from the questioning of other veniremembers. And the reasons proffered for the peremptory challenge were based on an inquiry that was common to all the veniremembers and involved each one's personal experience with the criminal justice system and attitudes toward the death penalty. Therefore, there was no reasonable probability of a different outcome had counsel provided a comparative juror analysis, and the district court did not err in rejecting this postconviction-counsel claim without conducting an evidentiary hearing.

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the prior decision was incorrect is not an "extraordinary circumstance[ ]" sufficient to warrant reconsideration, *see Hsu v. County of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 728-29 (2007), and postconviction counsel was not ineffective for not relitigating that claim.

Voir dire

Walker argues that postconviction counsel should have claimed that the district court erred during voir dire. We disagree for two reasons. First, any trial error could have been, and indeed was, raised on direct appeal, NRS 34.810(1)(b)(2), (2); *see Walker I*, Docket No. 49507, Order of Affirmance at 2, so postconviction counsel could not be faulted for declining to raise it again absent circumstances that could provide good cause to overcome the procedural bars or avoid the law-of-the-case doctrine, which Walker has not established. Second, Walker failed to show that any impaneled jurors were not impartial as required to prevail on challenges to the district court's decision regarding for-cause challenges or sequestered voir dire. *See Wesley v. State*, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996) ("If the impaneled jury is impartial, the defendant cannot prove prejudice."); *see also Leonard v. State (Leonard II)*, 117 Nev. 53, 64, 17 P.3d 397, 404 (2001) (recognizing that absent "a showing of prejudice to the defendant," a district court's decision to decline a request for individual voir dire will not be disturbed); *Ham v. State*, 7 S.W.3d 433, 439 (Mo. Ct. App. 1999) ("Even assuming it would have been better strategy to strike [a particular juror], we fail to see how [the defendant] could have been prejudiced because one qualified juror sat rather than another."). Although he asserts that three jurors were biased because they could not consider a sentence of life with the possibility of parole, the record shows otherwise. In particular, the jurors acknowledged that they could consider all forms of punishment and would consider aggravating and mitigating evidence. Therefore, Walker has not demonstrated that the district court erred in rejecting this postconviction-counsel claim without an evidentiary hearing.

Failure to challenge evidence

Walker asserts that postconviction counsel did not adequately substantiate claims raised in the first petition that alleged trial counsel should have retained experts to challenge eyewitness identifications and DNA evidence. He also argues that postconviction counsel should have raised claims related to evidence seized during an apartment search and victim-impact evidence introduced during the guilt phase of trial.

First, Walker has not demonstrated that postconviction counsel omitted a meritorious trial-counsel claim. He asserts that trial counsel should have introduced expert testimony challenging the eyewitnesses' ability to make an accurate identification given the circumstances surrounding their observations—poor lighting, obstructions, alcohol consumption, stress, and cross-racial identification. The expert testimony Walker now proffers was largely inadmissible at trial. In particular, the fact that darkness, a disguise, stress, and a brief interaction may cast doubt on the certainty of an identification is a matter of common sense and therefore did not require specialized knowledge. *See United States v. Raymond*, 700 F. Supp. 2d 142, 150 (D. Me. 2010) (recognizing that expert witness testimony about matters of common sense "invites a toxic mixture of purported expertise and common sense"); *see also Townsend v. State*, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987) (recognizing that expert testimony is admissible when "the expert's *specialized knowledge* will assist the trier of fact to understand the evidence or determine a fact in issue" (emphasis added)). Postconviction counsel thus had no sound basis to challenge trial counsel's performance in that respect. And although expert testimony about the reliability of cross-racial identifications may have been admissible, it was not unreasonable for trial counsel to forgo introducing

this testimony and instead argue that the eyewitnesses' different accounts were unreliable based on their differing descriptions and the conditions in which the witnesses observed the suspects. Walker further has not demonstrated prejudice based on trial counsel's failure to present this expert testimony or postconviction counsel's omission of the trial-counsel claim. He was identified by five witnesses either shortly after the crimes or at trial. Simon was the only witness to her purse snatching, but the crimes against Anziano and Cole were observed by two witnesses each. Moreover, physical evidence implicated Walker in the crimes. Anziano's purse and social security card, as well as Simon's keys, were discovered in Walker and Archie's home, and Cole's blood was found on Walker's shoes and Archie's car. Therefore, the district court did not err in rejecting this postconviction-counsel claim.

Second, Walker contends that postconviction counsel should have substantiated his claim that trial counsel was ineffective for not introducing DNA expert testimony.[6] We conclude that this argument lacks merit. The postconviction expert's analysis was premised on the notion that Walker's DNA connected him to the crimes such that the existence of a blood relative would alter the statistical analysis by the State's expert. However, Walker's DNA was not tied to any locations, victims, or instrumentalities of the crimes. Instead, the only DNA evidence offered in this case was that Cole's DNA was found on Walker's shoes. Thus, whether Walker has an additional blood-related relative would not have affected the expert's

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[6]Walker's claim only challenges conclusions as to the blood discovered on his shoes. He does not challenge the conclusions or random match statistics as they relate to the blood found on Archie's car.

conclusions as to Cole's DNA. Therefore, the district court did not err in denying this postconviction-counsel claim.

Lastly, Walker argues that postconviction counsel should have challenged the search of Archie's apartment, asserting the warrant application contained false information, and the victim-impact testimony admitted during the guilt phase of trial. We disagree. This court concluded on direct appeal that nothing in the record indicated any intentional or reckless falsehoods were included in the warrant application and that the introduction of victim-impact evidence did not prejudice Walker. *Walker I*, Docket No. 49507, Order of Affirmance, at 5-7. In light of these conclusions, Walker did not demonstrate that postconviction counsel acted unreasonably in omitting these arguments or that he was prejudiced by postconviction counsel's omission. *See* NRS 34.810(1)(b)(2), (2). Thus, the district court did not err in denying this postconviction-counsel claim.

Unrecorded bench conferences

Walker argues that postconviction counsel should have argued that trial counsel was ineffective for failing to ensure that all bench conferences were recorded. But postconviction counsel did raise that trial-counsel claim in the first petition. The district court rejected the claim and this court affirmed the decision, concluding that Walker did not identify "any issue that he was unable to argue due to the failure to record a portion of the proceeding." *Walker II*, Docket No. 62838, Order of Affirmance, at 4; *see Archanian v. State*, 122 Nev. 1019, 1033, 145 P.3d 1008, 1019 (2006). Walker still has not identified any issue that he was unable to argue due to the failure to record a bench conference and thus failed to show that trial counsel were ineffective in this regard. Because the trial-counsel claim

fails, the district court did not err in denying the postconviction-counsel claim.

Voluntary intoxication

Walker argues that postconviction counsel should have developed and introduced evidence supporting a defense of voluntary intoxication to substantiate his claim that trial counsel should have presented evidence to support a voluntary intoxication instruction. We conclude that this argument lacks merit. Walker did not allege that trial counsel failed to introduce credible, available evidence that Walker was intoxicated during the homicide. He also did not assert that he told trial counsel he had been drinking on the night of the homicide. Instead, he cites expert reports that are either inconclusive as to intoxication or based on evidence counsel could not have obtained before trial. Walker also has not demonstrated prejudice. The jury concluded that Walker committed both a premeditated homicide and a homicide during a felony—robbery. As robbery is a general intent crime, the voluntary intoxication instructions and supporting evidence would not have affected the jury's finding of first-degree felony murder. *See Daniels v. State*, 114 Nev. 261, 269, 956 P.2d 111, 116 (1998). Therefore, the district court did not err in denying this postconviction-counsel claim without conducting an evidentiary hearing.

Prejudicial photographs and videos

Walker argues that postconviction counsel should have challenged prejudicial photographs and videos which depicted injuries related to medical intervention, the attack on Anziano in slow motion, and repeated showings of Anziano's death. We conclude that this argument lacks merit. Postconviction counsel did not act unreasonably in omitting trial-error claims that were successive, constituted an abuse of the writ, or

were barred by the law-of-the-case doctrine. *See* NRS 34.810(1)(b)(2), (2); *Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

To the extent Walker couches the claims omitted by postconviction counsel as ineffective assistance of trial or appellate counsel, he has not demonstrated deficient performance or prejudice because postconviction counsel could not have demonstrated that trial or appellate counsel could have successfully challenged the district court's broad discretion to admit photographic and video evidence. *Byford v. State*, 116 Nev. 215, 231, 994 P.2d 700, 711 (2000); *Libby v. State*, 109 Nev. 905, 910, 859 P.2d 1050, 1054 (1993) (providing that even gruesome photographs may be admitted "as long as their probative value is not substantially outweighed by their prejudicial effect"), *vacated on other grounds*, 516 U.S. 1037 (1996). *But see Harris v. State*, 134 Nev. 877, 879-83, 432 P.3d 207, 210-13 (2018) (concluding that photographs of burned remains were more unfairly prejudicial than probative where court admitted numerous photographs and cause of death was not in dispute, but that admission was harmless considering overwhelming evidence of guilt). Although autopsy photographs have the potential to arouse the jurors' passions when they are gruesome and depict medical incisions, *see Clark v. Com.*, 833 S.W.2d 793, 794 (Ky. 1991) (noting that photographs become less admissible when the subject has been "materially altered by mutilation, autopsy, decomposition or other extraneous causes, not related to commission of the crime, so that the pictures tend to arouse passion and appall the viewer"), *superseded by rule as stated in Ragland v. Com.*, 476 S.W.3d 236 (Ky. 2015), trial and appellate counsel would not have been able to demonstrate that the district court abused its discretion in admitting them in this case because the evidence was relevant and not unfairly prejudicial. *See Hayes v. State*, 85

S.W.3d 809, 816 (Tex. Crim. App. 2002) ("[A]utopsy photographs are generally admissible unless they depict mutilation of the victim caused by the autopsy itself."). In particular, the photographs depicted the injuries Walker inflicted on Anziano and assisted the medical examiner in testifying about the cause of her death, and they were not so graphic as to "easily inflame the passions of a reasonable juror." *Harris*, 134 Nev. at 880, 432 P.3d at 211. Because there were no grounds on which trial or appellate counsel could successfully challenge the admission of the photographs, postconviction counsel was not deficient for omitting this trial- or appellate-counsel claim.

Walker has also not demonstrated that postconviction counsel performed deficiently in not challenging the introduction of videos of Anziano dying on the floor of the Sav-On store and the slow motion video of the attack. Appellate counsel challenged the video of Anziano on the Sav-On floor and this court concluded that it was relevant and that "[i]ts relevance was not substantially outweighed by the danger of unfair prejudice." *Walker I*, Docket No. 49507, Order of Affirmance, at 7. As to the slow-motion video, Walker's claim rests on a study published in 2016 that prior counsel could not have been faulted for not using at trial or in the prior postconviction proceeding, both of which were long over when the study was published. Walker also cannot show prejudice as there was considerable evidence of his intent based on testimony that he was waiting outside before attacking a customer on her way out and he was also convicted under a felony-murder theory, in which his intent flows from the robbery. Therefore, the district court did not err in denying these postconviction-counsel claims without conducting an evidentiary hearing.

Guilt phase prosecutorial misconduct

Walker argues that postconviction counsel should have claimed that trial counsel was ineffective for failing to address prosecutorial misconduct. To demonstrate that postconviction counsel was ineffective, Walker must show that trial and appellate counsel failed to challenge comments that "so infected the proceedings with unfairness as to make the results a denial of due process," *Hernandez v. State*, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002), and that it is reasonably probable that, but for counsel's error, the result of the trial or appeal would have been different, *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

First, Walker argues that the prosecutor vouched for the police by insisting that officers "do their best," "do[ ] things beyond what a lot of you really know," performed "amazing police work in this case," and showed "initiative." The prosecutor also argued that an eyewitness didn't "look like a guy that would just come in and just make stuff up now or to the police at the time. . . He seems conscientious." We conclude that Walker failed to demonstrate that postconviction counsel omitted a meritorious trial-counsel claim regarding these comments. The prosecutor did not "place[ ] the prestige of the government behind the witness by providing personal assurances of the witness's veracity." *Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (internal quotation marks and alteration omitted). Instead, the comments asserted that the thoroughness of the police work rendered their findings more credible. The comment about the eyewitness responded to Walker's closing argument which insinuated that he was an overly zealous witness and thus his testimony was not accurate. *See Emil v. State*, 105 Nev. 858, 868, 784 P.2d 956, 962 (1989) (providing that comments invited by defense argument do not amount to prosecutorial

misconduct). As the comments were not objectionable, the district court did not err in denying the postconviction-counsel claim.

Second, Walker argues that the prosecutor disparaged him during closing argument by describing him as "cowardly," a "predator," and not one of "the smarter criminals." Walker also argues that the prosecutor improperly characterized a line of defense questioning as a "second victimization" of Anziano. Walker challenged these comments on direct appeal and in his first postconviction petition. In both instances, this court concluded that they did not warrant relief. *Walker I*, Docket No. 49507, Order of Affirmance, at 9; *Walker II*, Docket No. 62838, Order of Affirmance, at 7-9. Therefore, he did not demonstrate that postconviction counsel neglected to raise a meritorious claim of ineffective assistance of trial counsel.

Third, Walker argues that the prosecutor misstated the law with respect to premeditation by asserting that it "can be formed by instantaneous thoughts of the mind," describing premeditation with a "trigger" analogy, and referring to premeditation and deliberation as a single concept. We disagree. The complained-of arguments are largely consistent with the first-degree murder instructions provided in *Byford*, 116 Nev. at 236-37, 994 P.2d at 714-15. The jury was instructed that the arguments of counsel were not evidence and was properly instructed on the elements, including the definition of premeditation and deliberation. In some instances in which Walker asserts the prosecution conflated the concept of premeditation and deliberation, the prosecution merely described premeditated and deliberate murder as a concept in contrast to felony murder. Walker's argument implicitly acknowledges that he cannot demonstrate prejudice. He concedes that "[t]he facts presented by the

prosecution showed . . . a killing during a robbery gone wrong," which was sufficient to convict him of first-degree felony murder regardless of the comments related to the premeditation theory. For these reasons, postconviction counsel did not omit a meritorious trial-counsel claim. Accordingly, the district court did not err in denying the postconviction-counsel claim.

Fourth, Walker argues that the prosecutor improperly asked the jurors to place themselves in the position of the victims. The comment was improper, *see McGuire v. State*, 100 Nev. 153, 157, 677 P.2d 1060, 1064 (1984); therefore, trial counsel should have objected. However, considering the overwhelming evidence of Walker's guilt, he has not demonstrated a reasonable probability of a different outcome at trial had counsel objected or on appeal had appellate counsel raised this issue. *See Strickland*, 466 U.S. at 687-88; *King v. State*, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (recognizing that prosecutorial misconduct may be harmless where there is overwhelming evidence of guilt). Walker therefore has not demonstrated that postconviction counsel neglected to raise a meritorious claim. Accordingly, the district court did not err in denying the postconviction-counsel claim.

Fifth, Walker argues that the prosecutor's argument about "responsibility and accountability under the law" was improper. We disagree. When considered in context, the prosecutor did not argue that the jury had a civic duty to convict Walker, *see, e.g., Haberstroh v. State*, 105 Nev. 739, 742, 782 P.2d 1343, 1345 (1989) (finding prosecutor committed misconduct by referring to the jury as "the conscience of the community"), but merely asked for justice and accountability, *see Lisle v. State*, 113 Nev. 540, 554, 937 P.2d 473, 482 (1997) (concluding that prosecutor's remarks

urging accountability do not amount to misconduct). Because the comments were not objectionable, Walker has not demonstrated that postconviction counsel omitted a meritorious trial-counsel claim. Therefore, the district court did not err in denying the postconviction-counsel claim.

Guilt phase jury instructions

Walker argues that postconviction counsel should have raised claims of ineffective assistance of trial counsel related to the guilt phase jury instructions. He has not demonstrated deficient performance or prejudice as to either counsel.

First, Walker has not demonstrated deficient performance by postconviction counsel as to the instructions that were challenged on direct appeal because this court already concluded that the district court did not err in giving or refusing to give those instructions, *Walker I*, Docket No. 49507, Order of Affirmance at 8-9 (addressing challenges to robbery, felony murder, and equal-and-exact-justice instructions and to refusal to give voluntary intoxication instruction).[7] To reiterate, postconviction counsel generally does not act unreasonably in omitting claims that have been rejected on the merits in a prior appellate proceeding absent circumstances that would overcome the law-of-the-case doctrine. *Rippo v. State*, 134 Nev. 411, 429, 423 P.3d 1084, 1102 (2018).

Second, Walker argues that postconviction counsel should have challenged the district court's failure to provide a limiting instruction that

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[7]In addition to the explanation provided in *Walker I*, the evidence does not support an afterthought robbery instruction because Anziano did not die from her injuries until after Walker absconded with her belongings. *See Nay v. State*, 123 Nev. 326, 333, 167 P.3d 430, 435 (2007) ("Robbery does not support felony murder where the evidence shows that the accused kills a person and only later forms the intent to rob that person.").

each juror was responsible to decide whether the evidence pertained to Walker, Archie, or both defendants. Walker failed to demonstrate deficient performance or prejudice. He cites no binding authority that requires the aforementioned instruction. The case he cites, *Zafiro v. United States*, 506 U.S. 534, 539 (1993), recognizes the risk of prejudice to codefendants in joint trials, but it does not require the jury to account for how it considered each piece of evidence. Walker also did not identify evidence that solely implicated Archie, which the jury could have unfairly considered against him. Therefore, the district court did not err in denying this postconviction-counsel claim.

Third, Walker argues that postconviction counsel should have claimed trial counsel was ineffective for not objecting to the reasonable doubt instruction. The district court gave the reasonable doubt instruction mandated by NRS 175.211, and this court has repeatedly upheld the constitutionality of that instruction. *See, e.g., Chambers v. State*, 113 Nev. 974, 982-83, 944 P.2d 805, 810 (1997); *Evans v. State*, 112 Nev. 1172, 1190-91, 926 P.2d 265, 277 (1996); *Lord v. State*, 107 Nev. 28, 40, 806 P.2d 548, 556 (1991), *limited on other grounds by Summers v. State*, 112 Nev. 1326, 1331, 148 P.3d 778, 782 (2006). Accordingly, Walker cannot demonstrate that postconviction counsel omitted a meritorious challenge to trial counsel's performance. The district court therefore did not err in rejecting this postconviction-counsel claim.

Fourth, Walker argues that postconviction counsel should have argued that the "abandoned and malignant heart" language in the malice aforethought instruction was vague and devoid of meaning and the implied malice instruction permitted the jury to find murder without the requisite culpability. This court has repeatedly upheld this language. *See Leonard*

v. State, 117 Nev. 53, 78-79, 17 P.3d 397, 413 (2001) (the statutory language defining implied malice is well established in Nevada and accurately informs the jury of the distinction between express and implied malice); *Cordova v. State*, 116 Nev. 664, 666, 6 P.3d 481, 483 (2000) (the substitution of the word "may" for "shall" in an implied malice instruction is preferable because it eliminates the mandatory presumption); *see also Leonard I*, 114 Nev. at 1208, 969 P.2d at 296 (the use of allegedly archaic statutory language in malice instruction did not deprive defendant of a fair trial). Therefore, Walker has not demonstrated that trial counsel performed deficiently in not objecting to the instruction or that postconviction counsel omitted a meritorious challenge to trial counsel's performance. Accordingly, the district court did not err in denying the postconviction-counsel claim.

Juror questions

Citing *Flores v. State*, 114 Nev. 910, 913, 965 P.2d 901, 902-03 (1998), Walker argues that postconviction counsel should have challenged the manner in which trial counsel and the district court managed juror questions. We disagree. On direct appeal, this court concluded that "[a]lthough the district court did not strictly comply with *Flores*, none of the instances Walker identifies suggest that the error had a substantial or injurious effect on the jury's verdict." *Walker I*, Docket No. 49507, Order of Affirmance at 3. Considering the decision in *Walker I*, which is the law of the case on the merits of the underlying issue, Walker has not demonstrated that postconviction counsel performed deficiently in omitting this claim or that he was prejudiced by the omission.

Failure to present mitigating evidence

Walker argues that postconviction counsel should have substantiated his claim that trial counsel failed to present evidence of his

family history of addiction and past trauma or prepare the penalty phase experts for their testimony. Walker has not demonstrated deficient performance.

Postconviction counsel raised claims related to mitigation evidence and requested funding to conduct additional investigation in that respect, which the district court denied. The district court's denial of investigative funds could have been raised in the prior postconviction appeal. In addition, given the nature of the evidence offered with the instant postconviction petition, even if trial counsel developed this evidence but declined to introduce it, such a decision would not have been clearly unreasonable. *See Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (explaining that appellate court is "required not simply to give the attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons [an appellant's] counsel may have had for proceeding as they did" (internal quotation marks, alterations, and citations omitted)); *McNelton v. State*, 115 Nev. 396, 410, 990 P.2d 1263, 1273 (1999) (noting that decision concerning what mitigation evidence to present is a tactical one). Much of the new evidence about Walker's childhood mirrors what was presented at trial and is reflected in the jury's finding of mitigating circumstances. In particular, at least one juror found that Walker was the product of a broken home, was raised in poverty by a dysfunctional family, had an absent father, only later discovered his biological father's identity, had two older siblings who died drug-related deaths, was placed in special education, had repeated school failures, suffered with learning disabilities, was introduced to drugs at a young age, was addicted to drugs, and abused alcohol.

In addition, at least one juror concluded that Walker's prior incarcerations mitigated the Anziano murder. Most of the evidence

submitted with the instant petition about Walker's time in prison consists of statements from people who served time with him. They described the racism, harassment, and violence that Walker and others faced in prison. They also described Walker's behavior and while some described him as quiet and a peacemaker, they also noted his drug abuse and disciplinary infractions. Eliciting testimony from numerous inmates who described the years they spent with Walker in prison bore a significant risk of casting him in an unfavorable light. *See Lisle v. State*, 131 Nev. 356, 367, 351 P.3d 725, 733 (2015) (recognizing that "mitigation evidence can be a double-edged sword that may indicate diminished culpability but at the same time may indicate an increased risk of future dangerousness"). This testimony could have reminded the jury of the extensive time Walker spent incarcerated as an adult, the seriousness of the prior crime that earned him such a lengthy sentence, and that the lengthy sentence did not quell his criminal impulses.

Walker further has not demonstrated a reasonable probability of a different result at the penalty hearing had trial counsel presented the evidence offered with the second postconviction petition. The jurors found six aggravating circumstances. Five of them were based on Walker's prior criminal history and the instant series of crimes involving the use or threat of violence to another person. These crimes included two attempted murders, robbery with the use of a deadly weapon, attempted robbery with the use of a deadly weapon, and attempted battery by a prisoner. The jury also found that the murder was committed during the course of a robbery. These are compelling aggravating circumstances. They show that Walker has a casual and callous relationship with violence and even a considerable prison sentence was not effective at tempering it. Within a few years of his release from prison, Walker engaged in a series of robberies in which he

killed one person and attempted to kill another in less than two days. The proffered additional mitigation evidence was not so compelling as to outweigh these aggravating circumstances and posed a significant risk of casting Walker in a more unfavorable light. Therefore, the district court did not err in denying the postconviction-counsel claim without conducting an evidentiary hearing.

Penalty phase evidence

Walker argues that postconviction counsel should have challenged trial counsel's ineffectiveness regarding the admission of evidence during the penalty phase of trial. He contends that trial counsel should have objected to the admission of: hearsay about Walker's prior criminal record and prison disciplinary record; improper victim impact evidence; improper testimony about appellate review; and improper testimony suggesting that Walker could be released if given a sentence less than death.

We conclude that postconviction counsel was not ineffective. On direct appeal, this court concluded that the district court did not err in admitting hearsay evidence, no improper victim impact testimony was admitted, the State did not mislead the jury regarding the appellate process and the jury's responsibility in deciding the sentence, and there was no discernable error regarding the admission of presentence investigation reports. *Walker I*, Docket No. 49507, Order of Affirmance, at 10-11. And in the first postconviction appeal, this court concluded that counsel was not ineffective for not challenging sentencing credit testimony because the testimony did not indicate that Walker would be released if not sentenced to death. *Walker II*, Docket No. 62838, Order of Affirmance at 14. In light of those conclusions in *Walker I* and *Walker II*, which establish the law of

the case on the underlying issues, we conclude that Walker has not demonstrated that postconviction counsel neglected to raise meritorious claims. Therefore, the district court did not err in denying these claims.

Penalty phase prosecutorial misconduct

Walker argues that postconviction counsel should have argued that trial counsel was ineffective in not objecting to prosecutorial misconduct during the penalty phase of trial. We disagree.

First, Walker claims that the prosecutor improperly called him a failed serial killer and referred to him as an animal. Walker has not demonstrated that postconviction counsel acted unreasonably in omitting a trial-counsel claim related to these comments. The prosecutor's argument asserting that Walker failed at multiple murders was supported by the evidence introduced at the trial and penalty hearing. In particular, Walker's other crimes included robberies during which Walker shot a victim in the torso and slashed another victim's throat. The injuries he inflicted could have resulted in each victim's death. And while a prosecutor may not characterize a defendant as an animal, *see Barron v. State*, 105 Nev. 767, 780, 783 P.2d 444, 452 (1989) (providing that a prosecutor has a "duty not to ridicule or belittle the defendant or his case"); *McGuire v. State*, 100 Nev. 153, 157, 677 P.2d 1060, 1064 (1984) ("Disparaging comments have absolutely no place in a courtroom, and clearly constitute misconduct."), the prosecutor expressly stated that he was not going to call Walker a "dog." But to the extent that the comment may have been improper, Walker did not demonstrate prejudice as a result of counsel's failure to object or raise the issue on appeal because the decision between life and death was not close and therefore there was not a reasonable probability of a different outcome at trial or on appeal. *See Schoels v. State*, 114 Nev. 981, 989, 966

P.2d 735, 740 (1998) (providing that in evaluating prosecutorial misconduct during the penalty phase, this court "will reverse the conviction or death penalty where the decision between life or death is a close one or the prosecution's case is weak"), *rehearing granted on other grounds*, 115 Nev. 33, 975 P.2d 1275 (1999). Because postconviction counsel therefore did not omit a meritorious trial- or appellate-counsel claim based on this alleged prosecutorial misconduct, the district court did not err in rejecting the postconviction-counsel claim.

Second, Walker argues that the prosecutor improperly asked the jurors to place themselves in the victim's shoes and compared the due process Walker was receiving to his actions against Anziano. These arguments were improper. *See Com. of Northern Mariana Islands v. Mendiola*, 976 F.2d 475, 486 (9th Cir. 1992) (recognizing that argument that defendant poses a risk to the specific jurors in the case was "plainly designed to appeal to the passions, fears, and vulnerabilities of the jury"), *overruled on other grounds by George v. Camacho*, 119 F.3d 1393 (9th Cir. 1997); *Berry v. State*, 882 So. 2d 157, 164 (Miss. 2004) (concluding that comparison of victim's rights to defendant's rights was egregious and "possibly rose to the level of prosecutorial misconduct"). Nevertheless, Walker has not demonstrated prejudice as a result of counsel's failure to object or raise the issue on appeal because the decision between life and death was not close and therefore there was not a reasonable probability of a different outcome at trial or on appeal. *See Schoels*, 114 Nev. at 989, 966 P.2d at 740. Because postconviction counsel therefore did not omit a meritorious trial- or appellate-counsel claim based on this prosecutorial misconduct, the district court did not err in rejecting the postconviction-counsel claim.

Third, Walker argues that the prosecution improperly asked the jury to consider justice for the victims and society. These arguments were not improper. "[A] prosecutor in a death penalty case properly may ask the jury, through its verdict, to set a standard or make a statement to the community." *Williams v. State*, 113 Nev. 1008, 1020, 945 P.2d 438, 445 (1997), *overruled on other grounds by Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). Because Walker has not demonstrated that prior counsel performed deficiently, the district court did not err in rejecting the postconviction-counsel claim.

Fourth, Walker argues that the prosecution improperly questioned a witness and elicited testimony about Walker invoking his right to remain silent during the penalty hearing. We disagree because trial testimony established that Walker was willing to talk with detectives after his arrest and did not unequivocally invoke his right to remain silent. *See Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010) (recognizing that a suspect who does not unequivocally invoke his right to remain silent, or who does so ambiguously while continuing to answer questions, is deemed to have waived his rights); *see also Gaxiola v. State*, 121 Nev. 638, 655, 119 P.3d 1225, 1237 (2005) (recognizing that prosecution may not comment on defendant's invocation of right to remain silent). Thus, the challenged comments were not improper, and consequently, trial counsel was not deficient in failing to object. Accordingly, Walker has not demonstrated that postconviction counsel omitted a meritorious challenge to trial counsel's performance.

Fifth, Walker argues that the prosecutor impermissibly referred to facts that were not in evidence in referencing Walker slapping a guard. Walker has not demonstrated that postconviction counsel acted

unreasonably as the argument was supported by Walker's disciplinary history, which was introduced during the penalty hearing, and by penalty phase testimony.

Lastly, Walker challenges arguments that: (1) the jury should weigh the worth of the Anziano family against Walker; (2) implied the jury's duty was to return a death verdict while showing a photograph of Anziano; (3) disparaged the use of psychological evidence; and (4) impermissibly inflamed the jury's passions by placing the responsibility for any future crimes he commits on the jurors. Walker also argues that the prosecutor failed to respond to numerous discovery requests, which permitted the prosecutor to ambush him with evidence he could not review. Trial counsel objected to the comments and appellate counsel challenged the comments and alleged the discovery violations on appeal. This court concluded that the comments were either proper or did not amount to a denial of due process and Walker was not prejudiced by any alleged discovery violation. *Walker I*, Docket No. 49507, Order of Affirmance, at 6, 12-13. Considering the decision in *Walker I*, which is the law of the case on the underlying issues, Walker has not demonstrated that postconviction counsel acted unreasonably in declining to raise claims for which he could not demonstrate prejudice.

Penalty phase jury instructions

Walker argues that postconviction counsel should have claimed that trial counsel was ineffective for failing to challenge or request several jury instructions. These claims lack merit for the reasons discussed below.

First, Walker argues that trial counsel should have asserted that the instruction that defined mitigating circumstances as those circumstances which reduce the degree of moral culpability impermissibly

limited the consideration of mitigating circumstances. As the instruction was not reasonably likely to confuse the jury, *see Watson v. State*, 130 Nev. 764, 783-87, 335 P.3d 157, 171-74 (2014), Walker has not demonstrated that trial counsel was ineffective for failing to challenge the instruction. Accordingly, he also has not demonstrated that postconviction counsel omitted a meritorious claim.

Second, Walker argues that trial counsel should have insisted that, pursuant to *Sonner v. State*, 112 Nev. 1328, 1345, 930 P.2d 707, 718 (1996), the jury be instructed that it could only consider other matter evidence after it found the aggravating circumstances. Walker has not demonstrated deficient performance or prejudice. The statement he points to in *Sonner* described the death penalty process as part of a constitutional challenge; it did not mandate the use of a new instruction. Additionally, as there was sufficient evidence supporting the aggravating circumstances found, *see Walker I*, Docket No. 49507, Order of Affirmance, at 13, Walker did not demonstrate that the jury's consideration of other matter evidence improperly influenced its finding of the aggravating circumstances. He therefore did not demonstrate that postconviction counsel omitted a meritorious claim in this respect.

Third, Walker argues that trial counsel should have challenged instructions that required the jury to unanimously find mitigating circumstances. Walker has not demonstrated deficient performance or prejudice. The instructions clearly provided that "[a] mitigating circumstance itself need not be agreed to unanimously," and "any one juror can find a mitigating circumstance." Considering the totality of the instructions, there is not a reasonable probability that the jurors thought they had to be unanimous in finding mitigating circumstances. *See Boyde*

v. California, 494 U.S. 370, 380 (1990) (providing that an instruction is ambiguous where "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence"). As such, Walker has not demonstrated that objectively reasonable trial counsel or postconviction counsel would have challenged the instruction.

Fourth, Walker argues that trial counsel should have objected to the anti-sympathy instruction. Walker has not demonstrated that postconviction counsel omitted a meritorious trial-counsel claim because this court has approved the anti-sympathy instruction where the jury is also instructed to consider "any mitigating evidence." *Leonard v. State*, 117 Nev. 53, 79, 17 P.3d 397, 413-14 (2001); *see also Sherman v. State*, 114 Nev. 998, 1011, 965 P.2d 903, 912 (1998) (upholding anti-sympathy instruction where trial court also instructs the jury to consider mitigating facts). Here, the jury was so instructed. Therefore, his trial counsel was not ineffective, and the district court did not err in denying this postconviction-counsel claim.

Fifth, relying on *Hurst v. Florida*, 136 S. Ct. 616 (2016), Walker argues that the district court erred in not instructing the jury that it must determine that the mitigating circumstances do not outweigh the aggravating circumstances beyond a reasonable doubt. This court has rejected the interpretation of *Hurst* advocated by Walker. *See Castillo v. State*, 135 Nev. 126, 442 P.3d 558 (2019) (rejecting argument that *Hurst* announced new law relevant to the weighing component of Nevada's death penalty procedures or appellate reweighing), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Feb. 12, 2020) (No. 19-7647); *Jeremias v. State*, 134 Nev. 46, 58, 412 P.3d 43, 54 (2018). Therefore, Walker cannot demonstrate deficient performance based on any prior counsel's failure to raise this issue

or resulting prejudice, and the district court did not err in denying this claim.

Sixth, Walker argues that trial counsel should have objected to the district court's failure to issue a presumption-of-life instruction that correlates to the presumption-of-innocence instruction. He asserts that the instruction is warranted because, pursuant to *Hurst*, all findings necessary to support a death sentence must be made beyond a reasonable doubt. Walker has not demonstrated that postconviction counsel performed deficiently. As discussed above, *Hurst* does not require that the weighing determination be subject to the beyond-a-reasonable-doubt standard of proof. The jury was instructed that it may impose a sentence of death only if it unanimously found at least one aggravating circumstance existed beyond a reasonable doubt, if each juror determined that the mitigating circumstances found did not outweigh the aggravating circumstance(s), and if the jurors unanimously determined that death was the appropriate sentence. Other instructions reiterated that the jury was not required to impose a death sentence and the jury always had the discretion to impose a sentence less than death. As the jury was adequately instructed that it could not impose death unless the State proved the existence of an aggravating circumstance beyond a reasonable doubt, and that even then, it still maintained the discretion to impose a sentence less than death, Walker has not demonstrated that an additional instruction on a presumption of life was necessary or warranted. *See Vallery v. State*, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002) ("The district court may . . . refuse a jury instruction . . . that is substantially covered by other instructions."). Therefore, the district court did not err in denying this postconviction-counsel claim.

Shackles

Walker asserts that postconviction counsel should have alleged ineffective assistance because trial counsel failed to challenge the use of visible shackles during the penalty hearing. We disagree. While being escorted into the courtroom, Walker briefly appeared shackled in front of several jurors. Officers immediately removed him from their view and informed the court. The viewing was accidental and brief. He was not paraded in front of the jury in visible restraints. *See Nelson v. State*, 123 Nev. 534, 545, 170 P.3d 517, 525 (2007) (concluding that failure to hold hearing before requiring leg restraints was harmless where no record that any juror saw restraints and defendant not made to walk in front of jury in restraints). Therefore, Walker did not demonstrate that trial counsel would have been able to successfully move for a mistrial or that appellate counsel would have been able to demonstrate reversible error. *See Ghent v. Woodford*, 279 F.3d 1121, 1133 (9th Cir. 2002) (recognizing no inherent prejudice when several jurors glimpsed defendant in shackles as he was entering courtroom); *United States v. Olano*, 62 F.3d 1180, 1190 (9th Cir. 1995) (holding that "a jury's brief or inadvertent glimpse of a defendant in physical restraints is not inherently or presumptively prejudicial" where, "on the sixth day of trial, the jury briefly witnessed [the defendant] in handcuffs as he entered the courtroom"). Therefore, the district court did not err in denying this postconviction-counsel claim without conducting an evidentiary hearing.

Elected judges

Walker argues that the district court erred in denying his claim that postconviction counsel should have challenged the ability of elected judges to conduct an adequate review of his case. We disagree. Walker did

not substantiate his claims with portions of the record demonstrating bias against him based on the fact that the district judge and Supreme Court Justices are popularly elected. *See Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (requiring petitioner to plead "specific factual allegations that would, if true, have entitled him" to relief). And he was found guilty and sentenced to death by a jury, not judges. Therefore, the district court did not err in denying this claim.

Lethal injection

Walker argues that postconviction counsel should have argued that lethal injection constitutes cruel and unusual punishment. This claim does not challenge the validity of the conviction or sentence and thus cannot be raised in a postconviction petition for a writ of habeas corpus, *see McConnell v. State*, 125 Nev. 243, 249, 212 P.3d 307, 311 (2009); therefore, postconviction counsel was not ineffective for failing to litigate this issue in the prior petition.

Ineffective assistance of appellate counsel

Walker argues that postconviction counsel should have asserted that appellate counsel was ineffective for not adequately challenging: the State's use of peremptory challenges, the exclusion of evidence of voluntary intoxication, errors during voir dire, the admission of prior bad act evidence, the admission of victim impact evidence, prosecutorial misconduct, the use of restraints during trial, the admission of gruesome photographs, jury instructions, and the admission of prejudicial videos. For the same reasons discussed previously, Walker has not demonstrated that appellate counsel unreasonably neglected to raise viable claims on appeal or that he was prejudiced. Walker also claims that appellate counsel failed to argue that the district court erred in denying

several motions argued during the course of trial. However, other than listing claims that appellate counsel should have addressed, Walker does not provide any further argument on these issues. Therefore, he has failed to demonstrate that review is warranted.[8] *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

Cumulative error review

Walker argues that the district court should have considered several claims that he had raised on direct appeal and in the first postconviction petition so that their cumulative effect would be considered with other claims for which he can demonstrate good cause to overcome the procedural bars. We disagree. Walker cites no authority that requires a state court to consider the cumulative effect of defaulted claims. The factual and legal bases for the claims he seeks to raise again were available during the prior proceedings, and he therefore cannot show that some impediment external to the defense prevented him from raising them before. *Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506. But more importantly, the reraised claims were previously rejected on the merits. Claims that we have already rejected on the merits "cannot logically be used to support a cumulative error claim because we have already found there was no error to cumulate."

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[8]We note that appellate counsel raised 15 issues, not including a number of sub-issues, in an approximately 80-page opening brief. It is well established that appellate counsel is not required to raise every conceivable issue to be effective. *See Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (reiterating Supreme Court's observation from *Jones v. Barnes*, 463 U.S. 745 (1983), that "appellate counsel is most effective when she does not raise every conceivable issue on appeal").

In re Reno, 283 P.3d 1181, 1223-24 (Cal. 2012); *see also Rippo v. State*, 134 Nev. 411, 436, 423 P.3d 1084, 1107 (2018), *amended on denial of rehearing by Rippo v. State*, 432 P.3d 167 (2018). Therefore, Walker has not demonstrated good cause to overcome the procedural bars or to avoid the law-of-the-case doctrine.

Having considered Walker's arguments and concluding that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

Cadish, J.
Cadish

Silver, J.
Silver

cc: Hon. Valerie Adair, District Judge
Joanne L. Diamond
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

APPENDIX B

Order Denying Rehearing but Clarifying Decision,
Walker v. State, Nevada Supreme Court,
Case No. 49507 (May 17, 2010)

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES R. WALKER A/K/A JAMES RAY WALKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49507

ORDER DENYING REHEARING BUT CLARIFYING DECISION

This petition for rehearing challenges an order of this court entered on March 3, 2010, affirming appellant James R. Walker's conviction. Although we deny rehearing, Walker justifiably complains about an inaccuracy in the disposition related to the admission of victim impact testimony.

Specifically, in this court's order of affirmance we stated that Walker failed to identify problematic testimony related to his claim that improper victim impact testimony was introduced but nevertheless our independent review of the record revealed that no improper victim impact evidence was admitted. On appeal, Walker's claim related to victim impact evidence was twofold.

First, he claimed that the State failed to provide notice of certain victim impact witnesses. Further review of Walker's briefs on this aspect of his claim shows that he identified two witnesses, Edward Williams and Roger Jacobs, whose testimony he argued contained improper victim impact evidence. Walker's claim, however, was somewhat confusing as it appeared to challenge the testimony of other unidentified witnesses. Out of an abundance of caution, we reviewed the testimony of

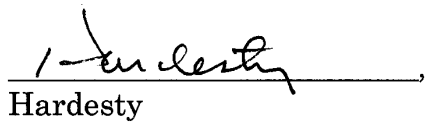
all penalty witnesses and concluded that no improper victim impact testimony was admitted.

Second, Walker argued on appeal that the State introduced improper evidence concerning the murder victim's absence at holiday gatherings and birthdays. Although this court's order does not explicitly address this contention, our review of the challenged testimony revealed that the evidence did not constitute improper victim impact evidence. See McConnell v. State, 120 Nev. 1043, 1061, 102 P.3d 606, 619 (2004) (concluding that testimony from victim's family members regarding birthdays, holidays, and victim's anticipated wedding was not improper victim impact testimony).

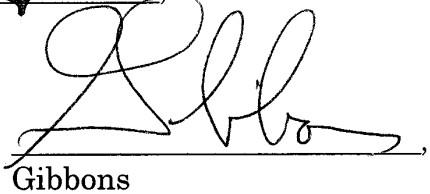
Any inaccuracy in the order of affirmance with respect to the admission of victim impact evidence does not alter our decision upholding Walker's judgment of conviction and sentence. Accordingly, we deny rehearing.

It is so ORDERED.

C.J.
Parraguirre



J.
Hardesty

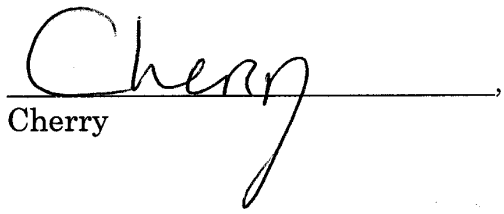


J.
Gibbons

J.
Pickering

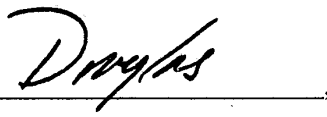
CHERRY, J., with whom DOUGLAS and SAITTA, JJ., agree dissenting:

I would grant the petition as to appellant's claim that prosecutorial misconduct rendered his penalty hearing unfair for the reasons stated in my prior dissent. Accordingly, I dissent.

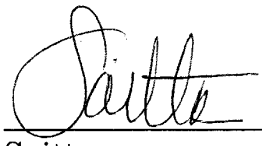


_____, J.
Cherry

We concur:



_____, J.
Douglas



_____, J.
Saitta

cc: Hon. Valerie Adair, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Christopher R. Oram
Eighth District Court Clerk

APPENDIX C

Order of Affirmance, *Walker v. State,*
Nevada Supreme Court, Case No. 49507 (March 3, 2010)

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES R. WALKER A/K/A JAMES RAY WALKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49507

FILED

MAR 03 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction in a death penalty case. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant James Ray Walker stabbed to death Christine Anziano as she exited a drug store in Las Vegas and stole her purse and purchased items. About 24 hours later, Walker slit the throat of Kirk Cole, absconding with Cole's money. Walker's girlfriend, Myrdus Archie, assisted him in the perpetration of these crimes. Several hours before Anziano's murder, Walker approached 17-year-old Susan Simon while Simon was sitting in a car in a store parking lot. Walker approached Simon, reached into the car, and stole her purse. Archie did not participate in this event. A jury convicted Walker of conspiracy to commit robbery, burglary, two counts of robbery with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and murder with the use of a deadly weapon and sentenced Walker to death. We affirm the judgment of conviction.

Guilt-phase issues

Walker argues that the district made numerous erroneous rulings on matters related to (1) jury selection, (2) the refusal to sever the defendants and charges, (3) the admission of evidence or discovery, (4) jury instructions, and (5) prosecutorial misconduct.

Jury selection

Walker challenges the district court's rulings on four jury related matters: (1) limiting counsel's questioning of the jury, (2) denying a Batson challenge, (3) refusing to empanel a jury reflecting a cross section of the community, and (4) allowing improper jury questions.

First, Walker asserts that the district court erroneously limited his counsel's questioning of potential jurors. In three of the four instances he identifies, after the jurors unequivocally expressed that they could not impose death, counsel queried each juror whether any circumstance existed whereby the juror could impose a death sentence. The district court sustained the State's objections to this inquiry. Because these prospective jurors expressed unequivocal opposition to the death penalty, the district court did not abuse its discretion by restricting counsel in this manner. See Salazar v. State, 107 Nev. 982, 985, 823 P.2d 273, 274 (1991). In the final instance Walker identifies, counsel sought to question a prospective juror as to whether the juror would change the law regarding punishment for murder if he could. Because counsel's inquiry was not relevant to determining whether a juror will be able to adjudicate the facts fairly or is biased toward either party, the district court did not unreasonably restrict counsel's voir dire of the juror. See id.

Second, Walker argues that the district court erroneously denied his challenge to the State's peremptory challenge of an African-

American prospective juror pursuant to Batson v. Kentucky, 476 U.S. 79 (1986). His claim stems from a colloquy in which the prosecutor questioned whether a juror would feel community pressure not to return a death sentence because the defendant is also African American. Considering the context of the prosecutor's question, we conclude that it was not grounded in racial discrimination, thereby invoking Batson, but rather was designed to expose bias. Accordingly, the district court did not err in this regard.

Third, Walker argues that his conviction and sentence are constitutionally infirm because the jury venire did not represent a cross section of the community. Nothing in our review of the record on appeal or Walker's argument suggests a systematic exclusion of African Americans from the venire. Williams v State, 121 Nev. 934, 939-40, 125 P.3d 627, 631 (2005). Accordingly, Walker's convictions and sentence are not invalid on this ground.

Fourth, Walker contends that the district court erred by allowing jurors to ask questions of witnesses without following the safeguards set forth in Flores v. State, 114 Nev. 910, 913, 965 P.2d 901, 902-03 (2005). Although the district court did not strictly comply with Flores, none of the instances Walker identifies suggest that the error had a substantial or injurious effect on the jury's verdict. See Knipes v. State, 124 Nev. ___, ___, 192 P.3d 1178, 1184 (2008).

Severance of trial

Walker contends that trying him and Archie jointly was prejudicial because he was unable to present his defense of mistaken identity. We conclude that the district court did not abuse its discretion. See Chartier v. State, 124 Nev. ___, ___, 191 P.3d 1182, 1185 (2008).

Walker's defense centered on the State's failure to prove that he committed the charged crimes and overzealousness on law enforcement's part to solve the crimes, while Archie defended on the theory that she was merely a bystander, unaware of the impending attacks or robberies. Walker could certainly pursue his defense of mistaken identity without inference of guilt or prejudice from Archie's defense, particularly considering that she did not implicate Walker as the person who stabbed Anziano and Cole. And the jury was instructed to consider the defendants separately.

Severance of charges

Walker contends that the three incidents were distinct because they occurred at different times and locations and involved three different methodologies and, therefore, should have been prosecuted separately. We disagree.

The offenses are parts of a common scheme or plan as contemplated by NRS 173.115 as the evidence illustrates a "purposeful design" on Walker's part to trawl for robbery victims. See Weber v. State, 121 Nev. 554, 572, 119 P.3d 107, 120 (2005). All three incidents involved Walker taking personal property or money from the victims and occurred within about a 24-hour period, either late at night or in the wee hours of the morning. And the incidents occurred in the same general geographical area.[1] Further, Walker used a knife in two of the incidents.[2]

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[1]Although Walker attacked Cole in front of Cole's residence, Walker met Cole in front of the same Food 4 Less store where the Simon incident occurred.

Additionally, the offenses are connected together as contemplated by NRS 173.115 in that the evidence of each offense would have been cross-admissible in separate trials to show intent to incapacitate potential robbery victims and identity by revealing Walker's modus operandi, in addition to a common scheme or plan as explained above. See NRS 48.045(2). Accordingly, the district court did not abuse its discretion in this instance. Weber, 121 Nev. at 570, 119 P.3d at 119.

Evidentiary rulings

Walker contends that the district court erroneously ruled on several evidentiary matters, including (1) summarily denying his motion to suppress evidence, (2) denying his challenge to discovery violations, (3) admitting a videotape showing Anziano after the attack, (4) admitting victim impact testimony, and (5) admitting prior-bad-act evidence. We conclude that the district court did not err in any of these matters.

First, Walker contends that the district court erred by denying his motion to suppress evidence without an evidentiary hearing. In particular, he argues that police detectives made false statements to support their affidavits for search warrants, rendering the search warrants illegal. However, nothing in the record on appeal indicates that the detectives' search warrant affidavits contained any intentional or reckless falsehoods. See Garrettson v. State, 114 Nev. 1064, 1068, 967

. . . continued

[2]Although Walker did not use a knife, or any other weapon, to relieve Simon of her purse, no weapon was necessary to subdue her, as Walker merely reached through an open car window to retrieve her purse.

P.2d 428, 430 (1998); Weber, 121 Nev. at 584, 119 P.3d at 127. Because we are not left with a "'definite and firm conviction'" that an error was committed in this instance, we conclude that the district court did not abuse its discretion by denying Walker's motion to suppress. State v. McKellips, 118 Nev. 465, 469, 49 P.3d 655, 658 (2002) (quoting United States v. Gypsum Co., 333 U.S. 364, 395 (1948)).

Second, Walker argues that numerous discovery violations were committed before and during trial with respect to several pieces of evidence, including a number of videotapes, an audiotape of Walker's statement to the police, "validation documents" concerning the DNA laboratory, a still photograph purportedly depicting Walker and Archie walking toward the Food 4 Less where Walker met Cole, and a photocopy of Anziano's social security card.

As to the videotapes, the audiotape, and "validation documents," absent from Walker's claim is any explanation of prejudice resulting from any alleged discovery violation.

As to the photograph, Walker objected to its admission on the ground that he did not have a copy of the videotape from which the photograph was taken. The district court allowed the State to use the photograph in its opening statement but ruled that it must be authenticated before its admission. Whether the photograph was admitted is unclear, but even if it was, we discern no error.

As to the copy of Anziano's social security card, Walker has no basis to complain as the original card was admitted without objection.

Third, Walker contends that the district court erred by admitting the Sav-On surveillance videotape showing Anziano after the attack, lying on the floor bleeding and dying, because the evidence was

highly prejudicial but not probative of any fact at issue. We disagree. The videotape was relevant as it assisted the testimony of a Sav-On employee in describing Anziano's condition, his actions in seeking help, and the circumstances of Anziano's death, and showed the layout of the store, how Anziano came to be inside the store when the stabbing occurred outside, and that she was no longer carrying her purse or purchases after the stabbing. Its relevance was not substantially outweighed by the danger of unfair prejudice. See NRS 48.035(1). Accordingly, the district court did not abuse its discretion by admitting this evidence. See Libby v. State, 109 Nev. 905, 910, 859 P.2d 1050, 1054 (1993), vacated on other grounds, 516 U.S. 1037 (1996).

Fourth, Walker complains that the district court erred by allowing several references to Anziano's children. Although there were scattered references to her children, to the extent this testimony can be considered victim impact evidence, no prejudice resulted considering the overwhelming evidence supporting Walker's guilt and the infrequency of the comments during the course of a lengthy trial.

Fifth, Walker argues that the district court erred by admitting evidence of 17 purses discovered during the search of Archie's apartment and a cut on his hand because the evidence suggested that he and Archie had committed other purse snatchings or robberies, and he therefore was entitled to a Petrocelli[3] hearing prior to its admission. As to the purses

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[3]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified in part on other grounds by Sonner v. State, 112 Nev. 1328, 1333-34, 930 P.2d 707, 711-12 (1996), and superseded by statute on other grounds as stated in Thomas v. State, 120 Nev. 37, 45, 83 P.3d 818, 823 (2004).

found during the search, we review this claim for plain error because Walker failed to object at trial. NRS 178.602; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003). To the extent that the purses constituted prior bad act evidence, any error did not affect Walker's substantial rights given the overwhelming evidence of guilt and the brevity of the testimony.

As to the cut on Walker's hand, which apparently predated Anziano's murder, the district court sustained Walker's objection. And he has not shown prejudice in light of a videotape depicting the murder and Walker's identification as the man on the videotape stabbing Anziano.

Jury instructions

Walker argues that the district court erroneously instructed the jury on robbery, felony murder, and "equal and exact justice" and improperly refused a voluntary intoxication instruction. We review a district court's decision on jury instructions for an abuse of discretion or judicial error. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). Walker's challenge to the robbery and felony-murder instructions lacks merit as the jury convicted him of premeditated murder as well as felony murder. His challenge to the "equal and exact justice" instruction also lacks merit. See Thomas v. State, 120 Nev. 37, 46, 83 P.3d 818, 824 (2004).

The district court did not err in refusing the involuntary intoxication instruction because, although a defendant is entitled to an instruction on his theory of the defense as disclosed by the evidence, no matter how weak or incredible the evidence, see Rosas v. State, 122 Nev. 1258, 1262, 147 P.3d 1101, 1104 (2006), there was no evidence of the intoxicating effect of any substance Walker ingested or the resultant effect

on his mental state at the time of the crimes. See Nevius v. State, 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985).

Prosecutorial misconduct

Walker argues that prosecutorial misconduct requires reversal of his convictions because the prosecutor disparaged counsel and him during closing argument. See Browning v. State, 124 Nev. ___, ___, 188 P.3d 60, 72 (2008) (providing that prosecutor may not "disparage defense counsel or legitimate defense tactics"), cert. denied, ___ U.S. ___, 129 S. Ct. 1625 (2009). Although Walker preserved one instance for review, he failed to object to several other challenged comments. Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 477 (2008) (providing that harmless-error standard is applied to review of prosecutorial misconduct; however, unpreserved allegations of error are subject to plain error review). Having carefully considered the comments, we conclude that none of them merit relief.

Penalty-phase issues

Walker contends that the district court erred in several rulings related to the penalty hearing, including refusing to bifurcate the penalty hearing, denying him relief on evidentiary matters, and allowing prosecutorial misconduct.

Bifurcation

Walker complains that the district court abused its discretion by denying his motion to bifurcate the penalty hearing. He recognizes that this court has never required a district court to bifurcate a penalty hearing, Johnson v. State, 118 Nev. 787, 806, 59 P.3d 450, 462 (2002), but urges this court alter its course and require penalty hearings to be bifurcated as a matter of law. We decline to do so.

Evidentiary rulings

Walker argues that the district court erred respecting four evidentiary rulings concerning evidence inadmissible under Crawford v. Washington, 541 U.S. 36, 68-69 (2004), victim impact testimony, evidence related to the appellate process, and the admission of presentence investigation reports.

Respecting his Crawford claim, Walker acknowledges that we have rejected Crawford's application to capital sentencing hearings, Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006), but urges this court to overrule this authority. We decline to do so.

Regarding victim impact evidence, Walker argues that constitutionally improper evidence was admitted because the State provided inadequate notice, some of the testimony was inadmissible under Sherman v. State, 114 Nev. 998, 1014, 965 P.2d 903, 914 (1998), and the evidence exceeded the scope of permissible victim impact testimony. However, Walker does not identify the problematic testimony and nothing in our review of the record shows that improper victim impact testimony was admitted.

As to evidence related to the appellate process, Walker argues that his death sentence is unconstitutional because the jury was misled to believe that the responsibility for determining the appropriateness of the death sentence rested with the appellate court rather than the jury. He identifies three episodes—an exchange between the prosecutor and a prospective juror and the prosecutor's cross-examination of two attorneys who testified for the defense. Our review of the record reveals that in none of these instances did the State mislead the jury regarding its responsibility in deciding the appropriate sentence. And the jury was

instructed that "the possibility of appellate review of your verdict cannot enter into your deliberations in any way. The appropriate sentence is your personal decision alone." There was no error in this respect.

Next, Walker contends that the admission of presentence investigation reports was improper under Herman v. State, 122 Nev. 199, 128 P.3d 469 (2006), and NRS 176.156(5). Because he inadequately explains this claim, his precise complaint is unclear. Further, he lodged no objection at trial, and we discern no error from the record on appeal.[4] See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003).

Prosecutorial misconduct

Walker challenges as improper several comments by the prosecutor made during closing argument. His claim encompasses five areas—the prosecutor improperly (1) argued that the jury's function was to weigh the lives of the victim and her family against Walker's life (comparative worth), (2) blamed the criminal justice system for Walker's conduct, (3) trivialized the concept of mitigating evidence, (4) argued that society's problems would be addressed by the jury's verdict, and (5) argued that the jury would be responsible for future victims if it did not impose death.

Regarding the comparative worth argument, the comments identified, to which there was no objection, were not improper but rather a message to the jury that Anziano's death was significant and that

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[4]It is unclear from the record on appeal whether any presentence investigation reports were admitted at trial.

although imposing death is a weighty matter, her murder warranted a death sentence. Walker failed to show plain error in this regard. See id.

Similarly, Walker's claim that the prosecutor improperly blamed society and the prison system for his conduct must be reviewed for plain error, and we conclude that no error occurred. Instead, the challenged comments reflected the idea that Walker was provided opportunities to curb his violent conduct but instead escalated his violence.

Next, Walker argues that the prosecutor trivialized the concept of mitigating evidence by arguing that he blamed his family, poverty, drugs, alcohol, prison, the victims, and correctional and probation officers rather than accept the decisions he made in his life, including killing Anziano. We conclude that none of the comments were improper.

Walker next argues that the prosecutor improperly suggested that society's problems would be addressed through the jury's verdict. However, considering the argument in context, the prosecutor merely related to the jury the importance of its participation in this case.

As to future dangerousness, although a prosecutor may argue a defendant's future dangerousness where the evidence supports it, he may not exhort the jury to return a death sentence or take responsibility for the death of a future victim. Blake v. State, 121 Nev. 779, 797, 121 P.3d 567, 579 (2005). Here, the prosecutor ventured beyond portraying Walker as a future danger by suggesting that the jurors would feel responsible if they did not impose death and Walker harmed another person. Nonetheless, considering the brevity of the comment and the compelling evidence in aggravation supporting a death sentence, the

comment was not so unfair as to deny Walker due process. See Browning v. State, 124 Nev. at ___, 188 P.3d at 72.

Constitutionality of the death sentence

Walker contends that the death penalty is unconstitutional on four grounds—(1) the death penalty scheme is unconstitutional as it fails to genuinely narrow death eligibility, a contention we have rejected, see State v. Harte, 124 Nev. ___, ___, 194 P.3d 1263, 1265 (2008), cert. denied, ___ U.S. ___, 129 S. Ct. 2431 (2009); (2) the reweighing analysis violates equal protection due to conflicting opinions regarding Nevada's reweighing equation; (3) the death penalty is cruel and unusual, an argument we have rejected, see Gallego v. State, 117 Nev. 348, 370, 23 P.3d 227, 242 (2001); and (4) the death penalty is unconstitutional because executive clemency is unavailable. Walker's death sentence is not unconstitutional on any of these grounds.

Mandatory review

NRS 177.055(2) requires that this court review every death sentence and consider whether (1) sufficient evidence supports the aggravators found, (2) the verdict was rendered under the influence of passion, prejudice or any arbitrary factor, and (3) the death sentence is excessive. First, sufficient evidence supports the six aggravators found—five of which involve prior violent felonies, including Walker's convictions for the attempted murder and robbery of Cole, his 1978 convictions for attempted murder and robbery, his 1987 conviction for attempted battery by a prisoner, and that Walker killed Anziano during the commission of a robbery or attempted robbery. Second, nothing in the record indicates that the jury reached its verdict under the influence of passion, prejudice or any arbitrary factor. And third, considering the viciousness of the

murder along with Walker's mitigation evidence, albeit credible, and his violent history, we conclude that the death sentence was not excessive.

Having considered Walker's contentions and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.[5]

_____, C.J.
Parraguirre

_____, J.
Hardesty

_____, J.
Gibbons

_____, J.
Pickering

cc: Hon. Valerie Adair, District Judge
Special Public Defender David M. Schieck
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Christopher R. Oram
Eighth District Court Clerk

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[5]We reject Walker's contention that cumulative error necessitates reversal of his convictions and death sentence. Although Walker's trial was not free from error, no error considered individually or cumulatively rendered his trial unfair. See Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 481 (2008).

CHERRY, J., with whom DOUGLAS and SAITTA, JJ., agree, concurring in part and dissenting in part:

I concur in the court's decision to affirm Walker's conviction. I dissent, however, from the conclusion that prosecutorial misconduct committed during the penalty hearing did not prejudice Walker. Although Walker did not object to the challenged misconduct, I conclude that he demonstrated plain error affecting his substantial rights. See Gaxiola v. State, 121 Nev. 638, 654, 119 P.3d 1225, 1236 (2005).

During closing argument in the penalty hearing, the prosecutor expressed the sentiment that no punishment, even death, would remedy the loss of Anziano to her family, that Anziano's family will "never be paroled" from her murder, that "Anziano's trial lasted a couple of seconds," with Walker being her only juror, and when addressing confinement and lethal injection, the prosecutor commented that "there was no lethal injection employed with regard to Christine." These comments served no purpose other than to inflame the passions of the jury and were improper. See Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 478 (2008) ("A prosecutor may not 'blatantly attempt to inflame a jury.'" (quoting Collier v. State, 101 Nev. 473, 479, 705 P.2d 1126, 1130 (1985))).

In a more troublesome instance, the prosecutor argued to the jurors that if they did not impose death, they would feel responsible if Walker harmed another person. This comment far exceeded the bounds of proper argument. See Blake v. State, 121 Nev. 779, 797, 121 P.3d 567, 579 (2005). We have recognized that "[p]resenting the jury's decision as a choice between killing a guilty person or an innocent person will likely result in a juror's decision to impose the death penalty more often than if the jury's decision had been portrayed in its proper light." Castillo v.

State, 114 Nev. 271, 280, 956 P.2d 103, 109 (1998). Where, as here, the murder is particularly brutal and the defendant has a significant history of violence, suggesting to the jurors that they would feel responsible for future victims unduly distorted their sentencing decision.

Although the inflammatory and improper comments considered individually are insufficient to warrant relief, when considered together, the resulting prejudice affected Walker's substantial rights by denying him a fair penalty determination. Therefore, I would reverse the death sentence and remand for a new penalty hearing.

_____, J.
Cherry

We concur:

_____, J.
Douglas

_____, J.
Saitta

APPENDIX D

Recorder's Transcript of Hearing Re: Jury Voir Dire,
State v. Waker, District Court, Clark County, Nevada,
Case No. C197420 (January 4, 2007)

ORIGINAL

FILED IN OPEN COURT
JAN 05 2007
CLERK
DENISE HUSTED DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

JAMES RAY EARL WALKER, MYRDUS ARCHIE, aka MARY SMITH,

Defendants.

CASE NO. C196420
DEPT. XXI

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

JANUARY 4, 2007

RECORDER'S TRANSCRIPT OF HEARING RE:
JURY VOIR DIRE

APPEARANCES:

FOR THE STATE: CHRIS J. OWENS, ESQ.
Chief Deputy District Attorney
BILL KEPHART, ESQ.
Chief Deputy District Attorney

FOR DEFENDANT ARCHIE: CHRISTOPHER R. ORAM, ESQ.
FOR DEFENDANT WALKER: SCOTT L. BINDRUP, ESQ.
Special Public Defender
ALZORA B. JACKSON, ESQ.
Special Public Defender

RECORDED BY: JANIE OLSEN, COURT RECORDER
TRANSCRIBED BY: LISA ZINGALE, LEX REPORTING SERVICES

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. JAMES RAY EARL WALKER, MYRDUS ARCHIE, aka MARY SMITH, Defendants.	)	CASE NO. C196420 DEPT. XXI

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

JANUARY 4, 2007

RECORDER'S TRANSCRIPT OF HEARING RE:
JURY VOIR DIRE

APPEARANCES:

FOR THE STATE: CHRIS J. OWENS, ESQ.
Chief Deputy District Attorney
BILL KEPHART, ESQ.
Chief Deputy District Attorney

FOR DEFENDANT ARCHIE: CHRISTOPHER R. ORAM, ESQ.
FOR DEFENDANT WALKER: SCOTT L. BINDRUP, ESQ.
Special Public Defender
ALZORA B. JACKSON, ESQ.
Special Public Defender

RECORDED BY: JANIE OLSEN, COURT RECORDER
TRANSCRIBED BY: LISA ZINGALE, LEX REPORTING SERVICES

THE COURT: All right. Court is now back in session. The record will reflect the presence of the State through the Deputy District Attorneys, Mr. Owens and Mr. Kephart, the presence of the Defendants, Mr. Walker and Ms. Archie, along with their attorneys, Mr. Bindrup, Ms. Jackson and Mr. Oram, all officers of the Court and the members of the prospective jury panel.

Good morning, ladies and gentlemen. Before you resume with the jury questioning, Ms. Husted will call the role of the remaining prospective jurors.

Ms. Husted?

THE CLERK: Badge 32, John Blake?

PROSPECTIVE JUROR BADGE NO. 32: Here.

THE CLERK: Where's Badge 30 -- 530, Charles Kennedy?

PROSPECTIVE JUROR BADGE NO. 530: Here.

THE CLERK: Badge 10, Gerald Baldridge?

PROSPECTIVE JUROR BADGE NO. 10: Here.

THE CLERK: Badge 14, Tom -- Shane Thomas?

PROSPECTIVE JUROR BADGE NO. 14: Here.

THE CLERK: I'm not sure. Is Spenser Pafias here?

MS. JACKSON: He was never -- he was absent from the first day.

THE CLERK: Because he kept showing up and getting released and he's supposed to come back today.

THE COURT: He may be -- still downstairs with the

others.

THE CLERK: Okay. Edward Henderson?

PROSPECTIVE JUROR BADGE NO. 18: Here.

THE CLERK: Thirty-one, Erin Rosequist?

PROSPECTIVE JUROR BADGE NO. 31: Here.

THE CLERK: Thirty-five, Monica Bradford?

PROSPECTIVE JUROR BADGE NO. 35: Here.

THE CLERK: Forty-three, Mary Capra?

PROSPECTIVE JUROR BADGE NO. 43: Here.

THE CLERK: Fifty-three, Anthony Ricadonna?

PROSPECTIVE JUROR BADGE NO. 53: Here.

THE CLERK: Seventy-two, Adam Flores?

PROSPECTIVE JUROR BADGE NO. 72: Here.

THE CLERK: Eighty-one, Frank Mercadante?

PROSPECTIVE JUROR BADGE NO. 81: Here.

THE CLERK: Eighty-three, Bradley Trimas?

PROSPECTIVE JUROR BADGE NO. 83: Here.

THE CLERK: Eighty-seven, Minh Khuu?

PROSPECTIVE JUROR BADGE NO. 87: Here.

THE CLERK: Skipped a page. Excuse me. Page 89, Minda Sogocio?

PROSPECTIVE JUROR BADGE NO. 89: Here.

THE CLERK: Ninety-, Nathan Christian?

PROSPECTIVE JUROR BADGE NO. 90: Here.

THE CLERK: Ninety-one, Melissa Butler?

PROSPECTIVE JUROR BADGE NO. 91: Here.

THE CLERK: Ninety-three, Annetta Yousef?

PROSPECTIVE JUROR BADGE NO. 93: Here.

THE CLERK: Ninety-five, Randy Buckner?

PROSPECTIVE JUROR BADGE NO. 95: Here.

THE CLERK: Ninety-six, Jenniver Aguiluz?

PROSPECTIVE JUROR BADGE NO. 96: Here.

THE CLERK: Ninety-eight, Matthew Cox?

PROSPECTIVE JUROR BADGE NO. 98: Here.

THE CLERK: One o two, Robert Jones?

PROSPECTIVE JUROR BADGE NO. 102: Here.

THE CLERK: One o three, Monica Ibarra?

PROSPECTIVE JUROR BADGE NO. 103: Here.

THE CLERK: One o five, Arlene Lewis?

PROSPECTIVE JUROR BADGE NO. 105: Here.

THE CLERK: One o seven, Jody Holt?

PROSPECTIVE JUROR BADGE NO. 107: Here.

THE CLERK: One o eight, Aaron Pacletta?

PROSPECTIVE JUROR BADGE NO. 108: Here.

THE CLERK: One fourteen, Jeller (phonetic) -- or Amber Weller?

PROSPECTIVE JUROR BADGE NO. 114: Here.

THE CLERK: One seventeen, Teena Kyle?

PROSPECTIVE JUROR BADGE NO. 117: Here.

THE CLERK: One eighteen, Ryu -- I have trouble with

allowing that person of the chance of parole someday?

PROSPECTIVE JUROR BADGE NO. 105: Yes, but I'd want to know what the circumstances were before I say any one of the (inaudible). And yes, I would consider it, but I would want information in order to consider it.

MR. BINDRUP: Okay. I -- I'm concerned because your initial questionnaire said you would automatically vote for the death penalty if you found a person guilty of -- of first -- degree murder period end of story. That's what you put down. So --

PROSPECTIVE JUROR BADGE NO. 105: I guess I'm not there.

MR. BINDRUP: You weren't there then or --

PROSPECTIVE JUROR BADGE NO. 105: I'm not there now.

MR. BINDRUP: Okay. Is that -- is that just not accurate then today, I mean --

PROSPECTIVE JUROR BADGE NO. 105: It's not accurate today.

MR. BINDRUP: Okay. It's not accurate, but is your inclination still such that if you -- if you found somebody guilty of such a charge, more likely that not you'd impose a death penalty over life with the possibility of parole?

PROSPECTIVE JUROR BADGE NO. 105: I don't know. I -- I -- you're putting me on the spot and I don't know.

THE COURT: Can I see counsel? I'm sorry to

interrupt to ma'am. I'll see counsel at the bench

(Whereupon, a bench conference was held.).

THE COURT: All right. Thank you Mr. Bindrup. The State may exercise their third challenge at the time. Well, we're going to -- were done. State?

MR. KEPHART: Thank you, Your Honor. At this time we would like to thank and excuse Juror No. 12, Badge No. 018, Edward Henderson.

MS. JACKSON: Your Honor --

MR. ORAM: Objection.

MS. JACKSON: -- We object.

THE COURT: Please approach.

(Whereupon, a bench conference was held.).

THE COURT: All right.

Ladies and gentlemen. You may all step back, thank you. Ladies and gentlemen, what we're going to do is the gentleman and Seat No. 12 will be excused at this time.

And I want to thank you very much, sir for your willingness to serve as a juror and your participation here. You're excused, sir you don't have to come back. Thank you very much.

For the rest of you, ladies and gentlemen, there are not enough prospective jurors left from this first panel. So we've brought in a second panel and we're going to have to do some preliminary things with them at this time. What that

means, is all of you will be excused and are asked to return tomorrow which is Friday at 9 a.m.

The court does not have another calendar in the morning, so we'll be able to start promptly at 9:00.

I am very confident that we will have a jury selected by tomorrow. So, I can promise you that unless you are one of the members of the jury, you will not have to return past tomorrow. Having said that I'm going to go ahead and excuse all of you for the evening recess.

Once again during the this evening recess you're admonished that you're not discuss this case, any person or subject matter connected with this case, with each other or with any one else.

You are not to watch or listen to any reports or commentaries on this case, any person or subject matter connected with his case by any medium of information. Please do not do any independent research on any subject connected with this trial and please do not form or express an opinion on any subject connected with this case.

Thank you and we'll see everyone back here at 9 a.m. tomorrow morning. Mr. Meza, you are -- since you missed the first day, you are going to be with the second panel and you are directed to remain in the courtroom. Anyone else who missed the first day that's here other than Mr. Meza is directed to remain in the courtroom.

9 a.m. on the third floor. Jury service is 9 a.m. Mr. Meza has to stay. Oh, I see. Okay. Thank you. All right. If anyone needs two or three minutes, take it. Please come right back so we can start.

(Whereupon, a brief recess was taken.)

THE COURT: Good afternoon. This is the time for Case Number C196420, State of Nevada v. James Walker and Myrdus Archie.

The record will reflect the presence of the State through the Deputy District Attorneys, Chris Owens and Bill Kephart, the presence of the defendants, Mr. Walker and Ms. Archie, along with their attorneys, Mr. Bindrup, Ms. Jackson, and Mr. Oram, all officers of the Court and the members of the Prospective Jury Panel B.

Good afternoon, ladies and gentlemen. Before we get into the nuts and bolts of this, I would first like to apologize for the delays I know you've experienced.

I know you came in Wednesday and were asked to complete the questionnaire. I know you came back yesterday and then were excused and I know that you've been sitting around all day today, up until this point, and I apologize for that.

We actually began this case on Tuesday morning and we are right -- we had an initial jury panel. We've been questioning them. We're running out of jurors there and that's why you all have been in and it's taken longer than

MR. OWENS: Did you?
THE COURT: Mr. Vitone, are you sure that CAT bus not pay you if you do jury services?
PROSPECTIVE JUROR BADGE NO. 050: No.
THE COURT: Did you look into that ahead of time?
PROSPECTIVE JUROR BADGE NO. 050: I guess I must have been confused when you asked me that. I thought you were asking me don't they pay us better than --
THE COURT: No. I mean, a lot of different types of jobs, particularly companies that can -- like if you have a government job, they typically pay you during the time you're doing your service so you're not out money.
And there are certain companies that contract with the government and it's the same provision, and, obviously, the point of that is that we want to encourage people to participate as jurors and not have them penalized in any way.
So my question to you is are you sure that CAT Bus will not pay you for the -- just your regular shift -- not overtime, obviously, or anything like that, for your regular shift while you're serving jury duty?
PROSPECTIVE JUROR BADGE NO. 050: No, I'm not sure. That's -- I don't know what they -- what they do, you know, how they go about something like that. This is my first time. I -- I don't --
THE COURT: Here's what I'm going --

PROSPECTIVE JUROR BADGE NO. 050: -- I don't know the whole --
THE COURT: All right. What shift do you normally -- what days do you normally work?
PROSPECTIVE JUROR BADGE NO. 050: I'm working Friday, Saturday, Sunday, and Monday, and I work like -- Friday and Monday is like I have a split shift; it's -- I do one, you know, I hold --
THE COURT: What time do you show up for work?
PROSPECTIVE JUROR BADGE NO. 050: I show up like particularly like 4:30 in the morning.
THE COURT: Okay. On Fridays you show up at 4:30?
PROSPECTIVE JUROR BADGE NO. 050: Yes. No -- Fridays -- I'm supposed to show up at 5:05 in the morning.
THE COURT: Okay.
PROSPECTIVE JUROR BADGE NO. 050: And I get off at --
THE COURT: And then what time do you get off on a Friday?
PROSPECTIVE JUROR BADGE NO. 050: About 5:00, 5:30, maybe 5:45 in the afternoon.
THE COURT: So you work a 12-hour shift?
PROSPECTIVE JUROR BADGE NO. 050: Yes, ma'am.
THE COURT: 12, 13-hour shift?
PROSPECTIVE JUROR BADGE NO. 050: It's like with an hour -- hour and a half --

THE COURT: Are you safe to be driving people after working 12, 13 hours?
PROSPECTIVE JUROR BADGE NO. 050: Yes.
THE COURT: Okay. Here's what I'm going to ask you to do, Mr. Vitone. I'm going to ask you to verify with your employer whether or not they're going to pay you for your jury services, okay?
You come back Friday. If you can get something from them, great. If they're going to pay you, you don't get excused. If they're not going to pay you, I'm going to excuse you. But if I find out you were not truthful, I'm going to summons you back here to explain it all to me.
Do you understand that -- and possibly hold you in contempt. If they don't pay you then, I'm fine with releasing you. Okay. But I want you to verify that because I think they may. All right?
PROSPECTIVE JUROR BADGE NO. 050: Okay.
THE COURT: All right. I'm going to --
PROSPECTIVE JUROR BADGE NO. 050: I -- I didn't know. I don't know if they do.
THE COURT: Okay. You need to find that out. You need to find that out, and you come back. And when you come back at 11 o'clock, get Officer Glasper to the side when you see him and talk to him and tell him what you found out. Okay?
PROSPECTIVE JUROR BADGE NO. 050: Sounds good.

THE COURT: All right. Thank you, Mr. Vitone.
And once again, just in case you are chosen, remember the admonishment about not talking the case.
PROSPECTIVE JUROR BADGE NO. 050: Yes, ma'am.
THE COURT: And not watching the news and that sort of thing.
PROSPECTIVE JUROR BADGE NO. 050: Yes, ma'am.
THE COURT: All right, sir. Thank you. You're excused at -- until tomorrow morning at 11:00.
Mr. Oram, we're not done.
MR. ORAM: Oh, I'm sorry, Judge.
THE COURT: You look so tired.
MR. ORAM: I am tired.
MS. JACKSON: He's ready to go.
THE COURT: All right. Since it's so early tonight, what I'm going to do, and I want to start right at promptly at 9 o'clock tomorrow, so I'd ask the corrections officers to please have Mr. Walker and Ms. Archie in the courtroom by like 8:45 so we can bring the jury up right at 9 o'clock, okay, if you can do that.
And then that will give also if they're lawyers want to talk to them or whatever if you guys get here at 8:45, that would be great. Then we can start right at 9:00 and won't have to wait around.
What I wanted to do at this point in time is if

anybody feels like they need to put something on the record we can do that. I know a Batson challenge was made at the Bench, and Mr. Kephart stated it race neutral reason.

I'm assuming that you want to put that on the record at this point in time. Additionally, the Court would note, I, in this new panel, observe three people who appear to be African American to the Court. I don't know if that comports with what other people observed.

One of -- and sometimes as we discussed earlier, it is difficult to tell exactly what race or ethnicity people are. Two of them remained.

One, Mr. Anwar Ali, sought to be excused and was not and remains in the panel. The other gentleman was the corporate airline pilot and we all agreed in the hallway that he did have a sufficient hardship excuse and so he was excused for that reason. And that was concurred -- or everyone concurred in that decision including all of the attorneys.

Does that comport with everyone's understanding?

MS. JACKSON: Yes.

UNIDENTIFIED SPEAKER: Yes, Your Honor.

THE COURT: All right. Very good.

Is there anything else that anyone would like to put on the record at this point.

MS. JACKSON: I'll go first, if I may.

Respecting Juror 018 --

MR. ORAM: Yes.

THE COURT: Yeah. He was in Seat 12.

MS. JACKSON: I need some reading glasses.

We would object to Mr. Henderson. The way he was handled from the very beginning we thought was improper. We believe that it was not fortuitous that he was singled out, for Mr. Kephart to invite the defense to go first. That was the first time that had occurred with this particular panel.

He was singled out. The defense was allowed to go first, Mr. Oram, and then Mr. Walker's attorneys. We were very brief. The record will reflect that Mr. Henderson was then questioned by the prosecutor at least by my calculations three times as long as any other prior prospective jury person.

And, moreover, was clearly asked inappropriate questions to, quote, do you find that because you're an African American male, that you -- you may have some ridicule coming to you from your -- from your associates, other African Americans, that you voted to put another African American on death row.

We take very strong the exception to the characterization. It seems to imply that African American males; A, they all have associates which have gang affiliation. It all -- and to invite ridicule would seem to imply that African American males somehow are in favor of crime or something of that nature.

No other prospective jury members were asked anything about if their white associates or brown associates or a Republican associates or any other associates would have a problem if that person voted for death.

We think it is clearly improper, inappropriate and at this time we make an oral motion for a mistrial on that basis.

THE COURT: All right. Thank you, Ms. Jackson.

And Mr. Oram?

MR. ORAM: Your Honor, I would join in that. And I would add one other factor. Ms. Myrdus Archie, by way of pre - - a judge's previous order, not this Court's order, was denied severance. We have --

THE COURT: Is that Judge Bell?

MR. ORAM: It -- it was, I believe, Judge Mosely (phonetic) Your Honor.

THE COURT: Judge Mosely? Because I've been sitting here wondering that, but --

MR. ORAM: Right. I believe it's Judge Mosely. And now I'm in a situation where in the first panel that was the only African American male. Ms. Myrdus Archie has a right to a jury of her peers. She will not receive a jury of her peers at least from that particular panel because there are no African American individuals now on that jury.

Additionally, I have counted, and I have -- and I will go through these slow --

Juror prospective 93, Annetta Yousef;

Juror 710, Laura Dotson;

Juror 023, Shontel Eifler;

Juror 011 (sic): Toby Solimon;

Prospective Juror 71, Maria Sanchez;

Prospective Juror 033, Luis Gutierrez;

Juror 003, Armand Virtuoso;

Juror 008, Margaret Harp;

Juror 013, Catherine Granger;

Juror 012, Jennifer Barksdale;

Juror 047, Jason Morton; combined with Edward Henderson and take away Edward Henderson for a second.

All 11 of those jurors said, "I could be fair to the State of Nevada and give Myrdus Archie life without parole" --

THE COURT: Actually, Mr. Oram, that's not what they said. You said, "Could be you be state -- fair to Myrdus Archie and could you be fair to the State of Nevada," and they said yes. And I'm not sure if in their minds being fair, A, pertained to the guilt phase, because there was -- I mean if there was anyone who said they couldn't be fair in the guilt phase, I don't remember.

Let's face it. Most people said they could be fair in the guilt phase, and the issue has been the penalty phase.

MR. ORAM: That's right.

THE COURT: But I don't -- I don't know -- and they

may -- I mean, maybe the implication was that they could be fair between life with the possibility of parole and life without the possibility of parole, but I'm not sure that that was clear as to all of them.

Do you see what I'm saying?

MR. ORAM: Yes, I do. And I --

THE COURT: Because I think -- I think they could have been talking about the guilt phase. It was never spelled out on all of them, well, could you consider life without the possibility of parole as well as life with the possibility of parole. Some it was, and they said, yes.

But some of these, it wasn't. And so --

MR. ORAM: And, Your Honor, really my only --

THE COURT: That's my recollection.

MR. ORAM: -- point -- my only point was each one of those jurors were kicked for cause because they couldn't give death and that --

THE COURT: Right. It was a death challenge.

MR. ORAM -- that's probably (inaudible.)

And also, Your Honor, I have marked those out. I would rather look at the record to make absolutely sure of what I'm telling the Court. But my recollection is we have 11 jurors, one, two, three, four -- 11 jurors excused for cause simply because they couldn't give death.

The State could not -- if I had kept all of those

jurors, the State could have gotten rid of 8 for preemptory challenges, but I'd still be left with three of these.

At this point, Your Honor, I would renew my motion for severance, ask that Ms. Archie receive a mistrial at this point and that the Court order severance for her.

THE COURT: All right. Thank you, Mr. Oram.

Mr. Kephart, do you first want to address the Batson?

MR. OWENS: Well, the Batson hasn't been raised yet, Your Honor.

MR. ORAM: We raised it under Batson on behalf of Ms. Archie.

MS. JACKSON: And on behalf of Mr. Walker.

MR. OWENS: Do we want to make some arguments first? I was going to address the issues that they raised.

THE COURT: Oh, I thought that was what Ms. Jackson was doing, and then I was going to have you address Mr. Oram's issue, but if you feel that's not what they did, then go ahead and address what they did.

MR. OWENS: I want to take them one a time. She was objecting to a question.

THE COURT: Right. I'm sorry. You're correct. You're correct. You're correct.

MR. OWENS: And my response to that is that there was no objection at the time that I remember.

MS. JACKSON: Yes, there was.

THE COURT: Actually, there was an objection at the time, and the Court didn't sustain it. Basically, I think, and I could be wrong; I think what at that point I did is I may have rephrased the question.

But there was an objection at the time. Ms. -- Ms. Jackson is absolutely correct.

MR. OWENS: The thing I remember is I don't remember any specifics about what was wrong with that particular questions. And an objection does have to be specific.

A lot of questions were asked by the Defense about the issue of race as well as by the State by those that had made some comments or where that came up in the case. It was a frequent question.

A question asked by Mr. Kephart was a question of race. It's kind of like a reverse race question, but I haven't heard law or things that say you can't ask, would you favor blacks or would you, you know, be prejudiced against blacks. It also seems to be a fair question.

At the bench a little while ago, there was a comment made by Defense Attorney Ms. Jackson saying that that question wasn't asked of anyone else, but there wasn't anyone else of the same race as the defendants in this case where that question would have made any sense.

And so I haven't seen anything that would indicate

that certainly no law saying that that's an inappropriate question. And I don't remember any specific objection on that grounds, just sort of a generic, I'm offended by it.

Unless we've fallen into some kind of a politically correct black hole here, it just seems tit-for-tat; it seems to be in the range of questions that were being asked of any of the jurors.

With regard to Mr. Oram's issue, you know, we're getting -- he's created this issue since the beginning of the trial.

There hasn't been any brief filed. I mean, if there's some law that says that this requires a severance, I'd like to see it. There were several motions for severance that were filed before the case. This issue wasn't raised as an issue in any of them.

If he's got some law, I think he needs to bring that forth so we can analyze it. I haven't heard anything that would support the position that he's taking here legally.

MS. JACKSON: Well, in our brief, we actually specifically raise the issue in our motion for severance that a death qualified jury would be unfair to Ms. Archie and would create another prosecutor in the courtroom against us.

And I've had Mr. Walker correctly point out that during -- even during voir dire, there are insinuations that Mr. Oram and his duty to Ms. Archie has to make which

may -- I mean, maybe the implication was that they could be fair between life with the possibility of parole and life without the possibility of parole, but I'm not sure that that was clear as to all of them.

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And I've had Mr. Walker correctly point out that during -- even during voir dire, there are insinuations that Mr. Oram and his duty to Ms. Archie has to make which

implicates my client. Our brief is replete with those references, and they do. It also contains that law and the research.

MR. ORAM: Yes, and, Your Honor --

THE COURT: Maybe, Ms. Jackson, you can point that out to Mr. Owens --

MR. OWENS: I'm (inaudible) of that.

THE COURT: -- because --

MR. OWENS: They did raise that. That's a separate issue.

THE COURT: Well, she's saying it contains the law referencing --

MS. JACKSON: Yes.

THE COURT: -- that Ms. Archie -- obviously cannot raise that on Ms. Archie's behalf, Ms. Jackson.

In terms of any insinuations that Mr. Oram is making, I think Mr. Oram obviously wants to make sure that the two are kept separate and wants to remind the jury that Ms. Archie is not on trial for possible death punishment, that she's in a different regard.

I think that that's appropriate for Mr. Oram to do. And I haven't, to be honest with you, picked up that in any way he's disparaged Mr. Walker or tried to insinuate that somehow Mr. Walker is more culpable than Ms. Archie.

I mean, I think Mr. Oram has been appropriate in

saying, "Keep them separate; I'm concerned about Ms. Archie; be fair to Ms. Archie," and has wanted to be clear that he's advocating on Ms. Archie's behalf just as you, Mr. Bindrup, are advocating on Mr. Walker's behalf.

So, you know, if it's there, I certainly truthfully, Ms. Jackson, didn't pick it up that he is in any way saying that Mr. Walker -- that there's been a proof against Mr. Walker or anything of that nature. I didn't hear anything like that.

MS. JACKSON: One good example is, have you ever heard of guilt -- and -- but don't get me wrong --

THE COURT: Guilt by association.

MS. JACKSON: If I had Ms. Archie, I'd do the same thing.

THE COURT: I mean --

MS. JACKSON: And that's part of why we make the argument. Any competent -- and Mr. Oram's a darned good attorney.

THE COURT: He's doing a -- a good job.

MS. JACKSON: He's doing a great job. You know, and he's going to have to at some point do that. And that was part of why we want to at this point also renew our motion to sever because Mr. Oram's instincts as a good defense attorney are such that he almost can't help it.

MR. OWENS: Your Honor, that was an issue that was briefed, but that's an issue you look at over the course of a

trial. And there was a lot of argument and briefs on that. That's a separate issue.

One that was raised by Mr. Oram, generically, that was raised and briefed.

Generically, that was raised in a brief what Mr. Oram is talking about generally. There have been defense that say going to trial with a co-defendant where the death penalty is being sought is unfair to them.

There's a US Supreme Court on point; we cited that. That was argued and decided. It's this numbers thing that he's talking about right now where he's adding up, we could have kept this juror and we wouldn't. There's no cases that have been cited on that particular issue at this point.

MR. ORAM: And he's correct. He's absolutely correct. And in the event there's a conviction, I would go up the Supreme Court, and I will tell the Supreme Court, I objected.

THE COURT: Yeah. He's making a record and we all understand that, Mr. Owens. I mean, the Court, you know, isn't inclined to grant a mistrial at this point. It's not inclined to sever the two cases. I don't think that there's any law.

Everybody appreciates why Mr. Oram would rather have a non-death qualified jury for Ms. Archie, and that's a strategic idea. And it's a well-founded one, but that's doesn't mean he's entitled to it as a matter of law. And so I

just think he's making a record here, but I'm not going to do that.

In terms of the question Mr. Kephart asked regarding association, I don't think it sounded like any gang implications or associates. I mean, he could have said friends, family; he could have said it another way. But I didn't pick up associates meant -- I think that's a valid question.

I mean, to me, I think that, you know, to sentence someone to death is a big deal and that there's lots of issues relating to race. It's been studied that there's a disparate impact on African Americans in this society, and I think people are cognizant of that. And I think that that's something that is appropriate to inquire about if a potential juror is going to burdened by that or reluctant about that.

And so that's kind of what I interpreted Mr. Kephart's question as being relevant too. So that's denied.

Anything else on the record?

MR. BINDRUP: Yes, just on three jurors that I had objected to and had challenges for cause. The first -- and they were all ruled against by Your Honor.

I just want to point out that Juror No. 53, Anthony Riccadonna, I asked Your Honor to evaluate him. I thought it was clear from his responses to me that he was certainly more pointed toward imposition of death penalty and

was not open to life with possibility of parole.

Additionally, I made the challenge today against Juror No. 103, Ms. --

THE COURT: Ibarra.

MR. BINDRUP: -- Ibarra. Ms. Ibarra indicated, and I couldn't have asked it more clearly, and she said that a violent crime against somebody that they lose their life that with the possibility of parole was not an option.

There was one other juror, Juror No. 83, Mr. Trimas seated in Juror No. 6 (inaudible.) And he said basically the same thing. He said, "I have a problem with life with the possibility of parole." He's the one that volunteered that.

The case of Wainwright vs. Whitt(phonetic) looked -- when you look at certain specific language on that case, you need the question to be asked does the juror's view substantially impair their ability to be fair during -- and not just the trial phase -- but the penalty phase as well.

And the Supreme Court indicated that, "Extremeness or absolutest views need not be proved with unmistakable clarify in order to disqualify."

It doesn't -- and I dispute the prosecution -- they continue to say at -- when we're having sidebars that if they don't absolutely say this or absolutely say that, then if they're just open to one extreme or the other, that's all that they need, and they okay.

But individuals like this, all three of these jurors, indicated enough --

THE COURT: What's the third one? You didn't say the third one or did you?

MR. BINDRUP: The -- yeah

THE COURT: Ms. Ibarra, Ms. --

MR. BINDRUP: Ms. Ibarra and Trimas.

THE COURT: Oh, Mr. Trimas. That's right.

MR. BINDRUP: Yes, Mr. Trimas, and Ric -- . Anyway, and when you look at their answers, clearly they were not in a first-degree murder situation. We open to fair consideration of life with possibility of parole.

As such, I think my challenge should have been granted and they should not have been seated.

THE COURT: Does the State want to put anything on the record?

MR. OWENS: Your Honor, the comment that I made at the Bench, I don't think I put on the record, but maybe I have is that I don't think that that's an adherence to the Witherspoon (inaudible) Yeah, if there's extreme position, then they might be subject to being excused for cause.

But for them to say after being asked the same question numerous times and at one point saying, I don't think that I could give, you know, life with the possibility of parole, and then reverse themselves again on that issue, I

don't think that shows an extremist position.

The Witherspoon case itself says, "They just have to say that they are willing to consider all the penalties provided by State law and be not -- and not be irrevocably committed before the trials begin to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of these proceedings." And that's the test.

And it says really that it's inappropriate to ask them any other question or apply any other test other than that automatically voting for or against the death penalty.

This thing about the sand (phonetic,) you keep feeding them facts and more facts and more facts and just paint them into a corner and say now that that's the scenario, you wouldn't be able to give him life with the possibility of parole.

And if you asked them one at a time, and one of them says that and then they get excused for cause, that's not the test in either Whitt or Witherspoon.

THE COURT: Yeah. I mean, I reviewed the transcript of Mr. Riccadonna, I believe, and reviewing that -- I mean, the transcript, the record, speaks for itself. But reviewing that I thought it was pretty clear that he said, "I would consider all four punishments."

And I think you said this at the bench, Mr. Bindrup,

but it wasn't solely on Mr. Owens' questioning of him. He offered that, in my review, on your questioning. At first, he said, yeah, he stands by what he said in the questionnaire, but then later on, he also says, well, I would consider all four punishments.

I don't remember exactly what the others said, but I felt satisfied that they said -- and that's why I asked him, would you, you know, consider -- everybody's all hung up on that word, what does consider mean.

I went back and I said, "Could you pick -- could you raise your hand and vote for life with the possibility of parole," and they said, "Yes."

So, you know, I think that, at least for cause, that there wasn't enough there I would just note on the record. And a number of other people were excused for cause that apparently the State objects to but didn't put down on the record.

Anything else?

MS. JACKSON: Yes, Your Honor. For the record, in light of the Court denying the motion for mistrial on behalf of Mr. Walker, we'd like to lodge a formal objection to Mr. Henderson's dismissal under Batson vs. Kentucky. And we'd like to hear the State's race neutral reason for releasing this prospective juror.

THE COURT: Thank you.

MR. ORAM: Join for Ms. Archie.

MR. KEPHART: It's our understanding that the Court has to make a finding that the State systematically excluded race from the proceedings, and I don't think that they've been able to -- the Defense has not shown any evidence of that.

THE COURT: Here's the problem with that, and I'll have to look at Batson again. I thought that prior to that, and I could be -- I could be not remembering this correctly -- had to state a race neutral reason.

The problem is in this particular case, you've only got one African American, so how do you systematically show systematic exclusion when you've only got one of them; you know what I mean?

Obviously, if now, they kick the next remaining two apparent African Americans, then there might be more there. But I'll have to look at it again to see if they have to make that first showing.

But again, you know, how do you -- how do you show systematic exclusion when you've only got one person?

UNIDENTIFIED SPEAKER: (Inaudible) 100 percent, Your Honor.

THE COURT: That's what I'm saying. I mean --

MR. OWENS: It would be (inaudible.)

THE COURT: I mean it cuts both ways. They can't show it, and what I'm saying is we don't know what your motivation is when there's just one.

MR. KEPHART: In retrospect, we do believe that that's what the law is, but however, I am willing to put on the record, just so you know that they get reviewed, in this particular case with regards to Mr. Henderson, if you will recall, he was one of 18 brothers or family members, that he's one of three that were not incarcerated, been in prison.

He also just had a nephew murdered that no one investigated and he -- I even used the word that it appeared when he talked he was angry about the fact that it wasn't investigated.

He made assumptions that the police didn't investigate because his nephew was a gang member. He talked extensively about his nephew being a gang member and that he was a notorious gang member in Washington and that he was close -- he was close to him.

He said -- I highlighted in the transcript when I read through it again. I think there was five separate times when I was trying to ask him about -- about his position on the death penalty, and he said, I believe five different times, that he didn't think he could do it. And his position was that he did not -- not sure to -- he was not sure if he could vote to have someone else's life taken.

So in with regards to what Mr. Bindrup has been posing about individuals not being able to consider the --

THE COURT: Life with or a term of years.

MR. KEPHART: -- life with the possibility of parole, and challenging these individuals. A portion of that is similar to his position on the death penalty, this man, Mr. Henderson's position on the death penalty, that he would not commit to us on that.

Certainly he said that he would consider it, but we feel that based on that, that he would not make a good juror for us based on -- and reasons noted with regards to his -- his past and his relationships with members of his family that had all been incarcerated.

THE COURT: Anything else?

MS. JACKSON: Yes. We had a juror -- we had someone who was allowed to (inaudible.)

THE COURT: I'm sorry. I can't hear you, Ms. Jackson.

MS. JACKSON: There's someone who's actually (inaudible.) There's still a guy on the jury who's occasion -- whose brother burned down a house.

And the record cannot pick up Mr. Henderson's demeanor and/or tone, but I would dare say that he (inaudible) angry as -- was not something that was ever displayed in this courtroom, I would beg to differ.

THE COURT: I would concur with that. I didn't see any anger. I thought it was very calm and articulate, in fact.

But I think he may have used the descriptive word that he was angry or disappointed or something like that, but I agree with you, Ms. Jackson, he did not display any anger.

MS. JACKSON: Mr. Kephart tends to do that. He does that with me. He says I'm angry, I'm upset, I'm this or I'm that, and I would like for the record to reflect that all black people, we do -- we can exhibit self control. We're not all angry or other adjectives that he tends to use.

THE COURT: Well, Ms. Jackson, if it's any consolation, Mr. Kephart thinks I'm angry all the time too, so I thought it was just -- I thought it was just a female thing.

MS. JACKSON: It may be. Nevertheless, we will submit it.

THE COURT: All right. Well, I mean, I think, you know, I picked up myself on some things that he said, which, you know, if I were prosecuting the case might make me concerned so, you know, I'm going to deny it, Batson. I think that, you know, obviously you can make another motion when we see what they do --

MS. JACKSON: Thank you.

THE COURT: -- down the road.

I had something else to say, but I don't remember what it was. I feel like I'm leaving so early today; it's before 6:00.

Oh, I know what I was going to say. They've only done three challenges, so maybe they will exclude the arsonist's brother. Wasn't that brilliance worth waiting for?

(Whereupon, the proceedings adjourned at 5:46 p.m.)

APPENDIX E

Recorder's Transcript of Hearing Re: Jury Voir Dire, *State v. Waker,* District Court, Clark County, Nevada, Case No. C197420 (January 2, 2007)

DISTRICT COURT

CLARK COUNTY, NEVADA

ORIGINAL

THE STATE OF NEVADA,

Plaintiff,

vs.

JAMES RAY EARL WALKER, MYRDUS ARCHIE, aka MARY SMITH,

Defendants.

CASE NO. C196420
DEPT. XXI

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

JANUARY 2, 2007

RECORDER'S TRANSCRIPT OF HEARING RE:
JURY VOIR DIRE

APPEARANCES:

FOR THE STATE: CHRIS J. OWENS, ESQ.
Chief Deputy District Attorney
BILL KEPHART, ESQ.
Chief Deputy District Attorney

FOR DEFENDANT ARCHIE: CHRISTOPHER R. ORAM, ESQ.
FOR DEFENDANT WALKER: SCOTT L. BINDRUP, ESQ.
Special Public Defender
ALZORA B. JACKSON, ESQ.
Special Public Defender

RECORDED BY: JANIE OLSEN, COURT RECORDER
TRANSCRIBED BY: LISA ZINGALE, LEX REPORTING SERVICES

THE COURT: All right. Thank you. The State may question prospective juror number 12.

MR. KEPHART: Judge, if Mr. Oram wants to go first right now so we won't forget him, I mean he's more than likely -- more than welcome --

MR. ORAM: Yeah sure. I'll go first.

MR. KEPHART: I'm -- it's up to you, Your Honor. I have no problem with that.

THE COURT: Officer Glasper, would you go back and see what that juror wants? All right Mr. Oram, Mr. Kephart has graciously asked that you go first.

Ms. Jackson, Mr. Bindrup, do you have any problem with Mr. Oram going first?

MR. BINDRUP: Not just this one occasion.

THE COURT: All right. Consider it graciousness from you as well, Mr. Oram.

MR. ORAM: Yes, Your Honor. How are you Mr. Henderson?

PROSPECTIVE JUROR BADGE NO. 018: Good.

MR. ORAM: You've heard all these questions over and over. You have any particular problem with anything that's being talked about in here?

PROSPECTIVE JUROR BADGE NO. 018: No.

MR. ORAM: You could consider everything that's being talked about, all forms of punishment; is that right?

PROSPECTIVE JUROR BADGE NO. 018: Yes.

MR. ORAM: Okay. One concern I had was that your nephew was -- was murdered.

PROSPECTIVE JUROR BADGE NO. 018: Yes.

MR. ORAM: How long ago was that, sir?

PROSPECTIVE JUROR BADGE NO. 018: It's been about four years, I think.

MR. ORAM: The fact that -- may I ask just a little bit about it? How was your nephew murdered?

PROSPECTIVE JUROR BADGE NO. 018: He was shot multiple times.

MR. ORAM: Was it robbery or --

PROSPECTIVE JUROR BADGE NO. 018: No. It was -- still being classified as gang related. He was at an event, got in the middle of an altercation, and he and a friend was -- were gunned down in the process.

MR. ORAM: Is there anything about that event, sir that would cause you to feel irritation with Ms. Archie?

PROSPECTIVE JUROR BADGE NO. 018: No.

MR. ORAM: You realize she had obviously nothing to do it that, right?

PROSPECTIVE JUROR BADGE NO. 018: Right.

MR. ORAM: You'd consider the facts of this case in determining what your decision would be; is that right?

PROSPECTIVE JUROR BADGE NO. 018: Yes.

MR. ORAM: You said that you thought that people who get in trouble often have become that way because of their childhood?

PROSPECTIVE JUROR BADGE NO. 018: I think sometimes, but not always it can -- it can play a part.

MR. ORAM: And that's not always blame, is it? Some people just go wrong?

PROSPECTIVE JUROR BADGE NO. 018: Some people just go wrong, correct.

MR. ORAM: You've heard this question; I've asked I think about every juror. Can you give separate and equal consideration to Ms. Archie?

PROSPECTIVE JUROR BADGE NO. 018: Yes.

MR. ORAM: You -- you understand what I'm saying by that right?

PROSPECTIVE JUROR BADGE NO. 018: Yes.

MR. ORAM: Okay. Although there's not going to be two separate trials I want to make sure that I get a jury that's going to consider her case and how the facts that you hear from the witness stand, how they apply only to her, and you'll do that?

PROSPECTIVE JUROR BADGE NO. 018: Yes.

MR. ORAM: Okay. You wouldn't let somebody else sit there and say well some of the evidence is against somebody else so we have to apply. You wouldn't do that, you'd be like,

how it applies to Ms. Archie?

PROSPECTIVE JUROR BADGE NO. 018: That is correct.

MR. ORAM: Okay. Is there any reason why you couldn't give her a fair trial?

PROSPECTIVE JUROR BADGE NO. 101902253 13-0018: No.

MR. ORAM: You can look at her and promise her a fair trial?

PROSPECTIVE JUROR BADGE NO. 018: Yes.

MR. ORAM: If they fail to prove it, will you come in this courtroom and say not guilty?

PROSPECTIVE JUROR BADGE NO. 018: Yes.

MR. ORAM: Thank you, sir. Pass for cause.

THE COURT: All right. We'll let Mr. Bindrup or Ms. Jackson go next.

MS. JACKSON: Mr. Henderson, good afternoon, sir. We are a little bit differently positioned, well, a lot differently than Mr. Oram, because the death penalty being table with reference my client and that a causes me to have some concern about your nephew, sir.

Just to cut to the chase, I mean, I'm very sorry first of all that this happened. And this is four years ago? So this is a nephew that you see on a regular basis or someone that perhaps lived out of state, sir?

PROSPECTIVE JUROR BADGE NO. 018: They lived out of state, but we grew up together.

MS. JACKSON: You grew up together.

PROSPECTIVE JUROR BADGE NO. 018: We were like brothers.

PROSPECTIVE JUROR BADGE NO. 018: And -- uncle and nephew.

MS. JACKSON: Okay. So even though he's nephew, he's more your age and -- then you're --

PROSPECTIVE JUROR BADGE NO. 018: That's correct.

MS. JACKSON: And there's ever been anyone charged or --

PROSPECTIVE JUROR BADGE NO. 018: No.

MS. JACKSON: -- with this offense. What state was it in, sir?

PROSPECTIVE JUROR BADGE NO. 018: Washington.

MS. JACKSON: How old was your nephew, sir?

PROSPECTIVE JUROR BADGE NO. 018: He was 28.

MS. JACKSON: Okay. Is there anything about that tragedy that would cause you to -- to touch on your ability to be a fair and impartial juror as it relates to Mr. Walker? There is no shooting alleged to have occurred in this case if that helps you at all.

PROSPECTIVE JUROR BADGE NO. 018: I can be fair, yes.

MS. JACKSON: You can? You sure of that, sir? And you understand -- you've heard me ask at least, I don't know, 12 people before you about two things that I need to ask you

about as it relates to the first phase, actually three; the number of charges, can you look at each charge individually and evaluate that charge by the beyond a reasonable doubt standard?

PROSPECTIVE JUROR BADGE NO. 018: Yes I can.

MS. JACKSON: And the presumption of innocence? You know I think Mr. Kephart's example is the best one. If you all were asked to go back and vote right now you really wouldn't have a choice but to check not guilty, because you don't have any evidence.

PROSPECTIVE JUROR BADGE NO. 018: That is correct.

MS. JACKSON: And the Fifth Amendment right? There are some people who have told me and they mean it, unless you take the stand and tell me what happened, I'm just totally blocked from hearing anything that your attorney said. Are you one of those people, sir?

PROSPECTIVE JUROR BADGE NO. 018: No, no. I would -- I wouldn't (inaudible). If -- if he exercised his right not to speak, that's -- that's his right.

MS. JACKSON: In other words, you can still hold the State to their burden, which is the State has the burden of proof beyond a reasonable doubt. Mr. Walker, now we don't have a burden; and you're okay with that?

PROSPECTIVE JUROR BADGE NO. 018: That's correct.

MS. JACKSON: Thank you, sir. Your Honor, we pass for cause.

THE COURT: All right. Thank you Ms. Jackson. Mr. Kephart.

MR. KEPHART: Thank you, Your Honor. This is kind of unorthodox. It's --

THE COURT: It was your idea.

MR. KEPHART: I know. Bound to do it in the trial. What Ms. Jackson was asking about I had some questions too. Now, you said that -- were you actually a witness to -- to the shooting of your -- of your nephew?

PROSPECTIVE JUROR BADGE NO. 018: No.

MR. KEPHART: Okay. Have you ever been a witness to a crime?

PROSPECTIVE JUROR BADGE NO. 018: No.

MR. KEPHART: Okay. You've never had to come in and testify in a courtroom or anything like that before?

PROSPECTIVE JUROR BADGE NO. 018: No.

MR. KEPHART: Okay. Did you do anything personally try to motivate the authorities on your -- on your nephew's case?

PROSPECTIVE JUROR BADGE NO. 018: No. At the time I was -- I believe I was -- yeah, still living in Kansas when it happened. So I flew back to Seattle so there's not a whole I could do.

MR. KEPHART: Okay. What about your family? I mean -- the reason why ask it is that I sense a little bit of

a -- a little bit of anger in your answer. And that's fair, and that, you know, and quite honestly I'd been surprised if there wasn't any that when a crime occurs and a crime of that nature and nothing happens.

Did -- is -- is your family still pursuing it or -- or is there anybody else pursuing it?

PROSPECTIVE JUROR BADGE NO. 018: My sister's still pursuing it. I think the -- the anger that you see if you can call it anger -- my nephew was a former gang member.

MR. KEPHART: Okay.

PROSPECTIVE JUROR BADGE NO. 018: I believe because of that he was trying to change his life around, but the fact that it happened to be gang-related when he was gunned down -- he was off the street and he, you know, he did bad things himself I'm sure back in his day when he was gang banging and --

MR. KEPHART: Okay.

PROSPECTIVE JUROR BADGE NO. 018: -- so it was sort of a thing that I just felt like they really didn't want to deal with that.

MR. KEPHART: So maybe they felt like something was already solved?

PROSPECTIVE JUROR BADGE NO. 018: No, not necessarily. My nephew was pretty notorious and he was -- he was a very big name in Seattle, Washington. And so when he

passed away -- was murdered, there was one less banger they had to worry about.

MR. KEPHART: I got you, I got you. Do you know if there was any type of information that would support prosecuting somebody? Do they have like eyewitnesses to it or anything like that or -- or is everyone kind of clamming up to it?

PROSPECTIVE JUROR BADGE NO. 018: A lot of people clammed up. That typically happens when it's gang related. You know, people like to take care of it on their own, so to speak.

MR. KEPHART: With that experience, my next question that is -- is -- is there anything about experience that you had, I would say with law enforcement or the lack of law enforcement that would give you some concerns with the State in this case?

PROSPECTIVE JUROR BADGE NO. 018: No. No, my -- my brother actually is a highway patrolman and -- and --

MR. KEPHART: Here in Nevada?

PROSPECTIVE JUROR BADGE NO. 018: No, in Washington.

MR. KEPHART: Okay.

PROSPECTIVE JUROR BADGE NO. 018: And so hey, I don't have a problem with, you know authority or the officers. I have a problem with the way that case was handled, because nothing was ever done.

MR. KEPHART: Okay.

PROSPECTIVE JUROR BADGE NO. 018: Sort of stuffed under the rug.

MR. KEPHART: Okay. Now, in that questionnaire where it asks about whether or not yourself or friends or family have ever been charged with a crime, are we talking about your nephew?

PROSPECTIVE JUROR BADGE NO. 018: My nephew -- I have several family members that have been charged and have been incarcerated or are incarcerated right now.

MR. KEPHART: Okay. You said they have been incarcerated, are incarcerated, and that you have been incarcerated?

PROSPECTIVE JUROR BADGE NO. 018: No. I said family members.

MR. KEPHART: Okay. All right. Is there anything about their incarceration that give you concern with the State?

PROSPECTIVE JUROR BADGE NO. 018: No. You know, and in most cases --

MR. KEPHART: You understand why we have to ask that question?

PROSPECTIVE JUROR BADGE NO. 018: Sure.

MR. KEPHART: Okay. You know, we don't want come in here have somebody that -- that has a problem with us right off the bat, because of something that's happened that had nothing

to do with this case. You know, people hold grudges; do you agree with that?

PROSPECTIVE JUROR BADGE NO. 018: I do agree that people hold judges (sic), but I -- I think -- I'm going to look at it in situations individually.

MR. KEPHART: Okay. That's good. Now, in this case in the one of the questions it talks about whether or not you've already formed an opinion about this case and you answered yes. And do you remember the answer that you gave?

PROSPECTIVE JUROR BADGE NO. 018: Yes, I do.

MR. KEPHART: Okay. You basically said that the two individuals are charged with a crime and you believe that their possible defense would be their past childhood experiences led them to a life of crime because of a drug habit, so forth and so on. Is that based on what you were to glean out of this?

PROSPECTIVE JUROR BADGE NO. 018: Somewhat and it was actually, I guess I was looking forward in the statement just kind of reading the questionnaire that if there was a conviction, that would be the possible defense.

MR. KEPHART: Okay. Now, actually for, you know, a defense to a murder or something that -- that -- I'm not going to into an argument with over legalese or whatever, but those are more mitigators as to the type of sentence. And you heard Ms. Jackson talk about it.

And we've talked a little bit about it, about

something that you need to look at, both mitigators and aggravators in the event that they're found guilty of first-degree murder.

And then with regards to your position on the death penalty, do you recall -- do you recall what you had indicated as to whether or not you felt that it was a proper type of sentence or not?

PROSPECTIVE JUROR BADGE NO. 018: What I recall is that I can tell you out right that in certain situations I am for the death penalty, but I am not sure if I were on a jury and I had to, you know, have someone else's life in my hand, whether or not I could do it. I -- I don't know for sure. But I'm not against the death penalty.

MR. KEPHART: Okay.

PROSPECTIVE JUROR BADGE NO. 018: In some cases, I'm for it, but I'm not sure I could do --

MR. KEPHART: Okay. I'm going to ask you something in the end and hopefully you don't take this wrong, but I feel it's very important, is that throughout the questionnaire it -- it -- it's pretty obvious that -- that -- that the questions were basically telling you that we're dealing with two African-Americans here, one African-American in -- in the questionnaire.

And you, so far, in this jury panel have been the first African-American that we've been able to talk to. And

I -- my concern is that in the event that your chosen as a juror and you find the defendant, Mr. Walker guilty of first-degree murder, we are going to be asking that you sentence him to death and we're going to present evidence to support that.

Do you find that because you're an African-American male that you -- you may have some ridicule coming to you from your -- from your associates, other African-Americans, that you voted to put another African-American on death row?

MR. BINDRUP: Objection, that's improper. It's --

MR. KEPHART: I don't think it's improper at all.

THE COURT: Well, --

MR. KEPHART: I'm in a situation --

MR. BINDRUP: Pressure from the community, which is not an appropriate form of inquiry.

MR. KEPHART: His own personal experiences, Your Honor.

THE COURT: But would feel in anyway constrained, by virtue of your family members or your friends or anything like that, to vote for the death penalty if you felt, after you've heard all of the evidence in this case, the guilt phase, and -- and assuming it gets to that in the penalty phase, if you felt that that was an appropriate sentence, would you feel in anyway hindered about rendering sentence knowing that Mr. Walker is an African-American?

PROSPECTIVE JUROR BADGE NO. 018: For me, race would

have nothing to do with it, but again I'm not sure if I were on the jury, if I could take someone's life.

THE COURT: And that --

PROSPECTIVE JUROR BADGE NO. 018: To be responsible --

THE COURT: -- is regardless of race, whether it was a Hispanic or a -- an Asian and or what have you; is that right?

MR. KEPHART: Okay.

THE COURT: Is that yes?

MR. KEPHART: Yeah, he said yes, Your Honor.

THE COURT: It's just because it's recorded. All right. Thank you.

MR. KEPHART: Then in the next light, you know to sit and consider all the punishments, that's one thing.

We've said that and, you know it's easy to talk, stand here and talk about it, but to actually find yourself doing it is the -- I think question that maybe you're dealing with here. I -- I want you to look across the room and you probably already have and you see the defendant here. He's a human being. He's living and breathing.

And there may be come a point in time where you may be asked to give him a sentence of death. And, you know to say, yeah, I can consider, but to actually do it; do you think you could do that?

PROSPECTIVE JUROR BADGE NO. 018: That's the part that I grapple with because I'm -- I'm not sure. I mean, I -- I look at certain cases. I have two kids. I love my kids. If something happened to them, where it was a case where they were murdered by someone who had done it multiple times. I would probably want that person to die.

MR. KEPHART: Okay.

PROSPECTIVE JUROR BADGE NO. 018: I would ask maybe ask to do it myself.

MR. KEPHART: Okay.

PROSPECTIVE JUROR BADGE NO. 018: But in this situation, I guess I'd have to hear all the facts, but again, you know, I can say that you now with emotion about my kids, but maybe when it actually came right down to it, maybe I actually couldn't.

MR. KEPHART: Yeah.

PROSPECTIVE JUROR BADGE NO. 018: I also -- I'm not sure --

MR. KEPHART: Okay. Well, see that's where we're -- where we're at odds maybe in some regards is that -- is that, you know the law requires that you -- that you consider the types of punishments that are here.

And consider not only means that you would consider and look at them, but there might be a point in time where you have to impose that or you feel that you need to impose that.

And the law doesn't say that you have to. Ms. Jackson's correct.

I mean, no, you're never required, but do you think it's fair to the State that you may be of the state of mind that yeah, I can consider it, but I don't know if I could ever give it.

MR. BINDRUP: Objection, Your Honor. The standard is whether they could consider it. He's already asked that.

THE COURT: Well, I mean, when you see consider, would you keep an open my and is that a possible -- assuming you know, the evidence is there a they meet their burden of proof, you know, get instructions on what you need to do. You know how all that works later. Is that something that you could -- when we see consider, not just look at, but meaningfully consider?

MR. KEPHART: And before he answers that, Your Honor I want to follow it up with question number 48 and this is why, you said -- the question is: "Do you hold strong moral religious views?" And your answer is: "I believe only God has the right to decide whether a man should live or die." That's pretty final.

MS. JACKSON: Your Honor, correction, he says, I believe on, O-N God, he does not say only. It says on.

MR. KEPHART: Well, maybe -- yeah, I believe on God? I took it has only. I believe on God has the right to decide

whether a man should live or die. Should it read I believe only God?

PROSPECTIVE JUROR BADGE NO. 018: I believe in God.

MR. KEPHART: Okay.

PROSPECTIVE JUROR BADGE NO. 018: And -- I think what I was trying to say that it's not my place to decide whether a man should live or die.

MR. KEPHART: Okay. You know I respect that. I -- we -- I do. And that -- that's getting at is that if you have that -- that belief, then could you truly ever consider giving an individual the death sentence?

PROSPECTIVE JUROR BADGE NO. 018: I think in a situation where I've been asked to do a duty, I mean, it's a hard question because I'm not against the death penalty, but again I can't honestly tell you with conviction that if three weeks from now I have to walk in that room and render that, I'm not sure. I just don't know.

I don't know all the facts yet. So it's an unknown for me. Like I said it's a lot to ask of a person. I mean, I have strong emotions about it because I've watched someone die, so you know, it's just -- it's a strong emotion for me.

MR. KEPHART: Okay. Now, with regards to your fellow jurors sitting next to you, Ms. Jackson asked him and seemed to be a little upset with him about the fact that he --

MS. JACKSON: Objection, said the characterization of

my question.

THE COURT: That sustained. That's sustained Ms. Jackson.

MR. KEPHART: As to the question about number 51 with regards that his answer in whether or not he would consider background and mitigating circumstances such as defendant's mental state and so forth and so on, he put somewhat, you put not sure. So you don't even think you'd be able to consider the circumstances?

PROSPECTIVE JUROR BADGE NO. 018: Can you read the question?

MR. KEPHART: Okay. It says in reaching a verdict in any penalty phase you must consider defendant's background. That is, mitigating circumstances such as defendant's mental state, childhood experiences, ingestion of drugs, alcohol abuse, lack of sleep, prior physical abuse, and neglect. You must also consider aggravating circumstances.

Do you feel you would consider these types of factors and circumstances? And you said, not sure.

PROSPECTIVE JUROR BADGE NO. 018: I think what I meant by that was I looked at the question a little bit. I grew up with 18 kids in my family. And we didn't live in the greatest place.

Like I said, a lot of them have been incarcerated. I grew up a little bit different even though we grew up in the

same household. My life went a different direction, so those things, although are important, I don't know how much they weigh in to this, but at the same time I understand -- I understand why my nephew was a gang banger, because of the way we grew up and for some people sometimes you have to find a way out. That was his way out. Mine was through sports. That's how I chose my avenue.

So although I do understand, I mean I grew up -- I could be very different. Some of my family members are. I went a different route. I was -- maybe I was lucky, I don't know. But I think when I said maybe it's because I kind of understand both sides.

I mean, out of 12 boys in my family, there's only three of us that have never been in prison so, and I'm one of them. So but, at the same time, when you grow in an environment where it's -- it's hostile and you've got to join a gang or get beat up, bullets are flying or whatever the circumstances may be, you've got to pick a path and hit the road.

And sports somewhat protected me from it. So it's -- it's difficult because I think I understand sometimes. I mean, it depends on where you -- what side of the street you grew up on.

MR. KEPHART: Okay.

PROSPECTIVE JUROR BADGE NO. 018: But at the same

time, I also know that I picked a different path. And so that it is possible, but -- but you can't discount it either until you've been in those shoes.

MR. KEPHART: In this particular case, do you perceive a circumstance in which you believe that you could consider and vote for the death sentence?

PROSPECTIVE JUROR BADGE NO. 018: Can you rephrase the question? I'm not sure I understand you?

MR. KEPHART: In this particular case, if you're chosen as a juror, and you're sitting in the jury, and the circumstances develop; do you believe that you could impose a death sentence on Mr. Walker if the circumstances are correct or what you want?

MS. JACKSON: Objection, Your Honor. He doesn't have to impose a death -- he does not have to impose a death sentence under any set of circumstances.

MR. KEPHART: Vote -- vote for the death sentence.

MS. JACKSON: It misstates the law.

THE COURT: All right.

MR. KEPHART: Well, I can -- I can ask him if he'd vote for the death sentence.

MR. BINDRUP: No.

THE COURT: I mean --

MR. KEPHART: I'm asking him if he -- if there's any circumstance that he could do it.

THE COURT: Well -- I, Mr. Kephart, I understand what you're asking. Basically I think the question is, are there any, and don't tell his they are, but is there any set of circumstances where you could conceivably chose the death sentence?

MS. JACKSON: Your Honor, for the record he's already given us one. He said he would even kill the person himself if someone was harming his children, so for the record he's already --

THE COURT: All right. Thank you, Ms. Jackson.

MS. JACKSON: -- given us at least one.

PROSPECTIVE JUROR BADGE NO. 018: Do you want me to answer that question?

THE COURT: Yes.

PROSPECTIVE JUROR BADGE NO. 101902253 13-0018: I'm sorry it was -- I lost my train with the confusion --

THE COURT: I think that was Ms. -- no. I mean, would you, when we say consider, I mean, a lot of people say oh, yeah I could consider it. But what they really mean is well, I'd -- I'd think about it, but I'd never actually pick it.

Is that what you mean when you say you'd consider or do you think that, you know, given the evidence and again don't tell us, you know, what the circumstances would be, but is that something that you could conceivably, given the right set of

circumstances pick or is it something that you believe that you would not ever under any circumstances be able to choose? I think that's really what Mr. Kep -- Mr. Kephart is that basically what you're asking?

MR. KEPHART: Heck yeah, that was well -- well placed, Judge.

THE COURT: Thank you, Mr. Kephart.

PROSPECTIVE JUROR NO. 018: Honestly, I -- I cannot say, because again I guess until I'm in that situation -- I know I have a civic duty to do. I will try to do that to the best of my ability, but I can't honestly tell you today it's -- it's --

THE COURT: Okay. And that's -- basically what we're looking for is someone who can keep an open mind as to all four possible punishments; 40 to 100 years, life with the possibility of parole, life without the possibility of parole, and as to Mr. Walker, the death sentence. Can you assure me that you'll keep an open mind?

PROSPECTIVE JUROR BADGE NO. 018: I can keep an open mind.

THE COURT: All right. Thank you. Mr. Kephart, go on.

MR. KEPHART: You indicated that you had a -- I don't know if I'm reading this right -- an NASD series seven and 63 license?

PROSPECTIVE JUROR BADGE NO. 018: Correct.

MR. KEPHART: What -- what is that? I was just --

PROSPECTIVE JUROR BADGE NO. 018: That a securities license. Stocks, bonds --

MR. KEPHART: Oh, okay. And that your job causes you to travel a lot?

PROSPECTIVE JUROR BADGE NO. 018: Well, that my new job (inaudible).

MR. KEPHART: Is that --

PROSPECTIVE JUROR BADGE NO.: I -- I am -- I still have my licenses, but I am no longer a practicing stockbroker after 2001.

MR. KEPHART: Okay. And then your job -- is there something coming up going to cause you to be -- I mean, you wrote on here it may cause you to do -- the trial may cause problems with your job.

PROSPECTIVE JUROR BADGE NO. 018: Yeah. In fact, it's -- I --

MR. KEPHART: Causing problems right now?

MS. JACKSON: Yeah. My new title, I am the state director of the coaching education and player development for Nevada. And there's is probably 18, 11-10 year olds waiting for me right now to be out at the fields. They're going to get there at six o'clock. I also have to be in a convention that I did buy a ticket for because of this because I didn't know if

the judge would say, too bad, so sad.

MR. KEPHART: Okay.

PROSPECTIVE JUROR BADGE NO. 018: So but it's not anything pressing. There's four national conventions that I'm supposed that give me new techniques how to help the kids.

MR. KEPHART: Okay. So you could basically set that aside for this trial?

PROSPECTIVE JUROR BADGE NO. 018: They would survive, yes.

MR. KEPHART: Okay. Are you going to be able to give us your attention on the case if you -- if you were here or would you be doing something with your job?

PROSPECTIVE JUROR BADGE NO. 018: Now, I mean what I do is a lot different. I mean, I -- I grew up with 11 kids and I -- through education and development technique and things like that so. And in fact, once I leave the field I like to leave the field there.

MR. KEPHART: Courts indulgence, Your Honor.

THE COURT: All right. Thank you, Mr. Kephart.

PROSPECTIVE JUROR BADGE NO. 018: Your Honor?

THE COURT: Yes.

PROSPECTIVE JUROR BADGE NO. 018: I -- I don't know if this is appropriate. I just have a question. I'm not sure; I think I may know the defense attorney. Is your first name Scott?

MR. BINDRUP: Yes.

PROSPECTIVE JUROR BADGE NO. 018: And you have a son James?

MR. BINDRUP: Yes.

THE COURT: Okay. Do you know Mr. Bindrup's son possibly through the youth athletic that you're involved with?

PROSPECTIVE JUROR BADGE NO. 018: Correct.

THE COURT: Okay. Have you ever -- do you kind of just recognize Mr. Bindrup or do you feel like maybe you've had conversations with him or is it more that you've seen him as a parent at some kind of athletic event?

PROSPECTIVE JUROR BADGE NO. 018: Well, I've seen him as a parent. I'm not sure if it was he or but we had a little, at the awards ceremony, was that you or another parent?

THE COURT: You are wrong to know what Mr. Bindrup may or may not have done. I think Mr. Bindrup's wondering. I mean basically whatever your interaction was --

MS. JACKSON: Did you moon the awards banquet?

THE COURT: -- Do you think that that would cause you to be biased in any way for or against Mr. Bindrup's client?

PROSPECTIVE JUROR BADGE NO. 018: No, but I had formulated an opinion.

THE COURT: All right. Now, and this is a question a lot of times the lawyers will ask and sometimes they address it in their closing statement, but it's very typical for either a

lawyer for the State or one of the defense attorneys to say, you know even if -- if I'd done something that you didn't -- when I say I, I'm not talking about me because it doesn't matter -- but you know, one of the lawyers from either side may say to you, you know if I've done something that you didn't like or you felt like their performance was substandard, would you be able to set that aside and only judge the case on evidence, the testimony from the witness, and the exhibits?

PROSPECTIVE JUROR BADGE NO. 018: Yes, I would.

THE COURT: Okay. So you could put -- because you know you, you don't know the other lawyers, but after you've been in here with for two or three weeks, you may have feelings about them and regardless of any feelings you may have about the lawyers would you be able to set that aside and strictly decide the case based on the evidence that's presented?

PROSPECTIVE JUROR BADGE NO. 018: Yes, I can.

THE COURT: All right. Thank you. Does anyone have any follow-up questions for Mr. Henderson based on that?

MR. BINDRUP: We're scared to ask.

PROSPECTIVE JUROR BADGE NO. 018: Your Honor?

THE COURT: Yes. We're about to take our -- our evening recess. I had hoped ladies and gentlemen to get further along today, but it's almost six o'clock. Were going to go ahead and take our evening recess. As I indicated earlier the Court has its civil calendar. I hope to be done

prior to 10:30.

I'm going to ask that you all report at 10:30 to jury services. I'm about to read some names. Please listen to see if your name is read. If you -- if you're name is read you are excused. You do not need to come back tomorrow. The rest of you do. Mr. Schaller, Mr. Blyveis, Mr. Romanski, Ms. Singh, Ms. Dotson, Ms. Harp, Ms. Barksdale, Ms. Granger, Ms. Solomon, and Mr. Virtuoso do not need to return tomorrow. You are excused.

Everyone else does need to return tomorrow at 10:30. Hopefully we'll move through this quickly so that those of you who will be excused do not need to spend the day here again tomorrow.

If anyone has any questions, please direct those questions to our bailiff. And once again everyone is -- everyone who was not excused by me -- excuse me; I'm not speaking. Everyone who is not excused by me must report back here at 10:30.

Additionally, before I excuse -- you leave the room, I am required by law to once again admonish you that during our evening recess you are not to discuss this case, any person, or subject matter connected with this case, with each other, or with anyone else.

You're not to read, watch, or listen to any reports of, or commentaries on this case, any person or subject matter

connected with this case, by any medium of information. Obviously include -- that includes the television news as well as the printed news media.

You are not to do any independent research by way of the computer on any subject connected with this case. Nor are you to visit the locations made mention of in connection with this case.

That concludes my admonished to you. You are all now free to leave the courtroom. And we'll see everyone back here at 10:30 tomorrow morning.

(Whereupon the proceeding adjourned at 5:40 p.m.)