No. _____

In the
Supreme Court of the United States

Donte Johnson,

Petitioner,

v.

William Gittere, et al.,

Respondents.

Petitioner's Application to Extend Time to File Petition for Writ of Certiorari

CAPITAL CASE

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To the Honorable Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Petitioner Donte Johnson respectfully requests that the time to file a Petition for Writ of Certiorari in this matter be extended for sixty (60) days, to and including February 23, 2024. The Nevada Supreme Court issued its decision in this case on June 29, 2023. *See* App. A. The Nevada Supreme Court denied Johnson's timely petition for rehearing on September 26, 2023. *See* App. B. Petitioner's current due date for filing a Petition for Writ of Certiorari is December 26, 2023. *See* Sup. Ct. R.

13.1, Sup. Ct. R. 13.3, Sup. Ct. R. 30.1.[1] Petitioner is filing this Application at least ten days before that date. *See* Sup. Ct. R. 13.5.

BACKGROUND

Donte Johnson was convicted and sentenced to death in 2000. His sentence was overturned on appeal. *Johnson v. State*, 59 P.3d 450 (Nev. 2002). In 2005, Johnson again received a death sentence; the Nevada Supreme Court affirmed. *Johnson v. State*, 148 P.3d 767 (Nev. 2006). Johnson's state postconviction petition was denied, which the Nevada Supreme Court affirmed. *Johnson v. State*, 402 P.3d 1266 (2017). After filing a federal postconviction petition, Johnson returned to state court to exhaust his claims. His state petition was denied, and the Nevada Supreme Court affirmed. *See* App. A.

This appeal arises from that affirmance.

REASONS FOR GRANTING THE EXTENSION

The time for filing a Petition for Writ of Certiorari should be extended for sixty days for the following reasons:

1. Randolph M. Fiedler, counsel of record for Petitioner has been unable to complete the Petition for Writ of Certiorari, despite diligent efforts to do so, due to his caseload and deadlines in other capital habeas matters. Specifically, since the Nevada Supreme Court's denial of rehearing, Mr. Fiedler has had the following deadlines: in *Vanisi v. Gittere*, No. 3:10-cv-00448-CDS-CLB (D. Nev.), a Second

[1] 90 days after September 26, 2023 is December 25, 2023, a federal holiday. *See* Sup. Ct. R. 30.1; 5 U.S.C. § 6103. Counsel is asking for 60-days from December 25, 2023, to February 23, 2024.

Amended Petition for Writ of Habeas Corpus on October 16, 2023; in *Welch v. Liggett* (a non-capital matter), No. 23-15200 (9th Cir.), a Reply Brief on November 3, 2023; in *Moore v. Gittere*, No. 2:13-cv-00655-JCM-DJA (D. Nev.), a Reply to Opposition to Motion for Evidentiary Hearing and a Reply to Opposition to Motion for Leave to Conduct Discovery on November 22, 2023. In addition to these deadlines, Mr. Fiedler has had extensive work related to a federal capital case in anticipation of filing a motion under 28 U.S.C. § 2255 in *Coonce v. United States*, No. 6:20-cv-0800-BCW (W.D. Mo.).

2. As a result of these obligations, Mr. Fiedler has been unable to complete the Petition for Writ of Certiorari and will not be able to dedicate sufficient time to completing the petition until after the current deadline. Granting the instant request for a sixty-day extension of time will allow Mr. Fiedler to complete the Petition for Writ of Certiorari no later than February 23, 2024.

3. The Court has consistently held that death is different: "[t]he taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights." *Reid v. Covert*, 354 U.S. 1, 45–46 (1957) (on rehearing) (Frankfurter, J., concurring); *see also Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (Stewart, Powell, Stevens, JJ., concurring) (plurality opinion) ("the penalty of death is different in kind from any other punishment imposed under our system of criminal justice."). Capital litigants should be given every reasonable opportunity to bring their claims of constitutional error before the courts.

4. The Petition for Writ of Certiorari that Mr. Johnson intends to file raises substantial questions of constitutional law related to the effective assistance of counsel both to investigate guilt issues and in ensuring appropriate jury instructions. *See* Sup. Ct. R. 10(a).

5. This application for an extension of time is not sought for the purposes of delay or for any other improper purpose, but only to ensure that Mr. Johnson receives competent representation in this matter.

Dated this 14th day of December, 2023.

Respectfully submitted,

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Appendix

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APPENDICES

APPENDIX A

Order of Affirmance, *Johnson v. State,* Supreme Court of the State of Nevada, Case No. 83796 (June 29, 2023)

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83796

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus.[1] Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

Appellant Donte Johnson was convicted for the robbery, kidnapping, and murder of four men. After finding Johnson guilty of four counts of first-degree murder with the use of a deadly weapon and associated offenses, the jury could not agree on the sentence for the murders. The case went to a three-judge panel, which sentenced Johnson to death for each murder. On direct appeal, this court upheld the convictions, vacated the death sentences, and remanded for a new penalty hearing. *Johnson v. State (Johnson I)*, 118 Nev. 787, 59 P.3d 450 (2002). On remand in 2005, a jury sentenced Johnson to death for each murder at a penalty phase retrial. This court upheld the death sentences on appeal. *Johnson v. State (Johnson II)*, 122 Nev. 1344, 148 P.3d 767 (2006). Johnson filed a timely postconviction petition for a writ of habeas corpus, and the district court denied the petition after an evidentiary hearing. This court

[1]The Honorable Elissa F. Cadish, Justice, did not participate in the decision of this matter.

affirmed. *Johnson v. State (Johnson III)*, 133 Nev. 571, 402 P.3d 1266 (2017). While the appeal from the denial of that postconviction petition was pending, Johnson filed a pro se petition that alleged actual innocence based on a codefendant's declaration that he lied to the police about Johnson's culpability. The district court denied the second petition and this court affirmed. *Johnson v. State (Johnson IV)*, No. 67492, 2018 WL 915534 (Nev. Feb. 9, 2018) (Order of Affirmance). Johnson then filed the instant petition (his third) raising collateral challenges to the convictions obtained during the first trial and the death sentences imposed in the 2005 penalty hearing. The district court denied the petition without conducting an evidentiary hearing. We affirm.

Johnson filed his petition in February 2019, over 11 years after the remittitur issued on his direct appeal following the 2005 penalty hearing retrial. The petition therefore was untimely under NRS 34.726(1). The petition was also successive because some of the claims he raised had been litigated on the merits in the first postconviction proceeding, and some of the claims constituted an abuse of the writ, NRS 34.810(2), or were waived because he raised new and different claims that could have been litigated in prior proceedings, NRS 34.810(1)(b). Petitions that are untimely, successive, or constitute an abuse of the writ are subject to dismissal absent a showing of good cause and prejudice. NRS 34.726(1); NRS 34.810(1)(b), (3). Because the petition was filed over five years after issuance of the remittitur from his direct appeal, NRS 34.800(2) imposes a rebuttable presumption of prejudice to the State. *See* NRS 34.800(1) (identifying two types of prejudice to the State). Thus, NRS 34.800 may bar the petition even if Johnson could show good cause and actual prejudice to satisfy NRS 34.726 and NRS 34.810. In addition, some of the claims raised

in the petition have been resolved in prior appellate proceedings and therefore further consideration of them is barred by the doctrine of the law of the case. *Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).[2]

Ineffective assistance of postconviction counsel

Johnson contends that he can demonstrate good cause and prejudice to overcome the procedural bars because of ineffective assistance of first postconviction counsel.[3] Ineffective assistance of postconviction counsel can be good cause for an untimely and successive petition when, as here, postconviction counsel was appointed as a matter of right. *See Crump v. Warden*, 113 Nev. 293, 303-05 & n.5, 934 P.2d 247, 253-54 & n.5 (1997). This court applies "the *Strickland*[ ] standard to evaluate postconviction counsel's performance where there is a statutory right to effective assistance of that counsel." *Rippo v. State*, 134 Nev. 411, 423, 423 P.3d 1084, 1098 (2018). To demonstrate ineffective assistance of counsel, a petitioner must show both deficient performance by counsel and resulting

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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. Cty of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 728-29 (2007) (quotation marks omitted).

[3]The State argues that Johnson should have litigated his postconviction counsel claims in his pro se second postconviction petition. But Johnson filed his second petition on October 8, 2014, during the pendency of his first postconviction appeal. Thus, claims of good cause based on first postconviction counsel's ineffectiveness were not available when Johnson filed his second petition. *See Chappell v. State*, 137 Nev. 780, 783, 501 P.3d 935, 946 (2021) (explaining that "the postconviction-counsel claim must be raised within one year after entry of a final written decision by the district court resolving all the grounds in the petition or, if a timely appeal was taken, the issuance of the appellate court's remittitur").

prejudice. *Id.* "And when a petitioner presents a claim of ineffective assistance of postconviction counsel on the basis that postconviction counsel failed to prove the ineffectiveness of his trial or appellate attorney, the petitioner must prove the ineffectiveness of both attorneys." *Id.* at 424, 423 P.3d at 1098. An evidentiary hearing is required when the petitioner raises claims supported by specific facts that are not belied by the record and that, if true, would entitle the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

"[A] reviewing court begins with the presumption that counsel performed effectively[,] [and] [t]o overcome this presumption, a petitioner must do more than baldly assert that his attorney could have, or should have, acted differently." *Johnson III*, 133 Nev. at 577, 402 P.3d at 1274 (internal citation omitted). "Instead, he must specifically explain how his attorney's performance was objectively unreasonable." *Id.*; *see also Evans v. State*, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001) (explaining that this court will reject conclusory ineffective-assistance claims), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015). Accordingly, Johnson's general assertion that first postconviction counsel was ineffective for not raising every possible claim misses the mark. Specifically, we are not persuaded by Johnson's contention that defense counsel has an obligation to raise all potential claims under the Nevada Indigent Defense Standards of Performance. *See* ADKT 411 (Order, Oct. 16, 2008) (Exhibit A, Standard 2-10(a)(1)) (explaining that defense counsel should exercise professional judgment and "consider all legal claims potentially available"). As the Supreme Court has explained, professional standards "are guides to determining what is reasonable, but they are only guides." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). It is not

objectively unreasonable for counsel to focus on the strongest claims that may warrant relief rather than bury those claims in a morass of every conceivable claim. *See Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (explaining that "every weak issue in an appellate brief or argument detracts from the attention a judge can devote to the stronger issues, and reduces appellate counsel's credibility before the court"); *Hernandez v. State*, 117 Nev. 463, 465, 24 P.3d 767, 769 (2001) ("Attempting to deal with a great many issues in the limited number of pages allowed for briefs will mean that none may receive adequate attention." (internal alteration and quotation marks omitted)). Rather, counsel should vet claims, prudently decide which claims to raise, and thoroughly advocate those claims counsel decides to raise. For the reasons discussed below, we conclude that Johnson has not alleged sufficient facts to demonstrate that first postconviction counsel provided ineffective assistance.

Jury issues

In claim 1 of his petition, Johnson alleged that first postconviction counsel should have challenged trial counsel's failure to adequately litigate an objection pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). Johnson failed to allege sufficient facts to demonstrate deficient performance by postconviction counsel. First postconviction counsel argued that appellate counsel should have raised the *Batson* issue, which this court rejected.[4] *Johnson III*, 133 Nev. at 578, 402 P.3d at 1275. And because trial

[4]To the extent that Johnson argues that first postconviction counsel failed to adequately challenge appellate counsel's omission of the *Batson* issue, he has not shown any of the "extraordinary circumstances" necessary to overcome the doctrine of the law of the case and warrant revisiting a prior decision. *See Hsu v. Cty of Clark*, 123 Nev. 625, 630-31, 173 P.3d 724, 729 (2007) (discussing exceptions to the doctrine). Likewise, we conclude that

counsel objected and, although unsuccessfully, attempted to traverse the State's race-neutral reasons as pretextual, we conclude first postconviction counsel pursued an objectively reasonable course of challenging appellate counsel's omission of the *Batson* issue. *See id.* at 133 Nev. at 576, 402 P.3d at 1273-74 ("[A]n attorney is not constitutionally deficient simply because another attorney would have taken a different approach."); *see also Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome."). Johnson also has not shown a reasonable probability of a different outcome had postconviction counsel challenged trial counsel's performance. Because the trial-counsel claim fails, the district court did not err in denying the postconviction-counsel claim without conducting an evidentiary hearing.

Johnson also argues that (1) his trial venire did not represent a fair cross section of the community, (2) the district court erred in denying his for-cause challenges, and (3) juror misconduct warrants a new trial. While Johnson discusses the merits of the claims, he concedes similar claims were raised and rejected in prior proceedings. *See* NRS 34.810(1)(b); *Johnson III*, 133 Nev. at 578-79, 402 P.3d at 1274-75 (rejecting claims that appellate counsel should have raised a fair-cross-section challenge and argued that the district court erred in denying Johnson's for-cause challenges); *Johnson I*, 118 Nev. at 796-98, 59 P.3d at 456-57 (upholding the denial of a motion for a new trial based, in part, on alleged juror

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Johnson's assertion that postconviction counsel should have raised the *Batson* issue independent from an ineffective-assistance-of-counsel claim lacks merit because postconviction counsel would have had to demonstrate good cause to raise an independent claim and Johnson identifies no such good cause. *See* NRS 34.810(1)(b), (3).

misconduct). However, Johnson contends that these jury issues individually and cumulatively constitute structural error, and this court's denial of relief in prior proceedings should excuse any procedural bar to raising them again now. Johnson does not provide any controlling authority to support his contention, *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."), and we decline his invitation to adopt a dissenting position from an unpublished disposition. Asserting an error constitutes structural error does not avoid the law-of-the-case doctrine or relieve Johnson of his burden to show good cause and prejudice to overcome the procedural bars. *See Thornburg v. Mullin*, 422 F.3d 1113, 1141 (10th Cir. 2005) ("[E]ven structural errors are subject to state procedural bars."). We conclude that Johnson has not demonstrated an impediment external to the defense that prevented him from complying with procedural rules. *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Therefore, the district court did not err in denying these claims without conducting an evidentiary hearing.

Guilt phase evidence

In claim 3 of his petition, Johnson alleged that first postconviction counsel omitted meritorious trial-counsel claims related to the evidence presented at trial.

Expert witnesses

Johnson argues that first postconviction counsel should have challenged trial counsel's failure to utilize defense experts. Johnson first contends that trial counsel should have retained an expert to explain the potential for police coercion of witnesses' voluntary statements. The decision not to call a witness at trial is within counsel's discretion. *See*

Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) (noting that "the trial lawyer alone is entrusted with decisions regarding legal tactics such as deciding what witnesses to call"). And here, trial counsel challenged the key witnesses' credibility without the speculative expert opinion advanced in the current petition. Furthermore, expert testimony about police interrogation tactics would have, at most, given the jurors another factor to assess the credibility of that testimony. *See McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) ("[I]t is the jury's function, not that of the [reviewing] court, to assess the weight of the evidence and determine the credibility of witnesses."); *Clark v. State*, 95 Nev. 24, 28, 588 P.2d 1027, 1029 (1979) (providing that expert "testimony is not binding on the trier of fact, and the jury was entitled to believe or disbelieve the expert witnesses"). Because physical evidence corroborates the testimony that Johnson was involved in the killings, it is unlikely that expert testimony casting doubt on the witnesses' pretrial statements would have led the jury to disregard the testimony presented at trial. Thus, Johnson has not demonstrated deficient performance and prejudice at the trial-counsel level, and he has not demonstrated that postconviction counsel provided ineffective assistance by omitting a meritorious issue.

Johnson also contends that a blood spatter expert could have explained that the blood on the back of his pants was likely transferred and not spatter from shooting the victims. The inference that Johnson would not get blood on the back of his pants after shooting the victims 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"). First postconviction counsel thus had no sound basis to challenge trial counsel's performance in that respect. In fact, trial counsel argued to the jury that the blood on the back of Johnson's pants meant he was not the shooter. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Cross-examination of prosecution experts

Johnson argues that postconviction counsel should have challenged trial counsel's cross-examination of the State's expert witnesses on the ground that it was inadequate. First, Johnson contends that trial counsel should have challenged the fingerprint expert's method of comparing fingerprints and his testimony that he could match a fingerprint with 100 percent accuracy. Rather than challenge the forensic evidence, trial counsel elicited testimony that it is impossible to determine when a fingerprint is made and argued to the jury that Johnson had previously sold the victims crack cocaine packaged in the cigar box, thus providing an alternative explanation for Johnson's fingerprint being on the cigar box. That approach was objectively reasonable, particularly when testimony suggested that the perpetrators may have worn gloves at the scene. Accordingly, Johnson did not allege sufficient facts to show that postconviction counsel neglected to raise a meritorious claim.

Next, Johnson contends that trial counsel should have undermined the State's firearms expert testimony that he was certain in his opinion that four bullet casings recovered at the scene were fired from the same weapon, which suggested that Johnson personally killed each victim. However, this court concluded that "the evidence produced at trial

overwhelmingly shows that Johnson was guilty of first-degree murder under the theories that the murders were willful, deliberate, and premeditated or were committed during the course of a felony." *See Johnson III*, 133 Nev. at 582, 402 P.3d at 1277-78; *see also Johnson I*, 118 Nev. at 797, 59 P.3d 450 at 457 (noting the overwhelming evidence connecting Johnson to the crime). Thus, even assuming trial counsel could have undermined the theory that Johnson personally killed each victim, he would be liable for the other murders under the felony-murder theory, making the death sentence available for the jury to impose. Accordingly, Johnson has not shown that he would have been granted relief had postconviction counsel raised this claim.

Next, Johnson contends that postconviction counsel should have asserted that trial counsel was ineffective for not challenging the pathology expert's testimony that the victims were shot at very close range. Johnson contends that during a different trial another pathologist testified that the gunshots were fired from a farther distance. Johnson has not shown that evidence that the victims being shot from a greater distance would have undermined the State's theory that he shot each victim. Accordingly, Johnson has not shown that he would have been granted relief had postconviction counsel raised this claim.

Finally, Johnson contends that postconviction counsel should have challenged trial counsel's failure to contest the DNA expert's assertions about the certainty of the testing results. This claim is belied by the record, which shows that trial counsel elicited testimony from the expert that nothing is certain and that false readings are always possible. And Johnson does not specify further impeachment that would have led to a

different outcome. Therefore, the district court did not err in denying this postconviction-counsel claim without conducting an evidentiary hearing.

Impeachment of witnesses

Johnson argues that postconviction counsel should have challenged trial counsel's failure to adequately impeach the State's lay witnesses. While he lists inconsistencies in the witnesses' testimony and prior statements, this court previously found that "defense counsel aggressively cross-examined each of the State's witnesses." *Johnson I*, 118 Nev. at 793, 59 P.3d at 454. Johnson has not shown that trial counsel's performance was deficient. Consequently, Johnson has not shown a reasonable probability of a different outcome had trial counsel further cross-examined these witnesses. Therefore, the district court did not err in denying this postconviction-counsel claim without conducting an evidentiary hearing.

Stolen VCR

Johnson argues that postconviction counsel should have challenged trial counsel's failure to object to the State's theory that he robbed the victims of a VCR. In support, Johnson cites a crime scene report that noted "[a] VCR, multi-play compact disk [in the victims' residence] had its back removed" and a photographic exhibit of an electronic device with its back panel removed. The superseding indictment charged Johnson with robbing the victims of personal property (money); thus, the robbery convictions did not hinge on the VCR theft. At trial, the evidence showed that Johnson stole other property, including a gaming console, a pager, and money. Thus, challenging the VCR theft would not create a reasonable probability of a different outcome, and the district court did not err in denying this claim without conducting an evidentiary hearing.

Guilt phase jury instructions

In claim 4 of his petition, Johnson alleged that first postconviction counsel should have raised claims that trial and appellate counsel failed to challenge or request several jury instructions.

First, Johnson argues that postconviction counsel should have claimed that trial and appellate counsel were ineffective for not challenging the felony-murder instruction because it improperly suggested that, by proving felony murder, the State conclusively proved premeditation, and lessened the State's burden to prove premeditated murder. Johnson has not shown that postconviction counsel omitted a meritorious issue. Even assuming error, Johnson cannot show a reasonable probability of a different outcome in the postconviction proceedings as his claim of error depends on the jury first finding him guilty of felony murder, making the killings first-degree murder. *See* NRS 200.030(1)(b). Therefore, the district court did not err in denying this postconviction-counsel claim.

Second, Johnson argues that postconviction counsel should have claimed that trial and appellate counsel were ineffective for not challenging the burglary instruction because it improperly created a presumption of burglarious intent. Johnson has not demonstrated deficient performance or prejudice because this court has approved the instruction based on NRS 205.065. *See Barlow v. State*, 138 Nev., Adv. Op. 25, 507 P.3d 1185, 1198-99 (2022). The district court therefore did not err in rejecting this postconviction-counsel claim.

Third, Johnson contends that postconviction counsel should have argued that the district court failed to instruct the jury that murder and kidnapping could not be predicates for one another and trial and appellate counsel were ineffective for not raising the issue. Johnson has not shown that counsel's performance was deficient or that he was prejudiced.

This court has recognized that dual convictions for murder and kidnapping may be warranted depending on the circumstances of the crime. *Pascua v. State*, 122 Nev. 1001, 1006, 145 P.3d 1031, 1034 (2006). Furthermore, even if a challenge had been made, Johnson cannot demonstrate prejudice because the jury convicted him of robbery, which independently supports the theory of felony murder. Therefore, the district court did not err in denying this postconviction-counsel claim.

Fourth, Johnson argues that postconviction counsel should have claimed that trial and appellate counsel were ineffective for not challenging the kidnapping instruction because it did not tell the jury that Johnson could not be convicted of the charge if the movement or restraint was incidental to the robbery. Postconviction counsel raised an ineffective-assistance claim based on the dual convictions for kidnapping and robbery. This court rejected the claim because "the victims were bound with duct tape, which prevented them from escaping or defending themselves" such that the dual convictions were proper. *Johnson III*, 133 Nev. at 581, 402 P.3d at 1277. Therefore, Johnson has not shown that postconviction counsel performed deficiently by failing to base the ineffective-assistance claim on instructional error.

Fifth, Johnson argues postconviction counsel should have claimed that trial and appellate counsel were ineffective for not challenging the robbery instruction because it failed to inform the jurors that the victims must have actual possession or a possessory interest in the property taken. Aside from the stolen electronics, the State presented evidence that Johnson and the other perpetrators removed the victims' wallets and stole the contents. A reasonable juror thus could infer that Johnson robbed the victims of their property. Therefore, Johnson has not shown that

postconviction counsel performed deficiently in omitting this ineffective-assistance claim based on error as to the robbery instruction.

Finally, Johnson argues that postconviction counsel should have claimed that trial and appellate counsel were ineffective for not challenging the aiding and abetting instruction because it failed to inform the jury about the requisite intent. We disagree because the latter portion of the challenged instruction informed the jurors that Johnson needed to act with the intent that the underlying crimes be committed. And the trial court properly instructed the jury about the requisite intent for the charged crimes. Therefore, Johnson has not shown that postconviction counsel performed deficiently by omitting ineffective-assistance claims based on this instructional error. We conclude the district court did not err in denying these postconviction-counsel claims without conducting an evidentiary hearing.

Nonunanimous verdicts

In claim 11 of his petition, Johnson alleged that first postconviction counsel should have argued that trial and appellate counsel were ineffective for failing to assert that the jury must unanimously agree on the theory of liability for murder. Given controlling Nevada law, Johnson failed to allege sufficient facts to demonstrate that first postconviction counsel omitted a meritorious issue. *See, e.g., Anderson v. State*, 121 Nev. 511, 515, 118 P.3d 184, 186 (2005) ("A unanimous general verdict of guilt will support a conviction so long as there is substantial evidence in support of one of the alternate theories of culpability."). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Penalty-phase-counsel claims

In claim 14 of his petition, Johnson alleged that first postconviction counsel omitted several alleged instances of trial counsel's

deficient performance during the 2005 penalty hearing retrial. First, Johnson contends that trial counsel should have challenged his guilt during the penalty hearing by moving to strike the multiple-murder aggravating circumstance. This court found that "[t]he State presented overwhelming evidence" of Johnson's guilt and affirmed the convictions before remanding for a new penalty hearing. *Johnson I*, 118 Nev. at 797, 806, 59 P.3d at 457, 463. Thus, trial counsel made the reasonable decision to focus on a mitigation case and asking the jury to spare Johnson's life. *See Florida v. Nixon*, 543 U.S. 175, 191 (2004) (providing that during the penalty phase of trial, "counsel's mission is to persuade the trier that his client's life should be spared"). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, Johnson contends that postconviction counsel should have asserted that trial counsel failed to adequately investigate and prepare for the penalty hearing. Johnson contends that trial counsel did not maintain a consistent defense theory and points to three inconsistent statements offered by his trial counsel team. Johnson asserts that trial counsel contradicted each other about the availability of drugs in prison. This court rejected a similar claim of ineffective assistance of counsel in the first postconviction appeal, *see Johnson III*, 133 Nev. at 585, 402 P.3d at 1280, and Johnson has not alleged what tack first postconviction counsel should have taken that would have resulted in a different outcome. Johnson also cites his trial counsel team making inconsistent comments about his level of involvement in the murders. To the extent their comments were inconsistent, the multiple-murder aggravating circumstance was proven by the jury's verdict. Because Johnson's guilt had been established, it was not objectively unreasonable for trial counsel to acknowledge the difficult facts

of Johnson's crimes, which this court described as "unprovoked, vicious, and utterly senseless." *Johnson v. State (Johnson II)*, 122 Nev. 1344, 1360, 148 P.3d 767, 778 (2006); *see also Yarborough v. Gentry*, 540 U.S. 1, 9 (2003) ("By candidly acknowledging his client's shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case."). The third inconsistency—the trial counsel team focusing on different mitigating circumstances—is not inconsistent. One member of the trial team discussed how Johnson's family loved him, and the other discussed Johnson's difficult, violent upbringing. Because presenting multiple mitigating circumstances is not objectively unreasonable, the district court did not err in denying this claim without conducting an evidentiary hearing.

Third, Johnson contends that postconviction counsel should have asserted that trial counsel should have interviewed Johnson's father for mitigation purposes. But postconviction counsel raised this claim in the first petition, trial counsel testified that the defense could not locate Johnson's father, this court rejected the ineffective-assistance claim, and reconsideration is barred by the doctrine of the law of the case. *See Johnson III*, 133 Nev. at, 583, 402 P.3d at 1278 (rejecting postconviction counsel's claim that trial counsel failed to present testimony from Johnson's father in mitigation). Because at least one juror found multiple mitigating circumstances based on Johnson's difficult childhood, he also has not demonstrated that his father's testimony would have added anything significant to what trial counsel presented at the penalty hearing. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Fourth, Johnson contends that postconviction counsel should have claimed that trial counsel should have utilized a trauma expert. Johnson has not shown a reasonable probability that such an expert would have altered the outcome of the penalty hearing. Even without hearing from a trauma expert, at least one juror found multiple mitigating circumstances related to Johnson's traumatic childhood, including that he grew up in a violent neighborhood, was neglected by his mother, and never had a positive male role model. Additional evidence about trauma also could have been detrimental, suggesting that Johnson was too dangerous to be afforded mercy. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (noting that mitigating evidence "can be a two-edged sword that" jurors might find to show future dangerousness). Johnson offers no reasoning that an expert opining about the effects of trauma would have created a reasonable probability of a different outcome at the penalty hearing. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Fifth, Johnson contends that postconviction counsel should have claimed that trial counsel was ineffective for not requesting a full neuropsychological battery and for retaining a neuropsychologist who testified in a codefendant's trial and thus had a conflict of interest. Postconviction counsel cannot be expected to uncover every potential claim or chase down every lead. *See Rompilla v. Beard*, 545 U.S. 374, 383 (2005) ("[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up."). Here, postconviction counsel challenged trial counsel's failure to obtain a PET scan, *Johnson III*, 133 Nev. at 583, 402 P.3d at 1278, and Johnson does not explain what other testing trial counsel should have obtained or explain how it would have led

to a reasonable probability of a different outcome at the penalty hearing. As to the argument about the neuropsychologist retained by trial counsel, Johnson himself waived any potential conflict with the neuropsychologist. Therefore, the district court did not err in denying this postconviction-counsel claim without conducting an evidentiary hearing.

Finally, Johnson argues that postconviction counsel should have challenged trial counsel's failure to object to the prosecution's presentation of evidence from the guilt phase of trial in the eligibility stage of the penalty hearing. NRS 175.552(3) permits the State to present evidence "concerning aggravating . . . circumstances relative to the offense."[5] Thus, it was not objectionable for the State to present such evidence, and the district court did not err in denying this postconviction-counsel claim without conducting an evidentiary hearing.

Weighing of aggravating and mitigating circumstances

In claim 24 of his petition, Johnson alleged that first postconviction counsel should have challenged trial counsel's failure to request a jury instruction applying the beyond-a-reasonable-doubt standard to the weighing of aggravating and mitigating circumstances and appellate counsel's failure to raise the issue based on dicta in *Johnson I*, 118 Nev. at

[5]To the extent Johnson contends that postconviction counsel should have challenged trial counsel's failure to object to the introduction of autopsy photographs, he has not shown that postconviction counsel omitted a meritorious claim. *See Archanian v. State*, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006) ("This court has repeatedly upheld the admission of autopsy photographs, even grisly ones, when they are used to demonstrate the cause of death and reflect the severity of wounds and the manner in which they were inflicted.").

802-03, 59 P.3d at 460.[6] In *McConnell v. State*, this court clarified that the weighing determination need not be found beyond a reasonable doubt. 125 Nev. 243, 254, 212 P.3d 307, 314-15 (2009). Given that *McConnell* was published during Johnson's first postconviction proceedings, postconviction counsel was not ineffective for omitting the issue. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Implicit bias

In claim 27 of his petition, Johnson alleged that postconviction counsel omitted a claim that trial counsel should have asked the trial court to screen for implicit bias and requested an instruction on its dangers and that appellate counsel should have raised this issue. Johnson fails to allege specific facts to show that implicit bias affected his trial. Therefore, the district court did not err in denying this postconviction-counsel claim without conducting an evidentiary hearing.

Prosecutorial misconduct

In claim 16 of his petition, Johnson alleged that postconviction counsel neglected to claim that appellate counsel should have argued the State improperly asked his brother-in-law about misdemeanor convictions.

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[6]Johnson also alleged that *Hurst v. Florida*, 577 U.S. 92 (2016), announced a new retroactive constitutional rule that the State had to prove beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating. Johnson concedes that this court has rejected his interpretation of *Hurst*, *see, e.g.*, *Castillo v. State*, 135 Nev. 126, 442 P.3d 558 (2019), but urges this court to reconsider the issue without any further analysis. We conclude he has not made a compelling case to overrule that precedent. *See Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013) ("Under the doctrine of stare decisis, we will not overturn precedent absent compelling reasons for so doing." (quotation marks and alterations omitted)).

The trial court sustained trial counsel's objection, effectively obviating any prejudice from the prosecutor's inquiry. *See Pantano v. State*, 122 Nev. 782, 794, 138 P.3d 477, 485 (2006) (concluding that defendant received the appropriate remedy "when the district court sustained his objection and granted his motion to strike" an improper statement). Accordingly, Johnson has not shown that postconviction counsel omitted a meritorious claim as there is no reasonable probability of a different outcome on direct appeal based on the district court's actions. *See* NRS 178.598 (harmless error standard). Therefore, the district court did not err in denying this postconviction-counsel claim without conducting an evidentiary hearing.

Juror misconduct

In claim 18 of his petition, Johnson alleged that first postconviction counsel should have raised a claim that appellate counsel failed to challenge alleged juror misconduct in the 2005 penalty hearing retrial. Johnson contends that the jury foreperson (1) informed other jurors that Johnson had been previously sentenced to death, (2) decided the sentence to impose before deliberations, and (3) planned to write a book about her experience. Trial counsel moved for a new trial and the trial court held an evidentiary hearing. At the end of the hearing, the trial court discussed the evidence presented, reviewed the foreperson's trial notes, and found that based on a totality of the circumstances there was no misconduct or prejudice. *See Meyer v. State*, 119 Nev. 554, 563-64, 80 P.3d 447, 455 (2003) (explaining that a defendant must "establish: (1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial" resulting in "a reasonable probability or likelihood that the juror misconduct affected the verdict"). Because the record supports the trial court's decision, Johnson has not shown a reasonable probability of success had first postconviction counsel challenged appellate counsel's failure to

raise the juror misconduct issue. Therefore, the district court did not err in denying this postconviction-counsel claim without conducting an evidentiary hearing.

Juvenile records

In claim 20 of his petition, Johnson alleged that first postconviction counsel should have claimed appellate counsel's challenge to the admission of his juvenile records under *Roper v. Simmons*, 543 U.S. 551 (2005), was inadequate. On direct appeal, this court rejected the claim and explained that "*Roper* did not prohibit the admission of juvenile records during a death penalty hearing." *Johnson II*, 122 Nev. at 1353, 148 P.3d at 773. Given that decision, which is the law of the case on the merits of the underlying issue, Johnson has not demonstrated that postconviction counsel performed deficiently in omitting this ineffective-assistance claim or that he was prejudiced by the omission. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Constitutionality of the death penalty

In claim 21 of his petition, Johnson alleged that execution by lethal injection constitutes cruel and unusual punishment. Johnson concedes this court has held that a challenge to Nevada's death penalty protocol is not a cognizable claim in postconviction proceedings. *See McConnell*, 125 Nev. at 249, 212 P.3d at 311 (explaining that a "challenge to the lethal injection protocol does not implicate the validity of the death sentence and therefore falls outside the scope of a post-conviction petition for a writ of habeas corpus"). While he urges this court to reconsider *McConnell*, he fails to provide any compelling reasons to do so. *See Nance v. Ward*, 142 S. Ct. 2214, 2219 (2022) (reaffirming that an action under 42 U.S.C. § 1983 is the appropriate vehicle for a method-of-execution challenge); *Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398

(2013). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Judicial bias

In claim 23 of his petition, Johnson alleged that postconviction counsel should have argued that appellate counsel inadequately challenged judicial bias during the direct appeal after the 2005 penalty hearing retrial. This claim is belied by the record given that Johnson makes the same argument that appellate counsel made—challenging former Justice Becker's impartiality due to her employment negotiations with the Clark County District Attorney's Office while Johnson's direct appeal was pending. *Johnson II*, No. 45456, at 1-2 (Nev. June 29, 2007) (Order Denying Motion). And this court determined "that the result would have remained the same regardless of [Justice Becker's] participation" in deciding Johnson's appeal. *Id.* at 2. Because Johnson fails to show that appellate and postconviction counsel were ineffective, the district court did not err in denying this claim without conducting an evidentiary hearing.

Waived claims

Johnson generally argues that postconviction counsel was ineffective for not raising numerous claims—alleged instances of prosecutorial misconduct in both phases of trial (claims 5 and 16); trial court errors in allowing the State to conduct a pretrial deposition, allowing speculative expert testimony, admitting inflammatory photographs, not screening jurors for implicit bias, questioning a juror during the first penalty hearing deliberations, and admitting evidence in violation of the Confrontation Clause (claims 6(C), (F)-(H), 9); Johnson's conviction violated double jeopardy (claim 8); imposition of the death sentences violated double jeopardy and due process (claim 13); instructional error in the penalty phase of trial (claims 15(A)-(D)); the jury did not determine Johnson was a major

participant in the murders (claim 19); judicial bias in both phases of trial (claims 23(A), (C)); Nevada's mandatory review of death penalty cases is insufficient (claim 23(D)); elected judges are biased (claim 23(E)); and evidence of Johnson's gang affiliation violated the First Amendment (claim 28). These claims are procedurally barred as they could have been raised in prior proceedings. NRS 34.810(1)(b). Accordingly, Johnson must demonstrate good cause and actual prejudice to raise these claims now. "To show 'good cause,' a petitioner must demonstrate that an impediment external to the defense prevented him from raising his claims earlier." *Pellegrini v. State*, 117 Nev. 860, 886, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018).

In his appellate brief, Johnson makes the general statement that first postconviction counsel's deficient performance resulted in prejudice because the above claims are meritorious. Thus, Johnson appears to assert ineffective assistance of postconviction counsel as good cause to raise these waived claims. However, the claims would have been subject to the same procedural bar had postconviction counsel asserted them in the first petition, and Johnson fails to allege how postconviction counsel could have demonstrated good cause and prejudice. Johnson does not allege that the factual or legal bases for the claims were not reasonably available to be raised at trial or on appeal, *id.* at 886-87, 34 P.3d at 537, nor that postconviction counsel should have raised them as trial- or appellate-counsel claims, *Thomas v. State*, 138 Nev., Adv. Op. 37, 510 P.3d 754, 763 (2022) ("[W]hen a postconviction-counsel claim is based on the omission of a trial- or appellate-counsel claim, 'the petitioner must prove the ineffectiveness of both attorneys.'" (quoting *Rippo*, 134 Nev. at 424, 423 P.3d

at 1098)). Instead, Johnson devotes this part of his appellate briefing solely to the substance of the waived claims. Therefore, Johnson fails to cogently argue that there was good cause for him to raise the waived claims now. *See Chappell v. State*, 137 Nev., Adv. Op., 501 P.3d 935, 950 (2021) (noting that this court has "ma[de] it clear that a petitioner's appellate briefs must address ineffective-assistance claims with specificity, not just 'in a pro forma, perfunctory way' or with a 'conclusory[ ] catchall' statement that counsel provided ineffective assistance" (quoting *Evans v. State*, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001))). Accordingly, Johnson has not demonstrated that review is warranted. *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.").

Disclosure of evidence

In claim 7 of his petition, Johnson alleged that the State withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). A *Brady* violation has three components: that "(1) the evidence is favorable to the accused, either because it is exculpatory or impeaching; (2) the State withheld the evidence, either intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence was material." *State v. Huebler*, 128 Nev. 192, 198, 275 P.3d 91, 95 (2012) (internal quotation marks omitted). The second and third components parallel the cause and prejudice showings required to excuse the procedural time bar. *Id.* But Johnson also had to raise the *Brady* claim within a reasonable time after it became available. *Id.* at 198 n.3, 275 P.3d at 95 n.3. This means he had to provide specific information about when he discovered that the State withheld the evidence. *Moore v. State*, 134 Nev. 262, 264, 417 P.3d 356, 359 (2018). Johnson has not done so. Furthermore, Johnson could have raised this claim in prior

proceedings and has not demonstrated good cause for raising it now. *See* NRS 34.810(1)(b), (3). Accordingly, the district court did not err in concluding that this claim was insufficient to overcome the procedural bars.[7]

Actual innocence

In claim 29 of his petition, Johnson alleged that he can overcome the procedural bars because he is actually innocent of the death penalty, as his age at the time of the offenses (he was 19 years old) combined with his poor intellectual functioning render him categorically ineligible for the death penalty. We recently rejected a nearly identical argument. *Thomas v. State*, 138 Nev., Adv. Op. 37, 510 P.3d 754, 775 (2022) (declining invitation to extend categorical exclusions "to defendants who were under the age of 25 at the time of the crime and those who suffer from borderline intellectual functioning"). Accordingly, Johnson does not demonstrate that a fundamental miscarriage of justice would occur if his procedurally barred claims are not considered on the merits. We therefore conclude that the district court did not err in denying this claim.

Cumulative error

In claim 30 of his petition, Johnson alleged that cumulative error warranted relief. He argues that this court must consider every claim—whether newly or previously raised—when addressing his claim of cumulative error. We have held that "[a] petitioner cannot turn to 'cumulative error' in an effort to relitigate claims that the court has rejected on the merits or to reach the merits of claims that are procedurally barred."

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[7]Johnson also contends that the State did not provide certain discovery in a timely manner. But he does not allege or demonstrate good cause and prejudice to raise this procedurally barred trial claim. NRS 34.810(1)(b).

Chappell, 137 Nev., Adv. Op. 83, 501 P.3d at 959. Accordingly, we reject Johnson's attempt to relitigate previously rejected claims or to avoid the procedural bars to newly raised claims under the guise of cumulative error.

Having concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Stiglich

_____, J.
Pickering

_____, J.
Herndon

_____, J.
Lee

_____, J.
Parraguirre

_____, J.
Bell

cc: Hon. Jacqueline M. Bluth, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

APPENDIX B

Order Denying Rehearing, *Johnson v. State*,
Supreme Court of the State of Nevada,
Case No. 83796 (September 26, 2023)

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83796

FILED

SEP 26 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.[1]

Stiglich, C.J.
Stiglich

Pickering, J.
Pickering

Herndon, J.
Herndon

Lee, J.
Lee

Parraguirre, J.
Parraguirre

Bell, J.
Bell

[1]The Honorable Elissa Cadish, Justice, did not participate in the decision in this matter.

cc: Hon. Jacqueline M. Bluth, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk