CAPITAL CASE
NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

BRYAN LEE HALL,

Petitioner,

v.

STATE OF NEVADA,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Nevada

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN LEE HALL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 88788

FILED
MAY 21 2026
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

A jury found appellant Bryan Lee Hall guilty of first-degree murder and robbery and sentenced Hall to death for the murder. This court affirmed the conviction and sentence on appeal. *See Hall v. State (Hall I)*, No. 62663, 2015 WL 6447296 (Nev. Oct. 22, 2015) (Order of Affirmance). Hall filed a timely postconviction habeas petition, which, among other claims, alleged that trial and appellate counsel should have challenged the admission of Hall's California juvenile records during the penalty phase of trial. On appeal from an order denying that petition, we affirmed in part, reversed in part, and remanded for an evidentiary hearing on the ineffective-assistance claim related to the admission of Hall's juvenile records. *Hall v. State (Hall II)*, No. 81994, 2022 WL 17543910, at *1-2 (Nev.

Dec. 8, 2022) (Order Affirming in Part, Reversing in Part and Remanding). After conducting an evidentiary hearing, the district court again denied the petition. This appeal followed.

Hall argues that the district court erred in concluding that trial and appellate counsel were not ineffective for failing to challenge the admission of the California juvenile records on either of two different theories: as violating the Fifth Amendment and as violating California law. We disagree and affirm.

To prove ineffective assistance of trial or appellate counsel, a petitioner must satisfy a two-prong test. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*); *Kirksey v. State,* 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996) (applying the *Strickland* test to claims of ineffective assistance of appellate counsel). First, the petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. Second, the petitioner must show resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Id.* Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. The petitioner must demonstrate the underlying facts by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). On appeal, we give deference to the district court's factual findings—if supported by substantial evidence and not clearly erroneous—but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Hall did not demonstrate ineffective assistance based on a violation of the Fifth Amendment

Hall asserts that counsel should have challenged the use of psychological evaluations in the California juvenile records on Fifth Amendment grounds. Because the evaluations were court-ordered, Hall contends counsel should have challenged the records under *Estelle v. Smith*, 451 U.S. 454 (1981). Hall has not demonstrated deficient performance for two reasons.

First, both trial and appellate counsel challenged the admission of the psychological records under *Redmen v. State*, 108 Nev. 227, 234, 828 P.2d 395, 400 (1992), *overruled on other grounds by Alford v. State*, 111 Nev. 1409, 906 P.2d 714 (1995). In *Redmen*, we explained that "psychiatric evidence purporting to predict the future dangerousness of a defendant is highly unreliable and, therefore, inadmissible at death penalty sentencing hearings." *Id.* We conclude trial counsel made a reasonable objection to the use of the psychological records at trial based on *Redmen*. *See Johnson v. State*, 133 Nev. 571, 576, 402 P.3d 1266, 1273-74 (2017) ("[A]n attorney is not constitutionally deficient simply because another attorney would have taken a different approach."). Because trial counsel preserved that alleged error, appellate counsel made a reasonable strategic decision to challenge the use of the psychological records on the same basis. *See Hall I*, 2015 WL 6447296, at *4; *see also Anderson v. United States*, 393 F.3d 749, 754 (8th Cir. 2005) ("The question . . . is not whether counsel's choice to omit the argument on appeal was an intelligent or effective decision, but rather whether [the] decision was an unreasonable one which only an incompetent attorney would adopt." (citation modified)).

Second, Hall has not shown that counsel omitted a clearly meritorious challenge. Hall relies on multiple cases recognizing that statements made during court-ordered psychological evaluations cannot be used against defendants at trial. *E.g., Estelle*, 451 U.S. 454; *Brown v. State*, 113 Nev. 275, 290, 934 P.2d 235, 245 (1997). In *Estelle*, the United States Supreme Court concluded that a psychiatrist's testimony stemming from the defendant's competency evaluation for trial was improperly used later during the defendant's penalty hearing because it violated the Fifth and Sixth Amendments. 451 U.S. at 463. In *Brown*, this court relied on *Estelle* to determine the district court abuses its discretion by basing the defendant's sentence on information obtained from a court-ordered competency examination conducted before trial. 113 Nev. at 288-90, 934 P.2d at 243-45.

Unlike *Estelle* and *Brown*, the psychological evaluation at issue here was conducted in an unrelated matter, many years before Hall was tried in the instant case. Thus, the evaluation was not being used to incriminate Hall for crimes already committed when the evaluation was conducted. *See United States v. Harvey*, 869 F.2d 1439, 1446 (11th Cir. 1989) ("In general, the privilege against self-incrimination only prohibits compelled testimony that might incriminate a witness for crimes he had already committed, or was in the process of committing, at the time the testimony was given."). Given this key distinction, Hall failed to demonstrate trial or appellate counsel's performance fell below an objective standard of reasonableness. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims."); *Kirksey*, 112 Nev. at 998, 923 P.2d

at 1114 (recognizing that appellate counsel is not ineffective for declining to raise meritless issues).

Hall did not demonstrate ineffective assistance based on a violation of California law

Hall further asserts that trial and appellate counsel should have challenged the introduction of the juvenile records based on California law. Relying on Cal. Welf. & Inst. Code § 827, Hall asserts the Nevada prosecutors were authorized to inspect the juvenile records but had to obtain a California juvenile court order to introduce the records at the penalty phase in the Nevada case. We conclude Hall did not demonstrate deficient performance because he did not show trial or appellate counsel would have been successful in excluding the California juvenile records using this approach.[1]

This court has repeatedly observed that juvenile records are relevant in the penalty phase of a capital trial. *See, e.g.*, *Johnson v. State*, 122 Nev. 1344, 1354, 148 P.3d 767, 774 (2006) (concluding defendant's "juvenile record was relevant to his character, revealing a pattern of escalating violent criminal behavior"); *Thomas v. State*, 138 Nev. 359, 372, 510 P.3d 754, 769 (2022) (rejecting a claim of ineffective assistance of counsel for the failure to challenge the admission of juvenile records given the holding in *Johnson*). And Hall presents no authority that requires Nevada courts to apply Cal. Welf. & Inst. Code § 827 in assessing the

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[1]Although the district court erred in determining trial counsel performed deficiently, we conclude the district court properly denied the claim on the prejudice prong. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) ("If a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal.").

admissibility of juvenile records in a capital penalty hearing. *Cf. In re Det. of Marshall*, 90 P.3d 1081, 1087 (Wash. Ct. App. 2004) (observing "no authority" for the proposition that "the prosecutor could obtain . . . [California] juvenile dependency records legally but that it could not provide them to its chosen expert witness"); Restatement (Second) of Conflict of Laws § 138 (2024) (explaining that "[t]he local law of the forum determines the admissibility of evidence").

Even assuming California law applied to the evidentiary issue, Hall has not demonstrated trial counsel could have successfully excluded the records at trial. Hall asserts Cal. Welf. & Inst. Code § 827 prohibits Nevada prosecutors from disseminating juvenile records to unauthorized persons, including jurors, without a California juvenile court order. *See People v. Thurston*, 198 Cal. Rptr. 3d 585, 603 (Ct. App. 2016) (noting that a person in receipt of juvenile records may not disclose information contained therein to an unauthorized person without court approval). As a result, Hall contends trial counsel acted objectively unreasonably by omitting an objection under California law. We conclude this argument lacks merit.

California precedent suggests an evidentiary objection based on Cal. Welf. & Inst. Code § 827 would not have resulted in a different outcome. For example, the California Court of Appeal determined that the erroneous dissemination of juvenile records without the required juvenile court order during an adult offender's resentencing was harmless. *See Thurston*, 198 Cal. Rptr. 3d at 610 ("No legitimate rationale supports appellant's effort to avoid the consequence of his juvenile adjudication by exploiting the fortuity of the procedural missteps that occurred here."). The *Thurston* court noted "[t]he privacy rights implicated were not those of a child, but of an adult

decades past the age of majority," attenuating the policy interest in preserving the confidentiality of the underlying information. *Id.* at 607. Consequently, the court found it "all but impossible to imagine that [the juvenile] court would not have released the records in question" had it been asked to do so. *Id.* at 606.

We see no meaningful distinction here. The California authorities released Hall's juvenile records upon request to the Nevada prosecutors. Even assuming the Nevada trial court required the prosecution to petition for a California juvenile court order, there is little doubt the petition would have been granted. *Cf. Marshall*, 90 P.3d at 1087 ("It would make no sense [for California] to provide these [juvenile records] to the prosecutor and then forbid him from using them at trial.").

Similarly, Hall has not shown that appellate counsel performed deficiently given that a successful challenge to the evidence was unlikely. *See Burnside v. State*, 131 Nev. 371, 402-03, 352 P.3d 627, 649 (2015) (finding no plain error in the admission of allegedly improperly obtained juvenile records). Thus, Hall has not demonstrated it was objectively unreasonable for counsel to not challenge the juvenile records under Cal. Welf. & Inst. Code § 827.

In sum, we conclude Hall failed to demonstrate ineffective assistance of trial or appellate counsel based on their failure to challenge the admission of the California juvenile records pursuant to the Fifth Amendment or California law. Accordingly, we conclude the district court did not err in denying this claim.[2] We therefore

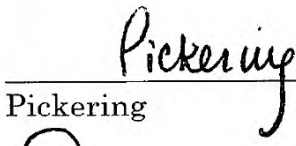
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[2]To the extent Hall argues the district court erred in applying the *Strickland* standard and the State did not demonstrate harmless error, we conclude the contentions are without merit.

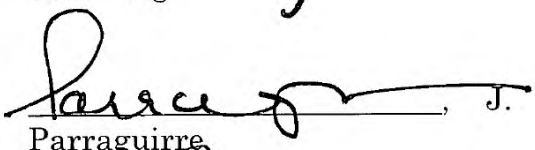
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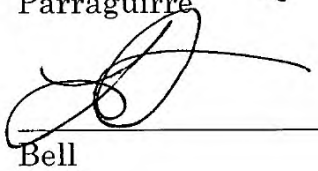
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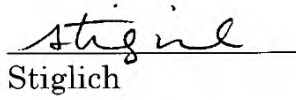
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Parraguirre



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Bell



_____, J.
Stiglich



_____, J.
Cadish



_____, J.
Lee

cc: Hon. Michelle Leavitt, District Judge
Karen A. Connolly, Ltd.
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Clark County District Attorney
Eighth District Court Clerk

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DISTRICT COURT
CLARK COUNTY, NEVADA

BRYAN L. HALL,
#1835435

Petitioner,

-vs-

STATE OF NEVADA,
Renee Baker, Warden, Ely State Prison;
James Dzurenda, Director, Nevada Department of Corrections;
Aaron Ford, Nevada Attorney General

Respondent.

Case No. 09C254922
Dept No. XII

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This cause having come on for hearing before the Honorable MICHELLE LEAVITT, District Judge, on July 30, 2020, the Petitioner, not appearing, represented by KAREN CONNOLLY, the Respondent being represented by STEVEN B. WOLFSON, District Attorney, through JOHN NIMAN, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, the Court makes the following findings of fact and conclusions of law:

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PROCEDURAL HISTORY

Bryan Hall was indicted, and a bench warrant for his arrest issued, on May 29, 2009. He was arraigned a few days later, on June 4, 2009, and attorney Jason Weiner was appointed to represent him.

On June 19, 2009, the State of Nevada filed a Notice of Intent to Seek Death Penalty. On July 20, 2009, Mr. Weiner filed a Motion to Withdraw as Counsel because Hall was unable to pay his fee. The motion was granted on July 30, 2009, and the Nevada Public Defender's Office was appointed and confirmed as counsel on August 4, 2009.

On August 6, 2009, the State filed a Notice of Motion and Motion to Grant Use and Derivative Use Immunity to Melissa Haw aka Melissa Paulsen (Hall's then-girlfriend or fiancé.) The Motion was granted on August 18, 2009.

On March 30, 2010, Hall moved to continue his trial date. The Motion was granted on April 13, 2010.

On October 4, 2010, Hall filed a Motion to Allow the Accused to be Married. The State Opposed the motion on October 6, 2010. Hall filed a Response on October 12, 2010. Hall's Motion was granted October 14, 2010.

On March 1, 2011, Hall moved to continue his trial date a second time. The Motion was granted on March 15, 2011. On July 26, 2011, Hall moved for a third continuance of his trial date. The Motion was granted on August 4, 2011. On April 18, 2012, Hall filed a fourth Motion to Continue Trial. The motion was granted on April 26, 2012.

Between September 21, 2012, and October 15, 2012, Hall and the State filed a flurry of pre-trial motions. Hall filed (1) Motion to Strike "Lying-In-Wait" First Degree Murder Theory, (2) Motion to Strike Aggravating Circumstances, (3) Defendant's Notice of Expert Witnesses, Pursuant to NRS 174.234(2), (4) Motion to Bar the Admission of Cumulative Victim Impact Evidence in Violation of the Due Process Clause, (5) Motion to Compel Production of Defendant's Direct and Vicarious Statements, (6) Motion in Limine to Preclude the State from Moving to Admit Into Evidence Photographs Prejudicial to Bryan Hall, (7) Motion to Allow the Defense to Argue Last at the Penalty Phase, (8) Motion for Discovery

and/or Brady Material, (9) Opposition to State's Motion to Admit Bad Acts, and (10) Defendant's Notice of Witnesses, Pursuant to NRS 174.234.

The State filed (A) Notice of Expert Witnesses [NRS 174.234(2)], (B) State's Opposition to Defendant's Motion to Strike "Lying in Wait" Theory of First Degree Murder, (C) State's Opposition to Defendant's Motion to Strike Aggravators, (D) Notice of Rebuttal Expert Witnesses [NRS 174.234], (E) Notice of Intent To Seek Death Penalty (outlining evidence in support of aggravating circumstances during penalty phase), (F) Notice of Motion and Motion to Admit Evidence of Other Crime, Wrong or Act, (G) Notice of Witnesses (NRS 174.234)(1)(a), (H) State's Opposition to Defendant's Motion in Limine to Preclude the State from Moving to Admit into Evidence Photographs Prejudicial to Bryan Hall (I) State's Opposition to Defendant's Motion to Bar the Admission of Cumulative Victim Impact Evidence in Violation of the Due Process Clause, (J) State's Opposition to Defendant's Motion to Allow the Defense to Argue Last at the Penalty Phase, (K) State's Opposition to Defendant's Motion to Compel Production of Defendant's Direct and Vicarious Statements, and (L) State's Opposition to Defendant's Motion for Discovery and/or Brady Material.

On October 9, 2012, the District Court denied defense motions 1 and 2. On October 16, 2012, the District Court denied defense motions 4 and 7. The Court also denied without Prejudice State's Motion F. The District Court granted defense motions 5 (to the extent required by NRS 174.235) and 8 (as required by specific discovery statutes.) The District Court reserved ruling on defense motion 6.

Hall's jury trial began on October 22, 2012, nearly three and a half years after he was indicted. On November 7, 2012, the jury found Hall guilty of First Degree Murder With Use of a Deadly Weapon and Robbery With Use of a Deadly Weapon. Penalty Phase began immediately on November 7, 2012, and on November 9, 2012, Hall was sentenced to death. The jury found two aggravating circumstances: (1) That the murder was committed by a person who had been convicted of a felony involving the use or threat of violence to the person of another, to wit: Battery Resulting In Substantial Bodily Harm, and (2) that the murder involved the torture and/or mutilation of the victim. The jury also found nine mitigating

circumstances, all related to Hall's familial ties. Hall was sentenced on February 21, 2013, and the Judgment of Conviction was filed February 21, 2013. An order of Execution and Warrant of Execution was filed the same day.

Hall filed a timely Notice of Appeal and appealed his Judgment of Conviction to the Nevada Supreme Court. Exhibit 1, Volume III at 2865-67. On April 7, 2014, Hall filed a lengthy Opening Brief challenging the sufficiency of the evidence presented, alleged court errors related to the introduction of Hall's juvenile court records and the Court's refusal to allow Hall to introduce evidence of Hydrocodone in Flamm's body, and alleging prosecutorial misconduct. Exhibit 2.[1] The Nevada Supreme Court affirmed Hall's conviction, and the propriety of his death sentence, rejecting all of Hall's arguments. Exhibit 5.[2] Hall moved the Nevada Supreme Court for rehearing, and the Nevada Supreme Court denied his request. Exhibits 6 and 7.[3] Remittitur issued May 9, 2016.

On May 26, 2016, Hall filed a bare-bones Petition for Writ of Habeas Corpus, Motion to Appoint Counsel, and Motion to Stay Execution of Judgment Pursuant to NRS 34.820(1). Hall filed a verified Post-Conviction Petition for Writ of Habeas Corpus on June 8, 2016. Counsel confirmed and was appointed on June 16, 2016. After numerous continuances, Hall filed a Supplement to Petition for Writ of Habeas Corpus on August 26, 2019. On August 27, 2019, Hall filed a Request to Seal Supplement to Petition for Writ of Habeas Corpus (Post Conviction.) The State opposed the Request on August 28, 2019, and the District Court denied it on September 17, 2019.

The State responded to the Petition for Writ of Habeas Corpus and Supplement thereto on March 18, 2020. Hall filed a Reply to the State's Response on June 25, 2020, and an Amended Reply on June 26, 2020.

On July 2, 2020, Hall filed a Motion to Disqualify the Clark County District Attorney. The State filed an Opposition thereto on July 8, 2020. On July 14, 2020, this Court heard

[1] Exhibit 2 is not Bates stamped, but contains Appellant's Opening Brief.
[2] Exhibit 5 is also not Bates stamped, but contains the Order of Affirmance.
[3] Exhibits 6 and 7 are not Bates stamped, but contain the Petition for Rehearing and Order Denying Rehearing, respectively.

argument on the Motion to Disqualify and denied the motion. An Order denying the Motion was filed on July 15, 2020.

On July 30, 2020, this Court heard argument regarding Hall's Petition for Writ of Habeas Corpus and Supplement and took the matter under advisement. Hall filed a Supplement to Oral Argument on July 31, 2020. On September 1, 2020, this Court denied Hall's Petition and Supplement via minute order. This Findings of Fact, Conclusions of Law, and Order follow.

UNDERLYING FACTS

On the night of Mother's Day 2009, and going into early the next morning, Bryan Hall ("Hall" or "Petitioner") robbed and murdered Bradley Flamm ("Brad" or "Flamm") by striking Brad with his fists, stabbing Brad in the neck, slitting Brad's throat, ramming Brad's head against the pavement, strangling Brad with his tie, slamming a full paint can into Brad's face, and crushing Brad's skull with a landscaping rock. Only minutes before, Brad had been at his place of employment—Trevi restaurant at the Forum Shops of Caesar's Palace on the Las Vegas Strip—getting off his shift as a server. His girlfriend, Melita Coie, was a manager at the restaurant and observed Brad in his typically chipper mood as he cashed out and waited to pick up some dinner. Exhibit 1, Volume II 1543-54. Servers at Trevi normally leave with about $100-$200 in tips at the end of a shift. Id. Another co-worker and friend of Brad's, Michael Brownell, worked in the restaurant kitchen and gave Brad a chicken dinner to take home. Brownell also saw that Brad was in a good mood, as usual. Id. at 1918-27. Brad exited the Forum Shops just before midnight on May 10, 2009.

Brad's body was found deposited in some shrubbery near the exit by janitorial staff the next morning. Id. at 1570-72; Exhibit 1, Volume III 2895 (diagram). Detectives and crime scene analysts from the Las Vegas Metropolitan Police Department arrived at about 8 a.m. The scene was covered in blood—on the ground and on all four walls adjoining it. Exhibit 1, Volume II 1583-90. Blood splatter patterns indicated splatter from forceful impact, from the cast-off from the objects that created the forceful impact, and wipe stains. Hair was deposited on the wall, indicated Brad's head made impact there as well. There was also a drag-pattern

blood stain indicating that Brad had been dragged about 7 to 8 feet from the initial attack scene to the secondary attack scene in the shrubbery. Id. at 1704-46. A paint can was found nearby, which was covered in blood and prints. One of the many injuries to Brad's skull matched the proportions of the bottom of the can. Id. at 1730-35. Next to Brad's body was a bloody dollar bill and inside his pockets were two quarters. Id. at 1681. Those pockets were turned inside out "rabbit-ear" style and his orange tie was turned around and so tight on his neck that it appeared it was used as a garrote. Id. at 2082-84.

Detectives met with a Trevi cook, Michael Brownell, and watched the surveillance videos around Caesar's and the Forum Shops. Id. at 1918-27. From those videos, Brownell recognized Bryan Hall from his large size, his mannerisms, and the way he walked. Id. Brownell could recognize Hall because Hall used to work at Trevi and was a former friend of Brad's. In fact, Brad also worked with Hall's girlfriend, Melissa Paulsen, and Brad had a brief romance with her. Melissa's car was also seen on the surveillance video picking Hall up after he committed the murder. Brad's blood was found inside Melissa's car when it was processed, Id. at 1817, and, after Hall was arrested, pictures of his injuries to his hands, legs, face and neck were taken, Id. at 1927-33.

Crime scene analysts testified that Hall's prints and Brad's DNA were found on the bloody paint can, Id, at 1626-36, 1796-1800, and Brad's DNA was also found on a bloody river rock found at the scene, Id. at 1809. Dr. Jaqueline Benjamins was the medical examiner in the case and testified to the injuries that Brad suffered. Id. at 1840-79. The cause of death was multiple blunt-force and sharp-force injuries. Brad's entire face was blackened from bruising and dried blood and his entire lower lip was almost severed from the repeated application of trauma. All of the injuries he suffered were antemortem or peri-mortem (around the time of death). Id. His left ear was split open, also due to application of blunt-force trauma. His brain was concussed due to the application of force and bruising covered his entire head. Brad had been stabbed in the neck three times and had his neck cut vertically twice. Brad's right eye socket collapsed and his thyroid cartridge and hyoid bones were destroyed, likely

due to being strangled by the tie. Id. Brad's also had injuries to his hands and arms consistent with defensive wounds. Id.

A composite of surveillance videos was played for the jury and showed that the attack endured for about 30 minutes. Id. at 2097-2108. At one point some 25 minutes into the attack, Hall leaves the scene to go pick up the large river stone and brings it back to the attack site. Id.

Hall testified in the defense's case-in-chief. He admitted that he killed Brad and admitted that the individual on the surveillance video was him. Id. at 2288-2358. Hall's version of events was that after getting into a spat with his girlfriend, he wandered over to the Forum Shops to see if a former co-worker would give him a ride home. While waiting, he coincidentally ran into Brad, who immediately made a comment questioning the paternity of Hall's and Melissa's child. According to Hall, this so enraged him that he attacked Brad first with his fists, then with the paint can, knife, and tie. As he was leaving the scene, he explained that he saw the river rock and that renewed his anger, so he returned with the rock to do some more damage. Id.

Melissa then came to pick him up from the murder scene. At some point that night after returning home, Hall's best friend Alex Sellers brought him back to the scene of the crime for a reason that remained unexplained. Hall then disposed of his clothes and knife the next day by bagging them and throwing them away in a park. At the close of evidence, the defense argued that this was a crime of passion and urged the jury to convict Hall of voluntary manslaughter or, at most, second-degree murder. Id. at 2491-2515. The jury declined and found Hall guilty of first-degree murder under both a premeditated, willful, and deliberate theory and a theory of lying-in-wait. The jury also found him guilty of robbery.

At the penalty hearing, the jury was presented with evidence that, as a teenager, he tormented and sexually assaulted a younger teenage boy, an act for which he expressed no remorse. Id. at 2622-43. Hall had also been convicted of felony battery-domestic violence of his wife and the uncharged acts of violence he committed upon her. Id. at 2646-57. The jury also heard from another of Hall's victims, Nahum (Alex) Robles. Id. at 2662-72. Nahum had

a friendship and a sexual encounter with Hall in 2006-07. When Robles told someone else about the encounter, Hall lured Nahum back to Nahum's house and attacked him. Hall held Nahum in a strangulating chokehold in front of a mirror so that Nahum "could watch himself die." Id. Nahum lost consciousness but fortunately survived. In mitigation, Hall presented testimony from and letters from his daughters and other family. At the conclusion of the hearing, the jury found the torture or mutilation and the prior-felony aggravators, several mitigating circumstances relating to his family, and elected a sentence of death.

FINDINGS

I. Standards of Review

a. Trial Counsel

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine

whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's

conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (*citing* Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064-65, 2068).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (Emphasis added).

Unsupported arguments and baseless assertions are suitable for summary dismissal. 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."); State v. Haberstroh, 119 Nev. 173, 187, 69 P.3d 676, 685-86 (2003) ("[c]ontentions unsupported by specific argument or authority should be summarily rejected on appeal.") (internal citations omitted); Jones v. State, 113 Nev. 454, 468, 937 P.2d 55, 64 (1997) (holding that Jones' unsupported contention should be summarily rejected on appeal).

A defendant who contends that his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004). Such a

defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. United States v. Porter, 924 F.2d 395, 397 (1st Cir. 1991), quoting United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989). "Where counsel and the client in a criminal case clearly understand the evidence and the permutations of proof and outcome, counsel is not required to unnecessarily exhaust all available public or private resources." Molina, 120 Nev. at 192, 87 P.3d at 538. Further, it is well established that a claim of ineffective assistance of counsel alleging a failure to properly investigate will fail where the evidence or testimony sought does not exonerate or exculpate the defendant. See Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989).

There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision-making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970).

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

b. Appellate Counsel

As with trial counsel, there is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); *citing* Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314. Appellate counsel is "not ineffective for omitting a particular claim—even a claim supported by existing law—to focus on claims with a better chance of success." Johnson v. State, 133 Nev. 571, 576, 402 P.3d 1266, 1274 (2017), reh'g denied (Jan. 19, 2018). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)); Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1994)("[A] petitioner may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker."). Accordingly, appellate counsel cannot be ineffective for refusing to raise ineffective assistance of counsel claims on direct appeal because the Nevada Supreme Court "declines to address such claims on direct appeal unless the district court has held an evidentiary hearing on the question or an evidentiary hearing

would be unnecessary." Rippo v. State, 122 Nev. 1086, 1096, 146 P.3d 279, 286 (2006)

II. Hall Waived All Substantive Claims Not Alleging Ineffective Assistance of Counsel

> NRS 34.810(1) reads:
>
> The court shall dismiss a petition if the court determines that:
>
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> . . .
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings…. [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

Hall asserts substantive claims related to "prosecutorial misconduct" through the introduction of his juvenile mental health records, asserts that elected judges and "judicial bias" render his conviction invalid, and that the death penalty is unconstitutional. Supplemental Petition at 48-86; 120-23. These substantive claims are waived for failure to raise them on direct appeal. Hall asserts that Pertgen v. State permits him to raise claims that would be waived for failure to raise the claims on appeal. 110 Nev. 554, 560, 875 P.2d 361, 364 (1994), abrogated by Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001); Supplemental Petition at 50-51. This argument fails for several reasons. First, Pertgen is limited to "the unique circumstances of [that] case" and is not a generally applicable exception to NRS 34.810(1), Franklin, or Evans. Id. Second, Pertgen reserved the right for the *Nevada Supreme*

Court to "review apparently meritorious issues" involving "plain error or issues of constitutional dimension." Id. Third, Pertgen permitted the Court to review those claims "on the merits *to determine whether appellant received ineffective assistance of counsel."* Id. (emphasis added) Fourth, and most importantly, Pertgen was explicitly abrogated by Pellegrini v. State. 117 Nev. 860, 882, 34 P.3d 519, 534 (2001). Pellegrini disapproved of the language in Pertgen, and Pertgen is no longer good law.

> This language confuses the waiver analysis as it applies to claims of ineffective assistance of counsel. Pertgen incorrectly indicated that procedural bars for waiver are applicable to claims of ineffective assistance of counsel initially brought in a first post-conviction proceeding. Ineffective assistance of counsel claims are properly raised for the first time in a timely first post-conviction petition; thus, the cause and prejudice analysis is not necessary in determining whether these claims are appropriately considered on the merits.

Id. Moreover, Pellegrini explicitly stated the first three points – that Pertgen stood for the proposition that the Nevada Supreme Court might review ineffective assistance of counsel claims on direct appeal, not whether claims that should have been raised on direct appeal are substantively reviewable on the merits in a timely, first post-conviction petition for writ of habeas corpus. Id. at 883-84. ("Pertgen failed to make a crucial distinction: trial court error may be appropriately raised in a timely first post-conviction petition in the context of claims of ineffective assistance of counsel, but independent claims based on the same error are subject to the waiver bars because such claims could have been presented to the trial court or raised in a direct appeal.") Hall's reliance on Emmons v. State, 107 Nev. 53 (1991) is flawed for the same reasons.

Hall's claims may be reviewed to determine whether trial or appellate counsel were ineffective under Strickland and its progeny. They may not be reviewed substantively outside of that context, and the claims are denied to the extent they are so-raised.

III. Hall's Ineffective Assistance of Counsel Claims Related to Juvenile Records Introduced During Penalty Phase Do Not Demonstrate Deficiency or Prejudice

Hall alleges, initially as a substantive "prosecutorial misconduct" issue, or as a claim that this Court erred, and later as an ineffective assistance of counsel claim, that Hall's juvenile records were improperly admitted. Supplemental Petition at 48-76, 101. Hall's substantive

claims are waived. See Section II, *supra*. His ineffective assistance of counsel claims are meritless for the following reasons:

a. California Law is Irrelevant to Nevada Evidentiary Rules

Hall asserts that he was not provided notice under the California Evidence Code that his juvenile records were provided to the State. Supplemental Petition at 51-52. He further asserts that the State was required to obtain juvenile court permission prior to disseminating the records. Id. at 52-58. Hall provides no authority showing that the California Evidence Code has any power in Nevada, that it is applicable in any way whatsoever to Nevada evidentiary codes or the admissibility of evidence, or that he is entitled to any relief even assuming he is correct.

Hall, his counsel, and his mitigation expert were provided with the exact same records as both this Court and the State. State's Exhibit A. Hall cites to Clay v. Eighth Judicial District Court for the proposition that the State is not permitted to inspect juvenile records, but, like the previously cited Pertgen case, Clay is no longer good law. 129 Nev. Adv. Op. 91, 313 P.3d 232 (2013). The cited Clay decision was reconsidered, the opinion was withdrawn, and a new opinion was issued. Clay v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, 12 Nev. Adv. Op. 91, 313 P.3d 232 (2013), reconsideration granted, opinion withdrawn, No. 62770, 2014 WL 4243641 (Nev. June 23, 2014), and on reconsideration, No. 62770, 2015 WL 2169967 (Nev. May 7, 2015). The revised unpublished opinion denied the petition for writ of mandamus and held the juvenile records could be used in a capital penalty hearing, but is neither precedential nor persuasive authority. NRAP 36(c)(2)-(3).

Hall's citation to Johnson v. State, however, demonstrates why use of Hall's juvenile records was permissible. Johnson v. State, 122 Nev. 1344, 148 P.3d 767 (2006). Johnson reiterated that evidence, including juvenile records, is admissible at the District Court's discretion as long as it is relevant and the risk of unfair prejudice does not substantially outweigh its probative value. Id. at 1353, 148 P.3d at 774. In Johnson, evidence of Johnson's "records and testimony regarding his participation in and conviction for the armed bank robbery in California in 1993 as a 15–year–old gang member and his subsequent successes

and failures in the CYA program for juvenile offender [and] his subsequent absconding from that program's parole a few years later" was admissible to show his character which revealed "a pattern of escalating violent criminal behavior that began with his participation in an armed bank robbery and culminated in the quadruple murder he committed in this case" Id. The Nevada Supreme Court held that the evidence "had significant probative value, showing not only his propensity for violence and gang involvement but also his amenability to rehabilitation—all relevant considerations in the determination of his sentence." Id. The Johnson Court also cited with approval Domingues v. State, which held evidence of juvenile records "proper and permissible in a penalty phase hearing." 112 Nev. 683, 696-97, 917 P.2d 1364, 1373 (1996).

Moreover, even assuming that (1) California law did somehow require either the State or this Court to request permission from a California juvenile court prior to releasing the records and (2) the State was otherwise permitted to inspect, but not use those records generally, even the California Court of Appeals has held that the use of juvenile records in sentencing for an adult outweighs any putative privacy interests of the defendant. See generally People v. Thurston, 244 Cal. App. 4th 644, 675, 198 Cal. Rptr. 3d 585, 606 (2016), as modified on denial of reh'g (Feb. 11, 2016). Under California Welfare and Institutions Code section 827, "the trial court, the prosecutor, and appellant were entitled to inspect appellant's juvenile file without a court order (Welf. & Inst. Code, § 827, subd. (a)(1)(A), (B), (C))." Id. The California Court of Appeals held that where a prosecutor was attempting to prove juvenile adjudication for the purposes of resentencing a then-adult defendant under the California Three Strikes Law, the "privacy rights implicated were not those of a child, but of an adult decades past the age of majority, whose past criminal history–including certain juvenile adjudications–was made relevant by the legislation governing the present proceeding. The public interest … clearly militates in favor of release." Id. at 676-677; 198 Cal. Rptr. 3d 607-608. The Court further held that "because the records at issue are appellant's own and appellant is not a minor in need of the juvenile court's protection, the need for the special sensitivity and expertise of the juvenile court is highly attenuated." Id. The same considerations apply in this

case: Hall was not a juvenile when he committed murder, or when he was convicted of and sentenced to death based on that murder, the records retrieved were his own, and any privacy rights Hall may have had under California law, even assuming California law applied, were outweighed by the public interest of showing his lack of remorse for heinous juvenile crimes.

To the extent Hall is asserting substantive claims of prosecutorial misconduct or court error, the claims are waived. See Section II, *supra*. To the extent that Hall's claims can be construed as ineffective assistance of either trial or appellate counsel, neither counsel could have been deficient for (1) failing to argue that inapplicable California law provided any remedy to Hall, particularly where Hall's counsel and mitigation expert received the records in exactly the same manner as the State, (2) citing to bad law, or (3) citing to Johnson, which explicitly permitted the introduction of juvenile records in penalty phase proceedings. Even if trial or appellate counsel had lodged a frivolous objection, this Court, and the Nevada Supreme Court, would have denied the objection for want of authority supporting Hall's position. Accordingly, Hall demonstrates neither deficiency or prejudice under Strickland with regard to these claims, and the claims are denied.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994). It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing."). Because determining whether California law applies to the introduction of evidence in Nevada is a purely legal question, this claim does not require additional factual investigation or an evidentiary hearing. Witness testimony on the point would add nothing to this Court's determination of the issue and is, therefore, unwarranted. Hall's request for an evidentiary hearing on these claims is denied.

b. Neither Doctor-Patient Privilege Nor Clinical Professional Counselor-Client Privilege Applies and Neither Could Have Been Asserted

Hall's argument related to "psychotherapist-patient privilege" cites little relevant case law. Supplemental Petition at 58-61. NRS 49.215 relates to the doctor-patient privilege which is largely inapplicable, but does include as a "doctor" a "psychiatric social worker" NRS 49.215(2). NRS 49.2502 is the "Clinical Professional Counselor and Client" privilege.[4] A "Clinical Professional Counselor" is "a person who describes himself or herself or his or her services to the public by any title or description which incorporates the term "clinical professional counselor" and under such a title offers to provide or provides services to any person." NRS 49.2502(2); NRS 641A.031.

L.C. Miccio-Fonseca, Ph.D., interviewed Hall and is a licensed clinical psychologist, not a "clinical professional counselor." Exhibit 1, Volume III at 3092. Hall was referred to L.C. Miccio-Fonseca, Ph.D., "to determine psychological state and the need for treatment." Id. L.C. Miccio-Fonseca, Ph.D., indicated that treatment would likely be useful, but Hall was not receptive to treatment. Id. at 3102-03.[5] Hall was also evaluated by Sallee Kraics, LCSW Casework Specialist. Id. at 3141. A Licensed Clinical Social Worker Casework Specialist is not a "Clinical Professional Counselor." A report was also prepared by Rob Winter, Youth Correctional Counsel, who also is not a "Clinical Professional Counselor." Id. at 3172-75. Moreover, nothing in this report indicates that Mr. Winter evaluated Hall for either diagnosis or treatment, but rather as an "Annual Review." Id. Hall was also evaluated by Richard Ancheta, another Youth Correctional Counselor. 3194-3200; 3211-16; 3226-32; 3238-45, 32478-45. This evaluation also appears to have been an "Annual Review." Id. Hall was also evaluated by Dr. C.T. Gruen, "Staff Psychologist, Clinical CF" – also not a "Clinical Professional Counselor." Id. at 3204-07; 3218-20. Hall was also evaluated by Deborah Leong, Ph.D., "Staff Psychologist, Clinical" – also not a "Clinical Professional Counselor." 3261-71. Because Hall was not evaluated by, and none of the reports were authored by, a "Clinical Professional Counselor," NRS 49.2502-NRS 49.2508 does not apply.

NRS 49.209 states that "[a] patient has a privilege to refuse to disclose and to prevent

[4] Hall cites to NRS 49.502, but presumably means this section. Supplemental Petition at 60.
[5] The California Court of Appeal was not restricted in quoting the reports in an unpublished opinion *while Hall was still a juvenile*. Exhibit 3 at 3158-64.

any other person from disclosing confidential communications between the patient and the patient's psychologist or any other person who is participating in the diagnosis or treatment under the direction of the psychologist, including a member of the patient's family." (emphasis added)

Hall's records were not "confidential," both because they were required to be disclosed to a third party (the California juvenile court) and because they were actually disclosed, at his request, to his counsel and mitigation specialist in contemplation of their use during the penalty phase of the instant case. NRS 49.207(1); State's Exhibit A at 3-6, 8-9, 13-16. As this occurred before the State used the records, the records were no longer confidential and, therefore, could not be suppressed.

However, Hall's records lost any confidential nature they may have had even prior to that. In Meador v. State, Meador objected to his psychologist testifying as to their communications. 101 Nev. 765, 768–69, 711 P.2d 852, 855 (1985), disapproved of by Talancon v. State, 102 Nev. 294, 721 P.2d 764 (1986) (disapproved on other grounds related to double jeopardy.) The Nevada Supreme Court held that the records were not confidential because the psychologist informed Meador that the consultation was made at the request of the Navy, and that "the privilege was inapplicable [because] NRS 49.215 defines a confidential communication as one 'not intended to be disclosed to third persons.' Since appellant knew that Dr. Little was talking to him at the Navy's request, The Nevada Supreme Court concluded that he must have known that the information would be transmitted to third persons. Therefore the privilege was inapplicable and the admission of Dr. Little's testimony was proper."

Hall's psychological report was made part of the Probation Officer's Social Study to the court for the underlying charges as a juvenile. Exhibit 1, Volume III at 3111, 3114. The juvenile Court in fact considered the report and it was admitted into evidence. Id. at 3118. Hall's report was also provided and considered for a clinic report dated November 26, 1997. Id. at 3136, 3139-40. The California Court of Appeals, Fourth Appellate District, Division One was, likewise, furnished the report and considered the report as part of an appeal that Hall filed. Id. at 3158-63. Hall additionally filed a Petition for Modification of Court Ordered

Placement At The California Youth Authority where he again referenced and included the psychological report. Id.at 3181-87. Thus, as in Meador, Hall's psychological evaluation was not confidential because it was "intended to be disclosed to third persons," and was, in fact, disclosed to third persons, several times of his own accord.

Even if Hall's records were confidential, an exception to the general rule prevents him from asserting the privilege. NRS 49.213(7) (There is no privilege … "For communications made in the course of a court-ordered examination of the condition of a patient with respect to the specific purpose of the examination unless the court orders otherwise.") As Hall asserts, his juvenile examinations were "court-ordered" and were required to be disclosed to the juvenile court for the court to make a determination as to the continued treatment of Hall in the California Youth Authority. Once the records were so disclosed, they became a part of his juvenile correctional record and were no longer subject to any privilege preventing disclosure. The records were, therefore, required to be disclosed subject to state law, implicating yet another exception to the general privilege. NRS 49.213(4).

Hall cites to Esquivel v. State, which held virtually without rationale that statements made to a court appointed physician should not later be used against a defendant. 96 Nev. 777, 778, 617 P.2d 587, 587 (1980); Supplemental Petition at 60-61. Esquival was impeached during the guilt phase of a non-capital trial, and decisions since Esquival indicate that the Nevada Supreme Court has retreated from such a blanket holding. McKenna v. State, decided shortly after Esquival, largely follows the same rational. 98 Nev. 38, 39, 639 P.2d 557, 558 (1982). In Estes v. State, the Nevada Supreme Court clarified previous jurisprudence related to the use of statements from court-ordered mental examinations, including the Esquival and McKenna cases. 122 Nev. 1123, 1131, 146 P.3d 1114, 1120 (2006). However, the Court analyzed the statements from a Fifth and Fourteenth Amendment analysis, not an assertion of privilege under NRS 49.215. Accordingly, the cases cited from Nevada are inapplicable.[6]

Because Hall's records were not confidential, and several exceptions applied even if

[6] But see Section III(c), *infra*, refuting the claims that counsel should have objected under the Fifth and Fourteenth Amendments and analyzing Estes in that context.

the records were confidential, Hall could not prevent the disclosure or use of the records under either the doctor-patient or clinical professional counselor-client privilege. Because neither privilege was applicable, neither trial nor appellate counsel were deficient for electing not to argue that it was. However, trial and appellate counsel both argued that the records should not be used under an alternative theory which, if successful, would have resulted in the same outcome. Both this court and the Nevada Supreme Court rejected that theory. See Section II(e), *infra*. Accordingly, Hall has demonstrated neither deficiency nor prejudice under Strickland, and the claims are denied. Because these claims are a purely legal question, no evidentiary hearing is warranted on the claims.

c. Hall's Juvenile Statements Were Not Incriminatory, So the 5th Amendment Does Not Apply

Hall asserts that self-incriminating statements made while he was evaluated in the California Youth Authority were provided to the jury in violation of the Fifth Amendment. Supplemental Petition at 61-62. Hall does not identify any allegedly incriminating statements, and none of the statements in the reports were incriminating.

The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." Dzul v. State, 118 Nev. 681, 684–85, 56 P.3d 875, 877 (2002). The Fifth Amendment serves to protect persons from being "compelled to incriminate themselves." Id. at 685, 56 P.3d at 878. Incriminating means "[d]emonstrating or indicating involvement in criminal activity." INCRIMINATING, Black's Law Dictionary (11th ed. 2019). An incriminating statement is "[a] statement that tends to establish the guilt of someone, [especially] the person making it." STATEMENT, Black's Law Dictionary (11th ed. 2019).

Hall also asserts that he should have been *Mirandized* prior to any statements made during his psychological evaluations. Supplemental Petition at 62-64; Miranda v. Arizona, 348 U.S. 436 (1966). Hall cites to United States v. Antelope in support of this proposition, but Antelope does not support Hall's proposition. 395 F.3d 1128 (9th Cir. 2005). The Antelope

court held that "[t]o establish his Fifth Amendment claim, Antelope must prove two things: (1) that the testimony desired by the government carried the risk of incrimination, ... and (2) that the penalty he suffered amounted to compulsion." Id. at 1134. The Fifth Amendment privilege is only properly invoked in the face of "a real and appreciable danger of self-incrimination; … [i]f the threat is remote, unlikely, or speculative, the privilege does not apply ...." Id. (internal citations removed.) The Antelope Court cited Neal v. Shimoda, 131 F.3d 818, 833 (9th Cir.1997), which held that a prison treatment program requiring inmates to admit guilt of the crime for which they were imprisoned did not violate the Fifth Amendment because double jeopardy and the terms of their plea agreement insured that "no admission ... could be used against them". Id. To the extent that Antelope is applicable, it explains why Hall's statements were not protected by the Fifth Amendment – he had already been convicted of the crimes he spoke about, and no further prosecution was reasonably likely. Whereas Antelope was required to admit to "all past sexual criminal offenses," some of which could be prosecuted based on those admissions, Hall was not required to admit to anything. Id. at 1135. Moreover, Antelope demonstrates why Hall was not *compelled* to answer questions during his psychological interviews. Antelope explained that "an individual choosing silence does not get a free pass against all possible repercussions." Id. The court cited to Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 286, 118 S.Ct. 1244, (1998), which explained that "a state clemency board may draw "adverse inferences" from an inmate's failure to testify on his own behalf at a clemency hearing" without violating the Fifth Amendment. Here, even assuming that Hall is correct that he would have suffered adverse inferences if he chose not to make any statements, those adverse inferences are insufficient to show that he was compelled to make any statements. Moreover, Hall is not correct – even though he chose to make statements, he was found unsuitable for parole until four days prior to the end of his sentence, and failing to speak would have resulted in no worse outcome.

Hall cites to a number of cases which held that a defendant's Fifth Amendment rights were violated where a defendant was required either to expose himself to prosecution for uncharged crimes, or was compelled to make statements, pre-trial, for the crimes for which he

was awaiting trial. *See Generally* Supplemental Petition at 63-64. Welch v. Com., 149 S.W.3d 407, 409 (Ky. 2004), cited by Hall, is not binding, nor is it persuasive because the statements made by the appellant in that case related to *uncharged* crimes that resulted in further criminal prosecution. ("As a result of his statements, Appellant was charged with the offenses herein.") Supplemental Petition at 63-64. Estelle v. Smith, 451 U.S. 454 (1981), held a psychologist's testimony regarding a pre-trial psychological examination of a defendant made without a Miranda warning or the presence of counsel cannot be used to argue future dangerousness during the penalty phase of that crime. Estelle, at 467, 101 S.Ct. at 1875. Petrocelli v. Baker, 869 F.3d 710, 729 (9th Cir. 2017), as amended (Aug. 23, 2017), cited by Hall, is a straightforward application of Estelle. Supplemental Petition at 64. However, neither case is applicable to Hall for at least two reasons. First, Hall was not examined immediately prior to his trial, and none of the statements made related to any crime for which he had not already been found guilty when he made the statements. Second, none of Hall's statements were used to demonstrate that he was a future danger.

The Nevada Supreme Court has soundly rejected Hall's Miranda claim. In Dzul, the Nevada Supreme Court held that "while the right against self-incrimination clearly attaches at a court-ordered presentence psychosexual evaluation, a defendant is not entitled to Miranda warnings prior to the evaluation. Accordingly, we conclude that Dzul's constitutional rights were not violated by the lack of Miranda warnings prior to his interviews with Dr. Slagle and Pacalt. Thus, he is not entitled to a new sentencing hearing based on this contention." Dzul v. State, 118 Nev. 681, 687, 56 P.3d 875, 879 (2002). Dzul's statements were made after he was convicted, but prior to his sentence to determine the severity of his sentence. Hall's evaluations were even further attenuated than a presentence evaluation, which in Dzul's case might have impacted his sentence, because Hall was not evaluated until *after* he was sentenced for his juvenile crimes. Like Dzul, Hall "was informed in advance that the psychosexual evaluation was for the purpose of determining his sentence" or, in Hall's case, that he was being evaluated so that the court could determine whether to end his sentence early. Id. at 686, 56 P.3d at 878. Like Dzul, Hall "never invoked his right against self-incrimination," and never "objected or

refused to submit to the psychosexual evaluation when he was interviewed." Id. at 686-87, 56 P.3d at 878-79. Moreover, like Dzul, Hall was Mirandized when he was arrested for committing the crimes that placed him in the California Youth Authority. Exhibit 1, Volume III at 3082 ("Detective Brothers read each suspect their [M]iranda rights. Each suspect (Bryan Hall, Ryan Rogers and Brandon Stewart) sought an attorney and did not want to give a statement.") Dzul further explained that even if Hall were correct, and his silence would have led to a worse outcome in terms of his being released later, and Hall had decided to remain silent anyway, "the reduced likelihood of being granted probation for refusing to admit guilt during the psychosexual evaluation do not present the "classic penalty situation" that renders the Fifth Amendment self-executing." Dzul at 692, 56 P.3d at 882.[7] In the absence of a self-executing Fifth Amendment right, Hall was required to affirmatively exert the right, and he did not.

In Estes v. State, the Nevada Supreme Court held that "a defendant is generally entitled to protection from admission of un-Mirandized incriminating statements made to health care professionals in the context of a court-ordered evaluation or examination," unless the defendant seeks to introduce an evaluation, or portion of it, in support of a defense implicating his mental state, in which case the prosecution is allowed to use the evaluation to rebut the defense. Estes, 122 Nev. 1133, 146 P.3d 1121. In reviewing each of the prior cases, as well as Estes, the focus was on incriminatory statements from those reports tending to show (or outright admitting to) the crime for which the defendant was on trial during the guilt phase of that trial.

Hall's psychological records were not incriminating in any sense. To the extent they related to the crimes he committed that resulted in his placement in the California Youth Authority, he had already been adjudicated guilty of those crimes and faced no further

[7] Hall's arguments that his statements were compelled under the Fifth Amendment are foreclosed by this holding. Supplemental Petition at 65-66. Dzul specifically addressed, and found inapplicable, the only controlling case law cited by Hall, Minnesota v. Murphy, 465 U.S. 420 (1984). Dzul at 690-93. Murphy is also inapplicable because it led to admission of previously uncharged conduct rather than the admission of convicted conduct as in Hall's case. Id. ("In *Murphy*, when the defendant's probation officer questioned him about admissions he had made during the course of treatment regarding an uncharged rape and murder, the defendant confessed to those crimes.")

prosecution. None of the statements memorialized in the reports incriminated him in Flamm's murder, as that murder was more than a decade away from occurring when the statements were made and none of the statements in any way related to it. The reports were, additionally, used in penalty phase, not in the guilt phase, and so the statements could not possibly have been used by the jury to incriminate Hall because they had *already* found him guilty without the statements. Even assuming, *arguendo*, that a statement could be "incriminating" with respect to an aggravating circumstance, neither any statements Hall made that were contained within the reports themselves, nor the underlying crimes of which he was adjudicated that put him in the California Youth Authority were aggravating circumstances for the jury to consider. The only purpose for which the reports were introduced, and the only argument the State made from the reports, was that Hall was not remorseful for those crimes, despite having attended programming classes while incarcerated as a juvenile. Not being remorseful is not a crime.

Hall does not identify any specific statements which should have been excluded, and it is clear, as the Nevada Supreme Court's analysis in Estes shows, that even if some specific statements were objectionable, large portions of reports made by non-psychologists, or which "[do] not reveal their confidential communications other than by inference" are permissible. Estes, 122 Nev. at 1135, 146 P.3d at 1123. Moreover, Estes analyzed testimony made by psychiatrists and whether that testimony ought to be excluded, not whether *reports* generated and presented to a court previously could also be introduced where no psychologist testifies.

Assuming Hall is complaining about portions of the reports read to the jury, his claims fail.[8] The State, through their testifying investigator, read portions of a psychological evaluation created June 19, 1997, into the record. Exhibit 1, Volume III 2633-37. Virtually all the report read to the jury was the impressions of the psychologist, not statements made by Hall. The first statement attributable to Hall was "I just made some bad choices." Id. at 2635. The other statement attributable to Hall was "I'm not gay. I've got a girlfriend that I'm in love with. I am not gay. I've had a – I've had girlfriends. I think – I didn't think that the things I

[8] These are the only portions of the reports identified in the Supplemental Petition. Supplemental Petition at 67-71.

was doing to Sheldon was sexual. I didn't do it because it turned me on. I just wanted to really humiliate him. I don't know why. I just wanted to humiliate him." Most of the statement is not incriminatory, and to the extent that either statement is understood as an admission of the crimes that place him in the California Youth Authority, he had already been adjudicated guilty of those crimes. From an addendum to an annual report, dated December 19th, 2000, the jury learned that Hall "states that he takes full responsibility for his actions." Id. at 2640. He also "has stated that he has – that he changed the required amount on McCloud Hall, so there is no reason for future – or for further treatment." Id. at 2641. Neither of those statements are incriminatory for the same reasons. A portion of a psychological report from Debra Leon, Ph.D., was read to the jury, but that contained her recommendations and observations, not any statements Hall made. Id. at 2642-43. On cross-examination, Hall elicited a statement that he had self-reported that he was not sexually abused. Id. at 2645.

Finally, the statements Hall made were not used to show he was a future danger or that the jury should sentence him to death based on his future dangerousness. This Court, during the guilt phase, specifically held that statements Hall made, while a juvenile, were not relevant to future dangerousness and that the State could not argue that point. Exhibit 1, Volume II at 2567-72; 2610-18.

> THE COURT: The State of Nevada is allowed to argue the future dangerousness of a defendant based upon the instant -- in this case based upon the instant murder alone. They don't need anything else. … But … these psychological records are when he was a juvenile, and they're giving recommendations clear back in 1997 about something completely different. So I don't think the jury would be able to use these to predict his dangerousness in a prison setting. It would be inappropriate.
> MR. O'BRIEN: Well, it --
> THE COURT: And it'd be inappropriate for the State to argue that.

Exhibit 1, Volume II at 2617. Hall does not demonstrate that the State ever argued that Hall was a future danger based on his juvenile psychological records, and the State followed the order of this Court and did not make any such argument. *See generally* Exhibit 1, Volume II at 2789 – Exhibit 1, Volume III at 2802 (State's Closing Argument, which does not mention future dangerousness); Exhibit 1, Volume III at 2821-25 (State's Rebuttal Argument, which mentions future dangerousness at 2824-25, but only indicates that it's a factor for the jury to

consider.)[9]

As Hall does not identify any allegedly incriminating statements, he has not demonstrated that any statements were compelled or incriminating, or that trial counsel was deficient for failing to object that the statements were incriminating, or that appellate counsel was deficient for failing to argue the point on appeal. Hall was not prejudiced by the introduction of the statements because they were not an aggravating circumstance which led to the imposition of the death penalty, and he was not prejudiced by appellate counsel's failure to raise the claim on appeal because the claim is meritless. Because whether the Fifth Amendment or Miranda applies to the statements Hall alleges were introduced in error is a purely legal question, neither an evidentiary hearing nor counsel's testimony would assist the Court in the resolution of these claims and are, therefore, unwarranted. Accordingly, the claims are denied without the need for an evidentiary hearing.

d. Counsel Was Not Deficient For Not Objecting to the Introduction of Hall's Juvenile Records Under NRS 62H.025

In Hall's reply brief, and again at oral argument, Hall asserted that trial and appellate counsel were deficient for failing to object to the introduction of Hall's juvenile records under NRS 62H.025. Amended Reply To State's Response To Supplement To Petition For Writ Of Habeas Corpus (Post-Conviction) at 6-10; Petitioner's Motion to Disqualify Clark County District Attorney, July 14, 2020 at 4. Hall fails to demonstrate deficient performance of either trial or appellate counsel as NRS 62H *et seq.* was not enacted until July 1, 2013, after the date of Hall's trial. Counsel could not have objected to the introduction of juvenile records under a law which did not yet exist. Hall also failed to demonstrate the even if NRS 62H were applicable, that there was any error in providing the records to the jury. Finally, Hall fails to demonstrate prejudice, as he has not demonstrated that in light of the entire penalty phase the

[9] On appeal, Hall argued that the State used the juvenile records to indicate that he was a future danger. Exhibit 2 at 27-31. The State, in its Answering Brief, argued that the records were introduced to show lack of remorse, not future danger. Exhibit 3 at 17-19. Hall again argued that the reports were used to argue future dangerousness in his Reply Brief. Exhibit 4 at 6-7. The Nevada Supreme Court did not find that the State had argued future dangerousness. Exhibit 5, at 2, 8. Hall again reasserted that the State had used the psychological reports when he argued that the Nevada Supreme Court should rehear his case. Exhibit 6 at 5-7. The Nevada Supreme Court denied the Petition for Rehearing without comment. Exhibit 7.

jury would probably have returned a different verdict, or that this Court would have granted the objection, had counsel so objected. Because this is a legal analysis capable of review on the existing record, no evidentiary hearing is warranted.

IV. Hall Failed to Demonstrate Deficiency or Prejudice Where Trial Counsel Did Not Object, and Appellate Counsel Did Not Allege, Prosecutorial Misconduct Where the State Represented That Hall Was a "Sexual Sadist" and Was Diagnosed With Antisocial Personality Disorder

Hall claims both trial and appellate counsel were ineffective for failing to object to, or to raise on appeal, the State's opening argument during penalty phase that Hall was a "sexual sadist" and had "anti social personality disorder." Supplemental Petition at 76-85, 102-03. To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process. The statements should be considered in context, and "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004). The substantive prosecutorial misconduct claims are waived. See Section II, *supra*. The ineffective assistance of counsel claims are reviewed under Strickland.

During the opening statement for penalty phase, the State said:

> "You'll see in the documentation that the defendant refused to participate in counseling. He's in the juvenile justice system adjudicated guilty and is in there for several years, as you can imagine. He's assessed to be a couple things; one, a sexual sadist, two, a violent offender. The defendant is assessed as being an antisocial disorder, an antisocial personality disorder. He's assessed by them to be a risk to the community. And they have a very chilling exit evaluation with the defendant, that based upon their assessment of his lack of willingness to involve himself in treatment and his complete rejection of showing remorse and emotion for what he did, their evaluation of the defendant ends as he leaves the custodian -- custodianship of the Youth Authority in California."

Exhibit 1, Volume II at 2251-52. Hall asserts, correctly, that he was not determined to be a sexual sadist, and faults trial counsel for not objecting. The State admitted in its response to Hall's Petition, and in argument before this Court, that Hall was not determined to be a "sexual sadist" or diagnosed with "anti-social personality disorder."

Hall, rather, was found in a June 19, 1997, report to have had "participated in sexually sadistic behaviors that, if continued, may have had lethal results," and was found to have "a

number of elements of that of a sexual sadist." Exhibit 1, Volume III at 3099, 3102. Similarly, Hall was not diagnosed with (or as an) antisocial personality disorder, but was found to be "often extremely annoyed by little inconveniences, frustrations, or disappointments; he will frequently be uncooperative, disobedient, and resistant when faced with rules and regulations. He negatively reacts against discipline and criticism. Bryan expresses attitudes markedly different from common social codes. He is prone to depart from the truth and behave in an unethical and untrustworthy manner. Bryan feels little to no guilt." Id. at 3101-02. Hall also was found to be "a high risk for antisocial behaviors, including sexual offending." Id. at 3102.

Ultimately, a psychologist stated that:

> "Bryan's case is unusual when compared to many of the youthful sex offender cases that come to the attention of the law. In his case in light of the violent, aggressive sexual behaviors, Bryan has a number of elements of that of a sexual sadist. As is defined in the Diagnostic Statistical Manuel (DSM-IV), a sexual sadist is involved in sadistic acts that involve activities of dominance of the victim, keeping the victim against his-her will, used restraint, and beat the victim. According the DSM IV 'When Sexual Sadism is severe, and specially when it is associated with Antisocial Personality Disorder, individuals with Sexual Sadism may seriously injure or kill their victims.'"(DSM-IV pg. 530) This diagnosis needs to be ruled out. Because of Bryan's age he is not diagnosed with Antisocial Personality Disorder, however he is diagnosed with Conduct Disorder which is a precursor to Antisocial Personality disorder."

Exhibit 1, Volume III at 3102. Later in the report, the psychologist gave the following diagnoses:

> Diagnosis:
> Axis I
> V71.02 Child or Adolescent Antisocial Behavior
> V61.20 Parent-Child Relational Problem
> 309.xx Adjustment Disorder With Depressed Mood
> 312.8 Conduct Disorder, severe
> 291.9 Alcohol-Related disorder NOS (In remission due to being detained in custody)
> Rule out 302.84 Sexual Sadism
> 302.75 Sexual Dysfunction, Premature Ejaculation. Acquired Type Situational Type, Due to Combined Factors
> Axis II
> Axis III
> Axis IV Psychosocial and Environmental Problems,
> Problems related to interaction with the legal system/crime
> Axis V Global Assessment of Functioning, 20, serious

Exhibit 1, Volume III at 3104. Trial counsel could have objected to the State's assertions that

Hall was a sexual sadist and had been diagnosed with antisocial personality disorder, and there is a reasonable possibility that the objection would have been sustained since the evidence indicated otherwise.[10] This was not necessarily deficient, however, and also fails to demonstrate that hall was prejudiced, because had counsel objected, the State would likely have clarified what the reports indicate, that Hall may not be a "sexual sadist" *per se*, but he has participated in sexually sadistic behaviors and "has a number of elements of that of a sexual sadist." Likewise, Hall was not diagnosed with Antisocial Personality Disorder "because of [his] age," but was diagnosed with child or adolescent antisocial behavior, a severe conduct disorder that is a precursor to antisocial personality disorder, and an adjustment disorder. Ultimately, objecting would have placed even more focus on the findings of the reports, but would not have placed Hall in any better light. It certainly would not have changed the outcome of the proceedings because Hall's asserted sexual sadism and antisocial personality disorder were not aggravators or even especially significant considering the overwhelming evidence of Hall's persistent, violent nature. Moreover, the reports themselves were presented to the jury, and they had the opportunity to review the reports for themselves. It was probably wiser not to object, but even if counsel were deficient for failing to object, Hall was not prejudiced. Likewise, appellate counsel was not deficient for failing to raise an unobjected-to claim of prosecutorial misconduct, and would at most have been able to raise an issue that would be found harmless in light of the entire proceedings.

Hall also argues that it was improper for the State's investigator to read a portion of the report, but provides no authority demonstrating that reading part of a report is somehow improper. Supplemental Petition at 77-80. To the extent that Hall cites to cases regarding falsified evidence, the citations are irrelevant. What was read to the jury was stated in the reports. Hall's counsel could have objected, as with the opening statement, or could have reviewed the reports with the investigator on cross-examination, but both options would have placed even more emphasis on Hall's conduct as a youth only to win the minor point that he

[10] This assumes that Hall's "Child or Adolescent Antisocial Behavior," "Adjustment Disorder With Depressed Mood," and/or "Conduct Disorder, severe" diagnoses were meaningfully different to a diagnosis of "antisocial personality disorder."

was not *technically* a sexual sadist. At best, counsel might have secured a pyrrhic victory – it was simply not an argument worth making.

Finally, Hall complains that trial counsel was deficient for failing to object "when the prosecutor erroneously stated [] that Hall had refused counseling." Supplemental Petition at 102. The prosecutor said "[y]ou'll see in the documentation that the defendant refused to participate in counseling." Exhibit 1, Volume II at 2551. At that time, the prosecutor was arguing about Hall's conduct regarding his juvenile victimization of Sheldon and behavior in the California Youth Authority.[11] Id. Hall asserts, without support, that the records indicate that he did "[avail] himself of counseling." Supplemental Petition at 102. Initially, Hall indicated that he was willing to participate in treatment programs. Exhibit 1, Volume III at 3138. On November 24, 1998, the El Paso De Robles Youth Correctional Facility noted that Hall "has not completed his Board orders, i.e., sex offender treatment and a victim awareness class." Id. at 3175. On November 5, 1999, the N.A. Chaderjian Youth Correctional Facility noted that Hall "has not participated in this Board ordered group" for victim impact. Id. at 3195. Hall did complete some class, but it was also noted that Hall "continues to victimize wards and staff on the living unit as documented by his numerous Level A behavior reports." Id. at 3200. Hall completed some treatment programs, and did not complete others, but on May 1, 2001, the N.A. Chaderjian Youth Correctional Facility noted that Hall:

> "has been housed on McCloud Hall Specialized Counseling Program for approximately two years. During this time, he has shown minimal progress. Bryan has completed most of the groups offered on McCloud Hall's SCP, however he has not completed a Violent Offender's (187 group) resource group and Informal Drug group. Despite Bryan's completion of the Board Ordered Victims group, he continues to create victims."

Id. at 3238. The facility further noted that "[d]espite Bryan's completion of Victims Group, he still continues to victimize others. It is recommended that since Bryan is unable to internalize the information, he would greatly benefit from retaking this group." Id. at 3240. In the same report, the facility further noted that "During a recent case conference (03/08/01) Bryan stated

[11] Accordingly, whether Hall completed counseling at CCDC years later would have been irrelevant to the prosecutor's statement. Supplemental Petition at 102.

that he didn't need to take Gang Awareness group, as he was not a gang member. As he discussed being transferred to another living unit, he requested to go to American Hall, as he didn't want to be involved with gangs. Ward Hall was then questioned why it would matter, since he stated that he wasn't involved in gangs. His response was a stare." Id. Overall, the facility noted that:

> "Bryan has not completed his Board orders and staff identified treatment issues. His program has been up-and-down for the past eight months. He states that he takes full responsibility for his actions; however, he demonstrates no emotion for what he has done to others. He still struggles with his inability to feel empathy for his victim's. Bryan does not appear to have internalized the treatment information presented to him. Bryan has stated that he has changed "the required amount" on McCloud Hall, so there is no reason for further treatment. The McCloud Hall Treatment Team is concerned that this type of thought process makes Bryan a danger to society."

Id. at 3245. During a psychological evaluation on October 11, 2001, Deborah Leong, Ph.D. noted that "[c]urrently, Hall presents as disinterested in treatment, does not view himself as a sex offender, minimized certain aspects of his offense and presented himself as overwhelmingly positive." Id. at 3270. Dr. Leong further noted that "Mr. Hall should be referred for a treatment program for Violent Offenders and Sex Offenders, however his dynamics and history show lack of receptiveness to treatment. Current testing and his self-statements indicate he is content with his functioning and his dynamics." Id.

Overall, there was a fair basis for the prosecutor's statement, so any objection would have been overruled. Counsel was not deficient for failing to object. However, even if an objection would have been sustained, Hall was not prejudiced. First, even if counsel pointed out that Hall had completed some classes, the State could have further emphasized those classes which he did not complete, or for which he showed no progress despite his completion. Second, and more importantly, whether Hall participated in counseling as a juvenile was largely irrelevant considering the significant domestic violence and other crimes he committed *after* being released from a juvenile facility, and the murder for which he had just been convicted. If counsel did emphasize that Hall had previously completed counseling, it was clear that the counseling had no lasting effect and that Hall was no less a danger for having completed the classes. Finally, the jury had access to the records and could review them for

themselves. The jury was instructed that the arguments of counsel are not evidence, and jurors are presumed to follow the instructions they are given. Exhibit 1, Volume II, 2229, 2599, 2604. Hall does not demonstrate that the jurors failed to follow the instructions they were given.

Given trial counsel's lack of an objection, appellate counsel could, at most, have requested the Nevada Supreme Court review the claim under plain error, and Hall fails to cite any authority suggesting that such a claim would have been successful on appeal. Because neither trial nor appellate counsel performed deficiently, and because Hall was not prejudiced even if trial counsel should have objected or appellate counsel had raised these claims, the claims are denied. Because no additional factual determination is necessary and the existing record is sufficient for this Court's review, Hall's request for an evidentiary hearing is also denied.

V. Trial Counsel was Not Deficient for Not Presenting Expert Testimony About the Effects of Hydrocodone

Hall asserts that trial counsel should have presented additional testimony about the effects of Hydrocodone, and that he was deficient for failing to do so. Supplemental Petition at 87-90. Hall's argument is generally that (1) there was Hydrocodone in Flamm's system, (2) the Hydrocodone made it more likely for Flamm to make an inflammatory comment, (3) expert testimony was required to connect the presence of Hydrocodone with Flamm's likelihood to make an outburst, and (4) that because of the comment, Hall was overcome with passion and could not resist killing Flamm. Id.

Trial counsel (perhaps) could have presented expert testimony regarding the effects of Hydrocodone, but it would have been irrelevant. First, Hall has presented no evidence that any expert would have testified that 96 ng/ml of Hydrocodone would, in fact, make it more likely for a person to make an inflammatory comment. Exhibit 1, Volume II at 1865-70. While Hall faults trial counsel for failing to present that evidence, Hall has failed in the instant petition to demonstrate that that evidence even could have been presented. Dan Berkabile, an expert hired by Hall for post-conviction purposes, was unable even to state that Hydrocodone *was present* in Flamm's body. Exhibit 22 ("The main issue I see in this case is the Hydrocodone was only identified, not confirmed. … If the result of 96 ng/ml is too low or too high or maybe even

incorrect, meaning in reality there was no drug present or a different drug was present, this would certainly lead to wrong conclusions.") If an expert presented by the defense would have likewise been unable to say whether Hydrocodone was even present in Flamm's system, then counsel was certainly not deficient for not calling such an expert. After all, counsel was able to argue that the drug *was* present and even had a report saying as much entered into evidence without an expert.

Second, even assuming that Hydrocodone were present in Flamm's system, and that an expert could have testified to that, at most an expert could have testified about what effects 96 ng/ml of Hydrocodone would have had on a person generally. Perhaps, though Hall presents no evidence of it, an expert could even have testified as to what effects 96 ng/ml of Hydrocodone would *likely* have had on a person of Flamm's height, weight, and age. But even assuming all of that could have actually been presented by an expert, an expert could not have overcome the testimony of several witnesses who observed Flamm's *actual* behavior just prior to his murder. Only minutes before being murdered, Brad had been at his place of employment—Trevi restaurant at the Forum Shops of Caesar's Palace on the Las Vegas Strip—getting off his shift as a server. His girlfriend, Melita Coie, was a manager at the restaurant and testified that Brad was in his typically chipper mood as he cashed out and waited to pick up some dinner. Exhibit 1, Volume II at 1543-54. Another co-worker and friend of Brad's, Michael Brownell, testified that Brad was in a good mood, as usual. Id. at 1918-27. Every witness who actually saw Brad during his entire shift as a server at Trevi that night testified that Brad was in a good mood. No one reported any outrageous or inappropriate outbursts that evening. No one testified that Brad was so much as sarcastic that evening. Even assuming that 96 ng /ml of Hydrocodone might *generally* cause a person to make an inappropriate comment, there was no evidence that, even if present, Hydrocodone (in whatever amount, or even some other drug that was not tested for or was misidentified) *actually* had that effect on Brad the night he was murdered.[12] Given that an expert could not overcome the

[12] Further, it would be absurd to assume that a server at a restaurant, who interacts with the public for the entirety of their shift and is expected to do so courteously and politely, would knowingly ingest a drug prior to their shift that they knew caused them to make inappropriate comments or otherwise be

testimony of the people who actually observed Brad just prior to his murder, counsel was not deficient for failing to call an expert. Indeed, if the expert at trial agreed with the post-conviction expert, the trial expert would have been forced to admit that they were not sure Brad had ingested Hydrocodone at all. Instead, counsel was able to argue as if it were a proven fact that Brad had ingested Hydrocodone and was able to introduce a report that appeared to corroborate that speculation. The uncertainty worked to Hall's advantage, and counsel was able to craft an argument he might otherwise have been foreclosed from if an expert testified.

Third, and finally, the Hydrocodone was never the point of Hall's defense. The purpose of the Hydrocodone evidence, even now in post-conviction, was to demonstrate that it was more likely that Flamm made an inappropriate comment. Hall testified that he did – "[Flamm] said because the way that [Flamm] fucked [Melissa], she never got over [Flamm]. The way that [Flamm] fucked her, [Flamm was] surprised that she didn't have twins." Exhibit 1, Volume II at 2312. It's not clear whether the jury believed Hall that Flamm made the statement – if they did, an expert testifying that the Hydrocodone would have made Flamm more likely to make the comment would be cumulative. If the jury did not believe Flamm had made the statement, Hall does not show that expert testimony, even if that expert would have testified exactly as counsel (both trial and post-conviction) suggested they might, would have caused the jury to believe Hall. But even assuming that the jury did not believe Hall, and that the expert testimony would have made the difference and the jury would have believed that Flamm made that statement to Hall, that comment might have justified punching Flamm, but would never have justified slashing his neck, stabbing his neck, strangling him, hitting him over the head with a 5-gallon paint can, and then crushing his head with a landscaping rock. Hall's actions were, literally, indefensible and expert testimony that, with every possible inference drawn in Hall's favor, would have suggested that Flamm actually did make the statement Hall alleged would not have changed the outcome of the proceedings. Trial counsel was not deficient for failing to call and expert witness that may not even have been helpful, but even if counsel were deficient Hall was not prejudiced by the lack of expert testimony. Because an

prone to spontaneous outrageous outbursts.

expert witness would not have been helpful to Hall's defense whatever trial counsel's reasoning, trial counsel's testimony will not help this Court resolve the claim and an evidentiary hearing on this claim is unwarranted.

VI. For the Same Reasons, Counsel Was Not Deficient for Not Engaging in Frivolous Testing

Hall asserts that trial counsel was deficient for failing to have additional bodily fluids tested to confirm the presence of Hydrocodone, or to test for other drugs, and that the defense was not viable (or not known to be viable) without the presence of additional testing. Supplemental Petition at 91-92. This argument fails for two related reasons.

First, Hall has not shown that additional testing would have led to evidence that would have produced a more favorable result. A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Hall admits that he cannot show prejudice unless this Court orders additional discovery, but Hall cannot even show that counsel was deficient. Indeed, testing *could not* have led to a more favorable result. Had counsel performed the testing Hall now suggests, three possible results could have been obtained. First, Hydrocodone could have been confirmed in Flamm's blood – something counsel was already allowed to argue was present based on the toxicology screen already presented to the jury. This would have led to the same result. Second, the "Hydrocodone" may have turned out to be a different drug, which would itself have faced the same difficulties the Hydrocodone already did – namely, whatever potential effects the drug might have produced would have been contrasted with the testimony adduced at trial of Flamm's actual behavior in the hours and minutes prior to his death. This, too, would have led to the same result. Third, Hydrocodone could have been determined to be falsely represented on the toxicology screen. This would have led to a worse result, because counsel would then have had no basis to argue that Flamm's alleged comment was prompted from the effects of some drug. In no scenario would counsel have received a better result than the already Hydrocodone-positive toxicology result.

Second, despite Hall's contention now, Hydrocodone was never "the theory of

defense." Hydrocodone, it was argued, prompted Flamm to make an inflammatory comment, but otherwise the Hydrocodone did not play a role in the defense. Hall could have testified that Flamm made the alleged comment even without Flamm testing positive for Hydrocodone. And, as found just previously, whether Hydrocodone, some other drug, or nothing at all, prompted Flamm's comment, and whether the jury actually believed Flamm made that comment or not, that comment alone could never reasonably justify Hall brutally murdering Flamm. In short, the Hydrocodone was, and is, largely irrelevant to Hall's version of events.

Hall requests permission to conduct discovery to test whatever bodily fluids might remain, but that is unwarranted because there is no possible result that would lead to a better outcome, or that could determine that Hall's trial counsel was deficient or that could show Hall was prejudiced. The presence of Hydrocodone, or not, is utterly irrelevant, and additional testing would be a waste of both time and money. Hall has not demonstrated either deficiency or prejudice under Strickland, and the claim is denied. An evidentiary hearing on this claim is not warranted because counsel could not have been deficient, and Hall could not have been prejudiced, where additional testing would have been frivolous.

VII. Hall Fails to Demonstrate Deficiency or Prejudice Where Counsel Strategically Rejected a Tavares Instruction Related to Hall's Prior Threat to Rape and Kill a Prior Girlfriend's Ex-Boyfriends

Hall notes that trial counsel "moved to preclude Hall's prior felony conviction" and "statements made by Hall to Jennifer Hook." Supplemental Petition at 92. This Court admitted the testimony, and offered to give a Tavares instruction – counsel argued vehemently against the introduction of Hall's threat and even deferred making a decision until after Lieutenant Roberts testified and Hall testified on direct examination before determining whether the instruction should be given. Exhibit 1, Volume II 2246-80. After Hall testified, this Court, the State, and Hall, again discussed whether a Tavares instruction should be given. Id. at 2318-28. Ultimately, counsel was exceedingly clear about what he was doing: "MR. O'BRIEN: Mark that Tavares instruction that you've drafted as a Court Exhibit. We are -- since I have to make the decision now, we are making the strategic decision and asking this Court not to give that instruction contemporaneously." "Strategic choices made by counsel after thoroughly

investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Counsel clearly "thoroughly [investigated] the plausible options" because he spent almost 45 transcript pages battling the Court's determination that the evidence was admissible and weighing his possible options. While Hall cites to several authorities regarding "bad act" evidence generally, here trial counsel argued extensively to keep the testimony out. Once this Court determined that the evidence was admissible, counsel explicitly made a strategic decision not to have a Tavares instruction given contemporaneously, likely to avoid focusing the jury any further on the statement. Counsel's strategic decision to decline the Tavares instruction is "virtually unchallengeable," and Hall fails to demonstrate that counsel was deficient.

Moreover, Hall cannot demonstrate prejudice. The statement was admitted to show that Hall had threatened to rape and kill an ex-girlfriend's prior boyfriends, and that he had the intent, motive, and desire to kill Flamm. However, by the time Jennifer Hook testified, Hall had already admitted to killing Flamm. Even assuming that counsel should have requested a contemporaneous Tavares instruction, there is no possibility the result of the trial would have been different given the other overwhelming evidence, including Hall's admission, presented during guilt phase. Hall fails to demonstrate either deficiency or prejudice under Strickland and the claim is denied. Because the record is sufficient to resolve the claim, the request for an evidentiary hearing is also denied.

VIII. Hall Fails to Demonstrate That Appellate Counsel Should Have Argued That This Court Abused Its Discretion When It Admitted Hall's Prior Threat to Kill and Rape Jennifer Hall's Ex-Boyfriends

Hall generally asserts that appellate counsel should have argued that this Court abused its' discretion when, after extensive argument, the Court admitted "prior bad act evidence which consisted of Hall's prior felony conviction for battery with substantial bodily harm and Jennifer Hall's testimony about his prior statement" to rape and kill Jennifer's ex-boyfriends. Supplemental Petition at 94-95.

Hall fails to show either deficiency or prejudice, and he does not allege, much less

demonstrate, that the issue would have had a reasonable chance of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Hall makes a bare and naked assertion that the introduction of this evidence was more prejudicial than probative, but this Court determined otherwise, and Hall does not explain how this Court erred or what appellate counsel should have argued. Hall also asserts that this Court erred because "[t]here was no pre-trial determination, by clear and convincing evidence, that Hall even made the statement to Jennifer Hook." A challenge related to a pre-trial determination can only apply to the statement Hall made to Jennifer, because his Judgment of Conviction was, itself, clear and convincing evidence of his prior conviction. With regard to the statement, this Court noted that it had read the police reports in the prior case, which contained and explained the statement Hall made to Jennifer. Exhibit 1, Volume II at 2255-56. As the State explained at trial, Hall made the statement, and the State was permitted to inquire of him on cross-examination whether he made that statement or not, but the extent of the details the State would be permitted to explore depending on Hall's answers to the State's questions. Id. at 2259-68. Hall cites no authority suggesting that asking a defendant about a prior statement they made needs to be shown by "clear and convincing evidence," or that, even if it does, it must be determined pre-trial, as opposed to before something other than the Defendant's own answer is presented to the jury. Indeed, the Court is only required to conduct a balancing test "before admitting … evidence" of a prior felony conviction. Whisler v. State, 121 Nev. 401, 406, 116 P.3d 59, 62 (2005). Even assuming that Hall's statement could be considered a "bad act," evidence of such an act need only be conducted "at a hearing outside the jury's presence," and not necessarily before trial. Tavares v. State, 117 Nev. 725, 731, 30 P.3d 1128, 1131 (2001), holding modified by Mclellan v. State, 124 Nev. 263, 182 P.3d 106 (2008).

Hall additionally argues that Hall's statement "was made six year pre-crime and thus was remote and should have been excluded on that basis alone." Hall's citation to Montgomery indicates that remoteness is a *factor*, but Hall cites no authority which suggests, much less holds, that a six-year gap is irrebuttably remote, or that it overwhelms all other factors in considering its admissibility. The State argued, and this Court agreed, that the similarity

between threatening to rape and kill an ex-girlfriend's prior boyfriends, and Hall actually murdering a girlfriend's prior boyfriend in this case, made the probative value extremely relevant:

> THE COURT: … there's only a few things that are relevant about that time frame. (of Hall's prior conviction and when he threatened Jennifer.) They are that they had an argument that day, what the argument was about and what he intended to do about that. And that goes to motive, intent. He puts his intent to issue when he takes the stand. I assume he's going to explain what happened that day or he wouldn't take the stand.

Exhibit 1, Volume II at 2277. After Hall testified, further argument ensued and this Court noted that through his testimony Hall "opened up the issue of intent, motive, mistake, absence of mistake, knowledge, preparation, knowledge." Id. at 2321-22. This Court found, on the basis of the evidence presented "[t]hat the clear and convincing standard has been met." Id. at 2323. That determination occurred at a hearing outside the presence of the jury, prior to the State cross-examining Hall. That is all the law requires, and appellate counsel, had he argued that this Court abused its discretion, would not have been successful. Appellate counsel was not deficient for not making a frivolous argument, and even if he were Hall was not prejudiced because the issue would not have been meritorious. Because Hall's claim is meritless, there an evidentiary hearing is unwarranted and the claim is denied without one.

IX. Trial Counsel Made Appropriate Objections

a. Witness Veracity

Hall asserts that trial counsel should have objected because the State asked Hall to testify about the veracity of a witness. Supplemental Petition at 96. Although Hall does not identify a particular statement, presumably he is complaining about this interaction:

> THE STATE: You were in this courtroom when Ms. Paulsen testified, correct?
> HALL: Yes.
> THE STATE: Did you hear my question to her and her answer about what she said to you when you got into the car with her picking her up after you murdered Brad Flamm?
> HALL: Yes.
> THE STATE: Was she accurate in what she testified before this jury?
> HALL: I honestly don't remember what she said, if anything. I was in a completely different state of mind.
> THE STATE: You don't recall what she testified here in court?
> HALL: I recall what she testified in court, but I don't recall from that incident what was said, if anything, at the time.

Exhibit 1, Volume II at 2342. Counsel did object, and the objection was overruled. Id. at 2344. Hall faults counsel for not asking that his answer be stricken, but as this Court pointed out, Hall did not answer the question – his testimony was that he did not recall what Ms. Paulsen's testimony was. Id. The State did not ask Hall if Paulsen was lying, but rather whether Hall recalled the events in the same way. However, even assuming the question was improper, there was no substantive answer given and the error was harmless. Daniel v. State, 119 Nev. 498, 519, 78 P.3d 890, 904 (2003).[13]

b. The State's Use of the Word "Murder"

Hall claims that the "prosecutor repeatedly stated that Flamm was murdered without objection by defense counsel," but then admits that "[d]efense counsel initially objected to the prosecutor referring to the "murder."" Supplemental Petition at 96.[14] Counsel had objected on those same grounds several days prior with regard to another witness, and the Court overruled his objection. Exhibit 1, Volume II at 1917. As the Court had already made its position clear, any further objection would have been futile. To the extent Hall asserts that this Court or the State erred, the claim is waived. See Section II, *supra*. To the extent that Hall passingly asserts that appellate counsel was deficient for failing to raise the claim, Hall has not shown or alleged that the claim had a reasonable chance of success, particularly given that even if there were error it was certainly harmless in light of the overwhelming evidence of Hall's guilt. Rippo v. State, 113 Nev. 1239, 1254, 946 P.2d 1017, 1026 (1997). Hall had just finished admitting to killing Flamm brutally over a comment Flamm had allegedly made, and so the question before the jury was simply one of first or second-degree murder. At the time the State asked the question, there was no reasonable question about whether Hall had murdered Flamm or not.

c. Testimony of Clifford Mogg

Hall asserts that trial counsel should have objected where the prosecutor asked

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[1313] Hall's citation to Lay v. State, 110 Nev. 1189, appears to be irrelevant, as that case did not analyze a witness commenting on another witness's veracity at all, but rather that "the prosecution's references to, or implications of, witness intimidation by a defendant are reversible error unless the prosecutor also produces substantial credible evidence that the defendant was the source of the intimidation." Id. at 1193. There were no allegations of witness intimidation here.

[14] Exhibit 1, Volume II 2194 does not address Hall's point at all.

Detective Mogg leading questions. Supplemental Petition at 97. Hall does not identify any leading questions, or explain how even if there were leading questions that prejudiced Hall such that the result of his trial would have been different.

Hall also asserts that counsel should have objected because Detective Mogg "speculated" as to whether there was a robbery. Id. As Hall points out, Detective Mogg was testifying as to whether he was investigating a robbery. He did not opine as to whether Hall had robbed Flamm. There was no error which could be objected to, so trial counsel was not deficient.

Finally, Hall complains that trial counsel did not object to Detective Mogg "narrating" a series of videos. Supplemental Petition at 98. Hall does not identify any specific instances of "narrating", and the 20-page range Hall cites shows Detective Mogg's testimony about the investigative process he went through to identify Hall, examine the scene, and collect the video. Exhibit 1, Volume II at 2086-2107. To the extent he is describing video, he is describing how things operate that are shown on video. Id. Hall suggests that, on cross-examination, the State objected that Detective Mogg was narrating the video and the objection was sustained. Supplemental Petition at 98. That was not the State's objection. The State objected that counsel repeatedly asked Detective Mogg the same question attempting to get a different answer, and that the video spoke for itself.

> MR. STANTON: Your Honor, by my count that's four times he's tried to get him to get -- to answer that he wants. The --
> THE COURT: Right .
> MR. STANTON: -- video speaks for itself. I would object as --
> THE COURT: The objection is sustained. If you want to ask the detective, you may.

Exhibit 1, Volume II at 2132. Finally, even assuming there counsel could have objected, and that the objection would have been sustained, Hall fails to demonstrate that the result of the trial would have been any different. Accordingly, counsel was not deficient, and Hall was not prejudiced even if counsel were.

d. Various Other Alleged Deficiencies

Hall asserts, without authority or analysis, various other errors. Supplemental Petition

at 98-99. Hall asserts that counsel should have objected to "leading questions," but the only question identified was not leading. Rather, the witness explained that she does not use the term "defensive wounds," but that the wounds were consistent with being inflicted while Flamm was in a defensive posture.

> THE STATE: What are defensive wounds?
> DR. BENJAMIN: The -- I don't. use the term, because it implies that I know what was happening at the time. But in forensic practice, people use defensive wounds to mean that the person had either their hands if they're standing, or their feet if they're laying down, trying to protect some vital area of their body, such as their head and neck region.
> THE STATE And in these injuries here, are they, once again, potentially consistent with blunt force trauma that was inflicted to Mr. Flamm's body in a defensive posture?
> DR. BENJAMIN: That would on[e] explanation, yes.

Exhibit 1, Volume II at 1850-51. The question is not leading because it does not suggest an answer. Counsel was not deficient for failing to make a frivolous objection, and Hall was not prejudiced by the question.

Hall also complains that Melita Cioe, a manager at Trevi, testified that a waiter would make $100-$200 per night. Supplemental Petition at 98-99. Hall does not explain how a *manager* would not generally know how much her waiters make in tips. In fact, Cioe testified how it was that she *did* have that personal knowledge. Exhibit 1, Volume II at 1542-44. Additionally, Melita was Brad's girlfriend, and they lived together. Under those circumstances, she presumably also knew roughly what he made in tips per night. Hall fails to demonstrate either deficiency or prejudice.

Hall complains that a witness who knew Hall identified him on a video. Supplemental Petition at 99. Hall fails to explain how a witness identifying a defendant in court, subject to cross-examination, is improper, or why counsel should have objected, or how Hall was prejudiced, particularly given that Hall later *identified himself* on video. All of Hall's claims are meritless.

Finally, Hall asserts a variety of unobjected-to errors, which appellate counsel raised and the Nevada Supreme Court reviewed for plain-error. Supplemental Petition at 103-04. Hall asserts that, had trial counsel objected and the Nevada Supreme Court reviewed the issues

under a stricter standard, that he would have been successful on appeal. Id. Hall provides no authority supporting this position, nor more than a bare and naked assertion that the Nevada Supreme Court would have ruled any differently under a different standard. Accordingly, his bare and naked claims are suitable only for summary dismissal. Hargrove, 100 Nev. at 502, 686 P.2d at 225. The level of prejudice necessary to establish an ineffective assistance of counsel claim is the same as that necessary to find plain error. Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008) ("the 'substantial rights' standard of plain error review is identical to the 'prejudice' standard of an ineffective assistance claim."). The Nevada Supreme Court has already found that Hall did not establish that the failure to object was plain error. As such, he cannot establish sufficient prejudice to support an ineffective assistance of counsel claim. Gordon, 518 F.3d at 1300. Additionally, as this issue has already been decided on appeal, Hall is barred from raising it in the instant habeas proceedings by the law of the case doctrine. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (*citing* McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. Nev. Const. Art. VI § 6. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799.

Hall's complaints under subsection ii, iii, and iv were found not to be error at all by the Nevada Supreme Court, so under any standard the claim that the Nevada Supreme court would have reached a different conclusion is belied by the record. Order of Affirmance at 10-11.

Because all of Hall's claims related to trial counsel's failure to object to a variety of supposed deficiencies are meritless, either because counsel did object or because counsel did not object to a non-error, Hall fails to demonstrate either deficiency or prejudice and his claims are denied without an evidentiary hearing. Likewise, because Hall's claims against appellate counsel are meritless and barred, and so an evidentiary hearing is not required to deny the

claims.

X. Appellate Counsel Appropriately Declined to Raise a Meritless "Burden Shifting" Argument

Hall complains that appellate counsel did not argue that the State had engaged in burden shifting during rebuttal. Supplemental Petition at 99. Appellate counsel was not deficient because no burden shifting occurred.

Although a prosecutor may not normally comment on a defendant's failure to present witnesses or produce evidence, in some instances the prosecutor may comment on a defendant's failure to substantiate a claim. Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 415 (2001) (*citing* Lisle v. State, 113 Nev. 679, 706–07, 941 P.2d 459, 477 (1997), *limited on other grounds by* Middleton v. State, 114 Nev. 1089, 1117 n. 9, 968 P.2d 296, 315 n. 9 (1998), *cert. denied*, 528 U.S. 927, 120 S.Ct. 322, 145 L.Ed.2d 251 (1999).) During closing, defense counsel argued that Hydrocodone in Flamm's blood tended to make him disinhibited and likely to make an inappropriate comment:

> DEFENSE COUNSEL: You know, I asked Melita, and I don't mean any disrespect, but I asked Melita if Brad tended to say things that could be deemed inappropriate. Now, please, I want to explain where I'm coming from. I'm not saying that simply because of his -- that trait, that he necessarily said those things. But you may have heard earlier today the defense admitted per stipulation Defense Exhibit M. Defense Exhibit M. This is a toxicology report. This was a toxicology report ordered by the Clark County Coroner's Office. I was unable to talk to Dr. Benjamin about this. But it will show you – this is Defense Exhibit M -- it will show you that Brad Flarrm had a certain level of a controlled substance in his system. Again, what you decide to do with that information is up to you, since I was unable to talk to Dr. Benjamin about that. But here's what I would submit to you. That somebody under the influence of a controlled substance is going to tend to be disinhibited. And if you -- if you have a -- a natural proclivity to make some statements that may be inappropriate, that that tendency is going to be heightened and is going to be much greater if you're under the influence of a controlled substance. That's going to be for you to decide, because again, I was unable to get into the specifics with Dr. Benjamin.
> MR. STANTON: You know, I'm going to object, Your Honor. Three times he's said it
> THE COURT: Sustained.

Exhibit 1, Volume II at 2496-97. Counsel's complaints that he "wasn't able to get into" the toxicology result in closing were, themselves, inappropriate argument and this Court correctly sustained the State's objection. On rebuttal, then, the State responded to the argument made by counsel:

> MR. STANTON: Counsel talked about Dr. Benjamin. And he introduces State's

> -- or Defense Exhibit M, Loxicology report of Brad Flamm. And says that I couldn't get into it with Dr. Benjamin. I wasn't permitted to ask her questions about that evidence. He could have called any witness he wanted to to talk about the effects of that narcotic at that level - -
> MR. O'BRIEN: Judge
> MR. STANTON: or ask any person --
> MR. O'BRIEN: objection. Burden shifting.
> MR. STANTON: It's not burden shifting, Your Honor.
> THE COURT: Overruled.
> MR. STANTON: It's comment on his
> MR. O'BRIEN: Well, let the Judge decide that, please.
> THE COURT: We need -- just -- I'm sorry?
> MR. STANTON: I'm responding, counsel.
> THE COURT: I'm sorry. What -- what did you say?
> MR. O'BRIEN: Objection. Burden shifting.
> THE COURT: Okay. Overruled. And you may proceed.
> MR. STANTON: He could have called any witness to describe the effect of that amount on a person. But more important, it's not relevant about how that would affect anybody, to the extent of what counsel's arguing that evidence shows you. What's relevant is how did it affect Brad Flamm. What's the evidence? From that witness chair in this trial about it, everybody that was around Brad Flamm on the night of May 10th said one consistent thing. He was fine, he was happy, just like he is every night when we see him. Not impaired, not acting inappropriate or saying inappropriate comments.

Exhibit 1, Volume II at 2522-23. The State is permitted to comment on defense counsel's failure to substantiate a claim, particularly when the argument advanced by defense counsel is, itself, improper. Accordingly, this Court appropriately overruled trial counsel's objection. Because there was nothing improper in the State responding to the argument, appellate counsel was not deficient for failing to raise a frivolous claim, and Hall has not demonstrated prejudice in any event.[15] This Court denies Hall's claim without an evidentiary hearing because it is meritless and testimony would not assist the Court in evaluating the claim.

XII. Counsel Should Not, and Could Not, Have Presented "Future Dangerousness" Evidence Through a Psychologist at Penalty Phase

Hall complains that trial counsel was deficient for failing to provide evidence in penalty phase rebutting the State's argument that Hall was a future danger. Supplemental Petition at 104-06. Hall's argument fails for at least two reasons.

First, Hall's argument fails because the State did not argue that Hall was a future danger. The State's opening penalty phase argument focused on the aggravating circumstances the State had proven, why Hall was death eligible, and why the mitigating circumstances did

[15] Hall's brief statement that his Fifth Amendment and Fourteenth Amendment rights were violated is meritless, as the State's argument has nothing to do with Hall's right to silence, and Hall elected not to be silent even if it did. Supplemental Petition at 99.

not outweigh the aggravating circumstances. Exhibit 1, Volume II at 2789-92; Exhibit 1, Volume III at 2793-94. The State also argued that death was an appropriate sentence, but because of Hall's *past* conduct, including Flamm's murder, and not because of any concern that he would be a danger in the *future*. Exhibit 1, Volume III at 2794-2802. Accordingly, there was no "future dangerousness" argument made for trial counsel to "rebut" when Hall's counsel was able to argue. On appeal, Hall argued that the State used the juvenile records to indicate that he was a future danger. Exhibit 2 at 27-31. The State, in its Answering Brief, argued that the records were introduced to show lack of remorse, not future danger. Exhibit 3 at 17-19. Hall again argued that the reports were used to argue future dangerousness in his Reply brief. Exhibit 4 at 6-7. The Nevada Supreme Court did not find that the State had argued future dangerousness. Exhibit 5, at 2, 8. Hall again reasserted that the State had used the psychological reports when he argued that the Nevada Supreme Court should rehear his case. Exhibit 6 at 5-7. The Nevada Supreme Court denied the Petition for Rehearing without comment. Exhibit 7. Hall's claim was previously raised and rejected by the Nevada Supreme Court. Accordingly, counsel was not deficient for failing to "rebut" an argument the State never made.

Rather, trial counsel argued against what the State *actually* argued. Mr. O'Brien focused on the virtually unlimited reasons why the jury might find a mitigating factor, reminded the jury that they were never required to vote for death, and pleaded to the jury that sentencing Hall to death would have wide-ranging consequences that they might not intend. See Generally Exhibit 1, Volume III at 2802-11. Mr. Banks, then, focused on the State's argument that Hall's *past conduct* warranted a death sentence:

> "Yeah, Jeff, but what about all that other stuff. And the State has hammered it this morning. You can bet dollars to donuts that Mr. Stanton's going to get up and hammer it again. They're going to hammer his background, and I submit to you they're going to hammer his background because on that spectrum of first degree murder this killing may not be the worst of the worst. His background might be, but this murder (inaudible]. He's hurt so many people in the past 15 years, and Mr. O'Brien touched on it. The decision that you make here can potentially devastate so many more people in the years to come."

Exhibit 1, Volume III at 2816. Mr. Banks also tried to convince the jury that Hall was not "the

worst of the worst," reiterated that the jury could consider *any reason* as a mitigator, that the jury could vote for a non-death sentence simply out of mercy, and made a passionate argument that the jury might even decide to sentence Hall to life in prison without the possibility of parole because either Hall might make some positive impact while he was in prison or, alternatively, because life in prison would be *worse* than sentencing Hall to death. Id. at 2816-20.

When the State gave rebuttal argument in penalty phase, it did not argue that Hall was a future danger. Hall's counsel was right – the State reiterated the brutality of the instant murder, and Hall's exceptionally egregious past crimes – and argued that Hall's character, as demonstrated by both his past crimes and his testimony at trial, evidenced an individual unworthy of mercy. Moreover, the State argued that Hall did not deserve to be sentenced to life in prison because Hall felt no remorse for his actions, and that it's "not punishment, ladies and gentlemen, if you don't care, if you don't think about your victim, if you don't punish yourself every single day for what you did." Id. at 2824. The entirety of the State's "argument" that Hall was a future danger consisted of briefly reminding the jury that it was "a consideration." Id. at 2824-25. Nowhere in Hall's trial did the State ask the jury to find Hall was a future danger.

Second, the evidence supplied by Hall in his Supplemental Petition would not have led to a better outcome for Hall, and would, in fact, not have been admissible. This Court, Hall, and the State, engaged in *extensive* debate regarding whether the State's use of Hall's juvenile records should have been excluded and, in fact, whether it demonstrated that Hall was a future danger. See Generally Exhibit 1, Volume II at 2549-50; 2567-72; 2609-19. Defense counsel argued that Hall's psychological records should not be permitted based on two Nevada Supreme Court cases, Redmen and Greene. Redmen held that "psychiatric evidence purporting to predict the future dangerousness of a defendant is highly unreliable and, therefore, inadmissible at death penalty sentencing hearings." Redmen v. State, 108 Nev. 227, 234, 828 P.2d 395, 400 (1992), overruled on other grounds by Alford v. State, 111 Nev. 1409, 906 P.2d 714 (1995). The Greene Court reiterated Redmen's holding. Greene v. State, 113 Nev. 157,

179, 931 P.2d 54, 68 (1997). In Exhibit 25, Hall has asked Dr. Cunningham, Ph.D. and ABPP (American Board of Professional Psychology) to prepare a report indicating whether Hall would be a future danger. But the Redmen Court was clear that such evidence is inadmissible at a penalty phase hearing. Psychiatric evidence purporting to predict future dangerousness is not inadmissible because there is some prejudice to a defendant if the State introduces it, but rather because such evidence is "highly unreliable." Redmen, 108 Nev. at 234. Neither party is permitted to introduce "highly unreliable" evidence into a penalty phase. Particularly given the extensive discussion this Court and the parties had regarding these cases, had Hall's attorney tried to introduce Dr. Cunningham's report, or asked him to testify regarding Hall's future dangerousness, this Court would have excluded the report and/or testimony. Hall's counsel was not deficient for not attempting to introduce inadmissible evidence.

Moreover, as stated above, the proffered evidence would have "addressed" an argument that the State never made – and opened Hall up to actual debate as to whether he was a future danger. Put differently, had Hall tried to advance the point that he was not a future danger, the State would have been entitled to call witnesses to rebut Hall's point or, at the least, would have focused in argument on the fact that Hall likely *would* present a future danger. Hall's counsel wisely chose to address the points the State actually made, and did not open Hall to further argument about how dangerous he was. Hall's counsel did not perform deficiently in this regard. Hall fails to demonstrate either deficiency or prejudice, and his claim is denied without the need for an evidentiary hearing.

XIII. Counsel Advocated Zealously for Hall During Penalty Phase

Hall argues that trial counsel abandoned the role of advocate in penalty phase, and specifically that counsel argued that Hall did not deserve mercy when "Hall's best argument in avoidance of a death sentence was arguably a plea for mercy." Supplemental Petition at 108. Hall's argument is meritless and belied by the record.

Trial counsel may try to "soften the blow" by acknowledging that a defendant may have done terrible things, but that he accepted responsibility for his actions and should not be punished as harshly due to other mitigating factors. See Florida v. Nixon, 543 U.S. 175, 192,

125 S. Ct. 551, 563, 160 L. Ed. 2d 565 (2004) ("counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade.'"); State v. Hamilton, 791 S.W.2d 789, 797 (Mo.App.1990) (trial counsel was not ineffective when, in pursuing strategy of reverse psychology, he characterized his client as a "jerk" and a "fool."); State v. Foster, 838 S.W.2d 60, 69-70 (Mo.App.1992)[16]; People v. Welch, 20 Cal. 4th 701, 764, 976 P.2d 754, 795 (1999) (finding counsel was not ineffective where trial counsel referred to defendant as "crazy" during closing argument; read in context, the use of that resonant colloquial term appears to have been an attempt to move beyond legalisms to appeal to the jury's likely perception that there was something psychologically quite wrong with defendant. Use of the term was followed by discussion of statutory mitigating factors and reasoned argument about how defendant's "craziness" fit into these factors.); Cordova v. Johnson, 993 F. Supp. 473, 538 (W.D. Tex. 1998) (holding that given the evidence then before the petitioner's jury, the decision to acknowledge the weighty evidence regarding the heinous nature of the petitioner's crimes and the petitioner's capacity for violence was well within the realm of reasonable, professionally competent performance at petitioner's [] trial.).

There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Harrington v. Richter, 562 U.S. 86 at 105; 131 S. Ct. 770 at 788. Although courts may not indulge post hoc rationalization for counsel's decision-making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson, 91 Nev. at 432, 537 P.2d at 474, quoting McMann v. Richardson, 397 U.S. at 771, 90 S.Ct. at 1449.

[16] "In Foster, 838 S.W.2d 60, during closing arguments defense counsel described his client, an admitted pedophile who had been charged with attempting to promote child pornography and abuse of a child, as a "low life," "creep," etc. Id. at 69–70. In our review, it was clear that defense counsel's strategy was to admit defendant's character, and focus instead upon whether defendant's conduct constituted a criminal offense. Id. The reviewing court then determined that given the circumstances of the case, defense counsel's choice of defense and his method of implementing that defense was not unreasonable and did not constitute ineffective assistance of counsel. Id. at 70."

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

Hall takes issue with a portion of Mr. Bank's opening statement, but assigns to Mr. Bank's statement a meaning unsupported by the record. Supplemental Petition at 106-07. Hall claims that Mr. Banks "communicated to the jury that his work representing people accused of capital crimes is so repugnant – there are no words to describe what he does to school children!" Id. at 107. However, what Mr. Banks did was direct the jury away, for a brief moment, from the disturbing narrative the State had just indicated the evidence was going to show by refocusing, for a moment, on a speech he might give in a classroom. Moreover, Mr. Banks set up a portion of his closing argument, where he returned to the concept of the speech to his son's class and offered the jury a rationale even a child could understand:

> I spoke to my son's class. When I went in there and I said, Good morning, everybody, I'm a public defender, they looked at me with a thousand-yard stare. And I made about as much sense to them as a tall midget when I told them that's what I did. It was very apparent that they had no clue what that even meant, and I kind of knew that they wouldn't. And they wanted to know, well, what is it, Winston's dad, that you really do at work.
>
> And I said, You know what, sometimes what I do at work is simply remind everybody that mercy can have a place in a courtroom. Sometimes that's all I do at work. This is what I told them, that mercy has a place. Because sometimes, sometimes that gets lost in the shuffle. Sometimes emotions overcome mercy. That's what I explained to them. I said, Sometimes that's my job, is to remind everybody that mercy has a place.

Exhibit 1, Volume III at 2818-19. During Mr. Banks' opening statement, he related to the jury. He accepted, as he must, the guilty verdict the jury had returned, and explained that the rest of the process involved the jury determining whether Hall lived or died. Id. at 2564-65. He acknowledged and admitted that "a lot of horrific and inexcusable stuff about Bryan Hall" was going to be presented, and that the jury was "not going to like it one bit," and that it was likely to make them "very angry." Id. at 2565. Mr. Banks knew what evidence was going to be presented, and reasonably concluded that pretending that it did not exist would lose credibility with the jury. However, while recognizing that the evidence existed, Mr. Banks reminded the jury of several reasons why, despite the evidence that was going to be presented, they might choose not to sentence Hall to death. He emphasized the connections Hall had to his family, and that a death sentence would devastate not only Hall, but his family as well. Id. at 2566. He also reminded the jury that each individual was required to determine whether the death penalty was an appropriate sentence, and that it was an "individual moral decision." Id. Mr. Banks opening statement, confined as it must be to an explanation of what the evidence was likely to show, attempted to curry credibility while giving the jury some reason why Hall should not be executed.

Hall also takes issue with Mr. Banks' closing statement, arguing that Mr. Banks "abandoned his role as advocate" and "then proceeded to tell the jury Hall was not deserving of mercy since he did not give any mercy to Brad Flamm." Supplemental Petition at 107. Hall also briefly argues that "co-counsel O'Brien reiterated to the jury that Hall was not deserving of mercy." Id.

Mr. O'Brien argued first defense closing. Exhibit 1, Volume III at 2802-11. Mr. O'Brien explained the deliberative process of arriving at a sentence. Id. at 2802-09. He explained that, while the jurors might be angry at Hall, or even may hate him, that they should consider their decision rationally, rather than emotionally, because "that hate will subside. That anger will subside." Id. at 2803. He further went on to explain why, despite what the jurors may be feeling, they might consider a sentence other than death for Hall, including that "the medical evidence in this case … wasn't given to you as proof beyond a reasonable doubt,"

and that Ms. Hook, who had testified as to repeated, severe abuse Hall inflicted upon her, nevertheless was friends with Hall. Id. at 2804. Moreover, Mr. O'Brien argued that the jury should consider, and vote for a sentence less than death, to bestow mercy. Id. at 2807. While Hall complains that both defense counsel argued that "Hall was not deserving of mercy," Mr. O'Brien argued that "Mercy isn't something somebody earns. Mercy is something that's bestowed. … I will ask any one of you to consider mercy if not for Mr. Hall, you can consider mercy for those children, for his mother." Supplemental Petition at 107; Exhibit 1, Volume III at 2807. Mr. O'Brien further clarified that "the mercy we ask for you is tempered, because [life without the possibility of parole] isn't the severe, severe punishment." Exhibit 1, Volume III at 2809. He reminded the jury that some had expressed, during voir dire, that life without the possibility of parole might be a *worse* punishment than death. Id. at 2808-09.

Mr. Banks elaborated on Mr. O'Brien's argument. Mr. Banks, too, openly admitted how terrible the murder of Bradley Flamm was, but implored the jurors to sentence him to something less than death regardless. Id. at 2811-21. Mr. Banks, through an imaginary scenario, attempted to place the jurors in a situation somewhere down the line where it would seem as though Hall's murdering Flamm was not an example of the "worst of the worst." Id. at 2814-16. Mr. Banks reminded the jury that "[t]he decision that you make here can potentially devastate so many more people in the years to come." Id. at 2816. He argued that Hall had shown, through the testimony of Zach Bales and Bryan Dula, that he could be a good influence in prison, and that Hall might have future chances to be a good influence if he were not executed. Id. at 2817. Mr. Banks gave the jury many reasons they might find as a mitigator, and encouraged the jury to think up more. Id. at 2818. It was in that context where his opening statements about giving a talk to his son's class came back to the jury in closing, and where Mr. Banks reminded the jury (by reminding his son's class) that "mercy has a place." Id. at 2818-19. Mr. Banks encouraged the jury to show mercy, if not for Hall, then for his children and his friends and for those people he might yet do a positive thing for. Id. at 2819. Finally, Mr. Banks placed the jurors in Hall's hypothetical future position in prison, being yelled at daily by correctional officers. Id. at 2820.

Mr. O'Brien's, and later Mr. Banks', entire point was that it was understandable and OK for the jury to be angry at Hall, to accept all of the things Hall did, both in murdering Flamm and in his past, and even to think that Hall deserved the death penalty, yet still show mercy because of what each juror thought of themselves, or to show mercy to Hall's children, or mother, or friends. Hall recognizes that "Hall's best argument in avoidance of a death sentence was arguably a plea for mercy." Supplemental Petition at 107-08. Mr. O'Brien and Mr. Banks thought so too and argued vehemently for that point. If the jury was not inclined to offer mercy to Mr. Hall, they encouraged him to show mercy to Hall's family, friends, and others who would be impacted if he were executed. They encouraged the jurors to show mercy on their own behalf, even if not for any of those people. They encouraged the jurors to show mercy for Flamm's family, because a death sentence would be litigated for a long time, while life-without would be "final." Exhibit 1, Volume III at 2810. Mr. Banks and O'Brien encouraged the jurors to find anything at all that might be a mitigating circumstance and to add that to those which they proposed. If some jurors were not inclined to show mercy for any of those reasons, Mr. O'Brien and Mr. Banks reiterated how terrible life in prison would be, and that such a sentence might even be *more vindictive* than a death sentence. Mr. O'Brien and Mr. Banks tried to address any belief each of the jurors may have had, tried to strike a chord with any of those, whether mercy or anger, and tried to show why life without the possibility of parole was the sentence that would get the jurors there. Their argument was nuanced, persuasive, and well considered; not deficient.

Even assuming counsel were deficient, Hall fails to demonstrate prejudice. Hall asserts that prejudice should be presumed under United State v. Chronic. 466 U.S. 648 (1984). Supplemental Petition at 108. Hall cites to Toomey v. Brunnell for the proposition that Chronic applies "where there has been an actual breakdown in the adversarial process at trial." 898 F.2d 741, 744 n. 2 (9th Cir.), cert. denied 111 S.Ct. 390 (1990); Supplemental Petition at 108. However, the 9th Circuit did not hold that in Toomey; Rather, the Court explained in *dicta* why the dissent was wrong to assert that Chronic should have applied in Toomey's case. Id. The Court stated that it applied the Chronic exception "very sparingly" and that it would not do so

in Toomey's case, where counsel *deliberately erred to preserve an issue for appeal*. Id. Hall presents no evidence that either Mr. O'Brien or Mr. Banks deliberately sabotaged the penalty phase of Hall's trial to preserve an appellate issue. Nor can he, as counsel argued vehemently that Hall should be spared the death penalty. Chronic, likewise, is easily distinguishable. In Chronic, "[t]he court appointed a young lawyer with a real estate practice to represent respondent, but allowed him only 25 days for pretrial preparation, even though it had taken the Government over four and one-half years to investigate the case and it had reviewed thousands of documents during that investigation." Cronic, 466 U.S. at 649. While the Chronic Court did hold that "there are 'circumstances that are so likely to prejudice the accused that the cost of litigating their effects in a particular case is unjustified,'" the Court identified only two and neither of those circumstances are present here. Supplemental Petition at 108. The Chronic Court suggested one such circumstance was when there was the "complete denial of counsel," but here Hall had two attorneys. Cronic, 466 U.S. at 659. Second, Chronic held that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing" prejudice might be presumed but, as argued above, counsel here did argue against the State's request that the jury sentence Hall to death. Id. Hall's citation to Wilson v. State fares no better. 105 Nev. 110, 771 P.2d 583 (1989); Supplemental Petition at 108. First, the Wilson Court did not apply a Chronic presumption, but rather found ineffective assistance of counsel under Strickland. Id. Second, in Wilson, the Nevada Supreme Court found error where "counsel's decision not to present a large body of mitigating evidence, coupled with counsel's egregious remarks before the sentencing panel, denied him the effective assistance of counsel" Id. at 105 Nev. 113, 771 P.2d at 584. Here, Hall does not identify any evidence counsel should have provided.[17] Nor does Hall identify what other argument counsel should have made – The very argument Hall suggests, "mercy," was actually made throughout the sentencing proceedings, and the jury rejected it.

Finally, Hall argues that appellate counsel was deficient for not raising the ineffective assistance of counsel claim on appeal. Hall recognizes that the Nevada Supreme Court

[17] Counsel could not present future dangerousness evidence as argued in Section XII, *supra*.

generally does not consider ineffective assistance of counsel claims on direct appeal. The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). The Nevada Supreme Court "has repeatedly declined to consider ineffective-assistance-of-counsel claims on direct appeal unless the district court has held an evidentiary hearing on the matter or an evidentiary hearing would be needless." Archanian v. State, 122 Nev. 1019, 1036, 145 P.3d 1008, 1021 (2006).

The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. No evidentiary hearing regarding ineffective assistance of counsel, or counsel's arguments during penalty phase, was held prior to Hall's direct appeal. Accordingly, counsel would had to have shown that "an evidentiary hearing would be needless" for the Court to even consider an ineffective assistance of counsel claim on appeal. Given the Nevada Supreme Court's reluctance to examine ineffective assistance of counsel claims on direct appeal, appellate counsel was not deficient for winnowing out the claim to focus on stronger arguments. Even assuming counsel were deficient, Hall was not prejudiced by counsel's choice not to raise the claim on direct appeal because he is permitted to, and has raised, the issue in the instant proceeding.

Hall fails to demonstrate either deficiency or prejudice of either trial or appellate counsel and his claims are denied. Because the existing record is sufficient to resolve the claims, no evidentiary hearing is warranted.

XIV. Counsel Did Not Mislead the Jury Regarding Hall's Death Eligibility

Hall asserts that counsel "made very confusing and misleading statements to the jury

in terms of death eligibility." Supplemental Petition at 109-110. Hall appears to argue that, if not error warranting relief itself, this should be considered in a cumulative error analysis. Id. at 110. Cumulative error analysis does not apply to post-conviction proceedings and would not be warranted in this case even if it did. See Section XIX, *infra*. However, assuming Hall intends to raise the alleged error as an individual claim, the claim fails.

Hall's claim is essentially that counsel told the jury that if the jury determined that the mitigating circumstances outweigh the aggravating circumstances, the death process stops, and that this was misleading because death was not on the table unless the jury had already determined that the mitigating circumstances do not outweigh the aggravating circumstances. Supplemental Petition at 109.

Counsel's statements were not erroneous. The jury must determine whether the charged aggravating circumstances exist. NRS 175.554(2)(a). That was the "first room" counsel referenced. Supplemental Petition at 109. Then the jury must determine whether the mitigating circumstances exist. NRS 175.554(2)(b). If the jury "finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found" then the jury may impose a sentence of death. NRS 175.554(3). Assuming the jury got to the point where they determined that some aggravating and some mitigating circumstances exist, counsel was correct when he said that "[i]f the mitigating circumstances outweigh the aggravators the death process stops." Supplemental Petition at 109. There was nothing either confusing or misleading about counsel's statements.

Even assuming counsel's statements were misleading or confusing, Hall was not prejudiced. The jurors received jury instructions from the Court explaining how to determine what sentence to impose. Exhibit 1, Volume II at 2584-2604. The jury was instructed that it was to "be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions…" Id. at 2604. The jury was instructed regarding the order for determined whether death was an appropriate sentence. Id. at 2586, 2591. A jury is presumed to follow its instructions, including in the penalty phase of

a capital trial. Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001). Hall does not assert, and has not demonstrated, that any juror was confused, misled, or did not follow the instructions they were given. Counsel was not deficient because they did not misstate or confuse the law, and even if counsel had Hall suffered no prejudice because the jury was correctly instructed and is presumed to have followed the instructions they were given. Because counsel was not deficient, and because Hall suffered no prejudice even if counsel's argument was confusing, and because the existing record belies Hall's claims, this Court denies the claim without an evidentiary hearing.

XV. Counsel Appropriately Declined to Make Frivolous Objections to Valid Jury Instructions

Hall asserts that counsel was deficient for not objecting to guilt phase jury instructions 7, 10, 26, and 40, as well as penalty phase instructions 3, 7, and 15, but counsel is not required to make frivolous objections and all these instructions have repeatedly been upheld by the Nevada Supreme Court. Supplemental Brief at 111-15, 116-117; Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

The Nevada Supreme Court has held that the "abandoned and malignant heart" language in guilt phase instruction 7, the express malice instruction, is essential and informs the jury of the distinction between express and implied malice. Leonard v. State (Leonard II), 117 Nev. 53, 78-79, 17 P.3d 397, 413 (2001). Because the instruction is a correct statement of law and has been repeatedly affirmed by the Nevada Supreme Court, trial counsel was not deficient for failing to object to the instruction, and appellate counsel was not deficient for winnowing out an issue with no chance of success on appeal. Jones, 463 U.S. at 751-52.

Jury instruction 10, the premeditation instruction, has also been repeatedly upheld by the Nevada Supreme Court. In fact, the Nevada Supreme Court specifically ordered that district courts use this exact instruction.[18] Byford v. State, 116 Nev. 215, 237, 994 P.2d 700, 714 (2000). Hall does not allege that either trial or appellate counsel were ineffective with regard to this instruction, and as a direct challenge to the instruction the claim is waived for failure to raise the claim on appeal. Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059

[18] The instruction used in this case is in Exhibit 1, Volume II, at 2211.

(1994) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). However, assuming, *arguendo*, Hall means to challenge the effectiveness of either counsel, neither could be deficient where the instruction given was explicitly mandated by the Nevada Supreme Court.

Hall admits that jury instruction 26, the reasonable doubt instruction, has been upheld by the Nevada Supreme Court, but raises the claim so that "this Court may reconsider its previous decisions and because this issue must be preserved for federal review." Supplemental Petition at 114.[19] Certainly this Court cannot overrule the Nevada Supreme Court, which has approved of the instruction, and raising the claims merely to preserve federal claims is inappropriate. The instruction is additionally mandated by statute. NRS 175.211. As with jury instruction 10, any direct challenge to the instruction is waived, and any allegation that either trial or appellate counsel were deficient necessarily fails. Hall's challenge to penalty instruction 15, the reasonable doubt instruction, is identical to the guilt-phase reasonable doubt instruction, and fails for exactly the same reasons. Supplemental Petition at 117-18. There was no error, much less structural error, in the instruction and neither trial nor appellate counsel were deficient for failing to object to the instruction.

Jury instruction 40, the "equal and exact justice" instruction, fails for all the same reasons. Leonard v. State (Leonard I), 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998) (providing that where the jury has been instructed that the defendant is presumed innocent and that the State bears the burden of proving guilt beyond a reasonable doubt, the equal-and-exact-justice instruction does not deny defendant the presumption of innocence or lessen the burden of proof). Accordingly, any direct challenge to the instruction is waived, and any allegation that either trial or appellate counsel were deficient necessarily fails.

Penalty instruction 3, as Hall notes, has been upheld by the Nevada Supreme Court, which has explicitly stated that the weighing of aggravating and mitigating circumstances is not required to be found beyond a reasonable doubt, and that such an instruction violates

[19] The Court assumes that references to "Crawley" are a scrivener's error, and that the position is being asserted on behalf of Hall.

neither Apprendi nor Ring. Nunnery v. State, 127 Nev. 749, 770, 263 P.3d 235, 250 (2011). As Nunnery was decided well after both of the cases Hall asserts the instruction runs afoul of, it is clear the Nevada Supreme Court disagrees, and has for some time. As a direct challenge, the claim is waived for failure to raise the claim on appeal, and as a claim that either trial or appellate counsel was ineffective, the claim fails as the instruction is a correct statement of Nevada law.

Penalty instruction 7, as Hall notes, was not objected to at trial but was raised on direct appeal. Supplemental Petition at 116. The Nevada Supreme Court held that jury instruction 7, when read in conjunction with other instructions given, was not error and did not affect Hall's substantial rights. Hall v. State, No. 62663, 2015 WL 6447296, at *6-7 (Nev. Oct. 22, 2015). That holding is now law of the case, which "cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 797 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (*citing* McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. Nev. Const. Art. VI § 6. Hall speculation that review under a standard other than plain error is mere speculation, and does not demonstrate that trial counsel was deficient for failing to object.

As neither trial not appellate counsel were deficient with respect to any of these jury instructions, an evidentiary hearing on these claims is not required and his claims are be denied.

XVI. Hall is Not Actually Innocent of the Death Penalty

Hall makes a bare and naked assertion that he is actually innocent of the death penalty, based on unspecified "inadmissible evidence" presented during penalty phase. Supplemental Petition at 118-19; NRS 34.735(6). As a direct challenge, to either the evidence or the judgment of conviction, the claim fails for not having been raised on direct appeal. Franklin, 110 Nev. at 752. Moreover, actual innocence is not a freestanding claim. Instead, actual

innocence is one method by which a petitioner asserting claims in a successive petition, or a petition barred by laches, may overcome the procedural bars and "secure review of the merits of the defaulted claims." Berry v. State, 131 Nev. 957, 967, 363 P.3d 1148, 1155 (2015). Hall's petition is not time-barred, successive, or barred by laches, so there are no procedural bars to this petition which must be overcome. Moreover, actual innocence means factual innocence, nor mere legal insufficiency. Mitchell v. State, 122 Nev. 1269, 1273–74, 149 P.3d 33, 36 (2006). Hall does not allege any facts that demonstrate that he is actually innocent. Nor does he allege any new facts that challenge the legal validity of all the aggravating circumstances found by the jury. See Lisle v. State, 131 Nev. 356, 362, 351 P.3d 725, 730 (2015). Accordingly, "actual innocence" is irrelevant to this petition.

XVII. Neither Trial Nor Appellate Counsel Were Deficient for Failing to Argue that Elected Judges and "Judicial Bias" Require Reversal of His Conviction

The Nevada Supreme Court has held that elected judges do not violate a defendant's Constitutional rights or require reversal of a valid Judgment of Conviction. See McConnell v. State, 125 Nev. 243 at 256, 212 P.3d 307 at 316, as corrected (July 24, 2009). The substantive claim is waived for failure to raise it on direct appeal. See Section II, *supra*. While Hall does not allege that either trial or appellate counsel was deficient for failure to raise this claim, to the extent that Hall's petition might be understood to raise the claim, it fails. In McConnell, the petitioner raised "an ineffective-assistance claim based on appellate counsel's failure to argue that it was prejudicial to have elected judges and justices preside over his trial and appellate review because elected judges are beholden to the electorate and therefore cannot be impartial." Id. at 256, 212 P.3d at 316. The Nevada Supreme Court denied the petitioner's claim on two grounds. First, the Court explained that the petitioner "failed to substantiate this claim with any specific factual allegations demonstrating actual judicial bias." Id. Further, the "argument is unpersuasive and would not have had a reasonable probability of success." Id. Pursuant to McConnell, this Court rejects Hall's generalized argument that an elected judiciary cannot be fair, or that either trial or appellate counsel was deficient for not arguing a meritless claim without an evidentiary hearing.

/ / /

XVIII. Nevada's Death penalty Is Constitutional, and Cannot Be Challenged in a Post-Conviction Petition for Writ of Habeas Corpus

Hall asserts that Nevada's lethal injection protocol is unconstitutional, and that trial and appellate counsel were deficient for failing to raise this claim. Supplemental Petition at 122-23. The substantive claim is waived for failure to raise it on direct appeal. See Section II, *supra*. The claim that trial counsel was deficient for failing to raise the claim fails because trial counsel would have had no reason to raise the claim – Hall had not yet been convicted or sentenced to death. Nor was appellate counsel deficient for failing to raise the claim, as it is meritless. McConnell v. State, 120 Nev. 1043, 1054-58, 102 P.3d 606, 615-17 (2004) (rejecting the claim that Nevada's lethal injection statute is unconstitutional.) Additionally, the claim cannot be raised in the instant Petition and must be rejected. McConnell v. State, 125 Nev. 243, 248, 212 P.3d 307, 311 (2009), as corrected (July 24, 2009) ("Because McConnell's challenge to the lethal injection protocol would not preclude his execution under current law using another protocol, we conclude that the 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.") Because the claim cannot be raised in the instant petition, and because neither trial nor appellate counsel were deficient even if it could be, this Court rejects Hall's claim without an evidentiary hearing.

XIX. Cumulative Error Does Not Apply to Post-Conviction petitions for Writ of Habeas Corpus, and Provides No Relief Here if it Did

Hall asserts that cumulative error requires a new guilt and penalty phase. Supplemental Petition at 100, 124. The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated. However, even if they could be, here was no ineffective assistance in Hall's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Furthermore, Hall's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). Any errors that occurred at trial were minimal in quantity and character, and a defendant "is not

entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975). The first factor strongly favors the State, as the evidence presented was overwhelming and, largely, uncontroverted. In addition to the extensive evidence presented by the State, Hall admitted to killing Flamm, but argued only that he was less culpable because he was provoked. Further, extensive evidence of Hall's aggravating circumstances was presented, and the jury found both the previous-felony aggravator and the torture/mutilation aggravator. The second factor also favors the State, as no errors have been shown. Finally, the third factor is neutral, as the crimes charges were extremely grave. Without any error, or only minor error, to cumulate, and in the face of overwhelming evidence of both guilt and death-eligibility, Hall is not entitled to relief even if cumulative error analysis did apply.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief and supplement thereto shall be, and it is, hereby DENIED.

DATED this _____ day of September, 2020. Dated this 22nd day of September, 2020

DISTRICT JUDGE

3D8 819 4D91 7F24
Michelle Leavitt
District Court Judge

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ John Niman*
JOHN NIMAN
Deputy District Attorney
Nevada Bar #014408

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Findings of Fact, Conclusions of Law and Order, was made this 14th day of September, 2020, by Electronic Filing to:

KAREN A. CONNOLLY, ESQ.
Email: advocate@kconnollylawyers.com

/s/ E.Davis

Employee for the District Attorney's Office

JN//ed

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

State of Nevada	CASE NO: 09C254922
vs	DEPT. NO. Department 12
Bryan Hall	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN LEE HALL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81994

FILED
DEC 08 2022
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Bryan Hall robbed and murdered Bradley Flamm at a Las Vegas resort and casino. Hall testified that he killed Flamm because Flamm made offensive comments about his sexual history with Hall's wife and the paternity of Hall's child. A jury found Hall guilty of robbery and first-degree murder and sentenced him to death for the murder. This court affirmed the convictions and death sentence on appeal. *See Hall v. State*, No. 62663, 2015 WL 6447296 (Nev. Oct. 22, 2015) (Order of Affirmance). Hall filed a timely, first postconviction petition for a writ of habeas corpus. The district court denied the petition without conducting an evidentiary hearing.

Ineffective assistance of counsel

Hall argues the district court erred in denying his claims of ineffective assistance of trial and appellate counsel.[1] To prove ineffective

[1]We acknowledge that Hall argues that ineffective assistance of counsel provides good cause and prejudice to raise claims that could have been raised on direct appeal. *See* NRS 34.810(1)(b). We need not address the procedural-bar overlay for two reasons. First, the ineffective-

assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. 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).

Juvenile records

Hall argues that the district court erred in denying his claim that trial and appellate counsel failed to adequately challenge the State's use of his California juvenile records during the penalty phase of his trial. He contends that trial and appellate counsel should have challenged the State's introduction of his juvenile records based on a California law prohibiting the release of juvenile records to unauthorized persons.[2] Hall alleges that when the State obtained his juvenile file, a notice was attached to the records that cited Cal. Welf. & Inst. Code § 827, which requires a

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assistance-of-counsel claims were properly raised for the first time in the postconviction habeas petition. *See Pellegrini v. State*, 117 Nev. 860, 34 P.3d 519 (2001). Second, if Hall had demonstrated that either trial or appellate counsel provided ineffective assistance, he would be entitled to relief and a separate review of the substantive claim underlying the ineffective-assistance-of-counsel claim would not provide further relief.

[2]To the extent Hall argues that counsel should have challenged the use of his juvenile records under NRS Chapter 62H, we conclude this contention lacks merit because those statutes govern Nevada juvenile justice records.

party authorized to inspect juvenile records to petition the juvenile court for an order before further disclosure. *See Lorenza P. v. Superior Court*, 242 Cal. Rptr. 877, 879 (Ct. App. 1988) (explaining that defendant could not obtain juvenile records by a subpoena; instead, she had "to petition the juvenile court to review the records in camera to determine which, if any, may be disclosed"). Because the State did not petition for a juvenile court order permitting further release of his juvenile records, Hall alleges that the State was not authorized to disseminate the records at trial. *See People v. Stewart*, 269 Cal. Rptr. 3d 687, 701 (Ct. App. 2020) (providing that "neither a prosecutor nor any other person authorized to inspect without a court order is permitted to disseminate confidential information in juvenile files to a person not so authorized").

Regarding the psychological portions of his juvenile file, Hall contends that, even if the State properly obtained the records, trial and appellate counsel should have challenged the use of psychological evaluations against him on Fifth Amendment grounds. Hall alleges that, as a juvenile, he did not initiate or voluntarily undergo a court-ordered psychological evaluation, and the State affirmatively used his un-*Mirandized*[3] statements against him in the penalty hearing, and not as rebuttal of a mental status defense. Furthermore, Hall contends that the district court erred in denying his claim of prosecutorial misconduct related to the State's use of his juvenile psychological records—e.g., telling the jury he had been assessed as a sexual sadist—and the State concedes that the psychologist did not make that diagnosis.

The Supreme Court has found that the use of court-ordered psychological examinations against a defendant may violate the Fifth

[3]*Miranda v. Arizona*, 384 U.S. 436 (1966).

Amendment in some circumstances. *Compare Estelle v. Smith*, 451 U.S. 454, 468 (1981) ("A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding."), *with Buchanan v. Kentucky*, 483 U.S. 402, 423-24 (1987) (explaining that introducing portions of a psychiatric report, which the defense jointly requested, to rebut defendant's mental status defense did not violate the Fifth Amendment), *and Penry v. Johnson*, 532 U.S. 782, 794-95 (2001) (concluding that the admission of a defense-requested psychiatric report during the penalty phase of trial, which was prepared before trial for an unrelated rape charge, did not warrant habeas relief). Likewise, this court has explained that "[g]enerally, the State may not use a healthcare provider to introduce a defendant's un-*Mirandized* statements from a court-ordered psychiatric evaluation." *Pimentel v. State*, 133 Nev. 218, 228, 396 P.3d 759, 768 (2017); *see also Brown v. State*, 113 Nev. 275, 281, 289, 934 P.2d 235, 240, 245 (1997) (concluding that the consideration at sentencing of defendant's unwarned statements made to a psychiatrist in a court-ordered examination "violates the 'fair play' rules . . . and the Fifth Amendment concerns set forth in *Estelle*, and constitute[d] reversible error"). Although trial and appellate counsel challenged the use of Hall's juvenile psychological records under *Redmen v. State*, 108 Nev. 227, 234, 828 P.2d 395, 400 (1992), *overruled on other grounds by Alford v. State*, 111 Nev. 1409, 906 P.2d 714 (1995), which provided that "psychiatric evidence purporting to predict the future dangerousness of a defendant is highly unreliable and, therefore, inadmissible at death penalty sentencing hearings," given the authority above, counsel's decision to forgo a Fifth Amendment challenge may have

fallen below an objective standard of reasonableness and resulted in prejudice.

In denying this ineffective-assistance-of-counsel claim without conducting an evidentiary hearing, the district court overlooked the factual issues concerning the California proceedings and the reasonableness of trial and appellate counsel's investigation and litigation decisions. *Cf. Johnson v. State*, 117 Nev. 153, 161, 17 P.3d 1008, 1013 (2001) (noting that an evidentiary hearing may "be of little value" when the issue presented is purely legal). We conclude that Hall alleged specific facts that are not belied by the record and that, if true, may have entitled him to relief. In particular, the factual underpinnings of trial and appellate counsel's investigation into the juvenile records and the context of the psychological evaluations exist outside the record. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225; *see also Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) (providing "that [w]here something more than a naked allegation has been asserted, it is error to resolve the apparent factual dispute without granting the accused an evidentiary hearing." (internal quotation marks and alteration omitted)). While we express no opinion as to the merits of the issues discussed above, we conclude that an evidentiary hearing is necessary to fully assess trial and appellate counsel's performance and any potential prejudice that resulted. Accordingly, we reverse the district court's order as to these ineffective-assistance-of-counsel claims and remand for an evidentiary hearing to consider in the first instance whether Hall can demonstrate deficient performance and prejudice. At the evidentiary hearing, the district court should focus on whether trial and appellate counsel's performance was deficient in investigating and addressing the State's procurement and use of his juvenile file and challenging the

admissibility of the juvenile psychological records. In assessing any potential prejudice during the penalty phase, the district court should consider the weight of the juvenile evidence considering the other evidence presented and the extent to which the State relied on the juvenile evidence.

Provider-patient privilege

Hall argues that the district court erred in denying his claim that trial and appellate counsel should have challenged the introduction of his juvenile psychological records under California and Nevada privilege statutes. We conclude this argument lacks merit.

Even assuming the records were privileged under California law, he has not shown the documents were protected from admission in Nevada. *See* Restatement (Second) of Conflict of Laws § 139(2) (1971) (providing that "[e]vidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted"). As to Nevada, Hall contends that his psychological records were protected by the psychologist-patient privilege. The district court found that, even if the records were confidential, the "court-ordered examination" exception under NRS 49.213(7) applied to Hall's statements. And Hall concedes that no Nevada cases support his contention that the district court erroneously applied the exception. Accordingly, he has not shown deficient performance based on counsel's failure to assert the privilege. *See Steinhorst v. Wainwright*, 477 So. 2d 537, 540 (Fla. 1985) ("The failure to present a novel legal argument not established as meritorious in the jurisdiction of the court to whom one is arguing is simply not ineffectiveness of legal counsel."). To the extent Hall cites other privilege statutes, he has not presented relevant authority or cogent argument. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (recognizing that "[i]t is appellant's responsibility to present

relevant authority and cogent argument"). Therefore, the district court did not err in denying this ineffective-assistance-of-counsel claim without conducting an evidentiary hearing.[4]

Investigation and theory of defense

Hall argues that trial counsel should have called an expert to discuss the effect of Hydrocodone found in Flamm's system and requested independent testing of Flamm's bodily fluids.

At trial, the district court admitted a toxicology report that showed Flamm had Hydrocodone in his system when he died. Hall contends that trial counsel should have presented expert testimony to explain how the effect of the drug in Flamm's system made him more prone to make a comment instigating a fight. Hall has not shown deficient performance or prejudice. Considering Hall's testimony that he attacked and killed Flamm, trial counsel pursued an objectively reasonable defense that Flamm provoked Hall and he acted in a sudden heat of passion, rather than with deliberation and premeditation. *See Florida v. Nixon*, 543 U.S. 175, 191 (2004) ("Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear."). At trial, Hall testified about what Flamm said, and Flamm's fiancée testified that Flamm sometimes made inappropriate comments. Nevertheless, the jury rejected lesser offenses and found Hall guilty of first-degree murder. Because the State presented overwhelming evidence supporting that finding, Hall has not shown that presenting

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[4]Hall also argues that the district court erred in denying his claims that counsel should have argued that the use of the psychological records violated his constitutional rights to counsel and due process. Hall points to nothing in the record demonstrating violations of these rights beyond the issues addressed above regarding use of the juvenile records. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225.

additional evidence that Flamm likely made an inappropriate comment would have created a reasonable probability of a different outcome in the guilt phase of trial. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (providing that "[w]here counsel and the client in a criminal case clearly understand the evidence and the permutations of proof and outcome, counsel is not required to unnecessarily exhaust all available public or private resources" when preparing a defense for trial). Likewise, independent testing to confirm the presence of drugs in Flamm's system would not have resulted in a different outcome. Therefore, the district court did not err in denying this ineffective-assistance-of-counsel claim without conducting an evidentiary hearing.

Prior-bad-act evidence

Hall argues that trial counsel should have ensured a limiting instruction was given addressing the use of prior-bad-act evidence and appellate counsel should have raised the issue. Hall has not shown deficient performance or prejudice. The record shows that trial counsel objected to the admission of evidence that, during an incident that led to a prior felony battery conviction, Hall told his ex-wife that he would rape and kill her former romantic partners. After the district court permitted the State to elicit that testimony, trial counsel made a strategic decision to decline the district court's offer to give a limiting instruction pursuant to *Tavares v. State*, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001); however, the jury was instructed that a prior felony conviction could only be considered in assessing a witness's credibility. Hall has not shown extraordinary circumstances to challenge trial counsel's strategic decision. *See id.* (recognizing that "the defense may not wish a limiting instruction to be given for strategic reasons"); *see also Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (explaining that a reviewing court is "required not simply to give the

attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons [a petitioner's] counsel may have had for proceeding as they did" (internal quotation marks, alterations, and citations omitted)); *Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (holding that counsel's strategic decisions are "virtually unchallengeable absent extraordinary circumstances" (internal quotation marks omitted)). Likewise, given the overwhelming evidence of Hall's guilt, including his testimony that he killed Flamm, he has not shown that appellate counsel omitted a meritorious claim. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Examination of witnesses

Hall argues that trial and appellate counsel should have made several challenges to trial testimony. For the reasons discussed below, Hall has not shown deficient performance or prejudice. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims."); *see also McConnell v. State*, 125 Nev. 243, 253, 212 P.3d 307, 314 (2009) ("Appellate counsel is not required to raise every nonfrivolous issue on appeal.").

First, Hall contends that trial counsel failed to appropriately object when the State asked him if his wife testified accurately about picking him up the night of the killing and that appellate counsel should have raised the issue. We disagree because trial counsel made an appropriate objection pursuant to *DeChant v. State*, 116 Nev. 918, 924, 10 P.3d 108, 112 (2000) (holding that lay witness's opinion about the veracity of another witness is inadmissible), and, given the overwhelming evidence of guilt, Hall has not shown a reasonable probability of success had appellate counsel raised this issue. *See King v. State*, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (providing that prosecutorial misconduct may

be harmless where there is overwhelming evidence of guilt). The district court therefore did not err in rejecting this ineffective-assistance-of-counsel claim without conducting an evidentiary hearing.

Second, Hall contends that trial and appellate counsel failed to challenge a detective narrating surveillance footage. Much of the surveillance footage came from an elevated camera and the detective's narration assisted the jurors by orienting them and helping them follow the timeline of Hall's movements inside and outside the casino. The narration thus was not improper. *See Burnside v. State*, 131 Nev. 371, 387-89, 352 P.3d 627, 639-640 (2015) (explaining that narration of surveillance video is proper if it assists the jury in making sense of the depicted images). Hall also asserts that the State asked the detective leading questions about his investigation. Even if the questions were leading, there was nothing objectionable about the detective testifying to his perceptions of the crime scene and his opinions about what crimes he was investigating. *See* NRS 50.265 (permitting opinion testimony based on a witness's perceptions). Accordingly, Hall has not shown a reasonable probability of success had trial counsel objected or appellate counsel raised this issue on appeal. Therefore, the district court did not err in denying this ineffective-assistance-of-counsel claim without conducting an evidentiary hearing.

Third, Hall contends that trial counsel should have objected to leading questions posed to the medical examiner. After reviewing the record, we discern nothing objectionable about asking the medical examiner about her perceptions and opinions of Flamm's injuries. *See* NRS 50.285 (permitting expert opinion testimony). Accordingly, the district court did not err in denying this ineffective-assistance-of-counsel claim without conducting an evidentiary hearing.

Fourth, Hall contends that trial and appellate counsel should have challenged the testimony of Flamm's fiancée based on a lack of personal knowledge about Flamm's tip money. She testified that on the night of his murder, Flamm likely earned between $100 and $200 in cash from tips. On the night of the murder, Flamm's fiancée worked as a manager at the restaurant where Flamm worked. We conclude she had sufficient personal knowledge to estimate the amount of tip money Flamm likely made that night. *See* NR 50.265; *Lane v. Second Judicial Dist. Court*, 104 Nev. 427, 446, 760 P.2d 1245, 1257 (1988) ("[T]o be competent to testify, a witness must have personal knowledge of the subject of his testimony."). Thus, neither trial nor appellate counsel omitted a meritorious challenge, and the district court did not err in denying this ineffective-assistance-of-counsel claim without conducting an evidentiary hearing.

Finally, Hall contends that trial and appellate counsel should have challenged a witness's identification of him from surveillance footage. Hall has not shown that counsel omitted a meritorious challenge given his testimony admitting that he was the individual depicted in the surveillance footage. Furthermore, the record reflects that the witness had a reasonable basis from which he could correctly identify Hall since he previously worked with Hall for over a year. *See Rossana v. State*, 113 Nev. 375, 380, 934 P.2d 1045, 1048 (1997) (providing that a lay witness's opinion testimony "regarding the identity of a person depicted in a surveillance photograph" is admissible "if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury" (internal quotation marks omitted)). Therefore, the district court did not err in denying this ineffective-assistance-of-counsel claim without conducting an evidentiary hearing.

Use of the term "murder"

Hall argues that trial counsel should have challenged the prosecutor referring to Flamm's death as a "murder" by making ongoing objections, and appellate counsel should have raised the issue. Contrary to Hall's assertion, trial counsel's decision to object to the first instance and not make ongoing objections was objectively reasonable because continued objections would have unnecessarily drawn attention to the prosecutor saying that Hall murdered Flamm. *Cf. Bussard v. Lockhart*, 32 F.3d 322, 324 (8th Cir. 1994) (observing that counsel's decision to object to prosecutorial misconduct during closing argument is a strategic decision which "must take into account the possibility that the court will overrule it and that the objection will either antagonize the jury or underscore the prosecutor's words in their minds"). The district court therefore did not err in denying this ineffective-assistance-of-counsel claim without conducting an evidentiary hearing.

Regarding appellate counsel, he raised several alleged instances of prosecutorial misconduct that occurred in the penalty hearing. *See Hall v. State*, No. 62663, 2015 WL 6447296, at *4-5 (Nev. Oct. 22, 2015) (Order of Affirmance). The issue raised now would not have been frivolous given that trial counsel preserved it below but considering the overwhelming evidence in the guilt phase it was objectively reasonable for appellate counsel to focus on penalty-phase claims of misconduct. *See Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) ("When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the [reviewing] court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal."). Therefore, the district court did not err in denying this

ineffective-assistance-of-counsel claim without conducting an evidentiary hearing.

Closing argument

Hall argues that appellate counsel should have argued the State improperly shifted the burden of proof during its rebuttal argument. "Generally, a prosecutor's comment on the defense's failure to call a witness impermissibly shifts the burden of proof to the defense." *Browning v. State*, 120 Nev. 347, 360, 91 P.3d 39, 49 (2004).

Here, the State commented on trial counsel's unsupported assertion about disinhibition and told the jury that the defense could have presented a witness to testify about the effects of the Hydrocodone in Flamm's blood. "The tactic of stating that the defendant can produce certain evidence . . . is an attempt to shift the burden of proof and is improper." *Barron v. State*, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989). Although the issue thus may not have been frivolous, particularly where trial counsel preserved the issue with an objection, appellate counsel was not ineffective because even if this instance of misconduct were cumulated with the single *possible* error demonstrated on direct appeal, *Hall*, 2015 WL 6447296, at *8 n.4, it is not reasonably probable that this issue would have changed the outcome on appeal given the overwhelming evidence of guilt. Therefore, the district court did not err in denying this ineffective-assistance-of-counsel claim without conducting an evidentiary hearing.

Jury instructions

Hall argues that trial and appellate counsel should have challenged the guilt and penalty phase jury instructions regarding the weighing of aggravating and mitigating circumstances, premeditation and deliberation, malice, equal and exact justice, and reasonable doubt. Hall has not shown deficient performance or prejudice. Counsel could not have

successfully challenged any of these instructions given controlling Nevada authority. *See, e.g., McConnell*, 125 Nev. at 254, 212 P.3d at 314-15 (explaining that nothing in Nevada's statutory scheme "requires a jury to find, or the State to prove, beyond a reasonable doubt that no mitigating circumstances outweighed the aggravating circumstances in order to impose the death penalty"); *Byford, v. State*, 116 Nev. 215, 236-37, 995 P.2d 700, 714-15 (2000) (approving the premeditation and deliberation instruction given here); *id.* at 232, 995 P.2d at 712 (upholding the malice instruction where the jury is properly instructed on the presumption of innocence); *Leonard v. State (Leonard I)*, 114 Nev. 1196, 1208, 969 P.2d 288, 296 (1998) (concluding that the use of allegedly archaic statutory language in the malice instruction did not deprive defendant of a fair trial); *id.* at 1209, 969 P.2d at 296 (providing that where the jury has been instructed that the defendant is presumed innocent and that the State bears the burden of proving guilt beyond a reasonable doubt, the equal-and-exact-justice instruction does not undermine the presumption of innocence or lessen the burden of proof); *Chambers v. State*, 113 Nev. 974, 982-83, 944 P.2d 805, 810 (1997) (upholding the reasonable doubt instruction provided in NRS 175.211). Therefore, the district court did not err in denying this ineffective-assistance-of-counsel claim without conducting an evidentiary hearing.[5]

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[5]Hall also argues that trial counsel should have objected to the mitigation-evidence instruction. After considering the instructions as a whole, this court rejected a challenge to this instruction on appeal. *Hall*, 2015 WL 6447296, at *6-7. That decision is the law of the case and Hall has not demonstrated circumstances to warrant revisiting it. *See Hsu v. Cty. of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 728 (2007) (explaining that the purpose of the law-of-the-case doctrine is to prevent reconsideration of matters that have been settled and put to rest).

Penalty hearing advocacy

Hall argues that trial counsel abandoned the role of an advocate during opening and closing remarks.[6] During the penalty phase of trial, "counsel's mission is to persuade the trier that his client's life should be spared." *Florida v. Nixon*, 543 U.S. 175, 191 (2004). First, Hall takes issue with trial counsel opening the penalty phase of trial with an anecdote about not knowing how to describe his profession to his son's class. Hall asserts that the anecdote told the jurors that trial counsel believed representing capital defendants is so distasteful that he could not describe it. We disagree because the anecdote communicated to the jurors that counsel understood the unpleasant details of Hall's juvenile and adult criminal offenses. Trial counsel was not objectively unreasonable in acknowledging the grisly facts of both the underlying murder of Flamm and Hall's juvenile conduct. *See id.* at 192 ("[C]ounsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in a useless charade." (internal quotation marks omitted)); *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."). And trial counsel returned to the anecdote in closing argument to support his appeal for mercy, which Hall concedes was his best argument against the death penalty.

Relying on *Wilson v. State*, 105 Nev. 110, 771 P.2d 583 (1989), Hall also contends that trial counsel made comments that aided the

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[6]Hall also contends that trial counsel should have objected to multiple alleged trial errors this court rejected under plain error review on direct appeal. We conclude that harmless error review would not have resulted in a different outcome on direct appeal.

prosecution. In *Wilson*, this court concluded that trial counsel's "decision not to present a large body of mitigating evidence, coupled with counsel's egregious remarks before the sentencing panel, denied [appellant] the effective assistance of counsel." *Id.* at 113, 771 P.2d at 584. Counsel's performance in this case is not comparable to defense counsel's performance in *Wilson*. Trial counsel presented substantial evidence in mitigation that is reflected in one or more jurors finding nine mitigating circumstances. Rather than making a plea for mercy directly for Hall, trial counsel implored the jurors to bestow mercy for Hall's family and impose a life sentence. Given the brutal and senseless nature of Flamm's murder and Hall's adult and juvenile conduct, we conclude that counsel's approach was not objectively unreasonable. *See Yarborough*, 540 U.S. at 5-6 ("[C]ounsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage."). Drawing the jurors' attention to the pain felt by Flamm's family supported counsel's argument that sentencing Hall to death would also inflict pain on Hall's family. Furthermore, Hall has not shown a reasonable probability of a different outcome had trial counsel made a plea for mercy directly for Hall. Therefore, the district court did not err in denying this ineffective-assistance-of-counsel claim without conducting an evidentiary hearing.[7]

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[7]To the extent Hall argues that appellate counsel should have raised this issue, we conclude that he has not shown that counsel omitted a meritorious issue because this court generally declines to address ineffective-assistance-of-counsel claims on direct appeal. *See Feazell v. State*, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

Capital deliberations

Hall argues that trial counsel misled the jurors about the deliberative process and when the death penalty is an available sentence. We disagree because under Nevada law, "a defendant is death-eligible once the State proves the elements of first-degree murder and the existence of at least one statutory aggravating circumstance." *Castillo v. State*, 135 Nev. 126, 128, 442 P.3d 558, 560 (2019); *see also* NRS 175.554(3). After reviewing the record in this case, we conclude that trial counsel accurately described the capital deliberative process. Trial counsel correctly told the jury that if one juror finds mitigating circumstances sufficient to outweigh the aggravating circumstances, the death penalty is no longer a sentencing option. *See Barlow v. State*, 138 Nev., Adv. Op. 25, 507 P.3d 1185, 1199-00 (2022). Therefore, the district court did not err in denying this ineffective-assistance-of-counsel claim without conducting an evidentiary hearing.[8]

Future dangerousness

Hall argues that trial counsel should have presented mitigation evidence that he would make a positive adjustment to incarceration to rebut the State's future dangerousness argument. Relying on a violence risk assessment for prison, he contends that trial counsel should have introduced evidence that he would behave well in prison and not be a danger. Hall has not shown deficient performance or prejudice. Trial counsel presented testimony from two fellow inmates about positive interactions with Hall while in custody. Therefore, this ineffective-

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[8]Hall also argues that erroneous weighing language in the unused verdict form warrants relief. We disagree because Hall could have raised this claim in prior proceedings, NRS 34.810(1)(b), and Hall has not shown cause and prejudice to overcome the procedural bar. *See Barlow*, 138 Nev., Adv. Op. 25, 507 P.3d at 1192 n.4 (finding no error in the district court giving a similar verdict form).

assistance-of-counsel claim is belied by the record and the district court did not err in denying it without conducting an evidentiary hearing. *See McNelton v. State*, 115 Nev. 396, 410, 990 P.2d 1263, 1273 (1999) (providing that the decision regarding what mitigation evidence to present is a tactical one entrusted to defense counsel).

Challenges to the death penalty

Hall argues that trial and appellate counsel should have argued that lethal injection constitutes cruel and unusual punishment. A challenge to the method of execution cannot be raised in a postconviction petition for a writ of habeas corpus because it does not challenge the validity of the sentence. *See McConnell*, 125 Nev. at 249, 212 P.3d at 311. And Hall has not shown deficient performance or prejudice given that this court has repeatedly rejected similar challenges. *See, e.g., Belcher v. State*, 136 Nev. 261, 278, 464 P.3d 1013, 1031 (2020) (rejecting a claim that the death penalty "violates the Eighth Amendment's prohibition against cruel and unusual punishment"); *Leonard v. State (Leonard II)*, 117 Nev. 53, 83, 17 P.3d 397, 416 (2001) (explaining that "[t]his court has repeatedly upheld Nevada's death penalty against similar challenges"). Therefore, the district court did not err in denying this ineffective-assistance-of-counsel claim without conducting an evidentiary hearing.

Cumulative error

Hall argues that the district court erred in denying his claim that the cumulative effect of errors by trial and appellate counsel deprived him of a fair trial. This court has never determined that multiple deficiencies in counsels' performance may be considered cumulatively for purposes of *Strickland*'s prejudice prong. *See McConnell*, 125 Nev. at 259, 212 P.3d at 318 (applying without adopting the cumulative error standard). Even assuming that counsel's deficiencies can be cumulated, we have found

only one potential deficiency related to Hall's juvenile records and granted appropriate relief (an evidentiary hearing), and therefore there is nothing to cumulate.[9]

Actual innocence

Hall argues that he is actually innocent of the death penalty. Even assuming that a free-standing claim of actual innocence is cognizable in a postconviction habeas petition, *see Berry v. State*, 131 Nev. 957, 967 n.3, 363 P.3d 1148, 1154 n.3 (2015) (noting that "[t]his court has yet to address whether and, if so, when a free-standing actual innocence claim exists"), Hall does not point to any new evidence or allege that either aggravating circumstance is legally invalid. Accordingly, he has not demonstrated that he is actually innocent of the death penalty. *See Lisle v. State*, 131 Nev. 356, 362, 351 P.3d 725, 730 (2015) (providing that to show actual innocence of the death penalty, the petitioner must show that it is more likely than not that no reasonable juror would have found the aggravating circumstances based on new evidence or that the aggravating circumstances are invalid as a matter of law). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Elected judges

Hall argues that the district court erred in denying his claim that elected judicial officers are inherently biased. Hall did not substantiate his contentions with portions of the record demonstrating bias against him because the district judge and Supreme Court justices are popularly elected.

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[9]To the extent Hall argues that the State failed to respond to some of his arguments, we conclude the State adequately addressed Hall's contentions. *Cf. Belcher*, 136 Nev. at 267, 464 P.3d at 1023 (discussing the State's complete failure to respond or address an issue as a confession of error).

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 this court has rejected similar claims where an appellant fails to establish actual judicial bias. *See, e.g., McConnell*, 125 Nev. at 256, 212 P.3d at 316 (rejecting the same claim where appellant "failed to substantiate this claim with any specific factual allegations demonstrating actual judicial bias"). Furthermore, a jury, not judges, found Hall guilty of first-degree murder and sentenced him to death. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Disqualification of the District Attorney's Office

Hall argues that the district court erred in denying his motion to disqualify the Clark County District Attorney's Office.[10] Hall contends that the prosecutors' improper use of his juvenile records created an appearance of impropriety warranting disqualification. We disagree. This court has retreated from the impropriety standard and concluded "that the appropriate inquiry is whether the conflict would render it unlikely that the defendant would receive a fair trial unless the entire prosecutor's office is disqualified from prosecuting the case." *State v. Eighth Judicial Dist. Court (Zogheib)*, 130 Nev. 158, 165, 321 P.3d 882, 886 (2014). And the State disagreeing with Hall's legal position on admission and use of his juvenile records is insufficient to show the prosecuting office's participation in the postconviction proceeding resulted in an unfair proceeding. Thus, the

[10]We reject the State's argument that the denial of the motion to disqualify is not properly raised in this appeal as it is a decision related to the habeas proceedings. *See* NRS 177.045 (providing that intermediate decisions of the district court may be raised in an appeal from a final judgment).

district court did not abuse its discretion in denying the motion to disqualify. *See id.* at 161, 321 P.3d at 884 (reviewing a district court's resolution of a motion to disqualify a prosecutor's office for an abuse of discretion).

Having concluded that Hall is entitled only to the relief described above, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[11]

_____, C.J.
Parraguirre

_____, J.
Hardesty

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Pickering

_____, J.
Herndon

cc: Hon. Michelle Leavitt, District Judge
Karen A. Connolly, Ltd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[11]This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

The Honorable Abbi Silver having retired, this matter was decided by a six-justice court.

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ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

BRYAN HALL,

Defendant.

Case No.: 09C254922

Department XII

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

Findings of Fact

1. The State filed an Indictment on May 29, 2009 charging Petitioner, Bryan Lee Hall with Murder With Use Of A Deadly Weapon (Felony-NRS 200.010, 200.030, 193.165), and Robbery With Use Of A Deadly Weapon (Felony- NRS 200.380, 193.165).

2. The State filed a Notice of Intent to Seek the Death Penalty on June 19, 2009.

3. On October 22, 2012, Petitioner's trial commenced, and on November 7, 2012, the jury returned a verdict finding Petitioner guilty of First Degree Murder With Use Of A Deadly Weapon, and Robbery With Use Of A Deadly Weapon. Mr. Hall took the stand and testified he killed the victim because he made offensive comments about his sexual history with Mr. Hall's wife and the paternity of his (Halls) child. The jury rejected Petitioner's version of events in finding him guilty of First Degree Murder.

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LAS VEGAS, NEVADA 89155

Statistically closed: N. USJR - CR - Other Manner of Disposition (USCO)

4. The penalty phase commenced on November 7, 2012, and on November 9, 2012 the jury returned a verdict of Death. The jury found two aggravating circumstances: (1) the murder was committed by a person who had been convicted of a felony involving the use or threat of violence to the person of another; and (2) the murder involved torture and/or mutilation of the victim. Further, the jury found nine (9) mitigating circumstances, all related to Petitioner's familial ties.

5. On February 21, 2013 the court conducted a sentencing hearing and entered the Judgment of Conviction on the court record. The court filed an Order of Execution and Warrant of Execution the same day.

6. Petitioner filed a Notice of Appeal of his judgment of conviction to the Nevada Supreme Court. The Nevada Supreme Court affirmed the Judgment of Conviction, and the propriety of the death sentence, rejecting all of Petitioner's arguments. The court denied rehearing and issued the Remittitur on May 9, 2016. (*See* Hall v. State, No. 62663, 2015 WL 6447296 (Nev. Oct. 22, 2015) (Order of Affirmance).

7. On May 26, 2016, Petitioner filed a Petition for Writ of Habeas Corpus, Motion to Appoint Counsel, and Motion to Stay Execution of Judgment pursuant to NRS 34.820(1). The court appointed counsel to represent Petitioner and counsel filed a supplemental Petition for Writ of Habeas Corpus on August 26, 2019.

8. On July 30, 2020, the court heard argument regarding the Petition and Supplement to Petition and on September 1, 2020 the court denied the Petition for Writ of Habeas Corpus (Post-Conviction). The court filed Findings of Fact and Conclusions of Law on September 22, 2020.

9. Thereafter, Petitioner filed a Notice of Appeal to the Nevada Supreme Court on October 21, 2020.

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10. The court issued its decision on December 8, 2022, and remanded the matter to the District Court for proceedings consistent with the order. (*See* Hall v. State, No. 81994, Dec. 8, 2022)(Order Affirming In Part, Reversing In Part And Remanding).

11. Specifically, the Supreme Court directed the District Court to conduct an evidentiary hearing regarding the ineffective assistance of counsel claim regarding the juvenile records. The court stated as follows: "While we express no opinion as to the merits of the issues discussed above, we conclude that an evidentiary hearing is necessary to fully assess trial and appellate counsel's performance and any potential prejudice that resulted. Accordingly, we reverse the district court's order as to these ineffective assistance of counsel claims and remand for an evidentiary hearing to consider in the first instance whether Hall can demonstrate deficient performance and prejudice. At the evidentiary hearing, the district court should focus on whether trial and appellate counsel's performance was deficient in investigating and addressing the State's procurement and use of his juvenile file and challenging the admissibility of the juvenile psychological records." (*See* Order Affirming In Part, Reversing In Part And Remanding, pg. 5-6).

12. An evidentiary hearing in this matter took place on April 14, 2023 wherein the Petitioner called trial counsel, Mr. Jeff Banks, and appellate counsel, Mr. Howard Brooks as witnesses.

13. The instant Findings of Fact and Conclusions of Law and Order now follow.

Conclusions of Law

1. The sixth amendment to the United States Constitution provides that, "[I]n all criminal prosecutions, the accused shall enjoy the right…to have the

Assistance of Counsel for his defense." The United States Supreme Court recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); *See also* State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

2. To prevail on an a claim of ineffective assistance of counsel, a defendant must establish he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S. Ct. 2052, 2063-64 (1984). A defendant must first show his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. *Id.* at 687-88, 694, 104 S. Ct. at 2065, 2068; *See also,* Warden, Nevada State Prisons v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984)(adopting the Strickland two-prong test).

3. The court begins with the presumption of effectiveness. The defendant must demonstrate by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975). The court's task is to determine, based on the facts and circumstances of the case, whether trial counsel failed to render reasonably effective assistance of counsel. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978).

4. Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice. The defendant must show a reasonable probability that, but for counsel's

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errors, the outcome would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064).

5. Therefore, Petitioner must show his trial counsel's performance in investigating, and addressing the State's procurement and use of his juvenile file and challenging the admissibility of the juvenile psychological records fell below an objective standard of reasonableness. Petitioner contends his attorney's should have challenged the admission of his juvenile records based on a California law prohibiting the release of juvenile records to unauthorized persons. Petitioner alleges that when the State obtained his juvenile records, a notice was attached to the records that cited Cal. Welf. & Inst. Code Section 827, which requires a party authorized to inspect juvenile records to petition the juvenile court for an order before further disclosure. *See* Lorenza P. v. Superior Court, 242 Cal. Rptr. 877, 879 (Ct. App. 1988) (explaining that defendant could not obtain juvenile records by a subpoena; instead, she had "to petition the juvenile court to review the records in camera to determine which, if any, may be disclosed").

6. Even if the State properly obtained the juvenile records, petitioner contends counsel should have challenged the psychological portions of the juvenile file based on the Fifth Amendment. Petitioner contends that as a juvenile he did not initiate or voluntarily undergo a court-ordered psychological evaluation, and the State affirmatively used his un-Mirandized statements against him in a penalty hearing, and not as rebuttal of a mental status defense. *See* Miranda v. Arizona, 384 U.S. 436 (1966). In other words, Petitioner was required to undergo an evaluation while in custody as a juvenile. He did not voluntarily participate but was court ordered to participate. Petitioner made statements during that evaluation that were then used against him in a subsequent proceeding wherein the State was seeking the death penalty.

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DISTRICT JUDGE
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LAS VEGAS, NEVADA 89155

7. Although Petitioner's attorneys did object to the use of his juvenile records during the penalty phase, the objection was based on Redman v. State, 108 Nev. 227, 234, 828 P.2d 395, 400 (1992), overruled on other grounds by Alford v. State, 111 Nev. 1409, 906 P.2d 714 (1995). (*See* Evidentiary Hearing Transcript, April 14, 2023, pg. 22). Further, the defense objected to the records being used based on untimely disclosure in the Notice of Intent to Seek the Death Penalty. *Id.* However, a Motion to Suppress was never filed, even though the defense was in possession of the records for more than three (3) years prior to the commencement of trial.

Defense counsel did not object to the records based on the California Code Section 827, which required a court order prior to dissemination of juvenile records. Further, no objection was made based on the mandatory nature of the evaluation. Mr. Hall was in juvenile custody and was court mandated to participate in the evaluation. There was no objection made that his statements made in this setting should not be used against him in a future prosecution. Finally, defense counsel did not object to the use of the psychological records based on Mr. Hall's Fifth Amendment rights. *See* Estelle v. Smith, 451 U.S. 454, 469 (1981).

Defense counsel failed to file a Motion to Suppress prior to trial as to the juvenile records. The objection was not made until the time of trial and prior to the State seeking admission of the records during the penalty phase. *Id.* at 29-33. In fact, trial counsel testified he did not recall ever reading the specific code which required a court order prior to dissemination. *Id.* at 34. Trial counsel admitted he should have objected to the use of the juvenile records based on Section 827 of the Calif. Welf. & Inst. Code and sought an order preventing the State from introducing those records during the penalty phase. *Id.* at 36. Counsel testified he never read or researched the statute. There was no strategic reason for failing to do so. *Id.* at 37.

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LAS VEGAS, NEVADA 89155

Therefore, the court finds Petitioner met his burden by a preponderance of the evidence that his counsel's actions and inactions relevant to the juvenile record were not reasonable. However, Petitioner must meet both prongs of the Strickland test to prevail on this claim.

8. Even if Petitioner can demonstrate his trial attorney acted unreasonably in failing to assert proper objections to the juvenile records, he must also demonstrate prejudice. Petitioner must demonstrate that but for counsel's errors, the outcome in his penalty phase would have been different. Strickland, 466 U.S. 668, 687-88 (1984); Warden, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984). Both prongs of the test must be established. Petitioner must show that but for counsel's failure to properly investigate and object to the juvenile records, the outcome of his penalty phase would be different—he would not have received the death penalty.

9. In determining any prejudice during the penalty phase, the court must consider the weight of the juvenile records in relation to the other evidence that was introduced during the penalty hearing.

Although the juvenile records were not good for Petitioner and contained prejudicial information, it was not solely what the State relied upon during the penalty phase in seeking the death penalty in this matter.

Petitioner took the stand and testified during the guilt phase. He testified he was provoked by the victim because he made offensive comments about his sexual history with the Petitioner's wife and the paternity of Petitioner's child. Clearly the jury rejected this version of events and concluded Petitioner was not credible, and returned a verdict of first degree murder and robbery. The State presented evidence that the motive for the murder was the victim previously had a relationship with the Petitioner's wife.

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The nature of the murder was extremely violent, brutal and included mutilation. The evidence demonstrated Petitioner was lying in wait for the victim, his friend and former co-worker. Petitioner waited outside the employee entrance/exit waiting for the victim to come out after completing his shift at work. The victim was beaten and strangled to death. The evidence demonstrated he had significant head lacerations, a depressed skull fracture, and two large incise wounds on his neck damaging the carotid artery, vagus nerve, and internal jugular vein. He was so badly beaten his parents had to do DNA testing to confirm identity. His head was purple from being smashed in by the Petitioner. All of the injuries were inflicted from the neck up. The jury heard testimony that the parents of the victim could not give him a proper burial and had to cremate his remains. This evidence presented supported the torture and/or mutilation aggravating circumstance.

The jury heard extensive evidence regarding the violence Petitioner committed against those closest to him, including his mother, brother, pregnant girlfriend, and intimate partner. He committed a battery against his own mother when he was 15.

Petitioner committed several acts of violence against his girlfriend/mother of his child. During one such altercation Petitioner was beating his pregnant girlfriend and Petitioner's brother attempted to intervene to stop the beating. Petitioner then proceeded to beat his own brother. When a neighbor tried to intervene to help the brother he beat up and humiliated the neighbor by spitting on him.

Further, the jury heard about Petitioner's felony conviction involving the use or threat of violence—battery resulting in substantial bodily harm. The State presented evidence of the 2003 conviction Petitioner received for beating his girlfriend who was five months pregnant at the time with his daughter. The facts presented indicated Petitioner came home drunk and proceeded to sexually assault his girlfriend. The victim had sex with him because she was afraid he would kill her if she didn't.

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LAS VEGAS, NEVADA 89155

He threatened to kill and rape her ex-boyfriends. He punched her in the ear and refused to allow her to seek medical treatment—his pregnant girlfriend. They went out to eat later and he proceeded to insult her in front of his friends. He told her that if she suffered loss of hearing due to the beating, it would serve as a reminder to not lie to him about her ex-boyfriends.

Petitioner's girlfriend eventually left and went over to the home belonging to Petitioner's mother. Petitioner followed her, and when he found her he beat her into unconsciousness requiring his own mother to intervene. When his mother attempted to pull him off of his girlfriend he spit on his mother.

In November, 2005, Petitioner committed another domestic violence against the same victim. He came home drunk and strangled her in front of their daughter. This was the third *reported* domestic violence against this victim. She reported being strangled until she was unconscious. He then ripped her clothes off and wanted to have sex with her. The violence continued into the next day until his own daughter had to save her mother from Petitioner by calling Petitioner's mother.

In February 2006, Petitioner and his girlfriend became estranged and she asked his brother and a friend to collect his belongings from their home. Incredibly, Petitioner showed up during this process and again began to beat up his girlfriend even in front of his own brother and friend. He then ransacked the house taking whatever he wanted.

Furthermore, the jury heard the testimony from Alex Robles; a man Petitioner had a homosexual relationship with. He told the jury Petitioner tried to lure him to a dark and secluded area. However, Alex refused and instead Alex met Petitioner at the house. He immediately knew he made a mistake by being alone with Petitioner. The Petitioner followed Alex into the bathroom and violently beat him. He was strangled

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until he was unconscious. Petitioner made him face the mirror and said he was going to kill him, and the last thing he would see is the Petitioner before he died. Apparently the Petitioner wanted to be able to see the fear in Alex as he was strangled until he was unconscious.

Finally, the jury heard powerful victim impact testimony from the victim's father, mother, grandmother, and fiancé. The witnesses presented testimony regarding his positive character and testified about the pain and devastation they felt as a result of his death.

Based on the foregoing, and the complete record, the court cannot conclude that but for the errors of counsel, the outcome in the penalty phase would have been different in that the jury would not have returned the death verdict. Accordingly, Petitioner has not shown prejudice, and therefore his claim regarding the juvenile records must be denied.

IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus (Post-Conviction) shall be, and it is hereby DENIED.

Dated this 29th day of July, 2023

MICHELLE LEAVITT
DISTRICT COURT JUDGE
DEPARTMENT XII
EIGHTH JUDICIAL DISTRICT COURT

28D DBE 57F1 0546
Michelle Leavitt
District Court Judge

MICHELLE LEAVITT
DISTRICT JUDGE
DEPARTMENT TWELVE
LAS VEGAS, NEVADA 89155

CERTIFICATE OF SERVICE

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to the Honorable Michelle Leavitt
District Court Department XII

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

State of Nevada	CASE NO: 09C254922
vs	DEPT. NO. Department 12
Bryan Hall	

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DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. BRYAN HALL, Defendant.	Case No.: 09C254922 DEPT. No.: XII

ORDER ON MOTION FOR REHEARING OR ALTERNATIVELY, TO AMEND AND/OR MAKE ADDITIONAL FINDINGS

DATE OF HEARING: 10/31/23
TIME OF HEARING: 8:30 AM

Petitioner, Mr. Hall brought the instant motion seeking an amendment to this court's prior order. (*See* Findings of Fact and Conclusions of law filed July 23, 2023).

The court having reviewed the pleadings submitted by the parties and after hearing oral argument does hereby grant in part Petitioner's motion. Accordingly, the court makes additional findings as follows:

APPELLATE COUNSEL

1. Petitioner contends he received ineffective assistance of appellate counsel because his counsel did not raise the Fifth Amendment claim relevant to his juvenile records. Although appellate counsel did raise appellate issues as to the juvenile records, counsel did not make a Fifth Amendment argument on appeal. Counsel's performance on appeal was therefore deficient, according to petitioner.

2. The sixth amendment to the United States Constitution provides that. "[I]n all criminal prosecutions, the accused shall enjoy the right….to have the Assistance of Counsel for his defense." The United States Supreme Court recognized that "the right to counsel is

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Las Vegas, Nevada 89115

the right to effective assistance of counsel" *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); See also *State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

3. The court reviews a claim of ineffective assistance of appellate counsel using the "reasonably effective assistance" test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1994).

4. Petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness—deficient performance—and a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *Id. See also Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. *Strickland*, 466 U.S. at 694, 104 S. Ct. 2052.

5. The constitutional right to effective assistance of counsel extends to a direct appeal. *Burke v. State*, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The *Strickland* test applies to appellate counsel claims. However, the test applies with a somewhat different application because of the limitations of the appellate process that require an attorney to make strategic decisions regarding which claims to argue and which to ignore. *Knox v. United States*, 400 F.3d 519, 521, (7th Circ. 2005). "Lawyers must curtail the number of issues they present, not only because appellate briefs are limited in length but also because the more issues a brief present the less attention each receives, and thin presentation may submerge or forfeit a point."

6. An attorney is not constitutionally deficient simply because another attorney would have taken a different approach. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. "Even the best criminal defense attorneys would not defend a particular client in the same way." The issue is whether a petitioner's counsel "made errors so serious that counsel was not

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functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687, 689, 104 S. Ct. 2052.

7. Appellate counsel is not ineffective for omitting a particular claim supported by existing law—to focus on claims with a better chance of success. *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S. Ct. 3308 (1983).

8. Appellate counsel is not required to raise every non-frivolous claim. *Id.* at 751-54, 103 S. Ct. at 3312-15.

9. Professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). A" brief that raises every colorable issue runs the risk of burying good arguments…in a verbal mound made up of strong and weak contentions." *Id.* at 753, 103 S. Ct. at 3313.

10. Appellate counsel is most effective when he does not raise every conceivable issue on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome. *Smith v. Robbins*, 528 U.S. 259, 288, 120 S. Ct. 746 (2000) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)); *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994).

11. The court's analysis begins with the presumption appellate counsel performed effectively. *Strickland*, 466 U.S. 689-90, 104 S. Ct. 2052. Petitioner must overcome the presumption with more than assertions that my attorney should have or could have, acted differently. *Evans v. State*, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001). Conclusory statements are not enough. Petitioner must specifically articulate how his attorney's performance was objectively unreasonable—deficient performance. Further, Petitioner must

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89115

also demonstrate the deficient performance undermines confidence in the outcome of the proceeding sufficient to establish prejudice. Both prongs must be met. The court is not required to consider the two prong test in any order. If petitioner fails to meet his burden as to either prong of the test, the claim will not prevail.

12. With these principles in mind, the court reviews the merits of any ineffective assistance of counsel claim to determine whether counsel's performance was deficient.

Failing to raise the Fifth Amendment challenge To Petitioner Hall's juvenile records on appeal

13. Appellate counsel in the instant matter argued the psychological records were a due process violation because the records should have been excluded based on *Redmen*[1] and *Greene*.[2] *(See* evidentiary hearing transcript, pg. 97). He did not raise the Fifth Amendment challenge or argue the Fifth Amendment required exclusion of his psychological records included in the juvenile records. Petitioner contends this was unreasonable and the court should conclude counsel's performance was therefore deficient. However, appellate counsel indicated he made a strategic decision. "I made a strategic decision not to do that." (*See* evidentiary hearing transcript, pg. 97). He testified as follows:

> What you've got here is he is in custody as a juvenile. When he made these statements, there was no potential criminal liability in the *Flamm* matter. There was no potential harsher penalty in *Flamm* matter. When these statements were made in California, they were not self-incriminating. What happened in this case is the statements were made, they were not self-incriminating. Years later, by killing *Flamm*, Mr. Hall exposed himself to prosecution and those statements years later become inflammatory.

[1] 108 Nev. 227, 828 P.2d 395 (1995).
[2] 131 Nev. 157, 931 P.2d 54 (1997).

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Las Vegas, Nevada 89115

> The law is crystal clear. The law is the Fifth Amendment does not protect testimony that might become incriminating in the future. The PCR petition, as far as I can tell, does not address the timeliness issue at all. But I think the idea that you have statements made when he was a juvenile, and they are not self-incriminating, I don't think that matches the facts and the law in these cases you are citing.

(*See* evidentiary hearing transcript, pg. 101-102).

Mr. Brooks opined the court did not commit reversible error in admitting the California youth juvenile records. He testified:

> And we start with the fact that Tim O'Brien made no objection whatsoever to the records, okay? And I—and I'm not referring to the dangerousness argument, I'm talking to the records in general. So, obviously my first reaction to that was, this must be ineffective assistance of counsel by our office. So, I'm in a weird situation now, my partner, my team member has made a decision, I think, to not object. The question is, should I raise it independently? So I did several things.
>
> First of all, I talked to Tim O'Brien. Tim O'Brien said he could not figure out a way to keep these records out …
>
> He's saying to me, I don't know how to keep it out, plus, I think the good is bad and bad is good rule of penalty phase may apply here…In penalty phase, good evidence is often bad and bad evidence is often good. This rule obviously applies to these juvenile records because they show that Bryan Hall had problems as a juvenile, he was incarcerated, and obviously, he did not receive the treatment he needed.
>
> So, it could be used possibly to argue for –as mitigation. So Tim told me this. My impression from my conversation with Tim O'Brien was that he—did not affirmatively seek to stop these records, and he did it as a matter of choice. So, at this point, I feel like I'm—because he's my team member, I feel like I have to defer to

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him. But I'm still wondering if I can raise it as an independent issue. (*See* evidentiary hearing transcript pg.102-104).

Further, appellate counsel opined the records could not be kept out based on California Code, section 827 because records may be shared with court personnel. Once the jury was empaneled, he believed the court could share the records with the jury for purposes of penalty. Counsel further contacted California practitioners to determine whether there was a way to exclude these records. He testified the only way to stop it "is to go to California to the juvenile court and get it sealed." So "as far as raising it as an independent appellate argument, there is just no record here." I've got to make an argument that Judge Leavitt erred with this record, and I can't do that. That's why I did not raise that." *(See* evidentiary hearing transcript, pg. 105-106.

Mr. Brooks testified further:

> I raised the best issues I could raise that I thought were winnable. I do not believe in raising loser issues or issues that are going nowhere. Tim O'Brien, in my opinion, had decided not to oppose the admission of these things. And I thought the record was totally deficient as far as raising it independently on appeal.
>
> If I—if he doesn't object, I've got to pursue a plain error argument. *Plain error arguments almost always fail*. (*See* evidentiary hearing, pg. 107).

The testimony of appellate counsel demonstrates he made a strategic decision not to raise a claim/argument regarding the juvenile records based on the Fifth Amendment or California law. Prior to making that decision, counsel reviewed the penalty phase and discussed the issues with trial counsel. He further spoke with California practitioners and discussed how the law operates in California relevant to juvenile records. He concluded since no objection was raised at the time of trial the standard of review would be plain error, and plain error arguments almost always fail based on his experience.

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Appellate counsel made a strategic decision to winnow out weaker arguments and focus on the strongest arguments. Counsel's decision to winnow out weaker arguments has been held to be effective, not ineffective advocacy. *Doleman v. State*, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996). The Nevada Supreme Court recently explained:

> 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.

Johnson v. State, 531 P.3d 599 (Nev. 2023)"(unpublished disposition)".

The court concludes Petitioner's claim of ineffective assistance of appellate counsel fails the *Strickland* test. Petitioner failed to demonstrate deficient performance as to either issue relevant to the juvenile records. He did not suffer prejudice because he failed to demonstrate the claims would have likely succeeded on appeal given the trial record and the lack of objection.

Role the records played at penalty hearing

The court previously made findings regarding the extent to which the State of Nevada relied on the juvenile records at penalty phase. (*See* Findings of Fact and Conclusions of Law, filed July 29, 2023). The court expands only to indicate the juvenile records were not

MICHELLE LEAVITT
DISTRICT JUDGE
DEPARTMENT TWELVE
Las Vegas, Nevada 89115

tied to an aggravator which made petitioner eligible for the death penalty. The juvenile records did not support either of the aggravators. The records were "other matter" evidence to consider in deciding on the appropriate sentence after the jury determines whether the defendant is or is not eligible for the death penalty.

Further, even if the defense were successful in excluding the actual records from evidence, the subject of the records would still be admissible during the penalty phase. Only statements Mr. Hall made to clinical social workers and/or psychologists would be excluded. The jury would still be able to hear testimony regarding the violent incident with Sheldon while he was in juvenile detention in California as "other matter" evidence. Even had trial counsel objected pursuant to the Fifth Amendment or California law, the majority of the evidence would still be heard by the jury panel.

Accordingly, the Petitioner's claims of ineffective assistance of trial counsel and appellate counsel are denied. This order does now resolve all issues relevant to the Remand issued by the Nevada Supreme Court. (*See* Hall v. State, No. 81994, Dec. 8, 2022)(Order Affirming in Part, Reversing in Part and Remanding).

DATED THIS 15th DAY OF MAY, 2024.

Dated this 15th day of May, 2024

MICHELLE LEAVITT
DISTRICT COURT JUDGE
34E 290 5FF5 394E
Michelle Leavitt
District Court Judge

MICHELLE LEAVITT
DISTRICT JUDGE

DEPARTMENT TWELVE
Las Vegas, Nevada
89115

CERTIFICATE OF SERVICE

I hereby certify on the date filed, this document was electronically served to the email addresses and/or by Fax transmission or by standard mail to:

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Pamela Osterman

Pamela Osterman
Judicial Executive Assistant
to the Honorable Michelle Leavitt
District Court Department XII

MICHELLE LEAVITT
DISTRICT JUDGE

DEPARTMENT TWELVE
Las Vegas, Nevada
89115

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

State of Nevada	CASE NO: 09C254922
vs	DEPT. NO. Department 12
Bryan Hall	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 5/15/2024

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FILED
Aug 07 2026
ELIZABETH A. BROWN
CLERK OF SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN LEE HALL, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 88788

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(a),(h).

It is so ORDERED.

Herndon, C.J.

Pickering, J.

Parraguirre, J.

Bell, J.

Stiglich, J.

Cadish, J.

Lee, J.

cc: Hon. Michelle Leavitt, District Judge
Karen A. Connolly, Ltd.
Clark County District Attorney
The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN LEE HALL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 88788

FILED

JUN 03 2026

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER GRANTING MOTION

Appellant filed a motion for an extension of time to file a petition for rehearing. The motion is granted. NRAP 26(b)(1)(A); NRAP 40(a)(1). Appellant shall have until July 20, 2026, to file and serve a petition for rehearing. If no petition for rehearing is filed within this time period, the remittitur shall issue.

It is so ORDERED.

_____, C.J.

cc: Karen A. Connolly, Ltd.
Attorney General/Carson City
Clark County District Attorney

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Attorney for Appellant

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IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN L. HALL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Supreme Court No. 88788

NRAP 40 PETITION FOR REHEARING

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Carson City, NV 89701
Attorneys for Respondent

Docket 88788 Document 1339325

ARGUMENT

On May 21, 2026, this Court filed an Order of Affirmance (hereinafter "*Order*"). An extension of time to file a petition for rehearing was granted on June 3, 2026. Petitioner was granted up to and including July 20, 2026, to file and serve a petition for rehearing.

Rehearing is appropriate under NRAP 40(a)(1) and (2) because the Order misapprehends the scope of Estelle v. Smith, 451 U.S. 454 (1981), misapplies United States v. Harvey, 869 F.2d 1439 (11th Cir. 1989), and issues a disposition that cannot readily be reconciled with Hall I's remand instructions.[1]

I. THE ORDER EFFECTIVELY TREATS THE TIMING OF THE EVALUATIONS AS DISPOSITIVE, CONTRARY TO ESTELLE

The Order concludes that Hall's Fifth Amendment claim fails because the compelled juvenile psychological evaluations occurred years before the homicide. In doing so, the Order effectively makes the timing of the evaluations dispositive, even though neither Estelle v. Smith, 451 U.S. 454 (1981), nor any subsequent Supreme Court decision has held that the Fifth Amendment's protection against the later use of compelled psychiatric evidence depends upon chronology.

---

[1] Pursuant to NRAP 40(b), Hall previously argued that the State's use of the juvenile psychological evaluations violated Estelle v. Smith, 451 U.S. 454 (1981), that the evaluations could not be used absent compliance with California juvenile-record procedures, that the State substantially relied upon the psychological evidence during the penalty phase, and that the resulting constitutional error was prejudicial. See Appellant's Opening Brief at 10-48; Appellant's Reply Brief at 1-28.

A. Estelle and Satterwhite Focus on the State's Use of Compelled Psychological Evidence

Estelle did not turn on the chronology between the psychiatric examination and the charged offense. Rather, the constitutional violation occurred when the State later used statements obtained through a compelled psychiatric examination against the defendant during a capital sentencing proceeding. Id. at 462-69. The Court held that a defendant who neither initiates a psychiatric evaluation nor attempts to introduce psychiatric evidence may not be compelled to respond to a psychiatrist where the resulting statements are later used against him at capital sentencing. Id. at 468.

Likewise, in Satterwhite v. Texas, 486 U.S. 249, 254-56 (1988), the constitutional violation arose from the State's introduction of psychiatric evidence during capital sentencing. The focus remained the State's use of the evidence, not the timing of the examination. In both cases, the constitutional violation occurred when the State introduced compelled psychiatric evidence at sentencing.

Neither decision suggested that constitutional protection depends upon whether the examination occurred before or after the offense ultimately being prosecuted.

The continuing force of Estelle's protections in capital sentencing proceedings is reflected in Petrocelli v. Baker, 869 F.3d 710, 728-31 (9th Cir. 2017), where the Ninth Circuit applied Estelle in reviewing this state's use of psychiatric evidence in a Nevada capital case. Petrocelli underscores that Estelle remains a significant limitation on the State's use of compelled psychiatric evidence and is not confined to the particular facts presented in Estelle itself.

B. Buchanan and Cheever Do Not Support the Temporal Limitation Adopted by the Order

Nor do Buchanan v. Kentucky, 483 U.S. 402 (1987), or Kansas v. Cheever, 571 U.S. 87 (2013), support the temporal limitation adopted by the order. Those cases address circumstances in which a defendant affirmatively places his mental condition at issue. Hall did not request the evaluations, did not voluntarily undergo them, did not introduce psychiatric evidence, and did not place his mental condition at issue. As this Court previously recognized, in Hall I, he "did not initiate or voluntarily undergo a court-ordered psychological evaluation, and the State affirmatively used his un-Mirandized statements against him in the penalty hearing, and not as rebuttal of a mental status defense." Hall I, *Order.*

The Order therefore effectively adopts an approach under which compelled psychological evidence becomes exempt from Fifth Amendment scrutiny whenever the evaluation predates the charged offense. Nothing in Estelle, Satterwhite, Buchanan, or Cheever recognizes such an exception. The Fifth Amendment inquiry turns on compelled acquisition and subsequent prosecutorial use, not chronology.

C. The Order Also Overlooks the Independent Sixth Amendment Concerns Recognized in Estelle and Satterwhite

Estelle also recognized an independent Sixth Amendment violation arising from the State's use of psychiatric evidence obtained without adequate notice to counsel. 451 U.S. at 470-71. The Court explained that counsel must be informed of the nature and scope of a psychiatric examination so that counsel can advise the defendant regarding the significant consequences of participation. Id. Satterwhite likewise

treated the admission of psychiatric evidence obtained in violation of the Sixth Amendment as constitutional error. 486 U.S. at 254-55. Those concerns are particularly acute here because Hall was not even facing the prosecution in which the evidence was ultimately used when the evaluations were conducted.

Neither Hall nor his counsel had notice that evaluations obtained for juvenile rehabilitative and treatment purposes could later be transformed into substantive aggravating evidence in a capital sentencing proceeding decades later.

II. THE COURT MISAPPREHENDED HARVEY

The order's reliance on United States v. Harvey, 869 F.2d 1439 (11th Cir. 1989), overlooks critical distinctions between Harvey and Hall's claim.

A. Harvey Involved a Speculative Risk of Future Incrimination

In Harvey, the Eleventh Circuit applied Marchetti v. United States, 390 U.S. 39 (1968), and concluded that the asserted risk of incrimination during was too speculative because it depended upon future criminal conduct that had not yet occurred. Harvey, 869 F.2d at 1446-47. The court therefore found no "real and appreciable" danger of incrimination sufficient to invoke the Fifth Amendment privilege.

B. Hall Faced a Real and Appreciable Risk That Ultimately Materialized.

Hall was required to participate in mandatory sex-offender treatment, submit to repeated psychological evaluations and annual treatment reviews, discuss his past conduct and psychological functioning, and make treatment-related disclosures to

mental-health professionals.[2] That compelled rehabilitative process generated the psychological evidence, including evaluations, treatment assessments, professional observations, diagnoses, and derivative psychological opinions upon which the State later relied as substantive aggravating evidence during the penalty phase.

It is precisely because compulsory sex-offender treatment requires participants to make compelled disclosures that may later be used in criminal proceedings that the Ninth Circuit has repeatedly recognized Fifth Amendment concerns arising from such treatment. See Pens v. Bail, 902 F.2d 1464, 1465-67 (9th Cir. 1990); United States v. Antelope, 395 F.3d 1128, 1134-38 (9th Cir. 2005); United States v. Hulen, 879 F.3d 1015, 1020-24 (9th Cir. 2018). Those decisions illustrate why compelled sex-offender treatment presents the type of "real and appreciable" risk of incrimination described in Marchetti v. United States, 390 U.S. 39, 48 (1968), rather than the speculative or imaginary risk rejected there.

Hall's case demonstrates why the risk here was "real and appreciable," not speculative as in Harvey. Unlike Harvey, where the asserted risk of incrimination depended upon the possibility of future criminal conduct that might never occur,

---

[2] Hall underwent multiple court-ordered psychological evaluations and mandatory sex-offender treatment while in juvenile custody. See **XIX AA 4276-4288; 4460-4472.** The evaluations and treatment reviews documented Hall's psychological functioning, treatment progress, and statements made during treatment. Hall was required to participate and cooperate in the treatment program. Although at least one evaluation was expressly designated confidential and another discussed limits of confidentiality, the resulting evaluations, treatment records, and Hall's treatment-related statements were later presented to the penalty-phase jury.

Hall's compulsory participation in mandatory treatment generated the very psychological evaluations, treatment records, professional observations, and derivative psychological opinions that the State later introduced as substantive aggravating evidence during the penalty phase of his capital trial. Thus, the Fifth Amendment concern recognized in Pens, Antelope, and Hulen was not theoretical. It materialized when the State introduced the psychological evidence generated through Hall's compelled participation in mandatory treatment as substantive aggravating evidence in support of a death sentence.

C. Harvey Did Not Involve the State's Direct Use of Evidence Created Through a Compelled Treatment Process

Harvey is further distinguishable because it arose in an entirely different Fifth Amendment context. There, the government maintained that any subsequent prosecution would rest upon evidence independent of Harvey's immunized statements yet the district court dismissed the indictment before the government had an opportunity to establish an independent source. Harvey, 869 F.2d at 1442-43. Thus, Harvey concerned whether a later prosecution was tainted by evidence derived from protected statements.

Hall raises no comparable claim. He does not contend that the State lacked sufficient evidence to prosecute the homicide or that the prosecution itself should have been barred. Rather, Hall challenges the State's direct use of the compelled psychological evidence itself during the penalty phase of his capital trial.

The distinction is fundamental. Hall was compelled to participate in

court-ordered psychological evaluations and mandatory sex-offender treatment that generated psychological evaluations, treatment assessments, professional observations, diagnoses, and derivative psychological opinions. Those materials were not merely investigative leads later corroborated through independent proof. They became substantive aggravating evidence. The prosecution repeatedly relied upon the evaluations, treatment records, evaluator observations, dangerousness assessments, and derivative psychological opinions to portray Hall as sexually deviant, dangerous, lacking remorse, and undeserving of mercy. The evaluations did not lead to the evidence; the evaluations became the evidence.

Accordingly, unlike Harvey, where the government sought to demonstrate that its prosecution rested upon evidence independent of the challenged disclosures, Hall challenges the State's direct use of evidence created through a compelled treatment process. Harvey therefore does not resolve the constitutional question presented here.

Moreover, the implications of the Order extend well beyond this case. The juvenile justice system is built upon rehabilitation, candid psychological evaluation, and treatment, not the creation of evidence for future criminal prosecutions. If confidential psychological evaluations and treatment disclosures compelled for rehabilitative purposes may later be transformed into substantive evidence in an adult prosecution decades later, the very premise of compulsory juvenile treatment is fundamentally altered.

Such a rule also places defense counsel in an untenable position. Counsel advising a juvenile must either encourage candid participation in treatment to further

rehabilitation or warn that confidential treatment disclosures may someday be used as substantive evidence in a future criminal prosecution. That dilemma is fundamentally inconsistent with the rehabilitative purposes of the juvenile justice system.

D. Harvey Did Not Involve the State's Use of Compelled Psychological Evidence at Capital Sentencing

Harvey did not involve compelled psychiatric examinations, court-ordered sex-offender treatment, dangerousness testimony, derivative psychiatric opinions, or capital sentencing. Estelle and Satterwhite directly address the State's use of compelled psychiatric evidence at sentencing. Harvey addressed a fundamentally different Fifth Amendment issue and therefore does not resolve the constitutional question presented here.

III. THE DECISION CANNOT BE RECONCILED WITH HALL I

Rehearing is independently warranted because the present disposition cannot readily be reconciled with Hall I.

A. Hall I Required Consideration of the State's Reliance on the Juvenile Psychological Evidence

In Hall I, this Court concluded that Hall had alleged potentially meritorious claims concerning the State's procurement and use of his juvenile file, including the juvenile psychological evaluations, and remanded for an evidentiary hearing. In doing so, the Court cited Estelle related authority and directed the district court to consider "the weight of the juvenile evidence considering the other evidence presented and the

extent to which the State relied on the juvenile evidence." Hall I, *Order.*

Hall I did not treat the issue as a narrow question of admissibility. Rather, it required factual development concerning counsel's investigation and litigation of the State's procurement, dissemination, and use of confidential juvenile records and psychological evaluations in a capital sentencing proceeding. The present Order largely bypasses that inquiry by resolving the constitutional claim principally through Harvey rather than the reliance-and-prejudice inquiry Hall I directed.

Had the constitutional and confidentiality issues been immaterial, or had Harvey clearly foreclosed Hall's Estelle claim, there would have been no reason for Hall I to remand for factual development concerning the State's procurement and use of the juvenile psychological evidence. Hall I's remand therefore underscores why the present Order should have addressed not merely whether other aggravating evidence existed, but how the State obtained, used, relied upon, and benefitted from the juvenile psychological evidence during the penalty phase.

B. The Record Demonstrates Substantial Reliance on the Psychological Evidence

The State relied heavily on the psychological evidence both quantitatively and qualitatively. Quantitatively, the prosecution introduced extensive psychological evaluations, treatment records, and related evidence. Qualitatively, it used that evidence to portray Hall as sexually deviant, dangerous, lacking remorse, and undeserving of mercy.

The significance of the psychological evidence is further demonstrated by trial

counsel's own testimony. Jeff Banks testified that the juvenile records were "not helpful to the defense by any stretch of the imagination" and were "pretty horrific." **XVII AA 4001, 4011.** He further testified that he did not believe the facts of the homicide alone necessarily would have resulted in a capital prosecution. **XVIII AA 4013-4014.** Those admissions by Hall's own trial counsel powerfully refute any suggestion that the juvenile psychological evidence was cumulative or insignificant. If the evidence was sufficiently damaging that counsel believed it materially affected the State's decision to pursue a capital prosecution, it cannot reasonably be dismissed as peripheral to the penalty phase. Rather, Banks' testimony confirms the central role the juvenile psychological evidence played in the State's case for death.

In Hall I, this Court recognized Hall's allegation that the prosecutor informed the jury Hall had been assessed as a sexual sadist and further noted the State's concession that no psychologist had rendered such a diagnosis. Hall I, *Order*.

This demonstrates that the prosecution was not using the evaluations merely as historical background. Rather, it relied upon the psychological evidence to portray Hall as sexually deviant, dangerous, lacking remorse, and undeserving of mercy. Indeed, the State's willingness to attribute a nonexistent sexual-sadism diagnosis to Hall underscores both the significance of the psychological evidence and the extent of the prosecution's reliance upon it. If the psychological evidence were truly peripheral or cumulative, there would have been no reason to embellish it with a diagnosis that no psychologist had rendered.

The record confirms that the psychological evidence played a substantial role

in the State's presentation of aggravating evidence. This Court has repeatedly recognized the substantial impact that psychological evaluations and expert mental-health testimony may have on a jury's assessment of culpability, dangerousness, and punishment. See Esquivel v. State, 96 Nev. 777, 784-85, 617 P.2d 587, 592 (1980); McKenna v. State, 98 Nev. 38, 41-42, 639 P.2d 557, 559 (1982); Sechrest v. State, 101 Nev. 360, 366-67, 705 P.2d 626, 630-31 (1985); Winiarz v. State, 104 Nev. 43, 49-50, 752 P.2d 761, 765 (1988); Brown v. State, 114 Nev. 1118, 1125-26, 967 P.2d 1126, 1131 (1998); Estes v. State, 122 Nev. 1123, 1135-36, 146 P.3d 1114, 1122 (2006). Hall I therefore properly directed consideration of the extent to which the State relied upon the psychological evidence and whether that reliance prejudiced Hall.

C. The Present Order Cannot Be Reconciled with Hall I's Remand Instructions

Hall I did not remand for the limited purpose of determining whether the juvenile psychological evidence was admissible or whether the State could otherwise support a death sentence. Rather, Hall I directed factual development concerning the State's procurement, use, and reliance upon the juvenile psychological evidence, and whether that use prejudiced Hall. By resolving Hall's constitutional claim principally through Harvey, the present Order does not meaningfully engage the inquiry Hall I required.

Had Harvey clearly foreclosed Hall's constitutional challenge, there would have been no reason for Hall I to remand for factual development concerning the State's

procurement and use of the juvenile psychological evidence. Yet the present Order resolves the claim largely through Harvey without addressing the extent to which the State relied upon that evidence or whether its use prejudiced Hall, despite Hall I's express remand instructions.

Accordingly, the present disposition cannot readily be reconciled with Hall I.

CONCLUSION

The present disposition imposes a temporal limitation not found in Estelle or its progeny, extends Harvey beyond its facts and holding, and does not meaningfully undertake the reliance-and-prejudice analysis Hall I required. Because the order misapprehends controlling authority and cannot readily be reconciled with Hall I's remand instructions, rehearing should be granted.

DATED this July 15, 2026.

/s/ Karen A. Connolly

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), and the typeface requirements of NRAP 32(a)(5), the type style requirements of NRAP 32(a)(6) because:

It has been prepared in a proportionally spaced typeface using WordPerfect 2021 in 14 point-Times New Roman, double-spaced, on 8 ½ by 11-inch paper with 1 inch margins on all sides and consecutively numbered at the bottom.

2. I further certify that this petition for rehearing complies with the page- or type-volume limitations of NRAP 40, 40A, or 40B because it is:

Proportionately spaced, has a typeface of 14 points or more, and does not exceed 2,694 words.

DATED this July 15, 2026.

/s/ Karen A. Connolly
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CERTIFICATE OF SERVICE

I certify that on the July 15, 2026, I served a copy of the above and foregoing ***Petition for Rehearing*** upon all parties as follows:

☒ by depositing the same in the U.S. Mail, First Class Mail, with postage fully prepaid, at Las Vegas, Nevada, addressed as follows:

Bryan Hall, #79143
High Desert State Prison
PO Box 650
Indian Springs, NV 89070
Appellant

☒ by electronic service via eFlex:

Steven B. Wolfson
Clark County District Attorney
Attorney for Respondent

Aaron Ford
Attorney General
Attorney for Respondent

/s/ Shaeley Foster
An Employee of KAREN A. CONNOLLY, LTD.

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN L. HALL, Appellant, vs. THE STATE OF NEVADA, Respondent.	CASE NO: 88788

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Elizabeth A. Brown
Clerk of Supreme Court

ERRATA TO APPELLANT'S NRAP 40 PETITION FOR REHEARING

COMES NOW, KAREN A. CONNOLLY, of the law firm of KAREN A. CONNOLLY, LTD., attorney of record for Appellant, BRYAN L. HALL, and hereby respectfully submits this Errata to the NRAP 40 Petition for Rehearing to correct a typographical omission.

On page 4, paragraph 3, the petition currently states:

> "In Harvey, the Eleventh Circuit applied Marchetti v. United States, 390 U.S. 39 (1968), and concluded that the asserted risk of incrimination during was too speculative because it depended upon future criminal conduct that had not yet occurred."

The sentence should instead read:

> "In Harvey, the Eleventh Circuit applied Marchetti v. United States, 390 U.S. 39 (1968), and concluded that the asserted risk of incrimination during *the interview* was too speculative because it depended upon future criminal conduct that had not yet occurred."

/ / /

/ / /

Docket 88788 Document 1340834

This correction is limited to the omission of the words "the interview" and does not alter the substance of Appellant's arguments or the relief requested.

DATED this 23th day of July, 2024.

KAREN A. CONNOLLY, LTD.

/s/ Karen A. Connolly
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Attorney for Appellant

/ / /

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of KAREN A. CONNOLLY, LTD., and on the 23th day of July, 2024, I served a true and correct copy of the above and foregoing ***Errata to Appellant's NRAP 40 Petition for Rehearing*** pursuant to NRCP 5 by the method or methods indicated below:

☐ by depositing the same in the U.S. Mail, First Class Mail, with postage fully prepaid, at Las Vegas, Nevada, addressed as follows:

Steven B. Wolfson
Clark County District Attorney
200 Lewis Avenue
Las Vegas, NV 89101
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Aaron Ford
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Attorney for Respondent

☒ by electronic service via eFlex:

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Aaron Ford
Attorney General
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/s/Shaeley Foster
Employee of KAREN A. CONNOLLY, LTD.

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Attorney for Petitioner

DISTRICT COURT, CRIMINAL DIVISION
CLARK COUNTY, NEVADA

BRYAN L. HALL,

Petitioner,

vs.

STATE OF NEVADA,
Renee Baker, Warden, Ely State Prison,
James Dzurenda, Director, Nevada Department of Corrections,
Aaron Ford, Nevada Attorney General,

Respondent.

CASE NO.: 09C254922
DEPT. NO.: 12

SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

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COMES NOW, KAREN A. CONNOLLY, attorney for Petitioner, BRYAN L. HALL, and submits his *Supplement to Petition for Writ of Habeas Corpus (Post Conviction)*.

DATED this 26th day of August, 2019.

KAREN A. CONNOLLY, LTD.

/s/ Karen A. Connolly
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Attorney for Petitioner

/ / /

Case Number: 09C254922

September 7, 2018, the Defense filed a signed Ex Parte Order to Seal Ex Parte Request and Order for Appointment of Expert (**Exh. 16**).

ARGUMENT

BRYAN HALL'S CONVICTIONS AND DEATH SENTENCE ARE INVALID UNDER THE FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, EFFECTIVE ASSISTANCE OF COUNSEL, TRIAL BEFORE AN IMPARTIAL JURY AND A RELIABLE SENTENCE. U.S. CONST. AMENDS. V, VI, VIII, XIV; Nev. Const. Ar. I, Secs. 3,6 and 8; Art. IV, Sec.21

As a result of outrageous prosecutorial misconduct, trial errors and ineffective assistance of counsel, Bryan Hall's murder conviction and death sentence must be set aside.

CLAIM NO. 1.

THE STATE OF NEVADA ENGAGED IN OUTRAGEOUS PROSECUTORIAL MISCONDUCT WHICH SINGULARLY AND CUMULATIVELY DENIED HALL HIS RIGHT TO A FUNDAMENTALLY FAIR TRIAL IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

During the penalty phase of the trial, the State not only violated Hall's constitutional rights but also the law in zeal to secure a death sentence.

A. THE PROSECUTION DISSEMINATED HALL'S CONFIDENTIAL JUVENILE RECORDS TO THE JURY DURING THE PENALTY PHASE OF HIS TRIAL IN VIOLATION OF CLEARLY ESTABLISHED LAWS AND HIS CONSTITUTIONAL RIGHTS

On September 10, 1997, Hall was committed to the California Department of Corrections and Rehabilitation-Division of Juvenile Justice (formerly the California Youth Authority or CYA) for sexual battery and false imprisonment. During the

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penalty phase of the trial, the State unlawfully disseminated Hall's juvenile records obtained from the California Division of Juvenile Justice. They were then disseminated to the jury - State's Exhibit 335 filed under seal as **Exhibit 17**. The exhibit contained the following documents:

1.	5-16-97	San Diego Sheriffs Department Arrest/Juvenile Contact Report
2.	5-21-97	Petition re: Bryan Lee Hall
3.	6-19-97	Dr. Miccio-Fonseca, Ph.D Confidential Psychological Evaluation to Juvenile Probation to determine need for treatment
4.	8-22-97	Probation Officer's Social Study
5.	9-10-97	Superior Court of California Juvenile Division Findings and Order of Adjudication
6.	11-26-97	Clinic Report
7.	12-29-97	Correspondence between Lisa Hales and Youth Offender Parole Board
8.	7-16-98	California Court of Appeal's Affirmance of the Superior Court Findings and Order of Adjudication
9.	11-24-98	El Paso De Robles Youth Correctional Facility Case Report
10.	5-25-99	Petition for Modification of Court Ordered Placement at the California Youth Authority
11.	11-5-99	N. A. Chaderjian Youth Correctional Facility Case Report
12.	8-9-00	N. A. Chaderjian Youth Correctional Facility Case Report
13.	12-19-00	N. A. Chaderjian Youth Correctional Facility Case Report
14.	5-1-01	N. A. Chaderjian Youth Correctional Facility Case Report
15.	9-17-01	Heman G. Stark Youth Correctional Facility Case Report

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16. 10-11-01 Heman G. Stark Youth Correctional Facility: Dr. Leong, Ph.D Psychological Evaluation Report to the Youthful Offender Parole Board

17. 2-21-02: Order of Discharge

During the penalty phase, Matthew Johns, an investigator with the Clark County District Attorney, was called upon to read extensively from Hall's confidential juvenile records and psychological evaluations which were submitted to the jury. **See, Exh. 1 - 12 AA 2620-2646.**

The State revealed its intent to admit Hall's juvenile records in it's Notice of Intent to Seek Death Penalty filed on October 9, 2012. **See, Exh. 1 - 2 AA 269-276.** Hall's counsel filed no formal objection to State's expressed intent to introduce those confidential records. Remarkably, neither trial or appellate counsel addressed the improper dissemination of Hall's confidential juvenile records. The only arguments asserted by trial appellate counsel in objection thereto was that psychiatric reports cannot be used to support a future dangerousness argument under Redmen v. State, 108 Nev. 227, 828 P.2d 395 (1992) and Green v. State, 113 Nev. 157, 931 P.2d 54 (1997). **See, Exh. 1 - 12 AA 2550, 2567.**

1. *THE COURT SHOULD CONSIDER THE MERITS OF HALL'S SUBSTANTIVE CLAIMS*

In addition to claiming ineffective assistance of counsel, a Sixth Amendment violation, Hall is raising for the first time a claim that his rights were violated and that the State engaged in gross misconduct in disseminating his juvenile records. Previously the Nevada Supreme Court had a general rule that issues raised in a post-conviction petition which could have been raised on direct appeal are considered waived absent a showing of good cause and actual prejudice. See former NRS 177.375(2); Johnson v. Warden, 89 Nev. 476, 477-78, 515 P.2d 63, 64 (1973). Pertgen v. State, 875 P.2d 361, 110 Nev. 554 (Nev., 1994) However, in Pertgen, the court pointed out that defense counsel's failure to raise issues previously, deprived

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defendant of his Sixth Amendment right to the effective assistance of trial and appellate counsel. See generally, Strickland v. Washington, 466 U.S. 668,(1984)

A valid claim of ineffective assistance of counsel may establish good cause such that the court may review apparently meritorious issues that should have been raised on direct appeal. Moreover, the power of the court to address plain error or issues of constitutional dimension sua sponte is well established. Emmons v. State, 107 Nev. 53, 60-61, 807 P.2d 718, 723 (1991); See also Edwards v. State, 107 Nev. 150, 153 n. 4, 808 P.2d 528, 530 n. 4 (1991) (where appellant presents an adequate record for reviewing serious constitutional issues, this court will address such claims on the merits). The Nevada Supreme Court determined in Pertgen that because the case involved the ultimate punishment and because appellant's claims of ineffective assistance of counsel are directly related to the merits of his claims, the court should consider defendant's claims on the merits. Pertgen v. State, 875 P.2d 36.1 Accordingly, Hall's substantive claim should be heard on it's merits.

2. *HALL'S JUVENILE RECORDS WERE DISCLOSED AND DISSEMINATED IN VIOLATION OF THE LAW*

The State improperly accessed and disseminated Hall's juvenile records.

(a) Requisite notice was not provided to Hall before his protected juvenile records were provided to the State.

Exactly how the State obtained Hall's juvenile records is not entirely clear. The State has refused to provide this information to undersigned counsel.[1] To date, the State has refused to divulge this information to undersigned counsel. As best can be ascertained, on August 27, 2009, the State subpoenaed Hall's juvenile file. Documents related to the request are provided as **Exhibit 18.** The subpoena is directed to CDCR-DJJ-Ward Master File Unit requesting Hall's record with the Department of Corrections and Rehabilitation Division of Juvenile Justice (Formerly

[1] Hall requests that he be permitted to engage in discovery in regard to this claim.

guarded fear that statements may be used against him. Fair play dictates nothing less." Esquivel v. State, 96 Nev. at 778, 617 P.2d at 587.(1980)

In McKenna v. State, 98 Nev. 38, 639 P.2d 557 (1982), a psychiatrist, was appointed by the court to inquire into the sanity of McKenna. During the psychiatrist's examination, McKenna apparently discussed the circumstances surrounding a murder. Over the defendant's objection, the psychiatrist was permitted to testify at trial that McKenna had admitted he had "exploded and killed J. J. Nobles." The court stated that "Fair play does indeed dictate that our trial courts not appoint a psychiatrist to examine an accused and then employ the confidential contents of the interview to obtain a conviction." Id. The court determined that introduction of this kind of evidence violates the defendant's right to due process. Hall's due process right was violated when his psychological evaluations and treatment records were provide to the jury.

Incredibly, Hall's counsel did not object to the records based on privilege, either at the trial level, or on appeal.

4. *HALL'S FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION WAS VIOLATED*

Hall was *ordered* to participate in sex offender treatment and therapy. Statements made by Hall while in treatment were provided to the jury. The State referred to these both during both the opening and closing arguments in the penalty phase.

Admission of Hall's statements made during court ordered treatment violated his Fifth Amendment privilege against self incrimination. Trial counsel did not object on this ground. Appellate counsel did not raise it on appeal.

The Fifth Amendment Self-Incrimination Clause, which applies to the States via the Fourteenth Amendment, Malloy v. Hogan, 378 U. S. 1 (1964), provides that no person "shall be compelled in any criminal case to be a witness against himself." McKune v. Lile, 536 U.S. 24 (2002). The privilege is not limited to criminal

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proceedings and protects in circumstances where the person's freedom is curtailed. Miranda v. Arizona, 384 U.S. at 467 (1966) Welch v. Com., 149 S.W.3d 407 (Ky., 2004.)

> The Fifth Amendment privilege not only protects the individual against being involuntarily called as a witness against himself at a criminal trial in which he is a defendant, but also "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings ... unless and until he is protected at least against the use of his compelled answers."
> Minnesota v. Murphy, 465 U.S. 420,(1984) (quoting Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38 L.Ed.2d 274 (1973)).

Constitutional safeguards such as the Fifth Amendment protection against self-incrimination apply to juvenile delinquency proceedings. In re Gault 387 U.S 1 (1967) In re D.S., 111 Ohio St.3d 361, 2006-Ohio-5851, 856 N.E.2d 9.

The Fifth Amendment protection remained available to Hall despite his juvenile adjudication and his conviction. See Minnesota v. Murphy, 465 U.S. 420, 426 (1984) ("A defendant does not lose this protection by reason of his conviction of a crime...."); U.S. v. Antelope, 395 F.3d 1128 (9th Cir., 2005)

For purposes of the Fifth Amendment privilege against self-incrimination, there is no appreciable difference between the guilt and penalty phases of the criminal proceedings. Estelle v. Smith, 451 U.S. 454, 462-463 (1981).Where a defendant is entitled to these procedural safeguards and the State fails to inform the defendant of his Fifth Amendment rights, the statements cannot be used against him. Id. at 469.

Generally, a person must invoke the Fifth Amendment protections in order for them to apply. There are two exceptions to this requirement: (1) custodial interrogation by a state agent, Miranda v. Arizona, 384 U.S. 436 (1966), and (2) situations where the assertion of the privilege would be penalized Minnesota v. Murphy, 465 U.S. 420(1984)). Both of these circumstances apply.

The remedy for Fifth Amendment violations is suppression of the tainted evidence. Missouri v. Siebert, 542 U.S. 600 (2004).

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(a) Hall's Miranda rights were violated.

The Miranda exception applies to cases where there is a custodial interrogation by a state agent. There are three requirements for this exception to apply: (1) there must be an interrogation; (2) the interrogation must be custodial; and (3) the interrogation must be conducted by a state agent. Illinois v. Perkins, 496 U.S. 292, 296-97 (1990)

Hall was adjudicated delinquent and was committed to DJJ. He was detained. He was required to participate in treatment. Participation in the program required Hall to make incriminatory statements. His participation in the program was considered and analyzed every time he was considered for parole. His refusal to participate would have adverse consequences. He was questioned by state officials. He was not Mirandized. Statements he made during treatment were used against him in a criminal proceeding. Under the circumstances, Hall's Fifth Amendment right again self incrimination was violated. See, United States v. Antelope, 395 F.3d 1128 (9th Cir., 2005)

In Welch v. Com., 149 S.W.3d 407 (Ky., 2004) the court ruled it was a violation of Miranda to use statements the juvenile made during sex offender treatment to pursue a new criminal investigation and prosecution. Like Hall, Welch was adjudicated as a juvenile sex offender and committed to the DJJ. Id. Like Hall, he was sent to a treatment facility to participate in the juvenile sex offender treatment program. While participating in the treatment program, he made statements to his counselor which were subsequently used against him in a subsequent criminal proceeding. The court found that Welch's participation in the juvenile sex offender program was involuntary. During the treatment program, the counselors questioned Welch. The questioning was a necessary part of the juvenile sexual offender program. The court found such questioning and encouraged disclosure amounted to coercion in the course of a custodial interrogation. This case is analogous to Hall.

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Miranda requires state action. Like in Hall, the counselors who questioned Welch were employees of the treatment facility not law enforcement.

In Estelle v. Smith, 451 U.S. 454, 469(1981) the Court held that a psychiatrist, who performed an involuntary evaluation of the defendant, could not testify regarding information that had been gathered by questioning during the evaluation because the defendant had not been apprised of his Fifth Amendment rights. The examining physician was not a law enforcement officer, but the Court held that the doctor went beyond a routine examination and gathered information during the evaluation to testify concerning the defendant's future dangerousness and to assist the prosecution in seeking the death penalty. In accordance with Estelle, the court in Welch found that the counselors gathered information and delivered that information to law enforcement. The court found that the counselors who interrogated Welch were state actors for the purpose of the Fifth Amendment, and Welch should have been informed of his Miranda rights regarding his privilege against self-incrimination. Welch v. Com., 149 S.W.3d 407 (Ky., 2004)

In Petrocielli v. Baker, a case from this jurisdiction, the 9th Circuit found that admission of a psychiatrist's testimony during the penalty phase was flagrant violation of defendant's Fifth and Sixth Amendment right under Estelle v. Smith, 451 U.S 454 (1981) and that the violation had a substantial and injurious effect on the jury's decision to impose the death sentence.

Hall's incriminating statements made during treatment were used against him in a criminal proceeding to secure the death penalty resulting in a violation of his Fifth and Sixth Amendment rights. They had an injurious effect upon the jury's decision to sentence him to death.

(b) Hall's statements made during treatment were involuntary.

If Hall had refused to make statements while in treatment, he would have been penalized. He had the choice of exercising his Fifth Amendment privilege and being

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penalized, or waiving the privilege and incriminating himself. His participation in treatment programs was routinely assessed, particularly when parole was being considered. He was in McCloud Hall Specialized Treatment Counseling program for two years.

The second exception to the general rule that the privilege against self-incrimination must be claimed occurs "where the assertion of the privilege is penalized so as to `foreclose a free choice to remain silent, and compel incriminating testimony.'" Minnesota v. Murphy (1984), 465 U.S. 420, 434. The "classic penalty scenario," occurs where the assertion of the privilege against self-incrimination is penalized so as to foreclose the right to remain silent. An individual who succumbs to the pressure of the penalty threatened by the State, fails to assert the privilege against self incrimination, and then makes an incriminating statement is excused from failing to assert the privilege when the State seeks to use the incriminating statement in a criminal prosecution. Id. In these situations, the individual is deprived of his "'free choice to admit, to deny, or to refuse to answer.'" Garner v. United States, 424 U.S. 648, 657(1975) (quoting, Lisenba v. California, 314 U.S. 219, 241,(1941). In such cases, the privilege becomes "self-executing." If the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution. Murphy, 465 U.S. at 435.

Various courts have applied the United States Supreme Court's holding in Murphy in the context of treatment programs for offenders. Such court-ordered treatment programs implicate the "classic penalty situation," in that the therapeutic programs often require a convicted offender to admit to the offense for which he was found guilty. See, e.g., In re Lineberry, 154 N.C. App. 246, 572 S.E.2d 229 (N.C. App., 2002) .Mace v. Amestoy, 765 F.Supp. 847, 851 (D.Vt.1991)(holding that the defendant's Fifth Amendment rights were violated where his probation was revoked

based on his failure to complete a sexual treatment program that required incriminating admissions); State v. Fuller, 276 Mont. 155, 166-67, 915 P.2d 809, 816 (holding that the defendant was placed in the classic penalty situation when he was ordered, as a condition of his probation, to participate in a sexual offenders treatment program that required participants to disclose their offense history), cert. denied, 519 U.S. 930 (1996); State v. Evans, 144 Ohio App.3d 539, 550, 760 N.E.2d 909, 918 (holding that the classic penalty situation existed where the delinquent juvenile made incriminating statements during court-ordered therapy at a residential treatment center for drug offenders), appeal dismissed, 93 Ohio St.3d 1473, 757 N.E.2d 771 (2001), State v. Warner, 125 Wn.2d 876, 889 P.2d 479 (Wash., 1995) (disclosures compelled by the threat of a penalty); In re Butts, 582 S.E.2d 279, 157 N.C. App. 609 (N.C. App., 2003) (Finding that juvenile's refusal to admit to the offenses was a factor justifying his continued custody, trial court exposed juvenile to the classic penalty situation of choosing between the privilege against self-incrimination and prolonged confinement. In Commonwealth of Pa. v. Brown, 26 A.3d 485, 2011 PA Super 47 (Pa. Super. Ct., 2011) by requiring juvenile to make admissions as a condition to prove he was amenable to treatment, trial court needlessly encouraged him to sacrifice his Fifth Amendment right against self incrimination. Id.; In re A.W., 2018 Ohio 2644 (Ohio App., 2018) (juvenile's participation in the sex offender treatment was compulsory. The juvenile court had previously warned A.W. that if he failed to participate in sex offender treatment, he would have to serve the adult portion of his sentence in prison. A.W. was in the classic penalty situation because, had A.W. asserted his right to remain silent, he would have been penalized by invocation of the adult portion of his sentence.) Welch v. Com., 149 S.W.3d 407 (Ky., 2004) (charges arose from statements made by Appellant during his treatment at a juvenile sex offender program.)

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IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN L. HALL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Supreme Court No. 88788

APPELLANT'S OPENING BRIEF

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Docket 88788 Document 2024-39321

I. STATEMENT OF JURISDICTION

This is an appeal from denial of post-conviction relief. Findings of Fact and Conclusions of Law were entered on September 22, 2020 and Order on Motion for Rehearing or Alternatively, to Amend and/or Make Additional Findings resolving all remaining issues filed on May 15, 2024. **Appellant's Appendix (hereinafter "AA") Volume VI, Bates 1245-1309 and VII AA 1498-1507.**

II. ROUTING STATEMENT

Pursuant to NRAP 17(b), this case is retained by the Nevada Supreme Court as it involves a death penalty case.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the district court used the wrong standard of review in assessing prejudice after finding trial counsel to be ineffective.

2. Whether the district court erroneously determined that the only contents of Hall's juvenile records that would be excluded under California law and Estelle v. Smith were statements he made during psychiatric evaluations.

3. Whether the State met its burden of proving that the error in disseminating Hall's juvenile records to the jury, particularly the court ordered juvenile psychiatric evaluations, during the penalty phase of his trial was harmless beyond a reasonable doubt.

4. Whether the prejudice resulting from the improper use of Hall's juvenile psychiatric evaluations was enhanced by the State's intentional misrepresentation that Hall received a diagnosis of sexual sadism and antisocial personality disorder.

VI. ARGUMENT

A. AFTER FINDING TRIAL COUNSEL TO BE INEFFECTIVE, THE DISTRICT COURT USED THE WRONG STANDARD OF REVIEW IN ASSESSING PREJUDICE

The district court held that while Hall was in juvenile custody he was court mandated to participate in a psychiatric evaluation.[1] Statements he made during the evaluations were used against him in a subsequent proceeding where the State was seeking the death penalty. Defense counsel did not object to use of the records under Estelle v. Smith, 451 U.S. 454 (1981). Also, defense counsel did not object to use of the records based on the California Code Section 827, which required a court order prior to dissemination of juvenile records. **VII AA 1429-1430.** The district court properly held that trial counsel was ineffective. **VII AA 1431.**

However, in denying the ineffective assistance of counsel claim, the court erroneously held that Hall must demonstrate that, but for counsel's errors, the outcome of the penalty hearing would have been different. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). **VII AA 1431.** The court concluded that Hall did not meet this

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[1] There was more than one. Hall was initially evaluated for purposes of treatment in 1997 by L.C. Miccio-Fonseca, Ph.D, a licensed clinical psychologist who performed a psychological evaluation. Her report is clearly marked "*confidential*." **XIX AA 4276-4288.** Another psychological evaluation was conducted as part of an annual review by Dr. C.T. Gruen. The records discussed Hall's participation in mandatory treatment while he was in juvenile custody. Hall was required to participate and cooperate in a sex offender treatment program. A third psychological evaluation was conducted in 2011 by Deborah Leong Ph.D, staff psychologist. **XIX AA 4460-4472.**

burden. **VII AA 1434.**

The Supreme Court has recognized that the concept of prejudice is defined in different ways depending on the context in which it appears. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Weaver v. Massachusetts, 137 S. Ct. 1899 (2017). In the ordinary Strickland case, prejudice means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S., at 694. But the Strickland court cautioned that the prejudice inquiry is not meant to be applied in a "mechanical" fashion. 466 U.S. at 696. For when a court is evaluating an ineffective-assistance claim, the ultimate inquiry must concentrate on "the fundamental fairness of the proceeding." Weaver v. Massachusetts, 137 S. Ct. 1899. Under Strickland, relief must be granted if the convicted person shows that attorney errors rendered the trial fundamentally unfair. Id, 466 U.S. 668; See also, Rippo v. State, 368 P.3d 729 (2016).

In Satterwhite v. Texas, 108 S.Ct. 1792 (1988), the Supreme Court held that the harmless error rule set forth in the landmark case of Chapman v. California, 386 U.S. 18 (1967), that an error is harmless only if the prosecution can prove beyond a reasonable doubt that the constitutional error did not contribute to the verdict, applies to the admission of psychiatric testimony as set forth in Estelle v. Smith; See also Petrocelli v. Baker, 869 F.3d 710 (9th Cir. 2018).

In Sechrest v. State, 108 Nev. 158, 826 P.2d 564 (1992), which was an appeal from a denial of post conviction relief like the instant matter, the defendant argued that his trial attorney was ineffective because he failed to prevent his psychiatrist from

testifying for the prosecution. This Court applied the test established in Chapman, not Strickland, stating that a fifth amendment analysis would shift the burden to the State to prove beyond a reasonable doubt that any constitutional errors were harmless. This is the standard of review this Court has always used in determining prejudice related to Estelle violations. See Esquivel v. State, 96 Nev. 777, 617 P.2d 587 (1980); McKenna v. State, 98 Nev. 38, 639 P.2d 557 (1982); Winiarz v. State, 104 Nev. 43, 752 P.2d 761 (1988); Brown v. State, 113 Nev. 275, 934 P.2d 235 (1997). Estes v. State, 122 Nev. 1123, 146 P.3d1114 (2006).

Accordingly, the district court erred in failing to assess the violation for harmless error.

B. THE DISTRICT COURT INCORRECTLY HELD THAT THE SUBJECT OF THE JUVENILE RECORDS WOULD HAVE BEEN ADMISSIBLE IN THE PENALTY PHASE EVEN IF THE PROPER LEGAL OBJECTION HAD BEEN MADE

The district court erroneously held that even if defense counsel had objected on proper legal grounds, the subject of the juvenile records would still be admissible:

> Further, even if the defense were successful in excluding the actual records from evidence, the subject of the records would still be admissible during the penalty phase. Only statements Mr. Hall made to clinical social workers and/or psychologists would be excluded. The jury would still be able to hear testimony regarding the violent incident with Sheldon while he was in juvenile detention in California as "other matter" evidence. Even had trial counsel objected pursuant to the Fifth Amendment or California law, the majority of the evidence would still be heard by the jury panel.
> **VII AA 1505.**

The court wrongly concluded that only statements Hall made to clinical social workers or psychologists would be excluded and that the majority of the evidence would still have been heard by the jury. In fact, nothing contained in the juvenile psychiatric evaluations was admissible. See Estelle v. Smith, 451 U.S. 454 and its progeny.

In Winiarz v. State, 104 Nev. 43, this Court confirmed that not only was it improper for defendant's psychiatrist to use the contents of his interview in order to assist the prosecutor but it was also improper to use the opinions the psychiatrists formed during the interview. In reversing the conviction, the court stated:

> We hold, first, that it was error under Esquivel v. State, 96 Nev. 777, 617 P.2d 587 (1980), to permit Dr. Master to attack Consuelo's credibility, to say that she was "lying" and "feigning," when such testimony was based largely upon his psychiatric interview with her.
>
> Secondly, under McKenna v. State, 98 Nev. 38, 639 P.2d 557 (1982), cert. denied, 474 U.S. 1093, 106 S.Ct. 868, 88 L.Ed.2d 907 (1986), it was error for Consuelo's psychiatrist to use the confidential *contents* of his interview with her in order to assist the prosecution in obtaining a conviction. Winiarz, 104 Nev. at 50, 752 P.2d at 766. (Emphasis added)

Additionally, none of the "other matter" evidence within the juvenile records was admissible because the State failed to obtain a California juvenile court order authorizing the State to use any of the contents of the juvenile file as required.

The records were requested and forwarded to the district court and Chief Deputy District Attorney David Stanton and Chief Deputy District Attorney Roy Nelson under California law which, unlike in Nevada, permits a district attorney in another jurisdiction to inspect them without a court order. The following mandate is

presumption of effective assistance of counsel is overcome. Smith v. Robbins, 528 U.S. 259; Davila v. Davis, 137 S.Ct. 2058 (2017); Chappell v. State, 501 P.3d 935 (2021); See also Rodrigues v. State, 281 P.3d 1214 (2009).

Like trial counsel, appellate counsel Howard Brooks raised the claim that use of psychiatric evaluations was improper. However, he merely adopted trial counsel's weak, losing argument that they cannot be used to prove future dangerousness[11] instead of presenting available, far stronger arguments: There was no authorizing California juvenile court order as required; use of the psychological evaluations violated Estelle and its progeny; the State deceived the jury; and use of the records violated NRS 175.552(3). Appellate counsel's failure to present these arguments in favor of a weaker one was not the result of reasonable strategy but the result of a misunderstanding/ignorance of the law.

1. APPELLATE COUNSEL'S FAILURE TO RAISE THE ESTELLE CLAIM WAS BASED UPON IGNORANCE/MISUNDERSTANDING OF THE LAW

Deficient performance occurs when counsel's actions are motivated by a clearly erroneous understanding of the law and not by any strategic concern. See Hinton v. Alabama, 571 U.S. 263, 273-74 (2014) (per curiam); Williams v. Taylor, 529 U.S. 362, 395 (2000); Kimmelman v. Morrison, 477 U.S. 365, 385 (1986). In Kimmelman, the Court held that counsel's performance was inadequate, noting that the justifications counsel offered for his failure to file a suppression motion "betray

[11] **II AA 260-264.**

a startling ignorance of the law—or a weak attempt to shift blame for inadequate preparation." Id.

At the evidentiary hearing on April 14, 2023, unlike trial counsel, a combative Brooks refused to concede his errors when confronted by them. He testified that he made the strategic decision not to argue that the psychological records were inadmissible on Fifth Amendment grounds and that the cases cited by Hall were inapplicable. **XVIII AA 4061.**

In denying the claim, referencing Brooks' testimony, the district court held as follows:

> What you've got here is he is in custody as a juvenile. When he made these statements, there was no potential criminal liability in the *Flamm* matter. There was no potential harsher penalty in *Flamm* matter. When these statements were made in California, they were not self-incriminating. What happened in this case is the statements were made, they were not self-incriminating. Years later, by killing *Flamm*, Mr. Hall exposed himself to prosecution and those statements years later become inflammatory.
>
> The law is crystal clear. The law is the Fifth Amendment does not protect testimony that might become incriminating in the future. The PCR petition, as far as I can tell, does not address the timeliness issue at all. But I think the idea that you have statements made when he was a juvenile, and they are not self-incriminating, I don't think that matches the facts and the law in these cases you are citing.
> **XVIII AA 4065-4066.**

Brooks was right, the law is crystal clear; however, he was wrong about the law. The relevant inquiry is not whether or not any given statement was in fact incriminatory, as Brooks claimed, but whether or not there was the potential or possibility of incrimination. See Kastigar v. United States, 406 U.S. 441, 445 (1972);

Chavez v. Martinez, 538 U.S. 760 (2003); Lefkowitz v. Turley, 414 U. S. 70 (1973); Fisher v. United States, 425 U.S. at 412–13 (1976); United States v. Oriho, 969 F.3d 917 (9th Cir. 2020).

Additionally, Hall was required to undergo sex offender treatment where the risk of incrimination is enhanced. There is a "real and appreciable risk" of incrimination associated with sex offender treatment which could be used in a subsequent prosecution absent Fifth Amendment protections. Pens v. Bail, 902 F.2d 1464 (9th Cir. 1989); United States v. Antelope, 395 F.3d 1128 (9th Cir.2005); United States v. Hulen, 879 F.3d 1015 (9th Cir. 2018).

In Brown v. State, 113 Nev. 275, this Court held that consideration at sentencing of defendant's unwarned statements made to a psychiatrist in a court-ordered examination "violates the 'fair play' rules ... and the Fifth Amendment concerns set forth in Estelle, and constitute[d] reversible error." During direct examination, Brooks was confronted by the fact that he had cited the Brown case in his appellate brief, yet failed to make the Estelle argument. Nevertheless, rather than acknowledge his error, a defiant Brooks simply stated that he chose not to make that argument and that McKenna, Estelle, and Esquivel were inapplicable:

> Q Now, that was a case you cited in your brief, right?
> A You say so. I don't know.
> Q Okay. And in that case that you cited, if you -- could you please turn to, I just -- to page 245 where it says -- it'll say on the bottom of page 245.
> A Okay.
> Q And if you look at -- I'm looking at the paragraph that starts, we conclude.
> A Okay.

Q It says, we conclude the District Court's consideration of the Lakes Crossing psychological reports was an abuse of discretion. In Estelle v. Smith, United States Supreme Court concluded that the testimony of a psychiatrist who violated a criminal defendant for purpose of competency was improperly used during the penalty phase of a trial. During the penalty phase, the psychiatrist testified regarding information he learned through the psychological examination, stating amongst other things that the defendant was a sociopath whose condition would only get worse, that the defendant would continue this behavior, and that defendant had no regard for other human beings.

Right?

The Court continues, the jury imposed the death penalty but the United States Supreme Court reversed the sentence on the grounds that the defendant was entitled to the protection of the Fifth Amendment of the Court-ordered psychiatric interview and was not apprised of his right to remain silent.

You see that cited in there?

A. I do.

Q. Okay, and if you go down to another paragraph, like two paragraphs below.

Nevada cases have utilized a similar analysis. In Esquivel v. State, this Court stated that it was improper for the prosecution to impeach a defendant with statements the defendant made during a Court-ordered mental evaluation. A defendant should feel free in a clinical climate to discuss all relevant facts without fear that those statements may be used against him later. Fair play dictates nothing less. And the opinion goes on.

In McKenna v. State, this Court reversed McKenna's sentence when the prosecutor presented substantive evidence from a psychiatrist who testified that McKenna had admitted during a Court-ordered psychological examination that he murdered the victim. The Court citing Esquivel reversed the conviction, stating that it was unfair for the State to appoint a psychiatrist to examine an accused and then employ with confidential -- and employ the confidential contents of that psychiatric interview to obtain a conviction.

The Court goes on.

Even though these cases only address the use of a Court-ordered psychiatrist's testimony in the guilt phase, the United States Supreme Court has stated that it could discern no basis to distinguish between the guilt and penalty phase of a trial -- of trial so far as the protection of the Fifth Amendment privilege is concerned. And that it is improper to use psychiatric testimony at either guilt or penalty phases.

The Court goes on at the bottom of that paragraph, see Pens v.

Basil, in a rape case, unwarned statements given in a psychiatric evaluation about other offenses could not be used to enhance the sentence. The use at sentencing of statements previously obtained in violation of a defendant's privilege against self-incrimination violates that defendant's privilege against self-incrimination. Pursuant to this law, we conclude that the District Court abused its discretion and that Troy is entitled to a new sentencing hearing.

The District Court ordered the psychological examination of Troy and then relied on the conclusions of that exam, including his unwarned statements to the psychiatrist to determine that Troy was likely to act out sexually and was not falsely convicted. Such consideration of the reports violates the fair play rule set forth in Esquivel, McKenna, and the Fifth Amendment concerns set forth in Estelle.

So, that was language in one of the cases that you actually cited in your opening brief, but you never made those arguments, did you?
A That is correct, and *I chose not to do so.*
Q Okay. And you were aware that the psychological evaluations that were used were obtained while Mr. Hall was in custody in the -- CYA now known DJJ, the California juvenile justice system as part and parcel of that system? In other words, they were ordered by the Court determine proper placement, proper treatment of Mr. Hall.
A Well, yes, but you're still discussing the self-incrimination issues, not the Miranda[12] issues, correct?
Q I'm just referring to --
A Or both.
Q Fifth Amendment based upon McKenna, Estelle, Esquivel --
A *Yeah, these cases are inapplicable*.
Q Okay, why are they inapplicable?
A. What you've got here is he is in custody A What you've got here is he is in custody as a juvenile. When he made these statements, there was no potential criminal liability in the Flamm matter. There was no potential harsher penalty in the Flamm matter. When these statements were made in California, they were not self-incriminating. What happened in this case is the statements were made, they were not self-incriminating. Years later, by killing Flamm, Mr. Hall exposed himself to prosecution and those statements years later become inflammatory.

The law is crystal clear. The law is, the Fifth Amendment does not protect testimony that might become incriminating in the future. That's U.S. v.3d 401 U.S. 601, 606. The PCR petition, as far as I can tell, does

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12 Miranda v. Arizona, 384 U.S. 436 (1966)

not address the timeliness issue at all. But I think the idea that you have statements made when he was a juvenile, and they are not self-incriminating when they are made, and ten years later he kills somebody, and we're now claiming they were self-incriminating, I don't think that matches the facts and the law in these cases that you are citing.

I think in these cases I think in these cases, the person is making statements that are self-incriminatory. But when Mr. Hall made these statements, they did not incriminate him at all.

Q So, that was the reason why you didn't raise them.

A That's correct.

Q Okay.

(Emphasis added) **XVIII AA 4062-4066.**

Accordingly, based upon a misunderstanding/ignorance of the law, Brooks chose not to make an Estelle argument.

During re-direct examination, Hall attempted to delve into Brooks' testimony about self incrimination and to question him about the Kastigar opinion stating that the relevant inquiry is not whether or not any given statement was in fact incriminatory, as Brooks had asserted, but whether or not there was the potential or possibility of incrimination. However, the State objected that was argument and the court agreed. **XVIII AA 4074.**

As this Court has reiterated, the privilege against self-incrimination has been "broadly applied and generously implemented" by the United States Supreme Court and has long been interpreted to mean that a defendant may refuse "to answer official questions put to him in any proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." In re William M., 196 P.3d 456 (2008) (Emphasis added). In that case, because statements a juvenile may make during certification proceedings could potentially be used against him in

a subsequent juvenile or adult criminal prosecution, over ruling prior precedent, this Court held that Fifth Amendment protections apply to juvenile certification proceedings. Statements Hall made while detained and undergoing required psychological evaluations and treatment might have incriminated him and were used in a subsequent criminal proceeding. Therefore, Fifth Amendment protections applied.

In United States v. Mitchell H., 182 F.3d 1034 (9th Cir. 1999), the Ninth Circuit found that since statements a juvenile made during a court ordered psychological evaluation could not legally be used against him in a subsequent criminal proceeding, ordering him to submit to a psychological evaluation did not implicate or violate his Fifth Amendment privilege against self-incrimination. The rule ensured that the juvenile did not unwittingly incriminate himself.

Also, in its Order Affirming in part and Reversing in Part, this Court indicated that "[g]enerally, the State may not use a healthcare provider to introduce a defendant's un*Mirandized* statements from a court-ordered psychiatric evaluation." Amentel v. State, 133 Nev. 218, 228, 396 P.3d 759, 768 (2017); see also Brown v. State, 113 Nev. 275.

Appellate counsel's failure to make an Estelle argument in support of his claim that the juvenile records should not have been admitted was the result of ineffective assistance of counsel not any objectively reasonable strategy.

2. APPELLATE COUNSEL FAILED TO BRIEF THE MERIT WORTHY ISSUE THAT IT WAS IMPROPER TO USE THE JUVENILE RECORDS WITHOUT AN AUTHORIZING CALIFORNIA JUVENILE COURT ORDER

On direct examination, after appellate counsel acknowledged that he knew that the juvenile records were from California, he was asked if he had researched California law to determine what is required in order for the records to be disseminated. He responded, to a certain extent. **XVIII AA 4050.** He then admitted that he was not aware that there is a great deal of California law stating that a juvenile court order is needed in order for a party, such as a district attorney in another jurisdiction, to disseminate a juvenile court case file. **XVIII AA 4052.** He further again replied that he did not agree with Hall's interpretation of the law. **XVIII AA 4053.**

In an obvious attempt to redeem himself, on cross examination, Brooks testified that he talked to California practitioners and "*the impression that I got from talking to California practitioners is this information absolutely would come into evidence during a penalty phase, but the way to stop it is to go to California to the juvenile court and get it sealed. And I was under the impression from these conversations that is the only way to stop it*." **XVIII AA 4069.** SCR 250(3) requires counsel in capital cases to maintain contemporaneous records of all work performed as well as rational for strategic decisions. Appellate counsel's notes were admitted at the evidentiary hearing. **XVIII AA 4069.** There is no notation therein of him ever contacting California counsel to discuss the matter. Regardless, California law is clear