

CLERK OF THE COURT

1 ORDR

2 EIGHTH JUDICIAL DISTRICT COURT

3 CLARK COUNTY, NEVADA

4
5 THE STATE OF NEVADA,

6 Plaintiff,

7 us.

8 ORENTAL JAMES SIMPSON,

9 Defendant.

Case No. 07C237890-4

Dept No. VII

10
11
12 **DECISION AND ORDER**

13
14 In 2008, a Nevada jury convicted Orenthal "O.J." Simpson on multiple charges
15 related to a Las Vegas hotel room robbery. Following an unsuccessful direct appeal, Mr.
16 Simpson seeks relief on twenty-two post-conviction claims. Mr. Simpson alleges that his
17 attorney labored under an actual conflict, that he received ineffective assistance of counsel
18 from both trial and appellate counsel, and that the State withheld exculpatory evidence. All
19 grounds in the petition lack merit and, consequently, are denied.

20 **FINDINGS OF FACT**

21 The 2007 Las Vegas hotel room robbery stemmed from a series of events dating back
22 to the 1990s. In 1996, the Estate of Ronald Goldman obtained a \$33,000,000 judgment
23 against Mr. Simpson related to the murder of Ronald Goldman. The Estate actively pursued
24 collection of the judgment. During collection efforts, the Estate obtained several turnover
25 orders for Mr. Simpson's non-exempt assets.

26 In the late 1990s, Bruce Fromong worked as a memorabilia dealer and at times sold
27 items for Mr. Simpson. The Goldman Estate served Mr. Fromong with a turnover order.
28

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

1 The turnover order required Mr. Fromong to surrender any of Mr. Simpson's possessions
2 held by Mr. Fromong. The order remained in force for two years.

3 Also in the late '90s, police executed another turnover order and searched Mr.
4 Simpson's California home for non-exempt assets. The night before the police search, Mr.
5 Simpson received an anonymous warning. At that time, Mike Gilbert worked as Mr.
6 Simpson's agent. Mr. Gilbert assisted in removing valuable items of memorabilia from Mr.
7 Simpson's home before the police arrived. Mr. Simpson did not see the items again and
8 believed Mr. Gilbert stole them.

9 Years later, Mr. Fromong obtained some of the personal memorabilia removed from
10 the Simpson home. Mr. Fromong testified he purchased the items from Mr. Gilbert. Mr.
11 Fromong believed Mr. Simpson gave the items to Mr. Gilbert in lieu of payment for a debt.
12 According to Mr. Fromong, Mr. Gilbert's former girlfriend provided him the items from her
13 storage unit.

14 Mike Gilbert recounted a different version of events with regard to the memorabilia.
15 At the post-conviction hearing in this case, Mr. Gilbert explained that the storage unit was in
16 his ex-girlfriend's name; however, he held the only key. Mr. Gilbert opined Mr. Fromong
17 stole the items after cutting the lock on the storage unit. Mr. Gilbert testified the items
18 belonged to Mr. Simpson.

19 Moving forward to late August of 2007, a memorabilia dealer named Al Beardsley
20 contacted Mr. Fromong regarding a sports memorabilia transaction. Mr. Fromong described
21 Mr. Beardsley as a long-time acquaintance and a Simpson "groupie." During their
22 conversation, Mr. Beardsley announced he knew a buyer interested in Simpson memorabilia.

23 After contacting Mr. Fromong, Al Beardsley sent a text message to Thomas Riccio, a
24 long-time friend of Mr. Simpson. Mr. Riccio owned part of a California auction house and
25 had experience selling sports memorabilia. The text message from Mr. Beardsley surprised
26 Mr. Riccio because the two men previously had a falling out over whether Mr. Simpson
27 agreed to an autograph signing event. As a result of this misunderstanding, everything
28 "exploded" between Mr. Riccio and Mr. Beardsley.

1 Despite the prior argument, the two ultimately talked. Mr. Beardsley knew a seller
2 with personal items belonging to Mr. Simpson. Mr. Beardsley asked Tom Riccio not to call
3 Mr. Simpson regarding the items because the memorabilia was stolen from Mr. Simpson.
4 Mr. Beardsley did not identify the seller; however, Mr. Riccio assumed Mike Gilbert was the
5 seller. On August 31, 2007, Mr. Beardsley faxed Mr. Riccio a description of the items. The
6 list included items removed from Mr. Simpson's house in the late 1990s, including family
7 photos.

8 Ignoring Al Beardsley's request, Mr. Riccio called Mr. Simpson regarding the
9 memorabilia. Mr. Simpson wanted his personal items returned. Mr. Riccio wanted to help
10 Mr. Simpson recover the property. His motivation stemmed in part from their friendship,
11 in part from his dislike of Mr. Beardsley and in part from Mr. Riccio's hope to have Mr.
12 Simpson sign 200 books. Mr. Simpson's book, "If I Did It" was scheduled for release in
13 September 2007.

14 Mr. Simpson and Mr. Riccio discussed ways to reclaim the Simpson property. The
15 initial plan was to tell Mr. Beardsley they had a buyer, identify the items and demand the
16 sellers to turn over the items. They planned to call the police if the sellers refused to return
17 the items. Mr. Riccio contemplated recording the property recovery on camera with
18 Entertainment Tonight or TMZ at his auction house in California.

19 Mr. Riccio continued to explore options to help Mr. Simpson. He understood Mr.
20 Simpson's lawyers advised against doing the recovery on camera or doing the recovery in
21 California due to the Goldman judgment. Mr. Riccio contacted California police regarding
22 the stolen property. Because the alleged theft occurred more than ten years prior, law
23 enforcement agents advised Mr. Riccio to contact a lawyer regarding civil remedies. Mr.
24 Riccio then spoke with the FBI. Mr. Simpson hoped the FBI could be present in the next
25 room during the property recovery, but the FBI was not interested.

26 As it turned out, the memorabilia was located in Las Vegas. Coincidentally, Mr.
27 Simpson planned to be in Las Vegas for the wedding of Tom Scotto, one of his closest
28

1 friends. Mr. Riccio suggested recovering the property in Las Vegas during the wedding
2 weekend.

3 At that point, Charles Ehrlich, a long-time friend of Mr. Simpson, became involved
4 in the plans to recover the property. Mr. Ehrlich was also traveling from Florida to Las
5 Vegas to attend the Scotto wedding. Mr. Simpson and Mr. Ehrlich insisted they could not
6 recover the property from the seller's hotel. The men also did not want to plan the recovery
7 at their hotel. Ultimately, they decided the recovery would take place in Mr. Riccio's room
8 at the Palace Station Hotel and Casino. In this version of the plan, Mr. Ehrlich planned to
9 pose as the buyer.

10 Mr. Simpson arrived in Las Vegas on September 12, 2007. That evening, Mr.
11 Simpson met his attorney, Yale Galanter, for dinner at the N9NE Steakhouse in the Palms
12 Casino Resort. Mr. Simpson was staying at the Palms in Las Vegas; Mr. Galanter was
13 staying at the home of a client, Junior Johnson. At dinner, Mr. Simpson discussed with Mr.
14 Galanter his plans to obtain the memorabilia the next day. Both men agree they did not
15 discuss the use of weapons that night.

16 The same evening, Mr. Beardsley informed Bruce Fromong the sale would take place
17 at the Palace Station. Mr. Fromong was still unaware of Tom Riccio's identity; he simply
18 knew the buyer worked for a reputable auction house.

19 The morning of September 13, 2007, Tom Riccio arrived in Las Vegas to help Mr.
20 Simpson obtain his property. Upon arriving in Las Vegas, Mr. Riccio obtained a recording
21 device from Radio Shack. Mr. Riccio habitually taped important deals. On this trip, he
22 wanted to ensure his book signing deal with Mr. Simpson.

23 At 1:30 that afternoon, Mr. Riccio met with Mr. Simpson at the Palms Pool. Several
24 people congregated at the pool, including Mr. Ehrlich who had also arrived that morning.
25 Mr. Ehrlich testified that everyone at the pool was drinking. Mr. Riccio began recording the
26 group conversation. Mr. Simpson told many people at the pool that Mr. Riccio was going to
27 help him recover his property. Attorney Willie Singleton, a friend of Mr. Simpson, and Mr.
28 Simpson's family all recommended against Mr. Simpson recovering the property.

1 Around 3:09 p.m., Mr. Simpson and Mr. Riccio decamped to Mr. Simpson's room.
2 Mr. Riccio recorded the conversation in the room. During that conversation, Mr. Simpson
3 mentioned the old turnover order and expressed frustration that Mr. Beardsley had the
4 property. Mr. Simpson planned to ask Mr. Beardsley to return the items. If Mr. Beardsley
5 refused, he planned to call the police.

6 Around the same time, Walter Alexander arrived in Las Vegas for the Scotto
7 wedding. Mr. Alexander and Mr. Simpson were friends, although the two had a
8 disagreement a few months prior over a loan. Upon arriving in Las Vegas, Mr. Alexander
9 met with his good friend Michael "Spencer" McClinton. Shortly after meeting with Mr.
10 McClinton, Walter Alexander received a call from his friend Clarence "C.J." Stewart, who
11 lived in Las Vegas. C.J. Stewart requested Mr. Alexander's help recovering the
12 memorabilia. After the call from Mr. Stewart, Mr. Alexander and Mr. McClinton headed to
13 the Palms to provide assistance.

14 At 3:37 p.m., Mr. Alexander and Mr. McClinton met with Mr. Simpson in his room.
15 Mr. Riccio, still in the room, left shortly after the men arrived. After Mr. Riccio left, Mr.
16 Simpson informed Mr. Alexander and Mr. McClinton that he needed a few guys to watch
17 his back while he retrieved some stolen property. According to Walter Alexander, Mr.
18 Simpson expressed a need to get some "heat." Mr. McClinton responded he had plenty of
19 heat; he showed Mr. Simpson his concealed weapons permit. Mr. Simpson asked the men
20 to bring guns to the recovery.

21 During the recovery, Mr. Simpson wanted the men to place the guns in their
22 waistbands and open their jackets to display the guns. The weapons display was to show
23 they meant business. Mr. Simpson also wanted to have protection in case anyone else had
24 guns. When Mr. Alexander expressed concerns about the police being called, Mr. Simpson
25 said, "Fuck the police. You know it's my shit. So, you know, I'm just going to get my shit."

26 After leaving Mr. Simpson's room, Mr. Alexander and Mr. McClinton decided they
27 could make some money by selling the story to the tabloids, so they also purchased a
28 recording device. The men stopped at Mr. McClinton's house and picked up two handguns.

1 The errands caused them to be late returning to the Palms. While they were gone, Mr.
2 Simpson called them several times asking when they were arriving and whether or not they
3 got the "heat." Mr. Alexander testified Mr. Simpson was becoming intoxicated at that
4 point. Eventually, Mr. Alexander and Mr. McClinton met up with the group at the Palace
5 Station.

6 Around 5:00 p.m., while Mr. Alexander and Mr. McClinton were running errands,
7 Charles "Chuck" Cashmore was interviewing for a job. His friend C.J. Stewart had arranged
8 the interview for him. After the interview, Mr. Stewart called Mr. Cashmore and asked him
9 to meet the group of men at the Palms. At approximately 6:30 p.m., Mr. Cashmore arrived
10 at the Palms. He met Mr. Simpson and Mr. Ehrlich. Mr. Ehrlich testified that during this
11 time, Mr. Simpson had a few drinks. Mr. Simpson asked Mr. Cashmore if Mr. Stewart had
12 informed him of the plans. Assuming the question referred to catering the Scotto wedding
13 the next day, Mr. Cashmore said yes. Finally, Mr. Stewart called and the men walked out to
14 the Palms valet.

15 When Mr. Stewart arrived, he told Mr. Cashmore they were going to the Palace
16 Station. He asked if Mr. Cashmore could ride along to discuss the interview. Mr. Stewart
17 informed Mr. Cashmore they were picking up some memorabilia items that belonged to Mr.
18 Simpson.

19 Around 5:30 p.m., Mr. Beardsley arrived at the Palace Station for the transaction.
20 He met Mr. Riccio and told him that Bruce Fromong was the seller. Mr. Riccio did not
21 know Mr. Fromong. Around 6:00 p.m., Mr. Fromong arrived at the Palace Station and
22 parked in the handicapped parking near hotel registration. Mr. Beardsley met Mr.
23 Fromong at the valet parking area, entered the lobby and introduced Mr. Fromong to Mr.
24 Riccio. The men then went to Mr. Fromong's truck to view the items.

25 Mr. Fromong brought 700 to 800 items of memorabilia to the Palace Station. Mr.
26 Fromong testified all the items belonged to him. According to Mr. Fromong, only twelve or
27 thirteen items were Simpson memorabilia purchased from Mike Gilbert. While looking at
28 the items in Mr. Fromong's truck, Mr. Riccio asked whether those items were all of the

1 Simpson memorabilia. Mr. Ehrlich called, and Mr. Riccio explained that not all of Mr.
2 Simpson's items were there. He asked Mr. Ehrlich if they still wanted to go through with
3 the plan.

4 Mr. Riccio then put Mr. Beardsley on the phone with Charles Ehrlich. Mr. Riccio
5 realized then that Mr. Ehrlich could no longer pose as the buyer because Mr. Ehrlich was
6 talking "ghetto" and did not portray a sophisticated buyer.

7 After the men agreed to proceed with the recovery, Bruce Fromong reluctantly
8 brought the items to Mr. Riccio's hotel room. Mr. Riccio convinced him that moving the
9 property to the room would speed things up because the buyer was running late. Mr. Riccio
10 told Mr. Fromong several times to bring only the Simpson memorabilia, but Mr. Fromong
11 insisted on bringing everything. According to the hotel surveillance video, at 6:27 p.m., a
12 Palace Station bellman assisted the men by taking a cart full of memorabilia to Room 1203.

13 At 6:55 p.m., surveillance video from the Palms valet shows Mr. Simpson leaving
14 with Mr. Ehrlich, Mr. Cashmore and Mr. Stewart. After arriving at the Palace Station, Mr.
15 Ehrlich and Mr. Cashmore exited the car at the north valet and waited in the lobby. Mr.
16 Stewart and Mr. Simpson met up with Mr. Alexander and Mr. McClinton in the parking lot.

17 Palace Station surveillance video shows Mr. Riccio going outside to meet Mr.
18 Simpson at 7:30 p.m. The men then gathered in the lobby. Mr. Riccio advised the group
19 that Mr. Ehrlich was not going to act as the buyer. Instead, they would all enter the room at
20 the same time. He also told them that Mr. Beardsley and Mr. Fromong were unarmed. The
21 group followed Mr. Riccio to the room. Before entering the room, Mr. Riccio thought either
22 Mr. Fromong and Mr. Beardsley would return the items or the Simpson group would call
23 the police. When the group arrived at Room 1203, Mr. Riccio opened the door with his key.

24 Mr. Stewart entered the room first. By all accounts, the room at the Palace Station
25 was small. When the men entered the room, Mr. Fromong was at the end of the bed and
26 Mr. Beardsley was at the corner of the bed. Mr. Stewart pushed Mr. Fromong into a chair
27 located in the corner of the room. Just before Mr. McClinton entered the room, Mr.
28 Simpson told him to take the gun out and put it in his hand. Mr. McClinton entered the

1 room with his gun drawn, waved the gun around and shouted for everyone to freeze. Both
2 Mr. McClinton and Mr. Stewart yelled at Mr. Fromong to put his phone down. Mr. Stewart
3 frisked Mr. Fromong, Mr. Beardsley and Mr. Riccio to ensure they did not have weapons.
4 Mr. Alexander entered the room next with a gun visible in his waistband, just as Mr.
5 Simpson had requested.

6 Mr. Simpson motioned to Mr. McClinton to put the gun down. Mr. Ehrlich recalled
7 that Mr. Simpson said to put the gun down twice, although that statement cannot be heard
8 on the recording of the incident. Mr. Fromong also heard someone say "put the gun down."
9 Mr. McClinton kept the gun out during the entire incident.

10 Mr. Simpson entered the room last and yelled, "Don't let anybody leave this room.
11 Nobody gets out of here." He then turned to Mr. Fromong and yelled, "How could you steal
12 my stuff? I thought you were a good guy." Mr. Fromong insisted he did not steal the items.
13 Mr. Simpson responded, "I know, Mike [Gilbert] stole my shit." Mr. Simpson told the men,
14 "This is all my shit. Gather it up. . . .Leave the other stuff down."

15 Mr. Simpson gave directions to the men while Mr. Cashmore and Mr. Ehrlich stuffed
16 memorabilia into pillowcases. Mr. Simpson and Mr. McClinton did not gather anything.
17 The men took all the memorabilia in the room except for a few baseball bats. Mr.
18 Alexander took a pair of sunglasses from the bed, unplugged the room phone and took Mr.
19 Fromong's cell phone from the bed. Mr. Simpson told Mr. Fromong they would leave his
20 cell phone at the front desk. After the men left the room, Mr. Simpson told Mr. Alexander
21 to give back the cell phone. Mr. Alexander, concerned about being arrested, figured they
22 could take care of it later, so he did not return the phone.

23 After the group left, Mr. Beardsley announced he was calling the police. Mr. Riccio
24 tried to talk him out of it. Before the police were called, Mr. Fromong contacted the media
25 to report the incident. He was angry because his "best friend" had just robbed him at
26 gunpoint. Mr. Beardsley was also interested in speaking to the media because he wanted to
27 know how much they could profit from the incident. At 7:37 p.m., Mr. Beardsley placed a
28 call to 9-1-1. After the 9-1-1 call, Mr. Fromong reported the robbery to the front desk. He

1 then went to his truck to retrieve his gun in hopes of finding the men and recovering the
2 property. By then, he was unable to locate them.

3 At the time of the 9-1-1 call, surveillance video showed the Simpson group in the
4 casino area. Surveillance video showed Mr. Cashmore and Mr. Ehrlich leaving the hotel
5 from the west valet exit with pillowcases in hand. Mr. Simpson and Mr. Stewart then
6 joined them at Mr. Stewart's car. All four men loaded items into the car. The foursome
7 then headed back to the Palms.

8 On the ride back to the Palms, Mr. Simpson reiterated that the items in the room
9 belonged to him, and insisted there were no guns. He instructed the men to return the
10 items that did not belong to him. Back at the Palms, the group of four met up with Walter
11 Alexander and Spencer McClinton. Mr. Alexander and Mr. McClinton unloaded items from
12 their car into the back of Mr. Stewart's car. Those items included Mr. Fromong's cell
13 phone. The sunglasses remained on the floor in the back of Mr. McClinton's car. Some of
14 the items were placed into a third vehicle at the Palms parking lot. During that process, Mr.
15 Simpson said repeatedly, "Remember, there's no guns."

16 Mr. Cashmore kept the Joe Montana lithographs and Mr. Fromong's cell phone
17 because Mr. Simpson did not want any property but his own. Mr. Cashmore offered to
18 return the items to the hotel's front desk, but instead went home and waited for a phone
19 call from Mr. Stewart with instructions on returning the remaining property. Mr.
20 Cashmore never received a call from Mr. Stewart. Eventually the property was turned over
21 to police at Mr. Cashmore's attorney's office.

22 Mr. Ehrlich and Mr. Simpson returned to Mr. Simpson's hotel room. Mr. Simpson's
23 girlfriend, Christine Prody, was there. Mr. Simpson told her, "I'm going to need a bail
24 bondsman. I fucked up." Mr. Ehrlich asked why Mr. Alexander and Mr. McClinton had
25 come along. He was upset the men had guns. Mr. Simpson insisted, "There were no guns.
26 What are you talking about?" Mr. Simpson then lamented, "Why did I tell those guys to
27 come along?"
28

1 Mr. Alexander and Mr. McClinton returned to the McClinton house. After Mr.
2 Alexander wiped off the gun, Mr. McClinton returned the guns to the safe. Mr. Alexander
3 called his attorney and bail bondsman. The men changed clothes and returned to the
4 Palms for the Scotto pre-wedding dinner at Little Buddha.

5 Around 9:00 p.m., the group met at the Little Buddha restaurant inside the Palms.
6 Mr. Alexander testified Mr. Simpson appeared intoxicated and was laughing about the
7 incident. Mr. Simpson called Mr. Alexander and Mr. McClinton "heavy-handed
8 motherfuckers" and told the men there would be no problems as long as everyone said
9 there were no guns. Mr. McClinton, who had been unsuccessful in taping earlier events,
10 taped part of the dinner conversation.

11 The following evening, Mr. Cashmore catered the Scotto wedding party at Mr.
12 Stewart's house. Mr. Cashmore, Mr. Alexander and Mr. McClinton also attended. The men
13 discussed the disastrous events of the previous night. C.J. Stewart apologized for involving
14 Mr. Cashmore. Mr. Stewart was upset with Mr. Simpson. He told the men he planned to
15 sell the memorabilia and distribute the proceeds among them.

16 After the wedding, Mr. Alexander called Mr. Scotto to accept his offer of help hiring
17 an attorney. Mr. Alexander left Mr. Scotto a message that he wanted to help Mr. Simpson.
18 Mr. Scotto understood the message to indicate that Mr. Alexander would testify favorably
19 toward Mr. Simpson. On September 15, 2007, Mr. Alexander tried to leave Las Vegas, but
20 was apprehended at the airport by police. Mr. Alexander talked to his attorney and
21 cooperated with the investigation.

22 In October 2007, Walter Alexander pled to conspiracy to commit robbery with a
23 conditional agreement to probation from the State. After testifying at trial, Mr. Alexander
24 was sentenced to four years probation with an underlying sentence of twelve to forty-eight
25 months. Mr. Alexander has since been discharged from probation.

26 Charles Cashmore brought memorabilia to his attorney's office and agreed to speak
27 with detectives. He entered into a plea agreement to plead guilty to accessory to robbery.
28 The State agreed to make no recommendation at the time of sentencing. Mr. Cashmore

1 pled guilty in November of 2007. After testifying at trial, Mr. Cashmore received three
2 years probation with a suspended sentence of twelve to thirty-six months. On September
3 27, 2010, Mr. Cashmore was honorably discharged from probation.

4 Spencer McClinton pled guilty to conspiracy to commit robbery and robbery in
5 November of 2007. He received four years probation after the court suspended concurrent
6 sentences of twelve to forty-eight months and twenty-four to eighty-four months. On
7 September 8, 2011, Mr. McClinton was honorably discharged from probation.

8 Charles Ehrlich pled guilty before trial. On July 30, 2008, as part of the agreement,
9 Mr. Ehrlich provided a voluntary statement to the police. On August 8, 2008, Mr. Ehrlich
10 entered a guilty plea to attempt accessory to robbery and attempt burglary. Each offense
11 carried a maximum sentence of five years, and the State agreed not to oppose probation.
12 Mr. Ehrlich received a sentence of twelve to forty-eight months and a concurrent sentence
13 of eighteen to forty-eight months suspended, with three years probation. On January 7,
14 2011, Mr. Ehrlich was honorably discharged from probation.

15 C.J. Stewart went to trial with Mr. Simpson and was convicted on all counts. Mr.
16 Stewart filed a timely appeal. In October of 2010, the Nevada Supreme Court granted his
17 appeal on the basis that the joint trial with Mr. Simpson caused Mr. Stewart undue
18 prejudice. Following his successful appeal, Mr. Stewart pled guilty to conspiracy to commit
19 robbery and robbery. He was sentenced to three years probation, with a suspended
20 sentence of nineteen to forty-eight months and a consecutive sentence of twenty-four to
21 sixty months. On July 20, 2012, Mr. Stewart was honorably discharged from probation.

22 Mr. Simpson took his case to trial. The jury convicted Mr. Simpson of conspiracy to
23 commit a crime (Count 1); conspiracy to commit kidnapping (Count 2); conspiracy to
24 commit robbery (Count 3); burglary while in possession of a deadly weapon (Count 4); first
25 degree kidnapping with use of a deadly weapon (Count 5); first degree kidnapping with use
26 of a deadly weapon (Count 6); robbery with use of a deadly weapon (Count 7); robbery with
27 use of a deadly weapon (Count 8); assault with use of a deadly weapon (Count 9); assault
28 with use of a deadly weapon (Count 10); coercion with use of a deadly weapon (Count 11);

1 and coercion with use of a deadly weapon (Count 12). At sentencing, the court dismissed
2 Counts 11 and 12 because the counts were redundant to the kidnapping charges.

3 On December 5, 2008, the court sentenced Mr. Simpson as set forth below:

- 4 - Conspiracy To Commit A Crime (Count 1): 12 months in the Clark County
5 Detention Center;
- 6 - Conspiracy to Commit Kidnapping (Count 2): 48 months maximum in the
7 Nevada Department of Corrections with minimum parole eligibility after 12
8 months. Count 2 is to be served concurrently with Count 1.
- 9 - Conspiracy to Commit Robbery (Count 3): 48 months in the Nevada Department
10 of Corrections with minimum parole eligibility after 12 months. Count 3 is to be
11 served concurrently with Count 2.
- 12 - Burglary While in Possession of a Deadly Weapon (Count 4): 120 months
13 maximum in the Nevada Department of Corrections with minimum parole
14 eligibility after 26 months. Count 4 is to be served concurrently with Count 3.
- 15 - First Degree Kidnapping with Use of a Deadly Weapon (Count 5): For
16 kidnapping, a fixed term of 15 years in the Nevada Department of Corrections,
17 with parole eligibility after 5 years. For use of a deadly weapon, a consecutive
18 term of 72 months maximum with minimum parole eligibility after 12 months.
19 Count 5 is to be served concurrently with Count 4.
- 20 - First Degree Kidnapping with Use of a Deadly Weapon (Count 6): For
21 kidnapping, a fixed term of 15 years in the Nevada Department of Corrections,
22 with parole eligibility after 5 years. For use of a deadly weapon, a consecutive
23 term of 72 months maximum with minimum parole eligibility after 12 months.
24 Count 6 is to be served concurrently with Count 5.
- 25 - Robbery with Use of a Deadly Weapon (Count 7): For robbery, 180 months
26 maximum in the Nevada Department of Corrections, with minimum parole
27 eligibility after 60 months. For use of a deadly weapon, a consecutive term of 72
28 -

- 1 - months maximum with minimum parole eligibility after 12 months. Count 7 is to
- 2 be served concurrently with Count 6.
- 3 - Robbery with Use of a Deadly Weapon (Count 8): For robbery, 180 months
- 4 maximum in the Nevada Department of Corrections, with minimum parole
- 5 eligibility after 60 months. For use of a deadly weapon, a consecutive term of 72
- 6 months maximum with minimum parole eligibility after 12 months. Count 8 is to
- 7 be served concurrently with Count 7.
- 8 - Assault with Use of a Deadly Weapon (Count 9): 72 months maximum in the
- 9 Nevada Department of Corrections, with minimum parole eligibility after 18
- 10 months. Count 9 is to be served consecutively to Count 8.
- 11 - Assault with Use of a Deadly Weapon (Count 10): 72 months maximum in the
- 12 Nevada Department of Corrections with a minimum parole eligibility of 18
- 13 months. Count 10 is to be served consecutively to Count 9.
- 14 - Counts 11 and 12 were dismissed.

15 Mr. Simpson received credit for sixty-four days served.

16 On January 9, 2009, Mr. Simpson filed a timely Notice of Appeal. At that time trial
17 counsel, Gabriel Grasso, withdrew from the case. Malcolm LaVergne substituted in as local
18 counsel, and Mr. Galanter remained on the case through the appeal. On May 26, 2009, Mr.
19 Simpson filed his opening brief. On October 22, 2010, the Nevada Supreme Court denied
20 Mr. Simpson's appeal. Mr. Simpson filed a petition for rehearing on November 16, 2010,
21 and the supreme court denied rehearing on February 2, 2011. A petition for en banc
22 reconsideration, filed on March 15, 2011, was denied on May 17, 2011. Remittitur issued on
23 June 13, 2011. On May 15, 2012, Mr. Simpson timely filed this post-conviction petition
24 challenging the performance of his counsel at trial and on appeal. On October 19, 2012, this
25 court denied Grounds 18, 20 and 21 and granted an evidentiary hearing on the remaining
26 grounds. Mr. Simpson's evidentiary hearing on the post-conviction petition began on May
27 13, 2013, and concluded on May 17, 2013. This decision follows.

1 **CONCLUSIONS OF LAW¹**

2 Mr. Simpson raises concerns regarding the performance of his counsel at trial and on
3 appeal. Mr. Simpson's current petition asserts claims of conflicted trial counsel, ineffective
4 assistance of trial counsel, ineffective assistance of appellate counsel, and a claim that the
5 State withheld exculpatory evidence. Each claim raised is evaluated under one of four legal
6 standards: the standard for conflicted counsel, the standard for ineffective assistance of trial
7 counsel, the standard for ineffective assistance of appellate counsel, and the standard for
8 when prosecutors must provide exculpatory evidence.

9
10 **The Sixth Amendment Provides a Guarantee to Conflict-Free Counsel**

11 The Sixth Amendment right to counsel is a fundamental right. This right applies to
12 the states through the Fourteenth Amendment to the United States Constitution. Cuyler v.
13 Sullivan, 446 U.S. 335, 343 (1980). The Sixth Amendment right to counsel includes the
14 right to conflict-free counsel. Wood v. Georgia, 450 U.S. 261, 271 (1981).

15 Whether a conflict rises to the level of a meritorious post-conviction claim is
16 determined by the test set forth in the case of Cuyler v. Sullivan. Under the Sullivan test, if
17 an actual conflict exists and that conflict impacts attorney performance, then prejudice is
18 presumed. Sullivan, 446 U.S. at 343. "Prejudice will be presumed only if the conflict
19 significantly affected counsel's performance, thereby rendering the verdict unreliable even
20 though Strickland prejudice cannot be shown." Mickens v. Taylor, 535 U.S. 162, 172-72

21
22 ¹ Both sides appear confused regarding the citing of unpublished dispositions. Nevada prohibits the
23 citation to any unpublished opinions or orders of the Nevada Supreme Court. Nevada Supreme
24 Court Rule 123. Those decisions are to be regarded as precedent and are not to be cited as legal
25 authority except when "relevant under the doctrines of law of the case, res judicata or collateral
26 estoppel." Id. Unpublished federal decisions, on the other hand, may be cited pursuant to Federal
27 Rule of Appellate Procedure 32.1, which provides: "A court may not prohibit or restrict the citation
28 of federal judicial opinions, orders, judgments, or other written dispositions that have been (i)
designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like; and
(ii) issued on or after January 1, 2007." The rule requires a copy of the unpublished decision to be
provided with the document in which the decision is cited. The court declined to consider any
unpublished Nevada opinion cited to by either side, except as permitted under Nevada Supreme
Court Rule 123. The court considered all properly cited federal decisions that were available
electronically.

1 (2002). Prejudice is presumed in conflict situations because when counsel's performance is
2 impacted by a conflict, "it calls into question the reliability of the proceeding and represents
3 a breakdown in the adversarial process fundamental to our system of justice." Ruben v.
4 Gee, 292 F.3d 396, 402 (4th Cir. 2002).

5 Conflict analysis does not change whether counsel is appointed or whether counsel is
6 privately retained as in the instant case. Sullivan, 446 U.S. at 344. A lawyer working under
7 an actual conflict is considered akin to no lawyer at all. Consequently, whether counsel is
8 appointed or retained, the Sixth Amendment right to counsel prohibits the State from
9 prosecuting individuals without legal representation. Id.

10 Courts have applied the Sullivan test to all manner of attorney conflict. Personal or
11 financial interests of counsel may result in conflicted counsel. See, e.g., United States v.
12 Hearst, 638 F.2d 1190 (1980) (hearing required to determine whether F. Lee Bailey
13 entering into a book deal during the course of Patty Hearst's trial constituted conflict);
14 Mannhalt v. Reed, 847 F.2d 576 (9th Cir. 1988) (defendant may have limited defense
15 because defense counsel was the target of the same criminal investigation).

16 The Nevada Supreme Court decisions with regard to conflicted counsel apply the
17 Sullivan test and generally mirror federal jurisprudence. See, e.g., Clark v. State, 108 Nev.
18 324, 831 P.2d 1374 (1982); Coleman v. State, 109 Nev. 1, 846 P.2d 276 (1993). Under
19 Nevada law, for conflict issues "a defendant is relieved of the responsibility of establishing
20 the prejudicial effect of his counsel's actions. An actual conflict of interest which adversely
21 affects a lawyer's performance will result in a presumption of prejudice to the defendant."
22 Clark, 108 Nev. at 326, 831 P.2d at 1376.

23 24 **The Sixth Amendment Guarantees Effective Assistance of Counsel**

25 The Sixth Amendment to the United States Constitution also guarantees effective
26 assistance of counsel at trial. To establish a claim of ineffective assistance of counsel, a
27 petitioner must first show that counsel's performance fell beneath "an objective standard of
28 reasonableness." Strickland v. Washington, 466 U.S. 668, 688 (1984). Once deficient

1 performance is established, the petitioner must show, but for counsel's deficiency, a
2 different result would have been had at trial. Id. at 694; Rubio v. State, 124 Nev. 1032,
3 1040, 194 P.3d 1224, 1229 (2008).

4 An objective standard of reasonableness is measured by the "prevailing professional
5 norms" of legal practice. Wiggins v. Smith, 539 U.S. 510, 521 (2003) (quoting Strickland,
6 466 U.S. at 688). Effectiveness does not mean errorless. Rather, effectiveness means
7 performance "within the range of competence demanded of attorneys in criminal cases."
8 Jackson v. Warden, Nev. State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting
9 McMann v. Richardson, 397 U.S. 759, 771 (1970)). Effectiveness encompasses making
10 "sufficient inquiry into the information that is pertinent" to the case to make "a reasonable
11 strategy decision on how to proceed with a client's case." Doleman v. State, 112 Nev. 843,
12 848, 921 P.2d 278, 280 (1996) (citing Strickland, 466 U.S. at 690-91). Strategic decisions
13 made by counsel are assumed to be intentional and are "virtually unchallengeable."
14 Doleman, 112 Nev. at 848, 921 P.2d at 280 (quoting Howard v. State, 106 Nev. 713, 722,
15 800 P.2d 175, 180 (1990)). Strategic decisions based on an incomplete investigation are
16 reasonable "precisely to the extent that reasonable professional judgments support the
17 limitations on investigation." Strickland, 466 U.S. at 690-91.

18 After a petitioner establishes deficient performance, the petitioner must establish
19 prejudice. Prejudice "requires showing that counsel's errors were so serious as to deprive
20 the defendant of a fair trial, a trial whose result is reliable." Id. at 687. Proving prejudice
21 requires the defendant to "show that there is a reasonable probability that, but for counsel's
22 unprofessional errors, the result of the proceeding would have been different." Reasonable
23 probability is defined as "a probability sufficient to undermine the confidence of the
24 outcome." Id. A court hearing claims of ineffective assistance of counsel must consider the
25 totality of the evidence in determining prejudice. Id.
26
27
28

Due Process Right to Effective Assistance of Appellate Counsel

The Fourteenth Amendment Due Process Clause of the United States Constitution requires effective assistance of counsel on appeal. Evitts v. Lucey, 469 U.S. 387, 396 (1985). Generally, the standard to establish a claim of ineffective appellate counsel mirrors the standard for ineffective trial counsel. To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must establish appellate counsel's deficient performance resulted in prejudice. McConnell v. State, 125 Nev. 243, 253, 212 P.3d 307, 314 (2009) (citing Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996)). 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 the omitted issue would have had a reasonable probability of success on appeal." Id. The deficiency of an appellate attorney is measured against the range of competence for appellate attorneys in criminal cases. Strickland, 466 U.S. at 690-91.

Appellate counsel need not raise every possible issue. Id. In fact, often the most effective appeals are generally limited in scope. McConnell, 125 Nev. at 253, 212 P.3d at 314 (citing Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989)). A petitioner satisfies prejudice for ineffective assistance of appellate counsel by showing an omitted issue had a reasonable probability of success on appeal. The question is whether appellate counsel unreasonably overlooked an issue that likely would have been successful on appeal.

Due Process Right to Material Exculpatory Evidence

The Fourteenth Amendment Due Process Clause also prohibits the State from withholding exculpatory evidence. Failure to provide exculpatory evidence is analyzed under the framework set forth in Brady v. Maryland, 373 U.S. 83 (1963). In Brady, the United States Supreme Court held that prosecutors must disclose evidence favorable to the defense "when that evidence is material either to guilt or to punishment." Id. at 87. To prevail on a Brady claim, the accused must show: 1) the evidence was favorable to the accused; 2) the State withheld the evidence, either intentionally or inadvertently; and 3)

1 prejudice ensued because the evidence was material. State v. Bennett, 119 Nev. 589, 599, 81
2 P.3d 1, 8 (2003). Evidence is material if “there is a reasonable probability that the result of
3 the trial would have been different if the suppressed [evidence] had been disclosed to the
4 defense.” Strickler v. Greene, 527 U.S. 263, 289 (1999) The inquiry is not whether there
5 would likely have been a different verdict with the exculpatory evidence, but whether the
6 defendant received a fair trial without the evidence. Id. (quoting Kyles v. Whitley, 514 US.
7 419, 434 (1995)). Failure to disclose material evidence is a violation of due process
8 regardless of the prosecutor’s motive. With that legal framework in mind, the court turns
9 to an examination of Mr. Simpson’s individual claims.

11 **GROUND FOR RELIEF**

12 Mr. Simpson raised twenty-two separate grounds for relief in his post-conviction
13 petition. The grounds will be addressed in the order presented in Mr. Simpson’s petition.

15 **Ground 1: Defense Counsel Yale Galanter Represented Mr. Simpson Under a** 16 **Conflict of Interest**

17 Mr. Simpson asserts that his counsel, Yale Galanter, represented Mr. Simpson while
18 laboring under an actual conflict of interest. Due to the conflict, Mr. Simpson believes he
19 was deprived of his Sixth Amendment right to counsel. Mr. Simpson raises this claim
20 specifically with regard to attorney Yale Galanter and not with regard to either local counsel
21 at trial, Gabe Grasso, or local counsel on appeal, Malcolm LaVergne.

22 Mr. Simpson raises two types of conflict. The first conflict relates to Mr. Galanter’s
23 role in advising Mr. Simpson prior to the robbery. Mr. Simpson asserts that Mr. Galanter’s
24 representation was affected by the desire to protect Mr. Galanter’s personal interests from
25 disclosure of his advice prior to the robbery. The second conflict relates to Mr. Galanter’s
26 fee arrangements for representing Mr. Simpson. Mr. Simpson asserts that Mr. Galanter
27 acted contrary to Mr. Simpson’s best interests to protect Mr. Galanter’s financial and
28 business interests.

1 Mr. Simpson failed to demonstrate that any possible conflict substantially impacted
2 counsel's performance. Therefore, Mr. Simpson's petition is denied on the claim of
3 conflicted counsel.

4
5 **"Actual Conflict of Interest"**

6 Mr. Simpson asserts a conflict in Mr. Galanter's representation related to Mr.
7 Galanter's role in events surrounding the robbery. The primary concern raised by Mr.
8 Simpson is that Mr. Galanter could have testified on Mr. Simpson's behalf that Mr.
9 Simpson relied on erroneous advice from Mr. Galanter.

10
11 **Mr. Galanter as a Potential Witness**

12 Mr. Simpson and Mr. Galanter discussed the property recovery prior to
13 September 13, 2007. Mr. Simpson recalls speaking to Mr. Galanter regarding the issue in
14 phone calls prior to arriving in Las Vegas on September 12, 2007. Both men agree they met
15 for dinner on the evening of September 12, 2007, the evening before the robbery. Mr.
16 Galanter met Mr. Simpson at NgNE Steakhouse at the Palms in Las Vegas. At dinner, Mr.
17 Simpson discussed with Mr. Galanter his plans to obtain his memorabilia. Mr. Galanter
18 testified he advised Mr. Simpson to call the police or hotel security. Mr. Galanter denied
19 telling Mr. Simpson at any point that Mr. Simpson could legally retrieve the property. Both
20 men agree the use of weapons was never discussed.

21 Mr. Simpson testified somewhat differently. He recalled Mr. Galanter advising him
22 the plan to obtain the property was legally permissible so long as Mr. Simpson did not
23 commit a trespass and so long as Mr. Simpson did not use physical force against the people
24 holding the property. Mr. Simpson recounted a specific example given by Mr. Galanter: if
25 Mr. Simpson saw his stolen laptop on the seat of a car, he could break the car window to
26 obtain the laptop. Mr. Simpson also testified that Mr. Galanter failed to advise him the
27 plan could subject him to criminal charges in Nevada regardless of rightful ownership of
28 the property. After the robbery, Mr. Galanter told Mr. Simpson he could have regained the

1 property without a problem in forty-eight or forty-nine states, but Nevada had some “wacky
2 laws.” Mr. Galanter never told Mr. Simpson his advice was wrong.

3
4 **Police Investigation of Mr. Galanter**

5 Following the robbery, the police did investigate Mr. Galanter’s possible
6 involvement. Former District Attorney David Roger testified the investigation developed
7 after Mr. Galanter’s name came up on the recordings. Additionally, a few of the co-
8 defendants discussed property being placed into a white Infinity SUV occupied by a white
9 man and woman. Mr. Ehrlich also mentioned in his statement to the police that Mr.
10 Simpson and Mr. Galanter had dinner the night of September 12, 2007.

11 As part of the investigation, on June 30, 2008, the police went to the home of Junior
12 Johnson. Mr. Galanter stayed at Mr. Johnson’s house during the weekend of the
13 September 13, 2007, robbery. The detective searched the room Mr. Galanter had stayed in.
14 He also inquired of the community gate guard whether Mr. Galanter had been driving a
15 white sport-utility vehicle. The guard did not recall. The detective was unable to find a
16 white Infinity SUV rented to any of the parties involved and did not obtain records for other
17 makes of SUV. The detective obtained the phone records showing incoming and outgoing
18 calls between Mr. Simpson and Mr. Galanter, but none were made during the robbery.
19 Nothing turned up during the investigation, and Mr. Galanter was never charged with an
20 offense.

21
22 **Motion to Declare Conflict**

23 Due to concerns that Mr. Galanter may be a witness, the State filed a Motion
24 to Disclose Conflict of Interest. The motion asserted that Mr. Simpson “told the victims,
25 during the course of the robbery, that his attorney, Yale Galanter, was staying at the Palms
26 Hotel.” 3 APP 522-23. Mr. Roger testified he filed the motion to determine whether Mr.
27 Galanter would testify at trial about giving advice to Mr. Simpson prior to the robbery.
28

1 Mr. Simpson's local counsel, Mr. Grasso, filed an opposition to the Motion to
2 Disclose Conflict of Interest. The opposition simply stated that Mr. Galanter would not be
3 testifying as a witness. During the post-conviction proceedings, Mr. Grasso indicated that
4 he had "no knowledge whether Galanter had advised Simpson regarding the exercise of his
5 right to recover his property prior to the incident." Mr. Grasso was also unaware that Mr.
6 Galanter and Mr. Simpson discussed plans to retrieve the property prior to the robbery.

7 Mr. Simpson was absent when the motion was heard. Court records indicate the
8 judge waived Mr. Simpson's presence at counsel's request. The court did not make any
9 inquiry of Mr. Simpson at a later time. During the hearing on the motion, Mr. Galanter
10 indicated, "I will tell you as an officer of the court, I didn't stay at the Palms Hotel, I wasn't
11 there. . . Judge, I tell you as an officer of the – not only am I not testifying, I wasn't there. I
12 had nothing to do with it." Mr. Galanter failed to mention the meeting with Mr. Simpson
13 the night before the events. The court denied the motion without any additional argument
14 or inquiry.

15
16 **Lack of Objection or Waiver**

17 Under both federal constitutional law and Nevada law, Mr. Simpson must
18 show that his attorney labored under an actual conflict of interest that was not waived, and
19 that the conflict adversely affected his attorney's performance. When no objection is raised
20 at trial, establishing a Sixth Amendment violation requires the defendant to demonstrate
21 "an actual conflict of interest adversely affected his lawyer's performance." Sullivan, 446
22 U.S. at 348. This test differs from other types of ineffective assistance of counsel. Under
23 Strickland, generally a defendant must show that not only was counsel deficient in his or
24 her performance, but also that the outcome of the trial would likely have been different.
25 466 U.S. at 688. The record shows no waiver of conflict and no objection to the conflict at
26 the time of trial.

27 Regarding Mr. Galanter's advice prior to the robbery creating a potential conflict,
28 Mr. Simpson did not object to the conflict at the time of trial, nor did he waive the conflict.

1 A defendant may waive his right to conflict-free representation. A waiver of conflict-free
2 representation cannot be presumed. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Waivers
3 of fundamental rights must be made with a full understanding of the ramifications and must
4 be determined by the court based on all the circumstances in a particular case. Id.; see also,
5 Ryan v. Eighth Judicial District Court, 123 Nev. 419, 168 P.2d 703 (2007). In this case, no
6 waiver appears in the record, and no argument has been raised that Mr. Simpson waived his
7 right to conflict-free counsel.

8 Mr. Galanter testified at the evidentiary hearing in this matter that he did not obtain a
9 written waiver of conflict from Mr. Simpson. Mr. Simpson testified that he was never
10 advised by Mr. Galanter regarding any conflict of interest or the possibility that Mr. Galanter
11 may have been able to offer favorable testimony on Mr. Simpson's behalf regarding the
12 advice Mr. Galanter gave Mr. Simpson, the California civil litigation, and the prior contacts
13 Mr. Galanter had with the witnesses in the case, including Mr. Beardsley. As there is no
14 waiver, the analysis turns to whether an actual conflict of interest existed and whether the
15 conflict adversely impacted counsel's performance.

16 17 **Actual Conflict of Interest**

18 An actual conflict of interest exists when the interests of the attorney and his
19 client diverge with regard to a material factual, legal or course of action issue. Government
20 of the Virgin Islands v. Zepp, 748 F.2d 125, 135-36 (3rd Cir. 1984). Generally a "conflict
21 exists when an attorney is placed in a situation conducive to divided loyalties." Clark v.
22 State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting Smith v. Lockhart, 923 F.2d
23 1314, 1320 (8th Cir. 1991)). A conflict must be more than a "theoretical division of
24 loyalties." Mickens v. Taylor, 535 U.S. 162, 171 (2002). In order to establish a Sixth
25 Amendment violation, a defendant must show that counsel "actively represented conflicting
26 interests." Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988).

27 Normally, an attorney may not act as legal counsel and a witness in the same case.
28 Nev. R. Prof. Conduct, Rule 3.7. Ethical obligations require defense counsel to avoid

1 conflicts of interest and to promptly advise the trial court when a conflict arises during
2 representation. Cuyler v. Sullivan, 446 U.S. 355, 346 (1980). The trial court has no
3 obligation to inquire about a conflict unless the court knows or should know conflict exists.
4 Id. at 348.

5 Courts examining conflicts of interest involving the attorney as a witness or
6 participant coming forward have generally found an actual conflict when counsel faces
7 potential criminal liability for actions related to the case. Zepp, at 136. Mr. Galanter was
8 not charged with any crime after police investigation of his role in the property recovery
9 and no evidence supported potential liability of Mr. Galanter. Testimony from Mr.
10 Simpson and Mr. Galanter dispels any argument that the white Infiniti SUV at the Palms
11 was driven by Mr. Galanter or that Mr. Galanter took possession of any of the property after
12 the robbery. Both men testified it was not Mr. Galanter.

13 Conflicts have also been found based on bad advice from counsel. The United States
14 District Court in Delaware found a conflict warranting reversal based on a lawyer providing
15 bad legal advice. United States v. Livingston, 425 F. Supp. 2d 554 (D. Del. 2006). In that
16 case, defense counsel erroneously advised Mr. Livingston he could possess a gun after
17 completing probation, but could not obtain a license to carry a gun. Id. at 556. After a
18 shooting incident at his home, Mr. Livingston was charged with possession of a firearm by
19 an ex-felon. Mr. Livingston retained the same attorney who failed to present evidence that
20 he had advised the defendant he could possess a gun. Id. at 556. The Delaware court found
21 that an actual conflict existed based on counsel's self-interest in concealing the bad advice,
22 and that the conflict substantially impacted his representation when the lawyer failed to
23 present a defense on his client's behalf and failed to argue at sentencing that the client
24 relied on his erroneous advice. Id. at 559-60.

25 The Fourth Circuit Court of Appeals found a conflict of interest when two attorneys
26 advised a client after a murder to help evade police and guarantee their fee. Ruben v. Gee,
27 292 F.3d 396 (4th Cir. 2002). In order to avoid criminal repercussions and keep their
28 conduct from coming to light, the attorneys stayed on the defense team. The two lawyers

1 did not appear in court. Id. at 398. The attorneys could not be called as fact witnesses and
2 their role in directing the defendant's actions after the murder was never explained in
3 court. Id.

4 Mr. Simpson claims Mr. Galanter similarly misadvised him of his right to retrieve his
5 property so long as he did not commit a trespass or use force. Thus, Mr. Simpson asserts
6 Mr. Galanter was a possible witness and trying to cover up erroneous advice. Certainly, the
7 impression Mr. Galanter left the court was that he had no involvement whatsoever prior to
8 the robbery. Mr. Galanter had, in fact, consulted with Mr. Simpson the evening prior to the
9 robbery. Phone records reveal several calls between Mr. Galanter and Mr. Simpson
10 between August 15, 2007 and September 12, 2007. Mr. Galanter met Mr. Simpson at the
11 Palms for dinner on September 12, 2007. At that dinner, Mr. Galanter discussed Mr.
12 Simpson's plan to obtain the memorabilia.

13 Even if this court assumes Mr. Galanter misadvised Mr. Simpson regarding the
14 lengths he could go to recover his property in Nevada, the events of September 13, 2007,
15 went far beyond Mr. Galanter's advice. The evidence also demonstrates Mr. Simpson did
16 not follow the advice given to him by Mr. Galanter. Mr. Simpson failed to establish that Mr.
17 Galanter advised Mr. Simpson he could use force or weapons. Both men agree the use of
18 weapons was never discussed. The evidence demonstrates Mr. Simpson requested and had
19 knowledge that guns would be present the night of the robbery.

20
21 **"Substantially Impacted Counsel's Performance"**

22 Once a petitioner has demonstrated an actual conflict, then the petitioner must also
23 show the conflict adversely affected his lawyer's performance. In order for a defendant to
24 prevail on a claim of conflicted counsel, the conflict must have "actually affected the
25 adequacy" of the lawyer's representation. Mickens, 535 U.S. at 171. An actual conflict may
26 exist that does not adversely affect a lawyer's performance. Rudin v. State, 120 Nev. 121,
27 145-46, 86 P.2d 572, 587-88 (2004). In the Rudin case, allegations surfaced that one of Ms.
28 Rudin's attorneys entered into publication agreements during the course of her trial. Id.

1 Obtaining or negotiating literary or media rights during representation violates the Nevada
2 Rules of Professional Conduct. Nev. R. Prof. Conduct, Rule 1.8(d) The Nevada Supreme
3 Court found that assuming a conflict, the record failed to establish the conflict adversely
4 affected counsel's performance to warrant granting relief on appeal. The decision was
5 based on the evidence presented by the defense, cross-examination of the witnesses, the
6 strength of the State's case, and the performance of co-counsel. Rudin, 120 Nev. at 146, 86
7 P.2d at 588.

8 To determine adverse performance, first, a petitioner must "identify a plausible
9 alternative defense strategy or tactic that his defense counsel might have pursued." United
10 States v. Nicholson, 611 F.3d 191, 197 (4th Cir. 2010) (quoting Mickens v. Taylor, 240 F.3d
11 348, 361 (4th Cir. 2001)). Second, the petitioner must establish "the alternative strategy or
12 tactic was objectively reasonable under the facts of the case known to the attorney at the
13 time of the attorney's tactical decision." Nicholson, 611 F.3d at 197. This second prong
14 requires the defendant to show the alternative strategy or tactic was "clearly suggested by
15 the circumstances." Id. (quoting United States v. Tatum, 943 F.2d 370, 376 (4th Cir. 1991)).
16 Finally, a petitioner must show his attorney's failure to pursue the strategy or tactic related
17 to the conflict. Nicholson, 611 F.3d at 197. Petitioners need not show the strategy or tactic
18 would have been successful, only that it would have been objectively reasonable. Id. Mr.
19 Simpson asserts that Mr. Galanter's performance at trial was substantially impacted in a
20 number of ways by Mr. Galanter's desire to protect his reputation.

21 22 **Failure to Convey Plea Bargain**

23 Mr. Simpson asserts that Mr. Galanter failed to inform him of a plea bargain.
24 Further, Mr. Simpson claims that had he been fully advised of the issues in this case, he
25 would have accepted a plea offer. According to Mr. Simpson, Mr. Galanter stated the State
26 could not prove their case because Mr. Simpson legally acted within his rights in retrieving
27 his property. Mr. Simpson asserts neither Mr. Grasso nor Mr. Galanter conveyed to him a
28 possible plea agreement. Mr. Grasso recalls a plea offer, but was unsure whether Mr.

1 Simpson was advised of the offer. Mr. Grasso testified plea negotiations were not within his
2 scope of responsibility, and Mr. Simpson never expressed a desire to negotiate the case.

3 Former District Attorney David Roger testified he and Mr. Galanter had limited
4 discussions concerning negotiations prior to trial. Mr. Roger claims the only negotiation
5 that would be considered by the defense would be stipulated probation. Mr. Roger testified
6 the State would not agree to probation, and, as a result, no offer was made. At trial, an offer
7 was made by the State. Evidence at the evidentiary hearing showed Mr. Simpson and Mr.
8 Galanter both declined the offer.

9 No evidence supports that Mr. Galanter failed to convey a plea bargain or that Mr.
10 Galanter would have benefitted in any way from doing so. If Mr. Galanter desired to hide
11 his role in the events as alleged, he would have benefitted from having Mr. Simpson accept
12 a negotiation.

14 **Stipulation Regarding Phone Calls**

15 During trial, Mr. Galanter entered into a stipulation that no telephone calls
16 occurred between Mr. Galanter and Mr. Simpson prior to the incident. This was a "legal
17 fiction," as phone records did reflect calls between Mr. Galanter and Mr. Simpson prior to
18 the robbery. The court believed the stipulation regarding the phone calls would make
19 things less complicated for the jury. Former Assistant District Attorney Chris Owens
20 testified that the court did not want to confuse the jurors and wanted a stipulation from the
21 parties that would get rid of the issue. He also testified that he was not sure the
22 conversation about the stipulation occurred on the record. The defendants were not
23 present for any conversations in chambers.

24 The judge told the jury, "All right, the parties have stipulated that before the incident
25 there were no phone calls that were seen on the phone records between Mr. Galanter and
26 Mr. Simpson." Detective Caldwell also testified that there were no calls between Simpson
27 and Galanter in the days leading up to the robbery. Telephone records reflected a number
28 of calls between Mr. Galanter and Mr. Simpson prior to September 13, 2007.

1 The evidence presented at the post-conviction hearing indicates the stipulation was
2 prompted by the court, not Mr. Galanter. Even if it would have been a reasonable tactical
3 decision under the circumstances to handle the phone calls in a different way, no evidence
4 suggests that the decision to enter the stipulation in any way related to the asserted conflict.

5
6 **Mr. Galanter "Testifying" During Cross-Examination**

7 Upon cross-examination of Thomas Riccio, Mr. Galanter elicited testimony
8 that Mr. Riccio had spoken with but never met Mr. Galanter. Mr. Galanter also elicited
9 testimony from Mr. Riccio regarding the presence of Willy Singleton at the Palms pool:

10 Mr. Riccio: Well, like you said, his sister and especially his lawyer
11 said they didn't like it, that he shouldn't be there.

12 Mr. Galanter: Judge, I object. Can we attach names to these people?
13 Because I'm Simpson's lawyer, I wasn't at the pool.

14 Mr. Riccio: It was a black man, Willy –

15 Mr. Galanter: And let the record reflect that's definitely not me.

16 The Court: Yes, Mr. Galanter, it is not you.
17

18 Mr. Simpson asserts Mr. Galanter was more concerned about making sure the court
19 understood he was not involved instead of protecting Mr. Simpson's interests. Mr. Simpson
20 fails to identify how tactically this situation could have been handled differently. Mr.
21 Galanter accurately stated that he was not at the pool and clarified with the witness that Mr.
22 Singleton, another lawyer, was at the pool.

23
24 **Mr. Galanter Stipulated to Admission of the Tapes**

25 Mr. Galanter failed to request redaction of the tapes. At trial, tapes were
26 introduced with no objection from Mr. Simpson's defense counsel. Those tapes contained
27 numerous references to "Yale" and "Mr. Simpson's lawyer." For example, on the
28

1 "McClinton" tape, Mr. Simpson indicated that he gave property "to my lawyer." Mr.
2 Simpson also commented during the robbery:

3 Mr. Beardsley: Hey, O.J., Yale knew all about this stuff?

4 Mr. Simpson: No man, Yale didn't know about this shit. (inaudible
5 conversation) He's at the hotel waiting on us right now.

6 Mr. Beardsley: No, I'm talking about two years ago, OJ.

7 Mr. Simpson: My lawyer's at the fucking hotel waitin' right now.

8
9 Evidence indicates that an attorney, Willy Singleton, was staying at the Palms that
10 night. Mr. Simpson claims he was referring to Mr. Galanter and thus, the jury had been
11 exposed to Mr. Galanter's involvement in the robbery. At the post-conviction hearing, Mr.
12 Simpson explained the statement was inaccurate; Mr. Galanter was not waiting at the hotel.

13 Mr. Galanter testified he believed the tapes contained more helpful information than
14 harmful information. Mr. Stewart's counsel, Mr. Bryson, objected strenuously to the
15 admission of the tapes. Mr. Grasso felt strongly that an expert should be retained to
16 analyze the tapes, but Mr. Galanter "would not agree to the expense." Ultimately, Mr.
17 Galanter stipulated to the admission of the tapes without any redactions.

18 Redacting the tapes would have been a reasonable tactical alternative in this case.
19 Ironically, however, redacting the tapes to remove all mention of Mr. Galanter would have
20 provided more support for Mr. Simpson's claim. The failure to redact the tapes seems
21 inapposite to Mr. Simpson's suggestion that Mr. Galanter allowed the tapes in as a result of
22 wanting to hide any participation on his part. Mr. Simpson has failed to present any
23 evidence to support that the failure to redact or object to the tapes was related to the
24 asserted conflict.

25
26 **Mr. Galanter and the White SUV**

27 Mr. Simpson asserts the jury was left to speculate whether or not Mr. Galanter
28 was in the SUV and, thus, Mr. Galanter acted under a conflict. Post-conviction hearing

1 testimony from Mr. Simpson and Mr. Galanter dispelled any argument that the white
2 Infiniti SUV at the Palms was driven by Mr. Galanter. At the post-conviction hearing, both
3 men testified the Infinity SUV was not driven by Mr. Galanter. At trial, however, Mr.
4 Simpson asserts the jury was left to speculate about Galanter's possible involvement which
5 might cause the jurors to reject Mr. Simpson's defense as corrupt. Mr. Ehrlich testified at
6 trial he did not see the occupants of the SUV. Mr. McClinton also testified the SUV was
7 occupied by a white male and female sitting inside. Detective Caldwell testified the white
8 Infinity SUV was at the Palms waiting for the men to return from the Palace Station. While
9 Detective Caldwell received multiple descriptions of the driver, he was never able to identify
10 that person.

11 Mr. Simpson asserts the failure to establish at trial that Mr. Galanter was not in the
12 SUV impacted the credibility of his defense with the jury because jurors likely speculated
13 Mr. Galanter was involved. No evidence was presented at trial to directly suggest Mr.
14 Galanter was driving the SUV. Both Mr. Simpson and Mr. Galanter deny that Mr. Galanter
15 was driving the SUV, and, in fact, Mr. Simpson denied knowing anything about the SUV at
16 the post-conviction hearing. The suggestion that the jurors speculated so is itself highly
17 speculative and does not support a finding that a different tactical approach would have
18 been reasonable or that Mr. Galanter's performance was substantially impacted by any
19 asserted conflict.

20

21 **Mr. Galanter Advised Mr. Simpson against Testifying**

22 Mr. Galanter advised against Mr. Simpson testifying. This was a point of
23 contention with co-counsel Mr. Grasso, who felt strongly that Mr. Simpson should testify.
24 Mr. Grasso advised Mr. Simpson he should testify. Mr. Grasso then recalls that after that
25 conversation, Mr. Galanter approached him and told Mr. Grasso there was no way Mr.
26 Simpson was going to testify. Mr. Grasso also recalls that Mr. Galanter advised Mr.
27 Simpson not to testify on the basis that the State had not proven its case.

28

1 While Mr. Grasso disagreed with Mr. Galanter about whether or not Mr. Simpson
2 should testify, Mr. Grasso testified Mr. Galanter's advice was not unreasonable based on
3 the evidence. Ultimately, Mr. Simpson voluntarily waived his right to testify after being
4 advised by one lawyer to testify and by the other not to testify. Mr. Simpson has failed to
5 establish that Mr. Galanter advised him not to testify based on the conflict.

6 Mr. Simpson failed to demonstrate that any tactical decision made by Mr. Galanter
7 related to the conflict. If Mr. Galanter truly wanted to hide any involvement, the easiest
8 way to accomplish that would have been for Mr. Simpson to plead guilty rather than go to
9 trial. Testimony at the post-conviction hearing established that the judge initiated the idea
10 of a stipulation regarding the phone conversations to simplify things for the jurors.
11 Additionally, Mr. Galanter did not request to redact tapes that mentioned him. No
12 evidence establishes that any failure on Mr. Galanter's part was related to the alleged
13 conflict.

14 15 **Presence of Co-Counsel**

16 Courts in Nevada and other jurisdictions generally consider the presence of
17 co-counsel in determining whether a conflict impacted counsel's performance. Rudin v.
18 State, 120 Nev. 121, 145-46, 86 P.2d 572, 587-88 (2004). In Rudin, the court found no
19 conflict partially because Ms. Rudin had non-conflicted co-counsel.

20 The Supreme Court of New Mexico determined the presence of co-counsel was a
21 factor in determining whether any conflict had an adverse affect on the performance of
22 counsel. State v. Case, 676 P.2d 241 (N. Mex. 1984). The New Mexico court found no
23 adverse impact on performance when a lawyer had an alleged conflict between pleasing the
24 trial court and aggressively representing the defendant. Id. at 244; see also People v. Fuller,
25 315 N.E.2d 687 (Ill. App. 1974)(explaining there is a per se rule where counsel's conflict of
26 interest arises from a commitment to others, but not where the conflict arises in another
27 fashion. The court noted that once a conflict of interest appears on the part of counsel, a
28 per se rule applies which mandates reversal without a showing of prejudice).

1 Notably, Gabe Grasso was retained to assist as local counsel for trial. Mr. Grasso's
2 office was the centerpoint for Mr. Simpson's trial preparation. Mr. Simpson specifically
3 acknowledges Mr. Grasso did not labor under a conflict. Additionally, Mr. Grasso testified
4 he was not aware of any conflict between Mr. Simpson and Mr. Galanter. At trial, Mr.
5 Grasso conducted cross-examination of witnesses and was an integral part of the defense.
6 The trial record reflects Mr. Galanter and Mr. Grasso aggressively advocating on behalf of
7 Mr. Simpson by objecting to several of the State's exhibits. Mr. Simpson had non-
8 conflicted co-counsel present before and during his trial.

9 Mr. Simpson failed to establish Mr. Galanter gave erroneous advice inducing him to
10 inadvertently commit a crime. Mr. Galanter's testimony at the post-conviction hearing
11 established that he likely would have provided harmful testimony to Mr. Simpson. No
12 evidence supports that Mr. Galanter took an active role in the robbery, and a thorough
13 police investigation failed to uncover any evidence of his involvement. Finally, even
14 assuming Mr. Galanter gave improper advice regarding recovering the property and
15 ownership, the record does not support a cover-up of that advice. If anything, Mr. Galanter
16 strongly pursued the ownership angle as a defense. Accordingly, this court finds Mr.
17 Galanter did not labor under an actual conflict in representing Mr. Simpson.

18 19 **Mr. Galanter's Financial Interest in the Case**

20 Mr. Galanter testified at the post-conviction hearing that, "I don't do anything for
21 free," a statement certainly borne out by the facts. Mr. Simpson's financial advisor testified
22 that he paid Mr. Galanter in excess of \$550,000 for Mr. Simpson's defense. Mr. Galanter
23 testified he received \$572,700 through appeal.

24 At the time of Mr. Simpson's trial, Leroy "Skip" Taft, a California attorney, handled
25 Mr. Simpson's money. According to Mr. Taft, Mr. Simpson did not owe Mr. Galanter
26 money in September of 2007. Every time Mr. Taft spoke with Mr. Galanter, he requested a
27 budget or a retainer agreement, but none was provided until the time of the appeal. Mr.
28 Taft was never contacted for money for an investigator or an expert. Mr. Taft wired Mr.

1 Galanter a total of \$387,000 for trial work, and Mr. Galanter received an additional
2 \$47,000 from Mr. Simpson's friends. Mr. Taft paid nothing directly to local counsel, Mr.
3 Grasso. Mr. Taft and Mr. Simpson both believed Mr. Galanter was paying Mr. Grasso.

4 Mr. Galanter failed to enter into a written fee agreement in violation of Nevada
5 Supreme Court Rule 1.5. The fee arrangement Mr. Galanter had with Mr. Simpson is best
6 described as a flat-fee agreement. Mr. Galanter testified that Mr. Grasso agreed to do the
7 case for free, while Mr. Grasso testified that Mr. Galanter promised him \$250,000, or one-
8 third of the expected \$750,000 fee. The men failed to enter into a written fee-sharing
9 contract as required by the Nevada Rules of Professional Conduct. Mr. Grasso and Mr.
10 Galanter dispute how much Mr. Grasso was paid and are currently in litigation over that
11 matter. Mr. Grasso testified that Mr. Galanter paid him \$15,000. Mr. Galanter recalled
12 paying Mr. Grasso \$25,000, plus expenses for a portion of the investigator fee. Mr.
13 Galanter informed Mr. Grasso he was still waiting for payment from Mr. Simpson. Thus,
14 Mr. Galanter refused to pay Mr. Grasso any more money.

15 The investigator on the case, who primarily served subpoenas, submitted a bill for
16 \$3,162. Mr. Galanter hired the investigator and did not pay the investigator because he felt
17 it was Mr. Grasso's responsibility.

18 Mr. Galanter did not hire an expert to analyze or enhance the poor quality audio
19 recording of the robbery or hire an expert to look at the issue of intoxication. Mr.
20 Simpson's friend, James Barnett, indicated that during the course of the trial, Mr. Galanter
21 told him there was not enough money to analyze the tapes. Brent Bryson, counsel for co-
22 defendant Mr. Stewart, testified at the post-conviction hearing that he had concerns
23 regarding chain of custody and whether the tapes had been manipulated. Mr. Grasso did
24 not share the same concern, but believed it was necessary to have someone improve the
25 quality of sound on the tapes. The tapes were admitted over Mr. Bryson's strenuous
26 objection after Mr. Galanter and the prosecution stipulated to admission.

27 Mr. Grasso also testified at the post-conviction hearing that he felt a jury consultant
28 would have been helpful. The prosecution used a jury consultant for the trial. Mr. Grasso

1 understood they were trying the case “on a shoestring,” unaware of the large sum of money
2 Mr. Galanter had been paid.

3 Mr. Galanter testified he had incurred \$120,000 in costs and expenses, including
4 bonding fees, fees for local counsel, copying fees, and travel expenses for Mr. Galanter. Mr.
5 Galanter did not have specific numbers, indicating at the post-conviction hearing that he
6 had everything at his office and no one had asked him for that information.

7 Mr. Taft paid an additional \$125,000 to Mr. Galanter on Mr. Simpson’s behalf for
8 the appeal. The breakdown of the appeal costs provided to Mr. Taft included \$35,000 for a
9 video montage that was never prepared; investigative costs of \$20,000 when no
10 investigation was performed; \$25,000 fee for local counsel when \$5,000 was paid to local
11 counsel, Malcolm LaVergne; and \$1,000 in fees to obtain JAVS recordings of the trial, for
12 which the court charged \$25 per DVD.

13 Mr. Simpson argues that Mr. Galanter failed to obtain experts, conduct investigation
14 or prepare exhibits for Mr. Galanter’s personal financial benefit, which created an actual
15 conflict. Charging fees, of course, does not automatically amount to a conflict of interest.
16 Conflict in fee situations generally has been found only when counsel received extremely
17 low compensation with no additional money for experts.

18 The Nevada Supreme Court found an actual conflict when a lawyer filed a civil
19 lawsuit against a client. Clark v. State, 108 Nev. 324, 831 P.3d 1374 (1992). The suit for
20 fees was filed prior to the client’s sentencing but after trial. One concern raised by the court
21 was that under the circumstances of the case, the attorney “may have been conservative in
22 his efforts to interview potential witnesses or hire necessary experts.” Id. at 327, 831 P.2d
23 at 1376. Underpayment appeared to be a significant factor in the court’s analysis. The
24 court concluded that “the appearance of impropriety and potential for adverse
25 consequences were so great here that the conflict could not be condoned.” Id.

26 A flat fee arrangement that combines attorney and expert fees does not necessarily
27 create a conflict of interest. People v. Doolin, 198 P.3d 11 (Cal. 2009). Potential for
28 misconduct alone does not create a conflict. Id. at 32. In Doolin, the California Supreme

1 Court found no conflict when counsel, under such an arrangement, actually hired an expert.
2 Id. On the other hand, the California Court of Appeals reversed a conviction when the
3 lawyer had a direct financial interest in the outcome in the case. The lawyer, who entered
4 into a book deal, appeared to benefit by having a lengthy, sensational trial to create
5 publicity. People v. Corona, 80 Cal. App. 3d 694, 145 Cal. Rptr. 894 (1978).

6 A Virginia court found that a petitioner was denied effective assistance of counsel
7 when counsel accepted a fee of more than \$100,000 and possibly as much as \$500,000,
8 but failed to hire or request from the court an investigator or experts. The court found the
9 failure was a direct result of the lawyer trying to avoid scrutiny of his fee. Stitt v. U.S., 369
10 F.Supp. 2d 679 (E.D. Va. 2005).

11 A contingency fee in a criminal case that provided an additional \$25,000 for counsel
12 only if the defendant was acquitted at trial was found to be an actual conflict because it
13 provided a disincentive for trial counsel to seek a plea negotiation or put forth defenses that
14 might result in conviction for a lesser-included offense. Winkler v. Keane, 7 F.3d 304 (2nd
15 Cir. 1993). In that case, trial counsel testified the defendant was not interested in pleading
16 to a lesser crime; trial counsel did not proffer an intoxication defense because it may have
17 resulted in a lesser charge, which the defendant was not interested in. The court ultimately
18 concluded there was no impact on counsel's performance because the representation would
19 not have been different if a proper fee arrangement had been in place. Id.

20 This Court finds Mr. Galanter's fee to be exceedingly high, particularly given the low
21 sums paid to local counsel; however, the issue appears to be more in the nature of a fee
22 dispute than a conflict of interest that impacted counsel's representation. Mr. Simpson
23 presented no evidence that Mr. Galanter was limited in what he could spend on items with
24 experts and exhibits or that he would not have had access to additional funds for those
25 items had he requested them.

26 This court finds no actual conflict in Mr. Galanter's fee arrangement with Mr.
27 Simpson. Even assuming a conflict, no evidence supports that Mr. Galanter's performance
28 was impacted by his financial stake in the case. While the court is not entirely without

1 concern regarding Mr. Galanter's decisions to not pursue investigation and to not hire an
2 expert to analyze the audiotapes, doing so was not necessarily called for by the
3 circumstances. Therefore, Mr. Simpson's claim on the issue of conflict of interest related to
4 fees is denied.

5
6 **Ground 2: Failure to Present the Defense of a Good Faith Reliance on Advice
7 of Counsel and to Request a Jury Instruction.**

8 Mr. Simpson claims trial counsel was ineffective for failing to present the defense of
9 a good faith reliance on the advice of counsel and for failing to request a jury instruction on
10 this defense. Relief on this claim is denied because Mr. Simpson failed to disclose a
11 material fact, the use of guns, to Mr. Galanter and because the evidence does not show Mr.
12 Simpson followed his lawyer's advice.

13 In order to assert an "advice of counsel" defense at trial, a defendant must have
14 made a full disclosure of all material facts to his attorney, received advice as to the specific
15 course of conduct that he followed, and relied on this advice in good faith. United States v.
16 Ibarra-Alcaarez, 830 F.2d 968, 973 (9th Cir. 1987). Reliance on advice of counsel is "not
17 regarded as a separate and distinct defense, but rather as a circumstance indicating good
18 faith which the trier of fact is entitled to consider on the issue of fraudulent intent." Id.
19 Additionally, "no one can willfully and knowingly violate the law and be insulated from the
20 consequences by claiming that he followed the advice of counsel." Adler v. State, 95 Nev.
21 339, 346, 594 P.2d 725, 730 (1979).

22 Mr. Simpson was charged with robbery, a general intent crime in the State of
23 Nevada. For a general intent crime, the State is only required to prove the defendant
24 committed the prohibited act. The State is not required to prove the defendant intended
25 any particular result. Reliance on advice of counsel would not have provided any defense to
26 the crime of robbery. Therefore, counsel could not have been ineffective in failing to raise
27 this defense with regard to the robbery charges.
28

1 Most of the charges against Mr. Simpson required the State to prove intent to
2 commit the crime. These specific intent crimes include conspiracy, kidnapping, burglary,
3 coercion and assault, as well as proving a knowledge element for the weapon enhancement
4 for the robbery. The State charged the weapon enhancement to the robbery under an
5 aiding and abetting or conspiracy theory. A weapon enhancement for a person not in
6 possession of the weapon requires proof of knowledge of the deadly weapon. Brooks v.
7 State, 124 Nev. 203, 210, 180 P.3d 657, 661 (2008).

8 With regard to the specific intent crimes, Mr. Simpson did seek advice of counsel
9 prior to the robbery. On September 12, 2007, the night before the incident, Mr. Simpson
10 and Mr. Galanter met for dinner at NgNE Steakhouse at the Palms in Las Vegas. During
11 the dinner, Mr. Simpson disclosed his plan to demand the return of his property from the
12 sellers and his plan to call the police if the sellers did not return his property. Mr. Simpson
13 claims Mr. Galanter advised him it was legally permissible to obtain his property so long as
14 he did not commit a trespass or use force. Mr. Galanter testified that he told Mr. Simpson
15 to call police or security; he denied telling Mr. Simpson that he had a legal right to retrieve
16 his property. Both men agree weapons were not discussed.

17 Mr. Simpson asserts that counsel was ineffective for failing to present a defense of
18 good faith reliance on advice of counsel. To establish a claim of ineffective assistance of
19 trial counsel, a petitioner must show (1) that counsel provided deficient performance, and
20 2) that the deficient performance prejudiced the defense. Strickland v. Washington, 466
21 U.S. 668, 694, (1984); Rubio v. State, 124 Nev. 1032, 1044, 194 P.3d 1224, 1232 (2008).
22 Deficient performance requires a showing that counsel's performance fell below an
23 objective standard of reasonableness. Strickland, at 687. Prejudice "requires showing that
24 counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose
25 result is reliable." Id. at 694.

26 Mr. Simpson has not shown that counsel acted unreasonably in failing to request a
27 jury instruction and failing to advise Mr. Simpson of the defense of a good-faith reliance on
28 the advice of counsel. Mr. Simpson failed to disclose the use of guns to Mr. Galanter. Mr.

1 Simpson failed to demonstrate that reliance on advice of counsel was a viable defense
2 strategy. First, Mr. Simpson did not disclose all material facts to Mr. Galanter. Secondly,
3 even looking in a light most favorable to Mr. Simpson, Mr. Galanter advised no force could
4 be used to regain the property. No evidence demonstrates Mr. Simpson actually followed
5 Mr. Galanter's advice. Mr. Simpson entered a small hotel room with a number of large
6 men, two of whom had guns. Counsel cannot be found ineffective for failing to pursue a
7 defense that had no chance of success.

8 Even if this court found trial counsel acted unreasonably by failing to raise this
9 defense, Mr. Simpson has failed to show that had an advice of counsel defense been
10 presented, a different result would have been had at trial. The men planned to take Mr.
11 Simpson's property for weeks prior to the incident. The men planned to lure Mr. Fromong
12 and Mr. Beardsley to the Palace Station for the purpose of taking the property. Trial
13 evidence supports that Mr. Simpson knew guns would be present. Mr. Alexander and Mr.
14 McClinton both testified that Mr. Simpson asked the men to bring some "heat" and then
15 specifically asked Mr. McClinton to bring a gun with him that night. Mr. McClinton
16 testified Mr. Simpson asked him to take out his gun before entering the room. Additionally,
17 given the small size of the room and the testimony by several witnesses that Mr. McClinton
18 was waving his gun around, the evidence supports the jury's determination that Mr.
19 Simpson was aware of the guns. The jury reasonably concluded Mr. Simpson was aware of
20 the guns. Mr. Simpson has failed to demonstrate that had counsel presented the defense of
21 Mr. Simpson's good faith reliance on advice of counsel that a different result would have
22 occurred.

23 Mr. Simpson has not shown counsel's performance was unreasonable in failing to
24 advise him of this defense or failing to request a jury instruction on this defense.
25 Furthermore, Mr. Simpson has failed to demonstrate that counsel's alleged deficiency
26 resulted in prejudice. Mr. Simpson's claim regarding advice of counsel defense is denied.
27
28

Ground 3: Failure to Advise Mr. Simpson to Testify

Mr. Simpson argues trial counsel was ineffective for advising him against testifying because counsel believed the State could not prove their case. Mr. Simpson's claim is denied because he was aware of his right to testify and voluntarily waived his right to do so.

Under the Fifth Amendment to the United States Constitution, a criminal defendant enjoys the right to testify in his own defense, or to refuse to do so. Counsel may advise a defendant whether to testify, but the final decision lies with the defendant. "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." Browning v. State, 120 Nev. 347, 360, 91 P.3d 39, 49 (2004). Counsel can "advise a defendant on whether it is wise for him to testify, but ultimately the decision lies with the defendant." Id. Strategic decisions made by counsel are assumed to be intentional and are "virtually unchallengeable absent extraordinary circumstances." Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 281 (1996) (quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990)).

Mr. Simpson claims he detrimentally relied on Mr. Galanter's advice not to testify. Tactical decisions of counsel almost never constitute ineffective assistance of counsel. Id. Advising criminal defendants to testify is a tactical issue often debated among defense attorneys. Mr. Simpson's attorneys disagreed about whether Mr. Simpson should testify. In Mr. Simpson's case, defense counsel held legitimate concerns regarding inconsistent statements and the possibility of opening the door to prior bad acts. While Mr. Grasso felt strongly and had good tactical reasons for wanting Mr. Simpson to testify, Mr. Galanter had equally compelling reasons to recommend Mr. Simpson stay off the witness stand. Under the circumstances, this court could not find either course of advice ineffective. Rather, each attorney advised based on a rational, legitimate difference of opinion regarding trial strategy.

Mr. Simpson argues that his testimony would have allowed him to explain he had no knowledge of the guns. At the evidentiary hearing, Mr. Galanter stated that after reviewing witness statements and other relevant evidence, he determined the evidence was

1 overwhelming, and Mr. Simpson would be harmed by testifying. Mr. Galanter reasonably
2 believed Mr. Simpson would suffer from the State's cross-examination regarding
3 inconsistencies with Mr. Simpson's claim he had no knowledge of the guns. Additionally,
4 to the extent that Mr. Simpson testified that Mr. Galanter advised him he need not testify
5 because the State could not prove its case, this court finds that Mr. Simpson's testimony
6 lacked credibility.

7 Finally, the district court advised Mr. Simpson of his right to testify during trial, and
8 he voluntarily waived this right:

9 The Court: Under the Constitution of the United States and the
10 Constitution of the state of Nevada, you cannot be
11 compelled to testify in this case. Do you understand
12 that, Mr. Simpson?

13 Mr. Simpson: Yes, ma'am.

14 The Court: You may, at your own request, give up this right and
15 take the witness stand to testify. If you do, you will be
16 subject to cross-examination by the Deputy District
17 Attorney, and anything that you may say, be it on
18 direct or cross-examination, will be the subject of fair
19 comment when the District Attorney speaks to the jury
20 in his final argument. Do you understand that, Mr.
21 Simpson?

22 Mr. Simpson: Yes, ma'am.

23 Mr. Simpson was aware of his right to testify and declined to testify. This court finds
24 Mr. Simpson voluntarily waived his right to testify based on reasonable advice from
25 counsel. Therefore, counsel cannot be deemed ineffective for advising Mr. Simpson not to
26 testify.

27 Mr. Simpson also failed to demonstrate a reasonable probability of a different
28 outcome had he testified. The evidence in this case was overwhelming. Mr. Simpson
planned the robbery for weeks before it occurred. He engaged in numerous conversations
with co-conspirators regarding recovering his property. The final plan involved luring Mr.
Fromong and Mr. Beardsley to a hotel room so that the property could be forcibly taken

1 from them. The evidence, including several witness statements and audio recordings,
2 contradict Mr. Simpson's claim he was unaware of guns.

3 Trial counsel acted reasonably in advising Mr. Simpson not to testify. Mr. Simpson
4 has neither shown that counsel was ineffective for providing this advice, nor shown that
5 had counsel advised him to testify a different result would have been had at trial. Mr.
6 Simpson has failed to demonstrate counsel's performance fell below an objective standard
7 of reasonableness or that had counsel acted reasonably a different outcome would have
8 been had at trial.

9
10 **Ground 4: Failure to Communicate Plea Offer**

11 Mr. Simpson complains that Mr. Galanter failed to notify him of a plea offer during
12 trial. Further, Mr. Simpson asserts he would have accepted the plea offer had he been fully
13 advised of the issues with his case.

14 A defendant possesses a Sixth Amendment right to effective assistance of counsel at
15 the plea bargaining stage. Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012). The two-part
16 Strickland test applies to the analysis of ineffective assistance of counsel in the context of
17 plea negotiations. Id. First, the performance prong requires a petitioner establish that
18 counsel's performance "fell below an objective standard of reasonableness." Strickland,
19 466 U.S. at 688. In Lafler, the United States Supreme Court found deficiency in defense
20 counsel's performance when counsel advised Mr. Lafler to reject a plea offer by advising
21 Mr. Lafler he could not be convicted at trial. 132 S. Ct. at 1385.

22 Second, the prejudice prong requires a petitioner to show that, but for the poor
23 performance of counsel, the petitioner likely would have had a different outcome.
24 Strickland, 466 U.S. at 694. In the context of the plea bargain process, the petitioner "must
25 show the outcome of the plea process would have been different with competent advice."
26 Lafler, 132 S.Ct. at 1384 (citing Hill v. Lockhart, 474 U.S. 52 (1985)). Prejudice may occur
27 after a defendant accepts a plea after receiving ineffective advice from counsel or after a
28 defendant rejects a plea and proceeds to trial based upon ineffective advice from counsel.

1 Id. Prejudice may also occur when defense counsel fails to communicate a plea offer before
2 it expires. Missouri v. Frye, 132 S. Ct. 1399 (2012).

3 Mr. Simpson raises concerns that he rejected a plea offer and went to trial based on
4 the ineffective advice of his trial counsel. Mr. Simpson testified that Mr. Galanter
5 discouraged him from considering a plea agreement. According to Mr. Simpson, Mr.
6 Galanter consistently told him that the State could not prove its case because Mr. Simpson
7 acted within his rights retaking his property. Mr. Simpson also asserted that neither Mr.
8 Grasso nor Mr. Galanter informed Mr. Simpson of any plea offer. He testified that had he
9 understood he faced a chance of conviction and had he known of the offer, he would have
10 accepted the negotiation.

11 Prior to the preliminary hearing in this case, then-District Attorney David Roger and
12 Mr. Galanter engaged in a brief discussion concerning negotiations. Mr. Galanter indicated
13 only a stipulated probation negotiation would be considered. Mr. Roger agreed they had
14 nothing to talk about at that point.

15 Mr. Grasso testified that the State made no offer to resolve the case pre-trial. Plea
16 negotiations were not within Mr. Grasso's scope of responsibility as local counsel. Mr.
17 Grasso was focused on preparing for trial, and Mr. Simpson was not asking him about
18 negotiations. Mr. Grasso was not included at all meetings between Mr. Galanter and Mr.
19 Simpson, so he also was not aware of discussions between Mr. Galanter and Mr. Simpson
20 regarding plea negotiations. Mr. Grasso recalls that following the testimony of the first two
21 witnesses at trial, the judge called counsel into chambers and asked if the parties had
22 attempted to resolve the case.

23 Following the court's suggestion, Mr. Roger proposed a negotiation. Mr. Grasso
24 recalls the offer was a single count of robbery, with a sentence of twenty-four to sixty
25 months in prison and no weapon enhancement. Mr. Grasso was not present during any
26 conversation about this offer between Mr. Galanter and Mr. Simpson. Mr. Galanter
27 ultimately declined the offer on Mr. Simpson's behalf.
28

1
2 Mr. Galanter also recalled the offer was two to five years. Mr. Galanter did not
3 memorialize any offer in writing. He discussed the offer with Mr. Simpson in the hall on a
4 short break, and Mr. Simpson wanted a negotiation of no more than a year in jail. The
5 State would not agree to a year. According to Mr. Galanter, he discussed the offer with Mr.
6 Simpson again after court and discussed "all the time" the consequences and benefits of a
7 plea. Mr. Galanter advised Mr. Simpson to seriously consider the offer. Mr. Galanter also
8 testified that he told Mr. Simpson repeatedly the evidence in the case was overwhelming.
9 According to Mr. Galanter, Mr. Simpson had a difficult time understanding why the men
10 who had guns received negotiations for probation and the offer for him was prison time.
11 Mr. Simpson would not consider more than a year of time, and the District Attorney would
12 not agree to anything less than a prison term.

13 Mr. Roger testified that he told Mr. Galanter they could discuss a specific negotiation
14 if Mr. Simpson would plead guilty and agree to serve at least thirty months in prison. Mr.
15 Roger testified he had a similar conversation with Mr. Bryson as the negotiation was a joint
16 offer. After discussion with their clients, Mr. Bryson indicated that Mr. Stewart was not
17 interested in a deal and Mr. Galanter indicated that Mr. Simpson would not agree to more
18 than twelve months in prison. Mr. Roger testified that no specific charge was discussed,
19 nor a clear minimum and maximum.

20 Mr. Owens also described the conversation as preliminary discussions, but not a
21 formal offer. Mr. Owens recalled that if both Mr. Simpson and Mr. Stewart agreed to a
22 thirty-month minimum sentence, the prosecutors would decide formal details of the offer.
23 He recalled Mr. Galanter telling them the next morning that Mr. Simpson would only agree
24 to twelve months.

25 Mr. Bryson, attorney for Mr. Stewart, testified that the State extended an offer to Mr.
26 Stewart to plead guilty to an offense, with a stipulated sentence of twenty-four to sixty
27 months. The offer required both defendants to accept the negotiation. Mr. Bryson had no
28 idea if the offer was conveyed to Mr. Simpson, but believed it was based on the offer he

1 received for Mr. Stewart. Both Mr. Galanter and Mr. Grasso told Mr. Bryson that Mr.
2 Simpson rejected the negotiation.

3 Defendants have “no right to be offered a plea.” Lafler v. Cooper, 132 S.Ct. at 1387
4 (quoting Missouri v. Frye, 132 S.Ct. 1399 (2012)). Given the differing testimony and
5 complete lack of documentation, this court is unclear whether an actual offer was extended.
6 For analysis purposes, the court will assume the State extended an offer of twenty-four to
7 sixty months on a charge of robbery.

8 First, assuming an offer was extended, the testimony of Mr. Roger, Mr. Owens and
9 Mr. Bryson support Mr. Galanter’s testimony that Mr. Simpson knew of the offer and did
10 not want to accept more than a year. Additionally, even if Mr. Galanter failed to convey the
11 offer as Mr. Simpson asserts, Mr. Simpson is unable to show prejudice under the
12 circumstances. To the extent that an offer was made, that offer was contingent on both
13 defendants accepting the offer. Mr. Stewart declined to resolve the case, so Mr. Simpson
14 would not have been able to accept the offer under the State’s terms.

15 Based on the totality of the testimony regarding this issue, this court finds: 1) the
16 negotiations discussed lacked sufficient clarity to be considered a formal offer; 2) Mr.
17 Galanter conveyed the offer to Mr. Simpson and advised him of the seriousness of the case;
18 and 3) regardless, Mr. Simpson was not prejudiced because Mr. Stewart refused the offer;
19 the offer required both defendants to accept in order to be valid. As a result, Mr. Simpson’s
20 claim is denied.

21
22 **Ground 5: Failure to Raise Double Jeopardy Issue**

23 At trial, the jury convicted Mr. Simpson of two counts of robbery with use of a deadly
24 weapon and two counts of assault with use of a deadly weapon. The robbery charges
25 alleged in the Information involved taking property from Mr. Beardsley and Mr. Fromong
26 “by means of force or violence or fear of injury to” the men by the use of a firearm. The
27 assault charges alleged in the Information involved placing Mr. Beardsley and Mr. Fromong
28 “in reasonable apprehension of immediate bodily harm” by use of a firearm. The court

1 sentenced Mr. Simpson to consecutive prison time for the robbery and assault charges.

2 Mr. Simpson asserts appellate counsel was ineffective when appellate counsel failed
3 to effectively litigate the double jeopardy issue and failed to alert the Nevada Supreme
4 Court's attention to a federal district court case finding double jeopardy under similar
5 circumstances. This claim is denied because counsel cannot be found ineffective for failing
6 to cite case law that is merely persuasive after the appeal has been concluded.

7 The Fifth Amendment to the United States Constitution prohibits multiple
8 prosecutions for the same offense under the Double Jeopardy Clause. Double Jeopardy is
9 present "if there are elements of one offense that are wholly included within the elements of
10 the other offense." Blockburger v. United States, 284 U.S. 299, 304 (1932). One offense
11 differs from another if each requires proof of a fact that the other does not. Albernaz v.
12 United States, 450 U.S. 333, 339 (1981).

13 In relation to the incident on September 13, 2007, Mr. Simpson was charged with
14 robbery with use of a deadly weapon in Counts 7 and 8 of the Information. Count 7
15 charged:

16
17 Defendants did then and there willfully, unlawfully, and feloniously take
18 personal property, to-wit: sports memorabilia autographed by O.J. Simpson
19 and/or other sports memorabilia; and/or a cellular phone from the person of
20 Bruce Fromong, or in his presence, by means of force or violence or fear of
21 injury to and without the consent and against the will of the said Bruce
22 Fromong; said Defendants using deadly weapons, to-wit: firearms, during the
23 commission of said crime; the Defendants being criminally liable under one
24 or more of the following principles of criminal liability, to-wit: (1) by directly
25 committing this said crime; and/or (2) by aiding or abetting one another
26 and/or one or more of their confederates in the commission of this said crime
27 by directly or indirectly, counseling or encouraging each other to commit said
28 crime and by encouraging, hiring, commanding, inducing or otherwise
procuring Thomas Riccio to arrange a meeting with Bruce Fromong and
Alfred Beardsley for the feigned purpose of purchasing certain items of sports
memorabilia autographed by O.J. Simpson and other sports memorabilia,
and, thereafter, Thomas Riccio inveigling, enticing and/or decoying Bruce
Fromong to the Palace Station Hotel & Casino, particularly Room No. 1203
therein, and one or more of the Defendants possessing, displaying and/or
pointing a firearm at Bruce Fromong; Defendants demanding said property
and using confinement, force, fear and threat of force to take said property

1 from Bruce Fromong; the Defendants acting in concert throughout; and/or
2 (3) each Defendant acting pursuant to a conspiracy to commit coercion,
burglary, assault and/or robbery.

3 Count 8 contained identical language, but named Alfred Beardsley as the victim.

4 The State also charged Mr. Simpson with assault with a deadly weapon. The assault
5 charges appeared in Counts 9 and 10 of the Information. Count 9 provided:

6 Defendants did then and there willfully, unlawfully, feloniously and
7 intentionally place another person, to-wit: Bruce Fromong, in reasonable
8 apprehension of immediate bodily harm with the use of a deadly weapon, to-
9 wit: firearms; the Defendants being criminally liable under one or more of the
10 following principles of criminal liability, to-wit: (1) by directly committing
11 said crime; and/or (2) by aiding or abetting one another and/or one or more
12 confederates in the commission of said crime, by directly or indirectly,
13 counseling or encouraging each other to commit said crime, and by
14 encouraging, hiring, commanding, inducing or otherwise procuring Thomas
15 Riccio to arrange a meeting with Bruce Fromong and Alfred Beardsley, for the
16 feigned purpose of purchasing certain items of sports memorabilia
autographed by O.J. Simpson and other sports memorabilia, and, thereafter,
Thomas Riccio inveigling, enticing and/or decoying Bruce Fromong to the
Palace Station Hotel & Casino, particularly Room No. 1203 therein, and one
or more of the Defendants possessing, displaying and/or pointing a firearm at
Bruce Fromong; the Defendants confining, pushing, searching, and physically
threatening Bruce Fromong and Alfred Beardsley, and acting in concert
throughout; and/or (3) each Defendant acting pursuant to a conspiracy to
commit coercion, burglary, assault and/or robbery.

17 Count 10 contained identical language, but named Mr. Beardsley as the victim.

18 During trial, defense counsel raised the issue of double jeopardy regarding the
19 assault and robbery charges. Defense counsel also objected to the court providing jury
20 instructions on both offenses. Over counsel's objection, the trial court instructed the jury
21 on both the robbery and assault charges. The jury then convicted Mr. Simpson of both
22 counts of robbery and both counts of assault. Mr. Simpson was sentenced to concurrent
23 prison time on the robbery charges and consecutive prison time on each of the assault
24 charges.

25 **Failure to Raise Issues on Appeal**

26 In his appeal, Mr. Simpson raised the issue, "Did the district court commit error
27 when sentencing Simpson for both robbery and aggravated assault with a deadly weapon?"
28

1 Mr. Simpson asserts that appellate counsel failed to adequately raise the issue of double
2 jeopardy. This court must determine if appellate counsel was ineffective in their
3 performance. To prevail on a claim of ineffective assistance of appellate counsel, a
4 petitioner must establish: (1) appellate counsel's deficient performance, and (2) resulting
5 prejudice. McConnell v. State, 125 Nev. 243, 253, 212 P.3d 307, 314 (2009). The prejudice
6 prong requires the petitioner to show that the "omitted issue would have had a reasonable
7 probability of success on appeal." Id. (citing Kirksey v. State, 112 Nev. 980, 998, 923 P.2d
8 1102, 1112-14 (1996)).

9 Appellate counsel asserted the claim that sentencing on both robbery and assault
10 violated the Double Jeopardy Clause of the United States Constitution. The Nevada
11 Supreme Court decided Mr. Simpson's appeal on October 22, 2010. The Nevada Supreme
12 Court noted that appellate counsel had intertwined redundancy and double jeopardy
13 arguments. The court rejected Mr. Simpson's argument that his double jeopardy rights
14 were violated when he was convicted of both assault with a deadly weapon and robbery
15 with a deadly weapon.

16 Specifically, the supreme court held that the elements of assault are not wholly
17 included in the elements of robbery and, as a result, a conviction for both assault with a
18 deadly weapon and robbery with a deadly weapon did not violate Mr. Simpson's double
19 jeopardy rights. This court is bound to follow the Nevada Supreme Court's determination
20 that Mr. Simpson's conviction for assault and robbery did not violate the Double Jeopardy
21 Clause. A claim raised and rejected on appeal is the law of the case and is precluded from
22 further consideration of the issue. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

23 Counsel could have more clearly briefed and analyzed the issue on appeal. The
24 double jeopardy argument consists of one paragraph and a passing reference to North
25 Carolina v. Peace, 395 U.S. 711 (1969). Despite counsel's shortcomings in briefing the issue,
26 the Nevada Supreme Court analyzed the issue under the double jeopardy standards and
27 denied Mr. Simpson's relief. Mr. Simpson's claim was considered by the Nevada Supreme
28

1 Court and rejected. Consequently, Mr. Simpson cannot show he would have likely enjoyed
2 a different outcome on appeal.

3
4 **Failure to Cite Relevant Case Law**

5 The second concern Mr. Simpson raises regarding the double jeopardy issue is that
6 counsel failed to cite relevant case law. After Mr. Simpson's appeal was decided by the
7 Nevada Supreme Court, the United States District Court for the District of Nevada decided
8 that a state conviction for assault and robbery violated the Double Jeopardy Clause under
9 Blockburger v. United States, 284 U.S. 299 (1932). Appellate counsel did not bring this
10 decision to the attention of the Nevada Supreme Court.

11 The timing of Mr. Simpson's appeal is relevant to the analysis of this issue. Mr.
12 Simpson's opening brief was filed on May 26, 2009. The Order of Affirmance was filed on
13 October 22, 2010. A petition for rehearing filed on November 16, 2010 did not request
14 rehearing on the double jeopardy issue. The Nevada Supreme Court denied rehearing on
15 February 2, 2011. A subsequent petition for en banc reconsideration filed on March 15,
16 2011, did not request rehearing on the double jeopardy issue. On the same date as the
17 petition for en banc reconsideration was filed, the United States District Court for the
18 District of Nevada decided the case of Hymon v. Williams, 2011 WL 941065 (D. Nev. Mar.
19 15, 2011). The Nevada Supreme Court denied Mr. Simpson's petition for rehearing en banc
20 on May 17, 2011.

21 In Hymon, the defendant was convicted of robbery with use of a deadly weapon and
22 assault with use of a deadly weapon. Id. The robbery involved taking a purse, and the
23 assault was swinging a knife at one of the victims during the course of the robbery. The
24 federal district court held that:

25 While the Nevada Supreme Court applied the appropriate federal legal
26 standard in discussing the definition of a lesser-included charge and was
27 correct in its assessment of the appropriateness of denying a jury instruction
28 for the lesser-included charge if the evidence is sufficient, the Court's
application of the law is erroneous as to these two charges because it ignores
the fact that the elements of assault with the use of a deadly weapon charge

1 are entirely included within the elements of the robbery with a deadly weapon
2 charge. As Respondents argue, the difference between the two charges is that
3 the robbery charge adds an element; the assault is threatened in an effort to
4 retain the stolen property. Nonetheless, all the elements of the assault charge
5 are present within the robbery charge, making assault with a deadly weapon a
6 lesser-included charge of robbery with a deadly weapon.

7 Id. at 6. The court also held that appellate counsel's failure to raise this claim on direct
8 appeal fell below an objective standard of reasonableness and found Mr. Hymon suffered
9 prejudice from this inadequate representation because he suffered an additional felony
10 conviction.

11 In Mr. Simpson's appeal, the Nevada Supreme Court held that robbery and assault
12 constituted separate offenses:

13 Generally, when determining whether two separate offenses can stand
14 without implicating double jeopardy, this court employs the test enunciated
15 in Blockburger v. United States, 238 U.S. 299, (1932). In essence, if the
16 elements of one offense are wholly included within the elements of the other
17 offense, then the defendant's double jeopardy rights are implicated. Id.
18 Here, the elements of assault, NRS 200.471, are clearly not wholly included
19 in the elements of robbery, NRS 200.380. We therefore conclude that the
20 conversation for assault and robbery did not violate Simpson's double
21 jeopardy rights.

22 Order of Affirmance, No. 53080, 18 fn. 3 (Oct 22, 2010). In addition to deciding that the
23 offenses were not redundant generally, the Nevada Supreme Court also found that under
24 the facts of this case, the assault took place after the property was recovered from the room.
25 The Nevada Supreme Court defined the assault as occurring after the other men left with
26 the memorabilia and Mr. Simpson remained in the room. Mr. Simpson was yelling at Mr.
27 Beardsley and Mr. Fromong while Mr. McClinton held them at gunpoint.

28 Under the facts of this case, which differ somewhat from the facts of Hymon, Mr.
Simpson argues appellate counsel was ineffective for failing to fully present Mr. Simpson's
double jeopardy claim on appeal when counsel failed to cite to new case law. Federal
district court opinions are persuasive to the Nevada Supreme Court. Rahn v. Warden,
Nevada State Prison, 88 Nev. 429, 431, 498 P.2d 1344, 1346 (1972). Hymon was issued the

1 same day Mr. Simpson's petition for rehearing was filed, a petition which did not raise any
2 concern with the double jeopardy issue. Hymon was an unpublished federal decision.
3 While it can be cited to under the federal rules, appellate counsel cannot be found
4 ineffective for failing to find and cite an unpublished case issued simultaneously with Mr.
5 Simpson's petition for rehearing, a petition that did not contain the relevant issue.

6 Mr. Simpson has failed to demonstrate deficiency in appellate counsel's
7 performance. An appellate lawyer cannot be found ineffective for failing to cite to a non-
8 binding unpublished case issued after all significant briefing has concluded in a case.
9 Finally, Mr. Simpson has failed to show he suffered prejudice. The supreme court
10 conducted a factual and legal analysis of the double jeopardy issue and held Mr. Simpson's
11 convictions were valid. Nothing in the record suggests Mr. Simpson would have enjoyed a
12 better outcome on appeal if appellate counsel had cited Hymon. The Nevada Supreme
13 Court determined that the facts of this particular case supported convictions for robbery
14 and assault. Thus, Mr. Simpson's claim is denied.
15
16

17
18 **Ground 6: Failure to Raise Redundancy of Assault, Kidnapping and Robbery**

19 Mr. Simpson claims that trial and appellate counsel were ineffective for failing to
20 raise the issue that Mr. Simpson's convictions for assault with a deadly weapon, robbery
21 with a deadly weapon and kidnapping with a deadly weapon were redundant. Mr.
22 Simpson's claim is denied because trial counsel preserved this issue for appeal, appellate
23 counsel raised this issue on appeal, and the Nevada Supreme Court denied Mr. Simpson's
24 redundancy argument on appeal.
25
26
27
28

Robbery and Assault

Mr. Simpson argues his convictions are redundant because they arise from a single course of conduct. In his petition, Mr. Simpson concedes that trial counsel preserved the redundancy issue for appeal, and appellate counsel raised this issue on appeal. Mr. Simpson claims appellate counsel was ineffective for failing to point out specific facts that are inconsistent with the Supreme Court's understanding of events. Convictions are redundant when: 1) the facts forming the basis of two crimes overlap; 2) the statutory language indicates one, rather than multiple criminal violations; and 3) legislative history shows that an ambiguous statute was intended to assess one punishment. Wilson v. State, 121 Nev. 345, 355, 114 P.3d 285, 292-93 (2005).

Mr. Simpson concedes trial counsel raised the issue of redundancy at trial. On that basis, no deficient performance or prejudice of trial counsel can be found.

Mr. Simpson also argues that appellate counsel was ineffective for failing to alert the supreme court that the evidence failed to establish both an assault and a robbery. Appellate counsel presented arguments on redundancy in Mr. Simpson's appeal. To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must establish: (1) appellate counsel's deficient performance, and (2) the likelihood of a successful outcome on appeal. McConnell, 125 Nev. at 243, 212 P.3d at 314.

On appeal, the Nevada Supreme Court found the evidence demonstrated a crime of fear and a separate crime of unlawful taking occurred on the night of September 13, 2007. Mr. Simpson and his co-conspirators held Mr. Fromong and Mr. Beardsley at gunpoint. Nearly \$100,000 worth of sports memorabilia was removed from the room. Testimony from several of Mr. Simpson's co-conspirators revealed that Mr. Simpson was angry with Mr. Gilbert and hoped he would be able to confront him in the hotel room. Mr. Alexander and Mr. McClinton testified that Mr. Simpson wanted the men to come armed and look menacing. After the property was recovered, Mr. Simpson remained in the middle of the small-sized room and yelled at the victims while Mr. McClinton held both men at gunpoint.

The Nevada Supreme Court also determined under the facts of this case the State

1 presented enough evidence to meet the elements for both robbery and assault, with the
2 assault occurring after the robbery. The supreme court found the language of each statute
3 criminalizes different behavior, and the legislative intent of the statutes is to criminalize
4 both actions. Mr. Simpson has failed to demonstrate counsel's performance was deficient
5 in presenting this argument on appeal or that he would have enjoyed a more favorable
6 outcome had the appeal been presented in a different manner.

8 **Assault and Kidnapping**

9 Mr. Simpson also asserts appellate counsel was ineffective for failing to argue his
10 convictions of assault with a deadly weapon were redundant to his convictions of
11 kidnapping with a deadly weapon. Mr. Simpson argues his convictions for assault and
12 kidnapping were based on the same act of restraining the victims in the room by gunpoint.
13 Mr. Simpson contends the charge for assault merged into the kidnapping.

14 Although appellate counsel did not raise this issue on direct appeal, the Nevada
15 Supreme Court found the evidence established both an assault and a kidnapping. The
16 supreme court also found an assault when Mr. Simpson and his co-conspirators held Mr.
17 Fromong and Mr. Beardsley at gunpoint after the robbery.

18 The supreme court found a kidnapping when Mr. Fromong and Mr. Beardsley were
19 lured into the Palace Station room for the independent purpose of lessening the risk of
20 detection by security. Additionally, the supreme court found that the kidnapping charges
21 were supported by the evidence presented at trial. Mr. Fromong and Mr. Beardsley were
22 "scared by the surprise entry of six men, one yelling and cursing at them and two armed;
23 moved to corners of the hotel room; possibly pushed; frisked and held at gunpoint." Order
24 of Affirmance 22.

25 The Nevada Supreme Court found both a luring kidnapping and a kidnapping that
26 was not incidental to the robbery. All of the facts cited by the supreme court relative to the
27 kidnappings took place before the facts supporting the assault. Consequently, this court
28 cannot find the convictions redundant or find counsel ineffective for failing to raise the

1 issue more clearly. Mr. Simpson has not demonstrated he would likely have enjoyed a
2 different outcome on appeal even if counsel had fully explored this issue on appeal. Thus,
3 Mr. Simpson's claim is denied.

4 **Ground 7: Failure to Raise Issue that Multiple Punishments Violate Due**
5 **Process**

6 Mr. Simpson claims appellate counsel failed to adequately raise the issue of
7 insufficient evidence to sustain his convictions for robbery with use of a deadly weapon and
8 kidnapping with use of a deadly weapon because the kidnapping charges were incidental to
9 the robbery. Mr. Simpson's claim is denied because the Nevada Supreme Court found the
10 State provided sufficient evidence to demonstrate the kidnappings stood alone from the
11 robbery.

12
13 **Kidnapping Incidental to Robbery**

14 Mr. Simpson concedes appellate counsel argued that the State presented insufficient
15 evidence to convict Mr. Simpson of robbery with use of a deadly weapon and kidnapping
16 with use of a deadly weapon. Mr. Simpson asserts appellate counsel was ineffective in how
17 counsel presented this issue. On appeal, appellate counsel argued:

18 In this case there was no independent significance separate and apart from
19 the Robbery itself nor was there any risk of danger, movement etc. that
20 exceeded that which was required to commit a Robbery. The record indicates
21 that any movement by Beardsley or Fromong during this incident was
22 incidental to the incident and without an increased danger to them. There
23 was no evidence of bodily harm to either Fromong or Beardsley during the
24 course of this incident at trial. To the contrary, evidence was deduced at trial
25 that immediately following this incident both Beardsley and Fromong were
26 more concerned with calling Inside Edition and receiving payment for their
27 story, than getting any medical care.

28 Appellant's Opening Brief 9-10. Mr. Simpson argues appellate counsel failed to inform the
Nevada Supreme Court that no evidence established Mr. Simpson knew the victims were
unarmed.

Sufficient evidence exists if "after viewing the evidence in the light most favorable to
the prosecution, any rational trier of fact could have found the essential elements of the

1 crime beyond a reasonable doubt.” Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)
2 (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1970)). In Nevada, a person is guilty of first
3 degree kidnapping if he “willfully seizes, confines, inveigles, entices, decoys or carries away
4 a person by any means whatsoever with the intent to hold or detain. . .or for the purpose of
5 committing. . .robbery.” Nev. Rev. Stat. §200.310(1)(2011). In this case, the evidence
6 demonstrates that Mr. Simpson and Mr. Riccio lured Mr. Beardsley and Mr. Fromong to a
7 small room at the Palace Station. When Mr. McClinton entered the room, he had his gun
8 out and directed the victims to get their backs to the wall. Mr. Simpson yelled, “Don’t let
9 anyone leave this room. . .You stole my stuff.” The Nevada Supreme Court found these facts
10 established a kidnapping.

11 In Mendoza, the Nevada Supreme Court held convictions for both robbery and
12 kidnapping arising from the same conduct are valid if any movement or restraint stands
13 alone and has independent significance from the act of robbery, creates a risk of danger to
14 the victim exceeding that necessarily present in the crime of robbery, or involves a seizure
15 or restraint in excess of what is necessary. Mendoza v. State, 122 Nev. 267, 275, 130 P.3d
16 176, 181 (2006). The Nevada Supreme Court conducted a factual analysis of Mr. Simpson’s
17 claim and found that the State presented sufficient evidence “to demonstrate that the
18 kidnapping was not incidental, but, rather, stood alone to the robbery.” Order of
19 Affirmance 24.

20 A claim raised and rejected on appeal is the law of the case and is precluded from
21 further consideration of the issue. Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 799 (1975).
22 In Mr. Simpson’s appeal, the supreme court found sufficient evidence demonstrating an
23 independent purpose for the kidnapping, “including substantially lessening the risk of
24 detection by the hotel employees, guests and law enforcement.” The supreme court stated
25 “if it had not been for Simpson’s plan to get both Beardsley and Fromong to Room 1203
26 under the false pretense of orchestrating a memorabilia sale, neither victim would have
27 been in that room on the evening of September 13, 2007.” Order of Affirmance 22. The
28

1 luring of the victims to the room had an independent purpose of lessening the risk of
2 detection by hotel employees, guests and law enforcement.

3 The supreme court also found an independent purpose for the kidnapping when Mr.
4 Simpson and his co-conspirators created a risk of danger substantially exceeding the
5 danger necessarily present for the crime of robbery. Mr. McClinton entered the room with
6 a gun pointing at the victims. Mr. Alexander entered the room with a gun in plain sight as
7 instructed by Mr. Simpson. The supreme court found this created a risk of danger that
8 substantially exceeded that necessarily present for the crime of robbery. Mr. Beardsley and
9 Mr. Fromong put up no fight, yet both victims were moved and restrained because Mr.
10 Simpson was angry.

11 Prevailing on a claim for ineffective assistance of appellate counsel requires a
12 petitioner establish that appellate counsel performed in a deficient manner and that
13 counsel's deficient performance resulted in prejudice. McConnell, 125 Nev. 243, 253, 212
14 P.3d at 307, 314 (2009). Mr. Simpson has failed to provide any factual allegations to
15 demonstrate how counsel's argument was deficient. While Mr. Simpson may disagree with
16 the factual findings of the Nevada Supreme Court, this court is bound by those findings and
17 the findings are supported by evidence presented at trial. Mr. Simpson alleges counsel
18 failed to alert the supreme court that there was no evidence to show Mr. Simpson knew that
19 the victims were unarmed; however, the supreme court found the evidence demonstrated
20 the victims did not fight back, yet they were held at gunpoint and restrained.

21 With regard to the argument that the kidnapping was incidental, Mr. Simpson has
22 failed to demonstrate he suffered prejudice. The Nevada Supreme Court found the State
23 presented sufficient evidence to demonstrate the kidnapping was not incidental to the
24 robbery, but stood alone. Mr. Simpson has not established that he likely would have
25 received a more favorable outcome on appeal had the issue been raised in a different way.
26 Mr. Simpson's claim is denied.

Kidnapping Deadly Weapon Enhancement

Appellate counsel failed to raise the issue that one of the two kidnapping theories charged did not involve a deadly weapon. Both the luring kidnapping and the robbery kidnappings were charged together in each of the two counts of kidnapping with use of a deadly weapon. The luring aspect of the kidnapping involved the men talking Mr. Fromong and Mr. Beardsley into bring the memorabilia to the Palace Station for the purposes of taking the property from them. The luring aspect of the kidnapping did not involve any use of weapons. The robbery occurring in the room that the Nevada Supreme Court found was independent from the robbery did involve the use of weapons. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (1991).

The Nevada Supreme Court did not decide the issue of whether the deadly weapon enhancement for the kidnapping could stand given that the State charged one theory that could not sustain the enhancement in the same count as a theory that could sustain the weapon enhancement. Whether appellate counsel was ineffective in this instance appears to turn on the viability of the claim.

When a verdict is supported by one legal theory but not another and it is impossible to tell which theory the jury selected, the verdict must be set aside. *Yates v. United States*, 354 U.S. 298, 312 (1956). In *Yates*, the statute of limitation had run under one charged theory but not the other. The United States Supreme Court declined to find harmless error where the instructions were not clear enough to warrant drawing an inference that the jury decided on the viable legal ground. *Id.* *Yates*, notably, was not a constitutional decision. Under the common law, the practice was to accept a general jury verdict so long as the verdict was supported on one of the submitted grounds. *Griffin v. United States*, 502 U.S. 46, 49 (1991). The Nevada Supreme Court has taken the position that verdicts which may be based on a legally insufficient theory are to be analyzed under a harmless error approach. *Cortinas v. State*, 124 Nev. 1013, 1029, 195 P.3d 315, 326 (2008).

1 In Griffin v. United States, the United States Supreme Court clarified that when a
2 verdict could be based on a legally insufficient theory, the verdict must be overturned.
3 When, however, jurors are faced with a choice of factual insufficiency, the conviction should
4 not be overturned if sufficient alternative grounds exist to support the conviction. Griffin,
5 at 472. The reason for this distinction is jurors are better equipped to analyze the evidence
6 and determine factual sufficiency than to determine issues of legal sufficiency. Id. at 472.

7 The verdict form in this case gave the jurors the option to decide between first
8 degree kidnapping, first degree kidnapping with use of a deadly weapon, and not guilty.
9 The jurors chose first degree kidnapping with use of a deadly weapon. Prior to coming to a
10 verdict, the jurors were instructed on the definition of kidnapping in Jury Instruction 17.

11 The court also instructed the jurors on finding of use of a deadly weapon in Jury
12 Instruction 24. That instruction provides "If, however, you find that a deadly weapon was
13 not used in the commission of such an offense, but you find that it was committed, then you
14 shall return the appropriate guilty verdict reflecting that a deadly weapon was not used."
15 Finally, the jurors were instructed: "In order to 'use' a deadly weapon, there need not be
16 conduct which actually produces harm but only conduct which produces a fear of harm or
17 force by means or display of the deadly weapon in aiding the commission of the crime."
18 Jury Instruction 26.

19 This court finds that Mr. Simpson cannot establish prejudice on this claim because
20 the discrepancy involved a factual determination regarding whether the deadly weapon
21 enhancement applied to the kidnapping charge under the facts of the case. The Nevada
22 Supreme Court determined that the kidnapping in the hotel room was not incidental to the
23 robbery, and this court is bound by that determination. Given that both the luring and not
24 incidental to robbery theories supported a legally valid kidnapping and that the jury was
25 properly instructed regarding their ability to find use of a deadly weapon, Mr. Simpson has
26 not shown a likelihood that the Nevada Supreme Court would have granted relief on this
27 issue. Consequently, Mr. Simpson's claim of ineffective assistance of appellate counsel is
28 denied.

Ground 8: Failure to Raise Issue of Lesser-Included Offenses

Mr. Simpson claims he was entitled to jury instructions on the lesser-included offenses of larceny and second degree kidnapping. He claims trial counsel was ineffective for failing to make an adequate record on this issue. Additionally, Mr. Simpson asserts appellate counsel was ineffective for failing to provide proper documents to the Nevada Supreme Court on appeal. This claim is denied because Mr. Simpson fails to provide any evidence to support giving instructions on the lesser-included offenses of larceny or second degree kidnapping.

A jury instruction on a lesser-included offense is “mandatory where ‘there is evidence which would absolve the defendant from guilt of the greater offense or degree, but would support a finding of guilt of the lesser offense or degree.’” Davis v. State, 110 Nev. 1107, 1115, 881 P.2d 657, 662 (1994) (quoting Lisby v. State, 82 Nev. 183, 187, 414 P.3d 592, 595 (1966)). If the greater offense includes all the elements of the lesser offense:

[I]t is not trial error to give instructions on the lesser-included offenses since all elements of the lesser offenses have been proven. However, if the prosecution has met its burden of proof on the greater offense and there is no evidence at trial tending to reduce the greater offense, an instruction on a lesser-included offense may be properly refused.

Lisby, 82 Nev. at 188, 414 P.3d at 595. Thus, this court must determine whether evidence at trial suggests Mr. Simpson committed a larceny or second degree kidnapping.

Larceny

At trial Mr. Simpson faced a charge of robbery. In Nevada, robbery is defined as:

The unlawful taking of personal property from the person of another, or in the person’s presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person or property, or the person or property of a member of his or her family, or of anyone in his or her company at the time of the robbery. . . .

Nev. Rev. Stat. § 200.380 (2011).

1 Larceny from the person prohibits takings under circumstances that do not amount
2 to robbery: “A person, who under circumstances not amounting to robbery, with the intent
3 to steal or appropriate to his or her own use, takes property from the person of another,
4 without the other person’s consent is guilty of [a felony].” Nev. Rev. Stat. § 205.270 (2011).

5 The evidence indicates Mr. Simpson and his co-conspirators used force and fear to
6 obtain the property. Mr. Riccio spent over an hour with Mr. Fromong and Mr. Beardsley
7 and confirmed they were unarmed. Furthermore, there is no evidence indicating Mr.
8 Fromong or Mr. Beardsley resisted during the recovery. Upon entering the room, Mr.
9 Stewart frisked the victims to ensure they were unarmed, yet Mr. McClinton waved his gun
10 around while the other men took the property and Mr. Simpson yelled at the victims.

11 Mr. Simpson asserts he was entitled to a jury instruction on the lesser-included
12 offense of larceny from the person. Nevada law defines larceny from the person as when
13 “[a] person, who under circumstances not amounting to robbery, with the intent to steal or
14 appropriate to his or her own use, takes property from the person of another, without the
15 other person’s consent.” Nev. Rev. Stat. § 205.270(1) (2011). Mr. Simpson claims he was
16 entitled to a jury instruction on larceny because he did not have the intent to commit a
17 crime.
18
19
20

21 **Kidnapping**

22 Mr. Simpson asserts he was entitled to a jury instruction on the lesser-included
23 offense of second degree kidnapping and counsel was ineffective for failing to request a jury
24 instruction on this offense. Nevada law defines first degree kidnapping as:

25 A person who willfully seizes, confines, inveigles, entices, decoys, abducts,
26 conceals, kidnaps or carries away a person by any means whatsoever with the
27 intent to hold or detain, or who holds or detains, the person for ransom, or
28 reward, or for the purpose of committing sexual assault, extortion or robbery

1 upon or from the person. . . . is guilty of kidnapping in the first degree which
2 is a category A felony.

3 Nev. Rev. Stat. § 200.210(1) (2011).

4 Mr. Simpson claims he was entitled to an instruction on second degree kidnapping
5 because he did not have the intent to commit a robbery and did not intend to use force to
6 take the property back. Under Nevada law, second degree kidnapping requires:

7 A person who willfully and without authority of law seizes, inveigles, takes,
8 carries away or kidnaps another person with the intent to keep the person
9 secretly imprisoned within the State, or for the purpose of conveying the
10 person out of the State without authority of law, or in any manner held to
11 service or detained against the person's will, is guilty of kidnapping in the
12 second degree which is a category B felony.

13 Nev. Rev. Stat. § 200.310(2) (2011).

14 **Ineffective Assistance of Trial Counsel**

15 Mr. Simpson concedes that trial counsel did include jury instructions for the lesser-
16 included offenses on larceny and second degree kidnapping. Mr. Simpson asserts trial
17 counsel failed to make an adequate record of the trial court's refusal of jury instructions on
18 the lesser-included offenses. A petitioner claiming ineffective assistance of counsel must
19 show that counsel's performance was beneath an objective standard of reasonableness and
20 as a result of counsel's deficiency, the petitioner suffered prejudice. Strickland, 466 U.S. at
21 694.

22 Mr. Simpson has failed to demonstrate counsel acted unreasonably. Trial counsel
23 did propose jury instructions on larceny and second degree kidnapping, but failed to place a
24 formal objection on the record after the judge refused to give the instructions. The
25 proposed instructions were lodged as court exhibits. While not ideal, this court cannot say
26 that counsel's actions fell below the standard of reasonably competent trial counsel.

27 Even if this court were to find that trial counsel acted unreasonably in failing to put a
28 formal objection on record, Mr. Simpson has failed to show counsel's deficient performance
 resulted in prejudice. No evidence supported the giving of the lesser-included instructions.

1 Mr. Simpson has failed to demonstrate any evidence tending to reduce the offense from a
2 robbery to a larceny. The jury reasonably inferred from the evidence presented that Mr.
3 Simpson took the property by force by having guns present and confronting Mr. Beardsley
4 and Mr. Fromong with six other co-conspirators in a small hotel room. Even if counsel
5 made a formal objection on record or had counsel been effective, a different result would
6 not have been had at trial.

7 8 **Ineffective Assistance of Appellate Counsel**

9 Mr. Simpson further claims appellate counsel was ineffective for failing to provide
10 the Nevada Supreme Court the proper documents necessary for appellate review. A
11 petitioner claiming ineffective assistance of appellate counsel must establish appellate
12 counsel was deficient in their performance and that counsel's deficient performance
13 resulted in prejudice. McConnell, 125 Nev. at 253, 212 P.3d at 314.

14 The Nevada Supreme Court declined to review Mr. Simpson's claim regarding the
15 jury instructions on lesser included offenses because the proposed instructions were
16 intentionally omitted from the record. Without the proposed instructions, the supreme
17 court was unable to reach a decision on whether Mr. Simpson was entitled the lesser-
18 included offense instructions. On November 16, 2010, appellate counsel filed a Petition for
19 Rehearing and argued:

20 The Court's opinion discussing our lesser-included offenses argument cited
21 correctly that an appellant has the ultimate responsibility to provide this
22 Court with portions of the record essential to its determination. Page 13 of
23 the Court's opinion states that the record cites that Simpson provided were
24 intentionally omitted from the Appendix, but in fact they were not. (See
25 attached Exhibit A). The proposed jury instructions were exactly where they
26 were cited in the brief. (JAA 5543-5547). A scrivener's error stated pages
27 5530-6621 were omitted but in fact they were not. The Court overlooked this
28 citation in its opinion. Appellant is entitled to reconsideration of his lesser-
included offenses argument with the citations to the Appendix, and,
accordingly, a rehearing on the issue should be granted.

1 Appellate counsel then provided in Exhibit A different jury instructions to the supreme
2 court than the instructions that were submitted at trial. On February 2, 2011, the supreme
3 court declined rehearing without comment.

4 The Nevada Supreme Court found that appellate counsel intentionally omitted the
5 proposed instructions from the appendix. The appendix indicated pages 5530-6620 "have
6 been intentionally omitted." Those pages included the proposed jury instructions. Mr.
7 Galanter then submitted instructions with the petition for rehearing. The instructions
8 submitted to the Nevada Supreme Court along with the petition for rehearing did not
9 match the proposed instructions submitted to the trial court as part of Court's Exhibit 80.
10 As a result of counsel's error, Mr. Simpson's claim was not heard. Counsel's actions fell
11 below the standard of reasonably competent appellate counsel and also raise ethical
12 concerns regarding candor to the court.

13 Despite counsel's shortcomings, Mr. Simpson cannot establish prejudice to warrant
14 relief. Nothing in the record supports giving a larceny or second degree kidnapping
15 instruction. Mr. Simpson's defense at trial was that he lacked intent because he wanted
16 only to retrieve his own property and that the property he took was his own. Larceny
17 requires the intent to steal and requires circumstances "not amounting to a robbery."

18 Mr. Simpson entered a small room with six men to take property and shouted at the
19 two men in possession of the memorabilia. That alone constitutes robbery, whether or not
20 Mr. Simpson was aware of the weapons. The larceny instruction was not consistent with
21 Mr. Simpson's lack of intent defense, nor was it supported by any evidence.

22 Similarly, no evidence supported a second degree kidnapping. The State presented
23 essentially two theories of kidnapping: (1) luring the men to the Palace Station to take the
24 property; and (2) using force above that required to commit the robbery while the men
25 were in the room. Ample evidence supported both theories of kidnapping for the purpose
26 of committing a robbery. The instruction also did not support Mr. Simpson's theory of
27 defense, which was lack of intent to commit any kidnapping.
28

1 Appellate counsel's performance was deficient in failing to provide the correct cite or
2 the correct jury instructions; however, Mr. Simpson has failed to show any prejudice as a
3 result of counsel's deficiency. The evidence in this case overwhelmingly demonstrates that
4 Mr. Simpson and his co-conspirators planned a robbery, lured Mr. Fromong and Mr.
5 Beardsley to a small hotel room, held the men at gunpoint and removed \$100,000 worth of
6 sports memorabilia from the room. Mr. Simpson has failed to show any prejudice as a
7 result of counsel's failure to provide the correct jury instructions. Consequently, Mr.
8 Simpson's claim is denied.

9
10 **Ground 9: Failure to Object to Judicial Misconduct, Prosecutorial Misconduct**
11 **and Admission of Prejudicial Evidence.**

12 Mr. Simpson claims trial and appellate counsel were ineffective for failing to object
13 to judicial misconduct, prosecutorial misconduct and the admission of prejudicial evidence.
14 Mr. Simpson's claim is denied because he has failed to demonstrate counsel's performance
15 fell below an objective standard of reasonableness.

16
17 **Judicial Misconduct**

18 Mr. Simpson claims the trial judge's pre-trial explanation of circumstantial evidence
19 to the jury was improper because the judge suggested that prior bad acts can be considered
20 in determining whether the State had met its burden. Mr. Simpson argues trial counsel
21 should have objected to the instruction from the court.

22 At the beginning of trial, the court provided the following circumstantial evidence
23 instruction:

24 Circumstantial evidence is testimony or exhibits which are proof of a
25 particular fact from which, if proven, you may infer the existence of a second
26 fact. And here's quick example: All right. I have three dogs, and this is one of
27 them. This is Magic the dog. He's a very nice dog, all right, but Magic has a
28 shoe problem. So I go walking into my family room one day. My other two
dogs are nowhere to be found. Magic's in there and he has one of my brand
new shoes in his mouth and he's chewing it and pieces are flying. I'm
watching him do it. I'm an eyewitness. That's direct evidence. Throw away

1 the shoe, put him in a nice doggy time-out. Weeks go by, everything's great,
2 no problems until another day when I go walking into the family room.
3 Magic's in the corner, his head's down, his tail is between his legs and across
4 the room there's a shoe. And the other two aren't there. And between the dog
5 and the shoe there are a couple of pieces, and there are pieces missing from
6 the shoe. And then when I get real close to the dog, right here in his fur,
7 there's a piece of my shoe sitting there. Now, nobody's in there chewing on
8 anything. Nobody's in there doing anything. But if I put it altogether, the
9 demeanor of the dog, there's no other dogs there, there's a shoe with missing
10 pieces, and there are pieces right here and across the room, that's all
11 circumstantial evidence that Magic the dog has once again chewed on my
12 shoe.

13 Trial counsel did not lodge an objection with the court regarding this instruction to the jury.

14 Prior to deliberation, the trial court instructed the jury:

15 The evidence you are to consider in this case consists of the testimony of the
16 witnesses, the exhibits and any facts admitted or agreed to by counsel. There
17 are two types of evidence, direct and circumstantial. Direct evidence is
18 testimony of a person who claims to have personal knowledge of the
19 commission of the crime which he has been charged, such as an eyewitness.
20 Circumstantial evidence is proof of a chain of facts and circumstances which
21 tend to show whether the defendants are guilty or not guilty.

22 Jury Instruction 34.

23 Mr. Simpson fails to show how the court's explanation of circumstantial evidence
24 suggested to the jury that prior bad acts are permissible in determining guilt. The judge
25 used a folksy personal explanation of direct and circumstantial evidence. The example
26 accurately reflected the difference between the two types of evidence and did not suggest
27 that the prior bad act of the shoe chewing was part of circumstantial evidence. Additionally,
28 a more concise and direct explanation of circumstantial evidence was provided to the jury
prior to deliberation in Jury Instruction 34.

Mr. Simpson also raises concerns that the judge compared him to an animal. He cites
to Jones v. State, 113 Nev. 454, 469, 937 P.2d 55, 65 (1997), where the Nevada Supreme
Court found that comparing a defendant to a rabid animal constituted prosecutorial
misconduct. In this case, the court did not make any direct comparison to Mr. Simpson to
warrant counsel objecting to the instruction, nor did the judge draw any improper
comparison between Mr. Simpson and her shoe-loving pet. The content of the court's

1 instruction were a far cry from Jones where the prosecutor inferred Mr. Jones was a “rabid
2 animal.”

3 Mr. Simpson has also failed to show prejudice. The jury considered all of the
4 evidence presented at trial, much of which was direct evidence of the crime. There were
5 audio recordings of the events as they unfolded. Several witnesses testified that Mr.
6 Simpson solicited their help and asked two of his co-conspirators to bring weapons the
7 night of the recovery. Mr. Simpson has failed to demonstrate how counsel’s failure to object
8 to the circumstantial evidence instruction given by the judge prior to the start of trial
9 resulted in prejudice. As a result, Mr. Simpson’s claim regarding ineffective assistance of
10 counsel for failure to object to judicial misconduct is denied.

11 **Prosecutorial Misconduct**

12 Mr. Simpson asserts the prosecutors’ opening statement and closing arguments to
13 the jury were intended to persuade the jury to convict Mr. Simpson through his prior bad
14 acts regarding the murder of Nicole Brown Simpson and Ronald Goldman and subsequent
15 wrongful death suits. Mr. Simpson argues counsel was ineffective for failing to object
16 during the State’s opening statement and closing arguments.

17 **Improper Argument and Evidence Regarding Character**

18 Mr. Simpson claims the prosecutor’s opening statement and closing
19 arguments established a theme that a jury should convict Mr. Simpson because of his prior
20 bad acts associated with the murder of Nicole Brown and the resulting wrongful death
21 lawsuits. He believes his attorney was ineffective for failing to object to the prosecutorial
22 misconduct. To prevail on a claim of prosecutorial misconduct, the defendant must
23 establish: 1) the prosecutor’s conduct was improper; and 2) if the conduct was improper,
24 that the improper conduct warrants reversal. Valdez, 124 Nev. 1172, 1188, 196 P.3d 465,
25 476 (2008). Prosecutorial misconduct may be harmless error where evidence of guilt is
26 overwhelming. Lay v. State, 110 Nev. 1189, 1194, 886 P.2d 448, 451 (1994).
27
28

Specifically, Mr. Simpson complains of a quote from The Scarlett Letter used in the prosecutor's opening statement. Mr. Simpson acknowledges that the prosecutor did not explicitly mention Nathaniel Hawthorne's The Scarlett Letter, but quoted from the book, "That no man for any considerable period of time can wear one face to himself and another to a multitude without finally getting bewildered as to which may be the true." The prosecutor also discussed Mr. Simpson's "true face and character" and described the trial as the "final chapter" in a pattern. Mr. Simpson argues the quote is well known and implied Mr. Simpson had the ability to hide his "true guilt" from the public. The prosecutor also made numerous references to the Goldmans. Trial counsel did not object.

The State argued that the civil judgment was relevant to show motive on Mr. Simpson's part. Prior to trial, the State argued the civil judgment was relevant to a certain extent to establish motive on Mr. Simpson's part:

You're right, Judge. . . .Our issues are with the civil judgment, and the civil judgment is entitled to Fred Goldman as executor of the estate, or something like that, Ron Goldman versus O.J. Simpson. And Mr. Simpson made all of this relevant, and he did by his statements throughout this case. We have audio recordings, and I listed some of those in the transcripts, many of which he talks about these turnovers. He talks about Mike Gilbert, his former agent, takes property. Now, you know, Mr. Simpson is going to say that he gave it to him, whatever. The fact of the matter is that the estate is entitled to collecting their judgment, period. Throughout these proceedings, Mr. Simpson will send interrogatories, do you own any personal property? The answer is no, I do not own personal property, and so that directly conflicts with his testimony that this is my property, because he said under oath, under penalty of perjury that he had no property except for his house and contents, and so it's Mr. Simpson who made this relevant, Judge.

Transcript of Proceedings 62-63 (March 7, 2008).

Mr. Galanter argued extensively for exclusion of the civil judgment:

No, I'm—I'm not arguing with that. You know, I listened to the commentators all the time discuss how everybody knows it [civil judgment], but it's not evidence in this trial because it's not probative as to whether a robbery or a kidnapping occurred, and that's what should take place inside.

Id. at 65.

1 The court ruled on this issue:

2 And I heard, I heard you the first time. Here's what I'm inclined to do.
3 Certainly, if we get to the point of letting the issue of the civil judgment, it just
4 has to be called a civil judgment. We don't have to—there's not—we deal with
5 people with issues and narrow them in what we talk about to prevent any
6 spillover or prejudice from anything, so at this point, until I get more
7 information, based on what I know now and based on what the State's told
8 me, if their theory is that this had something to do with property that should
9 have gone somewhere with regards to the civil judgment, and this is what I
10 believe you've said to---in your papers, that if this was---this was property
11 that was being deflected and prevented from being taken in the civil judgment
12 and that's why it went though what it went through, then I think it's going to
13 be relevant and something about a civil judgment is going to have to come in.

14 Id., at 64.

15 The court ruled the Goldman judgment could be admitted to establish potential
16 motive on Mr. Simpson's part. In the State's opening statement, the prosecutor told the
17 jurors that Mr. Simpson desired to keep Fredric Goldman from executing his civil judgment
18 for the death of Ronald Goldman.

19 To prevail on a claim of ineffective assistance of counsel, Mr. Simpson must show
20 counsel's performance fell below an objective standard of reasonableness and that counsel's
21 deficient performance resulted in prejudice. Mr. Simpson has failed to demonstrate how
22 counsel's performance fell below an objective standard of reasonableness. Prior to trial,
23 Mr. Galanter filed a Motion in Limine to prohibit the prosecution from referring to the
24 California murder case and wrongful death suit. The record reflects Mr. Galanter
25 vigorously argued that any reference to the civil judgment be precluded from trial because
26 civil judgment was irrelevant to Mr. Simpson's charges. The civil judgment, however,
27 began the chain of events that ultimately led to the robbery. Although defense counsel may
28 not have objected to every instance where the prosecutor mentioned the judgment, this
court cannot say that counsel acted below the standard for reasonably competent counsel.

Mr. Simpson has also failed to demonstrate prejudice. The jury heard extensive
witness testimony, as well as audio recordings, indicating Mr. Simpson planned and
solicited the help of his co-conspirators to obtain the property. The civil judgment from the
1990's was the genesis of the robbery -- the property was removed from Mr. Simpson's

1 house to ensure its safekeeping from the Goldman Estate. The plan took place in Las Vegas
2 to avoid collection concerns in California. The trial court limited the extent to which the
3 judgment could be discussed, but the story of the robbery makes little sense without the
4 larger picture. Additionally, even if the civil judgment was improperly mentioned during
5 trial, the State presented ample evidence supporting the jury's findings of guilt. Mr.
6 Simpson has failed to show the jury's verdict was improperly based on the civil judgment or
7 that had these comments been excluded at trial, it would have led to a different result.

8 9 **Introduction of Bad Character Evidence in Audio Recordings**

10 Mr. Simpson claims trial counsel was ineffective for failing to object to the
11 admission of bad character evidence contained on the audio recordings. Prior to admission
12 of bad act evidence, the proponent must bring a motion and request a hearing pursuant to
13 Petrocelli v. State, 101 Nev. 46, 692 P.3d 503 (1985). Mr. Simpson claims the State needed
14 to bring a Petrocelli motion to determine if: 1) the incident was relevant to the crime
15 charged; 2) the act was proven by clear and convincing evidence; and 3) the probative value
16 of the evidence was not substantially outweighed by the danger of unfair prejudice. Tinch
17 v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). Defense counsel stipulated to
18 the admission of the recordings without demanding a Petrocelli hearing or a limiting
19 instruction.

20 Mr. Simpson raises concerns about several comments made by Mr. Beardsley on the
21 recordings. For example, on one of the recordings Mr. Beardsley tells Mr. Riccio that
22 Christy Prody is "stupid and a cokehead and let her cat die of starvation while on a coke
23 binge, and even though she and Simpson fight like cats and dogs, she stands up to him."
24 Mr. Beardsley also mentions that Mr. Simpson does not pay his bills, that he's a liar and
25 that he hit Mike Gilbert for no reason.

26 Mr. Simpson references several statements from Lieutenant Nichols on the
27 audiotape after the robbery, such as Mr. Simpson is a "jackass" and that he is "mad about
28 the verdict." Detective LaNeve also comments on the tape, "There's no doubt in my mind,

1 he did it,” and “People are evil sometimes.”

2 Mr. Galanter testified at the post-conviction hearing that he did not ask to redact the
3 tapes because he believed the tapes were more helpful than harmful in proving Mr.
4 Simpson’s lack of intent to commit a crime. Preparation for a case is a strategic process and
5 strategy decisions are “virtually unchallengeable absent extraordinary circumstances.”
6 Doleman, 112 Nev. at 848, 921 P.2d at 281. Mr. Galanter believed that if Mr. Simpson
7 testified it would be “suicide.” He needed a way to get in Mr. Simpson’s side of the story
8 without putting Mr. Simpson on the stand to face cross-examination. He felt agreeing to
9 the admission of the tapes would be the best way to do so. On the tapes, Mr. Simpson
10 repeatedly mentioned that all he wanted was his stuff back, and he did not want anything
11 else. On the tapes, he did not mention guns. Mr. Galanter was happy the tapes had
12 audibility problems because of concerns that some things might be worse if the tapes were
13 clearer. Mr. Galanter testified at the post-conviction hearing that he believed the
14 comments on the tapes were beneficial to show the bad character of each of the men
15 making the negative comments. He also believed that because of Mr. Simpson’s notoriety,
16 all of the jurors would already know that Mr. Simpson had been accused of murder and
17 acquitted. Additionally, Mr. Galanter had an agreement with the State that they would not
18 play all the tapes, although the tapes in their entirety did go back to the jury during
19 deliberation.

20 In reviewing the statements on the tapes, some statements would have been ripe for
21 redaction. Defense counsel made a tactical decision to allow the entirety of the tapes in.
22 Mr. Simpson cannot show that counsel’s decision to admit the entirety of the tapes fell
23 below the standard of reasonably competent counsel as counsel made a rational, tactical
24 decision when stipulating to the admission of the tapes.

25 Even if this court found defense counsel ineffective for failing to request the tapes be
26 redacted, Mr. Simpson has failed to establish prejudice. Overwhelming trial testimony
27 from several witnesses established that Mr. Simpson planned the recovery and solicited
28 help from six co-conspirators. Furthermore, Mr. Simpson asked Mr. Alexander and Mr.

1 McClinton to bring guns with them the night of the recovery. Video surveillance showed
2 the men walking out of the Palace Station with the property in hand. The jury heard Mr.
3 Simpson direct the men to take the property from the hotel room and heard subsequent
4 conversations from Mr. Simpson indicating he would need legal assistance because he
5 “fucked up.” The evidence is clear that Mr. Simpson planned the recovery of his property in
6 advance and lured the sellers into a hotel room for the sole purpose of taking property by
7 whatever means necessary. Mr. Simpson has failed to show counsel was ineffective for
8 stipulating to admission of the tapes or that had the tapes been redacted, a different result
9 would have been had at trial.

10 **Improper Reference to Facts Not in Evidence**

11 Mr. Simpson asserts the prosecutor referred to facts not in evidence in the
12 State’s opening statement and trial counsel was ineffective for failing to object to these
13 statements. In the State’s opening statement, the prosecutor told the jury the Goldman
14 Estate sent interrogatories to Mr. Simpson asking him to identify property owned by him.
15 Under oath, Mr. Simpson failed to mention the property he later reclaimed from the Palace
16 Station. Mr. Simpson asserts the State was required to obtain a pre-trial ruling on this
17 issue. Petrocelli, 101 Nev. at 51, 692 P.2d at 507-08. Mr. Simpson also claims these
18 statements resulted in prejudice because it portrayed Mr. Simpson to be malicious and
19 dishonest.

20 Mr. Simpson has failed to demonstrate how trial counsel was ineffective for failing to
21 object to these statements. At the time of opening statements, the prosecution intended to
22 introduce evidence of the interrogatories done in February of 2007 relative to the collection
23 efforts of the Goldman Estate. The prosecution intended to call Ron Cook to testify that
24 Mr. Simpson did not list any of the memorabilia on those interrogatories. After extensive
25 argument, the court prohibited the prosecution from introducing evidence of the
26 interrogatories at trial, and the State decided not to call Mr. Cook.

27 With regard to the issue of the interrogatories, Mr. Simpson cannot show that his
28 attorney acted below the standard for reasonably competent counsel. Defense counsel

1 argued extensively and successfully to keep out the interrogatories during trial. Although
2 the State mentioned the interrogatories in opening statements, the jurors were informed
3 that statements by counsel do not constitute evidence in the case. Counsel prevented the
4 jury from hearing any evidence regarding the answers to interrogatories.

5 Mr. Simpson has also failed to show that had the State been prevented from
6 mentioning the Goldman judgment, a different result would have been had at trial. The
7 State presented evidence of Mr. Simpson's involvement in the property recovery. The jury
8 considered the audio recordings and witness testimony that demonstrate Mr. Simpson was
9 involved from the very beginning. Throughout trial, the State presented evidence that
10 showed Mr. Simpson lured the victims to the Palace Station and used his co-conspirators to
11 obtain the property. Mr. Simpson has failed to demonstrate how counsel's performance
12 was unreasonable, or, had counsel acted reasonably, he would have had a different outcome
13 at trial.

14 Failure of appellate counsel to raise this issue under a plain error standard also did
15 not fall below the standard for effective assistance of appellate counsel. Furthermore, the
16 issue had little likelihood of success on appeal, so Mr. Simpson was not prejudiced by the
17 failure of appellate counsel to raise this claim.

18
19 **Improper Vouching for State's Case and by Witnesses**

20 Mr. Simpson claims the State vouched for the strength of their case several
21 times during trial by referring to the events as a robbery and that Detective Caldwell
22 repeatedly vouched for witnesses and gave improper opinions regarding credibility. Mr.
23 Simpson asserts trial counsel was ineffective for failing to object.

24 Mr. Simpson claims counsel failed to object to the use of the word "robbery"
25 imprinted on State's Exhibit 78. During the trial, defense counsel objected numerous times
26 to the use of the word "robbery." For example, during redirect of Mr. Fromong:

27 Mr. Roger: Between the time of the robbery on September 13, 2007
28

1 Mr. Grasso: Objection as to the robbery, Judge the robbery.

2 Mr. Roger: He can call it alleged. I'm calling it a robbery, Mr.

3 Grasso.

4 Mr. Grasso: Well, that's a legal conclusion, Judge. That's what the

5 (sic) here for.

6 Court: Mr. Roger, please, just at the time of the incident, at the

7 time of the event...on September 13; ask it...

8 Mr. Roger: At the time that the Defendant came in with a bunch of

9 people with guns and took your property.

10 Mr. Grasso: I move to strike that question, Judge.

11 Court: I'm going to ask that the ladies and gentlemen of the jury

12 please disregard that last question, and I'm going to ask

13 Mr. Roger to please rephrase.

14 Mr. Simpson's defense throughout trial was he did not commit a robbery. Trial counsel

15 focused on this defense in their opening, their cross-examination of the State's witnesses

16 and in their closing. This court cannot find counsel ineffective for failing to object to

17 certain limited uses of the word "robbery" given that Mr. Simpson was charged with

18 robbery and defense counsel frequently objected to the use of the word "robbery."

19 Mr. Simpson also claims vouching occurred during the testimony of Detective

20 Caldwell and counsel was ineffective for failing to object. Detective Caldwell testified:

21 Caldwell: And now we have everybody in Room 1203. Switch sides

22 for a minute. We now have individuals leaving, and these

23 are the photographs of the subjects leaving with all the

24 property that they stole.

25 Bryson: Objection, Your Honor, as to the legal conclusion that it's

26 stolen. We're not there yet.

27 Owens: Well, I don't know if we're there. The detective may be

28 there.

29 Court: Right. And- -

30 Mr. Owens: I mean he took certain actions in this investigation based

31 on - -

1 Court: Right. I mean based on his—based on your investigation,
2 Detective, this is what you believe happened; is that
correct?

3 Caldwell: Yes, ma'am. That's correct.

4 Court: All right. Then your objection is overruled. Go ahead.

5 Detective Caldwell also opined Mr. Riccio was very honest about what happened.
6 Certain aspects of Detective Caldwell's testimony could be considered improper vouching
7 that likely would have been sustained upon an objection; however, Mr. Simpson cannot
8 demonstrate prejudice in this case. Trial attorneys, however, are not required to object to
9 every objectionable piece of testimony at trial. Objections are a matter of strategy in the
10 discretion of the trial attorney, and this court cannot find counsel's performance on this
11 issue below the standard for competent counsel.
12

13 Even assuming counsel's performance fell below the standard of care, Mr. Simpson
14 cannot show prejudice. The evidence against Mr. Simpson at trial was quite overwhelming.
15 Mr. Simpson cannot show he would likely have enjoyed a different outcome at trial even if
16 counsel objected to Detective Caldwell's comment that Mr. Riccio was honest.
17

18 Failure of appellate counsel to raise this issue under a plain error standard also did
19 not fall below the standard for effective assistance of appellate counsel. Furthermore, the
20 issue had little likelihood of success on appeal, so Mr. Simpson was not prejudiced by the
21 failure of appellate counsel to raise this claim.
22
23
24

25 **Improper Opinion Testimony and Witness Tampering**

26 Mr. Simpson claims Detective Caldwell's testimony regarding Mrs. Scotto
27 possibly tampering with witnesses prejudiced Mr. Simpson because the jury knew Mr.
28

1 Scotto was one of Mr. Simpson's best friends. Mr. Simpson claims trial counsel was
2 ineffective for allowing this testimony to come in at trial.

3 At trial, Detective Caldwell testified that Mrs. Scotto was removed from the
4 preliminary hearing because she suspected of witness tampering. Outside the presence of
5 the jury, defense counsel made a formal objection and moved for a mistrial on the basis that
6 Detective Caldwell testified that Mr. Scotto was removed from the preliminary hearing.
7 Trial counsel asserted this testimony was unfavorable because the jury was aware of the
8 close friendship between Mr. Simpson and Mr. Scotto. The jury was informed at the
9 beginning of trial that Mr. Scotto and Mr. Simpson were great friends.
10

11 The court denied defense's counsel's request for a mistrial. The court then
12 instructed the jury, "You are to disregard any testimony from Detective Caldwell regarding
13 allegations that Mr. Scotto was removed from the preliminary hearing and why he was
14 allegedly removed from the courtroom; totally disregard." Reporter's Transcript Trial by
15 Jury, Day 12, Vol. 1, Testimony of Detective Caldwell 239 (Oct. 1, 2008)
16

17 Later counsel clarified that Detective Caldwell referred to Mrs. Scotto and not to Mr.
18 Scotto. The trial court then instructed the jury that they could consider Detective Caldwell's
19 testimony. Mr. Simpson asserts that the jury was allowed to consider hearsay evidence that
20 Mrs. Scotto tampered with witnesses and inferred Mr. Scotto's involvement. Mr. Simpson
21 speculates the jury would impute Mrs. Scotto's actions to Mr. Simpson because Mrs. Scotto
22 and Mr. Scotto would be viewed as one unit. Mr. Simpson also claims the jury likely
23 believed Mr. Scotto acted on Mr. Simpson's behalf in tampering with the witnesses and,
24 therefore, the testimony impacted Mr. Simpson's defense.
25

26 Mr. Simpson's counsel objected when the issue came up and requested a limiting
27 instruction. Counsel cannot be found ineffective for their performance relative to this issue.
28

1 Again, even if counsel fell below the standard of care by not objecting when the judge
2 reversed her decision regarding the jury considering evidence relative to Mrs. Scotto, Mr.
3 Simpson cannot show prejudice. The evidence in this case was overwhelming and
4 supported the jury's verdict.

5 Failure of appellate counsel to raise this issue under a plain error standard also did
6 not fall below the standard for effective assistance of appellate counsel. Furthermore, the
7 issue had little likelihood of success on appeal, so Mr. Simpson was not prejudiced by the
8 failure of appellate counsel to raise this claim.
9

11 **Improper Disparaging of Defense by Prosecution**

12 Mr. Simpson asserts that the prosecution improperly made disparaging
13 remarks regarding Mr. Simpson's defense. As a result, Mr. Simpson alleges that defense
14 counsel was ineffective in failing to object to these remarks.

15 During closing arguments, the prosecutor remarked that it was "hypocritical" to call
16 the victims thieves and that the defense theory was a "spin." In response to the defense's
17 closing argument, the prosecutor remarked:
18

19 And so they attacked these individuals that came up here, his co-defendants.
20 They attacked them and talked about how they're all trying to profit on the
21 case. You may recall if you look at the tapes, Mr. Simpson talks and talks and
22 talks about money and profit and deals and books. He's right in there with
23 them and these are the guys. These are the people that he surrounds himself
24 with. These are the people that he does deals with. This is his life. Half the
25 people in the courtroom make their living trading on information and the
26 notoriety of Mr. Simpson. It's hypocritical to talk about these victims as
27 though they're thieves when they're hiding property from Mr. Simpson. It's
28 hypocritical to talk about them as individuals that are trying to have profit
motive in this case; what a joke.

Reporter's Transcript Trial by Jury, Day 13, Vol. 1, State's Rebuttal Closing 147 (Oct. 2,
2008).

Disparaging defense counsel or tactics constitute prosecutorial misconduct. Butler v.

1 State, 120 Nev. 879, 898-99, 102 P.3d 71, 84-85 (2004). Throughout trial, Mr. Simpson
2 cross-examined several witnesses and exposed their desire to profit from the recovery. At
3 trial, the defense focused on exposing the bias of each of the witnesses by pointing out their
4 desire to profit off the recovery. The facts of this case make it clear that everyone involved
5 had a financial motive.

6 The prosecution impermissibly disparaged the defense theory. Counsel failed to
7 object to the disparaging remarks. Nonetheless, Mr. Simpson has failed to show how
8 counsel's failure to object resulted in prejudice. The jury heard the testimony of several
9 witnesses and listened to audiotapes from before, during and after the recovery. The
10 evidence clearly demonstrates Mr. Simpson's role in the recovery. Mr. Simpson's claim is
11 denied.
12

13 Failure of appellate counsel to raise this issue under a plain error standard also did
14 not fall below the standard for effective assistance of appellate counsel. Furthermore, the
15 issue had little likelihood of success on appeal, so Mr. Simpson was not prejudiced by the
16 failure of appellate counsel to raise this claim.
17
18

19 **Ground 10: Failure to Maintain Mr. Simpson's Innocence**
20

21 Mr. Simpson claims trial counsel was ineffective for conceding guilt during his trial.
22 Specifically, Mr. Simpson refers to Mr. Grasso's statement made during an objection, "It's a
23 tail end robbery." This claim is denied because evidence at the evidentiary hearing
24 established this statement was a transcription error, and Mr. Grasso did not concede Mr.
25 Simpson's guilt.

26 Regardless of the weight of the evidence against the defendant, counsel is ineffective
27 when counsel concedes a defendant's guilt during trial if the defendant has entered a not
28 guilty plea and if the defendant has not consented. Jones v. State, 110 Nev. 730, 738, 877

1 P.2d 1052, 1057 (1994). In Jones, the court held that counsel's closing statement that "the
2 evidence shows beyond a reasonable doubt that the defendant did kill" the victim fell below
3 an objective standard of reasonable representation. Id. Counsel conceded Mr. Jones's guilt
4 despite Mr. Jones's earlier plea of not guilty and without Mr. Jones's consent.

5 Mr. Simpson argues trial counsel conceded his guilt when counsel objected to State's
6 Exhibit 4 based on the use of the word "robbery." At trial, Mr. Simpson faced twelve
7 charges. Counts 7 and 8 charged robbery with a use of a deadly weapon.

8 The relevant portions of the transcript of this allegation are as follows:

9 Mr. Grasso: Well, I mean, we would agree -- we made an objection
10 before, Judge. I think that there's legal conclusions when
11 Mr. Roger says "this robbery" or has the word "robbery"
written on the diagram. I think that's unnecessary.

12 The Court: Okay. And Mr. Roger?

13 Mr. Roger: That's the allegation. It's robbery. Ultimately, these
people have to decide whether it's robbery.

14 Mr. Grasso: It's a tail end robbery.

15 The Court: Thank you very much. At this point it's -- they're all
16 admitted in the condition in which they're admitted.
Thank you.

17 Although the trial transcript reflects Mr. Grasso stated, "it's a tail end robbery," it
18 was later revealed at the evidentiary hearing that this was a transcription error. Mr. Grasso
19 testified what he said was "alleged robbery." Mr. Grasso also denied using the term "tail
20 end robbery," saying he did not even know what that meant. Mr. Grasso adamantly
21 insisted at the evidentiary hearing he would never have made a statement conceding Mr.
22 Simpson's guilt.

23
24 Throughout trial, defense counsel consistently pursued the defense that Mr.
25 Simpson did not commit a robbery because he was retrieving property that was rightfully
26 his. In the defense's opening statement, counsel explained Mr. Simpson did not commit a
27 robbery because he was retrieving property that was rightfully his. Trial counsel engaged in
28

1 vigorous cross-examination of Mr. Gilbert and Mr. Fromong to establish that these items
2 originally belonged to Mr. Simpson. Furthermore, in the conversation that gives rise to this
3 claim, trial counsel objected to the State's exhibit because using the word "robbery"
4 improperly assumed guilt.

5 Throughout the defense's opening and cross-examination of witnesses, the defense
6 reiterated Mr. Simpson did not commit a robbery because he was retrieving his property.

7 During closing argument, defense counsel stated:
8

9 And O.J. says what are you talking about? There are no guns, there was no
10 robbery. I was trying to get my property back. Now he says it to the people in
11 the car with him. And when they get back to the Palms Hotel, you know,
12 when the -- we've seen all the video of the valet, and we've heard Mr.
13 Cashmore tell us, you know, what was O.J. Simpson saying - - listen,
whatever's not mine, give it back, take it back. Again, the reason that is so
important is because before somebody is branded a criminal in the United
States of America, their intention has got to be to commit a criminal act.

14 Reporter's Transcript Trial by Jury, Day 13, Vol. 1, Defense Closing 62 (Oct. 2, 2008). The
15 record demonstrates clearly Mr. Simpson's defense was he did not commit a robbery
16 because he lacked the criminal intent.

17 Mr. Grasso testified credibly at the evidentiary hearing that the transcription of "it's
18 a tail end robbery" was incorrect. His explanation that he said "an alleged robbery" mirrors
19 the defense's position throughout the trial. Mr. Simpson has failed to demonstrate Mr.
20 Grasso's performance fell below an objective standard of reasonableness and has failed to
21 show he suffered any prejudice. Mr. Simpson has failed to provide any evidence supporting
22 his claim for ineffective assistance of trial counsel; consequently, this claim is denied.
23
24

25 **Ground 11: Failure to Present Testimony on the Issue of Property Ownership**
26

27 Mr. Simpson argues trial counsel was ineffective for failing to present expert
28 testimony and other evidence to prove he was the owner of the memorabilia. Additionally,

1 Mr. Simpson argues trial counsel failed to challenge the State's evidence that Mr. Fromong
2 was the owner of the property. Ownership of property does not justify the taking of
3 property from another by force. Consequently, an expert witness would not have bolstered
4 or contributed to Mr. Simpson's defense. Therefore, this claim is denied.

5 Mr. Simpson asserts he did not commit a robbery because he had a good faith belief
6 that he owned this property. Specifically, Mr. Simpson argues trial counsel should have
7 presented testimony that he had reasonable expectations that this property was exempt
8 from the California judgment and he continued to be the rightful owner of the property.

9
10 To establish a claim of ineffective assistance of counsel, a petitioner must show: (1)
11 that counsel's performance was beneath "an objective standard of reasonableness," and (2)
12 that but for counsel's deficiency, a different result would have been had at trial. Strickland,
13 466 U.S. at 694; Rubio, 124 Nev. at 1040, 194 P.3d at 1229. "A strategy decision such as
14 who should be called as a witness is a tactical decision that is virtually unchallengeable
15 absent extraordinary circumstances." Doleman, 112 Nev. at 848, 921 P.2d at 281. In
16 Nevada, robbery is considered a general intent crime. A good faith belief that one owns
17 property does not nullify the intent to take property from another by force. Hickson v.
18 State, 98 Nev. 78, 79, 640 P.2d 921, 921 (1982).

19
20 During the trial, defense counsel introduced and attempted to introduce evidence
21 regarding Mr. Simpson's ownership of the property. Mr. Galanter informed the court he
22 wished to question Mr. Fromong about whether or not he stole the property from Mr.
23 Gilbert. Ruling on this issue was deferred by the trial judge until Mr. Fromong was
24 scheduled to take the stand. Prior to the cross-examination of Mr. Fromong, a bench
25 conference was held. Mr. Galanter claims the trial judge prevented him from questioning
26 Mr. Fromong about whether he stole the property. Mr. Simpson argues counsel acted
27
28

1 unreasonably for failing to put on the record the court's ruling, and claims counsel was
2 ineffective for failing to present expert testimony to establish his property was exempt from
3 the California judgment.

4 Mr. Simpson has failed to show any failure on counsel's part resulted in prejudice.
5 Ownership of property is not a defense to robbery in the State of Nevada. Providing expert
6 testimony that Mr. Simpson's property was exempt from the California judgment would not
7 have changed the outcome of the trial. Evidence at trial demonstrates Mr. Simpson
8 solicited the help of multiple co-conspirators and used deadly force to help retrieve his
9 property. The men also took property that had never belonged to Mr. Simpson. Thus, Mr.
10 Simpson's claim is denied.
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14 **Ground 12: Failure to Request Jury Instruction On Citizen's Arrest**

15 Mr. Simpson asserts trial counsel was ineffective for failing to request a jury
16 instruction on citizen's arrest. Because deadly force during the commission of a citizen's
17 arrest is unreasonable as a matter of law, Mr. Simpson's claim is denied.

18 Mr. Simpson claims he was within his rights to retrieve his property, and counsel
19 was ineffective for failing to request an instruction on citizen's arrest. A private individual
20 may arrest another person when 1) an offense was committed or attempted in the arrestor's
21 presence; 2) when the person committed a felony offense, although outside the arrestor's
22 presence; and 3) when a felony has been committed and the arrestor has reasonable cause
23 to believe that the person to be arrested has committed it. Nev. Rev. Stat. §171.126 (2011).
24 The Nevada Supreme Court has ruled a private person may only use force that is reasonable
25 and necessary under the given circumstances. State v. Weddell, 118 Nev. 206, 214, 43 P.3d
26 987, 991 (2002). Additionally, "the use of deadly force is, as a matter of law, unreasonable
27 unless the arrestee poses a threat of serious bodily injury to the private arrestor or others."
28 Id. at 214, 43 P.3d at 992.

1
2 Evidence at trial shows Mr. Simpson did not engage in a valid citizen's arrest
3 because he used excessive force by soliciting multiple co-conspirators and by asking Mr.
4 Alexander and Mr. McClinton to bring weapons. Mr. Simpson failed to provide any
5 evidence indicating Mr. Beardsley or Mr. Fromong posed a threat of serious bodily harm.
6 Mr. Riccio testified that he informed the men prior to the robbery that Mr. Beardsley and
7 Mr. Fromong had no weapons. Mr. Simpson also failed to call and alert the police of a
8 citizen's arrest.

9 Mr. Simpson has failed to show counsel acted unreasonably by declining to present a
10 citizen's arrest defense. An attorney has a duty to consult with the client regarding
11 important decisions. Florida v. Nixon, 543 U.S. 175, 187 (2004). This obligation, however,
12 does not require counsel to obtain the defendant's consent for every tactical decision made.
13 Taylor v. Illinois, 484 U.S. 400, 418 (1988). Not requesting a jury instruction on citizen's
14 arrest was a tactical decision.

15 This court cannot conclude counsel was ineffective for failing to pursue a citizen's
16 arrest defense when the evidence shows no citizen's arrest took place. Mr. Simpson did not
17 call the police, and the group of men used deadly force. Given the evidence, the court
18 would likely not have allowed such an instruction. Second, if the court had allowed such an
19 instruction, Mr. Simpson may have lost credibility with the jury.

20 Evidence at trial indicates Mr. Simpson used excessive force when he solicited help
21 from multiple co-conspirators, guns were present and neither Mr. Simpson nor any of his
22 co-conspirators called the police. There is no evidence indicating Mr. Fromong or Mr.
23 Beardsley posed a threat of great bodily harm. Mr. Simpson has failed to provide any
24 factual basis to support his claim that a citizen's arrest constituted a viable defense.
25 Consequently, he has failed to show counsel's performance was unreasonable or that had
26 counsel acted reasonably, a different result would have been had at trial. This claim is
27 denied.
28

Ground 13: Failure to Present Expert Testimony

Mr. Simpson claims trial counsel was ineffective for failing to provide expert testimony establishing physiological reasons to explain why Mr. Simpson did not observe the use of weapons. Because witness testimony indicates Mr. Simpson requested two of his co-conspirators to carry weapons, Mr. Simpson's claim is denied.

Under Nevada law, the State needed to prove Mr. Simpson was aware of the firearms for the weapon enhancement. Jury Instruction 27 stated:

If more than one person commits a crime and one of them uses a deadly weapon in the commission of that crime, each may be convicted of using the deadly weapon, even though he did not personally himself use the weapon. An unarmed defendant cannot be subject to a sentence enhancement for use of a deadly weapon by an armed defendant unless the armed defendant uses the deadly weapon in the commission of the offense, and the unarmed defendant had knowledge of the use of a deadly weapon and is liable as a principal for the offense that is sought to be enhanced.

Mr. Simpson argues trial counsel was ineffective for failing to present expert testimony establishing physiological reasons why Mr. Simpson might not perceive a gun in the Palace Station room. Mr. Simpson claims that prior head injuries, in conjunction with his intoxication level, prevented him from perceiving guns were used during the incident. Mr. Simpson argues that an expert would have substantiated the claim that he was not aware guns were present in the Palace Station room.

"A strategy decision, such as who should be called as a witness, is a tactical decision that is virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. 843, 848, 921 P.2d 278, 281 (1996) (quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990)). Trial counsel reasonably believed that an expert was not needed because the evidence indicated that Mr. Simpson was aware that guns would be used. Mr. Galanter testified at the evidentiary hearing that he made a tactical decision against presenting

1 expert testimony because he felt the defense would lose credibility with the jury due to the
2 overwhelming evidence demonstrating Mr. Simpson was aware of the guns. Also, trial
3 counsel cross-examined each witness present the night of the incident about whether or not
4 Mr. Simpson was aware guns were present. The evidence does not support a finding that
5 trial counsel's performance fell below the standard of reasonably competent counsel.

6 Even if counsel's conduct fell below the level of care expected of competent counsel,
7 Mr. Simpson has nevertheless failed to show that the jury's verdict is unreliable and that he
8 was prejudiced. At trial, Mr. Alexander testified that Mr. Simpson inquired about getting
9 some "heat" the night of the incident:
10

11 Mr. Alexander: O.J. said, Hey, man, there's some people in town that
12 stole some things that belong to me, and I need to get
13 them back. You know, I need a couple guys to -- I need
14 somebody to watch my back. Can you watch my back?
And I said, No problem. You know I got your back, Juice.

15 Mr. Owens: What did he say?

16 Mr. Alexander: He said, Okay. Do you think you could get some heat? And
17 when he said do you think you could get some heat, my
18 friend Spencer automatically spoke up and said, Hey,
19 man, you know, no problem. I got plenty of heat. You
20 know, I'm licensed to carry a gun. You know, you want to
see my permit? And he took the permit out and showed it
to O.J.

21 Mr. Owens: What did Mr. Simpson say?

22 Mr. Alexander: He said, Yeah, man. You know, I just need you-all to
23 bring the guns, but, you know, you don't have to take
24 them out. You know, just, you know, put them in your
waistbands.

25 Additionally, Mr. Alexander testified that right before they entered the room, Mr.
26 Simpson asked Mr. McClinton to take his gun out and put it in his hand. Mr. McClinton
27 testified Mr. Simpson said to "show them your gun and look menacing." Mr. Simpson
28

1 asked Mr. McClinton if he had pulled his "piece" out in the hall, referring to Mr.
2 McClinton's firearm. Furthermore, Mr. McClinton testified that he showed Mr. Simpson
3 his concealed weapons permit and told Mr. Simpson he had plenty of "heat." Mr. Simpson
4 asked him to bring his gun with him on the night of the incident. The evidence
5 demonstrates that Mr. Simpson was aware guns would be used in the robbery.

6 Mr. Simpson's argument that expert testimony was imperative to his defense is
7 highly speculative. While Mr. Simpson had been drinking, he did not appear impaired in
8 any of the audio or videotapes of the incident. Additionally, a significant amount of
9 evidence at trial supported the jury's finding that Mr. Simpson knew guns would be
10 involved in the robbery. Thus, Mr. Simpson's claim that trial counsel was ineffective for
11 failing to hire an expert on physiological reasons he might not have seen the guns is denied.
12

13 **Ground 14: Failure to Request Jury Instruction on Voluntary Intoxication**

14 Mr. Simpson claims trial counsel was ineffective for failing to request a jury
15 instruction on a voluntary intoxication defense as to the specific intent crimes. Mr.
16 Simpson's claim is denied because there is insufficient evidence to establish his intoxication
17 level, and Mr. Simpson's defense throughout trial was he lacked the criminal intent to
18 commit a crime because he was retrieving his personal property.

19 The defendant in a criminal proceeding is entitled to have the jury instructed on his
20 theory of the case if it finds support in the evidence. Nev. Rev. Stat. §175.161 (2011). A
21 voluntary intoxication defense is only appropriate for specific intent crimes, and a
22 defendant is entitled to this instruction if there is some evidence in support of the defense
23 theory of intoxication. Nevius v. State, 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985).

24 Mr. Simpson was charged with various specific intent crimes, including three counts
25 of conspiracy, two counts of first degree kidnapping with use of a deadly weapon and other
26 with use of deadly weapon charges. Mr. Simpson's defense throughout the trial was that he
27 did not have the requisite intent to take property belonging to another, but wanted to
28 obtain property he rightfully owned. Mr. Simpson's trial defense did not include

1 intoxication. Defense counsel objected to the admission of Mr. Simpson's intoxication at
2 trial:

3 Mr. Owens: And what is -- what was his attitude like when he would
4 call you?

5 Mr. Alexander: Anxious and a little tipsy. I think he was sitting at the bar
6 drinking, so I think he was becoming intoxicated.

7 Mr. Galanter: Objection, speculation.

8 The Court: All right. And that's sustained. And I guess he can
describe how he sounded. I don't know if you can't - -

9 Mr. Owens: I thought that's what he was doing, but - -

10 The Court: Well, with regards to what caused that, I don't think he
11 can say because he wasn't there to witness it.

12
13 Mr. Simpson was unable to show voluntary intoxication would have been a viable
14 defense theory. In order for a defendant "to obtain an instruction on voluntary intoxication
15 as negating specific intent, the evidence must show not only the defendant's consumption
16 of intoxicants, but also the intoxicating effect of the substances imbibed and the resultant
17 effect of the mental state pertinent to the proceedings. " Nevius, 101 Nev. at 249, 699 P.2d
18 at 1060. Trial evidence did not clearly support voluntary intoxication as a defense theory.

19 On September 13, 2007, Mr. Riccio met with Mr. Simpson at the Palms pool around
20 1:30 p.m. Mr. Ehrlich testified that everyone at the pool was drinking. There is no evidence
21 to indicate Mr. Simpson was so intoxicated that there was an effect on Mr. Simpson's
22 mental state. Weeks before this incident, Mr. Simpson began planning the retrieval of his
23 property. This plan was not spontaneous, but rather was a thought-out process that
24 involved an elaborate setup to lure Mr. Fromong and Mr. Beardsley to Las Vegas to meet
25 with a potential buyer. Arguably, the specific intent for conspiracy was formed well before
26 the actual incident when Mr. Simpson and Mr. Riccio devised this plan in California.

27 While Mr. Simpson was drinking at the pool and at the bar shortly before the
28 incident, no evidence demonstrates Mr. Simpson was so intoxicated as to impair his

1 judgment or influence his intent to carry out the robbery. Mr. Galanter and Mr. Grasso
2 testified that it was a tactical decision not to request this jury instruction. Both attorneys
3 believed arguing voluntary intoxication would have negatively impacted Mr. Simpson's
4 defense that he did not intend to commit a crime, but wanted to retrieve his property. Mr.
5 Simpson has failed to demonstrate how counsel's tactical decision was unreasonable.

6 Finally, Mr. Simpson has also failed to establish prejudice as a result of counsel
7 failing to request a jury instruction on voluntary intoxication. Mr. Simpson's demeanor
8 was captured on audio and videotape at various times before, during and after the robbery
9 on September 13, 2007. At no point does Mr. Simpson appear or sound impaired to the
10 point he would be unable to form criminal intent. Thus, Mr. Simpson's claim is denied.
11 Mr. Simpson has failed to show how counsel's tactical decision was unreasonable or that
12 had counsel presented the intoxication defense that a different result would have occurred
13 at trial.

14
15 **Ground 15: Failure to Conduct an Investigation**

16 Mr. Simpson claims trial counsel was ineffective for failing to make a reasonable
17 investigation into his case. This claim is denied because Mr. Simpson has failed to
18 demonstrate how an investigation would have resulted in a different outcome at trial.

19 Counsel has a duty to make reasonable investigations or make a reasonable decision
20 that makes particular investigations unnecessary. Strickland, 466 U.S. at 691, 688.
21 Preparation for a case is a strategic process, and strategy decisions are "virtually
22 unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 848, 921 P.2d
23 at 281. Additionally, trial counsel's duty to investigate does not require that every
24 conceivable witness be interviewed. Crittenden v. Ayers, 624 F.3d 943, 966 (9th Cir. 2010).
25 Finally, a defendant who asserts ineffective assistance of counsel because his attorney failed
26 to conduct a thorough investigation must show that a more thorough investigation would
27 have resulted in a more favorable outcome at trial. Molina v. State, 120 Nev. 185, 192, 87
28 P.3d 533, 538 (2004).

1 Defense counsel admittedly conducted little investigation or no investigation. In
2 most cases, the court would expect counsel to conduct significant investigation in a case of
3 this magnitude. Nonetheless, the failure to investigate does not necessarily constitute
4 ineffective assistance of counsel.

5 The question is whether the failure to investigate resulted in prejudice. Mr. Simpson
6 identifies two areas of investigation he asserts were probative. First, Mr. Simpson claims
7 Mr. Galanter failed to investigate Mr. Gilbert regarding Mr. Simpson's ownership of the
8 property and bad acts mentioned in the recordings. Second, Mr. Simpson argues
9 investigation could have given counsel information regarding Mr. Simpson's intoxication
10 level and possible deficits in perception from prior head traumas.

11
12 Mr. Simpson also claims that had Mr. Galanter interviewed Mr. Gilbert prior to trial,
13 he would have discovered that Mr. Gilbert could testify in support of Mr. Simpson. Mr.
14 Gilbert could have testified that Mr. Simpson did not laugh or joke about hiding property
15 from the Goldman family, nor did he hit Mr. Gilbert, contrary to testimony from Mr.
16 Fromong and Mr. Beardsley. During trial, Mr. Galanter inquired about how Mr. Fromong
17 obtained the property and elicited on cross-examination that the property belonged to Mr.
18 Simpson. Even so, ownership of property is not a defense to robbery. Even if Mr. Fromong
19 testified he had stolen the property, this would not be a viable defense for Mr. Simpson.
20 Mr. Gilbert was called as a State's witness during trial and was subject to cross-examination
21 by the defense. Mr. Galanter elicited on cross-examination of Mr. Gilbert that the property
22 belonged to Mr. Simpson.

23 Mr. Simpson argues that investigation of Mr. Gilbert would have also uncovered that
24 the State requested Mr. Gilbert delay filing formal charges against Mr. Fromong until after
25 the trial, thus providing a benefit to Mr. Fromong from the start. Mr. Gilbert does not
26 claim the State made this request directly, but rather made the request through his local
27 district attorney's office then through attorney. No evidence supports that anyone from the
28 Clark County District Attorney's Office contacted another district attorney's office in

1 California to contact Mr. Gilbert to delay filing charges against Mr. Fromong. This court
2 cannot rely on a mere allegation absent clear proof, which Mr. Simpson has not provided.

3 Finally, Mr. Simpson raises a vague assertion that investigation would have
4 supported the defense of voluntary intoxication and head trauma. Mr. Simpson presented
5 some evidence on those issues at the post-conviction evidentiary hearing; however, nothing
6 presented supports a finding that Mr. Simpson suffered prejudice for failure to investigate.

7 Even if trial counsel was deficient in their performance, Mr. Simpson has failed to
8 show a different result would have been had at trial. The trial court prohibited Mr.
9 Galanter from questioning Mr. Gilbert regarding ownership of the property, and as stated
10 by the Nevada Supreme Court during Mr. Simpson's appeal, ownership of property is not a
11 defense to robbery. Additionally, evidence does not support a voluntary intoxication
12 defense. Therefore, Mr. Simpson was not prejudiced by any alleged deficiencies in
13 counsel's representation.

14
15 **Ground 16: Failure to Move for Severance of Trial**

16 Mr. Simpson claims that counsel was ineffective for failing to request a severance of
17 his trial from co-defendant Mr. Stewart. Specifically, Mr. Simpson alleges that counsel's
18 failure to request a severance of his trial violated his due process rights by the admission of
19 hearsay statements. Mr. Simpson's claim is denied.

20 The United States Supreme Court found that the decision to try defendants jointly is
21 generally left to the discretion of the trial court. Zafiro v. United States, 506 U.S. 534, 539
22 (1993). Determining if a severance is appropriate requires a factual inquiry. Chartier v.
23 State, 124 Nev. 760, 765, 191 P.3d 1182, 1185 (2008). Joint trials have many advantages
24 including conserving state funds, decreasing inconvenience to witnesses and avoiding
25 delays in bringing cases to trial. United States v. Lane, 474 U.S. 438, 449 (1986). Courts
26 have "long recognized that some level of prejudice exists in a joint trial, [and therefore]
27 error in refusing to sever joint trials is subject to harmless-error review." Chartier, 124 Nev.
28 at 764-5, 191 P.2d at.1185.

1 Mr. Simpson claims trial counsel was ineffective for failing to request a severance to
2 avoid any incriminating hearsay statements from Mr. Stewart coming in. Mr. Simpson
3 asserts his rights to confrontation and due process were violated because hearsay
4 statements made by Mr. Stewart were admitted at trial.

5 Mr. Simpson raises concerns about counsel's failure to request severance based on a
6 few specific statements made by Mr. Stewart. Mr. Simpson asserts the statements violated
7 Bruton v. United States, 391 U.S. 123 (1968). First, Mr. Simpson asserts Bruton issues with
8 respect to Mr. Stewart's statements the day after the robbery. Trial testimony indicated Mr.
9 Stewart was upset with Mr. Simpson and he intended to sell the memorabilia and divide the
10 proceeds. Additionally, Mr. Stewart made statements to the district attorney that Mr.
11 Scotto threatened Mr. Alexander. Mr. Scotto vehemently denied the allegations when
12 questioned at trial.

13 In the Order of Reversal and Remand on Mr. Stewart's appeal, the Nevada Supreme
14 Court found that Mr. Stewart suffered from spill-over prejudice. That is, the verdict against
15 Mr. Stewart could not be considered reliable because of Mr. Simpson's notoriety, because
16 the trial focused so heavily on Mr. Simpson and because Mr. Simpson and Mr. Stewart took
17 opposite positions on the admission of the audiotapes. The Nevada Supreme Court did not
18 reach the issue of antagonistic defenses. Stewart v. State, No, 53100 (October 22, 2010).

19 The issue of antagonistic defense seems to weigh more heavily in Mr. Stewart's favor.
20 Counsel for Mr. Stewart vehemently opposed the admission of the tapes. Mr. Simpson's
21 counsel stipulated to admission. Mr. Simpson indicates that had he not been at trial with
22 Mr. Stewart, he would have been at liberty to blame Mr. Stewart for encouraging the other
23 men to join in the plan. Additionally, Mr. Simpson raises issues regarding a few hearsay
24 statements by Mr. Stewart. Severance was not warranted because hearsay statements made
25 by Mr. Stewart did not directly prejudice Mr. Simpson.

26 Mr. Simpson has failed to demonstrate how trial counsel was ineffective for failing to
27 request a severance. Furthermore, Mr. Simpson fails to show that he likely would have had
28 a better outcome at trial had counsel requested a severance. Despite Mr. Simpson's

1 assertions, the evidence at trial supported a finding that Mr. Simpson was heavily involved
2
3 in planning the recovery efforts and reached out personally to Mr. Stewart's friends to ask
4 them to bring weapons. As a result, Mr. Simpson's claim is denied.

5
6 **Ground 17: Failure to Challenge Confrontation Clause Violation**

7 Mr. Simpson argues trial and appellate counsel were ineffective for failing to object
8 to a Confrontation Clause violation when the State introduced evidence of Mr. Stewart's
9 statements expressing anger toward Mr. Simpson and alleging Mr. Scotto threatened Mr.
10 Alexander. The Confrontation Clause to the Sixth Amendment provides that "in all
11 criminal prosecutions, the accused shall enjoy the right...to be confronted with the
12 witnesses against him." U.S. Const. amend VI. Admission of a co-defendants incriminating
13 statements deny the constitutional right to confrontation. Bruton, 391 U.S. at 128. Not all
14 hearsay statements, however, implicate Sixth Amendment concerns. Id. at 135; Crawford v.
15 Washington, 541 U.S. 36, 50 (2004).

16 Mr. Simpson claims trial counsel was ineffective for failing to object to Mr.
17 Cashmore's testimony that Mr. Stewart was angry at Mr. Simpson and was going to sell the
18 memorabilia. Mr. Simpson claims that Mr. Cashmore's testimony violated his
19 confrontation clause rights because he was unable to question Mr. Stewart about these
20 statements. Mr. Simpson claims as a result of counsel's inability to question Mr. Stewart,
21 he was unfairly targeted for blame by Mr. Stewart.

22 Mr. Scotto was a defense witness and was subject to cross-examination by the State.
23 The State questioned Mr. Scotto about whether or not he put a hit out on Mr. Alexander.

24 Mr. Roger: You had a conversation with Mr. Stewart from the time of the
event until today?

25 Mr. Scotto: Yes.

26 Mr. Roger: How many times have you spoken with Mr. Stewart?

27 Mr. Scotto: 10, 15. I'm not sure.
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Mr. Roger: Did you tell him that you were going to take the money that you would have given him for not testifying and use it to put a contract on Mr. Alexander's life?

Mr. Scotto: That's ridiculous.

Mr. Roger: Did you say that?

Mr. Scotto: Of course not.

Mr. Roger: You didn't tell Mr. Stewart that?

Mr. Scotto: Absolutely not.

Mr. Roger: Did you say, He don't need to live. Fuck him?

Mr. Scotto: No, absolutely not.

Mr. Scotto adamantly denied threatening Mr. Alexander. Just as the defense had the opportunity to cross-examine the State's witnesses, the State was afforded the same opportunity.

Mr. Simpson has failed to demonstrate how trial or appellate counsel was ineffective for failing to raise this issue. None of the statements made by Mr. Stewart directly implicated Mr. Simpson. Additionally, Mr. Simpson has failed to demonstrate prejudice given the overwhelming evidence presented at trial. Thus, Mr. Simpson's claim is denied.

Ground 18: Failure to Raise Issue of Jury Misconduct

Mr. Simpson argues that his trial and appellate counsel were ineffective for failing to raise the issue that the jury acted with bias towards Mr. Simpson when he was convicted of two counts of coercion with use of a deadly weapon. Because the trial court dismissed the coercion counts, Mr. Simpson suffered no prejudice, and his attorneys were not ineffective. Therefore, Mr. Simpson's claim is denied.

At trial, Mr. Simpson faced twelve charges. Counts 11 and 12 of the Information

1 charged Mr. Simpson with coercion. The coercion charges were lesser-included offenses to
2 the first degree kidnapping charges in Counts 5 and 6. Jury Instruction 18 informed the
3 jury:

4 You are instructed that if you find that the State has established that the
5 defendant has committed first degree kidnapping that you shall select first
6 degree kidnapping as your verdict. The crime of first degree kidnapping
7 includes the alternative crime of coercion. You may find the defendant guilty
8 of coercion if: 1) you have not found beyond a reasonable doubt, that the
9 defendant is guilty of kidnapping of the first degree, and 2) all twelve of you are
10 convicted beyond a reasonable doubt that the defendant is guilty of the crime
11 of coercion.

12 Despite this instruction, the jury convicted Mr. Simpson of both first degree
13 kidnapping and coercion. At sentencing, defense counsel argued that coercion with a
14 deadly weapon falls into the first degree kidnapping count, and the coercion counts were
15 dismissed.

16 A jury's failure to follow a court instruction constitutes jury misconduct. Valdez v.
17 State, 124 Nev. 1172, 1186, 196 P.3d 465, 475 (2008). The defendant, using objective facts,
18 must prove juror misconduct. Misconduct may not be proved by the "state of mind or
19 deliberation process of the jury." Id. at 1187 (quoting Meyer v. State, 119 Nev. 554, 563, 80
20 P.3d 447, 454 (2003)). In this case, the comparison of Jury Instruction 18 and the verdict
21 rendered by the jury objectively demonstrates that the jury failed to follow the provided
22 jury instruction.

23 When juror misconduct of this nature occurs, a defendant is entitled to a new trial
24 "unless it appears beyond a reasonable doubt that no prejudice has resulted from the
25 misconduct." Id. at 1186. In this case, the trial court dismissed the counts in question. As
26 a result, Mr. Simpson suffered no prejudice from the failure of the jurors to follow the
27 provided jury instruction. Mr. Simpson has failed to demonstrate any other bias on the
28 part of the jurors that could be considered prejudicial.

In the context of ineffective assistance of trial counsel, Mr. Simpson claims trial
counsel failed to raise the issue that the jury acted with bias. Jurors were instructed that
they could find guilt on the coercion counts if "they have not found beyond a reasonable

1 doubt, that the defendant is guilty of kidnapping of the first degree.” The jury returned a
2 verdict for both kidnapping and coercion. Mr. Simpson has failed to provide objective
3 evidence of jury misconduct and relies on vague allegations that the jury acted with bias.
4 Furthermore, at counsel’s request the court dismissed both counts of coercion prior to
5 sentencing. Trial counsel acted within the standard of competent counsel by raising the
6 issue successfully.

7 In this case, although the jury returned a verdict for both coercion and kidnapping
8 the matter was resolved prior to sentencing when the court dismissed both counts of
9 coercion. Thus, appellate counsel had no reason to raise the issue successfully litigated by
10 trial counsel.

11 Finally, Mr. Simpson has also failed to show that he suffered any prejudice. Rather,
12 Mr. Simpson has made only vague assertions that the jury acted with bias against him when
13 finding him guilty of both coercion and kidnapping. The court dismissed both counts of
14 coercion prior to sentencing, thereby remedying the jury’s mistake. Because Mr. Simpson
15 was not impacted by the jury’s mistake, his claim is denied.

16
17 **Ground 19: Failure to Raise Deprivation of Due Process**

18 Mr. Simpson claims appellate counsel was ineffective for failing to fully raise Mr.
19 Simpson’s issue that Mr. Alexander was allowed to testify while holding a Bible in violation
20 of his due process rights. This Court denies this claim because Mr. Simpson has failed to
21 show appellate counsel was deficient in performance or that had counsel been ineffective,
22 he suffered prejudice.

23 Mr. Simpson claims appellate counsel was ineffective for failing to fully raise the
24 issue that Mr. Alexander was holding a bible while testifying and, thus, bolstered Mr.
25 Alexander’s credibility. Mr. Simpson claims appellate counsel presented this argument in
26 the context of a claim that the trial court improperly restricted cross-examination of Mr.
27 Alexander.

28 On appeal, appellate counsel did raise the issue to the Nevada Supreme Court as part

1 of a Confrontation Clause issue regarding Walter Alexander:

2 When called as a witness at trial, Alexander came to court with Bible in hand
3 and started reading in front of the jury. This was objected to by the Defense as
4 being prejudicial and improper. The Court admonished Alexander not to
5 bring the Bible to the witness stand. The cat however was already out of the
6 bag and the jury was left with the impression that Alexander was a God-
fearing, bible-worshiping individual.

7 Opening Brief 16. Appellate counsel spent several paragraphs discussing how Mr.
8 Alexander's Bible should have opened the door to more vigorous cross-examination. As
9 appellate counsel raised the issue and the Nevada Supreme Court considered the issue, this
10 court cannot find appellate counsel ineffective.

11 Mr. Simpson has failed to show how holding a Bible while testifying resulted in
12 prejudice. In addition to Mr. Alexander, the record includes testimony from Mr. McClinton
13 stating Mr. Simpson asked Mr. McClinton and Mr. Alexander to bring guns the night of the
14 robbery. Mr. Fromong testified Mr. Simpson entered the room yelling and directed his co-
15 conspirators to gather up Mr. Simpson's personal items. Audio recordings reflect Mr.
16 Simpson saying, "I walked in that room, I walked to the front. I told these guys to back up,
17 and I spent my time telling these guys how disappointed I was in them."
18

19 On appeal, the Nevada Supreme Court held:

20 More importantly, Simpson was allowed to vigorously cross-examine
21 Alexander as to his motives for cooperating with the police. Simpson
22 questioned Alexander at length about the voicemail messages he left Tom
23 Scotto, a mutual friend in Las Vegas, insinuating his testimony was up for
24 sale. In addition, the jury hears testimony and audio recordings of Alexander
25 helping to commit an armed robbery. Alexander admitted he carried a
26 handgun into Room 1203, pointed it at the two victims and then unplugged
27 the hotel room phone before leaving. We determine that given the above-
28 stated facts, the jury was not misled into believing Alexander was a
trustworthy individual simply because he came to court with a Bible (an
incident for which the District Court quickly admonished him). Rather, the
evidence shows that Alexander's testimony on direct and cross examination,
as well as other evidence at trial, portrayed a clear picture of the witness.

evidence shows that Alexander's testimony on direct and cross examination, as well as other evidence at trial, portrayed a clear picture of the witness.

Order of Affirmance 16.

Mr. Simpson has failed to demonstrate appellate counsel's performance was deficient as counsel did present this argument on appeal. The Nevada Supreme Court did not find Mr. Alexander holding a Bible while testifying to be prejudicial because Mr. Simpson had the opportunity to extensively cross-examine Mr. Alexander as to his motives and involvement in the recovery.

In support of his argument that counsel was ineffective, Mr. Simpson cites to Brown v. Commonwealth, 983 S.W.2d 513 (Ky. 1999). In Brown, the Kentucky Supreme Court found prejudice when a victim testified while holding the Bible. Id. at 515-16. The jury was faced with two opposed views. Brown argued he was protecting himself because the victims had guns; the victims claimed they had no weapons. Mr. Brown did take the stand and thus, the jury was forced to decide who they believed was credible, either Mr. Brown or the victims. Thus, the court found prejudice when one of the victims testified while holding the Bible because it bolstered her credibility with the jury. Id.

In Mr. Simpson's case, no one disputed that Mr. Simpson and his friends took property. Mr. Simpson argued he was not guilty because the property belonged to him and he had no criminal intent. Unlike Brown, the jury was not forced to choose between Mr. Simpson's testimony and Mr. Alexander's testimony. In fact, the jury heard from several witnesses who consistently testified to Mr. Simpson's involvement in the planning and execution of recovering his property. Mr. Simpson has failed to demonstrate appellate counsel was deficient or that prejudice resulted. Thus, his claim regarding deprivation of due process is denied.

Ground 20: State Withheld Exculpatory Evidence

Mr. Simpson alleges the State failed to turn over exculpatory evidence in the State's possession. Specifically, Mr. Simpson asserts that Mr. Gilbert was asked by government representatives to withhold pressing formal charges against Mr. Fromong for stealing his property.

Withholding exculpatory evidence is not an ineffective assistance claim, but is analyzed under the standard set forth in Brady v. Maryland, 373 U.S. 83 (1963). In Brady, the Supreme Court held that prosecutors are to disclose evidence that is favorable to the defense "when that evidence is material either to guilt or to punishment." Id. at 84. To prevail on a Brady claim, the accused must show: 1) the evidence is favorable to the accused; 2) the State withheld the evidence, either intentionally or inadvertently; and 3) prejudice ensued because the evidence was material. State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). Evidence is material if "there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler v. Greene, 527 U.S. 263, 280 (1999). Failure to disclose material evidence is a violation of due process regardless of the prosecutor's motive. Determining whether the prosecution adequately disclosed information under Brady requires consideration of both factual circumstances and legal issues. Mazzan v. Warden, Ely State Prison, 116 Nev. 48, 66, 993 P.2d 25, 36; State v. Huebler, 128 Nev. Adv. Op 19, 275 P.3d 91, 95 (2012).

In this case, Mr. Simpson alleges that governmental officials asked Mr. Gilbert to withhold pressing formal charges against Mr. Fromong for stealing his property. Mr. Simpson considers the request to defer prosecution a benefit to Mr. Fromong that should have been disclosed under Brady. Mr. Gilbert claims that Mr. Fromong stole Mr. Simpson's property from Mr. Gilbert's storage unit some time before the robbery. Mr. Gilbert stated that his attorney, Mark Kapetan, informed him that representatives from the Clark County District Attorney's Office had requested through the Kings County District Attorney's Office to hold off on pressing charges until after Mr. Simpson's trial. Mr. Gilbert informed Las

1 Vegas Metropolitan Police that Mr. Fromong stole this property and provided the same
2 information to Mr. Simpson's attorney, Yale Galanter.

3 Mr. Simpson asserts withholding formal charges gave the jury the perception that
4 Mr. Fromong was an innocent victim. At trial, the District Court prohibited Mr. Gilbert
5 from testifying about anything related to whether Mr. Fromong stole Mr. Simpson's items.
6 Even if Mr. Fromong did steal this property and had charges been filed, ownership is not an
7 element of robbery and would not create a defense. Additionally, the idea that Mr. Simpson
8 could have used the charges to impeach Mr. Fromong is quite speculative.

9 Nevada allows for impeachment by conviction of a crime when a person has
10 completed a sentence on a felony conviction within ten years prior to testifying. Nev. Rev.
11 Stat. §50.095 (2011); Wesley v. State, 112 Nev. 503, 510, 916 P.2d 793, 798 (1996).
12 Credibility of a witness may not be attacked by mere arrest. Azbill v. State, 88 Nev. 240,
13 247, 495 P.2d 1064, 1068 (1972). Arrests and misdemeanor convictions may not normally
14 be admitted even to attack the credibility of a witness. Sheriff v. Hawkins, 104 Nev. 70, 75,
15 752 P.2d 769, 772 (1988). A witness may be impeached with specific instances of conduct
16 but those instances cannot be proved by extrinsic evidence. Nev. Rev. Stat. §50.085(3)
17 (2011).

18 If Mr. Gilbert had filed a complaint against Mr. Fromong, the Kings County District
19 Attorney's Office would have made a decision whether to prosecute Mr. Fromong. Nothing
20 establishes a likelihood that Mr. Fromong would have been either charged or found guilty
21 of a felony by the time of trial. A complaint alone could not be used to impeach Mr.
22 Fromong. Mr. Simpson's counsel could have asked Mr. Fromong if he stole the property;
23 however, Mr. Fromong testified that he purchased the property and was the legitimate
24 owner of the property.

25 Even if this court were to find that withholding formal charges against Mr. Fromong
26 constitutes impeachment evidence subject to disclosure under Brady, Mr. Simpson has
27 failed to demonstrate that the State intentionally withheld this evidence, that the alleged
28 request to withhold filing charges was material, and that the failure to disclose and resulted

1 in prejudice. Mr. Gilbert never received a direct request to withhold filing charges against
2 Mr. Fromong from the Clark County District Attorney's Office. Additionally, because of Mr.
3 Fromong's poor health during trial, Mr. Gilbert ultimately decided not to file charges at all.

4 This court cannot rely on speculation in its determination of whether exculpatory
5 evidence was withheld from Mr. Simpson. Mr. Fromong was never charged with a crime
6 and he denies committing a crime. Mr. Simpson has failed to establish that the State
7 withheld exculpatory evidence. As a result, Mr. Simpson's claim is denied.
8

9 **Ground 21: Failure to Raise Improper Reasonable Doubt Instruction**

10 Mr. Simpson asserts that appellate counsel was ineffective for failing to challenge the
11 reasonable doubt jury instruction. Mr. Simpson alleges the instruction shifted the burden
12 of proof to the defense and lowered the State's burden of proof, thereby in violation of
13 constitutional due process. This court denies Mr. Simpson's claim because the reasonable
14 doubt instruction has been upheld by the Nevada Supreme Court and is valid pursuant to
15 Nev. Rev. Stat. §175.211 (2011).

16 A Nevada statute provides the specific language of the reasonable doubt jury
17 instruction used in all criminal actions. Nev. Rev. Stat. 175.211(1)(2011). In Browning, the
18 Nevada Supreme Court reaffirmed that the Nevada reasonable doubt instruction embodied
19 in Nevada Revised Statute 175.211 is constitutional. Browning v. State, 120 Nev. 347, 359,
20 91 P.3d 39, 48 (2004). Additionally, Nevada Revised Statute §175.211(2) states: "No other
21 definition of reasonable doubt may be given by the court to juries in criminal actions by the
22 State."

23 In his writ, Mr. Simpson acknowledges that the Nevada Supreme Court has
24 previously upheld the reasonable doubt instruction used at trial. The language of the
25 reasonable doubt instruction at trial was taken directly from Nevada Revised Statute
26 175.211. Jury Instruction 30 defined reasonable doubt:

27 The Defendants are presumed innocent until the contrary is proven. This
28 presumption places upon the State the burden of proving beyond a reasonable

1 doubt every material element of the crimes charged and that the Defendants
2 are the persons who committed the offense. A reasonable doubt is one based
3 in reason. It is not mere possible doubt but is such doubt as would govern or
4 control a person in the more weighty affairs of life. If the minds of the jurors,
5 after the entire comparison and consideration of all the evidence, are in such
6 a condition that they can say they feel an abiding conviction of the truth of the
7 charge, there is not a reasonable doubt. Doubt to be reasonable must be
8 actual, not mere possibility or speculation. If you have a reasonable doubt as
9 to the guilt of the Defendants, they are entitled to a verdict of not guilty.

10 Mr. Simpson argues appellate counsel was ineffective for failing to challenge the
11 reasonable doubt instruction because the instruction shifted the burden of proof to the
12 Defendants and lowered the State's burden of proof. Mr. Simpson seeks to preserve this
13 challenge for future proceedings. The Nevada Supreme Court has consistently upheld the
14 reasonable doubt language.

15 Mr. Simpson has failed to demonstrate how appellate counsel's performance was
16 deficient. The reasonable doubt instruction is standard for every criminal case. Appellate
17 counsel cannot be considered ineffective for failing to raise an issue precluded by Nevada
18 law. Furthermore, even if appellate counsel had challenged the instruction, the challenge
19 would have failed because the reasonable doubt instruction is standard for every criminal
20 proceeding. Finally, Mr. Simpson has also failed to demonstrate any prejudice. The jury
21 instruction did not deviate from the required language set forth in Nevada Revised Statute
22 175. 211. Mr. Simpson's claim is denied

23 **Ground 22: Cumulative Errors and Combined Deficiencies**

24 Mr. Simpson claims trial counsel was ineffective because of cumulative errors and
25 multiple deficiencies in representation. To prevail on a claim of cumulative error, the court
26 will consider relevant factors including whether "the issue of innocence or guilt is close, the
27 quantity and character of the error and the gravity of the crime charged." Big Pond v. State,
28 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

Mr. Simpson argues trial counsel's cumulative errors include failing to object to jury
instructions and inadmissible evidence, failing to present expert testimony and other

1 evidence to support Mr. Simpson's defense, failing to move for a severance and failing to
2 advise Mr. Simpson regarding a plea offer and his constitutional right to testify. This Court
3 has addressed each of Mr. Simpson's claims above and found that each claim is without
4 merit.

5 Nothing indicates that the jury's verdict would have changed had any or all of the
6 issues brought forth by Mr. Simpson been addressed at trial. There is no indication that
7 this was close verdict. The evidence was overwhelming that Mr. Simpson planned,
8 organized and led the recovery the night of September 13, 2007. Furthermore, Mr.
9 Simpson has failed to pinpoint significant errors that either alone or combined would have
10 changed the outcome of his case. The jury deliberated after hearing audio recordings of Mr.
11 Simpson planning the recovery, saw video surveillance of the men leaving the Palace
12 Station with several pieces of property and heard recordings of subsequent conversations
13 where Mr. Simpson states admitted he "fucked up."

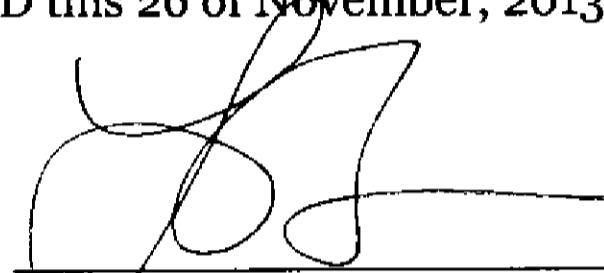
14 Additionally, Mr. Simpson has failed to demonstrate significant errors from his
15 appeal. While the appeal was less than perfect, Mr. Simpson has not shown any likelihood
16 of success on appeal had counsel done a more competent job.

17 Finally, Mr. Simpson's convictions stem from serious offenses. He planned the
18 recovery of his property weeks in advance and solicited the help of six co-conspirators. Mr.
19 Simpson specifically asked two of his co-conspirators to bring weapons the night of the
20 recovery to show the sellers he meant business. On September 13, 2007, Mr. Simpson did
21 not seek the help of law enforcement to recover his property. Mr. Fromong and Mr.
22 Beardsley were lured into a small hotel room and were surprised by the confrontation of
23 seven men. Even after the robbery was completed, Mr. Simpson continued to yell at the
24 men and expressed anger.

1 **CONCLUSION**

2 Mr. Simpson's post-conviction petition claims are denied because Mr. Simpson
3 failed to demonstrate that counsel experienced an actual conflict of interest that
4 substantially impacted counsel's performance at trial. Mr. Simpson also failed to establish
5 that the State withheld exculpatory evidence. Finally, Mr. Simpson failed to establish that
6 appellate and trial counsel were ineffective or that any deficient performance by counsel
7 resulted in prejudice. Given the overwhelming amount of evidence, neither the errors in
8 this case, nor the errors collectively, cause this court to question the validity of Mr.
9 Simpson's conviction.

10 DATED this 26 of November, 2013.

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13 LINDA MARIE BELL
14 DISTRICT COURT JUDGE
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th of November, 2013, he/she served the foregoing Decision and Order by faxing, mailing, or electronically serving a copy to counsel as listed below:

Name	Party	Phone	Service Method
H. Leon Simon Chief Deputy District Attorney	Attorney for the State of Nevada	702-671-2500	h.simon@ccdανv.com
Patricia A. Palm, Esq. Palm Law Firm, Ltd.	Attorney for Defendant Orenthal James Simpson	702-386-9113	Patricia.palmlaw@gmail.com


TINA HURD
JUDICIAL EXECUTIVE ASSISTANT
DEPARTMENT VII

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Decision and Order filed in District Court case number 07C237890-4 **DOES NOT** contain the social security number of any person.

/s/ Linda Marie Bell

District Court Judge

Date 11-26-2013