IN THE SUPREME COURT OF THE STATE OF NEVADA

TRAVERS A. GREENE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45023

FILED

NOV 14 2006

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Appellant Travers Greene was convicted, pursuant to a jury verdict, of two counts of first-degree murder with the use of a deadly weapon, one count of conspiracy to commit murder, and one count of possession of a stolen vehicle. He was sentenced to death for the murders. This court affirmed his conviction and sentence on direct appeal.[1]

Greene filed a post-conviction petition for a writ of habeas corpus in the district court in proper person. He was appointed counsel, and an amended petition and supplemental petition were later filed. The district court held a post-conviction evidentiary hearing on June 21, 2002, where David Schieck, one of Greene's trial counsel and his sole appellate counsel, testified along with two other witnesses, Edward Matthews and Heather Barker.

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[1]Greene v. State, 113 Nev. 157, 931 P.2d 54 (1997), overruled on other grounds by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000).

Another hearing was held on December 20, 2004, where the district court heard arguments from Greene's post-conviction counsel, Karen Connolly, and the State. The district court issued an order on February 8, 2005, denying Greene post-conviction habeas relief. This appeal followed, where Greene raises numerous claims for our review.

I. Ineffective assistance of trial counsel

Greene contends that the district court improperly denied several of his allegations that his trial counsel Schieck provided him with ineffective representation. We disagree.

A claim of ineffective assistance of counsel presents a mixed question of law and fact subject to independent review.[2] To establish that counsel's assistance was ineffective, a two-part test must be satisfied.[3] First, it must be shown that the performance of the petitioner's trial counsel was deficient, falling below an objective standard of reasonableness.[4] Second, there must be prejudice.[5] Prejudice is demonstrated by showing that, but for the errors of the petitioner's trial counsel, there is a reasonable probability that the result of the proceedings would have been different.[6] Judicial review of trial counsel's

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[2]See Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[3]See Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107.

[4]See Strickland, 466 U.S. at 687.

[5]Id.

[6]Id. at 694.

representation is highly deferential, and a petitioner must overcome the presumption that a challenged action was sound trial strategy.[7]

Medication and mental health issues

Greene contends that the district court improperly denied his claim that his trial counsel Schieck ineffectively handled several issues concerning medication he received during trial and his mental health problems. Within this claim, Greene interweaves several subarguments. We address each in turn below.[8]

First, Greene contends that Schieck failed to correctly advise the district court that Greene was being medicated during trial. We agree, but we conclude that Greene has failed to demonstrate that Schieck's performance was unreasonable or deficient in this regard.

Prior to the start of Greene's trial, Schieck informed the district court that Greene was no longer taking medication that he had previously taken. It was later revealed through prison records that Greene had been diagnosed by medical staff with "schizoaffective disorder" on February 17, 1995, and that Greene was being treated for the disorder with the following three drugs throughout his second trial: Prolixin, Cogentin, and Thorazine.

The State does not dispute that Greene was being administered medication during his trial. However, Schieck testified that he had advised Greene to stop taking any medication as a matter of trial

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[7]Id. at 689.

[8]To the extent Greene raises these issues as claims independent of ineffective assistance of counsel, he failed to demonstrate good cause for his failure to raise them on direct appeal, and they are procedurally barred. See NRS 34.810(1), (3).

strategy: Schieck believed that if the jurors knew that Greene was on medication it might cause them to believe that he was a violent or dangerous person and ultimately hurt his defense. According to Schieck, Greene told him that he had stopped taking the medication. Schieck "accepted his word."

At the conclusion of the evidentiary hearing, the district court reasoned: "If he says he is not taking medication, I think you're at liberty to believe it." The district court in its written order denying Greene relief on this claim found Schieck to be credible and not ineffective in handling this matter.

The United States Supreme Court has recognized that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."[9] Because Greene was the source of the incorrect information, it was not per se unreasonable for Schieck to rely upon his representations, absent some indication from Greene's behavior that would lead a reasonable attorney to believe he was untruthful or incompetent.

Greene does not expressly contend that he was incompetent. Even though Schieck incorrectly believed Greene had stopped taking medication and unwittingly misinformed the district court, his belief and actions were based on representations by Greene and were not unreasonable. Nor was Greene prejudiced. We conclude that the district court properly denied Greene relief on this matter.

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[9]Strickland, 466 U.S. at 691; see Krauss v. State, 116 Nev. 307, 310, 998 P.2d 163, 165 (2000).

Second, Greene contends that Schieck should have requested a hearing regarding the administration of antipsychotic medication to him pursuant to the United States Supreme Court's holdings in Riggins v. Nevada[10] and Sell v. United States.[11] We disagree.

The Supreme Court's decisions in Riggins and Sell concern instances where the defendant was administered antipsychotic medication against his will. Here, the district court found: "[T]he record is totally devoid of any evidence that Defendant was forcibly medicated." The district court also found no evidence that Greene ever filed any type of motion or otherwise sought to stop taking the antipsychotic medication.

Rather, evidence in the record shows that Greene voluntarily consented to receiving the medication—Greene signed his name to a consent form. Additionally, unlike the defendants in Riggins and Sell, Greene did not pursue an insanity defense.

Because there is no evidence that Greene was forcibly medicated, he never requested to be taken off the medication, and he did not pursue an insanity defense, the liberty concerns expressed by the Supreme Court in Riggins and Sell are not present in Greene's case. We conclude that the failure of Schieck to request a hearing pursuant to this line of cases,[12] even assuming he should have known of the administration of medication to Greene, does not support an ineffective-assistance-of-counsel claim. We conclude that the district court properly denied Greene relief on this basis.

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[10]504 U.S. 127 (1992).

[11]539 U.S. 166 (2003).

[12]See also Washington v. Harper, 494 U.S. 210 (1990).

Third, Greene contends that Schieck was ineffective because he failed to acquire the assistance of a psychiatrist or other expert to evaluate his mental health prior to trial. We disagree.

A defendant's trial counsel has the responsibility to make all reasonable investigations into potentially mitigating evidence or make a reasonable decision not to do so.[13] Here, Greene stresses that Schieck filed a pretrial motion for fees to pay for a psychiatrist to evaluate Greene's mental health. Accompanying that motion was an affidavit by Schieck, where he stated that in order to provide Greene with effective representation it was necessary to have psychiatric assistance. The district court granted the motion, but the evaluation never occurred.

Schieck later acknowledged in an affidavit submitted during post-conviction proceedings that he should have, "in an abundance of caution," proceeded with a psychiatric evaluation. Schieck testified during the evidentiary hearing that he could not recall a strategic reason for not having Greene evaluated. But again, Schieck was concerned that a mental health professional would have found Greene to be a dangerous and violent person and such evidence would have hurt Greene's defense.

Schieck visited Greene several times while he was in custody in preparation for trial and spoke to him on the telephone between 15 and 20 times. Schieck testified that he had no trouble communicating with Greene and was given no reason to believe Greene was mentally ill. Schieck testified further that if he believed that a psychiatric examination of Greene was warranted he would have sought one. According to Schieck there was nothing alarming or noteworthy about Greene's demeanor and

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[13]See Strickland, 466 U.S. at 691; see also NRS 175.552(3).

appearance during Greene's penalty hearing testimony. Rather, Schieck "found [Greene's] demeanor pretty consistent throughout the course of the trial proceedings." Even Greene's post-conviction counsel, Connolly, conceded that there was "no evidence in the transcripts" indicating Greene was incompetent.

Portions of Schieck's testimony on this issue were equivocal, but the district court's finding on this matter was supported by substantial evidence and was not clearly wrong.[14] It is entitled to deference.

Additionally, as previously mentioned, Greene did not pursue an insanity defense and does not allege that he was incompetent to be tried.[15] Given these considerations, we conclude that even if Schieck was

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[14]See Strickland, 466 U.S. at 689; Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

[15]A defendant is incompetent to stand trial when he is "not of sufficient mentality to be able to understand the nature of the criminal charges against him, and because of that insufficiency, is not able to aid and assist his counsel in the defense." NRS 178.400(2); see Dusky v. United States, 362 U.S. 402, 402 (1960). When "doubt arises" as to a defendant's competency, the district court shall suspend the proceedings until the question of competency is resolved. NRS 178.405. The district court found that Schieck had "no reason to believe that Greene was incompetent at the time of trial" and that Greene was "able to aid and assist in his defense." Although the fact that Greene was being administered antipsychotic medication is an obvious indication that he had mental health problems, Greene does not expressly contend he was incompetent to stand trial, either while on or off of the medication. Further, Schieck testified that he was able to communicate with Greene during trial and Greene was able to assist in his defense. To the extent that Greene contends that doubt arose about his competency such that Schieck was ineffective for failing to secure a competency determination, we conclude that he failed to demonstrate that the district court improperly denied him relief.

unreasonable in failing to have an expert evaluate Greene's mental health during trial, Greene has failed to establish that he was prejudiced. We conclude that the district court properly determined that Schieck was not ineffective in this regard.

Fourth, Greene contends that Schieck failed to adequately investigate his history of mental health problems, including such things as the impact of his learning that he was adopted, the impact of his adoptive parents' divorce, and the impact of the sexual abuse he suffered as a child from a neighbor. He also asserts that Schieck should have contacted his biological parents, which would have revealed that both Greene's mother and grandmother suffered from depression.

Both of Greene's adoptive parents testified at his penalty hearing. They testified that Greene was adopted; they divorced when Greene was young; Greene was diagnosed as a child as being hyperactive and having attention deficit disorder; Greene was given Ritalin; Greene's father worked a lot; Greene was sexually molested by a neighbor when he was about nine years old; Greene received psychological counseling; Greene had an illegal drug problem; and Greene was told by a cousin that he was adopted, which caused him to be angry, aggressive, depressed, withdrawn, and suicidal. And during Greene's statement of allocution, he mentioned his "childhood trauma" and asked the jurors to consider the social and mental effects upon him of being molested.

During the evidentiary hearing, Schieck testified that he made no effort to contact Greene's birth mother or natural father: "To the best of my recollection this was based on information provided by the adoptive parents that such an effort would not yield any benefit." Schieck added:

> I spent a good deal of time with Mr. Greene's adopted family, including his father, grandmother,

> mother and sister, visiting their home on several occasions, both concerning guilt and penalty matters. Based on information they provided about the birth parents, I decided not to try to locate the natural parents. I should have done so instead of just relying on the testimony of the adoptive parents.

In its written order denying this claim, the district court found that Greene's biological parents had no contact with him since he was an infant and that Greene failed to show that any testimony by his biological parents would have helped his defense. The district court also found that Schieck was "not ineffective for not calling more witnesses during the penalty phase to testify as to Defendant's past."

Most of the evidence concerning Greene's childhood that Greene complains Schieck was ineffective for failing to investigate was presented to the jury. Even if Schieck had presented testimony by Greene's biological mother at the penalty hearing, she would have merely testified, according to Greene, that some of his relatives suffered from depression. Greene failed to demonstrate that this information might have altered the outcome of his trial. We conclude that the district court did not improperly deny Greene relief on this issue.

Closing arguments

Greene contends that the district court improperly denied his claims that his other trial counsel, James Kent, was ineffective in making his closing argument during the penalty hearing. We disagree.

First, Greene contends that Kent's closing was ineffective because he argued that mitigating circumstances were not "justifications" or "excuses" for committing the murders. However, Kent's characterization of mitigating circumstances was correct—they are not

properly referred to as justifications or excuses.[16] We conclude that the district court properly denied Greene relief on this matter.

Second, Greene contends that Kent was ineffective during his closing argument because he argued that the jurors should be concerned with the deterrence of crime. However, Kent's references to deterrence were made within the context of an argument that the death penalty is not a deterrent and that Greene should be sentenced to a term of life in prison. This court has recognized that "[r]etribution and deterrence are widely accepted as the underlying rationale for the enactment of a death penalty."[17] We conclude that the district court properly denied Greene relief on this claim.

Finally, Greene contends that Kent was ineffective because he argued that if the jury sentenced him to a term of life in prison with the possibility of parole for murder with the use of a deadly weapon he would be eligible for parole in 40 years. Greene contended that this amounted to ineffective assistance because Kent failed to add that Greene faced two murder counts and if the district court imposed those counts consecutively that Greene would not be eligible for parole for 80 years.

However, Greene has failed to demonstrate that a fuller argument by Kent might have made a difference. If the jurors were

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[16]See Hollaway v. State, 116 Nev. 732, 743, 6 P.3d 987, 995 (2000) (recognizing that mitigating evidence presented during a capital penalty hearing neither justifies nor excuses a murder); Evans v. State, 112 Nev. 1172, 1204, 926 P.2d 265, 285 (1996) (approving of a jury instruction that described mitigating circumstances as simply "'factors [a juror] may take into account as reasons for deciding not impose a sentence of death on the defendant'").

[17]Pellegrini v. State, 104 Nev. 625, 629, 764 P.2d 484, 487 (1988).

concerned about Greene's parole eligibility, they could have imposed sentences of life without the possibility of parole. Given that they chose to impose a sentence of death, Greene has failed to demonstrate that he was prejudiced by this argument in any way. We conclude that the district court properly denied Greene relief on this basis.

Motion to suppress

Greene contends that the district court improperly denied his claim that his counsel were ineffective for failing to move to suppress statements he made to the police. Greene asserts that his counsel should have filed a motion on the basis that he did not intelligently, knowingly, and voluntarily waive his rights pursuant to Miranda v. Arizona[18] because he was suffering from mental illness at the time he was interrogated. When Greene raised this claim below, however, he contended that his counsel should have moved to suppress on the basis that his statements to the police were coerced, not because of any mental impairment. Thus, Greene's claim as it is framed on appeal is not properly before us.[19] Moreover, even if it were, Greene has failed to support his claim with any specific factual allegations whatsoever,[20] e.g., the facts surrounding the interrogation, the nature of the statement, and how that statement was used against Greene at trial. We conclude that the district court properly denied Greene relief on this claim.

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[18]384 U.S. 436 (1966).

[19]See State v. Powell, 122 Nev. ___, ___, 138 P.3d 453, 456 (2006).

[20]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Unrecorded discussions

Greene contends that that district court improperly denied his claim that his trial counsel were ineffective for failing to ensure that matters discussed at the bench or in chambers were recorded and transcribed. We conclude that Greene fails to show any prejudice.

The district court incorrectly remarked in regard to this claim, "that's not a requirement. That's of no moment." On the contrary, SCR 250(5)(a) requires the district court generally to "ensure that all proceedings in a capital case are reported and transcribed." Nevertheless, failure to make a record of a portion of the proceedings, "standing alone, is not grounds for reversal."[21] An appellant must demonstrate that the unrecorded portions of his trial were so significant that this court cannot meaningfully review his claims of error.[22] Here, Greene has failed to articulate how any unrecorded matters were significant or impaired this court's review. Consequently, even assuming that his counsel acted deficiently, he does not show that he was prejudiced. We conclude that the district court properly denied Greene relief on this claim.

Alleged prosecutorial misconduct

Greene contends that the district court improperly denied his claim that his trial counsel were ineffective for failing to object to several instances of alleged prosecutorial misconduct during the penalty hearing. We disagree.[23]

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[21]Daniel v. State, 119 Nev. 498, 508, 78 P.3d 890, 897 (2003).

[22]Id.

[23]Greene also contends that his "[t]rial counsel failed to file a motion to preclude the prosecutors from engaging in misconduct." However,

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"'[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'"[24] We have carefully reviewed the various remarks by the prosecutor that Greene challenges on the grounds that they improperly asked the jurors to place themselves in the victim's shoes; improperly urged the jurors that it was their duty to impose a death sentence; improperly argued that the death penalty was a deterrent; improperly inserted the prosecutor's personal opinion; improperly sought to inflame the jurors; and improperly argued that the death penalty was an act of self-defense by society. We conclude that the district court correctly determined Greene's trial counsel were not ineffective for failing to object to these remarks.

Other claims raised by Greene

Greene contends that the district court improperly denied his claims that his trial counsel were ineffective for failing to do the following: move the district court to change the venue because of pretrial publicity;[25]

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prosecutorial misconduct violates rules of law and ethics. No such pretrial motion by defense counsel is necessary, and we conclude that Greene was properly denied relief on this claim.

[24]Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

[25]Green failed to provide supporting facts regarding the nature of any pretrial publicity, explain how he was prejudiced by any failure of his counsel to move for a change of venue, or demonstrate any reasonable likelihood that such a motion would have been successful. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. Moreover, Schieck testified at the evidentiary hearing that he did not file such a motion because he thought it would have been strategically unsound. See Strickland, 466 U.S. at 689.

object to the dismissal of a prospective juror for cause during voir dire;[26] request that the jurors be required to specify which mitigating circumstances they found;[27] interview and investigate the background of the State's witnesses;[28] challenge the constitutionality of Nevada's death penalty scheme;[29] challenge the constitutionality of the two aggravators found in his case;[30] and move to dismiss his death sentence on the basis that it constitutes "cruel" punishment under the Nevada Constitution.[31]

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[26]Greene failed to support this allegation with specific supporting facts that if true would entitle him to relief. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. Nor did he allege that the jury actually seated was not fair and impartial. He therefore failed to demonstrate prejudice. See Weber v. State, 121 Nev. ___, ___, 119 P.3d 107, 125-26 (2005); see also Ross v. Oklahoma, 487 U.S. 81, 88-89 (1988).

[27]Similar challenges contending the jurors must specify which mitigating circumstances they find have been rejected by this court. Greene failed to demonstrate that this issue had any likelihood of success. See, e.g., Servin v. State, 117 Nev. 775, 781-82, 32 P.3d 1277, 1282 (2001); see also NRS 175.554(3).

[28]Greene failed to support this claim with specific facts that if true would entitle him to relief. See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

[29]This type of generalized challenge to Nevada's death penalty scheme is without merit and has been consistently rejected by this court. See, e.g., McConnell v. State, 120 Nev. 1043, 1070, 102 P.3d 606, 625 (2004).

[30]The constitutionality of NRS 200.033(9) and NRS 200.033(12) were reviewed in Greene's direct appeal. This court found these provisions were constitutionally applied in Greene's case. See Greene, 113 Nev. at 171-74, 931 P.2d at 63-64.

[31]The imposition of the death penalty has not been shown to be either cruel or unusual under the United States and Nevada Constitutions, and Greene failed to demonstrate that this issue had any

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We have carefully reviewed each of these claims and conclude that the district court properly denied Greene relief based upon them.

II. Ineffective assistance of appellate counsel

Greene also contends that the district court improperly denied his claims that Schieck ineffectively represented him on direct appeal. To establish a claim of ineffective assistance of appellate counsel, the petitioner must show that his appellate counsel's performance fell below an objective standard of reasonableness and that an omitted issue had a reasonable probability of success on appeal.[32] Greene raises three claims.[33]

First, Greene contends that the district court improperly denied his claim that Schieck was ineffective because he represented him both at trial and on direct appeal, which constituted a per se "actual conflict of interest." We disagree.

Greene cites to no authority to support his assertion that representing a defendant at trial and subsequently on direct appeal

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likelihood of success. See Colwell v. State, 112 Nev. 807, 814, 919 P.2d 403, 408 (1996).

[32]See Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14.

[33]In addition to the claims to be discussed, Greene contends that the district court improperly denied his claim that Schieck was ineffective for failing to communicate with him and to allow him to participate in his direct appeal. However, Greene fails to support these claims with any specific allegations that, if true, would entitle him to relief. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. Moreover, Schieck testified that he had "no trouble" communicating with Greene during trial proceedings.

constitutes any conflict of interest.[34] To the extent that Greene contends that Schieck should have raised claims of ineffective assistance of counsel on direct appeal, such claims are properly raised in a first, timely post-conviction petition for a writ of habeas corpus, not on direct appeal.[35] We conclude that the district court properly denied Greene relief on this basis.

Next, Greene contends that the district court improperly denied his claim that Schieck was ineffective for failing to challenge the reasonable doubt instruction on direct appeal. We disagree.

The reasonable doubt instruction given during both the guilt and penalty phases mirrored the statutory language of NRS 175.211(1) and has been approved by this court.[36] A challenge to the reasonable doubt instruction had no reasonable likelihood of success on appeal. We conclude that the district court properly denied him relief on this claim.

Third, Greene contends that Schieck was ineffective for failing to challenge on direct appeal various murder instructions. We disagree.

We reviewed the homicide instructions in Greene's direct appeal and concluded that "the jury instructions regarding homicide comport with the law."[37] Greene nevertheless argues that his appellate

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[34]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

[35]See Pellegrini v. State, 117 Nev. 860, 882, 34 P.3d 519, 534 (2001).

[36]See, e.g., Evans v. State, 112 Nev. 1172, 1190-91, 926 P.2d 265, 277 (1996).

[37]Greene, 113 Nev. at 168, 931 P.2d at 61.

counsel was ineffective in challenging the Kazalyn instruction[38] given in his case because this court overruled its decision in Greene's direct appeal when it published Byford v. State.[39] Because Byford was not published until after two years this court affirmed Greene's conviction, his appellate counsel could not be ineffective for failing to challenge the Kazalyn instruction pursuant to Byford. Moreover, this court has stated that giving the Kazalyn instruction was not constitutional error and that Byford has no retroactive effect.[40] We conclude that the district court properly denied him relief on this claim.[41]

III. Procedurally barred claims

Greene also appeals from the district court's denial of issues that he framed as direct appeal claims. NRS 34.810(1)(b)(2) provides that a claim shall be dismissed if the defendant's conviction was the result of a trial and the claim could have been raised on direct appeal, unless both

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[38]See Garner v. State, 116 Nev. 770, 787 n.6, 6 P.3d 1013, 1024 n.6 (2000), overruled in part on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

[39]116 Nev. at 235, 994 P.2d at 713.

[40]Garner, 116 Nev. at 787-89, 6 P.3d at 1024-25.

[41]Greene also contends that his appellate counsel was ineffective for failing to challenge on direct appeal the constitutionality of Nevada's death penalty scheme and prosecutorial misconduct. Having already concluded that these issues did not support Greene's claims that his trial counsel were ineffective, we conclude for the same reasons that he failed to demonstrate that his appellate counsel was ineffective.

good cause and prejudice are established to excuse this failure,[42] or the denial of a claim on procedural grounds would result in a fundamental miscarriage of justice. Greene raises two claims.

Greene contends that his trial proceedings and this court's review on direct appeal violated his constitutional rights because they were conducted by judicial officers whose tenure in office was dependent upon popular election. Because this claim was not raised on direct appeal, it is procedurally barred.[43] Greene has failed to overcome this bar. Thus, we conclude that this claim was properly denied by the district court.[44]

Greene also contends that the manner by which the State sought to pursue a death sentence against him was arbitrary. However, this claim is procedurally barred, and Greene has failed to demonstrate good cause and prejudice to overcome the bar.[45] Moreover, this court concluded on direct appeal that Greene's death sentence was "not imposed under the influence of passion, prejudice, or any arbitrary factor."[46] This determination is the law of the case.[47] We conclude that Greene is not entitled to relief on this claim.

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[42]See NRS 34.810(3); Evans v. State, 117 Nev. 609, 646-47, 28 P.3d 498, 523 (2001).

[43]See NRS 34.810(1)(b)(1).

[44]See NRS 34.810(3).

[45]See NRS 34.810(1), (3).

[46]See Greene, 113 Nev. at 174, 931 P.2d at 65.

[47]See Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

IV. Affidavit of Earl Matthews and alleged Brady violation

Greene contends that the district court improperly rejected testimony of Earl Matthews which supported a valid claim that the State violated Brady v. Maryland.[48] We disagree.

To establish a valid Brady claim, a defendant must show that evidence was favorable to him, the evidence was withheld by the State, and the evidence was material, i.e., withholding it prejudiced him.[49]

Here, Matthews prepared an affidavit in 2000 and forwarded it to Greene's trial and appellate counsel, David Schieck. He alleged in the affidavit that Heather Barker, State witness and eyewitness to the murders, admitted to him that she had fabricated her testimony during Greene's trial. However, Greene has failed to demonstrate that any information possessed by Matthews was known to the State and withheld from Greene during trial.

During the post-conviction evidentiary hearing, Matthews testified that Barker told him in 1996 that she lied when she testified at Greene's trial. Matthews also testified that he did not reveal this information to anyone until 2000. Given that Greene was tried in 1995 and Matthews did not reveal this information until over five years later, Greene has failed to demonstrate that the State withheld this information.

Moreover, Matthews was the cousin of Greene's codefendant, Leonard Winfrey. Matthews was released from prison in 1996 and reincarcerated in 1997. The sum of Matthews's testimony was that Barker admitted to him that she was not an eyewitness to the murders

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[48]373 U.S. 83 (1963).

[49]See State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003).

and fabricated her story because she was mad at Winfrey for a robbery that occurred at her home. Barker testified at the evidentiary hearing consistent with her trial testimony that she was an eyewitness to the murders, she never made any such statements to Matthews, and her home was never robbed. The district court found Matthews's testimony lacked credibility, as opposed to Barker's testimony, which the district court found credible. Given these considerations, we conclude that Greene failed to demonstrate a valid Brady claim and the district court properly denied him relief on this issue.

V. Faretta Canvass

Greene contends that the district court should have granted his motion to remove his post-conviction counsel, Connolly, and either appointed new counsel or allowed him to represent himself. He contends further that the district court failed to canvass him as required pursuant to Faretta v. California.[50] We disagree.

Greene has failed to demonstrate that a right to self-representation and the mandates of Faretta extend to post-conviction proceedings. He cites no authority that supports this proposition, whereas relevant authority actually cuts against his assertion.[51]

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[50]422 U.S. 806 (1975).

[51]See Martinez v. Court of Appeal of Cal., Fourth Appellate Dist., 528 U.S. 152 (2000). The Supreme Court recognized in Martinez that the rights upon which its decision in Faretta was predicated concerned only those that occurred during the trial stage of a criminal prosecution. Id. at 159-60. The Court in Martinez proceeded to hold that Faretta did not, under the federal constitution, "recognize a right to self-representation on direct appeal from a criminal conviction." Id. at 163. We conclude that if

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Greene also does not articulate, let alone demonstrate, how he was prejudiced by his post-conviction counsel's performance or what issues were omitted or defectively raised that otherwise had merit. Thus, we conclude that he is not entitled to relief on this claim.

VI. Refusal of the district court to appoint an expert witness to assist in post-conviction proceedings

Greene contends that the district court improperly denied his post-conviction motion to appoint a psychiatric expert to evaluate Greene and testify during the post-conviction evidentiary hearing about the effects of the antipsychotic medication Greene was being administered during trial. The district court refused to appoint an expert, reasoning: "This idea of a psychiatrist to come and tell us all about what these drugs are and some others testifying, I don't see the need." Primarily, Greene contends that the district court's refusal to appoint an expert violates the United States Supreme Court decision Ake v. Oklahoma.[52] We disagree, and conclude that Greene's reliance upon Ake is misplaced.

Unlike the defendant in Ake, not only has Greene failed to demonstrate that his sanity was in question at the time he committed the murders—Greene did not pursue an insanity defense—but Ake concerned the appointment of a psychiatrist for a defendant in preparation for trial.[53] Ake does not address the appointment of a psychiatrist to aid in post-

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a defendant does not have such a right during his direct appeal, it is extremely unlikely that such rights extend to post-conviction proceedings.

[52]470 U.S. 68 (1985).

[53]Id. at 83.

conviction proceedings, and none of the other authority Greene cites specifically supports this contention.

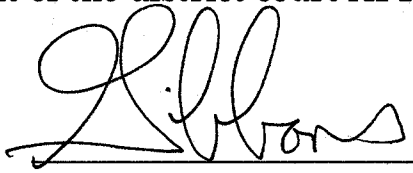
Greene essentially concedes this point, but nevertheless argues that this court should extend Ake to post-conviction proceedings. But the federal constitutional due process concerns that undergirded Ake are not implicated in post-conviction proceedings in Nevada, which are generally governed by statute,[54] not the federal constitution. Moreover, as previously discussed, Greene does not contend that he was incompetent during his trial, and even if he did, evidence revealed during post-conviction proceedings, as well as at trial, would belie such a contention.

Absent any allegation or evidence that Greene was incompetent, Greene has failed to demonstrate a need for calling a psychiatric expert nine years after his trial to testify about the effects of the antipsychotic medication on him, let alone that he had a constitutional right to have one appointed. We conclude that the district court properly

[54]See Pellegrini, 117 Nev. at 870 & n.11, 34 P.3d at 526 & n.11.

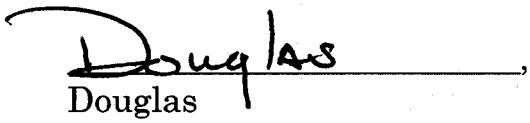
denied Greene's request. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Gibbons

_____, J.
Maupin



_____, J.
Douglas

cc: Hon. Donald M. Mosley, District Judge
Karen A. Connolly
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk