

IN THE SUPREME COURT OF THE STATE OF NEVADA

RUEL MERCADO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45584

**FILED**

**SEP 29 2006**

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court granting in part and denying in part appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On December 19, 1995, the district court convicted Mercado, pursuant to a jury verdict, of one count of first degree murder with the use of a deadly weapon with the intent to promote, further, or assist a criminal gang; one count of attempted murder with the use of a deadly weapon with the intent to promote, further, or assist a criminal gang; one count of burglary while in possession of a deadly weapon with the intent to promote, further, or assist a criminal gang; three counts of attempted robbery with the use of a deadly weapon with the intent to promote, further, or assist a criminal gang; two counts of first degree kidnapping with the use of a deadly weapon with the intent to promote, further, or assist a criminal gang; and ten counts of coercion with the use of a deadly weapon with the intent to promote, further, or assist a criminal gang. The State sought the death penalty, and after a penalty hearing, the jury returned a sentence of life in prison without the possibility of parole. The district court sentenced Mercado to serve two consecutive terms of life in

prison without the possibility of parole and additional determinate prison terms totaling eighty-five consecutive years. This court dismissed Mercado's direct appeal from his judgment of conviction and sentence.<sup>1</sup>

On March 25, 1999, Mercado filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Mercado or to conduct an evidentiary hearing. On September 21, 1999, the district court denied Mercado's petition. On appeal, this court affirmed the district court's denial of the claims presented in Mercado's petition except for Mercado's final claim of ineffective assistance of appellate counsel. This court reversed on that claim and remanded the case for the appointment of counsel to assist Mercado in pursuing the claim and any additional claims counsel identified.<sup>2</sup> The district court appointed counsel, who supplemented Mercado's petition. Following an evidentiary hearing, the two kidnapping convictions and two of the three attempted robbery convictions were vacated.<sup>3</sup> Mercado's other claims were denied. This appeal followed.

In the supplemental petition filed by appointed counsel, Mercado contended he received ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a

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<sup>1</sup>Mercado v. State, Docket No. 27877 (Order Dismissing Appeal, April 9, 1998).

<sup>2</sup>Mercado v. State, Docket No. 35006 (Order of Affirmance in Part and Reversal and Remand in Part, June 3, 2002).

<sup>3</sup>An amended judgment of conviction was filed by the district court on January 11, 2006.

judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice in that counsel's errors were so severe that they rendered the jury's verdict unreliable.<sup>4</sup>

First, Mercado contended counsel was ineffective for failing to file a pretrial motion to exclude a note allegedly written by him. Mercado failed to demonstrate counsel's performance was deficient or prejudiced him. Counsel objected to the note's admission at trial. Mercado failed to demonstrate that a pretrial objection to the note would have been successful. Further, counsel elicited that the note's author and time of writing were unknown. Mercado failed to demonstrate a reasonable probability that a pretrial objection to the note would have changed the outcome of the trial. Accordingly, we conclude the district court did not err in denying this claim.

Second, Mercado contended counsel was ineffective for failing to investigate Carl Flores's bias against Mercado and for failing to challenge Flores's testimony on that basis. Mercado claimed counsel should have located and called witnesses who would have testified that Flores's brother pulled a gun on Mercado six months before the instant offenses, that Mercado then called Flores's brother a coward and embarrassed him in front of other gang members, and that Mercado and Flores got into a fistfight about the incident. Although Mercado concedes that counsel cross-examined Flores about these facts, Mercado claims testimony from other witnesses would have been more useful in

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<sup>4</sup>Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984).

convincing the jury that Flores's statement that Mercado confided in him about the instant offenses was not credible. However, Mercado failed to identify these potential witnesses. Further, on cross-examination, counsel elicited from Flores that he and Mercado engaged in a fistfight. Flores denied knowing that his brother had ever pulled a gun on Mercado. Thus, evidence was presented to the jury that Mercado and Flores had some animosity in their relationship, and the jury was capable of determining whether Flores's testimony that Mercado confided in him about the crimes was credible in light of this animosity.<sup>5</sup> Mercado failed to demonstrate counsel's performance was deficient or prejudiced him. Accordingly, we conclude the district court did not err in denying this claim.

Third, Mercado contended counsel was ineffective for failing to challenge Flores's testimony based on his alleged paid-informant relationship with the FBI. Mercado also contended counsel failed to appropriately argue that the district court improperly admitted an FBI agent's testimony after the agent refused to answer a question about whether she had used Flores as an informant before the instant offenses. Mercado failed to demonstrate that counsel's performance was deficient or prejudiced him. On cross-examination, counsel elicited from FBI Agent Kelliher that she met Flores about six months prior to the instant offenses, she gave him some money at that time, and she had stayed in contact with him to obtain general information. She also testified that she had obtained information from Flores that had been useful in other cases,

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<sup>5</sup>See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981) (holding that it is for the jury to determine what weight and credibility to give to testimony).

but that she had not given him any money from the time she first met him until after he reported the instant offenses to her. Flores testified that Agent Kelliher gave him about \$200 after he first met her to assist him with his hospital bills and that she would contact him occasionally for information. Thus, evidence was presented to the jury that Flores had at least a six-month relationship with the FBI and that he had provided information to, and received money from, the FBI. Mercado failed to demonstrate a reasonable probability that further testimony on this point would have changed the outcome of his trial. Accordingly, we conclude the district court did not err in denying this claim.<sup>6</sup>

Fourth, Mercado contended counsel was ineffective for eliciting on cross-examination a positive identification of Mercado as one of the perpetrators of the offenses. Mercado failed to demonstrate counsel's performance prejudiced him. The jury was able to consider whether the witness's identification of Mercado was credible in light of her other testimony that she only saw the perpetrator in question for a few seconds and only saw the part of his face and hair that were not covered by the bandana tied around his face. The jury was also able to consider the credibility of the identification in light of the other victims' testimony,

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<sup>6</sup>To the extent Mercado also claimed his appellate counsel was ineffective in this regard, Mercado failed to demonstrate prejudice. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (holding that prejudice in the context of ineffective assistance of appellate requires a defendant to show the omitted issue has a reasonable probability of success on appeal) (citing Strickland, 466 U.S. 668). To the extent Mercado raised this claim as an error by the district court independently of his ineffective-assistance-of-counsel claims, it was waived by his failure to raise it on direct appeal, and Mercado failed to demonstrate good cause for his failure. See NRS 34.810(1)(b)(2), (3).

which established that all the perpetrators wore masks and none of the other witnesses could identify any of the perpetrators. In addition, two other witnesses testified that Mercado participated in the instant offenses. Accordingly, we conclude the district court did not err in denying this claim.

Fifth, Mercado contended counsel was ineffective for calling Felix Austria as a defense witness during the penalty hearing. Mercado failed to demonstrate counsel's performance was deficient or prejudiced him. After the State elicited testimony that Mercado had been a drug user before the instant offenses, the defense called Austria. Austria testified that he had introduced Mercado to drugs. Austria also testified that Mercado became a heavy drug user, that Mercado was using methamphetamine four to five times a day in the months prior to the robbery, and that he and Mercado had not been sober for at least six months prior to the robbery. "A strategy decision, such as who should be called as a witness, is a tactical decision that is 'virtually unchallengeable absent extraordinary circumstances.'"<sup>7</sup> Mercado failed to demonstrate extraordinary circumstances. Mercado also failed to demonstrate a reasonable probability of a different sentence had counsel not called Austria. Accordingly, we conclude the district court did not err in denying this claim.

Sixth, Mercado contended counsel was ineffective for failing to file a pretrial motion to preclude the State from requiring Mercado to display his gang-related tattoos to the jury. Mercado failed to

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<sup>7</sup>Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (quotation omitted).

demonstrate counsel's performance was deficient or prejudiced him. Mercado failed to demonstrate that counsel knew before trial that the State would make such a request. Counsel objected at trial to the State's request, but was overruled. Mercado also failed to demonstrate a reasonable probability that such a motion pretrial would have changed the outcome of his trial. Accordingly, we conclude the district court did not err in denying this claim.

Seventh, Mercado contended counsel was ineffective for failing to move to dismiss all the coercion charges. Mercado failed to demonstrate counsel's performance was deficient or prejudiced him. Although in his petition Mercado failed to specify who was allegedly coerced in each count, the record indicates that at least twelve people, including seven patrons and five employees, were present during the instant offenses. Testimony established all three robbers were armed and that at least one of the robbers said "freeze" or "don't move." Testimony also established that Austria told the bartender "get down and don't move," that Mercado told the cook and dishwasher "don't move," and that one of the gunmen told the security guard not to move and held him at gunpoint. This testimony was sufficient to establish that the robbers, by displaying their weapons, threatened violence or injury upon those persons or attempted to intimidate those persons by threatening them, with the intent to compel the patrons and employees to abstain from moving, in violation of NRS 207.190(1). Accordingly, we conclude the district court did not err in denying this claim.<sup>8</sup>

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<sup>8</sup>To the extent Mercado also claimed his appellate counsel was ineffective in this regard, Mercado failed to demonstrate prejudice. To the  
*continued on next page . . .*

Eighth, Mercado contended counsel was ineffective for failing to file a pretrial motion to dismiss or to move for an advisory verdict of acquittal on all the gang enhancement charges. Mercado failed to demonstrate counsel's performance prejudiced him. Flores and Austria both implicated Mercado, and we see no probability that Mercado would not have been convicted of the underlying crimes even had the jury not heard the gang evidence. Further, Mercado was not sentenced on the gang enhancements because his sentences were enhanced for the use of a deadly weapon. Mercado failed to demonstrate a reasonable probability that the outcome of the trial or the penalty hearing would have been different had counsel sought dismissal of the gang enhancements. Accordingly, we conclude the district court did not err in denying this claim.<sup>9</sup>

Ninth, Mercado contended counsel was ineffective for failing to prepare the defense expert witness, psychiatrist Dr. Roitman, for the penalty hearing. Mercado failed to allege specifically how counsel should have prepared Dr. Roitman differently. Mercado also contended counsel

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*... continued*

extent Mercado raised this claim as an error by the district court independently of his ineffective-assistance-of-counsel claims, it was waived by his failure to raise it on direct appeal, and Mercado failed to demonstrate good cause for his failure.

<sup>9</sup>To the extent Mercado also claimed his appellate counsel was ineffective in this regard, Mercado failed to demonstrate prejudice. To the extent Mercado raised this claim as an error by the district court independently of his ineffective-assistance-of-counsel claims, it was waived by his failure to raise it on direct appeal, and Mercado failed to demonstrate good cause for his failure.



should not have provided Dr. Roitman with a less favorable report prepared by another defense expert, psychologist Dr. Mortillaro. Mercado claimed that Dr. Roitman's reference to Dr. Mortillaro's report during his testimony opened the door for the State to call Dr. Mortillaro as a State's witness and that Dr. Mortillaro's testimony was damaging. Mercado failed to demonstrate counsel's performance was deficient or prejudiced him. During the penalty hearing, Dr. Roitman testified that he needed the results from intelligence and psychological tests Dr. Mortillaro administered to Mercado in order to develop his own analysis. Dr. Roitman also discussed the areas where he disagreed with Dr. Mortillaro and emphasized that professionals can form differing clinical impressions, as he and Dr. Mortillaro had in this case. In light of the evidence, Mercado failed to demonstrate a reasonable probability that the jury would have returned a different sentence. Accordingly, we conclude the district court did not err in denying this claim.

Tenth, Mercado contended counsel was ineffective for failing to move to limit victim impact statements by the family of victim Gerald Serna during the penalty phase. This claim is belied by the record.<sup>10</sup> Counsel objected to the testimony of Nancy Serna, who would have been the fourth Serna family member to testify at the penalty hearing.<sup>11</sup> As a result of counsel's objection, the State declined to call Nancy Serna to testify. Nor has Mercado shown that the evidence presented was excessive

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<sup>10</sup>See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

<sup>11</sup>A videotape of Gerald Serna eating dinner with his family the day before his death was also shown at the penalty hearing.

or otherwise improper. Accordingly, we conclude the district court did not err in denying this claim.<sup>12</sup>

Eleventh, Mercado contended counsel was ineffective for failing to object to prosecutorial misconduct during the penalty hearing closing arguments. Mercado failed to demonstrate that counsel's performance was deficient or prejudiced him. Specifically, Mercado claimed the prosecutor improperly referred to the jury as the conscience of the community. This reference was an isolated comment directed not at the jury, but at the trial court in response to counsel's objection that the prosecutor was improperly injecting the community's fear of gangs into the proceedings. Mercado also claimed that in final closing argument the prosecutor improperly argued that Mercado's due process rights had been protected but the victim had been killed without due process and that Mercado was a "psychotic time bomb" who was "not going to change" and was the jury's "worst nightmare" due to his lack of "necessary internal controls to adjust his antisocial behavior." Assuming these statements were improper, Mercado failed to demonstrate counsel's failure to object prejudiced him. In light of the evidence, Mercado failed to demonstrate a reasonable probability of a different sentence. Mercado also claimed counsel failed to object to the State's argument that gangs were prevalent in the area and the jury should send a message to gang members that

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<sup>12</sup>To the extent Mercado also claimed his appellate counsel was ineffective in this regard, Mercado failed to demonstrate prejudice. To the extent Mercado raised this claim as an error by the district court independently of his ineffective-assistance-of-counsel claims, it was waived by his failure to raise it on direct appeal, and Mercado failed to demonstrate good cause for his failure.

murder and robbery "of innocent, hardworking people" would not be tolerated. This claim is belied by the record. Counsel objected to both comments. Accordingly, we conclude the district court did not err in denying this claim.<sup>13</sup>

Twelfth, Mercado contended counsel was ineffective for failing to cross-examine Austria at trial as to whether he or another of the participants could have shot the two victims. Mercado failed to demonstrate counsel's performance was deficient or prejudiced him. On direct examination, Austria testified that he shot once at William Murr, then heard two shots but did not know where they came from; he then shot at Murr again and fled with the third robber, J. George Chuatoco. Austria further testified that an accomplice picked him and Chuatoco up and they left the scene without Mercado. Mercado failed to demonstrate any probability that Austria would have changed this testimony on cross-examination if asked whether he or Chuatoco shot Serna. Accordingly, we conclude the district court did not err in denying this claim.

In his petition, Mercado also contended that he received ineffective assistance of appellate counsel. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient and prejudice resulted in that the omitted issue would have had a reasonable probability of success on

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<sup>13</sup>To the extent Mercado also claimed his appellate counsel was ineffective in this regard, Mercado failed to demonstrate prejudice him. To the extent Mercado raised this claim as an error by the district court independently of his ineffective-assistance-of-counsel claims, it was waived by his failure to raise it on direct appeal, and Mercado failed to demonstrate good cause for his failure.

appeal.<sup>14</sup> Appellate counsel is not required to raise every nonfrivolous issue on appeal.<sup>15</sup> This court has stated that appellate counsel will be most effective when every conceivable issue is not raised on appeal.<sup>16</sup>

First, Mercado claimed appellate counsel was ineffective for failing to argue that the State improperly bolstered Austria's testimony at trial by asking him if he was telling the truth and if his plea agreement would be negated by untruthful testimony. Mercado failed to demonstrate counsel's performance was deficient or prejudiced him. Improper witness vouching occurs when the State "places the prestige of the government behind the witness by providing personal assurances of [the] witness's veracity."<sup>17</sup> Asking Austria if he was being truthful did not place the prestige of the government behind him or provide personal assurances of his truthfulness. Accordingly, we conclude the district court did not err in denying this claim.<sup>18</sup>

Second, Mercado claimed appellate counsel was ineffective for failing to argue that Mercado's Fifth Amendment right not to incriminate himself was violated when the district court required him to display his

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<sup>14</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

<sup>15</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

<sup>16</sup>Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

<sup>17</sup>Browning v. State, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (internal quotation marks omitted).

<sup>18</sup>To the extent Mercado raised this claim independently of his ineffective-assistance-of-counsel claims, it was waived by his failure to raise it on direct appeal, and Mercado failed to demonstrate good cause for his failure.

gang-related tattoos to the jury. Mercado failed to demonstrate counsel's performance was deficient or prejudiced him.

The Self-Incrimination Clause of the Fifth Amendment provides that no "person . . . shall be compelled in any criminal case to be a witness against himself." Although the text does not delineate the ways in which a person might be made a "witness against himself," we have long held that the privilege does not protect a suspect from being compelled by the State to produce real or physical evidence.<sup>19</sup>

"[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."<sup>20</sup> This court has previously held that requiring a defendant to bare a part of his body to display tattoos does not violate his right against self-incrimination.<sup>21</sup> Accordingly, we conclude the district court did not err in denying this claim.<sup>22</sup>

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<sup>19</sup>Pennsylvania v. Muniz, 496 U.S. 582, 588 (1990) (citation and internal quotation marks omitted).

<sup>20</sup>Holt v. United States, 218 U.S. 245, 252-253 (1910).

<sup>21</sup>See Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975); see also DeLeon v. State, 758 S.W.2d 621, 625 (Tex. Crim. App. 1988) (holding it was proper to order a defendant to display his gang-related tattoos).

<sup>22</sup>To the extent Mercado raised this claim independently of his ineffective-assistance-of-counsel claims, it was waived by his failure to raise it on direct appeal, and Mercado failed to demonstrate good cause for his failure.

Third, Mercado claimed appellate counsel was ineffective for failing to argue that the district court should have excused juror 28 during voir dire. Mercado failed to demonstrate counsel's performance was deficient or prejudiced him. A juror may be excused for cause if her state of mind evinces "enmity against or bias to either party."<sup>23</sup> In this case, juror 28 indicated in her jury questionnaire that she tended to think the prosecution would do its homework before charging someone with a crime and that as a result, a person charged with a crime was probably guilty. However, when questioned by the defense, juror 28 also stated that she understood and accepted the concept of reasonable doubt, the presumption of innocence, and that the prosecution had to prove its case. She also indicated that she could be fair and impartial. Accordingly, we conclude the district court did not err in denying this claim.<sup>24</sup>

Fourth, Mercado claimed appellate counsel was ineffective for failing to argue that the State used a peremptory challenge to excuse a venire member based on her race, in violation of Batson v. Kentucky.<sup>25</sup> Under the equal protection analysis set forth in Batson, once the opponent of a peremptory challenge makes a prima facie case of racial discrimination, the burden of production shifts to the proponent of the

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<sup>23</sup>NRS 16.050(1)(g).

<sup>24</sup>To the extent Mercado raised this claim independently of his ineffective-assistance-of-appellate-counsel claim, it was waived by his failure to raise it on direct appeal, and Mercado failed to demonstrate good cause for his failure.

<sup>25</sup>476 U.S. 79 (1986).

strike to give a race-neutral explanation.<sup>26</sup> If such an explanation is given, then the trial court must decide whether the opponent has proved purposeful racial discrimination.<sup>27</sup>

In this case, defense counsel argued that the State dismissed the juror because she was of Filipino heritage, as was Mercado, and that the State had struck other minority jurors. The State claimed it challenged the juror because she had an unfavorable view of police, especially traffic police, and a traffic stop was at issue in this case. The State also claimed it challenged the juror because she was young, approximately twenty years old, and it believed a level of life experience and the capacity to handle a great deal of responsibility were at issue when the juror would be required to consider a death sentence. The State emphasized it had challenged another juror because of her youth as well. The district court stated it was satisfied that the State had a neutral reason for the challenge and overruled counsel's Batson challenge.

"[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible."<sup>28</sup> A trial court's credibility finding may be influenced by factors including "the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy."<sup>29</sup> Because the trial court's findings on the issue of

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<sup>26</sup>Purkett v. Elem, 514 U.S. 765, 767 (1995).

<sup>27</sup>Id.

<sup>28</sup>Miller-El v. Cockrell, 537 U.S. 322, 339 (2003).

<sup>29</sup>Id.

discriminatory intent largely turn on evaluations of credibility, they are entitled to great deference<sup>30</sup> and will not be overturned unless clearly erroneous.<sup>31</sup> We conclude the district court's findings were not clearly erroneous and Mercado failed to demonstrate this issue had any likelihood of success on direct appeal. Accordingly, we conclude the district court did not err in denying this claim.<sup>32</sup>

Mercado also claimed the State improperly failed to disclose Felix Austria's guilty plea agreement. This court ruled in Mercado's direct appeal that the State's failure to turn over the plea agreement until the jury had begun deliberating did not violate NRS 175.282.<sup>33</sup> In the instant petition, Mercado claimed the failure violated his rights to due process and to confront and cross-examine a witness against him. This specific claim was waived by Mercado's failure to raise it on direct appeal, and Mercado failed to demonstrate good cause for his failure.<sup>34</sup> Further, reconsideration of this issue is barred by the law of the case.<sup>35</sup> The doctrine of the law of

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<sup>30</sup>See Thomas v. State, 114 Nev. 1127, 1137, 967 P.2d 1111, 1118 (1998).

<sup>31</sup>Libby v. State, 115 Nev. 45, 55, 975 P.2d 833, 839 (1999) (quoting Hernandez v. New York, 500 U.S. 352, 369 (1991)).

<sup>32</sup>To the extent Mercado raised this claim independently of his ineffective-assistance-of-counsel claims, it was waived by his failure to raise it on direct appeal, and Mercado failed to demonstrate good cause for his failure.

<sup>33</sup>Mercado, Docket No. 27877.

<sup>34</sup>See NRS 34.810(1)(b)(2), (3).

<sup>35</sup>See Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001).



the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings.<sup>36</sup> Accordingly, we conclude the district court did not err in denying this claim.

Finally, Mercado claimed that the district court erred by allowing the State to play a videotape at the penalty hearing of the murder victim eating Thanksgiving dinner with his family on the day before his death, and that the showing of the videotape violated his right to due process. This court ruled in Mercado's direct appeal that showing the videotape did not violate Mercado's due process right to fundamental fairness during the penalty hearing.<sup>37</sup> Reconsideration of this issue is barred by the law of the case.

Having considered Mercado's contentions and concluded they are without merit or are procedurally barred, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.  
Becker

Hardesty, J.  
Hardesty

Parraguirre, J.  
Parraguirre

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<sup>36</sup>See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

<sup>37</sup>Mercado, Docket No. 27877.

cc: Hon. Lee A. Gates, District Judge  
JoNell Thomas  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk