IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY GENE TILCOCK, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 38643
LARRY GENE TILCOCK, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 39678
LARRY GENE TILCOCK, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 40098

ORDER OF AFFIRMANCE

Docket No. 38643 is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Docket No. 39678 is a proper person appeal from an order of the district court denying appellant's motion for sentence modification. Docket No. 40098 is a proper person appeal from an order of the district

02-20130

court denying appellant's post-conviction petition for a writ of habeas corpus. We elect to consolidate these appeals for disposition.[1]

On August 14, 1998, the district court convicted appellant, pursuant to a jury trial, of one count of burglary, one count of ex-felon in possession of a firearm, and one count of failure to stop on signal of police officer. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve three concurrent terms of life in the Nevada State Prison without the possibility of parole. This court dismissed appellant's appeal from his judgment of conviction.[2] The remittitur issued on November 14, 2000.

Docket No. 38643

On June 16, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to

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[1]NRAP 3(b).

[2]Tilcock v. State, Docket No. 32821 (Order Dismissing Appeal, September 8, 2000).

conduct an evidentiary hearing. On October 4, 2001, the district court denied appellant's petition. This appeal followed.

In his petition, appellant first raised six claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable.[3] The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.[4]

First, appellant claimed that his trial counsel was ineffective for failing to object to jury instruction number 15. Jury number instruction 15 read:

> It is not necessary that the State prove a defendant actually took or carried away any of the goods or property contained in the structure since the gist of the crime of "Burglary" is the unlawful

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[3]Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[4]Strickland, 466 U.S. at 697.

> entry with the intent to steal goods or property contained therein, regardless of whether or not there was an actual larceny, or stealing of the goods or property.

Appellant claimed that this jury instruction allowed the State to prove there was a burglary "even though there was no entry or actual burglary." Appellant claimed that there "are numerous reasons why the window could have been broken-- far from the intent to commit larceny." Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Jury instruction number 15 was a proper statement of law. Jury instruction number 15 did not relieve the State of its burden to prove an unlawful entry. Further, this court has long held that the offense of burglary is complete when the protected structure is entered with the requisite intent, and actual stealing is merely evidence of intent.[5] Therefore, appellant failed to demonstrate that his counsel was ineffective in this regard.

Second, appellant claimed that his trial counsel was ineffective for failing to object to jury instruction number 13. Jury instruction number 13, in pertinent part, read:

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[5]State v. Simpson, 32 Nev. 138, 104 Pac. 244 (1909).

> The person who unlawfully breaks and enters or unlawfully enters into the [protected structure] may reasonably be inferred to have broken and entered or entered with the intent to commit larceny unless the unlawful breaking and entering or unlawful entry is explained by evidence satisfactory to the jury to have been made without criminal intent.

Appellant claimed that this jury instruction lowered the State's burden of proof and placed a mandatory presumption of guilt upon appellant. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. NRS 205.065 provides for an inference of burglarious intent as set forth in jury instruction number 13. NRS 205.065 does not provide for a mandatory presumption or inference of intent; rather NRS 206.065 provides for a permissive inference of intent. This court has held that "[i]nstructions phrased in the form of permissible inferences may satisfy NRS 47.230."[6] Jury instruction number 13 did not relieve the State of its burden to prove that appellant unlawfully entered the protected structure. Moreover, even assuming that there was any

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[6]Hollis v. State, 96 Nev. 207, 209, 606 P.2d 534, 536 (1980). NRS 47.230 sets forth the general guidelines regarding presumptions against defendants in criminal cases.

error in the jury instruction, the error was harmless in the instant case because the element of intent was not at issue.[7] At trial, appellant admitted upon cross-examination that his intent in breaking the window was to steal property from within the condominium. Thus, appellant failed to demonstrate that his counsel was ineffective in this regard.

Third, appellant claimed that his trial counsel was ineffective for failing to challenge the district court's admission of prior convictions. Appellant claimed that because he stipulated that he was an ex-felon for purposes of the ex-felon in possession of a firearm charge that it was error for the jury instructions to list four prior convictions under this charge. Appellant additionally claimed that the ex-felon in possession of a firearm charge should have been severed from the rest of the charges and tried separately. Appellant further claimed that his 1980 conviction should not have been included because it was too remote in time and that the district court erred in applying the res gestae doctrine. We conclude that appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Given the overwhelming evidence of

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[7]Wegner v. State, 116 Nev. 1149, 14 P.3d 25 (2000) (holding that erroneous jury instructions are subject to harmless-error analysis).

guilt and the fact that three of the four prior convictions were brought out for impeachment purposes during appellant's trial testimony, the inclusion of the four prior felony convictions in the list of charges contained in the jury instructions was harmless.[8] The district court, further, did not err in failing to sua sponte sever appellant's ex-felon in possession of a firearm charge.[9] There is no time requirement related to prior convictions used for purposes of establishing a count of ex-felon in possession of a firearm.[10] The record does not support appellant's contention that the district court relied on res gestae to admit the prior

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[8]Sanders v. State, 96 Nev. 341, 609 P.2d 324 (1980).

[9]Brown v. State, 114 Nev. 1118, 967 P.2d 1126 (1998) (holding that joinder of a count of ex-felon in possession of a firearm with other counts did not have a substantial and injurious effect on the jury's verdict given the overwhelming evidence of guilt, but providing that a count of ex-felon in possession of a firearm should be severed in future cases with multiple counts). Appellant was tried prior to the Brown ruling.

[10]To the extent that appellant argued that his 1980 conviction was too remote to be used for impeachment purposes, appellant failed to demonstrate that the conviction was too remote pursuant to NRS 50.095, and therefore, he failed to demonstrate that his counsel was ineffective in this regard.

convictions. Therefore, we conclude that appellant failed to demonstrate that his trial counsel was ineffective in this regard.

Fourth, appellant claimed that his trial counsel was ineffective at sentencing. Appellant claimed that his trial counsel was not prepared for sentencing. Appellant claimed that his trial counsel should have challenged the fact that the district court did not explicitly state it was just and proper to adjudicate appellant a habitual criminal. Appellant further claimed that his trial counsel should have objected to the number of prior convictions admitted and the remoteness of several of the prior convictions. Appellant claimed that trial counsel should have also emphasized the nonviolent nature of several of the prior convictions. We conclude that appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to provide sufficient, specific facts supporting his claim that his trial counsel was not prepared for sentencing.[11] Appellant's trial counsel did object to the number of prior convictions and the remoteness of several of the prior convictions. The district court stated at sentencing that it was basing its decision to adjudicate appellant a habitual criminal upon his past record.

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[11]Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

This court determined on direct appeal that the district court did not abuse its discretion in adjudicating appellant a habitual criminal. The doctrine of the law of the case prevents relitigation of this issue and cannot be avoided by a more focused and detailed argument.[12] Therefore, appellant failed to demonstrate that his trial counsel was ineffective in this regard.

Fifth, appellant claimed that his trial counsel was ineffective for failing to file a motion for discovery as soon as counsel was appointed in the case. Appellant believed that if trial counsel had filed a motion for discovery earlier that trial counsel may have received the voluntary statement of Wayne Norbert from the police and that the charges of attempted murder would not have been pursued. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel filed a motion for discovery one month prior to the trial. Appellant failed to demonstrate that even assuming that Norbert's statement was not a part of the discovery that Norbert's statement would have altered the outcome of the preliminary hearing or trial. Because appellant was acquitted of the attempted

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[12]Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

murder charges at trial, appellant cannot demonstrate prejudice relating to the attempted murder charges. Therefore, appellant failed to demonstrate that his counsel was ineffective in this regard.

Sixth, appellant claimed that his trial counsel was ineffective for failing to impeach the testimony of Detectives Sias and Gillins with the voluntary statements of Detectives Brady and Ray, the voluntary statement of Wayne Norbert, and with the prior statements of Detective Gillins. We conclude that appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that impeachment on the grounds that he set forth in his petition would have had a reasonable probability of altering the outcome of the trial given the overwhelming evidence of guilt at trial. Therefore, appellant failed to demonstrate that his counsel was ineffective in this regard.

Next, appellant raised twelve claims of ineffective assistance of appellate counsel.[13] "A claim of ineffective assistance of appellate

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[13]To the extent that appellant raised any of his claims independently from his ineffective assistance of appellate counsel claims, appellant waived these issues. See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). We nevertheless address appellant's claims in connection

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counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington, 466 U.S. 668 (1984)."[14] Appellate counsel is not required to raise every non-frivolous issue on appeal.[15] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[16] "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[17]

First, appellant claimed that his appellate counsel was ineffective for failing to argue that the prosecutor committed misconduct during the opening statement. We conclude that appellant failed to demonstrate that his appellate counsel's performance was deficient or that

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with his contention that appellate counsel should have raised the claims on direct appeal.

[14]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

[15]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[16]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

[17]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

he was prejudiced. Several of the instances of prosecutorial misconduct alleged by appellant were raised on direct appeal. This court considered and rejected these claims on direct appeal. The doctrine of the law of the case prevents litigation of this issue.[18] Further, given the overwhelming evidence of guilt, appellant failed to demonstrate that any of the alleged misstatements prejudiced the outcome of the trial. Therefore, appellant failed to demonstrate that his appellate counsel was ineffective in this regard.

Second, appellant claimed his appellate counsel was ineffective for failing to argue that the police fabricated evidence of the burglary and failure to stop charges in order to justify shooting appellant during the course of his apprehension. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. Appellant's assertion that the police fabricated evidence was not supported by the record on appeal. Therefore, appellant failed to demonstrate that his appellate counsel was ineffective in this regard.

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that the State knowingly used false and

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[18]Hall, 91 Nev. 314, 535 P.2d 797.

perjured testimony. Appellant claimed that this amounted to malicious prosecution and a violation of his due process and fair trial rights. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that this issue had a reasonable probability of success on appeal. The record does not support appellant's assertion that the State knowingly used false and perjured testimony. Therefore, appellant failed to demonstrate that his appellate counsel was ineffective in this regard.

Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that the State deliberately withheld the voluntary police statement of Norbert Wayne. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that this issue had a reasonable probability of success on appeal. Appellant failed to demonstrate that the material in Wayne's statement was exculpatory and material.[19] Therefore, appellant failed to demonstrate that his appellate counsel was ineffective in this regard.

Fifth, appellant claimed that the State withheld exculpatory evidence by failing to call Detectives Brady and Ray at trial. Appellant

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[19]Brady v. Maryland, 373 U.S 83 (1963); Lay v. State, 116 Nev. 1185, 14 P.3d 1256 (2000).

claimed that the voluntary statements of Detectives Brady and Ray contradicted the trial testimony of Detectives Gillins and Sias. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that this issue had a reasonable probability of success on appeal. The State did not withhold exculpatory evidence by failing to call Detectives Brady and Ray at trial. Appellant failed to allege, and there is no indication, that the defense was not aware or in the possession of the voluntary statements of Detectives Brady and Ray prior to trial. Therefore, we conclude that appellant failed to demonstrate that his appellate counsel was ineffective in this regard.

Sixth, appellant claimed that the State withheld exculpatory evidence by failing to present the testimony of Detective Johnson at the preliminary hearing. We conclude that appellant failed to demonstrate that his appellate counsel's performance was deficient or that this issue had a reasonable probability of success on appeal. The record reveals that Detective Johnson did not testify at the preliminary hearing because he was out of the jurisdiction at the time and not for the reason suggested by appellant. Sufficient evidence was presented to bind appellant over for

trial on all of the charges.[20] Therefore, we conclude that appellant failed to demonstrate that his appellate counsel was ineffective in this regard.

Seventh, appellant claimed that his appellate counsel was ineffective for failing to argue that there was insufficient evidence presented to support the charge of failure to stop on signal of a police officer. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Sufficient evidence was presented to support the charge of failure to stop on signal of a police officer.[21] Officer Tafoya testified that he received a radio dispatch alerting

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[20]NRS 171.206 ("If from the evidence it appears to the magistrate that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate shall forthwith hold him to answer in the district court.").

[21]NRS 484.348, in pertinent part, provides:

> 1. Except as otherwise provided in this section, the driver of a motor vehicle who willfully fails or refuses to bring his vehicle to a stop, or who otherwise flees or attempts to elude a peace officer in a readily identifiable vehicle of any police department or regulatory agency, when given a signal to bring his vehicle to a stop is guilty of a misdemeanor.

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him to appellant's car and turned on the lights and sirens of his marked police vehicle and proceeded to appellant's location. En route, Officer Tafoya observed appellant's vehicle approaching him at a high rate of speed and proceeded to follow appellant in his marked car with lights and sirens activated.[22] Detective Johnson testified that when he reached the pursuit, he observed two police vehicles, with red lights and sirens, following appellant. Appellant did not stop; rather appellant continued to

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> 2. The signal by the peace officer described in subsection 1 must be by flashing red lamp and siren.
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> 3. Except as otherwise provided in subsection 2 of NRS 484.377, if, while violating the provisions of subsection 1, the driver of the motor vehicle:
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> (b) Operates the motor vehicle in a manner which endangers or is likely to endanger any person other than himself or the property of any person other than himself,
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> the driver is guilty of a category B felony.

[22]Officer Tafoya testified that he had to swerve to avoid appellant's vehicle because appellant was traveling in the wrong lane.

drive his vehicle at a high rate of speed. Appellant ignored one stop sign and turned against a red light.[23] Appellant stopped only after he drove over a curb in the parking lot of a Circle K store. Therefore, appellant failed to demonstrate that his appellate counsel was ineffective in this regard.

Eighth, appellant claimed that his appellate counsel was ineffective for failing to challenge jury instruction numbers 13 and 15. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that these issues had a reasonable probability of success on appeal. As discussed earlier, these jury instructions did not misstate the law. Further, appellant failed to demonstrate that he was prejudiced by the giving of these instructions given the overwhelming evidence of guilt.[24] Therefore, appellant failed to demonstrate that his appellate counsel was ineffective in this regard.

Ninth, appellant claimed that his appellate counsel was ineffective for failing to challenge the reasonable doubt jury instruction.

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[23]Officer Tafoya testified that there were cars in the intersection when appellant turned against the red light.

[24]Wegner, 116 Nev. 1149, 14 P.3d 25.

Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. The district court gave Nevada's statutory reasonable doubt instruction as set out in and mandated by NRS 175.211. This court has repeatedly held that the current statutory definition is constitutional.[25] Therefore, appellant failed to demonstrate that his appellate counsel was ineffective in this regard.

Tenth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court improperly admitted his prior convictions at trial and failing to challenge his habitual criminal enhancement. We conclude that appellant failed to demonstrate that his appellate counsel's performance was deficient or that these issues had a reasonable probability of success on appeal for the reasons discussed earlier. Therefore, we conclude that appellant failed to demonstrate that his appellate counsel was ineffective.

Eleventh, appellant claimed that his appellate counsel was ineffective for failing to argue that the State violated his plea bargain in

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[25]See, e.g., Chambers v. State, 113 Nev. 974, 982-83, 944 P.2d 805, 810 (1997); Evans v. State, 112 Nev. 1172, 1191, 926 P.2d 265, 277-78 (1996); Lord v. State, 107 Nev. 28, 40, 806 P.2d 548, 556 (1991).

district court case number C149095 by pursuing the habitual criminal enhancement in this case. Appellant claimed that in exchange for his guilty plea in district court case C149095 the State agreed not to seek habitual criminal enhancement in this case. We conclude that appellant failed to demonstrate that his appellate counsel's performance was deficient or that this issue had a reasonable probability of success on appeal. Any challenge to the validity of the guilty plea in district court case C149095 must be raised in that case. Moreover, appellant failed to demonstrate that this issue was meritorious. Excerpts from the plea hearing conducted in district court case C149095, provided by appellant in support of his petition, do not support his assertion relating to the plea bargain. Therefore, appellant failed to demonstrate that his appellate counsel was ineffective in this regard.

Twelfth, appellant claimed that his appellate counsel was ineffective for failing to argue that his trial was the result of selective and vindictive prosecutorial tactics. We conclude that appellant failed to demonstrate that his appellate counsel's performance was deficient or that this issue had a reasonable probability of success on appeal. Therefore, appellant failed to demonstrate that his appellate counsel was ineffective in this regard.

Thus, we affirm the order of the district court denying appellant's habeas corpus petition.

Docket No. 39678

On May 2, 2002, appellant filed a proper person motion for sentence modification in the district court. In his motion, appellant challenged his habitual criminal adjudication and argued that he was entitled to a new sentencing hearing. The State opposed the motion. On May 14, 2002, the district court denied the motion. This appeal followed.

A motion to modify a sentence may be granted only on "very narrow due process grounds" and where the sentence "is based on a materially untrue assumption or mistake of fact that has worked to the extreme detriment of the defendant, but only if the mistaken sentence 'is the result of the sentencing judge's misapprehension of a defendant's criminal record.'"[26]

We conclude that the district court did not err in denying appellant's motion to modify his sentence. First, this court already

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[26]Edwards v. State, 112 Nev. 704, 707, 918 P.2d 321, 324 (emphasis omitted) (quoting State v. District Court, 100 Nev. 90, 97, 677 P.2d 1044, 1048 (1984)).

determined on direct appeal that the district court did not abuse its discretion in adjudicating appellant a habitual criminal. The doctrine of the law of the case prevents further litigation of this issue and cannot be avoided by a more detailed and precisely focused argument.[27] Moreover, appellant failed to establish that his sentence was based on materially untrue assumptions or mistakes of fact that worked to his extreme detriment. Therefore, we affirm the order of the district court denying appellant's motion.

Docket No. 40098

On June 3, 2002, appellant filed a second post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On July 29, 2002, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than eighteen months after this court issued the remittitur from his direct appeal. Thus, appellant's

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[27]Hall, 91 Nev. 314, 535 P.2d 797.

petition was untimely filed.[28] Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.[29] Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.[30]

Appellant argued that he had good cause to file an untimely and successive habeas corpus petition because he was prevented from raising claims of ineffective assistance of trial counsel on direct appeal. Appellant claimed that because he did not have the right to counsel in a habeas corpus petition but did have the right to counsel in a direct appeal, it was unfair not to allow him to raise claims of ineffective assistance of trial counsel on direct appeal where he could have received the assistance of counsel. Appellant claimed that he was ignorant in the law and had to rely on the assistance of an inmate law clerk.

Based upon our review of the record, we conclude that the district court did not err in determining that appellant failed to

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[28]NRS 34.726(1).

[29]NRS 34.810(1)(b)(2); NRS 34.810(2).

[30]NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

demonstrate adequate cause to excuse his procedural defects. This court has held that good cause must be an impediment external to the defense.[31] Appellant failed to demonstrate that an impediment external to the defense prevented him from complying with the provisions of NRS chapter 34. Claims of ineffective assistance of counsel may not be raised on direct appeal, "unless there has already been an evidentiary hearing."[32] Thus, appellant was properly advised that he could not raise his ineffective assistance of counsel claims on direct appeal. Appellant's limited intelligence or poor assistance in framing issues is not sufficient cause to overcome procedural bar.[33] Therefore, we affirm the order of the district court denying appellant's petition.

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[31]Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

[32]Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

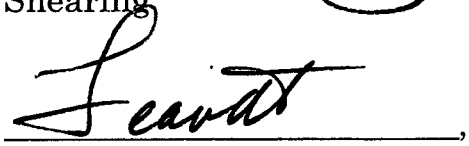
[33]Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988).

Conclusion

Having reviewed the records on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[34] Accordingly, we

ORDER the judgments of the district court AFFIRMED.[35]

 , J.
Shearing

 , J.
Leavitt

 , J.
Becker

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[34]Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[35]We have considered all proper person documents filed or received in these matters, and we conclude that the relief requested is not warranted.

cc: Hon. John S. McGroarty, District Judge
Attorney General/Carson City
Clark County District Attorney
Larry Gene Tilcock
Clark County Clerk