

ORIGINAL

**IN THE SUPREME COURT
FOR THE STATE OF NEVADA**

LATISHA BABB,

Appellant,

vs.

JENNIFER LOZOWSKY, ET AL,

Respondents.

Sup. Ct. Case No.: 49929

District Ct. Case No.:
CR98P0074B

FILED

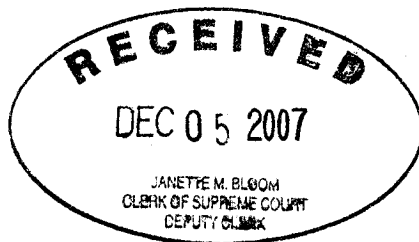
DEC 05 2007

JANETTE M. BLOOM
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On Appeal from the Second Judicial District Court, Washoe County,
The Honorable Connie Steinheimer, Department IV

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I.	STATEMENT OF RELATED CASES	1
II.	STATEMENT OF ISSUES PRESENTED	1
III.	STATEMENT OF THE CASE/PROCEDURAL HISTORY	2
A.	THE TRIAL & DISTRICT COURT PROCEEDINGS	2
B.	MS. BABB'S DIRECT APPEAL	6
C.	POST CONVICTION PROCEEDINGS	7
1.	The December 2001 Habeas Petition	7
2.	Appeal of the December 2001 Habeas Petition	9
3.	Ms. Babb's Federal Habeas Petition	10
4.	The March 2006 Habeas Petition	10
IV.	STATEMENT OF FACTS	14
A.	THE CONFLICT OF COUNSEL ISSUES	14
B.	THE BATTERED WOMAN SYNDROME ISSUES	17
C.	MS. BABB'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO GIVE ANY OPENING STATEMENT AND FOR ADMITTING THAT SHE COMMITTED ROBBERY IN HIS CLOSING ARGUMENT	18
D.	TRIAL COUNSEL FAILED TO RAISE ANY ISSUES REGARDING THE VOLUNTARINESS OF MS. BABB'S STATEMENTS	19
E.	THE STATE COMMITTED PROSECUTORIAL MISCONDUCT WHEN IT ARGUED THAT THE JURORS WERE TO DO EQUAL AND EXACT JUSTICE	19
F.	THE ADMISSION OF CO-DEFENDANT HARTE'S STATEMENTS AND THE FAILURE TO SEVER	19

G.	THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY REGARDING AGGRAVATING FACTORS AND THE DEATH PENALTY AND MS. BABB WAS NOT DEATH PENALTY ELIGIBLE	21
V.	LEGAL ARGUMENT	21
A.	JOINT REPRESENTATION AND CONFLICT OF COUNSEL	21
B.	SUCCESSOR COUNSEL'S FAILURE TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL	23
C.	AGGRAVATING CIRCUMSTANCES AND FELONY MURDER	27
D.	PROCEDURAL ISSUES	27
VI.	CONCLUSION	29
	ATTORNEY'S CERTIFICATE OF COMPLIANCE	30
	CERTIFICATE OF SERVICE	31

TABLE OF AUTHORITIES

United States Constitutional Authority

Fifth Amendment	1-2, 7-14, 21
Sixth Amendment	1-2, 7-14, 21, 22, 24
Eighth Amendment	1-2, 7, 8, 10-11, 14
Fourteenth Amendment	1-2, 7-8, 10-14, 21, 24, 27, 28

United States Supreme Court Authority

<i>Boyd v. California</i> , 494 U.S. 370 (1990)	25
<i>Bruton v. United States</i> , 391 U.S. 123 (1968)	26
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)	22
<i>Holloway v. Arkansas</i> , 435 U.S. 475 (1978)	22
<i>Powell v. Alabama</i> , 287 U.S. 45 (1932)	22
<i>Richardson v. Marsh</i> , 481 U.S. 200 (1987)	26
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	22, 24

<i>United States v. Ash</i> , 413 U.S. 300 (1973)	22
<i>United States v. Morrison</i> , 449 U.S. 361 (1981)	22
<i>United States v. Wheat</i> , 486 U.S. 153 (1988)	22
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000)	24-25

Federal Appellate Court Authority

<i>Boyde v. Brown</i> , 404 F.3d 1159 (9 th Cir. 2005)	25
<i>Daniels v. Woodford</i> , 428 F.3d 1181 (9 th Cir. 2005)	25
<i>Hoffman v. Arave</i> , 455 F.3d 926 (9 th Cir. 2005)	24
<i>Jennings v. Woodford</i> , 290 F.3d 1006 (9 th Cir. 2002)	25
<i>Mason v. Balcom</i> , 531 F.2d 717 (5 th Cir. 1976)	23
<i>Mayfield v. Woodford</i> , 270 F.3d 915 (9 th Cir. 2001)	25
<i>Siedel v. Merkle</i> , 146 F.3d 750 (9 th Cir. 1998)	25
<i>Summerlin v. Schriro</i> , 427 F.3d 623 (9 th Cir. 2005)	25
<i>United States v. Blaylock</i> , 20 F.3d 1458 (9 th Cir. 1994)	23
<i>United States v. Candoli</i> , 870 F.2d 496 (9 th Cir. 1989)	26
<i>United States v. Shwayder</i> , 312 F.3d 1109 (9 th Cir. 2002)	22

Nevada Authority

<i>Bejarano v. State</i> , 146 P.3d 265 (Nev. 2006)	27
<i>Clark v. State</i> , 108 Nev. 324 (1992)	23
<i>Crump v. Warden</i> , 113 Nev. 293 (1997)	29
<i>Hall v. State</i> , 91 Nev. 314 (1975)	27
<i>Harte v. State</i> , 116 Nev. 1054 (2000)	1
<i>Harvey v. State</i> , 96 Nev. 850 (1980)	22
<i>Jackson v. Warden</i> , 91 Nev. 430 (1975)	28
<i>Koza v. District Court</i> , 99 Nev. 535 (1983)	22
<i>McConnell v. State</i> , 120 Nev. 1043 (2004)	27
<i>McKague v. Whitley</i> , 112 Nev. 159 (1996)	29
<i>Rudin v. State</i> , 120 Nev. 121 (2004)	26-27
<i>Rusling v. State</i> , 96 Nev. 755 (1980)	28
<i>Ryan v. Eighth Judicial District Court</i> , 168 P.3d 703 (Nev. 2007)	22-23

Statutory Authority

N.S.C.R. 250	4
N.S.C.R. 250(4)(c)	5, 7, 15
NRS § 34.726	28
NRS §34.810	29

Other State Authority

<i>People v. Brown</i> , 177 Cal.App.3d 537 (Cal.App. 1986)	23
<i>State v. Holm</i> , 91 Wash.App. 429, 435 (Wash.App. 1998)	23

<i>State v. Olsen</i> , 258 N.W.2d 898, 905 (Minn. 1977)	22
<u>Other Authority</u>	
American Bar Association Standards for Criminal Justice 4-6.1, 4-6.2	23
Sarah M. Buel, <i>Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct</i> , 26 Harv. Women's L.J. 217, 226 (2003)	25-26
Henry Kalven, Jr. & Hans Zeisel, <i>The American Jury</i> , 23 Am. J. Trial Advoc., 203, 203 (1999)	26-27
Harvey J. Lewis, <i>One Trial Lawyer's Perspective</i> , 48 La B.J. 93, 93 (2000)	26-27
Thomas A. Mauet, <i>The New World of Experts in Federal and State Courts</i> , 25 Am. J. Trial Advoc. 223, 224 (2001)	26-27
Barry McNeil & Portia A. Robert, <i>War Story: An Interview with Judge Barefoot Sanders</i> , 28 Litig. 43, 48 (2002)	26-27
James W. Quinn, <i>The Mega-Case Marathon</i> , 26 Litig. 16, 20 (2000)	26-27
Matthew J. O'Conner & Nicholas B. Schopp, <i>Opening Statement Restriction Lifted? Are the Scales of Justice Tipping Back to Even After State v. Thompson?</i> 58 J. Mo. B. 35, 36 (2002)	26-27
Shari Seidman Diamond, <i>Scientific Jury Selection: What Social Scientists Know and Do No Know</i> , 73 Judicature 178, 182-83 (1989/1990)	26-27

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I.
STATEMENT OF RELATED CASES

Appellant, LATISHA BABB, filed a direct appeal of her conviction in this case in March 6, 2000, case number 34195. An order affirming the conviction was filed on July 10, 2001 and a remittitur issued on August 7, 2001.

Appellant also filed a direct appeal of the denial of one of several issues raised in her first post-conviction petition. That case, case number 42886, was filed on May 20, 2004. An order affirming the denial of the single issue appealed was entered on November 4, 2004 and the remittitur issued on November 30, 2004.

Co-defendant Shawn Harte filed a direct appeal of his conviction in the same district court case. His direct appeal was case number 34227. On December 4, 2000, this Court issued a published opinion affirming the conviction. The opinion is published as *Harte v. State*, 116 Nev. 1054 (2000). Harte filed a post-conviction appeal, case number 43877. An order dismissing the appeal was entered on April 7, 2005.

Co-defendant Weston Sirex filed a direct appeal of his conviction in the same district court case. His direct appeal was case number 34196. On July 10, 2001, this court issues an order affirming the conviction. Sirex filed a post-conviction appeal, case number 42725. On September 29, 2004, this Court issued an order affirming the denial of his petition for post-conviction relief.

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II.
STATEMENT OF ISSUES PRESENTED

1. Whether the Washoe County Public Defender Office's joint representation of Ms. Babb and co-defendant Shawn Harte was an impermissible conflict of interest in violation of Ms. Babb's Sixth Amendment right to the effective assistance of counsel?

2. Whether the conflict of interest was harmful to Ms. Babb in violation of her due process rights, her right to a fair trial and her right to a reliable sentence under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution?

3. Whether Ms. Babb was deprived of her right to due process, to a fair trial and to a

1 reliable sentence under the Fifth, Sixth, Eighth and Fourteenth Amendments when the jurors were
2 instructed that robbery, an element of the theory of felony murder with which Ms. Babb was
3 charged, was an aggravating circumstance?

4 4. Whether prior counsel's failure to present evidence that Ms. Babb was a battered
5 woman as defense to guilt and as a basis to sever Ms. Babb's case from Mr. Harte's case violated
6 Ms. Babb's right to the effective assistance of counsel and well as her substantive due process
7 rights?

8 5. Whether trial counsel's failure to give an opening statement, combined with his
9 admission in closing argument that she was "probably guilty of robbery" deprived Ms. Babb of
10 the effective assistance of counsel in violation of her Sixth Amendment rights?

11 6. Whether trial counsel's failure to challenge the voluntariness and admissibility of
12 Ms. Babb's statements to the police and to the media deprived her of the effective assistance of
13 counsel in violation of her right to the effective assistance of counsel and her due process rights
14 under the Fifth and Sixth Amendments?

15 7. Whether Ms. Babb was deprived of her right to the effective assistance of counsel
16 and to a fair trial by virtue of the jury instruction that the jurors must do "equal and exact justice"
17 in the penalty phase of Ms. Babb's trial?

18 8. Whether Ms. Babb was deprived of her right to due process, to a fair trial and to
19 the right to confrontation under the Fifth and Sixth Amendments by the admission of codefendant
20 Shawn Harte's statements?

21 **III.**

22 **STATEMENT OF THE CASE / PROCEDURAL HISTORY**

23 The record below is extensive and it is necessary to include all of the proceedings below
24 in this Appeal and the accompanying Appellant's Appendix in order to preserve Ms. Babb's
25 federal constitutional rights and her right to proceed in federal court should the same be
26 necessary.

27 **A. THE TRIAL & DISTRICT COURT PROCEEDINGS**

28 On November 13, 1997, Petitioner, Latisha Babb, and her co-defendants, Weston Sirex

1 and Shawn Harte, were arrested for their suspected involvement in the murder of a Reno taxi cab
2 driver. A Complaint was filed some time thereafter.

3 Following their arrests, they were visited by three lawyers from the Washoe County
4 Public Defender's Office. On November 20, 1997, Ms. Babb and Mr. Harte signed a document
5 entitled "waiver," purporting to waive their right to separate counsel. (Appellant's Appendix,
6 Volume II, pages 43-50, hereinafter cited as "II AAP 43-50".)

7 A preliminary hearing was scheduled for December 1, 1997. (II AAP 43.) The
8 preliminary hearing was waived by Ms. Babb and Mr. Harte. (II AAP 89-90.)

9 An Information was filed on January 15, 1998, charging Ms. Babb and her co-defendants
10 with Murder, a violation of NRS 200.010, 200.030(1) and 193.165, robbery with the use of a
11 deadly weapon in violation of NRS 200.380 and 193.165. (II AAP 51-53.)

12 An arraignment was held on January 22, 1998. (II AAP 54-61.) The arraignment was
13 continued until March 5, 1998. (II AAP 60.)

14 On February 3, 1998, the State filed a Notice of Intent to Seek the Death Penalty. (II AAP
15 62-68.)

16 On February 3, 1998, the State filed a Motion to Determine the Validity of the Waiver of
17 Conflict of Interest challenging a written waiver so that the Washoe County Public Defender's
18 Office could represent both Ms. Babb and Mr. Harte. (II AAP 69-78.) An Opposition was filed
19 by the Washoe County Public Defender (II AAP 79-86) as well as a Reply by the State (II AAP
20 87-93).

21 A hearing on the Motion to Determine the Validity of the Waiver was held on February
22 26, 1998. (II AAP 94-126.) The Court found that a conflict existed and that there was no way to
23 cure it. (II AAP 114-120.) The Court removed the Washoe County Public Defender's Office
24 from representing either Ms. Babb or Mr. Harte. (Id.) Paul Giese was appointed to represent
25 Ms. Babb. (II AAP 116-118.) A written Order reflecting the Court's findings was entered on
26 March 5, 1998. (II AAP 127-130.) The case was remanded back to the Justice Court for
27 preliminary hearing because the waiver was deemed invalid. (II AAP 118.)

28 On March 25, 1998, an Indictment was filed charging Ms. Babb, Mr. Harte and Mr. Sirex

1 with murder with the use of a deadly weapon and robbery with the use of a firearm. (II AAP 131-
2 135.) On April 7, 1998, Ms. Babb, Mr. Harte and Mr. Sirex were arraigned on the Indictment. (II
3 AAP 136-150.) Trial was set for March 15, 1999 (II AAP 145.)

4 On June 2, 1998, co-defendant Sirex filed a Motion to Sever the defendants. (II AAP 151-
5 161.) Mr. Harte filed a joinder to Sirex's Motion to Sever on June 12, 1998 (II AAP 162-63),
6 Ms. Babb filed a joinder to his Motion on June 16, 1998. (II AAP 165-165.) The State filed an
7 Opposition to the Motion to Sever on June 22, 1998 (II AAP 166-173) and Mr. Sirex filed a
8 Reply on July 6, 1998 (II AAP 174-181). Ms. Babb filed Supplemental Points and Authorities
9 regarding severance on February 3, 1999. (II AAP 182-186.) Her supplement was joined by Mr.
10 Sirex on February 18, 1999. (II AAP 187-193.)

11 On August 20, 1998, the State filed its Second Notice of Intent to Seek the Death Penalty
12 against all Defendants. (II AAP 194-199.)

13 On October 22, 1998, the court held a status conference to begin resolving evidentiary
14 matters. (II AAP 200-212.)

15 On January 8, 1999, the court held an initial hearing on all pending motions. (II AAP
16 213-224.) At this hearing, the trial court made its initial inquiry as to whether or not counsel
17 were qualified under the new Nevada Supreme Court Rule (Rule 250) to represent the defendants
18 in this case. (II AAP 217.)

19 On January 22, 1999, the State filed a Notice of Facts in Aggravation Pursuant to
20 Amended Supreme Court Rule 250(4)(c) in support of its Notice of Intent to Seek Death Penalty.
21 (II AAP 225-228.)

22 On January 28, 1999, the court held a hearing on pretrial motions. (III AAP 229-267.)
23 The issue of the qualifications of counsel also arose at this hearing. (III AAP 232.)

24 On February 3, 1999, Ms. Babb filed a Motion to Strike the Aggravating Circumstances
25 and to Dismiss the State's Notice of Intent to Seek the Death Penalty. (III AAP 268-278.) The
26 Motion was Joined by Mr. Sirex. (III AAP 279-280.) The State filed an Opposition on February
27 9, 1999. (III AAP 281-288.)

28 On February 10, 1999, the State filed a Notice of Additional Statement of Defendant

1 Harte relating to and inculcating Ms. Babb. (III AAP 289-303.)

2 On February 22, 1999, the court held a pretrial hearing on all pending motions, including
3 the motion to sever and the motion to strike the aggravating circumstances. (III AAP 304-404.)

4 On February 23, 1999, Ms. Babb filed her Notice of Expert Witness disclosing Martha
5 Mahaffey, PhD, her sole expert witness. (III AAP 405-409.)

6 On March 4, 1999, the trial court issued an omnibus order denying the motion for
7 severance filed and joined by all defendants and denying Ms. Babb's Motion to Strike
8 Aggravating Circumstances and to Dismiss the State's Notice of Intent to Seek the Death Penalty.
9 (III AAP 410-423.)

10 Jury instruction in this matter began on March 8, 1999, and a special Juror Instruction "A"
11 and Questionnaire was provided to prospective jurors. (III AAP 424-427.)

12 On March 11, 1999, the court heard additional motions related to jury selection. (III AAP
13 428-481.)

14 On March 12, 1999, Ms. Babb filed an Amended Notice of Witnesses. (III AAP 482-
15 483.)

16 Trial in this case (the guilt phase) began on March 15, 1999 and concluded on March 19,
17 1999. (IV AAP 484-682 through V AAP 673-769—Day One; V AAP 770-869 through VI AAP
18 870-980 – Day Two; VI AAP 981-1048 through VII AAP 1049-1184—Day Three; VII AAP
19 1185-1249 through VIII AAP 1250-1379—Day Four.) The jurors were instructed on March 19,
20 1999. (VIII AAP 1380-1423.) They began deliberating the same day. (Id.)

21 On March 19, 1999, the jurors returned a verdict against Ms. Babb finding her guilty of
22 murder in the first degree with use of a deadly weapon and robbery with the use of a deadly
23 weapon. (VIII AAP 1424-1426.)

24 On March 22, 1999, Ms. Babb filed her Motion to Limit the State's Evidence Regarding
25 the Aggravating Circumstances To the Notice Provided By the State. (VIII AAP 1427-1435.)
26 The Motion was denied. (IX AAP 1520-1521.)

27 On March 22, 23 and 24, 1999, the penalty phase was presented to the jury. (IX AAP
28 1436-1658—March 22nd; X AAP 1659-1858 through XI AAP 1859-1908—March 23rd; and XI

1 AAP 1909-2064—March 24th.) The lawyers gave their closing arguments on March 24, 1999.
2 (XI AAP 1909-2064.)

3 On March 23, 1999, Ms. Babb proposed a special verdict and Mr. Harte proposed an
4 instruction regarding sentencing. (XII AAP 2065-2068.)

5 On March 24, 1999, the jurors were instructed with regard to the penalty phase and neither
6 the proposed special verdict proposed by Babb nor the instruction proposed by Harte were given
7 to the jury. (XII AAP 2069-2087.)

8 On March 24, 1999, the jury found that one aggravating circumstance existed and they set
9 the penalty for Ms. Babb at life without the possibility of parole. (XII AAP 2086-2087.)

10 On May 7, 1999, Ms. Babb was sentenced to two consecutive life without parole
11 sentences and 72 to 180 months in prison for the robbery and use of a deadly weapon. (XII AAP
12 2088-2099.) The Judgment was filed on the same date. (XII AAP 2100-2101.)

13 **B. MS. BABB'S DIRECT APPEAL**

14 Ms. Babb's Notice of Appeal (XII AAP 2102-2103) and Designation of Record (XII AAP
15 2104-2105) were timely filed on May 7, 1999 and her case appeal statement was filed on May 10,
16 1999 (XII AAP 2106-2107).

17 Ms. Babb's Opening Brief was filed on March 6, 2000 (XII AAP 2108-2168) and the
18 Respondent's Answering Brief was filed on May 17, 2000 (XII AAP 2174-2205). The issues
19 raised on direct appeal were as follows:

- 20 • The District Court erred in denying the Motion for Severance;
- 21 • The District Court erred in denying the Motion to Strike the Aggravating
22 Circumstance and to Dismiss the State's Notice of Intent to Seek the Death
23 Penalty;
- 24 • The District Court erred in denying the Motion for More Definitive Statement to
25 Produce Facts, Statement and Evidence in Support of Aggravation to Seek the
26 Death Penalty Pursuant to SCR 250(4)(c);
- 27 • The District Court erred in denying the Motion to Declare Death Penalty Statutes
28 Unconstitutional and in Opposition to the State's Notice of Intent;

- The District Court erred in granting Plaintiff's Motion in Limit to Exclude Defendant Harte's Expert Witnesses, the opposition to which was joined in by appellant;
- The District Court's Instruction on the Elements of Premeditation and Deliberation Improperly Reduced the State's Burden of Proving Premeditation and Deliberation Beyond a Reasonable Doubt;
- Jury Instruction Number 17 Improperly Instructed the Jury That the Use of a Deadly Weapon Amounted to Intent and Premeditation Which In Turn Amounted To First Degree Murder;
- The Reasonable Doubt Instruction Given Impermissibly Reduced the State's Burden of Proving First Degree Murder Beyond a Reasonable Doubt in Violation of Due Process of Law; and
- The trial court erred in failing to disqualify jury foreperson Bradford L. Scott regarding his note to the trial court at the beginning of the penalty phase regarding the "guarantee" that penalties decided upon by the jury will actually be served.

(Id.)

This Court affirmed Ms. Babb's conviction and sentences on July 10, 2001. (XII AAP 2206-2221.) A Remittitur was filed on August 7, 2001. (XII AAP 2222.)

C. POST CONVICTION PROCEEDINGS

1. The December 2001 Habeas Petition

Ms. Babb filed a Petition for Writ of Habeas Corpus in the Second Judicial District for the State of Nevada on December 4, 2001. (XII AAP 2223-2235.) Counsel was appointed to represent Ms. Babb and a Supplemental Petition was filed on June 26, 2002. (XII 2236-2250.)

The issues raised in the Supplemental Petition are as follows:

- Ms. Babb's conviction and sentence are invalid under the state and federal constitutional guarantees of due process, equal protection of the laws, and a reliable sentence due to the court's failure to sever the trial. (US Const. Amd. V, VI, VIII and XIV.)
- Ms. Babb's conviction and sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, trial before an impartial jury and a reliable sentence because of the trial court's failure to properly instruct the jury concerning premeditation and deliberation. (US Const. Amd. V, VI, VIII and XIV.)

- 1 • Ms. Babb's conviction and sentence are invalid under the state and federal
2 constitutional guarantees of due process, equal protection of laws, the effective
3 assistance of counsel, and a reliable sentence due to the ineffective assistance of
4 counsel because (a) counsel failed to make any opening statement, (b) counsel
5 admitted to the jury in his closing argument that Ms. Babb had committed robbery,
6 and (c) counsel failed to investigate and present mitigating evidence for the
7 sentencing hearing. (US Const. Amd. V, VI, VIII and XIV.)
- 8 • Ms. Babb's conviction and sentence are invalid under the state and federal
9 constitutional guarantees of due process, and equal protection of laws due to the
10 aggravators presented in support of a death penalty verdict. (US Const. Amd. V,
11 VI, VIII and XIV.)
- 12 • Ms. Babb's conviction and sentence are invalid under the state and federal
13 constitutional guarantees of due process, equal protection, trial before an impartial
14 jury and a reliable sentence because of the "equal and exact justice" instruction
15 given during trial which improperly minimized the State's burden of proof. (US
16 Const. Amd. V, VI, VIII and XIV.)
- 17 • Ms. Babb's conviction and sentence are invalid under the state and federal
18 constitutional guarantees of due process, equal protection, trial before an impartial
19 jury and a reliable sentence because of the trial court's failure to properly instruct
20 the jury concerning the elements of the capital offense with regard to (a) the
21 instruction on malice aforethought and (b) the felony murder instruction. (US
22 Const. Amd. V, VI, VIII and XIV.)
- 23 • Ms. Babb's conviction and sentence are invalid under the state and federal
24 constitutional guarantees of due process, equal protection, trial by jury and a
25 reliable sentence because of the trial court's failure to properly instruct the jury
26 during the penalty phase hearing with regard to (a) the elements of the aggravating
27 factors, and (b) the application of the aggravating factors. (US Const. Amd. V,
28 VII, VIII and XIV.)
- Ms. Babb's conviction and sentence are invalid under the state and federal
constitutional guarantees of due process, equal protection, trial before an impartial
jury and a reliable sentence because of the unfairly prejudicial atmosphere in
which her trial and sentencing hearing took place. (US Const. Amd. V, VII, VIII
and XIV.)
- Ms. Babb's conviction and sentence are invalid under the state and federal
constitutional guarantees of due process, equal protection of laws due to the
admission into evidence of Ms. Babb's co-defendant's statements which were read
to the jury in violation of Ms. Babb's Sixth Amendment right to confrontation.
(US Const. Amd. V, VII, VIII and XIV.)
- Ms. Babb's conviction and sentence are invalid under the state and federal
constitutional guarantees of due process, equal protection, the effective assistance
of counsel, a fair tribunal, an impartial jury, and a reliable sentence due to the

1 cumulative errors resulting from the gross misconduct by the state officials and
2 witnesses and the deprivation of Ms. Babb's right to the effective assistance of
3 counsel. (US Const. Amd. V, VI, VIII and XIV.)

4 (Id.)

5 The State filed a Motion seeking partial dismissal of Ms. Babb's petition for writ of
6 habeas corpus. (XIII AAP 2251-2258.) Ms. Babb filed an Opposition to the same. (XIII AAP
7 2259-2267.) The Court granted the Motion for Partial Dismissal of the Petition for Writ of
8 Habeas Corpus. (XIII AAP 2268-2275.) The district court held, however, that Ms. Babb's claim
9 regarding the ineffective assistance of counsel for his failure to present additional mitigating
10 evidence warranted a hearing. (XIII AAP 2274.)

11 A hearing was held on September 26, 2003 on the single issue of whether Ms. Babb's
12 counsel was ineffective for his failure to present additional mitigating evidence during the penalty
13 phase. (XIII AAP 2276-2419.) Ms. Babb's habeas counsel presented the testimony of eleven
14 witnesses, most of who spoke about the abuse that Ms. Babb suffered at the hands of Mr. Harte
15 and her fear of Mr. Harte. (Id.) All of this evidence was presented in the context of trial
16 counsel's failure to present mitigating evidence as it was relevant to penalty. (Id.)

17 The district court denied Ms. Babb's state court Petition for writ of habeas corpus finding
18 that Ms. Babb had failed to show that she was deprived of the effective assistance of counsel.
19 (XIII AAP 2420-2427.) A notice of entry of order on the district court's judgment was entered on
20 January 30, 2004. (XIII AAP 2428-2438.)

21 2. Appeal of the December 2001 Habeas Petition

22 Ms. Babb filed a timely notice of appeal to the judgment on February 23, 2004. (XIII
23 AAP 2439-2445.) Ms. Babb filed her opening brief on the appeal of the denial of the Petition for
24 Writ of Habeas Corpus on May 20, 2004. (XIV AAP 2446-2471.) In her appeal of the denial of
25 the habeas petition, Ms. Babb's counsel raised the following sole issue: "Whether the district
26 court erred in denying Appellant's petition for post-conviction relief based on counsel's failure to
27 present available and compelling mitigating evidence." (XIV AAP 2449.)

28 The State's Answering Brief was filed on June 21, 2004. (XIV AAP 2472-2489.) This

1 Court affirmed the judgment of the district court on November 4, 2004. (XIV AAP 2490-2494.)
2 The Remittitur issued on November 30, 2004. (XIV AAP 2495.)

3 3. Ms. Babb's Federal Habeas Petition

4 Ms. Babb filed a federal petition for writ of habeas corpus in January 2005, case number
5 02: 05-cv-0061 PMP (RJJ), *Latisha Babb v. Jennifer Lozowsky, et al*, and the undersigned was
6 appointed as her counsel.¹ In her federal petition, Ms. Babb raised several issues that had not
7 been raised previously as well as several issues that had been raised previously, some exhausted,
8 and some unexhausted. As a result of the "mixed" petition consisting of unexhausted and
9 exhausted claims, Ms. Babb's federal case was stayed in order to allow her to complete the
10 proceedings below and herein. That order was entered in June 2006.

11 4. The March 2006 Habeas Petition

12 In March 2006, Ms. Babb filed a Petition for Writ of Habeas Corpus in the Second
13 Judicial District, Washoe County. (I AAP 1-37 and Exhibits consisting of volumes I through XI,
14 Exhibits 1 through 71, pages 38 through 2634 herein.) In her March 2006 Petition, Ms. Babb
15 raised the following grounds for relief:

- 16
17 • GROUND ONE: Ms. Babb was denied her constitutional right to due process and
18 to a fair trial under the Fifth and Fourteenth Amendments to the United States
19 Constitution because she was represented by the same attorney representing her
20 co-defendant during a critical stage in the proceedings against her
- 21 • GROUND TWO: Ms. Babb was denied her constitutional right to due process and
22 to a fair trial under the Fifth and Fourteenth Amendments to the United States
23 Constitution when her counsel asked her to execute a waiver of conflict of interest,
24 when her counsel asked her to make disclosures in the presence of a third party
25 during an attorney-client privileged meeting, when her counsel refused to obtain
26 evidence that would have been exculpatory to her and when her counsel disclosed
27 factual admissions contained in the waiver to the opposing party and to the court.
- 28 • GROUND THREE: Ms. Babb was denied her constitutional guarantees to the
effective assistance of counsel under the Sixth and Fourteenth Amendments to the
United States Constitution when her counsel asked her to execute a waiver of

¹ The federal habeas petition is not included in this record. It is however, referenced and documented in Ms. Babb's successor petition, which is the subject of this Appeal. (See I AAP 1-37; see also XV AAP 2661-2687 and 2700-2721.)

1 conflict of interest, when her counsel asked her to make disclosures in the presence
2 of a third party during an attorney-client privileged meeting, when her counsel
3 refused to obtain evidence that would have been exculpatory to her and when her
4 counsel disclosed factual admissions contained in the waiver to the opposing party
5 and the court.

- 6 • GROUND FOUR: Ms. Babb was denied her constitutional right to due process
7 and to a fair trial under the Fifth and Fourteenth Amendments to the United States
8 Constitution when her subsequent trial counsel failed to investigate issues relevant
9 to Ms. Babb's state of mind and her intent to commit the offenses alleged.
- 10 • GROUND FIVE: Ms. Babb was denied her constitutional guarantees to the
11 effective assistance of counsel under the Sixth and Fourteenth Amendments to the
12 United States Constitution because she and her co-defendant were represented by
13 the same attorney during critical stages in the proceedings against her.
- 14 • GROUND SIX: Ms. Babb was denied her constitutional guarantees to the
15 effective assistance of counsel under the Sixth and Fourteenth Amendments to the
16 United States Constitution because her subsequent trial counsel failed to
17 investigate issues relevant to Ms. Babb's state of mind and her intent to commit
18 the offenses alleged and when her appellate counsel failed to raise these issues in
19 the context of her due process rights.
- 20 • GROUND SEVEN: Ms. Babb was denied her constitutional right to due process
21 and to a fair trial under the Fifth and Fourteenth Amendments to the United States
22 Constitution when her subsequent trial counsel failed to present evidence of her
23 abuse at the hands of the co-defendant as a basis for severance of the codefendants
24 at trial.
- 25 • GROUND EIGHT: Ms. Babb was denied her constitutional guarantees to the
26 effective assistance of counsel under the Sixth and Fourteenth Amendments to the
27 United States Constitution when her subsequent trial counsel failed to present
28 evidence of her abuse at the hands of the co-defendant as a basis for severance of
the defendants at trial and when her appellate counsel failed to raise the issue in
the context of her due process rights.
- GROUND NINE: Ms. Babb was denied her constitutional right to due process, to
a fair trial and her right against self-incrimination under the Fifth and Fourteenth
Amendments to the United States Constitution when her subsequent trial counsel
failed to raise issues relating to her statements to the investigating officers,
whether or not she was ever given a Miranda warning and whether or not the
statements were voluntary.
- GROUND TEN: Ms. Babb was denied her constitutional guarantees to the
effective assistance of counsel under the Sixth and Fourteenth Amendments to the
United States Constitution when her subsequent trial counsel and her direct appeal
counsel failed to raise issues related to her statement to the police in the context of

1 her Fifth Amendment rights.

- 2 • GROUND ELEVEN: Ms. Babb was denied her constitutional guarantees to due
3 process under the Fifth, Sixth and Fourteenth Amendments to the United States
4 Constitution due to the trial court's failure to sever the defendants at trial.
- 5 • GROUND TWELVE: Ms. Babb was denied her constitutional right to due
6 process and to trial before an impartial jury under the Fifth and Fourteenth
7 Amendments to the United States Constitution due to the trial court's failure to
8 properly instruct the jury concerning premeditation and deliberation.
- 9 • GROUND THIRTEEN: Ms. Babb was denied her constitutional right to due
10 process and to the effective assistance of counsel under the Fifth, Sixth and
11 Fourteenth Amendment to the United States Constitution when her trial counsel
12 (A) Failed to make any opening statement; (B) Admitted to the jury in his closing
13 argument that Ms. Babb had committed robbery and (C) when counsel failed to
14 investigate and present mitigating evidence relevant to the sentencing hearing.
- 15 • GROUND FOURTEEN: Ms. Babb was denied her constitutional right to due
16 process and to trial before an impartial jury under the Fifth, Sixth and Fourteenth
17 Amendments to the United States Constitution when the trial court instructed the
18 jury to do "equal and exact justice" which minimized the state's burden of proof.
- 19 • GROUND FIFTEEN: Ms. Babb was denied her constitutional right to due process
20 and to the right to confront and cross examine witnesses against her as guaranteed
21 by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution
22 due to the admission of her codefendant's statements which were read to the jury.
- 23 • GROUND SIXTEEN: Ms. Babb was denied her constitutional guarantees of due
24 process, trial before an impartial jury, and a reliable sentence under the Fifth,
25 Sixth, Eighth and Fourteenth Amendments to the United States Constitution based
26 upon the trial court's failure to properly instruct the jurors on the elements of
27 capital offenses with regard to the instruction on (A) malice aforethought and (B)
28 felony murder.
- GROUND SEVENTEEN: Ms. Babb was denied the constitutional guarantees of
due process, trial by jury and a reliable sentence under the Fifth, Sixth, Eighth and
Fourteenth Amendments to the United States Constitution based upon the trial
court's failure to properly instruct the jury during the penalty phase on the
application of the aggravating factors.
- GROUND EIGHTEEN: Ms. Babb was denied her constitutional guarantees of
due process and trial by an impartial jury under the Fifth, Sixth and Fourteenth
Amendments to the United States Constitution based upon the unfairly prejudicial
atmosphere in which her trial and sentencing hearing took place.
- GROUND NINETEEN: Ms. Babb's constitutional guarantees to due process and

1 to a fair trial under the Fifth, Sixth and Fourteenth Amendment to the United
2 States Constitution were denied by the trial court's failure to grant her motion for a
3 more definitive statement to produce facts, statements and evidence in support of
4 aggravation as a predicate to seek the death penalty pursuant to Nevada Supreme
5 Court Rule 250(4)(c).

- 6 • GROUND TWENTY: Ms. Babb was denied her constitutional guarantees of due
7 process, the effective assistance of counsel (both at trial and on appeal), trial by an
8 impartial jury and a reliable sentence under the Fifth, Sixth, Eighth and Fourteenth
9 Amendment to the United States Constitution due to the cumulative errors
10 resulting from the misconduct by the State, by her counsel and by the witnesses
11 against her.
- 12 • GROUND TWENTY ONE: Ms. Babb was denied her constitutional guarantee of
13 due process under the Fifth and Fourteenth Amendments to the United States
14 Constitution due to habeas counsel's failure to raise battered women syndrome
15 issues in an context other than those relevant to sentencing.
- 16 • GROUND TWENTY TWO: Ms. Babb was denied her constitutional guarantee of
17 due process under the Fifth and Fourteenth Amendments to the United States
18 Constitution due to habeas counsel's failure to raise conflict of interest as a basis
19 for relief during the state habeas proceedings.
- 20 • GROUND TWENTY THREE: Ms. Babb was denied her constitutional
21 guarantees of due process under the Fifth and Fourteenth Amendments to the
22 United States Constitution due to habeas counsel's failure to retain and present an
23 expert on battered women syndrome as well as her failure to raise trial counsel's
24 failure to do so as an issue.

25 (I AAP 1-37.)

26 The State filed an Answer and a Motion to Dismiss Ms. Babb's petition on May 17, 2006.
27 (XIV AAP 2635-2641.) The Nevada Department of Corrections filed a Return on May 30, 2006.
28 (XIV AAP 2642-2649.) Ms. Babb filed an Opposition to the Motion to Dismiss on June 13,
2006. (XIV 2650-2660.)

A hearing was held on the State's Motion to Dismiss on January 10, 2007. (XV AAP
2661-2687.) At the hearing, the district court dismissed Grounds Two, Three, Five and Eight
through Twenty-Three and permitted Ms. Babb to file a supplement to her Petition with regard to
Grounds One, Four, Six and Seven. (XV AAP 2681-2682.) Ms. Babb's Supplement was filed
on February 9, 2007. (XV AAP 2688-2692.) It alleged as follows:

- 1 • GROUND TWENTY-FOUR: Ms. Babb was denied her constitutional right to due
2 process, to trial before an impartial jury and to a reliable sentence in violation of
3 her guarantees under the Fifth, Sixth, Eighth and Fourteenth Amendments to the
4 United States Constitution based on the use of an element of felony murder as an
5 aggravating factor during the penalty phase of her trial.
- 6 • Ground Twenty-Four implicates Ground One (raised in the first Petition and
7 Ground Eleven in the current petition)—the district court erred in failing to sever
8 the defendants at trial, in violation of Ms. Babb's various constitutional rights.
- 9 • Ground Twenty-Four implicates Ground Four (raised in the first Petition and
10 Ground Sixteen in the current petition)—the district court erred in giving
11 instructions regarding aggravating circumstances in violation of Ms. Babb's
12 various constitutional rights.
- 13 • Ground Twenty-Four implicates Ground Seven (raised in the first Petition and
14 Ground Seventeen in the current petition)—the district court erred in the manner in
15 which it instructed the jurors to find and/or apply aggravating factors, resulting in
16 the violation of various of Ms. Babb's federal constitutional rights.

17 (XV AAP 2688-2690.)

18 An Order granting in part and denying in part the State's Motion to Dismiss was entered
19 on April 5, 2007. (XV AAP 2697-2699.) The State filed a Motion to Dismiss Ms. Babb's
20 Supplement on March 26, 2007. (XV AAP 2693-2696.) A second hearing was held on April 5,
21 2007. (XV AAP 2700-2721.) On July 5, 2007, the district court issued its findings of fact and
22 conclusions as to Ms. Babb's successor Petition and its Supplement denying the relief sought on
23 all grounds raised by Ms. Babb. (XV AAP 2722-2725.) Notice of Entry of Order was filed on
24 July 26, 2007. (XV AAP 2738.)

25 Ms. Babb filed a timely Notice of Appeal on July 26, 2007. (XV AAP 2726-2737.) This
26 appeal follows.

27 IV. 28 STATEMENT OF FACTS

29 A. The Conflict of Counsel Issues—Grounds One, Two, Three, Five and Twenty-Two

30 Ms. Babb was arrested in November 1997. (II AAP 38-42.) She was represented by the
31 Washoe County Public Defender's Office until March 5, 1998. (II AAP 127-130.) The waiver
32 presented to Ms. Babb for her signature was presented to her on her first meeting with counsel.
33 (II AAP 38-42, 79-86 and 127-130.) Although the waiver stated that she was free to consult with

1 outside counsel, it would have been difficult for her to do so from the jail. This was particularly
2 true given her indigent status, her age (18), her lack of sophistication, and the fact that there were
3 no other lawyers who came to visit her.

4 When Ms. Babb had her initial meeting with the Public Defender, it was in the presence of
5 Shawn Harte and Weston Sirex. (II AAP 79-86.) Also present was a detective from the Reno
6 Police Department. (II AAP 81.) The waiver, which was prepared in advance of the Public
7 Defender's initial meeting with any of the defendants, was initially prepared for the signature of
8 all three defendants and it permitted the Public Defender to represent each of them. (II AAP 38-
9 42.) It stated that each defendant had made inculpatory statements. (II AAP 44.) It stated that:

10 8. That we understand that as active participants in the alleged crime, we all
11 share in the responsibility for the death of the decedent despite the fact that we all
12 did not "pull the trigger".

13 (II AAP 47.) It stated that each defendant acknowledged that this was a death penalty case. (Id.)
14 The waiver further stated that if a conflict arose, Ms. Babb and Mr. Sirex would be appointed
15 conflict counsel and the Public Defender would keep Mr. Harte as a client. (II AAP 49.)

16 At the joint meeting, which occurred in the presence of a detective and without privilege,
17 the Public Defender asked each defendant to sign the agreement. (II AAP 81.) Weston Sirex
18 refused to do so. (II AAP 43-50.) Ms. Babb, at that time, had already given an extensive
19 statement about her knowledge of the callous and cold-blooded capabilities of Defendant Harte,
20 as well as her fear of him. (XIV AAP 2532-2524, 2529, 2537-2540, 2570-2584, 2587-2606 AND
21 2609-2634.) For example, Ms. Babb stated:

22 . . . I think it was three days before John Castro (the decedent) died. . . . I
23 thought he (Shawn Harte) was only kidding around, and he said, "Why don't you
24 go stand in front of the car and we'll see uh, if uh, if I can kill you," or something
25 like that. And I thought he was kidding me. The long one with the holes in it, and
26 he shot that one at me. He said, "How did...", he asked me how it felt to have a
27 bullet graze past my face.

28 (XIV AAP 2614-15.)

Not only was it well known prior to her arrest that Ms. Babb was abused by Mr. Harte, she
gave a statement that on the night of the incident, she had a fight with Mr. Harte, that she ran

1 away, that Mr. Sirex chased her down and the two of them told her either she was in or she was
2 out, and that she understood out to mean the end of her life. (XIV AAP 2614.) Despite these
3 statements, the Public Defender determined, even prior to meeting Ms. Babb, that there was no
4 conflict. At her first meeting with the Public Defender, Ms. Babb told the attorney that a video
5 tape at a fast food restaurant in Fallon would show her trying to run away. The attorney's
6 response was, "You can't tell me that, because I also represent Mr. Harte."

7 The State ultimately became concerned with the joint representation. In response to this,
8 the Public Defender produced the written Conflict Waiver executed by Ms. Babb and Mr. Harte
9 and provided it to the State. The State then filed a Motion to Determine the Validity of the
10 Conflict Waiver and attached the conflict waiver to the Motion, which had been provided by the
11 Washoe County Public Defender's Office. (II AAP 69-78.) The Public Defender filed an
12 Opposition stating that waiver was validly obtained and that all terms were presented to the
13 defendants before they signed it. (II AAP 79-86.) At the hearing, the Public Defender
14 acknowledged that there might be a conflict since the State was seeking death. (II AAP 100.) In
15 reality, this information was included in the waiver that was prepared before the Public Defender
16 ever met with the defendants. (II AAP 75.) That information was well known to the Public
17 Defender when it sought the signature of all three defendants in its waiver. The conflict issue did
18 not arise because the State sought the death penalty as the Public Defender maintained. (II AAP
19 100-110.)

20 At the hearing, the Public Defender added more ethical misconduct to the mix when he
21 explained to the trial court that money was his primary concern and that he wanted to represent all
22 three defendants because it would save the county (Washoe) millions of dollars if they did not
23 have to appoint outside counsel, which comes out of the "Public Defender" budget. (II AAP 113-
24 114.) The trial court questioned the Public Defender about the problems associated with
25 representing both defendants and the Public Defender continued to argue that it was entitled to
26 represent both of them because the defendants agreed to it. (II AAP 111-113.) There was no
27 evidence presented that either defendant was ever given a chance to consult with outside counsel
28 before making this decision.

1 The trial court indicated it would not permit the joint representation and the Public
2 Defender argued it should be able to continue to represent Mr. Harte. (II AAP 111-112.) When
3 the court inquired as to how this could possibly be acceptable, particularly if Ms. Babb were to
4 testify against him, the response was, "she hasn't told us anything confidential." (II AAP 102-
5 103.)² The trial court ultimately disqualified the Public Defender from representing any of the
6 defendants. (II AAP 115, 128.) The order was issued in March 1998, some four months later.
7 Ms Babb appeared at her arraignment, with her new counsel, in April 1998. (II AAP 138.)

8 No one raised this issue prior to the undersigned raising it in Ms. Babb's federal habeas
9 petition and then again in her Petition appealed herein.

10 **B. The Battered Woman Syndrome Issues—Grounds Four, Six, Seven, Eight, Eleven,**
11 **Thirteen (C), Twenty-One and Twenty-Three**

12 Ms. Babb had legitimate defenses to first degree murder based upon her state of mind and
13 intent the result of her abusive relationship with Mr. Harte. Ms. Babb was a battered woman.
14 (XIII AAP 2276-2419.) She was under the influence and control of Mr. Harte. (Id.) She was 18
15 years old at the time of the offense. (Id.)

16 The battered woman issues were not explored by Ms. Babb's trial counsel, nor were they
17 presented at trial. These issues were the subject of an evidentiary hearing before the district court
18 pursuant to Ms. Babb's December 2001 habeas petition. (XII AAP 2223-2235, 2236-2250 and
19 XIII AAP 2276-2419.) They were only raised however, in the context of the "failure to present
20 mitigating evidence that was available and compelling." (Id.)

21 No one raised the issue as it related to Ms. Babb's state of mind, her intent to engage in
22 the offense conduct alleged or her liability for a crime other than first degree murder or felony
23 murder. In other words, the issues, albeit ignored initially, were never considered in any context
24 other than "mitigation" and "punishment." No counsel ever retained an expert for the purpose of
25 evaluating Ms. Babb for Battered Woman's Syndrome or explaining the same to a jury at trial or
26 to the trial court during the post-conviction evidentiary hearing.

27 ² This was after the Public Defender had been representing Ms. Babb for approximately three
28 months, in a death penalty case.

1 Furthermore, Ms. Babb's trial counsel presented the testimony of clinical psychologist
2 Martha Bernal Mahaffey, PhD, during the penalty phase of Ms. Babb's trial. Dr. Mahaffey told
3 the jurors that Ms. Babb presented a 55 to 64% risk of violent re-offense within seven to ten
4 years. (X AAP 1786, 1836.) And, she was prevented from discussing the dynamic of Ms.
5 Babb's relationship with Mr. Harte, the co-defendant, because the trials had not been severed. (X
6 AAP 1822-1823.) The net result was damaging to Ms. Babb. Dr. Mahaffey was one of two
7 witnesses presented on Ms. Babb's behalf. (X AAP 1661.) The other witness was her mother.
8 (Id.) It was ineffective assistance of counsel not to raise severance in this context. Furthermore,
9 appellate counsel was ineffective for failing to raise this aspect of the failure to sever on direct
10 appeal.

11 Ms. Babb does not seek review of the narrow issue already ruled upon by this Court in
12 2004, "[W]hether trial counsel was ineffective for failing to present mitigating evidence that she
13 was a battered woman at the sentencing hearing."

14 With regard to Ms. Babb's severance claim, she did raise severance, in a more limited
15 context (excluding battered women syndrome issues) on direct appeal. (XII AAP 2108-2172.)
16 She also raised the issue in the same limited fashion in her first habeas petition. (XII AAP 2223-
17 2235, 2236-2250.) Her habeas did not appeal the severance issue after it was denied at the
18 habeas level and her habeas counsel did not discuss severance and the need for the same given
19 Ms. Babb's status as a battered woman at the hands of Shawn Harte.

20 **C. Ms. Babb's Trial Counsel Was Ineffective For Failing To Give Any Opening**
21 **Statement and For Admitting That She Committed Robbery In His Closing**
22 **Argument—Grounds Thirteen (A) and Thirteen (B)**

23 Although counsel had two different opportunities to make an open statement, counsel
24 failed to do so. (V AAP 774, VII AAP 1220.) Trial counsel presented no witnesses on Ms.
25 Babb's behalf. (VII AAP 1220.) In closing argument he told the jurors that "My client probably
26 is guilty of planning and participating in a robbery. She probably is." (VIII AAP 1319.)

27 Appellate counsel did not raise these issues on direct appeal. Habeas counsel raised these
28 issues in Ms. Babb's first habeas petition. (XII AAP 2241.) The district court denies these
grounds for relief and habeas counsel did not appeal the denial to this Court.

1 **D. Trial Counsel Failed to Raise Any Issues Regarding the Voluntariness of Ms. Babb's**
2 **Statements—Grounds Nine and Ten**

3 The record is devoid of any challenge to the statements attributed to Ms. Babb and
4 presented to the jury at trial.

5 Appellate counsel did not raise this issue. Habeas counsel did not raise these issues in
6 Ms. Babb's habeas petition. Ms. Babb's statements, as well as her statement to a newspaper
7 reporter, were admitted at trial. (XIV AAP 2469-2608 and 2609-2634 and VII 1208-1211.) Not
8 only was there no legal challenge to the newspaper reporter's testimony, there was no cross-
9 examination by trial counsel. (VII AAP 1211.)

10 **E. The State Committed Prosecutorial Misconduct When It Argued That The Jurors**
11 **Were to Do Equal and Exact Justice—Ground Fourteen**

12 At the penalty phase of the trial, the state trial court provided the following instruction to
13 the jury:

14 Now you will listen to the arguments of counsel who will endeavor to aid
15 you to reach a proper verdict by refreshing in your minds the evidence and by
16 showing the application thereof to the law; but whatever counsel may say, you
17 will bear in mind that it is your duty to be governed in your deliberations by the
18 evidence as you understand it and remember it to be and the law as given you in
19 these instruction, with the sole, fixed and steadfast purpose of doing equal and
20 exact justice between the defendant and the State of Nevada.

21 (XII AAP 2083.)

22 Ms. Babb's trial counsel did not object. Appellate counsel did not raise this issue on
23 direct appeal. Ms. Babb's habeas counsel raised this issue in her habeas petition. (XII AAP
24 2242-44.) The issue was dismissed by the district court and Ms. Babb did not appeal the issue to
25 this Court.

26 **F. The Admission of Co-Defendant Harte's Statements and the Failure to Sever**

27 At trial, the State introduced a redacted letter from Ms. Babb's co-defendant, Shawn
28 Harte, to his ex- girlfriend, Lynette Bagby. (VII AAP 1218-1219.) The content of the letter that
was read to the jurors was extremely inflammatory and prejudicial:

So this cab driver is just spurting off his mouth about how he got "ripped" \$1,000
cash earlier, blah, blah, blah. Now what could that all have been about: Drugs.
fuck this piece of shit. It's because of people like him that I don't have a son or

1 daughter. Fuck him.

2 I chambered a round. A CCI Stinger. .22 caliber hyper-velocity, hollow-pointed
3 LubNloycoated 40 grain slug fired out of my Smith & Wesson semi-auto with
4 four-inch barrel. Point blank. An inch above the ear and two behind.

5 Boom. That simple. That easy. No remorse. Honestly.

6 I jumped up front and let the cab coast right in front of a drug dealer's house in
7 Cold Springs. Perfect. Windows were up, so it was noiseless (except that ringing
8 In my ears!). Got out. Dark neighborhood. Dark car.

9 We left. Went to Circus Circus. Played some games, gambled – continued our
10 Good time. Went to Taco Bell. And ate. Went home. Simple. Nothing to it. Just
11 Another chore, like taking out the trash, except easier. And funner.

12 (Id.)

13 The statements by Mr. Harte were damaging, inflammatory and prejudicial. They showed his
14 extreme callousness toward human life and essentially portrayed him as a cold blooded killer.

15 The jurors knew that Ms. Babb was Mr. Harte's girlfriend at the time of the incident and to this
16 extent, the prejudicial effect upon her was substantial. More importantly, Mr. Harte's statements
17 constituted direct evidence of not only his guilt, but of the guilt of Ms. Babb and Mr. Sirex
18 because it states "we." The letter purports to show that the defendants had planned to kill the cab
19 driver in cold blood, that they had no remorse and that they went to have fun afterwards. It
20 demonstrates a complete lack of any remorse. The emotional impact of this letter is both
21 compelling and powerful. As such, it had to have had a tremendous impact on the jury. It was a
22 letter from one of Ms. Babb's co-defendants detailing the killing and the defendants' activities
23 right after the killing. Ms. Babb was unable to cross examine Harte on the letter because he
24 invoked his Fifth Amendment right at trial.

25 Appellate counsel did not raise this issue on direct appeal. Habeas counsel did raise this issue
26 in Ms. Babb's first habeas petition. (XII AAP 2248-2249.) She failed, however, to appeal the
27 denial of the issue to this Court.

28 Additionally, no one raised this issue in the context of severance.

1 **G. The Trial Court Erred In Its Instructions To the Jury Regarding Aggravating**
2 **Factors and the Death Penalty And Ms. Babb Was Not Death Penalty Eligible—**
3 **Grounds Sixteen, Seventeen, Nineteen, Twenty and Twenty-Four**

4 The State's Notice of Intent to seek the death penalty states that the defendants are eligible
5 for the death penalty because the murder occurred during the commission of a robbery and
6 because the evidence would show that the decedent was killed to dissuade him from testifying.
7 (II AAP 194-199.) Ms. Babb filed a Motion seeking a more definitive statement and evidence in
8 support of the latter. (VIII AAP 1427-1435.) The trial court denied her motion. (IX AAP 1520-
9 1521.)

10 The only aggravating circumstance the jurors found applicable to Ms. Babb was that the
11 offense was committed during the commission of a robbery. (XII AAP 2086.) The jurors elected
12 to fix the penalty at life without the possibility of parole, though death was an option. (XII AAP
13 2087.)

14 Trial counsel opposed the presentation of these aggravating circumstances. Appellate
15 counsel raised the issue of the felony aggravators on direct appeal. Habeas counsel raised the
16 aggravating factors issue in Ms. Babb's first habeas petition, but failed to file an appeal when
17 those issues were rejected by the district court.

18 This Court has since held that an element of felony murder cannot also be used as an
19 aggravating factor. Additionally, this Court has held that this issue may be raised retroactively.

20 **V.**
LEGAL ARGUMENT

21 **A. Joint Representation and Conflict of Counsel**

22 Ms. Babb, of the three defendants, is arguably the least culpable. If ever she were to have
23 had a chance to cooperate with the police and/or the State, the time would have been right after
24 her arrest. She was precluded from this opportunity because she was jointly represented by the
25 co-defendant's counsel.

26 The Sixth Amendment, made applicable to the states through the Fourteenth Amendment,
27 guarantees that the accused "shall" enjoy the right to the assistance of counsel for his defense.

28 ***Sixth Am., U.S. Const.*** This is designed to ensure fairness in navigating the intricacies of the

1 criminal adversary process. *United States v. Morrison*, 449 U.S. 361, 364 (1981); *Powell v.*
2 *Alabama*, 287 U.S. 45, 49 (1932); *United States v. Ash*, 413 U.S. 300 (1973). In *Gideon v.*
3 *Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court held that the Sixth
4 Amendment right extends to those who need appointed counsel as well. The goal is to ensure that
5 criminal defendants receive a fair trial. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).
6 Joint representation is not a per se violation of the Sixth Amendment if the trial court takes
7 adequate steps to guarantee that the dual representation is knowing, voluntary and intelligent.
8 *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978).

9 This Court most recently examined the issue of joint representation of defendants in *Ryan*
10 *v. Eighth Judicial District Court*, 168 P.3d 703 (Nev. 2007). In that case, unlike in this case, the
11 primary issue was whether or not choice of counsel trumps the right to conflict free counsel. (Id.)
12 Here, choice of counsel is not an issue because the defendants in this case were indigent.
13 Additionally, the record below is clear that there was a recognized and known serious potential
14 for conflict, if not an actual conflict. See *Ryan v. Eighth Judicial District Court*, Maupin
15 dissent, 168 P.3d at 712, citing to *United States v. Wheat*, 486 U.S. 153, 164 (1988). Joint
16 representation poses numerous risks, including the possibility of inconsistent pleas, conflicts in
17 testimony, differences in the degree of involvement of the crime, admission of evidence, calling
18 witnesses, cross-examining them, impeaching them, strategy of final argument and the possibility
19 of guilt by association. *Harvey v. State*, 96 Nev. 850, 852 (1980), citing to *State v. Olsen*, 258
20 N.W.2d 898, 905 (Minn.1977) and *Koza v. District Court*, 99 Nev. 535, 540-41 (1983).

21 What is clear, however, from this Court's recent analysis, is that the Sixth Amendment to
22 the United States Constitution guarantees an effective advocate for each criminal defendant.
23 *Ryan v. Eighth Judicial District Court*, citing to *United States v. Wheat*, *supra*, at 159. In this
24 case, the waiver was presented at the first meeting, with all clients present. No one met
25 separately with Ms. Babb to explain the waiver to her. *United States v. Shwayder*, 312 F.3d
26 1109, 1117 (9th Cir. 2002) (waiver of conflict not valid where the defendant is not adequately
27 informed of the significance of conflict that might arise). Although the waiver states that they
28 have been advised that they may consult with other counsel, this was rather meaningless to Ms.

1 Babb, an 18 year old indigent defendant, suffering from battered women's syndrome, who was in
2 custody and facing the death penalty. Here, as in *Ryan*, there is no indication in the record that
3 the Public Defender provided access to independent counsel. *Ryan, supra*, 168 P.3d at 711. The
4 Public Defender never spoke to Ms. Babb alone. To Ms. Babb, it was a "fait accompli" that this
5 was her only option and that she was "in this together" with her boyfriend and abuser, Shawn
6 Harte because it made sense to the Public Defender that they share equally in the liability for the
7 death of the decedent. See *Ryan* at 711-712. More egregious is the Public Defender's
8 motivation – to save money. The Washoe County Public Defender's representation of Ms. Babb
9 was not within the range of competence demanded of attorneys in criminal cases. An actual
10 conflict of interest which adversely affects a lawyer's performance will result in a presumption of
11 prejudice to the defendant. *Clark v. State*, 108 Nev. 164, 170 (1986).

12 **B. Successor Counsel's Failure to Provide Effective Assistance of Counsel**

13 Ms. Babb's successor counsel, by the time he was appointed, had missed the opportunity
14 to obtain video evidence from a location in Fallon where Ms. Babb had tried to run away from
15 Harte earlier that night. Additionally, he failed to pursue plea negotiations on Ms. Babb's behalf,
16 a dynamic that was complicated by the nearly four month joint representation courtesy of the
17 Washoe County Public Defender. Defense counsel has an ethical obligation to discuss plea
18 negotiations with a client. *American Bar Association Standards for Criminal Justice*, 4-6.1 and
19 4-6.2; *State v. Holm*, 91 Wash.App. 429, 435 (Wash.App. 1998); *United States v. Blaylock*, 20
20 F.3d 1458 (9th Cir. 1994); *Mason v. Balcom*, 531 F.2d 717 (5th Cir. 1976); *People v. Brown*, 177
21 Cal.App.3d 537, 549-50 (Cal.App. 1986), *review denied* (May 29, 1986). In *People v. Brown*,
22 the California Court of Appeals stated that defense counsel has an obligation to initiate plea
23 negotiations where the facts and circumstances of the offense and its proof would lead a
24 reasonably competent counsel to believe that there is a reasonable possibility of a favorable result
25 to the accused by virtue of a potential plea negotiation. *Id.* In this case, any reasonably
26 competent defense counsel would know, after reading Ms. Babb's statement, that she was not
27 present when the murder took place, that she had knowledge that Harte committed a murder and
28 could have offered to testify against him, that she was substantially less culpable than Harte and

1 or Sirex and that it would be in her best interest to negotiate a plea to something other than death
2 or life without parole given this combination of factors. The time to do this would have been
3 immediately after she was arrested. This could not have occurred because of the conflict of
4 interest.

5 Ms. Babb's subsequent counsel picked up where the Public Defender left off. He did
6 nothing to pursue plea negotiations for Ms. Babb or to separate her, in terms of legal liability,
7 from Harte and/or Sirex. The test for ineffective assistance of counsel, in cases not involving an
8 actual conflict (for example the test applicable to subsequent counsel) is that propounded by
9 *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* sets forth two prongs that must be
10 met: (i) whether defense counsel's performance fell below an objective standard of
11 reasonableness and (ii) whether this deficiency prejudiced the defendant.

12 The decision to forego a diminished capacity defense to pursue a strategy, if there was
13 one, that would not result in a lesser charge falls outside the objective standard of reasonableness.
14 *Hoffman v. Arave*, 455 F.3d 926 933-934 (9th Cir. 2005). An attorney's failure to explore
15 options for cooperation and substantial assistance to the prosecuting agency constitutes
16 ineffective assistance of counsel. When Ms. Babb was first arrested, her best opportunity for
17 negotiating a sentence for something other than life without the possibility of parole was within
18 the first two weeks of her arrest. Additionally, the public defender failed to preserve evidence
19 which was critical to the defense of the charges against her. Each of the following deprived Ms.
20 Babb of her due process rights under the Fifth and Fourteenth Amendments to the United States
21 Constitution.

22 Ms. Babb was denied her right to the effective assistance of counsel under the Sixth and
23 Fourteenth Amendments. Ms. Babb lost the opportunity to negotiate a sentence for something
24 less than that which the State sought. Counsel had an obligation to explore these options on her
25 behalf. Additionally, exculpatory evidence was lost because of her counsel's ineffective
26 assistance.

27 Although the jury did not impose the death penalty, this was a death penalty case. In a
28 capital case, a defendant has a constitutionally protected right to provide the jury with mitigating

1 evidence. *Williams v. Taylor*, 529 U.S. 362, 393 (2000) (plurality opinion); *Summerlin v.*
2 *Schriro*, 427 F.3d 623, 630 (9th Cir. 2005). To perform effectively in the penalty phase of a
3 capital case, counsel must conduct investigation sufficient to be able to present and explain the
4 significance of mitigating evidence. *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) (en
5 banc, quoting *Williams* at 399.) This is because defendants who commit criminal acts that are
6 attributable to a disadvantaged background are often considered less culpable than other
7 defendants who have no such excuse. *Boyd v. California*, 494 U.S. 370, 382 (1990). At a
8 minimum, penalty phase investigation should include inquiries into social background and
9 evidence of family abuse. *Boyd v. Brown*, 404 F.3d 1159, 1176 (9th Cir. 2005). The failure to
10 investigate mitigating evidence is not just a penalty phase issue. It also leads to deficient
11 performance during the guilt phase because it leads to the failure to defend the intent necessary to
12 convict a defendant of first degree murder. *Daniels v. Woodford*, 428 F.3d 1181, 1206 (9th Cir.
13 2005) (Mitigating evidence could have been used to defend against first degree murder);
14 *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002) (defense counsel was ineffective
15 where there was some evidence of defendant's mental illness in the record but counsel failed to
16 investigate it as a basis for a mental defense to first degree murder); *Seidel v. Merkle*, 146 F.3d
17 750, 755-56 (9th Cir. 1998) (counsel was prejudicially ineffective for failing to conduct
18 reasonable investigation of guilty phase mental defenses where there was evidence in record that
19 defendant had previous mental treatment in the jail).

20 Here, trial counsel presented, through the psychologist, some testimony about the abuse
21 that Ms. Babb suffered as a child (sexual and physical), but there was nothing presented as to how
22 this related to her relationship with Shawn Harte or her involvement in this offense. Worse, it
23 was used to explain why she posed a moderate to serious risk to commit another violent offense
24 in the next seven to ten years. The testimony was more detrimental than it was helpful.

25 The prejudice to Ms. Babb is further underscored by her trial counsel's failure to develop
26 the need and right to sever Ms. Babb from Shawn Harte based upon adverse theories of defense at
27 trial. "A battered defendant who has often been denied the right to speak by the abuser, needs her
28 lawyer to accurately present her voice in court." Sarah M. Buel, *Effective Assistance of Counsel*

1 for Battered Women Defendants: A Normative Construct, 26 Harv. Women's L.J. 217, 226
2 (2003). "I began to learn that intimate abuse was not just about hits and punches. It was about
3 psychologically and physically trying to control their victims' use of time and space in order to
4 isolate them from all social connection, both past and present. It was an all out attempt to enslave
5 them psychologically." *Id.* at 233, *quoting* treatment expert Dr. Donald Dutton. Defending a
6 battered woman requires documentation of the abuse as well as presentation of witnesses and
7 educating the court and the jury as to the defendant's state of mind. *Id.* at 252-282. It also
8 requires avoiding conflicts of interest and the presentation of specific jury instructions. *Id.* at
9 282-289. None of that was done in this case, nor was it even understood by Ms. Babb's trial
10 counsel.

11 The issue of Ms. Babb's abuse by her codefendant was relevant to her right to be severed
12 from Mr. Harte at trial. To obtain reversal, the accused must show clear, manifest, or undue
13 prejudice from a joint trial, amount to the denial of the right to a fair trial. *United States v.*
14 *Candoli*, 870 F.2d 496, 510 (9th Cir. 1989). It is clear here that Ms. Babb expert, bad as she was,
15 was not permitted to testify to the abuse Ms. Babb suffered at the hands of Harte. Harte's counsel
16 objected at trial to any testimony that related to anything other than Ms. Babb's "childhood"
17 history of abuse.

18 Additionally, the district court permitted the introduction of the callous letter written by
19 Harte, describing the murder as "just another chore," to be introduced to the jury. The letter
20 makes reference to "we," and was prejudicial to Ms. Babb. Ms. Babb was not permitted to cross
21 examine Harte regarding the letter because he invoked his Fifth Amendment right not to testify at
22 trial. This violated her Sixth Amendment right to confront and cross examine Mr. Harte.

23 Had their trials been severed, the letter would not have been introduced against Ms. Babb.
24 Furthermore, the letter, as introduced, was not properly redacted in the manner necessary to avoid
25 a violation of the confrontation clause. *See Bruton v. United States*, 391 U.S. 123, 126 (1968);
26 *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

27 Trial counsel's failure to give any opening statement was prejudicial. This Court
28 acknowledged the importance of opening statements in *Rudin v. State*, 120 Nev. 121, 147 (2004)

(citing to Harvey J. Lewis, *One Trial Lawyer's Perspective*, 48 La B.J. 93, 93 (2000); Thomas A. Mauet, *The New World of Experts in Federal and State Courts*, 25 Am. J. Trial Advoc. 223, 224 (2001); Barry McNeil & Portia A. Robert, *War Story: An Interview with Judge Barefoot Sanders*, 28 Litig. 43, 48 (2002); Matthew J. O'Conner & Nicholas B. Schopp, *Opening Statement Restriction Lifted? Are the Scales of Justice Tipping Back to Even After State v. Thompson?* 58 J. Mo. B. 35, 36 (2002); Shari Seidman Diamond, *Scientific Jury Selection: What Social Scientists Know and Do Not Know*, 73 Judicature 178, 182-83 (1989/1990); Harry Kalven, Jr. & Hans Zeisel, *The American Jury*, 23 Am. J. Trial Advoc., 203, 203 (1999); James W. Quinn, *The Mega-Case Marathon*, 26 Litig. 16, 20 (2000). This was particularly prejudicial in light of counsel's closing argument wherein he argued that Ms. Babb was "probably guilty of robbery."

C. Aggravating Circumstance and Felony Murder

Use of a circumstance to establish felony murder and an aggravating factor in a capital murder case violates the Nevada State Constitution and the United States Constitution. *McConnell v. State*, 120 Nev. 1043, 1069 (2004). In this case, the jury found one aggravating factor—that the offense was committed during the course of a robbery. This was also an element of the State's theory of liability for felony murder. Thus, the jury's recommendation that Ms. Babb serve life without parole is not reliable and she is entitled to relief. This Court's holding in *McConnell* is retroactive. *Bejarano v. State*, 146 P.3d 265 (Nev. 2006).

D. Procedural Issues

The doctrine of the law of the case is inapplicable where this court has not made any determination on the claims. *Hall v. State*, 91 Nev. 314, 315 (1975). As the district court pointed out during the most recent proceedings, it would be reversing itself, something it declined to do previously and would decline to do herein, despite the new claims raised by Ms. Babb. This Court has not ruled on the conflict issues presented herein, nor has it ruled on the failures of trial counsel to present battered women syndrome issues in the guilt phase or in the context of severance. Additionally, this Court has not ruled on the felony murder/aggravating circumstance

1 The errors committed by her prior habeas counsel create not only the possibility of
2 prejudice, but they worked to her actual disadvantage and infected the state proceedings with
3 error of constitutional dimensions. *Crump v. Warden*, 113 Nev. 293 (1997); NRS
4 34.810(1)(b)(3).
5

6 NRS 34.810 states as follows:

- 7 2. A second or successive petition must be denied if the judge or justice determines
8 that it **fails to allege new or different grounds for relief** and that the prior
9 determination was on the merits, **or, if new and different grounds are alleged**,
the judge finds that the failure of the petitioner to assert those grounds in a prior
petition constituted the abuse of the writ.

10 Here, the petition raised new grounds for relief not previously raised as well as grounds
11 that were previously raised but never appealed to this Court. The failure to raise the previously
12 raised issues on direct appeal constitutes an abuse of the writ
13

14 Further, the balance of the claims that she raises herein were not decided on the merits,
15 but rather, they were dismissed. See *McKague v. Whitley*, 112 Nev. 159 (1996) (petitioner is not
16 entitled to hearing on merits of second petitioner where there was prior determination on merits
17 and petitioner's failure to raise claims for first time in prior petition constituted an abuse of the
18 writ.) Thus, she is entitled to the relief requested herein. Specifically, none of the claims
19 previously raised, and not determined on the merits were abandoned by Ms. Babb.
20

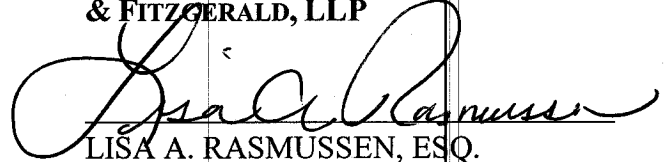
21 **VI.**
22 **CONCLUSION**

23 For each of the reasons stated herein, Ms. Babb respectfully requests that this Court either
24 reverse her conviction and sentence herein, or remand this matter to the district court for an
25 evidentiary hearing on the various grounds alleged herein as to whether or not she in fact had
26
27
28

1
2 effective assistance of counsel at trial.

3 Dated this 3rd day of December, 2007.

4 **WATT, TIEDER, HOFFAR**
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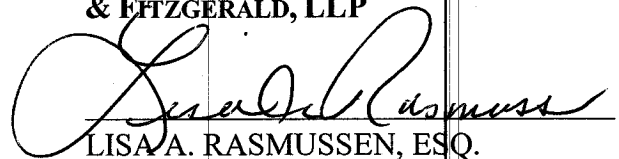
11 (702) 789-3100

12 **ATTORNEY'S CERTIFICATE OF COMPLIANCE**

13 I, hereby certify that I have read this appellate brief, and to the best of my knowledge,
14 information, and belief, it is not frivolous or interposed for any improper purpose. I further
15 certify that to the best of my knowledge, this brief complies with all applicable Nevada Rules of
16 Appellate Procedure, in particular, N.R.A.P. 28(e), which requires every assertion in the brief
17 regarding matters in the record be supported by a reference to the page of the transcript or
18 appendix where the matter relied on is to be found. I understand that I may be subject to
19 sanctions in the event that the accompanying brief is not in conformity with the requirements of
20 the Nevada Rules of Appellate Procedure.

21 Dated this 3rd day of December, 2007.

22 **WATT, TIEDER, HOFFAR**
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1
2 **CERTIFICATE OF SERVICE**


3
4 I hereby certify that I am an employee of Watt, Tieder, Hoffar & Fitzgerald, LLP,
5 that I am a person competent to serve papers and am not a party to the above-entitled action and
6 that on the 3rd day of December, 2007, I sent, via United States Mail, by depositing a true and
7 accurate copy of the foregoing:

8 **APPELLANT'S OPENING BRIEF**

9 in the United States mail, in a sealed envelope, with postage prepaid, addressed to the following
10 persons:

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