ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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WILLIAM LESTER WITTER,

Petitioner,

v.

E.K. McDANIEL, Warden, and CATHERINE CORTEZ-MASTO, the Attorney General of the State of Nevada,

Respondents

Case No. 50447

APPELLANT'S REPLY BRIEF

Appeal from Order Denying Petition for Writ of Habeas Corpus (Post-Conviction)

Eighth Judicial District Court, Clark County

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08-30814

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MISCELLANEOUS

Appellant William Witter submits the following reply to the Respondents' answering brief on appeal. Mr. Witter will not repeat the arguments in the opening brief which Respondents did not address. Mr. Witter continues to rely on the arguments and authorities previously advanced in these proceedings.

ARGUMENT

I. "RE-WEIGHING THE EVIDENCE" OR DETERMINING FACTS

Pursuant to McConnell v. State, 120 Nev. 1043, 102 P. 3d 606 (2004) and Bejarano v. State, 146 P.3d 265 (2006), the state post-conviction habeas court struck two aggravating circumstances which were based upon the same conduct which the prosecution used to obtain his conviction. 24 AA 5112 In his opening brief, Mr. Witter argued the court erred when it re-weighed the "one remaining aggravator of a prior felony conviction" along with mitigation evidence from the record, finding any error harmless. Opening Brief, pg 5; and 24 AA 5112.

Respondents initially contended that the court appropriately re-weighs mitigating and aggravating circumstances whenever it invalidated a jury's finding of an aggravating circumstance. Reply Brief, pg 5. This is in accordance with the holdings of this Court. See Canape v. State, 859 P.2d 1023, 1033-1034 (1993); Bridges v. State, 6 P.3d 1000, 1010 (2000); Leslie v. Warden, 59 P.3d 440, 446-447 (2002); State v. Haberstroh, 69 P.3d 676, 682-683 (2003); Browning v. State, 91 P.3d 39, 51-52 (2004); Archanian v. State, 145 P.3d 1008, 1023 (2006); Bejarano, 146 P.3d at 275-276; Rippo v. State, 146 P.3d 279, 283-284 (2006); and Hernandez v. State, __ P.3d ___, 2008 WL 4774853, (No. 44812, delivered

October 30, 2008), slip op. pg. 3-4. Essentially, this Court has held:

> The Supreme Court has held that the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review. It appears either analysis is essentially the same and that either should achieve the same result. ....

Haberstroh, 69 P.3d at 682-683. According to Respondents, the state post-conviction court appropriately considered evidence of "only one aggravator [which] remained" and "the possible mitigators available to Witter ... ." Reply Brief, pg. 16 ("Although the [state post-conviction court] claimed to have 'found' certain mitigators, in context the court was simply articulating that certain mitigators would be considered in the harmless error analysis based on whether it had been presented in support of them at the original trial."). Respondents, without authority, argued Mr. Witter was "afforded an opportunity to put more information in front of the [state post-conviction] court than the jury received." Reply Brief, pg. 19. Such circumstances, Respondents argued, demonstrated that Mr. Witter's sentence should be affirmed. Id.

Respondents never addressed Mr. Witter's argument, or the Court's determination in Johnson v. State 118 Nev. 787, 802, 59 P.3d 450, 406 (2002), that the determination of mitigating circumstances is a finding of fact, reserved for the jury.[1]

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[1] In Johnson, the Court held "Nevada statutory law requires two distinct findings to render a defendant death-eligible: "The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." NRS §175.554(3) (emphasis added); see also Hollaway v. State, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000). This second finding regarding mitigating circumstances is necessary to

It is appropriate for an appellate court to re-weigh aggravating and mitigating circumstances or to conduct a harmless error analysis. See Clemons v. Mississippi, 494 U.S. 738, 741, 110 S.Ct 1441 (1990). However, in Mr. Witter's case, the jury never determined which mitigating circumstances were present. Thus, the state post-conviction court considered "the possible mitigators available to Witter." See Reply Brief, pg. 16. Mr. Witter's claim challenges the court's determination of which mitigating circumstances will be considered–not the re-weighing process itself.

There is little distinction between an "element" of an offense and a sentencing "factor" or "circumstance." U.S. v. Booker, 543 U.S. 220, 231, 125 S.Ct. 738, 748 (2005); and Apprendi v. New Jersey, 530 U.S. 466, 478, 120 S.Ct. 2348, 2356-2357 (2000). In each instance sufficient evidence must be produced to convince the jury of its existence. Ten years after the Supreme Court sanctioned the practice of "re-weighing" aggravating and mitigating factors, see Clemons, supra, the court stated:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case [Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215 (1999)] : "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Apprendi, 530 U.S. at 490, 120 S.Ct. at 2363. Indeed, "... [t]he judge's role in sentencing is

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authorize the death penalty in Nevada, and we conclude that it is in part a factual determination, not merely discretionary weighing." Id. at 802

constrained at its outer limits by the facts alleged in the indictment and found by the jury. Id., 530 U.S. at 482, 120 S.Ct. at 2359 n. 10.

> "Few legal principles are either as ancient or deeply etched in the public mind as the notion that punishment should fit the crime. This familiar maxim, however, is only half-true. In the present century the pendulum has been swinging away from the philosophy that the punishment should fit the crime and toward one that the punishment should also fit the criminal."

United States v. Barker, 771 F.2d 1362, 1365 (9th Cir. 1985) (quoting W. LaFave & A. Scott, Handbook on Criminal Law § 5 at 25 (1972)). This trend can be seen through the concerns expressed by modern Legislatures and courts regarding mitigating evidence. See NRS § 200.030 (Degrees of murder; penalties); NRS § 200.035 (Circumstances mitigating first degree murder); NRS § 200.170 (Burden of proving circumstances of mitigation or justifiable or excusable homicide); Nelson v. Quarterman, 472 F.3d 287 (5th Cir. 2006); Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456 (2005); Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003); Penry v. Johnson, 532 U.S. 782, 121 S.Ct. 1910 (2001); and Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934 (1989). See also U.S. v. Fields, 483 F.3d 313, 367 (5th Cir. 2007) (Benavides, J. Dissenting) ("To state that those factors were not necessary to impose the death penalty requires the majority to turn a blind eye to the practical realities of capital sentencing.").

The determination of what will constitute a mitigating circumstance is a determination of fact. Johnson v. State 118 Nev. 787, 802, 59 P.3d 450, 406 (2002); and U.S. v. Floyd 945 F.2d 1096 (9th Cir. 1991). The determination of facts, including those relating to sentencing, lies squarely within the province of the jury. See Booker, 543 U.S. at 237, 125

S.Ct. at 752 ("As it thus became clear that sentencing was no longer taking place in the tradition that Justice BREYER invokes, the Court was faced with the issue of preserving an ancient guarantee under a new set of circumstances. The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime. And it is the new circumstances, not a tradition or practice that the new circumstances have superseded, that have led us to the answer first considered in Jones and developed in Apprendi and subsequent cases culminating with this one. It is an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance."). It is in this way that the Supreme Court squared a defendant's right to jury sentencing with the due process guarantees inherent in any death penalty case. See Ford v. Wainwright, 477 U.S. 399, 411, 106 S.Ct. 2595 (1986) ("In capital proceedings generally, th[e] Court has demanded that fact-finding procedures aspire to a heightened standard of reliability. This special concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different."). The responsibility to determine which evidence was mitigating in Mr. Witter's trial lay with the jury.

II. HARMLESS ERROR ANALYSIS–MCCONNELL

Mr. Witter argued that the state post-conviction court erred in conducting a harm analysis in this case, instead of ordering a new trial, and further erred in failing to consider all available mitigating evidence in its analysis. Opening Brief pgs. 8-13. Respondents

contended that the state post-conviction court may only consider that mitigating evidence which was before the jury at trial. Reply Brief pgs. 18-20. Respondents further contended that a harm analysis which considers all of the available mitigating evidence would contradict the previous opinions of this Court. Id. pgs 21-22. Respondents are incorrect.

The Court never held that a harm analysis must only include the mitigation evidence presented at trial. In support of their contention, Respondents cited Rippo v. State, 122 Nev. 1086, 146 P.3d 279 (2006); Archanian v. State, 122 Nev. 1019, 145 P.3d 1008 (2006); Bejarano v. State, 146 P.3d 265 (2006); and Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002). A careful analysis of such authority reveals that it fails to support Respondents' contentions. In Rippo, the Court, after finding McConnell error, considered the mitigating evidence which was previously presented at trial– but the opinion never indicated whether additional mitigation was presented.[2] Rippo, 146 P.3d at 284. This analysis was similar to that by the Court in Bejarano and Leslie. Bejarano, 146 P.3d at 276; and Leslie, 59 P.3d at 446. In Archanian, the Court addressed a claim on direct appeal–there was no opportunity for the record to include additional mitigation evidence. Archanian, 145 P.3d at 1013. In none of these cases did the Court limit the consideration of additional mitigating evidence.

Although the Court has never held that a harm analysis must include all available evidence, such an inference is available. In State v. Haberstroh, 69 P.3d 676 (2003), the Court stated:

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[2] A review of the state post-conviction petition before the Court in Bejarano revealed that it contained a single sentence regarding additional mitigating evidence.

> ... We are also cognizant that the jury heard no mitigating evidence and that Haberstroh would now offer evidence in mitigation. We conclude that Haberstroh has established prejudice ... .

Id. 69 P.3d at 684 (emphasis added). Such a statement suggested that additional mitigation evidence was included in the harm analysis. Likewise, the Court's statements in State v. Bennett, 81 P.3d 1 (2003), supported such an inference:

> Considering the remaining aggravators, the mitigating evidence that the jury heard, and the undisclosed mitigating evidence that the jury did not hear, particularly the evidence regarding Beeson's dominant role in the crimes, we cannot conclude beyond a reasonable doubt that the jury would have imposed the death penalty ... .

Id., 81 P.3d at 11-12 (emphasis added).[3] Bennett and Haberstroh are the only opinions of the Court in which it can be demonstrated that additional evidence was offered in the state post-conviction habeas proceedings–and the Court considered such evidence in both instances. The Court should grant relief and remand for a hearing in which all mitigating evidence is considered.

III. The Aggravating Circumstance Do Not Outweigh the Mitigating Circumstances

Mr. Witter argued that the mitigating circumstances before the Court outweighed the remaining aggravated circumstance. Opening Brief pgs. 14-16. Respondents disagreed and provided an extensive recitation of the aggravating evidence at trial. Reply Brief pgs. 23-25. Once again Respondents limited their analysis (weighing aggravating and mitigating circumstances) to that mitigating evidence presented at trial. Id. pgs 26-27.

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[3] It should also be noted that, in Haberstroh, supra, and Bejarano, supra, the Court relied upon its harm analysis in Bennett. Haberstroh, 69 P.3d at 683 n. 21; and Bejarano, 146 P.3d at 275 n. 68.

Respondents' analysis injected inappropriate aggravating evidence into an analysis of "death eligibility."[4] Before the jury may assess the death penalty, it must determine whether a defendant is eligible for the death penalty under Nevada law. Summers v. State, 122 Nev. 1326, 148 P.3d 778, 785 (2006). Therefore, the jury must unanimously find, beyond a reasonable doubt, the existence of at least one aggravating circumstance and thereafter consider whether the mitigating circumstances outweigh the aggravating circumstances. Geary v. State, 114 Nev. 100, 105, 952 P.2d 431, 433 (1998); and Hollaway v. State, 116 Nev. 732, 746, 6 P.3d 987 (2000). Any analysis which simply weighs the prosecutor's aggravating evidence against mitigating evidence violated Nevada's capital punishment scheme.

Respondents failed to respond to the additional mitigating evidence before this Court, or to Mr. Witter's arguments. See Opening Brief, pgs 15-16. As Mr. Witter demonstrated, the mitigating circumstances outweighed the aggravating circumstances and he is no longer eligible to receive the death penalty. Id. 14-16.[5]

IV. Nevada's Execution Protocol

Mr. Witter argued that the Nevada execution protocol violated his state and federal

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[4] Similarly, the analysis by the post-conviction court included inappropriate non-statutory aggravating evidence. The court considered Mr. Witter's age and the age of the prior complainant, as well as that the prior complainant was on a date with Mr. Witter's girlfriend, in weighing the prior conviction aggravating circumstance. Post-Conviction Hearing 08/30/07, p.2. 24 AA 5098.

[5] This argument is in the alternative. Mr. Witter maintains that no appellate court enjoys Constitutional authority to make factual determinations, including the selection of mitigating circumstances.

constitutional rights to avoid cruel and unusual punishment. Opening Brief pg. 17; and 12 AA 2426-2438. Respondents contended Mr. Witter's "arguments lack merit because they are nothing more than bare legal conclusions belied by current United States law, are procedurally barred, and not ripe for review." Reply Brief pg. 27. Respondents further contended that no court has found that an execution by lethal injection was unconstitutional. Id. pg. 28.

A. Cognizable

Respondents contended that a challenge to the Nevada execution protocol was not cognizable in state habeas proceedings and relied upon Nelson v. Campbell, 541 U.S. 637, 124 S.Ct. 2117 (2004) and Hill v. McDonough, 547 U.S. 573, 126 S.Ct. 2096 (2006). Reply Brief pg. 29. Respondents ignored the holding by the United States Supreme Court in Baze v. Rees, 553 U.S. ___, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) that the issue is cognizable in habeas litigation. In Baze, the Supreme Court outlined the contours of an Eighth Amendment Constitutional challenge to a lethal injection procedure:

> Our cases recognize that subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment. To establish that such exposure violates the Eighth Amendment, however, the conditions presenting the risk must be "sure or very likely to cause serious illness and needless suffering," and give rise to "sufficiently imminent dangers." [citing] Helling v. McKinney, 509 U. S. 25, 33, 34–35 (1993) (emphasis added). We have explained that to prevail on such a claim there must be a "substantial risk of serious harm," an"objectively intolerable risk of harm" that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment."

Id. (C.J. Roberts, p. 10); Opening Brief, p. 19. An argument that a lethal injection procedure

violated the Eighth Amendment is a Constitutional challenge and cognizable in habeas litigation.

In the same vein, the issue before the court in Hill was not whether a challenge to a lethal injection protocol must be raised in a suit brought under 42 U.S.C. § 1983, but instead it was "whether Hill's claim must be brought by an action for a writ of habeas corpus under the statute authorizing that writ, 28 U.S.C. § 2254, or whether it may proceed as an action for relief under [§ 1983]." Hill, 547 U.S. at 576, 126 S.Ct. at 2096. The resolution of this issue did not forbid a challenge to the execution protocol in habeas proceedings. Indeed, the Supreme Court specifically recognized that "[f]ederal law opens two main avenues to relief on complaints related to imprisonment: a petition for habeas corpus, 28 U.S.C. § 2254, and a complaint under the Civil Rights Act of 1871, Rev. Stat. §1983." Id., 547 U.S. at 579, 126 S.Ct. at 2101. Although the court held that a suit challenging an execution protocol may be brought under § 1983, this was not held to be the exclusive avenue. The court recognized that "in a State where the legislature has established lethal injection as the method of execution, a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself." Id.; see also Nelson, 541 U.S. at 644, 124 S.Ct. at 2117.

Ultimately, the authority upon which Respondents relied is only advisory. Such authority interpreted procedures related to habeas proceedings in United States Courts–and

never addressed habeas proceedings in Nevada.[6] It is important to note that the last time this Court addressed the constitutionality of a lethal injection protocol, it was raised on direct appeal–neither in habeas proceedings or in a § 1983 action.[7] McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). See also State v. Gee Jon, 46 Nev. 418, 211 P. 676 (1923) (upholding constitutionality of execution by lethal gas). Mr. Witter's claim involved factually intensive issues which required careful consideration. Indeed, Mr. Witter's petition provided the habeas court with substantial evidence and exhibits relating to the execution protocol and Mr. Witter sought an evidentiary hearing before the court. Such a proceeding would have allowed the development of the evidence before a tribunal with fact-finding jurisdiction. See McConnell, 120 Nev. at 1055, 102 P.3d at 615.

Mr. Witter argued the Nevada execution protocol violated his rights under the state and federal constitution. He specifically argued that Nevada may not execute him using this protocol. In Nevada, there was no alternative method of execution – every execution is accomplished by lethal injection. NRS § 176.355(1). The Director of the Department of Corrections selected the drugs through which this sentence will be accomplished, and instituted a protocol through which it will happen. In such a situation, Mr. Witter's challenge

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[6] This was also true of the additional authority which Respondents relied upon. See Beardslee v. Woodford, 395 F.3d 1064 (9th Cir. 2005); and Harris v. Johnson, 323 F.Supp.2d 797 (S.D. Tex. 2004). In each of these cases the courts interpreted what was cognizable in federal habeas proceedings (42 U.S.C. § 2254).

[7] The Court recognized that "McConnell's claim raises fact-intensive issues which require consideration by a fact-finding tribunal and are not properly before this court in the first instance. McConnell, 120 Nev. at 1055, 102 P.3d at 615.

to the execution protocol was a challenge to his death sentence.

B. Controlling Case Law

Mr. Witter and Respondents agree that this claim is controlled by Baze v. Rees, 553 U.S. ---, 128 U.S. 1520 (2008). However, Respondents contended that Baze resolved any constitutional issues surrounding the Nevada execution protocol. Reply Brief, pg. 32 ("Given the holding in Baze, Witter's arguments that the district court erred because of its reliance on McConnell and that McConnell no longer controls are without merit."). Once again Respondents failed to address Mr. Witter's claim.

Mr. Witter argued that the constitutionality of the Nevada execution protocol is controlled by Baze – a plurality opinion which provided the latest analysis regarding the constitutionality of an execution protocol and, specifically, lethal injection. However, in Baze, the Supreme Court did not hold that the Nevada execution protocol was constitutional. Instead the court reviewed the protocol and guidelines adopted by Kentucky and held that they did not inflict unnecessary pain and suffering. Id. No court has ever considered the constitutionality of the Nevada execution protocol or whether it meets the constitutional requirements recognized by the Supreme Court in Baze.

C. Timeliness

Respondents contended that resolution of this issue was premature because Mr. Witter "is not in imminent danger of execution and has yet to exhaust his state or federal remedies."[8]

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[8] Respondents appear to contradict themselves. In the paragraph immediately preceding this statement Respondents argued that Mr. Witter should have raised this claim earlier. Reply Brief pgs. 32-33.

Reply Brief pg. 33. Mr. Witter sought to exhaust his state remedies through his claim in the instant state post-conviction habeas petition. Mr. Witter sought an evidentiary hearing with the opportunity to develop the record in order to allow this Court to resolve this issue. Moreover, Mr. Witter sought to prevent any allegation that he reserved this claim in an effort to draw out litigation. This is a common consideration by prosecutors and courts:

> ... Respondents and their supporting amici thus contend that the legal distinction between habeas corpus and § 1983 actions must account for the practical reality of capital litigation tactics: Inmates file these actions intending to forestall execution, and Nelson's emphasis on whether a suit challenges something "necessary" to the execution provides no endpoint to piecemeal litigation aimed at delaying the execution. ... .

Hill, 547 U.S. at 581, 126 S.Ct. at 2102. In the instant proceedings Respondents contended that Mr. Witter did not save this claim in an effort to forestall his execution.

D. Conclusion

Respondents apparently agree that Mr. Witter's claim has merit. Reply Brief pg. 32 ("[W]itter relies on several documents which appear to support his position that inadequate anesthesia can cause pain and suffering during the execution."). The Court should determine this claim is cognizable and remand this claim so the post-conviction court can determine if there are contested issues of fact and hold an evidentiary hearing to allow the record to be developed.

V. MR. WITTER DEMONSTRATED GOOD CAUSE TO OVERCOME ANY PROCEDURAL BAR

Respondents contended that Mr. Witter failed to demonstrate good cause in order to overcome Nevada's statutory procedural bars for consideration of his claims. Reply Brief

pg. 33. Respondents are wrong.

A. Good Cause

Respondents contended that ten years elapsed between this Court's opinion on direct appeal and Mr. Witter's instant post-conviction habeas petition. Reply Brief, pg. 33. This, according to Respondents, foreclosed consideration of the instant petition. Id. pg 34. Respondents contended that a strict application of a procedural bar is necessary to avoid "meritless, successive and untimely petitions." Id. pg. 35 (quoting Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994)). Although Respondents characterized Mr. Witter's arguments as "absurd," id. pg 34, Respondents failed to rebut these arguments.

Mr. Witter demonstrated "cause" and "prejudice" for his failure to raise his claims earlier. See Colley v. State, 105 Nev. 235, 236, 773 P.2d 12229, 1230 (1989). As the record demonstrated, Mr. Witter was indigent. He relied upon the state to provide him adequate and effective representation throughout these proceedings. Moreover, under the Sixth Amendment, Mr. Witter was entitled to such representation. Any failures of trial counsel, appellate counsel, or initial state post conviction habeas counsel must be attributed to the state. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003); and Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456 (2005). Moreover, the failures of initial state post-conviction counsel will provide "good cause" sufficient to overcome a procedural bar. See Crump v. Warden, Nevada State Prison, 113 Nev. 293, 934 P.2d 247 (1997).

Evidence of prosecutorial misconduct can also be sufficient to overcome a procedural bar. Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256. Certain actions by a prosecutor which affect the fundamental fairness of a trial violates due process. See Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1959); Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985); and Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936 (1999). Strong policy reasons exist for allowing evidence of prosecutorial misconduct to excuse a procedural bar. As the Supreme Court held:

> The State here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoner still has the burden to ... discover the evidence," ... so long as the "potential existence" of a prosecutorial misconduct claim might have been detected ... . A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process. "Ordinarily, we presume that public officials have properly discharged their official duties." ... We have several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials." ... Courts, litigants, and juries properly anticipate that "obligations [to refrain from improper methods to secure a conviction] ... plainly rest[ing] upon the prosecuting attorney, will be faithfully observed." ... Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation. ...
>
> .

Banks, 540 U.S. at 696, 124 S.Ct. at 1275 (quotations omitted) (emphasis added). Mr. Witter alleged prosecutorial misconduct in his instant state post-conviction petition under Brady and Napue.

Good cause is also established whenever the factual or legal basis for a claim was unavailable at the time of a previous petition. Harris v. Warden, 114 Nev. 956, 959 n.4, 964

P.2d 785, 787 n.4 (1998). Mr. Witter's instant state post-conviction habeas petition alleged claims which relied upon McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004); Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002); and Roper v. Simmons, 125 S.Ct. 1183 (2005). Each of these opinions were previously unavailable to Mr. Witter.

Therefore, Mr. Witter established "cause and prejudice," or a fundamental miscarriage of justice, in at least three ways. Because Mr. Witter demonstrated that at least one claim was appropriately before the habeas court, the court erred in failing to address the entire petition. See State v. Powell, 122 Nev. 751, 138 P.3d 453, 457 (2006); and State v. Bennett, 119 Nev. 589, 81 P.3d 1 (2003). See also Opening Brief, pg 31; and Walker v. Crosby, 341 F.3d 1240 (11th Cir. 2003).

1. Law of the Case

Respondents contended that this Court rejected several of Mr. Witter's current claims in his initial post-conviction habeas petition.[9] Reply Brief pg. 38. This is a variant of an argument based upon the doctrine of law of the case. Essentially, the doctrine of law of the case provides that a decision on an issue will remain throughout the history of the case. However, this doctrine is not absolute– if the evidence before the court is substantially different, or adherence to the ruling would constitute a manifest injustice, the doctrine is not applicable. Hsu v. County of Clark, 173 P.3d 724 (2007).

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[9] Respondents attempt to address Mr. Witter's claims in light of the findings of facts and conclusions of law in the initial post-conviction habeas proceedings ignoring the merits and prejudice demonstrated through Mr. Witter's current claims.

Mr. Witter addressed this issue in his opening brief. Opening Brief pg. 35-38. He demonstrated that his current claims are supported by expert testimony which was never considered previously. Id. pg 36. Moreover, Mr. Witter's claims are supported by evidence which was not available previously–at least in part due to the prosecutions' suppression of that evidence. Id. pgs. 36-37. Mr. Witter further raised the claims in the instant post-conviction habeas petition under legal theories which were distinguished and separate than those previously presented. Finally, Mr. Witter argued that, in at least one instance, the previous resolution by the Court was clearly erroneous and constituted a manifest injustice. Id. pgs. 37-38. Therefore, the doctrine of law of the case was inapplicable to Mr. Witter's current petition.

2. Ineffective Assistance of Initial Post-Conviction Counsel

Respondents agreed that Mr. Witter held a right to the effective assistance of his initial state post-conviction attorney. Reply Brief pg 43. However, Respondents contended Mr. Witter essentially waived this right when he did not immediately return to state court and file another habeas proceeding shortly after his initial habeas proceedings concluded. Id. pgs 43-44. Such an analysis was erroneous and ignored reality.

In Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001), the Court determined that the one year procedural time bar of NRS 34.726 applied to successive petitions. The Court concluded that the Legislature's statutory one-year time limit could reasonably apply to successive petitions "especially in light of the provisions for excusing the bar in instances of cause and actual prejudice." Id. at 532, 879. However, the Court never required a petitioner

to present evidence of good cause within any specific time period. In State v. Bennett, 119 Nev. 589, 596, 81 P.3d 1 (2003) and Crump v. Warden, Nevada State Prison, 113 Nev. 293, 303, 934 P.2d 247 (1997) the Court held ineffective assistance of post-conviction counsel constituted good cause to excuse a violation of NRS 34.726. In neither case did the Court hold that proof of ineffective assistance of post-conviction counsel must be presented within a specific time period. Indeed such a requirement would adversely affect the reasonableness of the procedural bar itself.

Respondents' contentions are not persuasive. The complexities and risks associated with capital habeas litigation persuaded the Legislature that a defendant with a death sentence must be represented by counsel. Once the initial post-conviction habeas proceedings are concluded, the defendant is no longer represented by that counsel. Respondents' contentions were essentially that a pro se and indigent defendant, confined on the Nevada death row in Ely, must somehow investigate his own case and return to the post-conviction court with evidence to demonstrate that his attorney failed to provide constitutionally adequate representation. Reply Brief pgs. 43-44. Therefore, Respondents would place a burden on the defendant, who was not qualified or able to represent himself in the initial state habeas proceedings, to investigate and evaluate counsel's performance. The reality of death penalty practice is that no defendant is equipped to do so. It is only after that defendant receives counsel from the federal court that resources are available to initiate such an investigation and evaluation.

3. Prosecutorial Misconduct

In response to Mr. Witter's allegations of prosecutorial misconduct, Respondents again turned to the previous opinion by this Court. Reply Brief pg. 46. Indeed, Respondents did not address the allegations of prosecutorial misconduct within Mr. Witter's current petition. Id. pgs. 46-47.

B. Laches

Respondents rely upon a rebuttable presumption of prejudice, NRS 34.800, under the doctrine of laches. Reply Brief pg. 35. However, the prosecution would suffer no prejudice in any retrial of Mr. Witter's case. Mr. Witter's petition and exhibits demonstrated the availability of many witnesses. The trial record and the Court's exhibits were preserved. Moreover, much of the evidence in Mr. Witter's trial was presented through law enforcement/security witnesses –professionals who prepared written reports of their activities related to the case. Therefore, such evidence and testimony was preserved.

C. Successive Petition

Respondents contended Mr. Witter's instant post-conviction habeas petition should be dismissed as a successive petition under NRS 34.810. Because Mr. Witter alleged "new or different grounds for relief," a successive habeas petition is not barred if he demonstrated "good cause" and actual prejudice. NRS 34.810(3). Therefore, the successor procedural bar requires little more evidence than that already required by NRS 34.726. Because Mr. Witter demonstrated cause and prejudice for his failure to raise the claims in his instant post-conviction habeas petition, the petition was not procedurally barred under NRS 34.810.

D. Prejudice

In his opening brief, Mr. Witter demonstrated that the various errors in his trial, appeal, and post-conviction habeas proceedings worked to his disadvantage and infected the entire proceedings. Opening Brief pgs. 27-31. It was appropriate for Mr. Witter to argue, and the Court to consider, the prejudice which resulted from all of the errors collectively. Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006); State v. Bennett, 119 Nev. 589, 596, 81 P.3d 1 (2003).

Although Respondents' contentions are less than clear, Respondents essentially relied upon the habeas court's findings of facts and conclusions of law, as well as the facts of the offense. In other words, with little argument, Respondents simply recited the findings of the habeas court. Additionally, relying upon the prosecution evidence at trial, Respondents contended that any new evidence would not have prompted a different outcome– or, stated differently, it would not matter what mitigating evidence Mr. Witter presented in light of the facts of this offense. Reply Brief pgs. 40-41.

Respondents' argument ignored Mr. Witter's rights to due process and fundamental fairness. Among the substantial new evidence which was presented in the instant petition, was mitigating evidence which sought to explain Mr. Witter's life and actions. Such evidence demonstrated that Mr. Witter was different– he suffered from a congenital disorder that trial counsel recognized but failed to present evidence about. This disorder and his families extreme dysfunction denied him a normal childhood and the ability to develop as a normally. This disorder ultimately impacted his actions during the instant offense.

Moreover, the additional evidence rebutted the prosecutor's aggravating evidence–questioning the veracity or credibility of such evidence, and any other evidence sponsored by the prosecutor. Such circumstances question the fairness of the proceedings–and the jury's verdict.

VI. CONCLUSION

For the foregoing reasons, and those presented in his opening brief, Mr. Witter respectfully requests that this Court reverse his conviction and sentence. In the alternative, Mr. Witter requests that this Court remand his case for an evidentiary hearing.

Dated this 1st day of December, 2008

Respectfully submitted,
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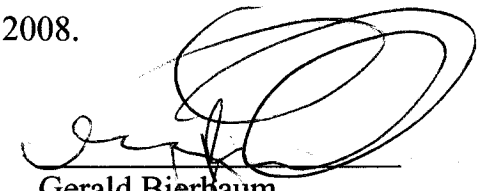
CERTIFICATE OF COMPLIANCE

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

Dated this 1st day of December, 2008.



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CERTIFICATE OF SERVICE

In accordance with Rule 31(f) of the Nevada Rules of Appellate Procedure, the undersigned hereby certifies that on the 1st day of December, 2008, a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** was deposited in the United States mail, first class postage prepaid, addressed to counsel as follows:

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