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 OPENING BRIEF

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

Eighth Judicial District Court, Clark County

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I. STATEMENT OF THE CASE

Mr. William Witter is in the custody of Nevada at Ely State Prison pursuant to a state court judgment of conviction and sentence of death. Respondent E.K. McDaniel is the warden of Ely State Prison, and Catherine Cortez-Masto is the Attorney General of the State of Nevada. The Respondents were sued in their official capacities.

Mr. Witter was convicted by a jury of first-degree murder with use of a deadly weapon, attempted murder with use of a deadly weapon, attempted sexual assault with use of a deadly weapon, and burglary. He was sentenced to death by the Honorable Stephen Huffaker, in Case No. C117513, in the Eighth Judicial District Court of Clark County. The jury found four aggravating circumstances: the murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another; the murder was committed while the person was engaged in the commission of or an attempt to commit any burglary; the murder was committed while the person was engaged in the commission of or an attempt to commit any sexual assault; and, the murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody. Judgment of conviction was entered August 2, 1995. 10 AA 1999.

On appeal, the Nevada Supreme Court deleted the preventing lawful arrest aggravating circumstance and affirmed Mr. Witter's conviction and sentence. Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996), cert.denied, 520 U.S. 1217 (1997).

On October 27, 1997, Mr. Witter filed a petition for writ of habeas corpus with the Eighth Judicial District Court in propria persona, requesting the appointment of counsel. Mr. Witter was appointed state post conviction counsel and, on August 11, 1998, post-conviction counsel filed a supplemental brief which failed to refer to evidence or issues outside the appellate record.[1] Following an evidentiary hearing at which only trial and appellate counsel

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[1] Pursuant to Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997), Mr. Witter (continued...)

testified, the state habeas court denied relief. The Nevada Supreme Court affirmed the denial of relief in an unpublished order. Witter v. State, (No. 36927, delivered August 10, 2001).

Mr. Witter filed a pro per petition for writ of habeas corpus in the United States District Court for the District of Nevada on September 4, 2001, and the District Court appointed the Law Offices of the Federal Public Defender to represent him. On November 23, 2005, Mr. Witter filed an amended petition for writ of habeas corpus followed by a motion for stay and abeyance on March 7, 2006. Respondents filed a motion to dismiss the petition, arguing Mr. Witter's claims were unexhausted, untimely, and not cognizable in federal habeas review. Respondents also filed an opposition to the motion for stay and abeyance. On November 30, 2006, the United States District Court granted Mr. Witter's motion for stay and abeyance pending the exhaustion of state court remedies.

Mr. Witter filed the instant petition in the state post-conviction court on February 14, 2007, and, after argument of counsel, the state post-conviction court denied relief in open court on August 2, 2007, and August 30, 2007. The state post-conviction court approved the prosecutor's proposed findings of fact on September 25, 2007. Mr. Witter timely filed his notice of appeal.[2]

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[1](...continued)
was entitled to effective assistance of counsel in the prior proceeding.

[2] Mr. Witter filed another petition in the state post-conviction court on April 28, 2008 alleging he is entitled to relief under a Ninth Circuit Court of Appeal's opinion in Polk v. Sandoval, 503 F.3d 903, 909 (9th Cir. 2007). This opinion was released on September 11, 2007, after the state post-conviction court announced its decision in these proceedings.

II. STATEMENT OF FACTS

Mr. Witter's death sentence survives even though this Court and the state post-conviction court invalidated three out of the four aggravating circumstances the jury found The death sentence survives even though the amount of available mitigating evidence increased from trial through the current post-conviction proceedings. Mr. Witter's death sentence survives even though it was largely supported in the trial court by the prosecution's knowing presentation of false gang association testimony.

Mr. Witter's conviction rests on similarly shaky ground, supported by Batson error and error in limiting trial counsel's attempts to death qualify the venire.

The state post-conviction court defaulted all of Mr. Witter's current claims except a claim alleging error from McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004) and Bejarano v. State, 146 P.3d 265, 272 (Nev. 2006), and a claim alleging lethal injection executions are unconstitutional.

The state post-conviction court denied the McConnell claim; misidentified the applicable harm analysis and erroneously applied the analysis chosen. The state post-conviction court erroneously denied the lethal injection claim, and relied on inapplicable precedent from this Court.

The state post-conviction court erroneously applied procedural default bars to Mr. Witter's petition and refused to hear Mr. Witter's claims, even though the facts and law supporting those claims were only recently available. The state post-conviction court refused to hear many of Mr. Witter's claims even though Mr. Witter was prevented, by ineffective assistance of the state post-conviction counsel, from raising these claims in the initial state post-conviction petition.

Mr. Witter argued twenty-two issues impacting his conviction and sentence. Each of these issues, when considered separately or cumulatively rendered the current conviction unconscionable.

III. Issues Presented

A. Did the state post-conviction court err while conducting harm analysis after striking Mr. Witter's aggravating circumstances under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004) and Bejarano v. State, 146 P.3d 265, 272 (Nev. 2006)?

B. Did the state post-conviction court err by determining the lethal injection execution protocol has been determined not to constitute cruel and unusual punishment pursuant to McConnell v. State, 120 Nev. 1043 (2004)?

C. Did the state post-conviction court err in determining Mr. Witter did not demonstrate good cause and prejudice excusing the delay in bringing this petition?

D. Did the state post-conviction court err in holding that ineffective assistance of post conviction counsel was not good cause?

E. Did the State Post-conviction Court Err to Apply the Doctrine of "Law of the Case?"

F. Were the procedural default rules relied upon by the district court to bar consideration of Mr. Witter's constitutional claims unenforceable because this Court applies them in its discretion and in an inconsistent manner?

IV. Argument

A. Did the state post-conviction court err while conducting harm analysis after striking Mr. Witter's aggravating circumstances under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004) and Bejarano v. State, 146 P.3d 265, 272 (Nev. 2006)?

In his state post-conviction petition, Mr. Witter contended the jury's reliance on aggravating circumstances including the same conduct upon which the prosecution secured his conviction was unconstitutional under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004) and Bejarano v. State, 146 P.3d 265, 272 (Nev. 2006).[3] The state post-conviction court agreed and struck the burglary and sexual assault aggravating circumstances. See 24 AA 5112, pg 3. However, the state post-conviction court itself reweighed the "one remaining aggravator of a prior felony conviction" along with mitigating evidence from the record and held the error "harmless error beyond a reasonable doubt with the aggravator outweighing the mitigators ... ." Id.

The state post-conviction court erred in "reweighing" the evidence and performing a harm analysis. There is no record of which mitigating circumstances the jury determined at Mr. Witter's trial and the state-post conviction court substituted itself as a jury to determine mitigating circumstances. The state post conviction court failed to distinguish the harm analysis by this Court in Bejarano from harm analysis the Court conducted in other cases involving substantial mitigating evidence outside the record. The state post conviction court failed to appropriately consider mitigating evidence which was not a part of the trial record. Finally, the state post conviction court ultimately erred in holding the substantial

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[3] Mr. Witter was charged with murder, sexual assault, and burglary. See 1 AA 37. Prosecutors pursued a felony murder theory, charging that the murder was committed with "malice aforethought and premeditation and/or while in the commission of a burglary and/or while in the commission of the attempt sexual assault of Kathryn Terry Cox." Id. Mr. Witter was convicted of all charges. See 10 AA 1999. The jury found the following aggravating circumstances: the "murder was committed while [Mr. Witter] was engaged in the commission of or an attempt to commit any Burglary"; and, the "murder was committed while [Mr. Witter] was engaged in the commission of or an attempt to commit any Sexual Assault." 10 AA 1996.

mitigating circumstances in Mr. Witter's case was outweighed by the sole remaining aggravating circumstance.

The State Post-conviction Court Sat as a Jury

The jury was never asked to "find" which mitigating circumstances were supported by the evidence because the jury verdict form did not allow this designation. Therefore, when the state post-conviction court "re-weighed" the evidence, it made its own factual determination of what evidence was mitigating.

In order to re-weigh punishment evidence, the state post-conviction court sat as a fact-finder–it took the place of Mr. Witter's jury.[4] The state post-conviction court reviewed the jury instructions, which designated a number of possible mitigating circumstances, and the punishment phase transcript. 24 AA 5098. Thereafter, the state post conviction court determined which mitigating circumstances were supported by the record.[5] This determination was a finding of fact. U.S. v. Fields 483 F.3d 313 (5th Cir. 2007) (J. Benevides dissent, p. 368) ("While the actual weighing of the factors is not a 'finding of fact,' the existence of such factors is a 'constitutionally significant factfinding . . .'); U.S. v. Floyd 945 F.2d 1096 (9th Cir. 1991), (". . . we now determine whether . . . the district court was correct in finding that the mitigating circumstance existed in this case. This is a finding of fact . . .").

Because the state post-conviction court assumed the role of the jury in the determination of his punishment, Mr. Witter was denied due process and a valid,

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[4] Ironically, the state post-conviction court held that it did not sit as a fact-finder. 24 AA 5112.

[5] The state post conviction court held: "the first one . . . is not applicable. . . The second one. . .the Court makes a finding for that mitigator. . .the third one. . . that's not applicable under these facts. . .the fourth one. . . that doesn't apply here. . . .the seventh one . . . .the Court finds there was evidence for any other mitigating circumstance." 24 AA 5099-5100.

fundamentally fair sentence.[6] There was substantial mitigating evidence available and no record of the jury' determination of what circumstances it determined to mitigate Mr. Witter's murder conviction. Due process and fundamental fairness required that a jury be convened to determine the circumstances which mitigated the murder conviction and to weigh such circumstances against the sole aggravating circumstance. United States v. Hilliard, 11 F.3d 618, 620 (6th Cir.1993),("An appellate court cannot substitute its judgment for that of the jury."); People v. Ceja, 4 Cal.4th 1134,1138, 1139, 847 P.2d 55 (1993) ("But it is the jury, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. . . an appellate court may not substitute its judgment for that of the jury."); In re Estate of Lunsford, 160 N.C.App. 125, 132, 585 S.E.2d 245, 250 (2003) ("It is not the role of this [appellate] Court to consider what the trial court could have found or to make our own findings based on our review of the record."); Wesbrook v. State, 29 S.W.3d 103, 111 (Tex.Crim.App.2000); Gomez v. State, 183 S.W.3d 86, 89 (Tex.App.-Tyler 2005, no pet.); Duren v. State, 87 S.W.3d 719, 724 (Tex.App.-Texarkana 2002, no pet.)(Texas criminal jurisprudence is clear: The jury is the exclusive arbiter of the credibility of a witness and it is the duty of the jury to resolve any conflicts in the evidence; it is not the province of an appellate court to play the role of the Monday morning quarterback in that credibility determination). Only after a jury determined which mitigating circumstances existed, and

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[6] Mr. Witter is aware of Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002). Mr. Witter contends that the post conviction court may not substitute its judgement for the fact-finder at trial. See People v. Regalado, 108 Cal.App.3d 531, 538-539, (1980) ("It is the sentencing court that determines from the facts and circumstances whether the cited mitigating circumstances in fact were established"); Gu v. Gonzales, 454 F.3d 1014 (9th Cir. 2006) ("It is equally well-settled that it is inappropriate for this court to weigh evidence and determine its probative value"); Dolliver v. United States, 379 F.2d 307, 308 n. 1 (9th Cir.1967) ("An appellate court may not usurp the function of the duly constituted fact finder."); State v. Mason, 160 Wash.2d 910, 162 P.3d 396 (2007) ("Juries routinely consider all characteristics of witnesses ('their relation to the parties, employment, and personal interests') in weighing the value or credibility of their testimony-that is, in fact, the *purpose* of a jury trial and why appellate courts defer ('with regard to factual conclusions') to the judgment of the fact finder"). Such a substitution replaces a jury trial with an appellate court's discretion.

their weight, will the capital punishment scheme comport with due process, the right to a fair trial, and fundamental fairness.[7] See Payne v. Tennessee, 501 U.S. 808, 824, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)(applying fundamental fairness to the punishment phase of a capital trial).

Inappropriate Harm Analysis

The state post-conviction court held that, in accord with McConnell, supra, "the court reweighs and considers mitigating evidence. . . . ." 24 AA 5112. In doing so, the state post-conviction court considered only that mitigating evidence which was within the trial record. Thereafter, the state post-conviction court held the sole aggravating circumstance outweighed the mitigating circumstances and that any error was harmless beyond a reasonable doubt. 24 AA 5112.

In Valerio v. Crawford 306 F.3d 742 (9th Cir. 2002), the Ninth Circuit Court of Appeals considered whether it was appropriate for a post-conviction court to re-weigh evidence when the jury was provided an aggravating circumstance in error. The Court of Appeals held:

> Under Clemons, [v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990)] the state appellate court reweighs aggravating and mitigating circumstances that have already been found by a jury to exist. The appellate court does no independent factfinding, but rather relies on facts already found by the jury. That is, under Clemons, the appellate court evaluates and "reweighs" the aggravating and mitigating circumstances, but it does not independently determine whether those circumstances exist.

Id. at 757. Therefore, whenever aggravating and mitigating circumstances were determined by the jury, a court may "re-weigh" those circumstances if it was later determined that an aggravating circumstance was inappropriate. Id.

Mr. Witter's case is distinguishable from Valerio, supra. The state post-conviction court, not Mr. Witter's jury, determined which mitigating circumstances would be included

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[7] See Petition for Writ of Habeas Corpus, pages 41 -45 (summary of trial counsel's punishment evidence); 11 AA 2258-2264.

in its analysis. Thus, even if it were appropriate for the state post-conviction court to "re-weigh" the aggravating circumstances in Mr. Witter's case, see Clemmons, supra, it could only consider those circumstances previously determined by the jury. Because Mr. Witter's jury was never asked to indicate which circumstances it determined to mitigate Mr. Witter's conviction, the state post-conviction court had nothing to re-weigh. The state post conviction court overstepped the constitutional boundary in Mr. Witter's case and assumed the role of the jury.

Bejarano is Distinguishable from Mr. Witter's case

The state post conviction court erred in applying the harm analysis used by this Court in Bejarano, supra, to Mr. Witter's case. In Bejarano, the Nevada Supreme Court struck aggravating circumstances based upon the same conduct which the prosecutors used to secure a first degree murder conviction. Id. 146 P.3d at 274. In deciding whether the defendant was "harmed" by the jury's consideration of invalid aggravating circumstances, the Court re-weighed the remaining aggravating circumstances with the mitigating circumstances. Id., 146 P.3d at 276. However, little mitigating evidence was produced at trial; indeed, the Court concluded "the case in mitigation was not particularly compelling." Id., 146 P.3d at 275-276. The petition for writ of habeas corpus included only one sentence regarding additional mitigating evidence, never produced at trial. Therefore the Court, in its attempt to re-weigh the remaining aggravating circumstances and mitigating circumstances, was never asked to consider substantial mitigating evidence, which was available to trial counsel, but raised only during the post-conviction proceedings.

The analysis used by the Court in Bejarano, should be distinguished from the analysis required in this case. In these state post conviction habeas proceedings Mr. Witter provided substantial mitigating evidence which must be considered in any re-weighing of the sole aggravating circumstance and the mitigating circumstances. But for the violation of Mr. Witter's state and federal constitutional rights to the effective assistance of counsel, the jury

would have considered such evidence when it originally weighed the mitigating and aggravating circumstances. See Archanian v. State, 145 P.3d 1008 Nev. 2006 (an appellate case with no extra record evidence); and contrast Williams v. State, Order Denying En Banc, July 5, 2007 (attachment, Supplemental Opposition to Dismiss); and Williams v. State, Order Affirming in Part, June 22, 2007 (attachment, Supplemental Opposition to Dismiss) (considered mitigating evidence provided in the habeas petition to conduct harm analysis after McConnell error), and State v. Bennett, 119 Nev. 589, 81 P.3d 1 (2003). In Williams and Bennett, the Court struck aggravating circumstances under McConnell, supra, and considered all available mitigating evidence, including evidence raised in post conviction habeas proceedings, in its harm analysis. Bennett at 605, 12. Because of the available mitigating evidence which was never presented at trial, Bejarano was distinguished from Mr. Witter's case and the state court erred in conducting a harm analysis pursuant to Bejarano.

Harm Analysis must Consider All Available Mitigating Evidence

Once the inappropriate aggravating circumstances were struck in Mr. Witter's case, prosecutors argued the state post-conviction court could not consider any mitigating evidence which was not presented at trial. 23 AA 4904. Prosecutors relied on Canape v. State, 109 Nev. 864, 859 P.2d 1059 (1993), an opinion on direct appeal, for the proposition that, when re-weighing evidence, the court cannot consider evidence outside the appellate record. The state post-conviction court sustained this argument and concluded, as a matter of law, "the appropriate inquiry is whether it is clear beyond a reasonable doubt that absent the invalid aggravators, the jury still would have imposed a sentence of death." 24 AA 5114. Therefore, the state post-conviction court refused to consider any of the mitigating evidence which was initially raised in Mr. Witter's post-conviction habeas petition.

Canape, supra, is not applicable to Mr. Witter's case. In Canape, the Court considered a direct appeal from a trial in which no mitigating evidence was offered. Id. at 881 ("We have thoroughly searched the record and find no evidence of mitigating circumstances, even

in the case presented by the prosecution."). The appeal followed the defendant's trial. The only evidence before the Court was the evidence which appeared in the trial record– there was no opportunity in the appellate proceedings for the defendant to produce additional mitigating evidence. See NRS 177.015 - 025. Thus, the only evidence available to the Court in its harm analysis was that evidence before it–from the trial.

In Mr. Witter's trial, the jury considered mitigating evidence from his father, his aunt, and his sisters. See testimony of Lewis Witter, 8 AA 1713-1748; Lani Sanders, 9 AA 1766-1792; Ruth Fabela, 8 AA 1664-1677; Tina Whitesell, 8 AA 1678-1712. Mr. Witters' state post-conviction habeas petition in these proceedings provided additional mitigating evidence. 11 AA 2242-2257, 11 AA 2269-2339. Mr. Witter's case was distinguished from Canape because the instant case involved substantial mitigating evidence, from his trial and these proceedings, and the state post-conviction court failed to consider all of the evidence before it.

The Court's opinion in Canape, supra, was on direct appeal and, while it may direct the Court in its consideration of similar error on appeal, Canape does not limit the consideration of all available evidence in state post conviction proceedings. The defendant in Canape had no opportunity to demonstrate the substantial and available mitigating evidence which his trial counsel failed or refused to discover; habeas proceedings are the appropriate vehicle for consideration of such evidence. To the extent that Canape is persuasive in the current proceedings, it teaches only that the court should consider all of the mitigating evidence before it.

The Court previously held that all available mitigating evidence, whether from the trial or habeas records, must be considered to determine whether a defendant was actually innocent of the death penalty. In State v. Haberstroh, 119 Nev. 173,184, 69 P.3d 676, 684 (2003), the Court considered all the mitigating evidence before it–evidence not only from the trial record, but also evidence developed during habeas proceedings, and held the mitigating

evidence outweighed the defendant's four remaining aggravating circumstances. Id. at 184. Similarly in State v. Bennett, 119 Nev. 589, 81 P.3d 1 (2003), the Court considered the prejudice which arose from the jury's improper consideration of an aggravating circumstance in conjunction with prejudice which resulted from other error. Id. at 598 ("... [W]e conclude that the finding of an improper aggravator in this case, combined with the prejudicial impact of the Brady violations identified below, undermined the reliability of the jury's sentencing determination. . . .). In Williams v. State, No. 45796, Order Affirming in Part, Reversing in Part, the Court conducted a harm analysis which focused on mitigating evidence of brain damage first raised in post-conviction habeas proceedings.[8] In Mr. Witter's case, the state post conviction court ignored the established practice wherein this Court required any harm analysis to consider all of the available mitigating evidence– whether presented at trial or in subsequent post-conviction habeas proceedings. Mr. Witter's rights to due process and equal protection ensure his claims are evaluated in same manner.

The Nevada Supreme Court previously held that the jury's reliance on an invalid aggravating circumstance, resulting in a death sentence, was a miscarriage of justice. See Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440 (2002). The United States Supreme Court held that, in considering claims of a miscarriage of justice, the reviewing court must consider all of the evidence before it. In House v. Bell 126 S.Ct. 2064 (2006), the Supreme Court

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[8] This disposition is not cited as legal authority. Cf. Nev. Sup. Ct. Rule 123. Rather, it is cited as evidence that a violation of equal protection of the laws, under the state and federal constitutions, U.S. Const. Amend. XIV; Nev. Const. Art. 4 § 21, will result if this Court disregards the prejudicial effect of the felony murder aggravating factor in this case, as the state urges. "The Equal Protection Cause of the Fourteenth Amendment. . . is essentially a direction that all persons similarly situated should be treated alike." City of Clelburne v. Clelburne Living Center, Inc., 473 U.S. 432, 439 (1985), citing Plyer v. Doe, 457 U.S. 202, 216 (1982); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Petitioner is similarly situated to the petitioner in Williams; and, with respect to the egregiousness of the offense (in Williams, the killing of an innocent elderly couple for the purpose of getting money for drugs), petitioner's case is no more aggravated. Under these circumstances, disregarding the effect of the felony murder aggravating factor would violate the constitutional guarantee of equal protection.

stated:

> ... the habeas court must consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.' See id., at 327-328, 115 S.Ct. 851 (quoting Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi. L.Rev. 142, 160 (1970)). Based on this total record, the court must make 'a probabilistic determination about what reasonable, properly instructed jurors would do.' [citing Schlup v. Delo] 513 U.S. at 329, 115 S.Ct. 851.

Id. at 2077. The habeas court must consider "all of the evidence available." The state post conviction court erred in limiting its consideration of mitigating evidence only to that evidence admitted at trial.

In a similar vein, the state post-conviction court was required to consider the harm associated with Mr. Witter's McConnell claim in conjunction with all of the error before it. See e.g., State v Bennett, 119 Nev. 589, 81 P.3d 1, 6-8 (2003). In its consideration of Mr. Witter's appeal, the Nevada Supreme Court struck an aggravating circumstance for "avoiding lawful arrest." Witter v. State, 112 Nev. 908, 929, 921 P.2d 886 (1996). The state post-conviction court failed to consider the cumulative impact of the McConnell error before it with the previous error sustained by this Court. As a result of multiple errors, Mr. Witter's jury weighed his mitigating circumstances against four aggravating circumstances--rather than the single aggravating circumstance which was appropriate. The cumulative impact of these errors was sufficient to preclude any court from determining the errors were harmless beyond a reasonable doubt.[9]

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[9] This Court in Archanian v. State, 122 Nev. 1019, 1023, 145 P.3d 1008 (2006), held: "[a] death sentence based in part on an invalid aggravator may be upheld either by reweighing the aggravating and mitigating evidence or conducting a harmless-error review." A harmless error review requires that, before federal constitutional error can be harmless, it must be harmless beyond a reasonable doubt. See Manley v. State, 115 Nev. 114, 979 P.2d 703 (1999) (citing Chapman v. California 386 U.S. 18, 87 S.Ct. 824 (1967).

The Sole Remaining Aggravating Circumstance Does Not Outweigh the Mitigating Circumstances

After it struck the inappropriate aggravating circumstances, the state post-conviction court held the error was "harmless ... beyond a reasonable doubt with the aggravator outweighing the mitigators, therefore, the sentence previously imposed stands." 24 AA 5112. The Court erred. Although the state post conviction court unconstitutionally limited its consideration to only that mitigating evidence presented at trial, that evidence was sufficient to mitigate the single aggravating circumstance supporting Mr. Witter's death sentence.

At trial, Mr. Witter presented evidence that his mother became an alcoholic when she was fifteen years old. She drank during her pregnancies with six children and ultimately drank herself to death. Mr. Witter's father, Lewis Witter, was an alcoholic and a convicted felon. Lewis Witter described his physical confrontations and violence with Mr. Witter's mother–most of which occurred in front of their children. He explained that this relationship was similar to the relationship he observed between his parents. Tina Whitesell, Mr. Witter's sister, confirmed her father's descriptions of the violence in their home and described a neglected childhood. Mr. Witter's childhood involved routine adult parties with drugs, and observations of his mother in bed with strange men. Mr. Witter and his siblings were removed from the home after Lewis Witter was sentenced to prison and his mother was using heroin. The children were placed with Lewis Witter's parents, who themselves were described as "heavy drinkers." 8 AA 1664 - 9 AA 1799.

Dr. Lewis Etcoff, a psychologist, testified that Mr. Witter's family was the "quintessential family that would produce a violent person."[10] 9 AA 1824. Dr. Etcoff predicted that, "[i]f you took a thousand babies and had them raised by his parents, I would

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[10] Dr. Etcoff stated that Mr. Witter grew up "in one of the most dysfunctional families that I can remember studying." Id. at 1836. Dr. Etcoff testified to the effects of alcoholism on the dynamics and genetics of Mr. Witter's family. Dr. Etcoff described Mr. Witter's mother's abandonment of her children and related that such issues never disappear and are often found in "murderous behavior of abandoned adults." Id. at 1836.

say a huge majority of them would be abnormal psychologically." Id. He believed that, of the thousand hypothetical infants, a significant number would be violent and very few of the children could successfully function in life. Indeed, Dr Etcoff concluded that "[f]or all intents and purposes, [Mr. Witter] would have been better off without parents than having the parents he had." 9 AA 1825.

The state post-conviction court was to re-weigh the mitigating circumstances in Mr. Witter's case and narrowly consider only the prior felony conviction as an aggravating circumstance. Hollaway v. State, 116 Nev. 732, 746, 6 P.3d 987 (2000) (evidence outside the statutory aggravating circumstance "is not admissible for use by the jury in determining the existence of aggravating circumstances or in weighing them against mitigating circumstances. Such use of this evidence would undermine the constitutional narrowing process which the enumeration and weighing of specific aggravators is designed to implement."[11]) When the prior felony conviction alone is compared to the substantial evidence of Mr. Witter's dysfunctional family, his alcoholic and abusive parents, and his deprived childhood, no rational fact finder would have imposed a sentence of death. No reasonable court could find, beyond a reasonable doubt, that the three erroneous aggravating circumstances did not affect the verdict in Mr. Witter's trial.

Had the state post-conviction court performed a proper analysis and considered all of the mitigating circumstances before it, see State v. Haberstroh, 119 Nev. 173,184, 69 P.3d 676, 684 (2003), or considered commutative effect of all the error, see State v. Bennett, 119 Nev. 589, 81 P.3d 1 (2003), there was no doubt of the harm in Mr. Witter's case. The evidence introduced in Mr. Witter's habeas proceedings demonstrated he suffered from Fetal Alcohol Syndrome (FAS). Substantial evidence demonstrated the profound impact of FAS on Mr. Witter's emotional and mental development and his abilities. 11 AA 2269-2289.

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[11] The prosecutor, in his motion to dismiss, argued all of the prosecution evidence from the trial and convinced the state post-conviction court that the sole remaining aggravating circumstance outweighed the mitigating circumstances. 23 AA 4904-4907.

Trial counsel failed to obtain and present substantial evidence which supported Mr. Witter's FAS diagnosis and which further demonstrated the extreme nature of the family dysfunction he suffered. See 11 AA 2236-2343. In effect, Mr. Witter was poisoned in utero through his mother's continued abuse of alcohol throughout her pregnancy, and this effect prevented Mr. Witter from normal development or functioning normally as an adult. 11 AA 2280-2287.

In Mr. Witter's instant habeas proceedings, additional evidence was discovered and introduced which demonstrated that prosecutorial entities possessed records which indicated Mr. Witter was not ever identified as a gang member. 11 AA 2242-2247. Such evidence, which was never disclosed to Mr. Witter, questioned the prosecutors' arguments and evidence that Mr. Witter belonged to a gang. 11 AA 2242-2257.

The state post conviction court erred in refusing to consider the mitigating circumstances demonstrated during the habeas proceedings. Haberstroh, supra. Such mitigating evidence easily established a miscarriage of justice. Moreover, the habeas proceedings demonstrated that prosecutors withheld evidence which impeached and contradicted their case. The error which resulted from this state and federal constitutional violation must be considered in conjunction with other error in the record. Bennett, supra Consideration of all of the mitigating circumstances before the state post conviction court, as well as the cumulative effect of all the error before it, demonstrated the state post-conviction court erred in its resolution of this issue. This Court should vacate Mr. Witter's sentence.

B. Did the state post-conviction court err by determining the lethal injection execution protocol has been determined not to constitute cruel and unusual punishment pursuant to McConnell v. State, 120 Nev. 1043 (2004)?

Mr. Witter contended the Nevada execution protocol violated his state and federal constitutional rights to avoid cruel and unusual punishment. 12 AA 2426-2438. The state post-conviction court denied Mr. Witter's claim on the merits, holding that, in McConnell v. State, 120 Nev. 1043 (2004), this Court determined Nevada's execution protocol was constitutional. 24 AA 5111-5112. Because McConnell, supra, did not resolve a challenge to the execution protocol, the state post-conviction court erred. The Nevada execution protocol is cruel and unusual punishment in violation of Art. 1, § 6 of the Nevada Constitution and the Eighth Amendment to the United States Constitution.

Reliance on McConnell

The state post-conviction court determined the Nevada execution protocol was constitutional based upon the Nevada Supreme Court's opinion in McConnell v. State, 120 Nev. 1043 (2004). 24 AA 5111-5112. In McConnell, supra, the defendant argued on the direct appeal of his death sentence that the absence of "detailed codified guidelines setting forth a protocol for lethal injection' failed to ensure that executions are not cruel and unusual punishment." Id. at 1054, 615. The Supreme Court noted:

> 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. [citing] NRS 177.025 ("The appeal to the Supreme Court from the district court can be taken on questions of law alone.")

Id. at 1055, 615. The Supreme Court ultimately held that the Nevada capital sentencing scheme, on its face, was not unconstitutional, and declined to hold the Nevada execution protocol unconstitutional absent "a clear showing of invalidity." Id. at 615 (citing Castillo v. State, 110 Nev. 535, 546, 874 P.2d 1252, 1259 (1994).[12] Id. at 1055 - 56, 615.

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[12] In McConnell, supra, the Court relied upon its more than eighty-year old opinion which held that execution by lethal gas was not cruel or unusual. See State v. Gee Jon, 46 Nev. 418, (continued...)

The Court's opinion in McConnell, supra, was distinguished from Mr. Witter's claim. The claim in McConnell occurred in direct appellate proceedings before a court which did not have fact finding jurisdiction. Mr. Witter's claim arose during state post conviction proceedings before a court which was charged with the responsibility of making fact findings. Nevada Const. Art. VI, § 6; and N.R.S. § 34.500. Moreover, Mr. Witter did not challenge the absence of "detailed codified guidelines." Instead he contended the execution protocol adopted by Nevada created an unreasonable risk of inflicting unnecessary suffering in violation of his state and federal constitutional rights. 12 AA 2426-2437. Indeed, Mr. Witter provided the state post conviction court with substantial evidence which demonstrated the lethal injection procedures not only could inflict horrible pain and suffering, but that such procedures did so previously. 12 AA 2426-2437.

McConnell, supra, did not resolve Mr. Witter's claim. N.R.S. § 34.500. The state post conviction court, instead of fulfilling its duty to review and consider the evidence before it which demonstrated the violation of Mr. Witter's state and federal constitutional rights, dismissed the claim as a facial challenge to the Nevada statutes. The state post conviction court never considered whether the execution protocol adopted by Nevada Department of Corrections violated Mr. Witter's constitutional rights. This issue was not controlled by McConnell, supra, and Mr. Witter was, at a minimum, entitled to a hearing in which to develop the record in a manner sufficient to allow this Court to address the important constitutional questions raised. N.R.S. § 34.470.

McConnell No Longer Controls

The United States Supreme Court recently considered the constitutionality of the Kentucky execution protocol in Baze v. Rees, 128 U.S. 1520 (No. 07-5439, delivered April 16, 2008). The plurality holding in Baze, which upheld the constitutionality of a lethal

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[12](...continued)
211 P. 676 (1923). The Court refused to substitute its judgment for that of the legislature in determining the method of execution. Id. at 436-38, 211 P. at 681-82; McConnell at 1056.

injection execution protocol, specifically relied upon the detailed and codified guidelines for execution adopted by Kentucky. Id. (Roberts, C.J., plurality opinion). To the extent that the Kentucky execution protocol was constitutional, it was because the extensive guidelines adopted by Kentucky ensured that a lethal injection execution did not inflict unnecessary pain and suffering. Id.

No Nevada court ever addressed Mr. Witter's issue on the merits. No Nevada court ever reviewed the Nevada execution protocol, in light of Baze, supra, to ensure the lethal injection execution did not inflict unnecessary pain and suffering. To the extent that any previous holding of this Court is in conflict with Baze, see e.g. McConnell, supra, Baze will control. U.S. Const. Art. VI (Supremacy Clause)[13]

A constitutional challenge to the lethal injection protocol will prevail upon proof that the protocol created a demonstrated risk of severe pain and that the risk is objectively intolerable. Baze, (plurality opinion) pg. 22, 1531. The plurality stated:

> 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."

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[13] U.S. Const. Art. VI provides in part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

Id. (C.J. Roberts, p. 10).[14] No court ever considered whether the Nevada execution protocol satisfied this standard.

Nevada's Execution Protocol Is Cruel and Unusual

Mr. Witter's claim before the state post conviction court demonstrated he was entitled to relief because the Nevada execution protocol created a substantial risk of serious harm which was objectively intolerable. Although the Nevada execution protocol is "confidential," and not generally released, Mr. Witter provided the state post-conviction court with a copy of a recent execution "manual" which he believed to be valid.[15]

Nevada's execution manual does not specify what, if any, training in anesthesiology the person(s) administering the lethal injection must have.[16] If an untrained or unskilled executioner failed to deliver sufficient sodium thiopental to ensure adequate anesthetic depth, the inmate will feel the excruciating pain of the subsequent injections of pancuronium bromide and potassium chloride.[17] 12 AA 2426. The failure to ensure that a person properly trained and practiced in the institution of intravenous lines, and the administration of anesthetic drugs through such lines, creates a subjective risk of serious harm and is

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[14] Justice Thomas, in his concurring opinion, reiterated this standard; "As I understand it, that opinion would hold that a method of execution violates the Eighth Amendment if it poses a substantial risk of severe pain that could be significantly reduced by adopting readily available alternative procedures. *Ante*, at 13." (Thomas, J., Concurrence, p. 1).

[15] This Court is aware that the Nevada execution protocol may have been amended this past year. American Civil Liberties Union of Nevada v. Skolnik, et al, Nevada Supreme Court No. 50354.

[16] Although the Nevada execution manual suggested that Nevada may use emergency medical technicians in its lethal injection process, the National Association of Emergency Medical Technicians discourages such practice. Baze at 1539.

[17] A majority of the Supreme Court appeared to agree that an injection of pancuronium bromide or potassium chloride after no, or insufficient, sodium thiopental was cruel and unusual punishment. See and compare Baze, supra (Roberts, C.J–plurality); (Breyer, J, concurring); (Stevens, J., concurring); and (Ginsburg, J. dissenting).

objectively intolerable. Moreover, the failure to adopt and practice appropriate execution procedures to assess and ensure the appropriate anesthetic depth creates a substantial risk of serious harm that is objectively intolerable.

In Baze, supra, the Supreme Court noted the dangers associated with the inadequate administration of sodium thiopental in a state sponsored execution:

> . . . failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.

Id. (Roberts, C.J., p. 15). The plurality noted that this danger, under the Kentucky execution protocol, was not substantial:

> If, as determined by the warden and deputy warden through visual inspection, the prisoner is not unconscious within 60 seconds following the delivery of the sodium thiopental . . . .
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> . . .
>
> Kentucky has put in place several important safeguards to ensure that an adequate dose of sodium thiopental is delivered to the condemned prisoner. The most significant of these is the written protocol's requirement that members of the IV team must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman. ... Kentucky currently uses a phlebotomist and an EMT, personnel who have daily experience establishing IV catheters for inmates in Kentucky's prison population. ... Moreover, these IV team members, along with the rest of the execution team, participate in at least 10 practice sessions per year. ... These sessions, required by the written protocol, encompass a complete walk-through of the execution procedures, including the siting of IV catheters into volunteers.
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> . . .
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> In addition, the presence of the warden and deputy warden in the execution chamber with the prisoner allows them to watch for signs of IV problems, including infiltration. Three of the Commonwealth's medical experts testified that identifying signs of infiltration would be "very obvious," even to the average person, because of the swelling that would result. ... Kentucky's protocol specifically requires the warden to redirect the flow of chemicals to the backup IV site if the prisoner does not lose consciousness within 60 seconds. ... In light of these safeguards, we cannot say that the risks identified by petitioners are so substantial or imminent as to amount to an Eighth Amendment violation.

Id. (Roberts, C.J., p. 6, 16). It was the safeguards instituted by Kentucky to ensure that

sodium thiopental rendered the inmate unconscious which ultimately satisfied the constitutional requirements.

The safeguards in the Kentucky execution protocol, relied upon by the plurality in Baze, are absent from the Nevada execution protocol. Nevada's execution protocol only required that "appropriate medical services personnel" perform a venipuncture.[18] After the venipuncture, the "medical services personnel will then leave the execution chamber." 22 AA 4759. The protocol does not designate who will administer the lethal chemicals, who will determine whether the lethal chemicals were appropriately administered, or who is responsible to determine when a condemned inmate requires further sedation. The Nevada execution protocol does not designate the training for any of these execution team members. Finally, the Nevada execution protocol does not require a regular or routine "walk through of the execution procedures, including the siting of IV catheters into volunteers." Nevada's protocol offers little or no safeguards to eliminate the substantial or imminent risks an inmate will suffer excruciating pain of an injection of pancuronium bromide and potassium chloride.

The Nevada execution protocol provides that, after the lethal injections are administered, "the attending physician or designee and coroner shall then determine whether it was sufficient to cause death. If the injections are determined to be insufficient to cause death, the third set of lethal injections shall be administered." 22 AA 4759. Therefore, under the Nevada execution protocol, an inmate who was never appropriately rendered unconscious, suffering the painful effects of the lethal chemicals, will be evaluated by a physician or coroner after an undesignated amount of time, and will possibly suffer further painful lethal injections. Such a protocol unquestionably poses a substantial risk of serious harm. See 12 AA 2431-2437, (demonstrating botched lethal injection executions and risk

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[18] The "execution checklist" attached to the protocol suggests Nevada contracts with the Carson City Fire department to provide emergency services personnel to assist in an execution. However, the Nevada execution protocol does not designate the training and experience of those personnel and never designates what responsibilities these personnel will have in an execution.

of such a result in Nevada).

If terror, pain, or disgrace are "superadded" to punishment, such punishment violates the Eighth Amendment. Baze, supra (Roberts, C.J.) pg. 9 (citing Wilkerson v. Utah, 99 U. S. 130 (1879)). Under the Nevada execution protocol, an inmate must be administered a strong sedative four hours before his scheduled execution and again one hour prior to execution. The medication is not voluntary–it is mandatory for all inmates scheduled to be executed. Such a requirement adds only disgrace and insult to an otherwise extreme punishment, and is cruel and unusual. The mandatory sedation clouds the inmate's senses, muddle his thoughts, and interferes with his ability to communicate with the warden or execution team. The forced sedation strips from the condemned inmate his last opportunity to acknowledge family or friends, to express remorse to the victims, and denies the inmate any dignity in death. The forced sedation only serves to inflict further terror, pain and/or disgrace and is constitutionally intolerable.

The Baze plurality suggested that alternative methods of execution will support an argument that an execution protocol is unconstitutional:

> Instead, the proffered alternatives must effectively address a "substantial risk of serious harm." ... To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment.

Id. (Roberts, C.J.) pg. 13. Even though Baze was not decided until after Mr. Witter filed his habeas petition, Mr. Witter identified three constitutional concerns with Nevada's execution protocol: (1)the protocol did not require experience, training or certification of the execution team members; (2) the use of pancuronium bromide assured a torturous death if the condemned inmate was not sufficiently anaesthetized; and (3) the protocol procedures independently provided a substantial risk of serious harm. 12 AA 2426-2437. Mr. Witter's habeas petition inherently proffered alternative procedures in requiring sufficient training,

expertise or certification of execution team members, dispensing with the use of pancuronium bromide, and requiring reliable safeguards.

These alternatives are feasible, readily implemented, and significantly reduce the risk of severe pain. The adoption of training, expertise or certification requirements similar to that in the Kentucky protocol is feasible and readily implemented. Nevada should require those who practice venipuncture in Nevada executions to be qualified and experienced. Nevada should ensure that persons within the execution chamber be trained and experienced in the determination and maintenance of consciousness. If technical procedures or equipment are available to ensure an inmate is unconscious before the administration of pancuronium bromide or potassium chloride, Nevada should use or adopt these resources. Nevada execution team members should regularly walk through the execution procedures, including venipuncture. Finally, Nevada can discontinue the use of pancuronium bromide or potassium chloride in the execution protocol, causing death solely with the use of sodium thiopental. See, 12 AA 2429-2430 (arguing that pancuronium bromide is torturous and unnecessary to the process). The adoption of such safeguards will easily and significantly reduce the risk of severe pain.

Mr. Witter's post-conviction habeas claim placed all these issues before the state habeas court but the court avoided the issue and denied relief based upon authority which is not controlling. The Supreme Court's later resolution of a similar issue relating to the Kentucky protocol only reinforced the validity of the constitutional issues within Mr. Witter's claim. The state post conviction court denied Mr. Witter the opportunity to supplement the record through an evidentiary hearing. Mr. Witter is entitled to relief.

C. Did the state post-conviction court err in determining Mr. Witter did not demonstrate good cause and prejudice excusing the delay in bringing this petition?

The state post-conviction court held that Mr. Witter's habeas petition violated NRS 34.726, NRS 34.800, and NRS 34.810 and that Mr. Witter did not allege or prove specific facts to demonstrate actual prejudice or good cause for failing to raise his claims previously. 24 AA 5111. The state post-conviction court erred in holding Mr. Witter did not demonstrate sufficient cause or prejudice to raise his current claims and in failing to hold that good cause for a single claim exempted Mr. Witter's entire petition from procedural bar.

Procedural default is excused if a habeas petitioner established either good cause for the default and prejudice or a fundamental miscarriage of justice. See NRS 34.726(1); NRS 34.810(3); Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006); Mitchell v. State, 149 P.3d 33 (2006); and Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002). Good cause for failing to file a timely petition or raise a claim in a previous proceeding is established when the factual or legal basis for the claim was not reasonably available at the time the previous petition was filed. Harris v. Warden, 114 Nev. 956, 959 n. 4, 964 P.2d 785, 787 n. 4 (1998) (citing Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)).

Good Cause

Mr. Witter's current post-conviction habeas petition alleged the violation of his state and federal due process rights under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) , and Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Mr. Witter explained that prosecutors suppressed records which demonstrated he was not a gang member and impeached the prosecution's evidence which alleged Mr. Witter belonged to a gang. 11 AA 2236-2237, 11 AA 2242-2243. Because prosecutors suppressed these records, and failed to disclose them to Mr. Witter, such evidence was not available through Mr. Witter's reasonable diligence. This claim was not procedurally defaulted

because the underlying facts were unavailable to Mr. Witter. Good cause was demonstrated.

Mr. Witter's current post-conviction habeas petition alleged that his state and federal constitutional due process rights were violated through the prosecutors' presentation of juvenile adjudications during his punishment trial. Mr. Witter's claim was based on Roper v. Simmons, 125 S.Ct. 1183 (2005), which is a legal basis which was unavailable to Mr. Witter at the time his previous petition was filed. 11 AA 2408-2410. Good cause was demonstrated.

Mr. Witter's current post-conviction habeas petition demonstrated two of the three aggravating circumstances used to secure his death sentence were invalid. 11 AA 2371-2372. Mr. Witter's claim was based upon a legal authority which was unavailable to Mr. Witter, McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), at the time his previous petition was filed.[19] Good cause was demonstrated.

Mr. Witter's current post-conviction habeas petition contended that persons who suffer from organic neo-natal disorders such as Fetal Alcohol Syndrome cannot be sentenced to death under the state and federal constitutional prohibition against cruel and unusual punishment. Mr. Witter's claim relied upon Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), authority which was unavailable at the time his initial petition was filed. See 23 AA 4879. Good cause was demonstrated.

Mr. Witter's current post-conviction habeas petition alleged unconstitutional racial bias during jury selection supported by the prosecutors' handwritten notes. The handwritten notes were suppressed and unavailable to Mr. Witter at the time his previous habeas petition was filed.[20] Good cause was demonstrated.

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[19] The state post-conviction court found good cause for the McConnell issue and rendered a decision on the merits. 24 AA 5112-5113.

[20] Mr. Witter obtained these handwritten notes through the federal discovery practice.

Mr. Witter's current post-conviction habeas petition alleged that his state and federal constitutional rights to the effective assistance of trial counsel were violated. In support of his claim Mr. Witter demonstrated he suffered from Fetal Alcohol Syndrome and that this ailment severely impacted his development, and his actions related to the crime for which he was convicted.[21] Mr. Witter demonstrated he was not a gang member. However, ineffective assistance of counsel, at trial and continuing through his state post-conviction proceedings prevented Mr. Witter from presenting this evidence in his previous habeas petition.

Mr. Witter's current post-conviction habeas petition alleged his state and federal constitutional rights to the effective assistance of trial counsel were violated when counsel failed to challenge the trial judge's unconstitutional limitation of his voir dire under Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). See 11 AA 2373. This issue was not raised in Mr. Witter's previous habeas petition solely due to the ineffective assistance of his state post-conviction counsel. The failure to raise this claim, and any other claim which was not presented in Mr. Witter's initial state writ petition, was unavailable to Mr. Witter and excused from procedural default under Crump v. Warden, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997).

Mr. Witter demonstrated sufficient cause to excuse his current post-conviction habeas claims through the presentation of previously unavailable law and evidence.

Prejudice

Prejudice is demonstrated when the errors presented work to a defendant's "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982); and

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[21] The Court previously held that previous state post-conviction counsel alleged trial counsel was ineffective for failing to pursue an FAS expert / diagnosis but "at the evidentiary hearing Witter failed to provide evidence demonstrating that he suffers from FAS or any similar ailment." Witter v. State, No. 36927. 20 AA 4314. Such evidence was established in Mr. Witter's current post-conviction habeas petition. Mr. Witter's rights to the effective assistance of post-conviction counsel were violated. Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997).

Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006). Mr. Witter demonstrated that his constitutional due process rights were violated by the prosecutors' suppression of material evidence, his state and federal constitutional rights to the effective assistance of counsel were violated by counsels failure to adequately investigate and present mitigating circumstances, including a diagnosis of FAS, and his rights to a jury selection process of free of racial bias were violated. These constitutional errors, either independently or cumulatively, infected Mr. Witter's entire trial.

Prosecutors effectively alleged Mr. Witter belonged to a street gang in order to strengthen an argument that Mr. Witter was dangerous and to obtain a death sentence. See 11 AA 2236, 11 AA 2241-2242, 9 AA 1947, 9 AA 1979- 10 AA 1982.[22] Yet evidence existed in records from the San Jose Police Department which impeached the prosecution evidence and substantially undermined the prosecutors' argument. Any impeachment of the prosecutions' aggravating circumstances increased the weight of Mr. Witter's mitigating circumstances. Through the suppression of impeachment evidence, Mr. Witter's trial was fundamentally unfair.[23]

Mr. Witter was further prejudiced by the failure of his trial counsel, and initial state post-conviction counsel, to adequately investigate and present his mitigating circumstances. Counsel failed to demonstrate Mr. Witter suffered from FAS and explain the influence of this diagnosis on his development and his actions related to the crime for which he was convicted. Counsel failed to rebut the prosecutors' evidence that he belonged to a street gang. These errors infected the entire trial and denied Mr. Witter fundamental fairness. See,

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[22] This allegation rested on testimony from San Jose police officers Ford and Ezel. 11 AA 2237-2259.

[23] See Albrecht v. Horn, 485 F.3d 103, 124 fn7 (3rd Cir. 2007) citing Murray v. Carrier, 477 U.S. 478, 494, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); and United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) (equated "infecting the entire trial" with a deprivation of fundamental fairness.).

11 AA 2258-2343.

The prosecution focused on Mr. Witter's past criminal offenses and his alleged gang association. In argument, the prosecutor focused on personal responsibility and exploited the "evidence" of gang association:

> At some point in growing up, we all develop a conscience, the ability to know right from wrong. The psychologist who testified, Dr. Etcoff, testified that William Witter knows right from wrong. He developed the ability - we develop the ability to make decisions for ourself and choose the path we will follow. William Witter chose his path.

9 AA 1946-1947. Prosecutors' argued that Mr. Witter's gang association was an independent choice which made him violent–in the instant offense and in the future. 9 AA 1948, 9 AA 1972-1980. However, a reasonable investigation revealed that Mr. Witter's life and path which ended in the death of another was not a voluntary choice. Mr. Witter was doomed to a life of failure, frustration, addiction and violence, because his mother poisoned him with alcohol during her pregnancy. There was no positive intervention in Mr. Witter's childhood–his parents either fought or were gone. Mr. Witter was not only neglected, but abandoned.[24] His father was in prison and, when not incarcerated, he introduced Mr. Witter to illegal drugs

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[24] Counsel not only ignored relevant mitigating evidence, but failed to rebut the prosecutors' implicit argument that Mr. Witter was the only child in his family who grew up violent.

Mr. Witter's sister, Lani Sanders, was questioned about her lack of violence. However, someone intervened in Sanders' life making it possible for her to escape the life which befell Mr. Witter. Sanders' was "rescued" by her father's second wife who took her to beaches, museums, parks, and Disney World. Sanders found a mother who became a positive role model. Mr. Witter found no such relationship. 23 AA 4886.

Even with such support, Sanders left home as a teenager to live with Donny Sanders. Even though Donny Sanders was an alcoholic and drug user, he ultimately rehabilitated himself and helped Sanders do so as well. Mr. Witter found no such relationship.

Mr. Witter's other sister, Tina Whitesell, was "adopted" by the families of her friends who took her to church services and church activities. She was encouraged to stay overnight, away from the dysfunction of her own family. Whitesell escaped her family circumstances through joining the United States Coast Guard, an institution which provided her with structure, discipline and a job. 23 AA 4888. Mr. Witter found no such support or relationships.

and alcohol. Mr. Witter's mother's conduct was well documented in his habeas petition. 11 AA 2258-2343. When Mr. Witter reached puberty, he was an alcoholic. The jury was never informed that Mr. Witter suffered from FAS which prevented his ability to make rational choices. The jury was falsely led to believe Mr. Witter belonged to a street gang and was destined to violence. The jury was deceived–by prosecutors and Mr. Witter's own counsel. The jury learned only a small amount of information relating to Mr. Witter's life; it had no accurate understanding of his impairment and its affect on his ability to function in life. Because Mr. Witter's counsel failed to adequately investigate and present the substantial and compelling mitigating circumstances in Mr. Witter's life, the entire trial was adversely affected and Mr. Witter was denied fundamental fairness. Prejudice was shown.

Additional prejudice was shown in the racial bias of the prosecutors in the selection of Mr. Witter's jury. See 11 AA 2344-2371. Under Batson v. Kentucky, 476 U.S. 79, 87, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court protected not only a defendant's constitutional rights, but also the rights held by those citizens who desired to participate "in the administration of the law, as jurors," Strauder v. West Virginia, 100 U.S. 303, 308, 25 L.Ed. 664 (1880). There exists an overriding interest in eradicating discrimination from the criminal justice system. The "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."Batson, 476 U.S., at 87, 106 S.Ct. 1712; see also Smith v. Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 85 L.Ed. 84 (1940) ("For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but it is at war with our basic concepts of a democratic society and a representative government" (footnote omitted)). See also Tankleff v. Senkowski, 135 F.3d 235, 248 (2d Cir.1998) and Ford v. Norris, 67 F.3d 162 (8th Cir.,1995)(discussing whether Batson error could ever be exposed to harmless error

analysis). Because Batson error infected the entire trial and the community, Mr. Witter was denied fundamental fairness.

Exception of the Entire Petition

The state post-conviction court erred in holding Mr. Witter failed to allege or prove specific facts that demonstrate actual prejudice, or good cause to litigate his claims in this habeas proceeding, because at least one claim was appropriately before the state post conviction court. 24 AA 5111. In State v. Powell, 122 Nev. 751, 138 P.3d 453, 457 (2006), the Nevada Supreme Court held that the procedural bars in NRS 34.726(1), 34.800(1-2) address a habeas petition as a whole and should not be applied to each individual claim. Similarly, in State v. Bennett, 119 Nev. 589, 81 P.3d 1, (2003), the Court held an entire habeas petition was exempted from procedural bar because the defendant demonstrated a Brady violation which was properly before the Court. Id. at 605, 12 ("Although the district court stated in its order that Bennett's petition should be considered on the merits due to Brady violations, it failed to specifically address or expressly deny Bennett's additional claims. For our review, we assume that the district court denied those claims"). The state post conviction court addressed two of Witter's claims on the merits and erred in refusing to consider Mr. Witter's remaining claims.

Federal courts employ a similar analysis in the application of procedural bars in the Anti-Terrorism and Effective Death Penalty Act (AEDPA). See 28 U.S. C. 2244(d)(1). In Walker v Crosby, 341 F.3d 1240 (11th Cir. 2003), the court of appeals considered whether "... as long as one claim was timely, the entire application was timely, even though other individual claims within the application appeared to be untimely when viewed by themselves." 341 F.3d at 1242. The court of appeals held the habeas court should "look at whether the 'application' is timely, not whether the individual 'claims' within the application are timely." Id. at 1243. "The statute does not suggest that a single application can be timely as to some claims and untimely as to other claims." 341 F.3d at 1244. See also Sweger v

Chesney, 294 F.3d 506 (3rd Cir. 2002) quoted in Walker v Crosby, 341 F.3d at 1244. Therefore, like the Nevada Supreme Court's opinions in Powell, supra, and Bennett, supra, federal courts apply procedural bars to a habeas petition, not to individual claims within the petition.

D. Did the state post-conviction court err in holding that ineffective assistance of post conviction counsel was not good cause?

The state post-conviction court held that the ineffective assistance of appointed post-conviction counsel did not excuse Mr. Witter's pursuit of federal remedies and delay of six years before returning to state court from federal court. 11 AA 5111-5112. The state post-conviction court erred.

In Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997), the Nevada Supreme Court held that a habeas petitioner who was appointed an attorney pursuant to state law was entitled to the effective assistance of that attorney during his post conviction proceedings. Claims related to the ineffective assistance of appointed state post conviction counsel were not subject to procedural default under NRS 34.810(1)(b).[25] Id. at 304-05, 934 P.2d at 254. In Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003), the Court explained:

> A claim of ineffective assistance of counsel may also excuse a procedural default if counsel was so ineffective as to violate the Sixth Amendment. However, in order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted. In other words, a petitioner must demonstrate cause for raising the ineffective assistance of counsel claim in an untimely fashion.

Id, at 506.

The state post-conviction court appeared to hold that Mr. Witter's claim of ineffective assistance of post-conviction counsel was itself defaulted as untimely. Cause to excuse a time bar is demonstrated by showing "... the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials,' made compliance

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[25] Mr. Witter's initial state habeas counsel was appointed under the mandatory appointment statute. See, 24 AA 5111.

impracticable." Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003) citing Murray v. Carrier, 477 U.S. 478, 488 (1986). The underlying facts of Mr. Witter's ineffective assistance of post-conviction counsel claim were unavailable until shortly before he filed his state successor petition, removing his Crump claim from any time bar.

Mr. Witter demonstrated state post conviction counsel failed to investigate and present extra-record evidence of a proper FAS diagnosis; failed to investigate and present extra-record testimony to prove Mr. Witter was not a gang member; and failed to demonstrate trial counsel's failures to investigate Mr. Witter's social history and circumstances. See 23 AA 4974-4981. An adequate post conviction investigation required collecting Mr. Witter's records and interviewing those persons who knew him during his developmental period. See Declaration of Dr. Natalie Novick Brown. 15 AA 3148.

The declaration by Dr. Natalie Novick Brown, an expert in FAS, was not available to Mr. Witter until November, 2005.[26] The evidence that Mr. Witter was not in a gang, and that trial counsel was unreasonable in failing to conduct a social history investigation, resulted from a comprehensive investigation which included interviews with persons who knew Mr. Witter well as a teen and adult, and the collection of California Youth Authority and social services records.[27] This investigation was time consuming and was not complete until 2005. See Declarations of Tina Whitesell, Lani Sanders, Donny Sanders, Linda Rose, Cary Jones, Adelle Chappel, Gina Reyes, Mary Byrd, Lewis Witter, Bobby Seeger, Eric Reyes, 14 AA 3016, 23 AA 4888, 14 AA 3004, 23 AA 4886, 14-15 AA 3078, 15 AA 3125, 15 AA 3117, 15 AA 3107, 15 AA 3087, 15 AA 3092, 14 AA 3027, 15 AA 3133, 15 AA 3115. Arguably,

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[26] Mr. Witter filed his federal petition in November 2005. He requested permission to return to state court in March of 2006, after the state responded to the federal petition.

[27] The letter from the San Jose police department declaring that the San Jose Public Defender had no record of gang affiliation for Mr. Witter was suppressed by the state until 2005. Should that letter have been available to trial counsel or state post-conviction counsel, they were ineffective for not seeking it out.

conducting such investigations was more time consuming and difficult for the undersigned counsel because the availability, identification, and location of such witnesses became more difficult as time passed. Therefore, such evidence was more readily available to trial counsel, or state post conviction counsel.

Mr. Witter did not personally forgo any investigation into his crime or social history. Indeed, on May 3, 1995, Mr. Witter filed a motion to replace his trial counsel based on his failure to investigate. 1 AA 61. It was only after undersigned counsel were appointed, and became familiar with the record, that Mr. Witter was able to conduct an adequate investigation and demonstrate the failures of the investigation of state post-conviction counsel. Any delay which occasioned Mr. Witter's demonstration that state post-conviction counsel violated his rights to the effective assistance of counsel was reasonable.

Mr. Witter should not be penalized for the time period he spent pursuing his rights in the federal habeas court. Initially, Mr. Witter could not have discovered the failures of his state post conviction counsel until he was appointed federal habeas counsel and his new counsel were provided an opportunity to obtain the appellate record, Mr. Witter's personal records, and conduct an adequate and thorough investigation. Until each of these circumstances occurred, Mr. Witter held no claim to present to the state post conviction court. Mr. Witter diligently pursued his rights to attack his conviction and sentence in state and federal court. Undersigned counsel sought to ensure Mr. Witter's state and federal constitutional rights through timely appearance in court, an adequate and thorough investigation, and the presentation of his claims in a timely manner. When it was evident that state post conviction counsel failed to conduct an adequate investigation into Mr. Witter's social history and offense, Mr. Witter identified those claims to the federal court and sought leave to return to state court in order present his new claims. The state post conviction habeas petition was timely presented to the state post conviction court once leave was obtained from the federal court. Mr. Witter's claims before this Court are timely and he is

entitled to relief.

E. Did the State Post-conviction Court Err to Apply the Doctrine of "Law of the Case?"

The state post-conviction court dismissed each of Mr. Witter's claims, except four and twelve, "based on law of the case or being time barred without legal excuse. . . . ." 24 AA 515112. "Law of the case" was not applicable to Mr. Witter's state post conviction petition.

The doctrine of "law of the case" provides that a decision of law on an issue will continue to be controlling throughout a case's history unless: the evidence in a subsequent proceeding is substantially different; controlling authority has since made a contrary decision of the law applicable to such issues; or the decision was clearly erroneous and would work a manifest injustice. Kimball v. Callahan, 590 F.2d 768, 771 (9th Cir.), *cert. denied,* 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979); League of Women Voters of California v. F.C.C., 798 F.2d 1255, 1256 (9th Cir.1986); United States v. Houser, 804 F.2d 565, 568 (9th Cir.1986); Handi Investment Co. v. Mobil Oil Corp., 653 F.2d 391, 392 (9th Cir.1981), and Hsu v. County of Clark, 173 P.3d 724 (2007). The doctrine did not apply to Mr. Witter's state post conviction petition because his claims involved substantially different evidence than was presented in his previous proceedings and the previous legal decisions were clearly erroneous.

Mr. Witter's second claim, contending his rights to the effective assistance of counsel were violated by the failure to investigate and present evidence of Fetal Alcohol Syndrome/Effect, was not barred under the doctrine of law of the case.[28] Mr. Witter's state post conviction counsel alleged that trial counsel was ineffective for failing to retain a fetal alcohol expert even though counsel repeatedly discussed the need for such an expert. See 17 AA 3628-3630, 3632; see also 17 AA 3655-3670, 17 AA 3686-3690. However, state post

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[28] Although the state post conviction court failed to identify which claims it barred under the doctrine of law of the case, Mr. Witter argues those claims which have some relation to this Court's previous opinions.

conviction counsel failed to retain such an expert to demonstrate the diagnosis and evidence the expert would have provided trial counsel. The instant state post conviction habeas petition provided the crucial evidence which state post conviction counsel failed to develop. See 15 AA 3148. In the instant state post conviction petition, Dr. Natalie Novick Brown explained that Mr. Witter suffered from Fetal Alcohol Effect and demonstrated how that syndrome neurologically incapacitated Mr. Witter from the time he was born. See 11 AA 2269-2289. State post conviction counsel failed to produce such evidence in the initial state post conviction habeas petition. The factual allegations and evidence in the instate petition were substantially different and Mr. Witter's current claim was not barred by doctrine of law of the case.

Mr. Witter's instant petition contended trial counsel failed to provide effective assistance of counsel because he failed to investigate the prosecutors' arguments that Mr. Witter belonged to a street gang. Trial counsel specifically failed to investigate Mr. Witter's incarceration in the California Youth Authority, and to explore why an incarcerated child might join a gang. In his initial state post-conviction petition, Mr. Witter contended that trial counsel was ineffective for not hiring a gang expert. The instant petition did not allege trial counsel was unreasonable for not consulting or present testimony from an expert on street gangs. Mr. Witter's claims in the instant petition were substantially different than his claim in the initial state post conviction habeas petition. Mr. Witter's claims were not barred by the doctrine of law of the case.

In his initial state post conviction habeas petition, Mr. Witter alleged that his appellate counsel failed to raise a viable claim that the prosecution violated Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In the instant habeas petition Mr. Witter supported this claim with newly available handwritten notes by the prosecutor. Mr. Witter's current claim was substantially different than that raised in his initial post conviction habeas petition. Mr. Witter demonstrated, through an analysis of the prosecutor's

notes, that the prosecutor's race-neutral explanation for his peremptory challenge was disingenuous and the challenge was not race neutral. As a result of the prosecutor's handwritten notes and Mr. Witter's analysis, the *prima facie* showing of a discriminatory use of peremptory challenges was un-rebutted. Mr. Witter's instant claim included additional evidence which demonstrated the prosecutor violated Batson and was a substantially different claim than that in his initial state post conviction habeas petition. The doctrine of law of the case did not bar Mr. Witter's current post-conviction habeas claim.

In his instant post conviction petition Mr. Witter contended prosecutors unconstitutionally argued that Mr. Witter's gang membership made him a threat of future danger because law enforcement records demonstrated Mr. Witter was not a gang member. On direct appeal, the Nevada Supreme Court held the prosecutors did not commit misconduct by arguing community standards and a societal compulsion to choose death for Mr. Witter. Witter v. State, 112 Nev. 908, 924 - 928, 921 P.2d 886 (1996). Mr. Witter's claim in the instant post conviction petition did not involve substantially the same evidence or theories which were before the Court on direct appeal. Mr. Witter's claim was not barred by the doctrine of law of the case.

The Court's opinion on direct appeal considered whether the trial judge erred in failing to distinguish between premeditation and malice, in the jury instructions, a difference between first and second degree murder in Nevada. Witter at 918. In Mr. Witter's instant post conviction habeas petition he contended the trial judge erred in jury instruction by: erroneously defining reasonable doubt; not requiring the jury to unanimously agree on an aggravating circumstance; and, in not allowing the jury to independently determine mitigating circumstances.[29] 11 AA 2401-2407. Mr. Witter's claim on direct appeal did not involve substantially the same evidence or theories as his claim in the instant petition and the

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[29] Mr. Witter's claim also demonstrated the trial judge failed to instruct the jury regarding the elements of the underlying felonies prosecutors alleged as aggravating circumstances. The state post conviction court struck these aggravating circumstances.

doctrine of law of the case was inapplicable.

The Nevada Supreme Court held the trial judge properly denied trial counsel's motion for a mistrial concerning Kathryn Cox's victim impact testimony. Witter at 921. In Ground Ten of the instant state post conviction habeas petition, Mr. Witter contended that testimony from Kathryn Cox, Phil Cox, and James R. Cox were all improper victim impact testimony and violated due process and fundamental fairness. Mr. Witter's current claim is substantially broader than the claim previously before this Court. Mr. Witter's current claim was not barred by the doctrine of law of the case.

In the alternative, Mr. Witter contends the doctrine of law of the case did not apply to this claim because the previous decision was clearly erroneous and application of this doctrine worked a manifest injustice. Kimball v. Callahan, 590 F.2d 768, 771 (9th Cir.), cert. denied, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979). In Mr. Witter's penalty trial, Kathryn Cox was allowed to read a prepared statement in which she demanded that the jury show no mercy to Mr. Witter and stated that she intended to do everything in her power to see that Mr. Witter received no mercy. The Nevada Supreme Court concluded that Cox did not express her opinion as to what sentence Mr. Witter should receive--she only asked the jury to return the most severe verdict that it deemed appropriate under the facts and circumstances of this case. Kathryn Cox' statements also emphasized the devastating effect this crime had on her and her family's life. Witter at 921, 895. Mr. Witter contended that Ms. Cox, in asking the jury to "show no mercy," clearly expressed her opinion as to an appropriate sentence. A plea for "no mercy" in a death penalty hearing, from a surviving victim, whose spouse was murdered, can only have a definite and powerful impact on the jury. Allowing such victim impact testimony into the jury's deliberations, and not correcting for this error on appeal, created a manifest injustice.

F. Were the procedural default rules relied upon by the district court to bar consideration of Mr. Witter's constitutional claims unenforceable because this Court applies them in its discretion and in an inconsistent manner?

Mr. Witter contends the state post-conviction court erroneously exercised its discretion to apply the rules of procedural default to his current post-conviction habeas petition and these rules failed to support the dismissal of his claims. The state post-conviction court relied on the procedural default rules in Nev. Rev. Stat. §§ 34.726, 34.800, and 34.810 to dismiss Mr. Witter's petition. This Court should consider whether the inconsistent application of procedural default rules is constitutional, or even generally appropriate.

While the Court has held that it applies procedural default rules consistently, Pellegrini v. State, 117 Nev. 860, 880, 34 P.3d 519, 536 (2001), federal courts have disagreed. E.g., Valerio v. Crawford, 306 F.3d 742, 774 (9th Cir. 2002) (en banc). Although the Court revisited this issue in State v. District Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005), Mr. Witter contends the Court's analysis was fundamentally flawed. The attacks made upon the arguments of the habeas petitioner in Riker were created by the Court sua sponte: prosecutors never offered the arguments reflected in Riker, either in the district court or the Supreme Court. Mr. Riker was provided no opportunity to respond to those arguments, in violation of his own state and federal rights to due process. E.g., Lankford v. Idaho, 500 U.S. 110, 126 n.22 (1991) (due process requires "giving the parties sufficient notice to enable them to identify the issues on which a decision may turn."). Moreover, the specific attack on Mr. Riker's claims regarding the inconsistent application of procedural default rules, (which were to the claims Mr. Witter raises herein), see 112 P.3d at 1077-1082, relied upon a misreading of the arguments and authorities provided.

Mr. Witter's current post-conviction habeas petition alleged the application of the procedural default rules was discretionary and inconsistent, and he supported his allegations with substantial evidence. 11 AA 2221-2235. As shown below, in conjunction with the

published opinions, the unpublished dispositions from this Court demonstrate the Court applies the default rules in its sole discretion and it does so inconsistently.[30] Precluding review of Mr. Witter's constitutional claims on the basis of these procedural default rules violated his due process right to adequate notice and his equal protection right to the consistent treatment of similarly-situated litigants. E.g., Bush v. Gore, 531 U.S. 98, 106-109 (2000) (per curiam); Village of Willowbrook v. Olech, 528 U.S. 562, 564-565 (2000) (per curiam); and Myers v. Ylst, 897 F.2d 417, 421 (9th Cir. 1990) (equal protection requires consistent application of state law to similarly situated litigants).

[I] Discretionary and inconsistent application of default rules in general

This Court has exercised complete discretion to address constitutional claims, when an adequate record is presented to resolve them, at any stage of the proceedings, despite the procedural default rules contained in Nev. Rev. Stats. §§ 34.726, 34.800, and 34.810. These cases include dispositions before and after the 1980s, the time period in which this Court has held that application of the rules became mandatory. Pellegrini, 117 Nev. at 886 and n. 116.

This Court's dispositions routinely use discretionary language to address constitutional claims despite the procedural bars, or simply ignores them. See ,e.g., Emil v. State, 106 Nev. 840, 843, 801 P.2d 1388 (1990) (on appeal from denial of collateral relief, "[w]e consider sua sponte whether failure to present such [mitigating] evidence constitutes ineffective assistance."); Bejarano v. Warden, 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (addressing claim on merits despite default rules); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing claim of error in Court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, with no discussion or

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[30] Consideration of the unpublished dispositions is necessary because "it is the actual practice of the state courts, not merely the precedents contained in their published opinions, that determine the adequacy of procedural bars preventing the assertion of federal rights." Powell v. Lambert, 357 F.3d 871, 879 (9th Cir. 2004) (citations omitted); see Valerio v. Crawford, 306 F.3d 742, 776 (9th Cir. 2002) (en banc). See also fn. 4, supra.

application of procedural default rules); Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981); Gunter v. State, 95 Nev. 319, 592 P.2d 708 (1979); Kewson v. Warden, 96 Nev. 886, 887, 620 P.2d 859 (1980) (Court was obligated to consider constitutional issues raised for the first time on appeal); Hardison v. State, 84 Nev. 125, 128, 437 P.2d 868 (1968); Hill v. Warden, 114 Nev. 169, 178-179, 953 P.2d 1077 (1998) (addressed claims on the merits which were raised for first time on appeal from denial of third post-conviction petition because claims were "of constitutional dimension which, if true, might invalidate Hill's death sentence and the record is sufficiently developed to provide an adequate basis for review."); Lane v. State, 110 Nev. 1156, 1168, 881 P.2d 1358 (1994) (vacated an aggravating factor finding based on instructional error on mandatory review without noting issue not raised at trial or on appeal); Lord v. State, 107 Nev. 28, 38, 806 P.2d 548 (1991) ("Normally a proper objection is a prerequisite to our considering the issue on appeal. However, since this issue is of constitutional proportions, we elect to address it now.") (citation omitted); Powell v. State, 108 Nev. 700, 705-06, 838 P.2d 921 (1992) (addressed issue of delay in probable cause determination without indicating the issue not raised at trial or on appeal); Stocks v. Warden, 86 Nev. 758, 760-761, 476 P.2d 469 (1970) (court "choose[s] to entertain" second post-conviction petition which could have been barred); Warden v. Lischko, 90 Nev. 221, 222, 523 P.2d 6 (1974) (trial judges "choice" to rule on barred claim "within its discretionary power"); Farmer v. State, No. 18052, Order Dismissing Appeal (March 31, 1988) (addressed two substantive claims on merits [guilty plea involuntary, insufficiency of aggravating circumstances] despite a failure to raise on direct appeal), 12 AA 2508; Farmer v. State, No. 22562, Order Dismissing Appeal (February 20, 1992) (denied claim of improper admission of victim impact evidence on merits despite default), 12 AA 2515; Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, at 5-6 (November 14, 2002) (granted penalty phase relief sua sponte [on appeal of first state habeas corpus petition] on the basis of ineffective assistance of post-conviction counsel without requiring petitioner to plead

"cause" in a successive petition), 12 AA 2524; Hardison v. State No. 24195, Order of Remand (May 24, 1994) (addressed claims and granted relief despite timeliness and successive petition procedural bars raised by prosecutors), 12 AA 2538; Hill v. State No. 18253, Order Dismissing Appeal (June 29, 1987) (dismissed an untimely appeal from the denial of relief on a second post-conviction habeas petition but sua sponte directed the trial judge to entertain the merits of a new petition), 12 AA 2544; Jones v. State, No. 24497, Order Dismissing Appeal (August 28, 1996) (held a challenge to the jurisdiction of court was waived by a guilty plea, without citing existing state rule that lack of jurisdiction not waivable, e.g., Application of Alexander, 80 Nev. 354, 393 P.2d 615 (1964); Nev. Rev. Stat. § 174.105(3)); Jones v. State, No. 39091, Order of Affirmance (December 19, 2002) (rejected petitioner's three-judge panel claims on the merits despite direct appeal and subsequent petition bar; rejected jurisdictional challenge on law of the case grounds, without citing authority that lack of jurisdiction was not waivable), 12 AA 2551; Milligan v. State, No. 21504, Order Dismissing Appeal (June 27, 1991) (rejected two substantive claims on merits [error to admit uncorroborated testimony of accomplice, death penalty cruel and unusual] despite a failure to raise the claims on direct appeal), 12 AA 2575; Neuschafer v. Warden No. 18371, Order Dismissing Appeal (August 19, 1987) (addressed the merits of claims, with no discussion of default rules, in case decided without briefing, and in which court expressed "serious doubts" about authority of counsel to pursue appeal, but decided to "elect" to entertain appeal due to "gravity of appellant's sentence"), 12 AA 2635-13 AA 2645; Nevius v. Sumner (Nevius I) Nos. 17059, 17060, Order Dismissing Appeal and Denying Petition (February 19, 1986) (reviewed first and second collateral petitions in a consolidated opinion, without addressing default rules as to second petition), 13 AA 2646; Nevius v. Warden (Nevius II), No. 29027, Order Dismissing Appeal (October 9, 1996) (entertained claim in petition filed directly with Nevada Supreme Court despite the failure to raise claim in district court), 13 AA 2651; Nevius v. Warden (Nevius III), Order Denying

Rehearing (July 17, 1998), 13 AA 2665 (same), Rogers v. Warden, No. 22858, Order Dismissing Appeal (May 28, 1993) (addressed two claims on merits [objection to M'Naughten test for insanity, and error to place the burden on defendant to prove insanity] despite successive petition bar and direct appeal bar; claims rejected under law of the case doctrine), 13 AA 2702; Stevens v. State No. 24138, Order of Remand (July 8, 1994) (found "cause" on the basis of failure to appoint counsel in proceeding in which appointment of counsel was not mandatory); cf. Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247 (1997), 13 AA 2726; Williams v. State No. 20732, Order Dismissing Appeal (July 18, 1990) (addressed claim in third collateral proceeding on merits without discussion of default rules), 13 AA 2740; Williams v. State, No. 29084, Order Dismissing Appeal (August 29, 1997) (addressed claim that trial counsel failed to rebut aggravating evidence; claim rejected under law of the case), 13 AA 2744; and Ybarra v. Director No. 19705, Order Dismissing Appeal (June 29, 1989) (addressed claim not previously-raised without reference to default rules), 13 AA 2751.

[II] Discretionary and inconsistent application of particular default rules

This Court's dispositions demonstrate the inconsistent application of specific procedural rules as well. This Court routinely failed to apply the procedural bar of Nev. Rev. Stat. § 34.726,[31] as well as the successive petition bar of Nev. Rev. Stat. § 34.810, to preclude

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[31] Although the district court arguably applied Nev. Rev. Stat. § 34.726, 24 AA 5111, it did not address Mr. Witter's argument that any delay in filing the petition was not his own "fault," under Nev. Rev. Stat. § 34.726(1)(a). To be at fault, a party must have acted in a manner that goes beyond negligence because "[f]ault contemplates more than mere negligence, and includes intentional acts." Slade v. Farmers Ins. Exchange, 5 P.3d 280, 285 (Colo. 2000); see, e.g., Nev. Rev. Stat. § 104.1201(16) ("[f]ault means wrongful act, omission or breach"); Nev. Rev. Stat. § 104A.2103(1)(f) ("[f]ault means wrongful act, omission, breach or default"); Nev. Rev. Stat. § 128.105(2) (fault of parent or parents can be established by proving abandonment, neglect, parental unfitness, failure of parental adjustment, risk of serious physical, mental or emotional injury to child, or token efforts by the parent(s));In re Termination of Parental Rights as to N.J., 116 Nev. 790, 8 P.3d 126, 133 (2000) (adopting a best interests/parental fault standard in termination of parental (continued...)

its review of constitutional claims contained in successive habeas petitions. E.g., Hill v. State, 114 Nev. 169, 953 P.2d 1077 (1998) (addressed claims on merits filed directly with the Nevada Supreme Court; successive petition claims filed September 19, 1996); Bennett v. State, 111 Nev. 1099, 901 P.2d 676 (1995) (amended petition filed December 30, 1993); Farmer v. State, No. 29120, Order Dismissing Appeal (November 20, 1997) (successive petition filed August 28, 1995), 12 AA 2518; Nevius v. Warden, No. 29027, Order Dismissing Appeal (October 9, 1996) (successive petition filed August 23, 1996), 13 AA 2651; Nevius v. Warden, Order Denying Rehearing (July 17, 1998) (successive petition filed February 7, 1997), 13 AA 2665; Riley v. State, No. 33750, Order Dismissing Appeal (November 19, 1999) (successive petition filed August 26, 1998), 13 AA 2697; Sechrest v. State, No. 29170, Order Dismissing Appeal (November 20, 1997) (successive petition filed July 27, 1996), 13 AA 2716; see also Koerner v. Grigas, 328 F.3d 1039, 1043-44 (9th Cir. 2003) (successive petition filed July 7, 1993); and Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (addressed three-judge panel claims on merits; successive petition filed May 1, 2000), 12 AA 2551.

In Rippo v. State, the Court demonstrated unequivocally that it has and exercises an unfettered power to address constitutional issues in habeas proceedings, whenever it decides to do so, regardless of any default rules. On appeal from the denial of post-conviction habeas

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[31](...continued)
rights cases; best interests of child necessarily include considerations of parental fault and/or conduct and both best interests of the child and parental fault must be proven by clear and convincing evidence); Hill v. State, 955 S.W.2d 96, 100 (Tex. Crim. App 1997) ("[t]he word "fault" implies wrongdoing; "[f]ault" is defined as "a weakness in character, failing imperfection, impairment, . . . misdemeanor . . . mistake . . . responsibility for something wrong") (citation omitted); State v. Jackson, 94 Ariz. 117, 133, 382 P.2d 229, 232 (Ariz. 1963) ("[f]ault implies misconduct not lack of judgment" (citation omitted)); Harrison v. Heckler, 746 F.2d 480, 482 (9th Cir. 1984) (the determination of whether a Social Security recipient is "at fault" for having received an overpayment "is highly subjective, highly dependent on the interaction between the intentions and state of mind of the claimant and the peculiar circumstances of his situation"); see Pelligrini v. State, 117 Nev. 860, 36 P.3d 519, 526 n.10 (2001), nor did the Court address the argument that applying § 34.726 would violate due process principles of notice, as argued by appellant.

corpus relief, this Court sua sponte directed the parties to be prepared to argue an issue arising from a penalty phase jury instruction, regarding whether the jury had to be unanimous in finding the mitigating evidence outweighed the aggravating factors to preclude death-eligibility. The issue was addressed on the merits in the Court's decision. Rippo v. State, 122 Nev. 1086, 146 P.3d 279, 285 (2006). The instructional issue was not raised in any previous proceeding, cf. Nev. Rev. Stat. § 34.810(1)(b),(2), or in the habeas proceedings in the trial court, or in the Court itself. The only issue raised with respect to this jury instruction was whether it adequately informed the jury that non-statutory aggravating evidence that was not relevant to the statutory aggravating circumstances could be considered in the weighing process for finding death-eligibility. The Court raised the issue sua sponte in its order directing oral argument in 2006, long after the one year rule, Nev. Rev. Stat. § 34.726(1), and the five year rule, Nev. Rev. Stat. § 34.800(2), elapsed from the finality of the conviction and sentence in 1998. Rippo v. State, 113 Nev. 1239, 946 P.3d 1017 (1997), cert. denied 524 U.S. 841 (October 5, 1998). This Court's decision in the habeas appeal failed to address the mandatory default rules, nor did it articulate a theory of cause, such as ineffective assistance of counsel under Crump, to excuse the failure of counsel to raise the issue in the district court, or the failure to allege any theory of cause, such as ineffective assistance of trial and appellate counsel, for failure to raise the claim in those proceedings. See § 34.810(1)(b); State v. District Court (Riker), 121 Nev. at 235, citing Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). This Court's willingness to address an issue sua sponte in a habeas appeal, by disregarding (or anticipatorily forgiving) applicable procedural default rules resulted in the arbitrary and inconsistent treatment of similarly-situated capital habeas litigants.

[III] Discretionary and inconsistent application of exceptions to default rules

This Court applied inconsistent rules when deciding whether a petitioner demonstrated "cause" to excuse a procedural default. One particularly striking inconsistency is the Court's treatment of cases in which trial and/or appellate counsel acted as habeas counsel in the first

state post-conviction petition.[32] This Court has reached diametrically opposite conclusions on whether an erroneous court ruling established "cause" to review the merits of a constitutional claim on post-conviction. See, e.g., Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944 (1994) (concluded that erroneous court ruling established cause for raising claim in later proceeding); Harris v. Warden, 114 Nev. 956, 958-59, 964 P.2d 785, 786-87 (1998) (same); contra Evans v. State, 117 Nev. 609, 28 P.3d 498, 521 (2001) (held Lozada exception applied only when federal court has found previous ruling erroneous); see also Mitchell v. State 149 P.3d 33 (2006) (cause for revisiting an issue when intervening, corrective case law was handed down). However, this Court continued to treat an erroneous court ruling as "cause" in unpublished dispositions without observing the limitation it purportedly established in Evans.[33] This Court reached inconsistent results on whether a procedural rule which did not exist at the time of a purported default, may preclude the review of the merits of meritorious constitutional claims.[34] In State v. Haberstroh, 119 Nev. 173, 69 P.3d 676,

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[32] Compare Moran v. State, No. 28188, Order Dismissing Appeal (March 21, 1996) (found that trial and appellate counsel's representation in first habeas proceeding did not establish "cause" to review merits of claims in subsequent habeas proceeding), 12 AA 2617; with Nevius v. Warden, Nos. 29027, 29028, Order Dismissing Appeal and Denying Petition (October 9, 1996) (petitioner "arguabl[y] established "cause" under same circumstances), 13 AA 2651; with Wade v. State, No. 37467, Order of Affirmance (October 11, 2001) (held sua sponte that petitioner established "cause" to allow filing of successive petition in same circumstances); with Hankins v. State, No. 20780, Order of Remand (April 24, 1990) (remanded sua sponte for a hearing and appointment of new counsel on first habeas petition due to representation by same office at sentencing and in post-conviction proceeding), 12 AA 2534.

[33] Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, at 7 n.19 (November 14, 2002) (quoted Lozada, "holding that where a claim had merit, denial of relief by this court constituted an impediment external to the defense that would excuse appellant's default in presenting the same claim in a successive petition"), 12 AA 2524.

[34] Compare Pellegrini v. State, 117 Nev. 860, 874-875, 34 P.3d 519 (2001) (applied Nev. Rev. Stat. § 34.726 to preclude review of merits of successive habeas petition when application of one-year default rule announced for the first time in that case); Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (same), 12 AA 2551; with Smith v. State, No. 20959, (continued...)

681-682 (2003), the Court held that parties may not stipulate to overcome the procedural defenses, but construed such a stipulation to establish "cause" to overcome the procedural default rules without identifying any theory of cause that such a stipulation would establish or how such a theory of cause could have existed before the stipulation was filed.[35] These decisions leave the definition of "cause" completely amorphous, because it is whatever this Court said it was on any particular occasion.

[IV] The discretionary and inconsistent application of procedural default rules precludes this Court from barring consideration of Mr. Witter's claims, consistent with federal constitutional standards

The dispositions relied upon herein demonstrate that there is no consistency in this Court's application of procedural default rules. Those "rules" are not treated as rules which bind the Court at all, but merely as exercises of discretion by which the Court applies, excuses, or ignores the rules at will. Even prosecutors have admitted that the Court disregarded procedural default bars on grounds which cannot be reconciled with a theory of consistent application of procedural default rules. Bennett v. State, Nev. Sup. Ct. No. 38934, Respondent's Answering Brief at 8 (November 26, 2002) ("upon appeal the Nevada Supreme Court graciously waived the procedural bars and reached the merits") (emphasis supplied), 12 AA 2470; Nevius v. McDaniel, D. Nev. No. CV-N-96-785-HDM(RAM), Response to Nevius' Supplemental Memorandum at 3 (October 18, 1999) (Nevada Supreme Court noted issue raised only on petition for rehearing in successive proceeding, "but it did not

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[34](...continued)
Order of Remand (September 14, 1990) (refusing to apply default rule that was not in existence at the time of the purported default), 13 AA 2721; Rider v. State, No. 20925, Order (April 30, 1990) (same), 10 AA 2445.

[35] Contra Sullivan v. State, 120 Nev. __, 96 P.3d 761, 763-764 (2004) (refused to find cause to review petition, despite pre-Haberstroh stipulation that petition timely); Doleman v. State, No. 33424, Order Dismissing Appeal (March 27, 2000) (finding stipulation with state to allow adjudication of merits of claim ineffective because of petitioner's failure to seek rehearing on claim and failing to find "cause" on the basis of the stipulation), 12 AA 2505.

procedurally default the claim. Instead, 'in the interests of judicial economy' and, more than likely, out of its utter frustration with the litigious Mr. Nevius and to get the matter out of the Nevada Supreme Court once and for all, the court addressed the claim on its merits"). 13 AA 2670.

Procedural default bars which can be "graciously waived," or disregarded out of "frustration," and which permit the Court to raise and resolve substantive issues sua sponte, are not "rules" that bind courts at all, but are mere exercises of unfettered discretion; such impediments cannot constitutionally bar review of meritorious claims. As Justice Kennedy wrote in Lonchar v. Thomas, 517 U.S. 314, 323 (1996), "'There is no such thing in the Law, as Writs of Grace and Favour issuing from the Judges.' Opinion on the Writ of Habeas Corpus, Wilm. 77, 87, 97 Eng. Rep. 29, 36 (1758) (Wilmot, J.)." This Court's practices make review of the merits of constitutional claims a matter of "grace and favor," and they cannot constitutionally be applied to bar consideration of Mr. Witter's claims. Accordingly, the district court's order dismissing the petition must be reversed and the case must be remanded for a hearing on Mr. Witter's substantive constitutional claims.

V. Conclusion

For the foregoing reasons, Mr. Witter respectfully requests this Court reverse his conviction and sentence. In the alternative, Mr. Witter requests this court remand his case to the district court for a hearing on his meritorious constitutional claims.

Dated this 29 day of April, 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 10th day of April, 2008.

FRANNY FORSMAN
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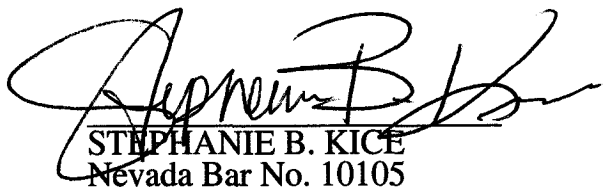

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CERTIFICATE OF SERVICE

In accordance with Rule 31(b) of the Nevada Rules of Appellate Procedure, the undersigned hereby certifies that on the 29th day of April, 2008, a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** was deposited in the United States mail, first class postage prepaid, addressed to counsel as follows:

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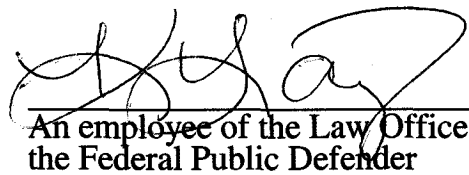

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