connected with the case had ever indicated to him that there was any relationship between Montez and Maria. RA 5, 1878-1884.

The district court conducted an evidentiary hearing at which Montez again indicated he was not Maria's brother; that he had read a transcript of his trial testimony and that everything he said was true. RA 5, 1909-1919. The district court found that whether or not Montez said he was Jessica's uncle to the reporter was irrelevant as there was no evidence that Montez really was Maria's brother. The district court stated that Defendant denied ever meeting Montez and it defied belief that Defendant would not know that he had a brother-in-law living down the street. The district court denied the motion and was affirmed on appeal. RA 5, 1932-1933; RA 6, 2197-2227.

3. Third Motion for New Trial – 3/18/86 – Record Issues

The process of reconstructing the record took approximately two years. At the outset, the record was missing the testimony of defense witnesses on April 15, 1985, the entire penalty phase on April 22, 1985 and the sentencing of April 30, 1985. The court reporter responsible for recording and transcribing these events was Lucille Fisher. Lucille was a short-hand reporter, who took notes in steno books, rather than typing into a court-reporter apparatus. Fisher suffered from multiple illnesses. She lost all notes relating to the April 15th witnesses and, although she had her notebooks for the remaining proceedings, she was too ill to transcribe them.

The method for reconstructing the witnesses' testimony was the subject of the third new trial motion. The district court recognized Rule 10(c) of the Nevada Rules of Appellate Procedure and the need to attempt to reconstruct the record from notes or other documents of counsel. Thereafter, DDAs Seaton and Jefferies submitted their notes, taken at the time of the witnesses' testimony, to the district court. In addition, they submitted the notes of two trial observer's working for a victim's right organization. RA 5, 1946-1974.

The defense objected to using these notes to reconstruct the record of the witnesses. Defense counsel indicated because he had been examining the witnesses, he did not take extensive notes and too much time had past for him to feel comfortable that the notes taken

by the other four persons were accurate. Counsel also pointed out that the trial judge had not taken detailed notes on these witnesses and so every source of information was tied to the prosecution. RA 5, 1934-45.

The district court determined that using the notes to reconstruct the witnesses' testimony was feasible. The court indicated it reviewed the notes and they were consistent with her general memory of the content of the testimony. It also noted it did not remember any significant legal issues or objections arising during the testimony. The district court denied the motion and ruled the notes would constitute the reconstructed record and would be sent to the Nevada Supreme Court. RA 5, 1984-1985; RA 11, 3323-3391. On appeal this ruling was upheld and the Supreme Court concluded the record was sufficient for adequate appellate review.[19] RA 6, 2197-2227.

4. Fourth Motion for New Trial – 3/16/87 – Maria's Alleged Recantation

Defense counsel was contacted by the Lopez family who alleged Maria had contacted them and recanted her previous testimony. Maria was living in Tijuana, Mexico and would not return to the United States. Defense counsel contacted a news outlet and agreed to an exclusive interview if they would pay the cost of a cameraman to fly to Mexico and record his interview with Maria. This was done. RA 6, 1992-93.

Maria begins the interview by indicating she is afraid something is going to happen to her because lying in front of the law is a crime. Defense Counsel assumed she was talking about her trial testimony and assured her she would be safe from prosecution in Mexico and he would get her immunity. Defense counsel then told Maria if the police urged her to say something that was untrue he needed to know about it. Maria replied that the police did not force her to say anything. RA 6, 2036-37.

Maria then related how she doesn't really know what happened and that since the trial she learned that Jessica sometimes bathed herself so Maria thought it might be possible that Jessica accidentally turn on the hot water and scalded herself. When asked whether

[19] Remaining issues regarding transcription of the reporters' notes are discussed below.

Defendant had anything to do with the burns, Maria refused to answer the question and said she would not keep talking. RA 6, 2037-38.

Defense counsel assumed Maria was afraid of being tried for perjury and once again started talking to Maria about why Nevada would not prosecute her.[20] Maria finally responded to the question indicating that the burns may have caused by Jessica but what about the other injuries. Maria asked defense counsel to explain how Jessica looked as Jessica appeared in the photos admitted at trial. RA6, 2038-39.

Defense counsel then switched subjects and asked Maria if anyone promised her anything. Maria indicated they promised her a lot and then explained that the officers told her about her rights and asked her to tell the truth. She told them she didn't know what to do without Defendant and they explained about welfare and other things and they offered to help her fill out the paperwork but they never said they would "fix" things. She also indicated no one promised her immunity before she gave her statements. RA 6, 2039-40.

Again, defense counsel changed the topic and asked Maria if she told the truth about Jessica hanging from the macramé on New Year's Day. Maria indicated she didn't know there would be so many questions, but she answered and said that it wasn't true. This was a misleading question, because Maria never testified she saw Jessica being hung with the macramé on any occasion and the New Year's Day incident involved the closet bracket. Maria testified at trial that the macramé was removed and Jessica was hung by an extension cord wrapped into her hair. Moreover Maria testified that Jessica told Maria what happened on New Year's not that Maria had observed it herself. So the statement was actually consistent with her trial testimony. RA 6, 2040.

Defense counsel hand-wrote a statement for Maria to sign. The statement did not reflect what Maria said in the interview, but what defense counsel tried to get her to say. Maria indicated; she'd had enough of the camera and wanted to be left in peace. Defense

[20] Defense counsel ignored the equally reasonable possibility that Maria was afraid of lying during the current interview and being prosecuted if she said Defendant had nothing to do with it despite what Jessica told her about Defendant's participation. Defense counse also ignored the possibility that Maria was concern if she answered the questions truthfully by affirming her trial testimony and Defendant's role in Jessica's death she was risking Defendant's family's displeasure and the help she needed for the other children.

counsel told her she would be left in peace and she eventually did execute it. The Statement said Jessica was burned by accident, that Defendant did nothing to cause the death of Jessica, that her previous statement that Jessica had been hung by her hair on New Year's was untrue and that the children had never played with Arturo Montez. RA 6, 2015.

Based upon this interview, Defense counsel moved for a new trial. He also asked the district court to grant immunity to Maria from any possible perjury charges arising from her trial testimony. The videotape was included as an exhibit to the motion. The defense counsel argued two primary grounds for a new trial. First that Maria recanted her trial testimony and second that the officers' who interviewed her, Detective Wohler and Sgt. Troncoso, had made undisclosed promises to induce her statements to the police. RA 6, 1988-2013.

The State's opposition pointed out that the written statement signed by Maria did not comport with the video testimony and that her actual statements on the video were not inconsistent with her trial testimony. The State attached a translated transcript of the video to the opposition. With respect to the written statement, the State noted that Maria had approached Defendant's family because one of her remaining children was ill and she needed help. The statement and interview reflected Maria's effort to balance between helping the family aid Defendant in avoiding the death penalty while not lying about his involvement in Jessica's death with the intent of maintaining good relations with Defendant's family for the children's benefit. RA 6, 2016-2035.

In addition, the State noted that the things discussed with Detective Wohlers and Sgt. Tronosco before Maria before she made her initial statement were not "promises" as the term is used in demonstrating a witness' bias, but were simply statements truthfully advising Maria of the rights and benefits available to her and that Maria herself indicated they did not guarantee her anything except assistance in filling out forms. Sgt. Tronosco and Detective Wohler's also signed affidavits indicating that they had made no promises to Maria and that they didn't begin helping her with immigration forms until after she had been granted

immunity.[21] RA 6, 2044-47.

Finally the State pointed out the physical evidence adduced at trial was inconsistent with Maria's speculation that Jessica accidentally scalded herself, nor was any such theory presented at trial. The pattern of burns could not have been made by Jessica accidentally turning on the hot water. And, as Maria pointed out, that still did not explain the extensive bruises and bald scalp as well as the hair found on the belt, macramé and electrical cords. The State also noted the Montez testimony and that of the neighbors as additional reasons why Maria's statement could not be read as a true recantation. RA 6, 2016-2035.

In reply, Defendant submitted a handwritten declaration by one Ernest Mercado, who claimed to be a cellmate of Montez when Montez was in jail on misdemeanor DUI charges. RA 6, 2040. Mercado indicated he was watching television with Montez when a story about Jessica's death was aired. Montez, in response to a picture of Defendant, allegedly said he would have killed Defendant if he had known what Defendant did to the little girl. Defendant argued this proved Montez had not truthfully testified at trial because he allegedly saw Defendant pulling Jessica's hair and did nothing about it. RA 6, 2110. In addition, Defendant indicated he had just learned that Montez had outstanding warrants when he testified in district court and because he wasn't arrested on those warrants and Montez and Detective Wohlers' testimony differed on when Montez and why Montez was first contacted by Wohler, there must have been some type of promise regarding the warrants made before his trial testimony. RA 6, 2102-2104.

The district court viewed the video tape and transcript and concluded this was not a true or valid recantation. The district court noted the inconsistency between Maria's discussion of accidental scalding and the physical evidence as well as the real possibility that Maria felt pressured to do something to stay in good graces with Defendant's family. RA 6,

[21] Both officers have subsequently stated that they did not carefully review the affidavits and that they should have changed the timing on the immigration issue. This occurred before the immunity was granted because Maria had to apply to remain in the United States pending trial and her request for legal papers. Until this was granted, Maria remained in jail. The officers have always stated, however, that no promises or benefits were given to Maria in return for her testimony; they only advised her of programs to aid her and the children and assisted in transporting her from jail to immigration offices or obtaining appropriate forms to apply for benefits.

2138-2139.

As for the Mercado information, the district court found it was not inconsistent with Montez' trial testimony since all Montez saw was a single instance of hair pulling, not the bruises and scalding. Thus Montez' reaction to the television could well be referring to not knowing about the more severe abuse and what he would have done had he known of it. RA 6, 2139-2140.

Defendant filed a motion for rehearing on April 24, 1987. In it he alleged that DDA Seaton had deliberately misled the district court about the timing of Detective Wohlers' actions in assisting Maria with immigration matters. RA 6, 2138-2139. This was based on an interview a defense investigator conducted with Wohlers, attached to the motion. In addition, the motion claimed that in the same interview, Wohlers discussed in more detail the conversation he had with Maria prior to the first taped statement on January 11th and that the pre-statement conversation had been taped using a pocket recorder which the officer used in preparing his reports. Wohlers told the investigator he didn't know what happened to the tape because it wasn't a formal statement and he probably taped over it when using the recorder on another case or even the same day. RA 6, 2157, 2164-65. The motion also raised the issue of alleged undisclosed benefits or promises based upon the same interview. RA 6, 2142-2150.

In the interview Wohlers stated Maria was scared and frightened when he initially talked to her. She asked them a number of things because she was afraid she would be deported and she had no rights except as Defendant's wife and no where to go for help. RA 6, 2158-62. Consistent with what Maria said at trial and in the Mexico video interview, Wohlers told her about welfare and other state services and her rights and that he would help her navigate the system. RA 6, 2158-62; 2170. Wohlers was emphatic that he made no promises or guarantees and that he discussed all of this with DDA Seaton who concurred that the discussion did not amount to promises of favorable action if Maria cooperated with the police. Wohler did acknowledge that he missed the error in his initial affidavit on the timing of the immigration application. RA 6, 2165-68; 2167-69; 2171-72; 2174.

The district court concluded this was not new information, it had been thoroughly brought out at trial and the interaction with Maria did not amount to undisclosed promises. Rehearing was denied. RA 6, 2193-2196.

Defendant filed a notice of appeal from the order denying the motion for rehearing, but failed to file a notice from the original order denying the fourth motion for a new trial. Because the denial of a motion for rehearing is not an appealable order, the Nevada Supreme Court dismissed this appeal for lack of jurisdiction. In the alternative, if the notice was considered to be an appeal from the fourth motion for a new trial, it was untimely. Thus the Nevada Supreme Court never ruled on the merits of the fourth motion on direct appeal. RA 6, 2228-2230. However, the Court had to consider the merits of the fourth motion when it considered the appeal from the ineffective assistance claim contained in the first State petition for post-conviction relief. Failure to file a timely appeal from the fourth motion for a new trial was raised as a claim of ineffective assistance of counsel. The district court found no prejudice because the claim would not have been successful on appeal. This finding was upheld on appeal when the Supreme Court indicated it had considered all of Defendant's claims of error and found them to be without merit. RA 7, 2231-39; RA 7, 2681-95; RA 8, 2696-99.

5. Additional Post-trial Motions

In addition to the motions for a new trial, the district court heard numerous motions and proceedings related to the missing transcripts. The Nevada Supreme Court issued an order directing the district court to take every step to attempt to reconstruct the missing trial transcripts for April 22, 1985. RA 11, 3392-93.

The district court employed Stella Butterfield, another short-hand reporter, to transcribe Ms. Fisher's short-hand notations of the closing arguments and penalty hearing. RA 11, 3398-99. Initially Ms. Butterfield did not think she had enough information on Ms. Fisher's short–hand idiosyncrasies to prepare a transcript. RA 11, 3418, PE 104. For a time, the issue was side-tracked because Ms. Fisher produced four tape recordings that she indicated might contain the missing information. Ms. Fisher has used an out-dated tape

recorder as a back-up when she reported a trial. Ms. Fisher's tape recorder was no longer functional and the State spent some time locating a model that would play the tapes. RA 11, 3400-01; 3413-15; 3419-21. However, after obtaining the correct model, it was discovered none of the tapes pertained to the Defendant's case. RA 11, 3432.

In the interim, Ms. Butterfield was able to consult with Ms. Fisher and another court reporter familiar with Ms. Fisher's work, Frances Holden. This enabled Ms. Butterfield to prepare draft transcripts for Ms. Fisher's review. Ms. Fisher was able to review and correct several pages before ill health made even this task impossible. However, based upon what was done, and her conversations with Ms. Fisher, Ms. Butterfield was able to complete a transcript. RA 3456-3477. After it was reviewed and corrected by the district court, defense counsel and the prosecutor[22], the transcript was submitted to the Nevada Supreme Court. RA 11, 3481-89; 3493-3569. On appeal, the Nevada Supreme Court found the transcript sufficient to conduct appellate review and rejected Defendant's argument that the problems with the transcript warranted reversal. Vol. 6, 2197-2227.

F. Direct Appeal

On appeal, Defendant raised the following issues: 1) trial court erred in denying the first motion for new trial based on inadequate record for appeal; 2) the trial court erred in finding Maria was not an accomplice and her testimony was uncorroborated; 3) the district court erred in denying Defendant's motion for mistrial based on the late disclosure of Ted Salazar's notes taken in conjunction with Dr. Strauss' report; 4) the trial court erred in denying Defendant's motion in limine regarding Jessica's statements to Maria; 5) the district court erred in deny Defendant's motion to strike the admission of exhibits, namely the brown electrical cord, the red and white electrical cord and the macramé plant holder; 6) the district court erred in permitting the State to use the life size mannequin as a demonstrative exhibit during closing arguments; 7) the district court erred in refusing to give supplemental instructions on "due caution and circumspection"; 8) insufficiency of evidence to support first-degree murder; 9) inadequate record of penalty phase to support appellate review; 10)

[22] In the time since the trial, DDA Jeffers passed away. Therefore only DDA Seaton was available.

due process violation resulting from three year delay in preparing the trial transcript and reconstructed record; 11) disproportionality of the death penalty; 12) insufficiency of evidence to support aggravating circumstances; 13) the district court erred in denying the first motion for new trial based on juror misconduct; and 14) the district court erred in denying the third motion for a new trial involving the allegedly perjured testimony of Montez. PE 113, 114. The Nevada Supreme Court found no merit on any of the claims and affirmed Defendant's conviction and death sentence. RA 6, 2197-2227.

G. Post-Conviction Habeas Corpus Relief Petitions

Defendant filed four previous petitions for post-conviction relief. All have been denied or dismissed.

1. First State Petition for Post-Conviction Relief – 8/31/89

Annette Quintana and Bill Smith were appointed as counsel for the 1989 Petition. The Petition raised the following claims and subclaims:

1. Ineffective assistance of trial counsel – Inadequate Pre-trial preparation and investigation.

a. Should have presented Defendant's testimony to grand jury.

b. Rejected Defendant's request to submit to lie detector test and request prosecution to conduct similar test on Maria

c. Inadequate communications and visits with Defendant.

d. Failure to investigate whether Maria received favorable treatment on theft charges in return for her testimony.

e. Failure to have Defendant psychologically evaluated and request independent evaluation of Maria.

f. Failure to retain an independent pathologist.

g. Failure to conduct indepth examination of Belmont apartment.

h. Failure to do independent testing on apartment water temperature.

i. Failure to investigate Maria and Jessica's background, particularly Maria's childhood abuse.

j. Failure to file a motion in limine to exclude testimony regarding Defendant's abuse of Maria.

k. Failure to preserve note allegedly written by Maria to Defendant stating "please forgive me for what I am going to do to you."

l. Failure to obtain report or statement from North Las Vegas Fire Department that Maria stated Jessica had been sick since moving to Las Vegas.

m. Failure to present testimony from Caesar's Palace personnel on Defendant's good character.

n. Failure to admit documents evidencing Defendant's naturalization and United States citizenship, good school attendance, trade and gaming school programs.

o. Agreed to short trial settings and acceleration of trial from June to April.

2. Ineffective Assistance of Counsel – Lack of Fair and Impartial Jury

a. Failure to ask prospective juror if they were abused as children.

b. Failure to object to excusal of juror during deliberations.

3. Ineffective Assistance of Counsel – Trial

a. Failure to raise issue of improper granting of immunity to Maria before trial court.

b. Failure to move to strike death penalty for abusive charging practices.

c. Failure to raise issues regarding executory promises of financial and immigration assistance to undermine Maria's credibility.

d. Failure to seek change of venue.

e. Failure to move to sequester jury during trial or limit media coverage.

f. Failure to move to suppress Defendant's statements.

g. Failure to object to autopsy pictures.

h. Failure to timely object to admission of belt, extension cord and macramé and photographs of those items.

i. Failure to move to strike Shoettmer and Mallory testimony for lack of personal knowledge.

j. Failure to object to information in Strauss report referencing physical and sexual abuse of Maria by Defendant.

k. Failure to object to Strauss report on lack of foundation grounds.

l. Failure to object to Strauss testimony portraying Maria as abused spouse.

m. Failure to request limiting instruction on use of Strauss report and testimony regarding Maria as abused spouse.

n. Opened door to Strauss opinion on Maria's credibility.

o. Waived second-degree murder instruction without consent of

Defendant.

p. Failure to object to admission of order granting immunity as effectively prosecutorial vouching of Maria's credibility.

q. Failure to timely proffer additional instructions on involuntary manslaughter.

r. Failure to object to prosecutorial misconduct – vouching – during closing arguments.

s. Failure to present mitigation evidence.

4. Challenges to Penalty Phase

a. Torture and depravity of mind constitute a single aggravator and do not sufficiently narrow the category of persons eligible to receive death penalty. Also raised as ineffective assistance of appellate counsel.

b. Trial court erred in giving anti-sympathy instruction and issue should have been raised on appeal.

c. NRS 175.552 is unconstitutional as it impermissibly broadens scope of death penalty.

5. Ineffective Assistance of Counsel – Post-Trial

a. Failed to notify State and conduct formal deposition of Maria's alleged recantation to preserve admissibility in future proceedings.

b. Should have obtained formal affidavit from Mercado regarding conversation with Montez.

c. Should have presented evidence demonstrating Maria initiated calls to Lopez relatives to dispel inference Lopez relatives pressured Maria into recantation.

d. Failure to timely appeal denial of fourth motion for a new trial involving Maria's alleged recantation.

e. Should not have instituted divorce proceedings against Maria which led to deportation and inability to effect process upon her.

RA 7, 2231-2339.

The State's response to the Petition pointed out what claims or issues were legally insufficient or belied by the record. The State also noted that many of the allegations lacked any demonstration that, but for Counsel's alleged errors, there was a reasonable probability of a different outcome. Those claims involved:

1. Communication - Counsel consulted with Defendant on multiple occasions. In addition, Counsel talked, almost on a daily basis, with Defendant's brother Arturo, who also acted as an interpreter for the family. Defendant did not attempt to contact

Counsel by phone because he knew phone calls were monitored and he assumed his conversations with his attorney would also be monitored.

2. A polygraph is not admissible evidence and there was no basis for compelling Maria to take one.

3. Maria received a petit larceny citation six months after her trial testimony and there is no evidence that any other criminal incidents existed or that any criminal charges were not pursued in return for her testimony.

4. The Petition does not include any current psychological evaluation of Defendant, therefore no prejudice could be demonstrated and the defense did not involve lack of intent or reduced capacity to form intent.

5. Counsel consulted with, and hired experts in support of, the abused/abuser defense theory and could not have compelled Maria to submit to a more extensive psychological examination.

6. No representation was made concerning what evidence would have been discovered if additional investigation of the apartment premises or water temperature had been done.

7. No evidence was presented that the NLV Fire Department ever took a written statement from Maria or documented her oral statement.

8. Counsel did conduct an investigation into Maria and Jessicas' backgrounds and there is no indication in the Petition that more extensive investigation would have lead to any additional evidence.

9. The allegations regarding Defendant's physical and sexual abuse of Maria were admissible to refute Defendant's defense that Maria was the abuser and there is no reason to believe that a motion in limine would have been successful.

10. Counsel did challenge the immunity issue below and there is no likelihood this would have been a successful issue on appeal.

11. Any motion to strike the death penalty notice as an abuse of prosecutorial discretion would not have been successful.

12. Detective Wohlers and Sgt. Tronosco's assistance in filling out forms for immigration and government benefits do not constitute promises or benefits under applicable case law.

13. No grounds existed for seeking a change of venue prior to trial and the record reflects pre-trial publicity did not present a significant problem during jury voir dire which would warrant a change of venue.

14. No authority exists for restricting media coverage and the record does not reflect a need for jury sequestration prior to deliberation.

15. No legal grounds existed to suppress Defendant's statements to the police and Counsel reasonably viewed them as exculpatory, not inculpatory.

16. Case authority would not support a motion in limine to exclude the autopsy video and photos so Counsel's decision to stipulate to the admission of certain photographs was reasonable.

17. Counsel did move to strike admission of the "instruments of torture" and the timing of the motion was irrelevant to the district court's decision that a proper foundation existed for their admission.

18. The neighbor lay witnesses who overheard the arguments coming from the Lopez apartment had personal knowledge of the arguments and no grounds existed for excluding their opinions that the male voice was the aggressor.

19. Counsel objected several times to Dr. Strauss' reference to the cultural roles of women in rural Mexico, however, given Dr. Strauss' background, no legal grounds existed for excluding this testimony.

20. The Petition's allegations that Counsel should have objected to instances of alleged prosecutorial misconduct are not supported by citations to the record.

21. Current case law has rejected challenges to anti-sympathy instructions and NRS 175.552.

RA 7, 2340-2404.

The district court held an evidentiary hearing. The excused juror, Dorothy Signorelli

testified that, as a result of the physical evidence and stress, she became ill the night before deliberations began and advised the bailiff of this on the way to the hotel. She was convinced both Defendant and Maria were responsible for the abuse and that he was guilty. The district court bailiff confirmed her testimony and added that her roommate, another juror, had informed the bailiff that Ms. Signorelli had been up all night and physically sick. The bailiff indicated the judge was informed of this in the morning and she believes the attorney's were present when the decision to excuse Ms. Signorelli was made as that would have been the usual practice. RA 7, 2411-2426.

Defendant's brother, Arturo Lopez, testified that he talked to Kevin Kelly every day and that Kelly acknowledged receiving a note allegedly written by Maria to Defendant while they were both in custody. Arturo stated that the family would have found money for anything Kelly wanted to do and money was not an object. Arturo then testified to the information he would have given the jury if he were called during the penalty phase, but admitted on cross-examination that some of his information, such as Defendant allegedly buying Jessica a T.V. for Christmas, came from Defendant and he had no personal knowledge of those events. RA 7, 2426-2463.

Several other relatives/friends of Defendant testified or submitted affidavits regarding information they would have provided to the jury if called in the penalty phase. This was not new information, but more in-depth testimony regarding Defendant's background and their opinion that he was a hard-working honest individual who never broke the law and would never hurt a child as well as their opinions regarding Maria. RA 7, 2464-74; 2484-96; 2604-2635; 2657-2680.

Socorro Lopez, defendant's mother, provided additional information on her conversations with Maria after the trial. Socorro indicated Maria contacted her because Victor was sick and Maria felt he was not being treated properly by the Tijuana doctors. Maria wanted Socorro's help in getting Victor treatment from an American doctor. Socorro contacted an attorney in Tijuana because she wanted to make sure she had documents giving her permission to do this. Soccor indicated "[w]hen I brought the children back to Maria,

she told me she did not like what happened to Defendant."[23] RA 7, 2474-2484.

Kevin Kelly testified regarding his general background (RA 7, 2499-2503) and trial strategy. He indicated that the family and Defendant wanted the case to be tried as quickly as possible and he was able to investigate and prepare in the short time period, therefore he did not object to a short trial setting. He never believed, based upon the evidence and the grant of immunity to Maria that the jury would find Defendant guilty of first degree murder. RA 7, 2507-08.

As to communications, Kelly denied ever telling Defendant not to call him as Kelly knew that attorney/client phone calls are not recorded, but he acknowledged he probably told Defendant not to talk to third parties about the case over the phone and Defendant may have misunderstood. Defendant did call him several times and he was in constant contact with the family. RA 7, 2509-2512.

Kelly indicated, regarding the decision to forgoe presentation of mitigation evidence; that he felt he had done a good job of discrediting Maria on cross-examination during the guilt phase only to have her come back very strongly in her rebuttal testimony. Since it was obvious by the verdict that the juror's did not believe Defendant and believed Maria, he saw no reason to think that she would not be a powerful witness in the penalty phase. Defendant could not give any elocution of atonement because he could not admit having anything to do with Jessica's death. The jury had already heard a great deal about Defendant's background and Kelly believed Defendant had a better chance of a life sentence if Maria did not testify; therefore he entered in to the agreement that neither side would present any additional information in the penalty phase. RA 7, 2505-06; 2512-19; 2535-37.

Kelly refuted the claim that he failed to consult experts. He stated he consulted with a number of experts besides those called by the defense. For example, Kelly hired an independent forensic pathologist, Dr. Alan Jones, to determine if it were possible that the ulcer was caused by an aspirin overdose, but Dr. Jones concurred with Dr. Clark's cause of

[23] This statement was apparently the basis for Manuel's family inaccurately representing to Kelly that Maria wanted to change her story.

death. RA 7, 2534-35. Thus some experts were not beneficial to the defense and were not called to testify, however he used all of the non-trial experts to map out a defense strategy, particularly the abused as abuser defense. RA 7, 2523-23.

As to the apartment investigation allegations, Kelly testified he examined the Belmont apartment on four occasions. Testing was done on the wall bracket and it confirmed Jessica could have been hung from it and there was no doubt Jessica was burned by the water so further temperature tests were unnecessary. RA 7, 2527-28.

With respect to Maria's alleged statements to NLV fire officials, Kelly stated he subpoened the NLV Fire Department records and they did not include any statement about Maria saying Jessica was sick and it was of little consequence since Maria admitted lying to the fire department about the injuries but indicated Defendant told her what to say. Thus a statement that Jessica was sick would not have been helpful especially in light of the fact that there was no question that Jessica's injuries were not accidental and that she died from the peritonitis, not some pre-existing illness. RA 7, 2529.

Kelly said he saw no purpose on spending money on an inadmissible polygraph and the results, even if favorable, would not have affected negotiations with the District Attorney's Office. RA 7, 2529-30.

Kelly refuted that the family resources permitted expansive discovery or investigation. He was limited on investigation and expert resources by the family's economic status. Although they met his requests for money, it would take them a long time to raise it and he knew they did not have the ability to raise much more in investigative and expert funds, especially when some of the consultations would be speculative and far-reaching. RA 7, 2530-32.

With respect to waiving the second-degree murder instruction, Kelly indicated he discussed this with Defendant but Defendant was opposed to any argument that would acknowledge he was responsible for Jessica's death. Kelly was able to convince Defendant to accept involuntary manslaughter on the theory that Defendant knew Maria was abusing Jessica and should have acted to stop it. He did not consider child neglect as a lesser offense

as an alternative to manslaughter. RA 7, 2537.

Kelly testified he saw no reason to admit documents regarding Defendant's background because the State never contested these facts. RA 7, 2538. He considered asking for an independent evaluation of Maria, but believed the better strategy, based on his discussion with his expert psychologists, was to attack Dr. Strauss' report, especially in light of the strong burden imposed upon defendants asking for independent psychological evaluations of a witness. RA 7, 2539-2541.

Kelly was questioned about an allegation that he lost exculpatory evidence, a magazine allegedly found under the mattress of Defendant and Maria's bed. Kelly acknowledged that a member of the Lopez family gave him a magazine illustrating and describing sado-masochistic sex acts. He indicated he destroyed the magazine because it was more likely to damage Defendant's case and support Maria's version of abuse as there was no way to prove Maria, not Defendant, placed the magazine under the mattress. RA 7, 2541-2544. Kelly admitted if he was given the note that Maria allegedly wrote to Defendant asking Defendant to forgive her for what she was going to do to him, then he lost it. RA 7, 2533-34.

Turning to jury issues, as to the failure to ask prospective juror's if they were ever the victim of child abuse, Kelly indicated he simply forgot to ask the question. RA 7, 2545-48. Kelly indicated he was told about the sick juror after she was excused and he had no ground to object, nor would she have been favorable to Defendant's case. Kelly was not aware of any statute requiring a resubmission to the jury, so he did not ask for that. RA 7, 2548-49. He did not challenge venue because the case law says that cannot be done pre-trial and they were able to select a jury despite pre-trial publicity so there was no basis for making a motion during voir dire. RA 7, 2555-57.

On some of the remaining issues, Kelly did not file a motion to suppress Defendant's statements because Kelly felt they were an expression of innocence. RA 7, 2557. He confirmed that although he could have limited admission of some of the photos of the autopsy, he had no grounds for excluding all of them and believed Defendant's best interests

were better served by negotiating which photos would be admitted rather than risk a ruling admitting the videotape. RA 7, 2557-59. Kelly acknowledged he should have asked for limiting instructions on the evidence regarding Defendant's physical and sexual abuse of Maria. As to the immunity order, Kelly indicated he did not believe the order was objectionable on vouching grounds. RA 7, 2561-63, 2565.

Kelly testified that he saw no reason to conduct the post-trial interview of Maria as a formal deposition. He did not want DDA Seaton or Jeffers present as Maria would not have signed the document he prepared and he was afraid information might be solicited implicating the Lopez family in pressuring Maria to make statements designed to help Defendant. RA 7, 2567-71.

Finally, Kelly indicated the divorce was solely Defendant's idea and Kelly simply followed his client's wishes. RA 7, 2571. On appeal, Kelly raised every issue he thought had a chance of success. RA 7, 2571-72.

Defendant Lopez testified in the hearing. Defendant claimed Kelly never discussed his right to testify or offer allocution at the penalty phase and that Kelly only saw him for some forty hours at the detention center. Defendant said his family told him Kelly said not to call him on the phone because of recording and that Kelly told him if he divorced Maria she wouldn't be around to testify against me anymore. Defendant also said he gave the note from Maria to Kelly directly. Defendant said he didn't remember any discussion about second-degree murder. RA 7, 2588-2599.

At the conclusion of the evidentiary hearing, the district court took the matter under advisement. Because the district judge handling the case became the juvenile judge for the Eighth Judicial District, the matter was not calendared for a status check and, unfortunately, the matter was not resolved until 1992, when the delay in deciding the petition became an issue in the district judge's Supreme Court race.[24]

Defendant moved for a stay of the decision pending the outcome of the election,

[24] The district judge was the Honorable Miriam Shearing. The Lopez case and delay were the subject of critical radio and television ads by her opponent, the Honorable J. Charles Thompson.

allegedly the campaign would affect the judge's impartiality. The motion was denied and the district judge frankly admitted the delay was caused by the failure of the judge and chamber's staff to internally calendar the matter during the move to juvenile court and not because the case presented any difficult issues or problems.

The district court issued an extensive written decision denying the Petition. The district court found that: 1) the record belied the lack of communication claim and there was extensive communication with Defendant and his family, 2) deciding not to present Defendant's testimony before the Grand Jury was a tactical decision and as Defendant could not be represented by counsel at the proceeding, letting him appear without counsel would be absurd, 3) polygraph's are inadmissible and a favorable result would not have changed the District Attorney's charging decisions, 4) the record reflects extensive pre-trial preparation and investigation and no evidence was presented demonstrating how additional preparation and investigation would have resulted in a different outcome at trial, 5) the decision not to use the sado-machestic magazine was tactical and admission would have harmed, not helped Defendant's case, 6) no evidence was presented demonstrating how advancing the trial date from June to April prejudiced the defense or resulted in the omission of any evidence, 7) although counsel should have inquired if potential jurors were the victims of child abuse, no prejudice was demonstrated as the Nevada Supreme Court upheld the previous denial of the motion for new trial on this issue, 8) counsel had no basis for objecting to Ms. Signorelli's excusal for illness and no prejudice was shown as she was convinced of Defendant's guilt, 9) media stories had no effect on the ability to pick a jury and there were no grounds for a change of venue, 10) no grounds existed for excluding all of the autopsy photos and video, therefore the decision to stipulate was tactical and reasonable, 11) the decision not to seek suppression of Defendant's statements because they could be viewed as exculpatory was tactical and reasonable, 12) sufficient foundation was presented for admission of the belt, macramé and electrical cords, therefore an earlier objection would not have succeeded, 13) no basis existed for striking the neighbor's testimony, they were percipient witnesses and based their opinions on actual knowledge, 14) counsel objected

numerous times to portions of Dr. Strauss' testimony and was overruled as Dr. Strauss' opinions were admissible and Maria's statements to him were not hearsay when used by an expert in forming an opinion and Maria was available for cross-examination and no limiting instruction was necessary, 15) Defendant's state of mind was never at issue as he denied doing any act to harm Jessica therefore the lack of a second-degree murder instruction was not prejudicial, 16) under existing case law, the depravity of mind aggravator based on torture was proper, 17) there was extensive family testimony during the guilty phase of the trial covering the same matters set forth in the Petition, therefore counsel's decision to forego presentation of the same evidence in exchange for a similar agreement by the State in the penalty phase was reasonable and the additional information supplied by the Casesar's Palace co-workers would not have changed the jury verdict, 18) there was no need to request a specific mitigating factor list instruction given the statutory "any other" mitigating evidence instruction, 19) counsel had good tactical reasons for not notifying the District Attorney's Office about interviewing Maria in Mexico and conducting a formal deposition, 20) failure to file the notice of appeal from the denial of the fourth motion for a new trial did not prejudice the defendant as the standard of review would be abuse of discretion and there is no reasonable likelihood an appeal would have been successful, and 21) defendant's remaining claims have been considered and lacked merit. RA 7, 2681-2695.

2. Appeal from Denial of First State Post-Conviction Petition

Annette Quintana and Dan Polsenberg represented the Defendant on appeal. The following issues were raised, as ineffective assistance of trial or appellate counsel or as direct claims, in the briefs on appeal: a) - failure to appeal the denial of the fourth motion for a new trial, preserve Maria's Mexican statements through formal deposition and failure to ask for an evidentiary hearing on the motion; b) - the denial of the petition was a political decision influenced by the election process; c) - torture could not be the basis for 1st degree murder and death penalty aggravator; d) - the statutory aggravators were enlarged by admission of character evidence under NRS 175.552; e) - counsel failed to submit a list of mitigating factors to the jury; f) - substitution of a juror during deliberations without an

instruction to resubmit the case was improper; g) - counsel failed to present any mitigation evidence during the penalty phase.; h) - the district judge improperly limited the length of the post-conviction evidentiary hearing; i) – Maria's grant of immunity was improper; j) - counsel failed to present Defendant to the Grand Jury; k) - counsel failed to move to suppress Defendant's statement that police should kill him; l) - counsel failed to object to admission of prejudicial photos; m) - counsel mishandled cross-examination of Dr. Strauss by not objecting to his qualifications, moving to strike reference to abuse of Maria by Defendant, opening door to opinion regarding lying and not seeking a limiting instruction on the use of the information in the report; n) - counsel failed to ask about child abuse in jury voir dire; o) - counsel failed to seek a change of venue, sequestered jury during trial or limited media exposure; p) - counsel lost the allegedly exculpatory note from Maria to Defendant; q) - counsel failed to timely object to the admission of the belt, electrical cords and macramé; r) - counsel failed to object to improper lay opinion testimony by neighbors; s) - counsel failed to introduce evidence that Defendant purchased a television set for Jessica at Christmas; t) -counsel failed to request a second-degree murder instruction or lesser included instructions on child abuse or neglect; u) - counsel failed to seek a limiting instruction on Dr. Strauss' testimony; v) - counsel failed to timely submit supplemental instructions on due caution and circumspection; w) - counsel failed to object to prosecutorial misconduct – vouching; x) - torture and depravity of mind can not be separate aggravators; y) -counsel failed to object to the anti-sympathy instruction.

See Exhibit A.

The Nevada Supreme Court rejected all of the claims as lacking merit on July 7, 1994. The Court only specifically addressed one claim, the failure to present mitigating evidence. The Court concluded that the district court did not err in finding that counsel made a reasonable tactical decision to forgo repeating the mitigation evidence presented at the guilt phase during the penalty phase in return for the State's agreement not to present additional evidence in the penalty phase, especially Maria's testimony. The Court then summarily indicated it had considered Defendant's other contentions and found them to be

unpersuasive. RA 8, 2696-99.

3. First Federal Petition for Post-Conviction Relief – 3/13/97

The Defendant's first federal petition contained thirty-two claims which set forth, including subparts, 101 alleged grounds for relief. Much of the petition mirrored the previously raised claims in State court, but phrased them as constitutional violations of the 5th, 8th or 14th Amendments to the United States Constitution. RA8, 2700-2750. There is no need to set forth the specifics of the claims because the Federal Court never ruled on the Petition; instead it dismissed it so that Defendant could exhaust his claims in State court on March 15, 1998. RA 8, 2751-2757.

4. Second State Petition for Post-Conviction Relief – 3/18/98

Defendant's Second State Petition raised the same claims previously raised in the First State Petition as well as phrasing the claims as Constitutional violations similar to those made in the First Federal Petition. The claims and sub-claims involved the following issues, raised directly and/or as claims of ineffective assistance of trial, appellate and post-conviction counsel:

a. Juror misconduct – failure to disclose victim of child abuse doing voir dire.
b. Improper grant of immunity to Maria.
c. Prejudicial pre-trial publicity.
d. Admission of prejudicial autopsy photographs.
e. Improper admission of electrical wire/cord and macramé, failure to object to same.
f. Improper admission of lay opinion – Neighbors' aggressor testimony, failure to object to same.
g. Dr. Strauss was not qualified to give psychological opinion, failure to challenge Dr. Strauss.
h. Admission of irrelevant evidence – alleged abuse of Maria by Defendant.
i. Admission of Dr. Strauss' opinion regarding Maria's honesty.
j. Inadequate reasonable doubt instruction.
k. Improper denial of proposed due cause and circumspection instruction.
l. Failure to resubmit case to jury when juror excused during deliberation.

m. Enlargement of aggravators through use of other bad act evidence not relevant to statutory aggravators.

n. No instruction given on non-statutory mitigating circumstances.

o. Improper anti-sympathy instruction.

p. Torture and depravity of mind as separate aggravators.

q. Improper denial of new trial motions involving jury misconduct, Montez perjury, missing transcripts and Maria recantation.

r. Inadequate record for appellate review.

s. Delay in processing appeal.

t. Ex-Parte Communications between Prosecution and Nevada Supreme Court on issues relating to reconstructing the record on appeal.

u. Failure to grant full and fair evidentiary hearing on First State Petition for Post-Conviction Relief.

v. Lack of communication with Defendant.

x. Failure to seek additional funds for investigation from district court.

y. Failure to discuss tactical decisions with the Defendant.

z. Agreed to advance trial date from June to April.

aa. Failure to present Defendant's testimony at Grand Jury.

bb. Failed to preserve alleged exculpatory statement of Maria to NLV Fire Department that Jessica had been sick since she arrived in Las Vegas.

cc. ~~Failure to seek polygraph examination of Maria and Defendant.~~

dd. Failure to preserve Maria's note to Defendant.

ee. Failure to investigate apartment water facilities.

ff. Inadequate background investigation of Maria.

gg. Failure to voir dire jurors on child abuse

hh. Failure to cross-examine Maria on shoplifting charges.

ii. Failure to object to autopsy photographs.

jj. Failure to request second-degree murder or child abuse/neglect instructions.

kk. Failure to object to prosecutorial misconduct – personal belief in arguments.

ll. Failure to present mitigating evidence.

mm. Prosecutorial vouching.

nn. Nevada's death penalty statute fails to properly narrow field of persons eligible for death penalty, the aggravators are overbroad and there is too much discretion in choosing capital cases.

oo. Equal protection – non-capital defendant's versus capital defendants.

pp. Nevada's proportionality review is inadequate.

qq. Death penalty was arbitrarily and capriciously imposed as a result of passion and prejudice.

rr. Nevada's death penalty scheme is unconstitutional on its face.

ss. Insufficient appellate review on direct appeal.

tt. Insufficient appellate review on appeal from First State Petition for Post-Conviction Relief.

RA 8, 2758-2840.

The State filed a motion to dismiss the Second State Petition for Post-Conviction Relief asserting procedural bars under NRS 34.726 (one year rule), NRS 34.810 (successive, abusive and waiver), NRS 34.800 (laches) and the Law of the Case Doctrine. RA 8, 2842-2866. The district court granted the motion and dismissed the Second State Petition for Post-Conviction Relief as procedurally barred or governed by the law of the case. The Nevada Supreme Court affirmed the dismissal on March 5, 2001 finding that all of Defendant's claims were barred as untimely under NRS 34.726 and successive under NRS 34.810 and many were barred by the Law of the Case Doctrine. The Nevada Supreme Court concluded the district court did not err in dismissing the Second State Petition as no good cause existed for excusing the procedural bars. The Court also concluded that Nevada consistently applies its procedural bars and no manifest miscarriage of justice had occurred to justify excusing the procedural bars. RA 8, 2884-2887.

5. Second Federal Post-Conviction Relief Petition – 4/6/01

Defendant's filed a pro per version of the second Federal petition for post-conviction relief in 2001. It was prepared by the Federal Public Defender's Office and signed by the Defendant in proper person. The Federal Public Defender was then formally appointed to represent the Defendant and subsequently filed a supplemental petition on November 28, 2006. For the most part, the Second Federal Post-Conviction Petition raised the same issues that had been previously raised in the direct appeal, first and second State petitions for post-conviction relief and first Federal petition for post-conviction relief however the claims were now couched as violations of Defendant's First, Fifth, Sixth and Fourteenth Amendment

rights as well as claims under international law pursuant to the Supremacy Clause of the United States Constitution, Article VI. RA 8, 2888-2951.

Once again the Federal District Court determined that because the arguments on the claims were phrased differently or relied on different legal theories than the previous State petitions, Defendant had not exhausted his claims in state court and the Federal petition was stayed pending exhaustion. Thereafter, Defendant filed the instant Third State Petition for Post-Conviction Relief, which is nearly word for word identical to his second supplemental petition in Federal Court.

The Defendant has had multiple opportunities to challenge his conviction in the past twenty years. All have failed. The procedural bars set forth in NRS 34.726, NRS 34.800 and NRS 34.810 were intended to prohibit unending, repetitive and untimely litigation of issues in post-conviction proceedings. They reflect the Legislature's desire for finality in criminal cases. The same policy consideration underlies the court-created Law of the Case Doctrine. No criminal trial will ever be perfect nor is perfection required by the Federal or Nevada Constitutions. Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975), cited in Pascua v. State, ___Nev.___, 145 P.3d 1031 (2006). Two district judges and the Nevada Supreme Court have already determined that Defendant received a fair trial with competent counsel, therefore the State respectfully asks this Honorable Court to dismiss Defendant's Third State Petition for Post-Conviction Relief pursuant to the procedural bars and the Law of the Case Doctrine as set forth below.

The State does not address the merits of Defendant's claims in this Opposition and Motion. In the event that the Court determines that a particular claim is not procedurally barred or governed by the Law of the Case Doctrine, then the State would request an evidentiary hearing on those claims and the opportunity to file a supplemental opposition addressing the merits of the claims after the conclusion of any evidentiary hearing.

ARGUMENT

Each of the procedural bars and the applicability of the Law of the Case Doctrine is discussed in each claim below. However, prior to analyzing each claim, the Court should

consider how the various bars operate in general to this Petition.

1. NRS 34.726 – One Year Time Bar

On September 15, 1987 the Supreme Court of Nevada issued its remititur dismissing Defendant's direct appeal. The Defendant filed the instant petition for writ of habeas corpus on June 5, 2007. The Defendant's petition has been filed more than one year (almost 20 years) from the filing of the remititur on Defendant's direct appeal. As such, it is procedurally time barred under NRS 34.726. The statute provides:

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, *within 1 year after the supreme court issues its remittitur*. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> a) that the delay is not the fault of the petitioner; and
> b) that dismissal of the petition as untimely will unduly prejudice the petitioner.

See NRS 34.726 (Emphasis added).

However, because the Nevada Supreme Court issued Remittitur from the direct appeal before the provisions of NRS 34.726(1) became effective on January 1, 1993, the one year time limit is extended and begins to run from the effective date of the statute, that is, January 1, 1994. Pellegrini v State, 24 P.3d 519, 529 (2001). The Supreme Court held that "for purposes of determining the timeliness of successive petitions pursuant to NRS 34.726, **assuming the laches bar does not apply**, it is both reasonable and fair to allow petitioners one year from the effective date of the amendment to file any successive habeas petitions." Id.

The Ninth Circuit applied a similar analysis to Federal statutes, holding that where a petitioner's conviction became final before the statute was enacted the time limitation begins to run from the effective date of the statute. United States v. Valdez, 195 F.3d 544, 546 (9th Cir. 1999) (holding one year statute of limitations under AEDPA began tolling from effective date of statute); see also United States v. Lomax, 86 F.Supp.2d 1035 (D. Or. 2000) (holding petitioner had one year from effective date of AEDPA to file timely motions where

conviction was prior to enactment of statute). Therefore, because Remittitur issued before the effective date of NRS 34.726, the statutory time limit to file a petition for post conviction relief would have commenced on January 1, 1993, and expired on December 31, 1993. Defendant did not file the present petition until June 5, 207, long after the one year deadline of January 1, 1994. Therefore, Defendant's petition is still time barred and should be dismissed, absent a showing of good cause for the delay and undue prejudice.

NRS 34.726 is strictly enforced. In Gonzales v. State, 118 Nev. 590, 53 P.3d 901, 902 (2002), the Nevada Supreme Court rejected a habeas petition, pursuant to the mandatory provisions of N.R.S. 34.726(1) that was filed two days late. Gonzales reiterated the importance of filing the petition within the mandatory deadline, absent a showing of "good cause" for the delay in filing. Gonzales, 53 P.3d at 902.

The statute clearly states that the burden of overcoming applicability of the time bar is on the petitioner. As noted above, good cause for delay means "an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 71 P.3d 503, 506 (2003) (Internal citations omitted). The Nevada Supreme Court has issued several rulings in this area. The lack of the assistance of counsel when preparing a petition, and even the failure of trial counsel to forward a copy of the file to a petitioner, have been found to not constitute good cause. See Phelps v. Director Nevada Department of Prisons, 104 Nev. 656, 660, 764 P.2d 1303 (1988); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995). Also, the failure of counsel to inform the petitioner of his right to direct appeal did not rise to good cause for overcoming the time bar. Dickerson v. State, 114 Nev. 1084, 967 P.2d 1132 (1998). Similarly, a decision to pursue federal habeas in lieu of filing a State petition does not constitute good cause. Colley v. State, 105 Nev. at , 773 P.2d at .

In contrast, an external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable". Hathaway, 71 P.3d at 506; *quoting* Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986); *see also* Gonzalez, 53 P.3d at 904; *citing* Harris v.

Warden, 114 Nev. 956, 959-60 n. 4, (64 P.2d 785 n. 4 (1998).

In addition to justifying the delay, a defendant must also demonstrate that the dismissal of a petition will cause undue prejudice. Undue prejudice is defined as "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982)(cited in Bejarano v. State, ___Nev.___, 146 P3d. 265 (2006).

Absent a showing of good cause for the delay and undue prejudice, only a fundamental miscarriage of justice may excuse a time-barred claim. A fundamental miscarriage of justice occurs "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 488 (1986). Actual innocence means factual innocence not mere legal insufficiency. Bousley v. United States, 523 U.S. 614, 623 (1998). A defendant claiming actual innocence must demonstrate that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3rd 519, 537 (2001). Actual innocence is a stringent standards designed to be applied only in the most extraordinary situations.

Finally, the United States Supreme Court recognizes the importance of procedural bars. In Bousley v. United States, 523 U.S. 614, 629, 118 S.Ct. 1604, 1614 (1998), the Court stated "No criminal law system can function without rules of procedure conjoined with a rule of finality." In Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639 (1986), the United States Supreme Court stated that "A State's procedural rules serve vital purposes on appeal as well as at trial and on state collateral attack, and the standard for cause should not vary depending on the timing of a procedural default."

As noted below, the Petition fails to demonstrate good cause for the almost twenty year delay in bringing these post-conviction claims. Nor does Defendant's new evidence meet the standard for actual innocence. Therefore the Petition should be dismissed as untimely. Dismissal of Defendant's petition properly supports the consistent application of procedural time bars as well as the concerns of both the Nevada Supreme Court and the

United States Supreme Court with the finality of convictions.

2. NRS 34.800 – Laches

NRS 34.800 indicates a petition may be dismissed if the State pleads laches and the delay in the filing of a petition prejudices the State. Where the prejudice involves the State's ability to respond to the petition, the defendant must demonstrate that he could not, through the exercise of reasonable diligence, have known of the grounds for his petition until after the circumstances constituting prejudice occurred. NRS 34.800(1)(a).

If the prejudice involves the State's ability to conduct a retrial, then a defendant must show that a fundamental miscarriage of justice has occurred in the proceedings leading to his conviction. Moreover, when more than five years has passed between the decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of that conviction, then the statute creates a rebuttable presumption of prejudice to the State.

The State pleads laches in the instant case. Defendant's judgment of conviction was entered on April 30, 1985 and he filed a timely notice of appeal. Remittitur issued on the denial of his direct appeal on September 15, 1987. Defendant filed the instant petition for habeas corpus on June 5, 2007. Since over twenty (20) years have elapsed between the Defendant's judgment of conviction and the filing of the instant petition, NRS 34.800 directly applies in this case and prejudice is presumed. Thus Defendant must show that he could not, through reasonable diligence, have known of the claims before prejudice attached and that a fundamental miscarriage of justice would result if the claims are not considered.

Many of the claims in Defendant's petition are mixed questions of law and fact that will require the State to prove or rebut facts that are over twenty (20) years old. NRS 34.800 was enacted to protect the State from having to relitigate matters that have become ancient history. If courts required evidentiary hearings for long delayed petitions as in the instant matter, the State would have to call and find long lost witnesses whose once vivid recollections have faded and re-gather evidence that in many cases has been lost or destroyed because of the lengthy passage of time.

In this case the main witness in the case, Maria Lopez, was a citizen of Mexico and

last resided in that country. DDA Jeffers is dead. DDA Seaton has retired and left the jurisdiction, returning only on an occasional basis. Carla Noziglia, who performed an independent hair analysis has retired from the Las Vegas Metropolitan Police Department and left the jurisdiction. Even if the State can locate all of the witnesses, as noted above, their recollections will be twenty years old and their appearance and demeanor will also have changed. A 41-year old Maria Lopez will not be the same woman as the 20-year old Maria who was married to Defendant. Therefore, this Court should summarily deny the instant petition according to the doctrine of laches pursuant to NRS 34.800, as the delay of more than twenty (20) years in filing is unexcused as discussed below.

3. NRS 34.810(1)(b) – Failure to Raise in Previous Proceedings (Waiver)

The Legislature has mandated that claims be timely raised at trial, direct appeal and first post-conviction petitions for habeas relief. NRS 34.810(1)(b) states that a court shall dismiss a petition if:

> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
>
> (1) Presented to the trial court;
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief; or
> (3) Raised in any other proceeding that the petitioner has taken to secure relief from his conviction and sentence,
>
> unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

The Nevada Supreme Court has indicated that the standard for demonstrating good cause for delay and prejudice under NRS 34.810(1)(b) is the same as for NRS 34.726, namely a "an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 71 P.3d 503, 506 (2003) (Internal citations omitted). As will be seen below, no such cause exists in this case and therefore Defendant must show a fundamental miscarriage of justice, i.e. actual innocence. The Petition, on its face, does not support actual innocence and the Court should find the claims barred under NRS 34.810(1)(b).

4. NRS 34.810(2) – Successive/Abusive Petition

Defendant's instant petition should be dismissed pursuant to NRS 34.810 as it is successive and abusive. Pertinent portions of NRS 34.810 state:

> 2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the Defendant to assert those grounds in a prior petition constituted an abuse of the writ.
>
> 3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
>
> (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
>
> (b) Actual prejudice to the petitioner.

Defendant filed previous state petitions for writ of habeas corpus (post-conviction) on August 31, 1989 and March 18, 1998. Those petitions were denied on the merits and procedurally barred respectively. The Nevada Supreme Court upheld the district courts' determinations on July 7, 1994 and March 5, 2001. Consequently, the instant petition filed on June 5, 2007 is a successive petition and an abuse of the writ. To avoid the procedural default under NRS 34.810(2), Defendant again has the burden of pleading and proving specific facts that demonstrate both good cause for his failure to present his claim in earlier proceedings and actual prejudice. The same standards and rules that apply to NRS 34.810(1)(b) also apply to NRS 34.810(2) bars. In the absence of good cause, Defendant may also overcome the procedural bars by showing actual innocence. For the reasons cited below, Defendant meets neither of these criteria and the Petition should be dismissed.

B. Overcoming Procedural Bars

Defendant asserts several grounds for excusing the procedural bars. They are: 1) ineffective assistance of trial counsel; 2) ineffective assistance of appellate counsel; 3) ineffective assistance of state post-conviction counsel; 4) inconsistent and discretionary application of procedural bars by the Nevada Supreme Court; 5) violations of Brady v Maryland (failure to disclose exculpatory evidence) and Giglio v United States (failure to

disclose impeachment evidence)[25]; 6) newly discovered evidence; and 7) fundamental miscarriage of justice – actual innocence. The State contends the allegations in the Petition support none of the grounds and do not constitute good cause for delay. Defendant has also failed to demonstrate he is actually innocent, therefore all of the procedural bars apply and this Petition should be dismissed.

1. Ineffective Assistance of Trial, Appellate and Post-Conviction Counsel

The Nevada Supreme Court has recognized that ineffective assistance of trial or appellate counsel constitutes good cause for failure to raise an issue at trial or on appeal. Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997). However, substantive claims and allegations of ineffective assistance of counsel for not raising those claims must still be raised in a timely fashion under NRS 34.726 and NRS 34.800 or they are procedurally barred. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003)(footnotes omitted) .

In addition, if a defendant was entitled to the appointment of post-conviction counsel by statute, ineffective assistance of post-conviction counsel may also constitute good cause for failure to raise a substantive or ineffective assistance of trial/appellate counsel in a first petition for post-coviction relief, but it cannot excuse a failure to comply with the time bars under NRS 34.726 or NRS 34.800.

In this case, Defendant's substantive and ineffective assistance of trial and appellate counsel claims relating to the failure to pursue the substantive claims at trial or on appeal were required to be filed within one-year of the remittitur (9/15/87) or alternatively within one-year from the effective date of NRS 34.726 – January 1, 1994. This Petition was filed on June 5, 2007. Thus any claims of ineffective assistance of trial and appellate counsel that were not raised in the first state petition for post-conviction relief are time barred. They are also barred by NRS 34.800. They cannot constitute good cause for failing to raise trial and appellate issues in a timely fashion because they themselves are time-barred.

Similary, any claims relating to ineffective assistance of post-conviction counsel would be required to be filed within one year of the remittitur reflecting denial of the first

[25] Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972).

petition for post-conviction relief or they would be time-barred and could not constitute good cause for delay. Moreover, where post-conviction counsel is not required by statute to be appointed, ineffectiveness of post-conviction counsel cannot constitute good cause.

In this case, Defendant was not entitled to appointment of post-conviction counsel. Between July 1, 1987 and January 3, 1993, appointment of post-conviction counsel, even in capital cases, was discretionary. See 1985 Statutes of Nevada, 63rd Session Ch. 435, Section 4 p. 1230 and Section 7, p. 1231; 1987 Statutes of Nevada, 64th Session Ch. 539, Section 14, p. 1218; 1991 Statutes of Nevada, 66th Session, Ch. 44, Section 20, p.87. Because Defendant was not entitled to post-conviction counsel, there can be no ineffective assistance of post-conviction counsel claim to constitute good cause for failing to raise issues in the first state post-conviction petition.[26]

Even if Defendant were entitled to appointed first post-conviction petition counsel, any claims of ineffective assistance of post-conviction counsel must be timely made under NRS 34.726 and NRS 34.800 or they are barred. In the instant case, the remittitur on the first state petition for post-conviction relief was issued on December 22, 1994. Therefore all claims alleging ineffective assistance of first post conviction counsel should have been raised by December 22, 1995. Thus any claims of ineffective assistance of first post-conviction counsel filed after that date are time barred and cannot be used to constitute good cause for delay in raising those claims in a timely fashion.

As all of Defendant's claims for ineffective assistance of counsel are time barred under NRS 34.726 or subject to laches under NRS 34.800, they cannot constitute good cause for the twenty year delay in bringing the claims in the instant Petition and the Petition must be dismissed as procedurally barred.

2. Alleged Inconsistent Application of Procedural Bars

Nevada courts, and the Nevada Supreme Court in particular, have been under regular attack by petitioners who claim Nevada does not consistently apply its procedural bars. See,

[26] Under past and current law, the right to assistance of counsel on successive post-conviction petitions is discreationary. Thus there can be no claim of ineffective assistance of counsel relating to the second state post-conviction petition.

e.g., Loveland v. Hatcher, 231 F.3d 640 (9th Cir.2000) (denying claim made that Nevada does not consistently apply NRS 34.726(1), the one year limit for filing habeas petition). These attacks have continued even though both the Nevada Supreme Court and the Ninth Circuit have recently ruled that "a petitioner must establish 'good cause' and 'actual prejudice' to overcome a post conviction procedural bar." Valerio v. State, 112 Nev. 383, 390, 915 P.2d 874 (1998); Loveland, supra. As long as the State rules are consistently applied, the federal courts must show deference to the State court's application of procedural bars. Loveland, supra. In Petrocelli v. Angelone, 248 F.3d 877 (9th Cir, 2001) the Ninth Circuit Court of Appeals, citing its earlier decision in Moran v. McDaniel, 80 F.3d 1261 (9th Cir.1996) found that the Nevada Supreme Court had consistently applied the procedural bar in NRS 34.800.

The Nevada Supreme Court definitely addressed this issue in State v. Riker, 121 Nev. 225, 112 P.3d 1070 (2005). The High Court stated:

> . . .we flatly reject the claim that this court at its discretion ignores procedural default rules. Riker offers a number of flawed, misleading, and irrelevant arguments to back his position that 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 default rules contained in [NRS] 34.726, 34.800, and 34.810."
>
> To begin with, Riker criticizes this court's consideration of unpreserved error on direct appeal and equates such consideration with a failure to respect procedural bars in post-conviction proceedings. This equation is utterly without merit. Unpreserved error on direct appeal is not subject to procedural bars or anything equivalent to such bars; on the contrary, statutes grant this court the discretion to consider unpreserved errors or even require the court, in some cases, to consider such errors. NRS 178.602 expressly provides this court with the discretion on direct appeal to consider plain error despite a failure to preserve the issue at trial or to raise the issue on appeal. As we have explained before, this plain-error rule applies only on direct appeal and "does not create a procedural bar exception in any habeas proceeding." [Footnotes omitted].

Riker, 121 Nev. at 236, 112 P.3d at 1077.

The Riker Court then went on to critize and analyze why none of the cases and unpublished orders Riker claimed support his theory of inconsistent application did no such thing. The shotgun approach used in Riker is identical to the one used in this Petition,

attaching a plethora of orders and opinions, asserting they demonstrate inconsistent application of procedural bars. See PE 201-249. In fact, many of the exhibits are the same cases referenced in Riker. This Court is not free to disregard Riker and must reject inconsistency as good cause to excuse the procedural bars pursuant to Riker.

3. Brady and Giglio Claims

Evidence that was not disclosed by the prosecution at an earlier date in violation of Brady or Giglio can be good cause for failure to raise claims relating to that evidence in a timely fashion. The non-disclosure constitutes good cause, while the materiality standard under Brady usually demonstrates prejudice. Mazzan v. Warden, 116 Nev. 48, 61-65, 993 P.2d 25, 36-37 (2000)(Mazzan II). However, as with ineffective assistance of counsel claims, Brady/Giglio issues must be timely brought under NRS 34.726 and NRS 34.800. Boyd v. State, 913 So.2d 1113 (Ala.Crim. App 2003); DeBruce v. State, 890 So.2d 1068 (Ala. Crim. App. 2003). That is the claim should be brought within a reasonable time period of its discovery, which is presumptively one year after its discovery pursuant to the rationale discussed in Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001).

As shown in the Claims Analysis below, all of Defendant's alleged Brady/Giglio claims were known prior to June 5, 2006 and therefore should have been brought sooner than June 5, 2007. As such they are barred under NRS 34.726 and NRS 34.800.

4. Newly Discovered Evidence

Evidence that could not have been discovered at an earlier date through the exercise of reasonable diligence may constitute good cause if the claims related to that evidence are brought within one year of its discovery. Swafford v. State, 828 So.2w 966 (Fla. 2002)(claims are barred if could have been discovered through due diligence prior to the running of the procedural bars or if not brought in a timely fashion after discovered). Defendant's new evidence claims could have been discovered years ago through due diligence, thus they should be dismissed as untimely.

5. Fundamental Miscarriage of Justice - Actual Innocence

Defendant alleges that the newly discovered evidence in this matter demonstrates actual innocence for purposes of waiving the procedural bars for claims or arguments asserted for the first time in this Petition. As noted above, the standard for actual innocence requires a finding that had the new evidence been presented at trial, it is more likely than not that no reasonable juror would have found the defendant guilty.

In considering the issue, the Court must consider the cumulative effect of the new evidence. The evidence and the concept of actual innocence are discussed in the applicable claims individually below. The cumulative effect is discussed in the conclusion following the claims analysis. For the reasons cited below, the State submits Defendant has not demonstrated actual innocence and the Petition should be disimissed as procedurally barred.

C. Law of the Case Doctrine

The following claims and subclaims were raised and decided on the merits on direct appeal or Defendant's first State petition for post-conviction relief, they are therefore barred from reconsideration under the Law of the Case Doctrine nor are they resurrected by new or better phrased arguments: Claim 1 - lack of verbatim transcript; Claim 2 - alleged prosecutorial misconduct relating to alleged promises or threats by Detective Wohlers in return for Maria's testimony, improperly obtained immunity for Maria and improper remarks in opening statement and closing argument; Claim 3 – issues relating to validity of Maria's alleged recantation; Claim 4 - improper admission of cords, macramé and mannequin; Claim 5 – admission of testimony of Dr. Strauss; Claim 6 – admission of evidence about physical and sexual abuse of Maria by Defendant; Claim 7 – admission of autopsy photographs; Claim 8 – challenges to guilt phase instructions; Claim 9 – invalidity of torture aggravator; Claim 10 – invalidity of depravity of mind aggravator; Claim 11 – ineffective assistance of trial counsel; Claim 12 – short trial setting; Claim 13 – improper grant or denial of immunity to Maria and use of improper accomplice testimony testimony; Claim 16 – failure to change venue or curtail pre-trial publicity; Claim 17 – juror misconduct; Claim 19 – failure to resubmit case to juror upon seating alternate juror; Claim 21 – failure to exclude Jessica's statements to Maria and Maria's statements to Dr. Strauss as hearsay; Claim 22 – improper

reasonable doubt instruction; Claim 23 – invalidity of anti-sympathy penalty phase instruction; Claim 25 – ineffective assistance of appellate counsel on direct appeal; Claim 27 – inherent bias of elected judiciary.

As can be seen from the above summary analysis of the various procedural bars and doctrines, all of Defendant's claims, except Claim 29 – lethal injection, are barred by NRS 34.726, NRS 34.800, NRS 34.810 and/or the Law of the Case Doctrine. No good cause exists to excuse the extreme delay in this case and Defendant is not actually innocent therefore no miscarriage of justice will occur if his claims are not considered. The Petition, excluding Claim 29, must be dismissed as procedurally barred. Claim 29 must be dismissed as premature as no execution date as been set and the execution protocols may change. A detailed analysis of each claim follows.

II. CLAIMS

Claim 1 – Lack of Verbatim Transcript

Defendant alleges that the reconstructed transcripts of the 4/22/85 penalty and the 4/30/85 sentencing hearings were insufficient to provide adequate appellate review. Defendant also inserts it was improper to use the prosecutors' and victim rights advocates' notes to reconstruct the 4/15/85 transcript of defense witnesses' testimony. Finally Defendant contends that his appeal was unreasonably delayed as a result of the need to obtain reconstructed transcripts.

These issues were raised on direct appeal and in the second State petition for post-conviction relief. The Nevada Supreme Court rejected these contentions and found the reconstructed record sufficient for appellate review in its decision on the direct appeal from the judgment of conviction. Thus the Law of the Case Doctrine governs and this claim should be dismissed. In the second State post-conviction proceedings, the issues relating to the trial record were deemed governed by the Law of the Case Doctrine and procedurally barred under the one year rule and as a second or successive petition – NRS 34.726 and NRS 34.810 respectively. These findings were upheld on appeal from the dismissal of the second State petition. Thus the Law of the Case Doctrine applies to the findings that the claim is

procedurally barred as well.

This Claim, and any new arguments in support of it, are independently barred under NRS 34.726 since it was raised over twenty years after the remitter was filed from the direct appeal and over thirteen years since the effective date of the statute; NRS 34.800 – laches as it was raised more than five years after the filing of the judgment of conviction and NRS 34.810(b)(2) as a successive/abusive petition. As noted above, no good cause exists for the delay and this does not involve new evidence, therefore actual innocence and fundamental miscarriage of justice are not applicable to this claim.

Claim 2 – Prosecutorial Misconduct – Alleged Brady Violations

Putting aside the hyperbole contained in the Petition, this claim makes multiple allegations that the State allegedly withheld exculpatory evidence or produced false testimony. Each allegation is either procedurally barred or unsupported by specific factual statements, as opposed to counsel's speculative conclusions or misstatements of the record.[27]

A. Arturo Montez Issues.

Defendant contends several pieces of information relating to Arturo Montez, obtained during discovery in Defendant's second Federal petition for post-conviction habeas relief, demonstrate either prosecutorial misconduct or Brady/Giglio violations.[28] These are:

1. A statement dated November 11,2004, written by an investigator of the Federal Public Defender's Office and allegedly signed by Arturo Montez, indicating that Montez made up his entire trial testimony and that the prosecutors allegedly put words in his mouth, prevented him from consulting with an attorney and that he subjectively feared he would get into trouble or be harassed if he did not cooperate or testify. [cites]; PE 18.

2. Records of the LVMPD, received by the Defendant on December 27,2002, indicating Montez was incarcerated in the Clark County Detention Center from

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[27] For example, nothing in the record, or in Mr. Montez' alleged recantation, supports the statements in the Petition that the State "purportedly located" Arturo Montez in response to Defendant's pre-trial writ of habeas corpus describing Maria Lopez as an accomplice. This is a speculative opinion of counsel, not a fact. The trial transcript citation at the end of the sentence refers to Montez' testimony about what he saw and says nothing about the State locating him. As such, it amounts to a misstatement of the record.

[28] [cite]

November 10, 1984 through November 20, 1984 – which could have been used to impeach his trial testimony. PE 68.

3. Records of the LVMPD and NLVPD indicating that Montez was actually listed in their records as Arturo Montes and had arrests for driving under the influence in November and December of 1984 and speeding on January 2, 1985 as well as three outstanding warrants during trial. This information was discovered by the Federal Public Defender's Office in 2002. PE 64-68.

Defendant argues that these documents prove that Montez was recruited by Antonio Cevallos to present false testimony that Defendant pulled Jessica's hair; that the State "knew or should have known" that Montez was lying but called him as a witness at trial and post-conviction proceedings and that the State failed to disclose exculpatory evidence. None of the exhibits, including the Montez statement, demonstrate that the State knew Montez was lying. This is sheer speculation.

With respect to the allegation that the State should have known Montez lied, although the State does not agree with the arguments, conclusions and speculative inferences contained in the Petition, as noted earlier, the State will not address the merits of the claims at this time because this Court must first determine whether the claims are procedurally barred. The State will discuss, however, where these assertions are belied in the record and why they illustrate the difference between a specific factual allegation in support of a claim and conclusory speculation.

The Defendant asserts that the State somehow mislead Defendant into believing that Montez was spelled with a "z" instead of an "s" and this prevented Defendant from locating the detention center and arrest records referred to above. The record demonstrates Defendant was given a copy of Mr. Montez' statement of March 29, 1985 where the name is clearly spelled with an "s". Defendant contends the State ran an NCIC under an alleged alias of Montez in 1986 which must mean the State knew of the Montes spelling and the documents and failed to produce them, even though Defendant knows these documents were not in the District Attorney's file. PE 131. Moreover, as noted below, the record reflects

that Defendant knew about the bench warrants in 1987. There is no indication the State mislead anyone. Mr. Montez as used "z" and "s" interchangabley over the years, a fact obvious the first time he spelled his name in court with a "z" after signing a statement a few days earlier with an "s".

Rather than look for conspiracies, the most obvious explanation is the failure of non-Spanish speaking individuals to understand how to spell a Spanish name in English. The same issue arises with Jessica's family name. It is spelled Cevallos or Ceballos throughout the record. See trial transcripts, PE 25, 43-47, 313. The letter "v" is pronounced in Spanish as if it were a "b" in English, hence the confusion. It is this kind of speculation that makes responding to the Petition so difficult.

The Defendant brings these claims twenty years after the remitter on direct appeal and thirteen years after the effective date of NRS 34.726. Defendant must show good cause for the delay. In general, Brady claims or issues involving evidence that could not have been reasonably discovered at an earlier date through due diligence can may constitute good cause under NRS 34.726 if they are timely asserted from the date of their discovery.

Second, even when the claim was not or could not be, through due diligence, discovered before the one year period expired, it must still be brought within a reasonable period from the date it was discovered. Here the claims were know between five and twenty years ago. It was unreasonable to let this much pass before filing the claims. Thus even if the Defendant has a Brady claim with respect to the police records, which the State disputes[29], that claim is now barred.

Morever, the fact that Defendant was pursuing additional federal discovery is not

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[29] Under Brady and its prodigy, a prosecutors' office is only charged with knowledge of information in its hands or the hands of investigating agencies directly relating to the case. There is no requirement that a prosecutor affirmatively seek out exculpatory information or due background checks on its witnesses. Only if such a check is done and it reveals exculpatory or impeachment information must the information be disclosed. It is for this reason that defense counsel seek orders directing the production of arrest records of prosecution witnesses. There is no evidence that these documents were ever in possession of the prosecution in this case and they were never requested. Only evidence of convictions was requested. PE 1.

good cause for the delay. Finally, these claims were subject to discovery through due diligence years ago. The records were easily available though subpoena from the police departments. Defendant's trial, first and second post-petition counsel as well as his first federal petition counsel could have issued similar subpoenas. Indeed, at the time of the second motion for a new trial in 1987, Defendant's trial and appellate counsel knew that Montez had been incarcerated on a DUI charge because he obtained a statement from Montez' cellmate. Clearly Defendant knew about the Montez/Montes problem then or he would not have found the cellmate. The Defendant could have obtained a subpoena for the records in 1987 and used the information in a motion for new trial or in the first petition for post-conviction relief. Presumably if Montez allegedly recanted after being confronted with the Clark County Detention Center records in 2004, he would have recanted in 1987 as well. Defendant has failed to demonstrate good cause for the delay and these claims should be dismissed as barred under NRS 34.726.

The claims are also barred by laches under NRS 34.800. Over five years has passed since the decision on direct appeal. As noted above, Defendant could have discovered this information years' ago through due diligence. Thus he is prohibited from bringing these claims under NRS 34.800.

Because the Montez/Montes issues could have been raised in the first petition for post-conviction relief, they are also barred by NRS 34.810(b)(2) as successive or an abuse of the writ.

Alhough the Defendant cannot show good cause for the delay in asserting these claims, the procedural bars relating to these issues may be overcome if Defendant can demonstrate actual innocence and therefore a fundamental miscarriage of justice. To do this, the Defendant must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation.[30] This is an extremely high standard. Thus, Defendant must show that had Montez never testified, or been subject to impeachment with

[30] Pellegrini v. State, 117 Nev. 860, 887, 34 P.3rd 519, 537 (2001).

the jail records during his testimony, no reasonable juror would have convicted him. In determining this, the court must consider the new admissible evidence contained in a petition and all of the evidence that was adduced at trial.

There has never been any dispute that Jessica was abused and tortured or that the beatings and scalding resulted in her death. The only issue was whether Maria or Defendant or both of them were responsible for the beatings and scalding. The trial transcripts make it clear that for the jury to convict Defendant they had to believe Maria's testimony that Defendant was responsible for the beatings, hangings and scalding. They did not have to find Maria bore no responsibility for Jessica's death.

The State referenced the Montez testimony in closing argument as support for Maria's testimony that it was Defendant who abused Jessica. But the State equally stressed the testimony of the three neighbors, who heard arguing, banging noises and a child crying from the time Jessica arrived until the time she died and that the man was the aggressor. This testimony contradicted Defendant's family who portrayed Defendant as a wonderful husband and father who never got mad and that Defendant and Maria never argued. Moreover, Montez was extensive cross-examined and the jury heard evidence demonstrating that Montez' testimony may have been solicited by Uncle Antonio, the same claim that is being made today.

Finally the Court needs to remember Defendant's theory of defense and his own contradictory statements. Defendant first insisted that Jessica's injuries were accidental; then he said he did not know about them; then he claimed Maria must have inflicted them. Defendant also claimed he failed to tell anyone about the abuse because he was afraid Maria would harm the other children and he loved her. The State stressed the absurdity of this position in closing argument and in cross-examination. Defendant was the one who was part of a close-knit family. He was the one with United States citizenship, a job and the car. Yet he tells no one in his family about the abuse and his fears for Victor and Francisco and he leaves Victor and Francisco alone with Maria while he goes to work. If Defendant were telling the truth, why not take the kids to his family, tell them what was going on and ask

them to protect the children while he went to the police.

In addition, the Court must consider the expert testimony that was given in the case, which also supported Maria's version of the events. Dr. Strauss testified that, given Maria's background and his interviews of her, she was less likely to be the abuser. Although the Defendant presented experts disagreeing with some of Dr. Strauss' findings, they also agreed that Maria showed signs of developmental problems. Moreover the jury heard evidence that a step-father was more likely to be the abuser in this situation than the natural mother as well as the defense theory that as an abused child, Maria was more likely to be the abuser.

Looking at the totality of the evidence, it cannot be said that it is more likely than not that no reasonable jury would have believed Maria without Montez' testimony or convicted the Defendant, therefore the Defendant has not demonstrated actual innocence and a fundamental miscarriage of justice and the claims should be dismissed.

Finally, if the Court is not inclined to make such a finding on the basis of the pleadings, then the State requests an evidentiary hearing on the Montez issues.

B. Maria Lopez Issues

Defendant asserts that the State failed to timely disclose exculpatory evidence, presented false testimony or committed prosecutorial misconduct. Each sub-claim is procedurally barred.

1. Alleged pre-interview threats or promises made by Detective Wohlers and Sgt. Tronosco – this sub-claim is based on information discovered in 1987. It is time-barred under NRS 34.726. They are also barred under NRS 34.800. No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

2. Detective Wohlers and Sgt. Tronosco assistance in providing information to Maria on, and aiding her in filling out forms for, public benefits – this information was discovered in 1987. It is time-barred under NRS 34.726. They are also barred under NRS 34.800. No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

3. Assistance in filling out forms with immigration authorities and obtaining temporary permission to remain in the United States pending trial – discovered in 1985 as it is contained in the Grand Jury transcripts and 1987 when investigator Dingle interviews Detective Wohlers; It is time-barred under NRS 34.726. They are also barred under NRS 34.800. No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

4. Handwritten police reports of Detective Wohlers and/or Sgt. Tronosco concerning the sequence of events leading to Maria's first statement – reports are not exculpatory and do not constitute Brady material. Moreover they were discovered in 2002 and are time-barred under NRS 34.726 and they could have been discovered through due diligence much earlier, therefore laches applies. No good cause has been demonstrated to excuse the delay and this is not new evidence as it was testified to years ago so actual innocence is inapplicable.

5. Alleged inaccurate translations of Maria's statements by Sgt. Tronosco – the differences between the two translator's opinions are not significant and do not constitute exculpatory material under Brady. Moreover the translation is dated 2/10/2004 and is time-barred pursuant to NRS 34.726 and such a translation could have been done at an earlier date through due diligence so the claims should be barred under NRS 34.800 laches. No good cause has been demonstrated to excuse the delay and this is not new evidence demonstrating actual innocence.

6. Reports indicating Detective Wohlers and/or Sgt. Tronosco transported Maria from jail to immigration offices so she could fill out forms requesting permission to remain in the United States and made calls to seek information on Maria's status - as noted above, this kind of assistance was found by the trial court not to be a benefit or promise in exchange for testimony, therefore it is not exculpatory under the Law of the Case Doctrine and no Brady violation exists. In addition, the reports were obtained in 2002, but the information is contained in the Grand Jury transcript of January 22, 1985 and any claim based upon them is time-barred under NRS 34.726. Finally they are also barred under

NRS 34.800 and NRS 34.810. No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

7. Material witness warrant for Maria in the event Maria failed to maintain communication with INS officials or Detective Wohlers – this information was a matter of public record as the documents were filed with the district court on January 22, 1985 and copies were provided to the Federal Public Defender pursuant to discovery in 2003 and is therefore time-barred under NRS 34.726. It was also subject to discovery through due diligence therefore it is also barred under NRS 34.800. No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable. PE 49-53.

8. Notes of Rosaura Tanon contained in the files of Families of Murder Victims, a non-profit victim rights organization – there is no basis for assuming that these documents were known to the State and the State has no obligation to seek notes in non-profit organizations' files. The claim was discovered in 2003 and is time barred by NRS 34.726 and NRS 34.800. In addition the notes are not exculpatory or impeachment material. Ms. Tanon indicates she does not entirely believe Maria in the context of Maria saying she was handling Jessica's death or that she bore no responsibility for Jessica's death. However the notes go on to discuss that Ms. Tanon thinks Maria may be suppressing her true feelings and her involvement indicating Ms. Tanon's disbelief was not an opinion that the Defendant was innocent, but that Maria could have done more to stop the Defendant and she is in denial. Thus it is simply speculation on Ms. Tanon's part and not exculpatory or impeachment evidence. Even if the evidence was somehow admissible, its admission at trial would not have affected the verdict. It does not meet the standard for actual innocence as it is not more likely than not that no reasonable juror, hearing Ms. Tanon's testimony, would have found the Defendant not guilty. At most the statement simply reflects that Ms. Tanon doesn't like Maria and feels Maria should have done more to protect her daughter and should have born some criminal responsibility – a fact already presented to the jury.

9. Ted Salazar's notes reflecting his independent interviews with

Maria and Salazar's relationship with the District Attorney's Office – The record reflects Ted Salazar was a drug and alcohol counselor who knew DDA Jeffers wife as they worked at Raleigh Hills treatment center. Mr. Salazar was hired by the District Attorney's Office to be a translator for Maria when speaking to DDA's Jeffers and Seaton as well as Dr. Strauss. Mr. Salazar also happened to be a drug and alcohol counselor and he made clinical notes during those conversations. Although the DDA's knew Mr. Salazar was taking notes, the record reflects they were not aware of the nature of the notes. When it was brought to their attention the notes were given to Defendant shortly before trial. Mr. Salazar was then apparently hired as a potential trial witness. Nothing in the documents and statements presented in support of this claim contradict this. PE 57. Defendant simply speculates that Mr. Salazar was hired to coach Maria because he was paid for services and told he helped with the case. This hardly constitutes a new Brady claim or evidence of actual innocence. Moreover the information was available through due diligence years ago. The claim is barred by NRS 34.726 and NRS 34.800. The issue of the admissibility of Mr. Salazar's notes and testimony and any alleged late disclosure problems were decided on direct appeal and are governed by the Law of the Case Doctrine and barred by NRS 34.810. No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

10. Improperly obtained immunity from prosecution for Maria – this issue was raised and rejected on the merits in the first State petition for post-conviction relief and affirmed by the Nevada Supreme Court. It was also raised in the second State petition for post-conviction relief and found to be procedurally barred; a finding which was upheld on appeal. The claim is prohibited by the law of the case doctrine. It is independently barred as untimely under NRS 34.726 as well as NRS 34.800 (laches) and NRS 34.810 (successive and abuse of the writ). No good cause has been shown for the delay and it does not involved new evidence, therefore actual innocence and fundamental miscarriage of justice waivers do not apply.

11. Alleged misrepresentations regarding ability of Grand Jury to

indict Maria – the Defendant complains that DDA Jeffers misspoke during the hearing on the pre-trial writ dealing with accomplice assertions when he said the Grand Jury could have indicted Maria if they so chose when in fact, the Grand Jury was told Maria had been given immunity. The claim was known almost twenty years ago or was available through due diligence. This is a new claim and is barred as untimely under NRS 34.726 as well as NRS 34.800 (laches) and NRS 34.810 (successive and abuse of the writ). No good cause has been shown for the delay and it does not involved new evidence, therefore actual innocence and fundamental miscarriage of justice waivers do not apply;

12. Existence of two extension cords given to DDA Jeffers and booked into evidence by Detective Wohlers on the first morning of the trial – this is a new claim – the evidence is not exculpatory nor does it have any impeachment value given the fact that the cord which was admitted in trial was the cord which had hairs imbedded in it, therefore no Brady/Giglio violation exists. Even if it can be considered such a violation, the claim was discovered in 2002 and is untimely under NRS 34.726. The jury heard evidence that other cords existed from Maria when she did not identify one of the cords as being the extension cord used to hang Jessica. The existence of additional cords does not make it more likely than not that no reasonable juror would have convicted the Defendant if this evidence had been presented. No good cause has been demonstrated to excuse the delay..

13. Allegedly missing hair samples – this claim is new and barred by NRS 34.726 and NRS 34.800. The evidence envelopes were always subject to review and the supposedly missing hair could have been discovered years ago through due diligence. Moreover the record belies the assertion. Hair was removed from certain exhibits and tested – thus the evidence vial that originally contained the hair would be empty, a fact that was discussed at trial. No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable. RA 3, 836-37; 854-55.

14. Allegedly misrepresented that Belmont apartment had been abandoned as grounds for search of premises on January 18, 1985 – this is a new claim based on documents available years ago. It is barred by NRS 34.726 and NRS 34.800 and the jury

heard evidence that the apartment was abandoned in Detective Wohler's mind, but that numerous family members had been in preserving property at his suggestion. This information have invalidated the search warrant or resulted in a suppression of the physical evidence therefore it as no bearing on actual innocence. No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

15. Carla Noziglia's bench notes – this is a new claim and it is barred under NRS 34.726 and NRS 34.800. It is not Brady/Giglio evidence as the petition miscontrues both Mr. Berkabile's trial testimony and his depostition testimony. Mr. Berkabile never testified that he and Ms. Noziglia used the same hair samples and slides in reaching their conclusions that the hairs found in the macramé, electrical/extension cords, wasterpaper baskets and the belt were similar to Jessica's and dissimilar to the other apartment occupants. Mr. Berkabile indicated he reviewed Ms. Noziglia's slides as well as his own and only one slide, the one of the single hair taken from the belt was the same slide. Both Mr. Berkabile and Ms. Noziglia reached the same conclusion regarding similarity of the hairs based on separate samples and in separate reports, with one exception. Ms. Noziglia's report indicated the hair on the red/white cord could also have been Maria's. RA 3, 1021, 1034-35. PE 14, 15.

Mr. Berkabile was asked to speculate in his deposition, twenty years later, that if he and Ms. Noziglia's reports referred to the same slides that they were inconsistent because Ms. Noziglia's hair lenth measurements did not match his. Mr. Berkabile said assuming the reports referred to the same slides and Ms. Noziglia's measurements were for a strand of hair, not sections of a strand, then that might be true but he also indicated that if one added up all of Ms. Noziglia's individual measurements on a particular hair, the measurements would not be significantly different from his measurements. Moreover Mr. Berkabile was told he testified that they based their reports on the same slides, which was incorrect. [cite].

Because this claim is not supported by the record, there is no Brady/Giglio violation as Ms. Noziglia's notes are not exculpatory. Moreover even if one could assume that the

speculative conclusions of the petition rise to a Brady/Giglio claim, it is time barred by NRS 34.726 as it was discovered in 2002 and could have been discovered through due diligence at an earlier time period, therefore it is barred by laches under NRS 34.800.

16. Chain-of-custody issues with hair fiber taken from red/white electrical cord – this is a new issue and is barred by NRS 34.726, NRS 34.800 and NRS 34.810. The custody evidence was available to trial, appellate and first post-conviction counsel and should have been raised twenty years ago. Finally, chain-of-custody was stipulated to trial. RA 3, 836-37. Nor does it meet the standard for fundamental miscarriage of justice. Good cause for delay has not been shown and actual innocence does not apply;

17. Prosecutor improperly questioned Maria regarding her custody of the two boys – this is a new claim that could have been raised on direct appeal. It is prohibited by the one-year time bar under NRS 34.726, laches under NRS 34.800 and as a successive and abusive claim under NRS 34.810(2) and as waived under NRS 34.810(1)(b). Good cause for delay has not been shown and actual innocence does not apply;

18. Improper remarks in opening statement;

19. Improper closing arguments – guilt phase;

20. Improper closing argument in penalty phase;

21. Alleged history of prosecutorial misconduct.

The above claims were either raised and rejected in the first State post-conviction relief petition, which findings were upheld on appeal and are governed under the Law of the Case Doctrine or were included in the second State post-conviction petition and were procedurally barred under NRS 34.726, NRS 34.800 and NRS 34.810 as successive, abusive and waived as they could have been asserted on direct appeal from the judgment of conviction. That procedural bar finding that is governed by the Law of the Case Doctrine. To the extent they are new claims or arguments they are still barred by NRS 34.726, NRS 34.800 and NRS 34.810 as successive, abusive and waived. No good cause exists for the twenty year delay and the fundamental miscarriage of justice exception does not apply.

Claim 3 – Factual Innocence (Torture) and Actual Innocence (Death Penalty)

The primary factual basis for this argument lies with Maria's alleged 1987 recantation. Once again the pleadings misstate the facts and contain a good deal of speculation and counsel's conclusions. For example, Defendant says that Maria admitted that she, not Manual, was responsible for Jessica's burns. No such statement is contained in the alleged recantation. The issue of the alleged inconsistencies between Maria's various statements was litigated before the jury, who chose to believe Maria over Defendant. The validity of the recantation was determined by the district court in the fourth motion for a new trial and the subsequent claim of ineffective assistance of appellate counsel for failure to timely appeal the trial court's decision.

With the exception of the affidavit of Maria's Aunt, Rosalinda Ceballos/Cevallos, Defendant's claim is based on information and arguments that were decided by the district court and upheld on either the direct appeal from the judgment of conviction or the appeal from the denial of the first State petition for post-conviction relief. Thus this claim is barred by the Law of the Case Doctrine. This issue was also raised in the second State petition for post-conviction relief and found to be procedurally barred. This finding was upheld by the Nevada Supreme Court and that holding is governed by the Law of the Case Doctrine

In addition, these claims were filed well after the one-year time bar under NRS 34.726, violate the laches provisions of NRS 34.800, involve issues that were either raised or could have been raised on direct appeal or the first State post-conviction relief petition, thus violating NRS 34.810(b) and NRS 34.810(2).

As for Rosalinda Ceballos' affidavit, Ms. Ceballos clearly indicates her belief that Defendant was guilty of abusing Jessica and that Maria was responsible for not stopping or reporting it. This hardly demonstrates actual innocence.

Hearing all of this does not demonstrate that it is more likely than not that no reasonable juror would have found these acts did not constitute torture or imposed the death penalty – thus there is no fundamental miscarriage of justice if these claims are not heard.

Claim 4 – Improper Admission of Evidence – Cords, Macrame, Mannequin

Defendant contends that the district court erred in admitting the brown extension

cord, the red/white electrical wire, the macramé holder and the child-sized mannequin into evidence. During direct examination, Maria identified pictures of the cord, wire and macramé as items involving Defendant's abuse of Jessica. Hair was found entangled in the cord and the macramé. Maria indicated that an extension cord was wrapped into Jessica's hair and used to hang her from the ceiling hook normally used for the macrame. The macramé was removed from the hook at such times. Maria never testified that Defendant used the macramé to hang Jessica.

When asked on cross-examination to identify the actual items, Maria indicated that the brown extension cord was used to tie Jessica up and that the red/white wire was not used on Jessica. She also confirmed the macramé was not used to hang Jessica. Defense counsel moved for the exhibits to be striken. The State argued that the presence of head hair on all three items tied them to the abuse of Jessica even if Maria did not observe two of them being used. The district court denied the motion and was upheld on appeal.

Defendant also objected to the use of the mannequin, the objection was overruled and this too was upheld on appeal.

These claims are governed by the Law of the Case Doctrine and cannot now be relitigated. They are also prohibited by the one-year time bar under NRS 34.726, laches under NRS 34.800 and as a successive and abusive claim under NRS 34.810. This claim involves no new evidence so actual innocence does not apply.

Claim Five – Testimony of Dr. Paul Strauss

Defendant asserts that the district court erred in permitting Dr. Strauss to testify: (1) regarding Maria's statements to him; (2) concerning alleged instances of abuse of Maria by Defendant; (3) regarding Dr. Strauss' opinion that Maria was not lying and; (4) Dr. Strauss giving his profession opinion about Maria and Mexican culture. These issues were litigated on direct appeal from the judgment of conviction and during the first State petition for post-conviction relief. The Nevada Supreme Court concluded the evidence was not improperly admitted and counsel was not ineffective in his cross-examination of Dr. Strauss.

Under the Law of the Case Doctrine, these claims are barred. They are also untimely

under NRS 34.726, barred by laches under NRS 34.800 and successive/abusive under NRS 34.810. This claim involves no new evidence so actual innocence does not apply.

Claim 6 – Admission of Bad Acts Testimony Regarding Defendant's Abuse of Maria

Defendant claims that the district court improperly permitted Maria to testify regarding alleged sexual bondage and physical abuse committed against her by Defendant. These issues were litigated on direct appeal from the judgment of conviction and during the first State petition for post-conviction relief. The Nevada Supreme Court concluded the evidence was not improperly admitted and counsel was not ineffective.

Under the law of the case doctrine, these claims are barred. They are also untimely under NRS 34.726, barred by laches under NRS 34.800 and successive/abusive under NRS 34.810. No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 7 – Admission of Jessica Cevallos' Autopsy/Post-death Photographs

Defendant contends the autopsy, crime scene and funeral photographs of Jessica's body were improperly admitted at trial. Counsel stipulated to the admission of the photographs to avoid admission of the autopsy video. The admissibility of the photographs and counsel's stipulation was litigated in the first State post-conviction relief petition in . The district court concluded the photographs were not improperly admitted and an objection to their admissibility would not have been sustained at trial or on appeal, therefore Counsel's conduct was not ineffective. This finding was upheld on appeal by the Nevada Supreme Court.

Under the law of the case doctrine, these claims are barred. The are also untimely under NRS 34.726, barred by laches under NRS 34.800 and successive under NRS 34.810. No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 8 – Challenges to Guilt Phase Instructions

Defendant argues that several of the jury instructions were improper. Specifically

Defendant challenges the instructions defining: 1) torture; 2) involuntary manslaughter; 3) premeditation and deliberation; and 4) implied malice instruction.

These issues were litigated on direct appeal from the judgment of conviction and during the first State petition for post-conviction relief. The Nevada Supreme Court concluded the instructions were not improper admitted and counsel was not ineffective in his cross-examination of Dr. Strauss.

Under the law of the case doctrine, these claims are barred. They are also untimely under NRS 34.726, barred by laches under NRS 34.800 and successive under NRS 34.810. No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 9 – Torture Aggravator Invalid

Defendant contends the torture aggravator is invalid because it involves the same instructions and mental state as torture used to enhance the crime to first-degree murder. Defendant argues the aggravator fails to perform a constitutional narrowing function and does not entail reckless disregard for human life or intent to kill as constitutionally required. Finally Defendant asserts insufficient evidence existed to support the jury's finding of torture.

These challenges to the torture aggravator were made either on direct appeal from the judgment of conviction or in the first State petition for post-conviction relief. The Nevada Supreme Court rejected these arguments and the claim is barred by the law of the case doctrine. They are also untimely under NRS 34.726, barred by laches under NRS 34.800 and successive under NRS 34.810. No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 10 – Invalidity of Depravity Aggravator

Defendant asserts the depravity of mind aggravator was invalid. The argument that depravity of mind and torture constitute a single aggravator was raised in the first State petition for post-conviction relief and the direct appeal from the denial of the petition. On appeal, the Nevada Supreme Court concluded this argument lacked merit.

To the extent this argument was previously raised, the claim is barred by the law of the case doctrine. It is also an abuse of the writ under NRS 34.810. Any new or restructured arguments challenging this aggravator are untimely under NRS 34.726, barred by laches under NRS 34.800 and waived for failure to previously assert or successive/abusive under NRS 34.810. No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 11 – Ineffective Assistance of Trial Counsel

Defendant raises numerous sub-claims asserting ineffective assistance of trial counsel. These claims were previously raised in the first State petition for post-conviction relief and denied on their merits:

a. Insufficient resources to mount an adequate defense – failure to request funds and hire pre-trial investigator, experts and co-counsel.

b. Failure to object to short trial setting – inability to prepare for trial.

c. Failure to challenge indictment for lack of immunity hearing and alleged misstatements of prosecution and failure to appeal denial of pre-trial writ of habeas corpus.

d. Failure to file a motion to change venue.

e. Failure to voir dire prospective juror about childhood abuse.

f. Failure to seek resubmission instruction upon excusal of Juror Signorelli.

g. During voir dire, failed to: 1) object to excusal of death scrupled juror, 2) ask 12 jurors about pre-trial publicity, 3) ask if jurors could consider life with or without parole and 4) seek to challenge four jurors for cause.

h. Failed to object to gruesome photographs.

i. Failure to object to or move to strike forensic evidence – extension cords, macramé, hair containers, failure to move to exclude Berkabile testimony.

j. Failure to object to admission of Dr. Strauss testimony.

k. Failure to adequately cross-examine Berkabile.

l. Failure to object to character evidence (Defendant's abuse of Maria) and seek limiting instruction.

m. Failure to cross-examine Maria about an alleged note written to Defendant or use the note on re-direct examination of Defendant.

n. Failure to retain and present testimony of forensic pathologist.

o. Waiver of second-degree murder instruction.

p. Failure to request child abuse/neglect instruction.

q. Failure to object to jury instructions defining: 1) murder by torture, 2) involuntary manslaughter, 3) premeditation, 4) malice/implied malice, 5) anti-sympathy instruction and 6) unanimity of jurors on statutory aggravator.

r. Failure to object to prosecutorial misconduct.

s. Failure to challenge invalid aggravating circumstances.

t. Failure to investigate and present mitigating evidence.

u. Failure to present social history, hire and present mitigation expert.

v. Inadequate closing argument.

w. Failure to file a timely notice of appeal from denial of fourth motion for new trial.

x. Failure to investigate and present impeachment evidence against Maria Lopez.

y. Failure to raise constitutional issues involving make-up of petit jury, Batson challenges and improper reasonable doubt instruction.

To the extent these arguments were previously raised and decided on their merits, the claims are barred by the law of the case doctrine. They are also barred as an abuse of the writ under NRS 34.810. Any new or restructured arguments alleging ineffective assistance of counsel based on these issues are untimely under NRS 34.726, barred by laches under NRS 34.800 and waived for failure to previously assert or successive/abusive under NRS 34.810. No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 12 – Due Process Violation – Short Trial Setting

This claim was raised as an ineffective assistance of counsel issue during the first State post-conviction proceedings. It was denied on its merits. The trial court found

Defendant's testimony that he did not agree to the advanced trial setting incredible and that Defendant and his family wanted it tried as early as possible. The trial court also found trial counsel was adequately prepared and no prejudice occurred. These findings were upheld on appeal by the Nevada Supreme Court. The Law of the Case Doctrine bars further consideration of this issue. In addition, it is time-barred under NRS 34.726, an abuse of the writ under NRS 34.810, and subject to laches under NRS 34.800.

To the extent that the issue is support by new arguments, it is still time- barred by NRS 34.726 as these arguments could have been raised within one year of the remittitur on direct appeal. It is also successive under NRS 34.810, waived under NRS 34.810 and subject to laches under NRS 34.800. No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 13 – Constitutional Claims Based on Immunity and Charging Decisions

Lopez contends that the procedures used to grant Maria immunity from prosecution failed to comply with statutory mandates and that the district court should have granted Lopez' request to grant Maria post-trial immunity. Lopez also asserts that the State made contradictory statements to the Grand Jury and the trial court regarding the effect of an immunity grant on the Grand Jury's ability to indict Maria for her role in failing to protect Jessica. Finally Lopez claims the State's charging decisions on Maria circumvented corroboration of accomplice testimony requirements. Lopez argues that these actions violate 5th, 6th, 8th and 14th Amendment rights under the Federal Constitution and Article 1 rights under the Nevada Constitution.

The pre-trial immunity and charging issues were raised on direct appeal from the judgment of conviction and found to be without merit by the Nevada Supreme Court. They are barred by the Law of the Case Doctrine. The post-trial immunity issue was raised as an ineffective assistance of counsel claim (failure to file appeal from denial of fourth motion for new trial – wherein post-trial immunity for Maria was requested). The trial court found counsel was not ineffective because the claim would not have been successful on appeal. This finding was upheld by the Nevada Supreme Court on appeal. Thus it too is barred by

the Law of the Case Doctrine. The claims are also an abuse of the writ under NRS 34.810.

To the extent that Lopez now raises these issues as constitutional claims and accompanies them with new arguments, they are still barred by the law of the case doctrine. Any new or restructured arguments challenging this aggravator are untimely under NRS 34.726, barred by laches under NRS 34.800, waived for failure to previously assert pursuant to NRS 34.810 or successive under NRS 34.810. No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 14 – Challenge to Grand Jury Selection Process

Lopez contends that the method by which the jurors for the 1984 Grand Jury were selected was improper. This claim has not been previously raised. However the facts upon which the claim is based have been known, or could have been known through reasonable diligence, for over twenty years. Thus the claim is time-barred under NRS 34.726 and subject to laches under NRS 34.800. It is also waived under NRS 34.810(b) and successive under NRS 34.810(2). No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 15 – Alleged Systemic Under-representation of Venire and Petit Jury

Lopez contends that the method by which the jurors for the 1984 Grand Jury were selected was improper. This claim has not been previously raised. However the facts upon which the claim is based have been known, or could have been known through reasonable diligence, for over twenty years. Thus the claim is time-barred under NRS 34.726 and subject to laches under NRS 34.800. It is also waived under NRS 34.810(b) and successive under NRS 34.810(2). No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 16 – Failure of Trial Court to Sua Sponte Change Venue

Issues relating to pre-trial publicity were litigated as ineffective assistance of counsel claims in the first State post-conviction petition. The district court found a motion for change of venue would not have been granted and therefore counsel was not ineffective for failing to seek a change of venue. This finding was upheld by the Nevada Supreme Court on

appeal. The claims were also raised as ineffective assistance and substantive issues in the second State post-conviction petition and dismissed as procedurally barred. This dismissal was upheld on appeal.

The claims are barred by the Law of the Case Doctrine. The facts upon which the claim is based have been known, or could have been known through reasonable diligence, for over twenty years. Thus the claim is time-barred under NRS 34.726 and subject to laches under NRS 34.800. It is also waived under NRS 34.810(b); successive under NRS 34.810(2) and an abuse of the writ under NRS 34.810(2). No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 17 – Juror Misconduct

Lopez asserts he was deprived of his right to a fair and impartial jury because two jurors did not reveal they had been the victims of childhood abuse during the voir dire process in response to a questioning about whether they had ever been the victim of a crime.

This issue was the subject of Lopez' first motion for a new trial. The trial court denied the motion and was upheld on appeal to the Nevada Supreme Court. It was also raised as a claim of ineffective assistance of counsel in the first State post-conviction proceeding and as both an ineffective assistance of counsel and substantive claim in the second State post-conviction petition. The ineffective assistance of counsel claim was denied by the district court in the first post-conviction proceeding and the denial was upheld on appeal. The claims were procedurally barred in the second post-conviction proceeding and this was upheld by the Nevada Supreme Court.

As this matter has already been decided on its merits as well as found to be previously procedurally barred, it is foreclosed by the Law of the Case Doctrine. Previously made arguments are an abuse of the writ under NRS 34.810(2) and new arguments are time-barred under NRS 34.726, subject to laches under NRS 34.800, waived under NRS 34.810(b) and successive under NRS 34.810(2). No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 18 – Batson Challenges

Lopez contends that the State used its pre-emptory challenges in a discriminatory manner in violation of Batson v. Kentucky, 476 U.S. 79 (1986). This claim has not been previously asserted. The facts and case law upon which the claim is based have been known for over twenty years. Thus the claim is time-barred under NRS 34.726 and subject to laches under NRS 34.800. It is also barred under NRS 34.810(b) (waiver) and successive under NRS 34.810(2). No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 19 – Failure to Resubmit Case to Jury Upon Substitution of Alternate Juror

Lopez argues that the trial court erred in replacing juror Dorothy Signorelli with alternate juror Donna Withers after deliberations began without first advising the jury on resubmission pursuant to Nevada statutes. This issue was previously asserted as a claim of ineffective assistance of counsel claim in the first State post-conviction petition and denied on the merits by the trial court and the Nevada Supreme Court. It was also raised as a claim in the second State post-conviction proceedings and found to be procedurally barred. Thus the Law of the Case Doctrine prohibits further consideration of this matter.

Previous arguments are barred as an abuse of the writ under NRS 34.810(2). New arguments are barred under NRS 34.726 (one year rule); NRS 34.800 (laches), NRS 34.810(b) (waiver) and NRS 34.810(2) as successive. No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 20 – Failure to Strike Juror Orick for Cause

This claim was not previously raised. The facts upon which the claim is based have been known for over twenty years. Thus the claim is time-barred under NRS 34.726 and subject to laches under NRS 34.800. It is also waived under NRS 34.810(b) and successive under NRS 34.810(2). No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 21 – Failure to Exclude as Hearsay Jessica's Statements to Maria and Maria's Statements to Dr. Strauss.

Lopez asserts the trial court erred in denying his motion in limine to exclude Jessica's

statements that Lopez hung her in the closet and scalded her as hearsay. Lopez also contends Maria's statements to Dr. Strauss about sexual and physical abuse inflicted upon her by Lopez were likewise inadmissible.

The denial of the motion in limine was sustained by the Nevada Supreme Court on direct appeal from the conviction. The admissibility of the Strauss report information was asserted as an ineffective assistance of counsel claim in the first State post-conviction petition. The trial court found that the statements were admissible and counsel was not ineffective. This finding was upheld on appeal. Finally the Strauss report information was also challenged in the second State post-conviction petition and was denied as procedurally barred. This was also upheld on appeal.

Issues and arguments that were previously raised and denied are barred by the Law of the Case Doctrine. They also constitute an abuse of the writ under NRS 34.810(2). New arguments are barred by NRS 34.726 (one year rule); NRS 34.800 (laches), NRS 34.810(b) (waiver) and NRS 34.810(2) as successive. No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 22 – Improper Reasonable Doubt Instruction

The propriety of the reasonable doubt instruction was argued as an ineffective assistance of counsel and a direct claim in the second State petition for post-conviction relief. It was determined to be procedurally barred and this finding was upheld on appeal. Therefore the Law of the Case Doctrine applies to the conclusion that this claim is procedurally barred.

The facts upon which the claim is based have been known for over twenty years. Thus the claim is time-barred under NRS 34.726 and subject to laches under NRS 34.800. It is also waived under NRS 34.810(b) and successive under NRS 34.810(2). No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 23 – Penalty Phase Instructions

Lopez challenges the following penalty phase instructions as being improper: 1) anti-

sympathy and 2) aggravating circumstances instructions – alleged failure to require unanimous finding of a least one aggravator.

The issue of the anti-sympathy instruction was raised as an ineffective assistance of counsel claim in the first State post-conviction petition and as a substantive claim in the second State post-conviction petition. The claim was denied as without merit in the first State petition and procedurally barred in the second. The Law of the Case Doctrine bars reconsideration of this issue. In addition, it is procedurally barred as an abuse of the writ under NRS 34.810(2). To the extent new issues or arguments are raised, the facts upon which the claim is based have been known for over twenty years. Thus the claim is time-barred under NRS 34.726 and subject to laches under NRS 34.800. It is also waived under NRS 34.810(b) and successive under NRS 34.810(2).

The issue regarding unanimity on aggravating circumstances has not been previously raised. It too is barred under NRS 34.726 (one-year rule), laches under NRS 34.800, waiver under NRS 34.810(b) and as successive under NRS 34.810(2). No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 24 – Failure to Instruct the Jury on Relationship Between Reasonable Doubt and Weighing of Aggravating/Mitigating Circumstances

This claim was not previously raised. The facts upon which the claim is based have been known for over twenty years. Thus the claim is time-barred under NRS 34.726 and subject to laches under NRS 34.800. It is also waived under NRS 34.810(b) and successive under NRS 34.810(2). No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 25 – Ineffective Assistance of Appellate Counsel – Direct Appeal

Lopez argues that appellate counsel was ineffective for failing to raise a constitutional challenge to the torture aggravator as well as the constitutional aspects of Claims 5 – 10, 12 – 16, 18-20, 22-24 and 28 of the instant petition and all the factual allegations contained in Claim 4. Lopez also contends appellate counsel was ineffective for failing to federalize

claims.

Many of the issues contained in the above claims were raised as ineffective assistance of counsel claims in the first and second State petitions for post-conviction relief. They were either denied on their merits or procedurally barred and the findings in those petitions were upheld on appeal. Therefore the Law of the Case Doctrine forbids reconsideration of those claims and the continued litigation of the claims is an abuse of the writ under NRS 34.810(2).

The facts upon which these claims are based have been known for over twenty years. Thus the claims are time-barred under NRS 34.726 and subject to laches under NRS 34.800. They are also barred under NRS 34.810(b) (waiver) and successive under NRS 34.810(2). No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 26 – Failure of Nevada Supreme Court to Conduct Adequate Review on Direct Appeal and on Appeal from Post-Conviction Relief.

This claim was not previously raised. The facts upon which the claim is based have been known for over twenty years. Thus the claim is time-barred under NRS 34.726 and subject to laches under NRS 34.800. It is also waived under NRS 34.810(b) and successive under NRS 34.810(2). No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 27 – Elected Judiciary Inherently Biased

This claim was raised in the first State post-conviction proceedings and denied on the merits. The denial was upheld on appeal and the Law of the Case Doctrine prohibits revisiting this issue. It is also barred as an abuse of the writ under NRS 34.810(2). To the extent new arguments are being made as a new claim, the facts upon which the claim is based have been known for over fifteen years. Thus the claim is time-barred under NRS 34.726 and subject to laches under NRS 34.800. It is also waived under NRS 34.810(b) and successive under NRS 34.810(2). No good cause has been demonstrated to excuse the delay and this is not new evidence so actual innocence is inapplicable.

Claim 28 – Cumulative Error

As all of the claims are procedurally barred and/or governed by the law of the case doctrine, there is no cumulative error.

Claim 29 – Lethal Injection Protocols

This claim is premature as no execution date has been set and the nature of the protocols to be used will not be known until that time.

SUMMARY

Except for Claim 29, all of Defendants' claims are barred by NRS 34.726, NRS 34.800 and NRS 34.810. Most of the Claims are also barred by the Law of the Case Doctrine. No good cause has been shown for the failure to raise claims and new arguments in a timely fashion as even alleged Brady claims were not brought within the time frames of NRS 34.726 and NRS 34.800.

As for fundamental miscarriage of justice, Defendant presented new evidence alleging Montez was in custody during the times he claims he saw Defendant pull Jessica by her hair and that Montez manufactured his testimony. Defendant also claims new evidence has been presented that the hair analysis was exculpatory or impeachable by Carla Noziglia's bench notes, based on speculative questions asked of Dan Berkabile. Defendant also presents the notes of Rosara Tanon, whose notes about her observations of Maria indicate she felt Maria was not being totally honest in Tanon's conversation with Maria, but the notes do not exculpate Defendant. Finally Defendant relies on some differences in opinion between translators and the fact that Maria gave DDA Jeffers the cords she talked about in her testimony, as well as the Ceballos affidavit indicating Montez was unknown to her.

Even taken cumulatively, this evidence is not enough to demonstrate that no reasonable juror would have convicted Defendant or imposed the death penalty in this case given the extensive abuse and torture of Jessica. Obviously the most crucial information is the Montez statement and other evidence indicating he fabricated his testimony. However, even without that testimony, it cannot be said it is probable that no juror would have believed Maria.

The State referenced the Montez testimony in closing argument as support for Maria's testimony that it was Defendant who abused Jessica. But the State equally stressed the testimony of the three neighbors, who heard arguing, banging noises and a child crying from the time Jessica arrived until the time she died and testified that the man was the aggressor and the woman sounded scared. This testimony contradicted Defendant's family who portrayed Defendant as a wonderful husband and father who never got mad and that Defendant and Maria never argued. Moreover, Montez was extensively cross-examined and the jury heard evidence demonstrating that Montez' testimony may have been solicited by Antonio Cevallos or at least done to curry favor with him. This is the same inference the new evidence would support and the same claim that is being made today.

The Court needs to read and compare Defendant's theory of defense and his alleged reasons for lying to the police with Maria's story of abuse. Defendant says that Jessica's injuries were accidental then changes his story as says he did not know about them. Finally he claimed Maria must have inflicted them. Defendant also claimed he failed to tell anyone about the abuse because he was afraid Maria would harm the other children and that he loved her. The State stressed the absurdity of this position in closing argument and in cross-examination. Defendant was the one who was part of a close-knit family. He was the one with United States citizenship, a job and the car. Yet he tells no one in his family about the abuse and his fears for Victor and Francisco and he leaves Victor and Francisco alone with Maria while he goes to work. He even says he could not take the time off from work to go to the police.

In addition, the Court, after reading the expert testimony, should consider how that that supported Maria's version of the events. Dr. Strauss testified that, given Maria's background and his interviews of her, she was less likely to be the abuser. Although the Defendant presented experts disagreeing with some of Dr. Strauss' findings, they also agreed that Maria showed signs of developmental problems. Moreover the jury heard evidence that a step-father was more likely to be the abuser in this situation than the natural mother as well as the defense theory that as an abused child, Maria was more likely to be the abuser.

Looking at the totality of the evidence, it cannot be said that it is more likely than not that no reasonable juror would have believed Maria without the Montez' testimony or convicted the Defendant. Defendant has not demonstrated actual innocence and a fundamental miscarriage of justice and all claims except Claim 29 should be dismissed as procedurally barred. Claim 29 should be dismissed as premature.

DATED this 15 day of February, 2008.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
NANCY A. BECKER
Deputy District Attorney
Nevada Bar #00145

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 15th day of February, 2008, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

Franny A. Forsman
Federal Public Defender
David S. Anthony
Assistant Federal Public Defender
411 East Bonneville Ave., Suite 250
Las Vegas, Nevada 89101

_____
Secretary for the District Attorney's Office

334. Floyd v. McDaniel, Eighth Judicial District Court, Case No. C159897, State's Opposition to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) and Motion to Dismiss, filed August 18, 2007.

335. State v. Rippo, Eighth Judicial District Court, Case No. C106784, Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction), filed February 10, 2004.

336. Rippo v. State, Nevada Supreme Court, Case No. 28865, Appellant's Opening Brief.

337. State v. Salem, Eighth Judicial District Court, Case No. C124980, Indictment, filed December 16, 1994.

338. State v. Salem, Eighth Judicial District Court, Case No. C124980, Reporter's Transcript of Proceedings, Thursday, December 15, 1994.

339. Declaration of Stacie Campanelli dated April 29, 2008.

340. Declaration of Domiano Campanelli, February 2008, Mastic Beach, N.Y.

341. Declaration of Sari Heslin dated February 25, 2008.

342. Declaration of Melody Anzini dated February 26, 2008.

343. Declaration of Catherine Campanelli dated February 29, 2008.

344. Declaration of Jessica Parket-Asaro dated March 9, 2008.

345. Declaration of Mark Beeson dated March 26, 2008.

346. State's Trial Exhibit 1: Laurie Jacobson photograph

347. State's Trial Exhibit 2: Denise Lizzi photograph

348. State's Trial Exhibit 99: Michael Rippo

349. State's Trial Exhibit 31: Autopsy photo Denise Lizzi

350. State's Trial Exhibit 53: Autopsy photo Laurie Jacobson

351. State's Trial Exhibit 125: Laurie Jacobson victim-impact scrapbook photographs

352. State's Trial Exhibit 127: Denise Lizzi victim-impact scrapbook photographs

353. Declaration of Jay Anzini dated May 10, 2008

354. Declaration of Robert Anzini dated May 10, 2008

355. Juvenile Records of Stacie Campanelli

356 Blackstone District Court Case Inquiry: Case No. C136066, State v. Sims, Case Activity, Calendar, Minutes

357 Justice Court Printout for Thomas Sims

358	Justice Court Printout for Michael Beaudoin
359	Blackstone District Court Case Inquiry: Case No. C102962, State v. Beaudoin, Case Activity, Calendar, Minutes
360	Blackstone District Court Case Inquiry: Case No. C95279, State v. Beaudoin, Case Activity, Calendar, Minutes
361	Blackstone District Court Case Inquiry: Case No. C130797, State v. Beaudoin, Case Activity, Calendar, Minutes
362	Blackstone District Court Case Inquiry: Case No. C134430, State v. Beaudoin, Case Activity, Calendar, Minutes
363	Justice Court Printout for Thomas Christos
364	Justice Court Printout for James Ison
365	State v. Rippo, Eighth Judicial District Court, Case No. C106784, Order dated September 22, 1993
366	Declaration of Michael Beaudoin dated May 18, 2008
367	State v. Rippo, Eighth Judicial District Court, Case No. C106784, Amended Indictment, dated January 3, 1996
368	State's Trial Exhibits 21, 24, 26, 27, 28, 32, 34, 38, 39, 40, 41, 42, 45, 46, 47, 48, 51, 56, 57, 58, 60, 61, 62
369	State's Trial Exhibit 54
370	Letter from Glen Whorton, Nevada Department of Corrections, to Robert Crowley dated August 29 1997
371	Letter from Jennifer Schlotterbeck to Ted D'Amico, M.D., Nevada Department of Corrections dated March 24, 2004
372	Letter from Michael Pescetta to Glen Whorton, Nevada Department of Corrections dated September 23, 2004
373	State v. Rippo, Eighth Judicial District Court, Case No. C106784, Warrant of Execution dated May 17, 1996
374	Declaration of William Burkett dated May 12, 2008
375	Handwritten Notes of William Hehn

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May 2008, I served a true and correct copy of the **EXHIBITS TO OPPOSITION TO MOTION TO DISMISS** to the following parties by delivering to prison authorities an envelope containing a copy if the foregoing, addressed as follows, and with authorization for payment of full payment of first class postage:

Catherine Cortez Masto
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Heather Procter
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Regional Justice Center
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Las Vegas, Nevada 89155

Employee of the Federal Public Defender

EXHIBIT 329

EXHIBIT 329

REPLY
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
STEVEN S. OWENS
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Nevada Bar #004352
200 Lewis Avenue
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Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- GREGORY NEAL LEONARD, #1214424 Defendant.	CASE NO: C126285 DEPT NO: II

REPLY TO OPPOSITION TO MOTION TO DISMISS

DATE OF HEARING: 3/13/08
TIME OF HEARING: 10:30 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Reply to Defendant's Opposition to Motion to Dismiss Petition for Writ of Habeas Corpus.

This reply is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

A. Correct Standards of Review

1. Summary Judgment Does Not Apply

Defendant maintains that the proper standard of review for the district court to use when evaluating a motion to dismiss is that it must liberally construe the defendant's petition and accept as true all of the factual allegations. While this may be the proper standard for a motion for summary judgment in a civil case or for dismissal under NRCP Rule 12(b)(5), the Nevada Supreme Court has determined that is not the proper standard when considering dismissal of a petition for writ of habeas corpus.

None of the statutes governing petitions for post-conviction relief provide for the civil remedy of summary judgment as a method for determining the merits of a post-conviction petition for a writ of habeas corpus. Beets v. State, 110 Nev. 339, 871 P.2d 357 (1994). The Nevada Rules of Civil Procedure apply only to the extent they are not inconsistent with NRS Chapter 34. See NRS 34.780. Because NRS Chapter 34 addresses the applicable standards for resolving post-conviction petitions for a writ of habeas corpus, the rules of civil procedure and the standard for summary judgment enunciated by Defendant simply do not apply.

2. Clear and Convincing Evidence is Needed to Overcome Procedural Bars

In Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993) (quoting Sawyer v. Whitley, 505 U.S. 333, 336, 112 S.Ct. 2514 (1992)), the Nevada Supreme Court held that a post-conviction habeas petitioner who was attempting to overcome a procedural default by demonstrating he was ineligible for the death penalty due to "actual innocence" was required to prove by " 'clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.' " The Court's subsequent discussion of a preponderance standard in Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004) was expressly limited to a petitioner's burden of proof of facts underlying claims of ineffective assistance of counsel that are raised in a post-conviction habeas petition that are not otherwise procedurally barred. The Court's

prior holding in Hogan remains unaffected and intact.

The petition in the instant case is Defendant's second attempt at state post-conviction relief and constitutes a successive petition per NRS 34.810. Any claims of ineffective assistance of counsel either at trial or on appeal should have been raised in the first post-conviction proceedings and are now procedurally barred absent a showing of good cause or prejudice. The burden of proof for such defaulted claims is the higher standard of clear and convincing evidence.

B. Good Cause – Intervening Case Law

1. Claims 8 and 9 - Nay v. State

Defendant alleges that recent intervening case authority of Nay v. State, 123 Nev. ___, 167 P.3d 430 (2007), constitutes good cause for failing to raise Claims 8 and 9 previously or for raising them again. Notably, Defendant did not allege as good cause or even cite to Nay v. State in his petition but has raised it for the first time in his opposition to the State's motion to dismiss filed on February 26, 2008. Defendant's argument that the State somehow failed to address or respond fully to his initial claims of good cause is without merit.

The State agrees with the general proposition that good cause to overcome procedural bars might be shown where the legal basis for a claim was not reasonably available at the time of any default. See e.g., Bejarano v. State, 122 Nev. ___, 146 P.3d 265 (2006). Notwithstanding the new case authority, the law in Nevada remains that a person who takes property from a victim after he is dead still commits robbery. Nay, 167 P.3d at 433. Also, in regards to felony-murder, on direct appeal the Leonard court held there was sufficient evidence from which the jury could find that Leonard did in fact intend to commit robbery when he killed the victim as opposed to the robbery being an afterthought. Leonard v. State, 114 Nev. 1196, 1208, 969 P.2d 288, 296 (1999). This factual finding remains law of the case.

The Nay case does not constitute good cause to overcome the procedural bars because

it is not retroactively applicable to Defendant's case and any such error in the jury instructions would be subject to harmless error review. Nay, 167 P.3d at 435. Key to the reversal in Nay was that the jury was affirmatively instructed that it was "irrelevant" when the intent to steal was formed and that the prosecutor had emphasized this in closing argument when discussing felony-murder. Id. No such instruction or argument is found in Leonard's case. Also, Defendant's case has been final on direct appeal since 1999 and is unaffected by new rules of law. Because of the Nevada Supreme Court's finding on direct appeal, factually an "afterthought" robbery defense would not have succeeded and it is clear beyond a reasonable doubt that a rational jury still would have found the defendant guilty absent any alleged error.

2. Claim 10 – Polk v. Sandoval

Defendant alleges that recent intervening case authority of Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), constitutes good cause for failing to raise Claim 10 previously or for raising it again. Notably, Defendant did not allege as good cause or even cite to Polk v. Sandoval in his petition but has raised it for the first time in his opposition to the State's motion to dismiss filed on February 26, 2008. Defendant's argument that the State somehow failed to address or respond fully to his initial claims of good cause is without merit.

Several factors distinguish Defendant's case from that of Polk v. Sandoval. First, the Polk decision does not address retroactivity and the law remains that Nevada's change in the premeditation/deliberation instruction has only prospective application. Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). Unlike Polk, Defendant's case was final on direct appeal in 1999 and is unaffected by new rules of law announced thereafter. Next, the Polk decision does not involve the application of state procedural default rules or the higher burden of clear and convincing evidence being faced by Defendant. Also, Polk objected to the premeditation instruction thereby preserving the issue for appeal whereas Defendant made no such objection below. Finally, unlike Polk, any error would be harmless because of 1) the facts of Defendant's case which involved deliberate strangulation with a ligature, 2) the Nevada Supreme Court's finding of deliberation on direct appeal, and 3) the numerous

detailed jury instructions on voluntary manslaughter and heat of passion.

3. Claim 19 – Blakely v. Washington

Defendant alleges that recent intervening case authority of Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004), constitutes good cause for failing to raise Claim 19 previously or for raising it again. Notably, Defendant did not allege as good cause or even cite to Blakely v. Washington in his petition but has raised it for the first time in his opposition to the State's motion to dismiss filed on February 26, 2008. Defendant's argument that the State somehow failed to address or respond fully to his initial claims of good cause is without merit.

Defendant argues that under Blakely v. Washington, juries must be specifically instructed that aggravating circumstances must outweigh the mitigating circumstances "beyond a reasonable doubt." However, Blakely was not a death penalty case and it held only that "any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." Id. In so holding, Blakely simply repeated the holding of a well-known case decided four years earlier. Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000). It is neither the law in Nevada nor anywhere else that the reasonable doubt standard applies to the weighing process in the death determination. Blakely does not support Defendant's position and neither Blakely nor Appendi are timely raised three and seven years, respectively, after they became law.

C. Good Cause – Impediment External to the Defense

Defendant alleges that the State's failure to disclose evidence and other external impediments constitute good cause to overcome any procedural bars as to Claims 3, 5, 6, and 23. The State agrees with the general proposition that good cause to overcome procedural bars might be shown where an impediment external to the defense, such as interference by officials, prevent him from complying with procedural rules. See e.g., State v. Powell, 122 Nev. ___, 138 P.3d 453 (2006).

In Claim 3, Phyllis Fineberg's tainting of the jury is framed in terms of court error

and ineffective assistance of counsel, but not as a Brady violation. That is because there are no documents withheld by the State which prevented the defense from raising this claim previously or for raising it again. The new information from Juror Lynn Weaver was equally available to both the State and the defense and there was no external impediment which prevented the defense from interviewing her and learning her information ten years ago after the trial.

Likewise, Claim 5 dealing with an alleged Batson violation is framed in terms of the court's failure to consider a comparative juror analysis under Miller-El v. Dretke, 545 U.S. 231, 125 S.Ct. 2317 (2005). This claim has nothing to do with an alleged Brady violation, withheld evidence or an impediment external to the defense.

Claim 6 alleges a Brady violation for failing to fully disclose inducements and impeachment information on Jesus Cintron and Phyllis Fineberg. The State agrees that it has a constitutional obligation to disclose material exculpatory and impeachment evidence. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). Even assuming Defendant has uncovered additional new facts since the issue was last raised and denied in this case, Defendant knew of these new allegations at least as early as April of 2005 when the federal public defender furnished these same claims and supporting documentation to Chris Oram who filed them in Defendant's other murder case (C126427) on June 18, 2005.

For a full year and a half from April of 2005 until October of 2006, Defendant has no explanation for failing to raise the claims in this case other than that he was exercising due diligence and litigating his claims in federal court. However, pursuit of federal remedies does not constitute good cause to overcome state procedural bars. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989). The value and materiality of the alleged new impeachment information is extremely limited and is cumulative to what has been known all along. There is no reasonable possibility that the claimed evidence would have affected the judgment of the trier of fact, and thus the outcome of the trial.

Claim 23 is a challenge to the lethal injection protocol. Defendant's attorney admits he received a copy of the prison's execution protocol in April of 2006, but offers no

explanation or good cause for delaying a full year and a half before raising the claim in state court in October of 2007.

D. Good Cause – Ineffective Assistance of Post-Conviction Counsel

Defendant alleges that ineffective assistance of his post-conviction counsel constitutes good cause for not raising many of his claims previously. The State agrees that as a death row petitioner, Defendant had a right to effective assistance of counsel in his first post-conviction proceeding, so he may raise claims of ineffective assistance of post-conviction counsel in a successive petition. See McNelton v. State, 115 Nev. 296, 416 n.5, 990 P.2d 1263, 1276 n.5 (1999); Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997). However, he must raise these matters in a reasonable time to avoid application of procedural default rules. See Pellegrini v. State, 117 Nev. 860, 869-70, 34 P.3d 519, 525-26 (2001) (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim of ineffective assistance of his post-conviction counsel must itself be timely raised:

> 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.

State v. District Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005).

Defendant waited more than five years after conclusion of his first post-conviction proceedings in April of 2002 to file the instant petition. Instead of timely filing a successive state petition to challenge the effectiveness of his first post-conviction counsel, Defendant proceeded to federal court where he initiated his federal habeas case on October 15, 2003, in

case 2:03-cv-01293-LRH-RJJ. Even then, Defendant waited an additional four (4) years before returning to state court to file the instant petition.

The fatal flaw in Defendant's current petition is that he can not demonstrate good cause for this delay. Pursuit of federal remedies does not constitute good cause to overcome state procedural bars. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989). In Colley, the defendant argued that he appropriately refrained from filing a state habeas petition during the four years he pursued a federal writ of habeas corpus. The Nevada Supreme Court disagreed:

> Should we allow Colley's post-conviction relief proceeding to go forward, we would encourage offenders to file groundless petitions for federal habeas corpus relief, secure in the knowledge that a petition for post-conviction relief remained indefinitely available to them. This situation would prejudice both the accused and the State since the interest of both the petitioner and the government are best served if post-conviction claims are raised while the evidence is still fresh.

Id. The state procedural rules simply do not afford a petitioner the luxury of federal counsel and an investigation before being required to bring state claims. Accordingly, no matter how diligent and expansive the federal investigation may have been, it does not constitute good cause as a matter of law.

Defendant maintains that he has been "diligent" in "discovering" his claims. This is irrelevant. The time bars in NRS 34.726 and 34.810 do not begin running from "discovery" of a claim. There was no impediment external to the defense which prevented the Defendant from discovering and timely raising his claims of ineffective assistance of post-conviction counsel in a timely manner. The purpose of the one-year time bar is to require petitioners to investigate, discover and raise all their claims within one year or be forever barred.

State procedural bars operate independent of federal rules and the federal remand order was not a prerequisite to filing a state petition. The federal public defender can and does file ancillary state habeas petitions without waiting for a federal remand order. Defendant has also cited no authority that Nevada's procedural bars are subject to "tolling"

of any kind. Under Colley, the delay occasioned by Defendant's voluntary choice to pursue federal relief to the exclusion of state habeas remedies simply does not constitute good cause.

E. Good Cause – Ineffective Assistance of Trial and Appellate Counsel

Claims of ineffective assistance of both trial and appellate counsel must be raised in the first post-conviction proceeding or they are barred. NRS 34.726; NRS 34.810. Defendant must allege some other good cause for why such claims are being raised for the first time eight (8) years after issuance of remittitur. The fact that such claims may be "meritorious" is potentially relevant to showing prejudice, but does not in anyway supply the necessary good cause explanation for why they were not raised previously. Without a showing of good cause, the merit of such claims is of no consequence.

F. Good Cause – Cumulative Error

Certainly, cumulative error may be considered when conducting a harmless error analysis. But this has very little to do with showing good cause and prejudice to overcome procedural bars. Potentially relevant to showing prejudice, a cumulative error analysis does not in anyway supply the necessary good cause explanation before the claims can be considered on the merits.

G. Lethal Injection Protocol

A challenge to the lethal injection protocol is not cognizable in a petition for writ of habeas corpus because it neither requests relief from a judgment of conviction nor a sentence. NRS 34.720. Defendant is not claiming that lethal injection itself is unconstitutional, but only that the way in which he anticipates it will be administered to him at some unknown future date will be unconstitutional. Defendant's sentence of death by lethal injection remains lawful and entirely unaffected by such a challenge. The only thing conceivably implicated is the actual execution protocol which is selected by the Director of

the Department of Corrections and can be changed at any time. NRS 176.355.

That is why current challenges to lethal injection protocols in other jurisdictions have been raised by way of federal civil rights actions or requests for declaratory relief when an execution date has been scheduled. See e.g., Baze v. Rees, 217 S.W.3d 207 (Ky. 2006) (action initiated by request for declaratory relief); Hill v. McDonough, 126 S.Ct. 2096 (2006) (death row inmate may bring a §1983 action against state corrections officials challenging, as cruel and unusual, a particular method of lethal injection planned for his execution). Defendant can not direct this court to any case where execution protocols have been successfully raised in a post-conviction petition. Additionally, if and when Defendant's execution ever becomes imminent, it is likely that the protocols in effect at that time will be different, making such a challenge at this time either moot or not ripe for adjudication.

H. Application of Procedural Bars

The Nevada Supreme Court has repeatedly upheld Nevada's procedural bars against attacks that they are unconstitutional or are applied in an arbitrary and capricious manner. See Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001). The latest word in this line of cases came in 2005 when the Court again held that the bars are mandatory and have been consistently applied. State v. Dist. Ct. (Riker), 121 Nev. 225, 112 P.3d 1070 (2005). Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory. Id. Thus, Defendant's assertion in this regard has been soundly and repeatedly rejected by the Nevada Supreme Court. Whether federal courts agree or not that the bars have been consistently applied in the past, does not relieve this court from its obligation to follow Nevada Supreme Court precedent and apply the bars in this case.

I. No Need for an Evidentiary Hearing

A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief, unless the factual allegations are belied by the record. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603,

605 (1994). "The judge or justice, upon review of the return, answer, and all supporting documents which are filed, shall determine whether an evidentiary hearing is required." NRS 34.770(1). However, "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record." Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984); *citing* Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981).

Even assuming all of Defendant's factual allegations are true, Defendant still would not be entitled to relief on his petition. Defendant's stated need for an evidentiary hearing in order to demonstrate good cause and prejudice to overcome the procedural bars is contrary to law. Defendant must first make an allegation of good cause and prejudice which if true would not only overcome the procedural bars but would also entitle him to relief as in a new trial or penalty hearing. As argued above, none of Defendant's allegations rise to this level.

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CONCLUSION

Defendant fails to allege good cause for the bringing of a successive petition at this late date. Neither intervening case law, nor alleged Brady violations, nor the ineffective assistance of post-conviction counsel constitute good cause in the present case for the delay in bringing a successive petition. Defendant caused the delay himself by electing to pursue federal relief before exhausting his state remedies. Because the five (5) year delay between the first and second post-conviction proceedings was not due to any impediment external to the defense, this successive petition must be denied.

DATED this 11th day of March, 2008.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

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CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of REPLY TO OPPOSITION TO MOTION TO DISMSS, was made this 11th day of March, 2008, by facsimile transmission to:

David Anthony
Heather Fraley
Assistant Federal Public Defenders
FAX # (702) 388-5819

Eileen Davis

Employee for the District Attorney's Office

SSO/ed

DA, HF, HW, CS

OFFICE OF THE DISTRICT ATTORNEY
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SUBJECT: Greg Leonard, C126285

DATE: March 11, 2008

NO. OF PAGES, EXCLUDING COVER PAGE: ___13____
Please call (702) 671-2750 if there are any problems with transmission

EXHIBIT 330

EXHIBIT 330

MLopez-08050-PLDG0001

FILED

2008 FEB 15 P 3:31

CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
MANUEL SAUCEDO LOPEZ,
Defendant.

Case No. C 068946
Dept No. I

NOTICE OF MOTION AND MOTION TO DISMISS DEFENDANT'S THIRD STATE PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: April 9, 2008

~~TIME OF HEARING: 9:00 AM~~

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through NANCY A. BECKER, Deputy District Attorney, and files this Notice of Motion and Motion To Dismiss Defendant's Third State Petition for Writ of Habeas Corpus (Post-Conviction).

This Motion is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

NOTICE OF HEARING

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing motion on for setting before the above entitled Court, in Department I thereof, on Wednesday, the 9th day of April, 2008, at the hour of 9:00 o'clock AM, or as

soon thereafter as counsel may be heard.

DATED this 15 day of February, 2008.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
NANCY A. BECKER
Deputy District Attorney
Nevada Bar #00145

POINTS AND AUTHORITIES

Twenty-Two years ago, defendant Manuel Lopez was convicted of First Degree Murder by Torture. He killed his four-year old step-daughter Jessica Cevallos. Jessica was beaten, hung by her hair, and severally burned by scalding hot water all in the course of a few weeks. As result of the abuse and torture, Jessica developed a stress ulcer in her duodenum. The ulcer eroded the duodenum, causing peritonitis and a slow, painful death.

The egregious abuse and torture of Jessica formed the basis for the jury's guilty verdict and sentence of death, a sentence that has been upheld on direct appeal from the conviction as well as appeals from two state petitions for post-conviction relief. This is Defendant's third state petition for post-conviction relief and the State asserts the Petition is procedurally barred under NRS 34.726 (one year rule - untimely), NRS 34.810(2) (successive/abusive petition) and NRS 34.810(1)(b) (waiver – failure to raise in previous proceeding). In addition, the State contends the Petition is subject to dismissal under NRS 34.800 (laches). Finally, the majority of Defendant's claims are prohibited by the Law of the Case Doctrine, having previously been decided on their merits. Defendant alleges several grounds for excusing the procedural bars. The State submits no grounds exist and that the Petition should be dismissed in its entirety.

Before considering the individual claims, and to put the factual background in proper

prosepective, a review of the applicable bars and Nevada case law on this issue is warranted. First, procedural bars are timeframes established by the Legislature to curb repetitive post-conviction pleadings. In Nevada, they can be found at NRS 34.726 (1 year time bar), NRS 34.800 (5-year laches), NRS 34.810(1)(b) (waiver - failure to previously raise), NRS 34.810(2) (successive or abusive petition).

Procedural bars are not discretionary with a court and cannot be ignored. Riker v. State, 121 Nev. 255, ___, 112 P.3d 1070, 1075 (2005). As the Nevada Supreme Court noted in Pellegrini v. State, 117 Nev. 860, 34 P.3d 519, 530 (2001), "the legislative history of the habeas statutes shows that Nevada's lawmakers never intended for petitioners to have multiple opportunities to obtain post-conviction relief absent extraordinary circumstances." Furthermore, legislative imposition of statutory time limits "evinces intolerance toward perpetual filing of petitions for relief, which clogs the court system and undermines the finality of convictions." Id. 34 P.3d at 529. Defendants are entitled to "one time through the system absent extraordinary circumstances" Id. "Where the intention of the Legislature is clear, it is the duty of the court to give effect to such intention and to construe the language of the statute so as to give it force and not nullify its manifest purpose." Woofter v. O'Donnell, 91 Nev. 756, 762, 542, P.2d 1396, 1400 (1975); see also Pellegrini v. State, 117 Nev. 860, 34 P.3d 519, 528-529 (2001).

NRS 34.726 and NRS 34.810 provide that a court shall dismiss petitions or claims that violate the statute. NRS 34.800 provides that a court may dismiss a petition, but then establishes a presumption that the State is prejudiced when a petition is brought more than five years after the direct appeal and the petition should be dismissed.

Nevada recognizes two grounds for excusing procedural bars. The defendant must prove specific facts that 1) demonstrate good cause for the delay in bringing the claims and undue prejudice or 2) the failure to consider the petition will result in a fundamental miscarriage of justice. Mazzan v Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996)(Mazzan I).

The Nevada Supreme Court defines "good cause" under the statutes as "an

impediment external to the defense which prevented [the petitioner] from complying with the state procedural rules." Crump v. Warden, 113 Nev. 293, 934 P.2d 247, 252 (1997); see also Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), quoting State v. Estencion, 625 P.2d 1040, 1042 (Haw. 1981)("Good cause" under NRS 34.726 "means a substantial reason; one that affords a legal excuse."). However, even when an external impediment exists that might constitute good cause for failure to raise a claim at an earlier proceeding; the claim must still be raised in a timely fashion once it is discovered. For example, a claim of ineffective assistance of counsel would excuse the failure to raise a claim at trial or on appeal, but the ineffective assistance of counsel claim must be timely raised. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3rd 503, 506 (2003)(footnotes omitted).

Undue prejudice is defined as "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions" United States v. Frady, 456 U.S. 152, 170 (1982)(cited in Bejarano v. State, ___Nev.___,146 P3d. 265 (2006).

A fundamental miscarriage of justice occurs "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 488 (1986). Actual innocence means factual innocence not mere legal insufficiency. Bousley v. United States, 523 U.S. 614, 623 (1998). A defendant claiming actual innocence must demonstrate that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3rd 519, 537 (2001).

In addition, the Nevada Supreme Court has ruled that Nevada's procedural bars are consistently enforced and the district courts are not free to ignore them. Riker, 112 P2d at 1076-77. Moreover, the High Court has reiterated that court rules or case law governing appellate practice are not procedural bars and should not be used as evidence that procedural bars are not uniformly enforced. Riker at 1077-82. Cases and orders reflecting an appellate court's decision not to apply a general court rule or policy have no bearing on issues relating to statutory procedural bars. Id.

Finally, the Law of the Case Doctrine operates independently of statutory procedural bars. Thus a claim may be governed by the Law of the Case Doctrine even if it is not procedurally barred. Where an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue will not be revisited. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001); see McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); see also Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993). The law of a first appeal is the law of the case in all later appeals in which the facts are substantially the same; this doctrine cannot be avoided by more detailed and precisely focused argument. Hall, supra; see also McNelton, supra; Hogan, supra.

Before discussing why the various procedural bars and the law of the case doctrine mandate the dismissal of the claims set forth in this Petition, it is important for the Court to understand what has taken place over the past two decades. To facilitate this, the State has condensed the thousands of pages of pleadings and transcripts into one Statement of the Facts.[1] The Statement encompasses the pre-trial, trial, post-trial and post-conviction testimony and history in chronological order.

Factual Background

This is a case involving extreme physical abuse and torture of Jessica, a four-year old girl, who was visiting her mother for a few weeks from approximately mid-November, 1984 until her death on January 10, 1985. What should have been a season of joy became a nightmare.

Previous to November of 1984, Jessica lived with her grandmother in Tijuana, Mexico. She came to Las Vegas to visit her mother. RA 2, 853. She was a healthy, happy child who had a bed-wetting problem. RA 3, 1060-16. During her visit, Jessica lived with

[1] For the Court's convenience, the State has attached an index that contains the trial and evidentiary hearing transcripts as well as pleadings. In addition, the State has compiled in single volumes, the statements and testimony of primary witnesses so that the Court need not search through multiple files or microfiche documents. Unless otherwise stated all citations are to Respondent's Index. Pages are marked with RA and cited as "RA" followed by the volume and page numbers. Where citation is made to Petitioner's Exhibits, the State has used "PE" and the exhibit number.

her mother, Maria; her step-father, Defendant and her brothers, Victor (2 years) and Francisco (newborn). RA 9, 2969.

A. Arrest

On January 11, 1985 at approximately 7:00 a.m., the North Las Vegas Fire Department received a phone call concerning a sick child. Upon responding, firefighters were met by a number of Hispanic individuals in a small two-bedroom apartment located on Belmont Street. Firefighters were directed to a bedroom where they discovered Jessica lying on a bed, deceased. She had substantial obvious bruising to her face and had been deased for a number of hours. When firefighters removed a portion of her clothing to check for additional injuries, they found she had significant first and second degree burns on her legs and feet, as well as additional bruises. RA 2, 644-650

Firefighters asked about Jessica's parents and were told that her parents were in Tijuana.[2] Eventually they learned that Maria and Manual were Jessica's parents. When asked what happened to Jessica, Maria and Manual told firefighters, and later the police, that Jessica had fallen off a slide about three days earlier. Id

Recognizing that Jessica's injuries were not caused by a playground accident, the fire officials called the North Las Vegas Police Department to report suspected child abuse and homicide. Detective Randolph Wohlers was assigned to the case. He arrived at the scene around 8:10 a.m. After viewing Jessica's body, he classified the case as a homicide investigation. At the scene, both Defendant and Maria maintained that Jessica fell off a slide. Maria and Defendant were transported to the North Las Vegas Police Headquarters and placed in separate rooms. A Spanish speaking police officer, Sgt. Jose Tronosco was summoned to assist in interviewing Maria and Manual.[3] RA 4, 1486-89; PE 117

Maria was initially afraid to talk to Detective Wohler. When asked why she was afraid she indicated she was afraid her children would be taken away because she was an

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[2] The conversations were translated between English and Spanish by a teenage boy, later identified as the Defendant's younger brother Jose.

[3] Maria spoke almost no English and Manuel, although more fluent, still had some English language difficulties.

illegal alien and without Defendant how would she support her children and herself. Detective Wohler explained that there were government people who would assist her with food and housing, she would not be separated from her children simply because she entered the country illegally and he would help her fill out paperwork to request permission to remain in the United States, but made no promises or guarantees that permission would be granted. RA 12, 3775-79. He also told Maria this was not Mexico and the government helped people in the United States. Wohler offered to aid Maria in obtaining the forms or referrals she needed to obtain public benefits, but no promises that Maria would actually receive any public benefits or that benefits would be conditioned upon her cooperating with the police. RA 12, 3784-88.

As a result of their discussion, Maria gave a formal statement in which she told Detective Wohler that Defendant beat Jessica with a belt because she wet the bed and soiled herself. RA 9, 2953-54, 2955. As to the burns, Maria indicated that Jessica woke Maria up one morning after Defendant had left for work. Jessica told Maria that Defendant poured hot water on Jessica's feet. Maria went to the bathroom and found with pieces of skin falling off the tub and examined Jessica's burns. When Maria confronted Defendant about the burns, he denied any involvement. Maria put burn ointment on Jessica. Maria thought this occurred about two days after Francisco's birth, which would be approximately December 28, 1985. RA 9, 2953.

She also discussed Defendant's abuse of her and that she was afraid of him. RA 9, 2954. Whenever she tried to speak up or disagree with him, he would hit her. Maria stated that she did not speak English amd she knew no one in Las Vegas other than her aunt and uncle and Defendant's family. RA 9, 2956. Finally she indicated no one had threatened her into making a statement. RA 9, 2957.

Later in the afternoon, Detective Wohler interviewed Defendant. Defendant initially indicated he would talk to the police. He stated that Jessica was burned accidentally. Manual indicated that he had been taking a shower and when he got done, he told Jessica to shower. She went into the bathroom, closed the door and then came out screaming.

Defendant said this happened around December 26th or 27th. He said that Jessica's facial bruises were caused when she fell off a slide and he denied any knowledge of the bruises on the remainder of Jessica's body. Defendant told Detective Wohler that Maria was responsible for disciplining Jessica and that he only used verbal discipline. When told that his statement did not make sense given Jessica's injuries. Defendant exclaimed "Go ahead and shoot and kill me. I know you want to. I deserve it. I have nothing to live for,"[4] Defendant then declined to make a formal statement and requested a lawyer. RA 4, 1486-89; PE 116.

Based upon these conversations, Detective Wohler believed he had probable cause to arrest Defendant and Maria on separate charges relating to Jessica's death. He consulted with Dan Bowman, a deputy district attorney, about charging options. RA 12, 3781. Upon receiving Mr. Bowman's input, Defendant was arrest on charges of murder and child abuse while Maria was charged with child neglect resulting in death and accessory after the fact for the murder. RA 12, 3794, PE 32.

On January 17, 1985, Detective Wohler conducted a second interview of Maria. In the interim between January 11th and the second interview, Maria spoke to an attorney representing Defendant. The attorney instructed her not to talk to the police again. However Maria indicated she had information she had not discussed in her first statement and she wanted the police to know about it. RA 9, 2958.

Maria described additional instances in which Defendant abused Jessica. Maria indicated that when Jessica soiled her pants, Defendant would bang her head in the toilet illustrating this is where people go and calling Jessica an animal. RA 9, 2959. He would also hang Jessica by her hair, and an extension cord, from a plant hook that normally contained a macramé plant holder. RA 9, 2958-59. Maria described another incident where Defendant tied Jessica up in a shed and when Maria snuck out to free her, Defendant beat Maria. RA 9, 2959.

In addition, on New Years' eve or day, Jessica was left in the house by herself. When

[4] Defendant denies making the statement and claims he said: "Go ahead and kill me if you think I did it" RA 3, 964.

Maria came back from a party at her in-laws's house, she found Maria tied up with electrical cords in a closet. RA 9, 2959. Jessica told Maria that Defendant had come home earlier, tied her up and hung her by her hair in the closet, but the hook broke and she landed at the bottom of the closet. Maria also stated that, the night before Jessica was discovered dead, Defendant grabbed Jessica by the hair and threw her against a wall, banging her head. RA 9, 2959. Defendant also used a belt on Jessica. RA 9, 2960-61. Maria gave a different date for the scalding incident, saying it occurred while she was in the hospital having Francisco. Maria indicated Jessica also told her that Defendant had forced her to sit in the hot water because she had pooped in the bed. Id. Maria reiterated that she was afraid to tell anyone and noted that at times when Defendant left the home he would disconnect the phone. RA 9, 2961. Maria also stated that, at Defendant's urging, she told Defendant's family that Jessica was a cousin rather than her daughter. RA 9, 2962.

Detective Wohler had Maria sign a consent to search form for her apartment. A warrant was also obtained. Detective Wohler and others searched the apartment on January 18, 1985. In the kitchen and bathroom wastepaper baskets, he discovered clumps of hair. In a basket on the floor of a bedroom closet, he recovered a brown extension cord with hair attached and in the bathroom he discovered a red and white spliced electrical cord with hair intertwined in it. In the kitchen, Detective Wohler recovered a macramé hanger with hair tangled in it and in a kitchen drawer he found a belt with a single hair fiber attached. An examination of the closet where Maria said she discovered Jessica showed the shelving brace had been bent consistent with Jessica's statement that Defendant hung her from the bracket until it broke. Numerous photographs of the apartment and the recovered evidence were taken. RA 12, 3580-87.

Deputy District Attorneys Dan Seaton and Ray Jeffers were assigned to prosecute the case. Upon reviewing Maria's statement and the physical evidence, Mr. Jeffers filed an ex parte motion, on January 21, 1985, requesting that Maria be granted complete immunity for her part in Jessica's death. The motion was granted. Also on January 21st, Mr. Jeffers talked to the Immigration and Naturalization Service about Maria's status as an illegal alien and

had Detective Wohlers transport Maria from jail to the INS offices to complete forms permitting her to remain in the United States pending the trial. RA 9, 2992-93; PE 43-47.

Finally, DDA's Seaton and Jeffers obtained a material witness warrant on Maria. The warrant was obtained as a precaution should Maria attempt to leave the jurisdiction, but was never served as she remained with her uncle and aunt in Las Vegas. There is no indication anywhere in the record that Maria was aware of the warrant. The pleadings requesting the warrant were filed with the district court on January 22, 1985. PE 49-53.

B. Grand Jury

On January 22, 1985, Maria testified at a grand jury proceeding. At the time, Maria was represented by attorneys Bob Miller and Rick Alswede of the Clark County Public Defender's Office. The Grand Jury was informed that Maria was given complete immunity from any criminal charges arising out of Jessica's death. Maria testified that no one threatened her since she's been in jail. RA 9, 2965; RA 3, 1080-81.

Maria indicated that Jessica was in good health when she came from Mexico. RA 9, 2972. Maria hoped Jessica's visit would become permanent. RA 9, 2990. Things were fine for a couple of weeks and Defendant treated Jessica well. RA 9, 2972. However matters deteriorated as Defendant became increasingly frustrated with Jessica's bedwetting.

Maria testified that Defendant used a belt to tie Jessica up in the closet. He also beat Jessica with the belt all over her body, but especially in the back, arms and legs. RA 9, 2968. He would remove the macramé plant holder from its hook and hang Jessica by her hair and an extension cord from the hook. RA 9, 2969. Maria indicated when she was released from the hospital after giving birth to Francisco, Jessica had bruises all over her body, but she didn't see any burns. RA 9, 2974.[5]

About two days later, Maria indicated she woke up after Defendant had gone to work because Jessica was crying in the bathroom. She found Jessica burned in the tub. She

[5] As will be seen with the trial testimony, Maria gave three different time periods for the scalding. Between her statements, the Grand Jury testimony and trial testimony, Maria indicated the scalding occurred when she was in the hospital (December 26, 1984), two days after she left the hospital (December 28, 1984) and the morning Manuel went to work but returned early due to rain, which, according to National Weather Service information introduced at trial, would be January 6, 1985. RA 9, 2960; RA 9, 2974; RA 3, 1073-75, 1082; RA 4, 1149-50, 1178, 1182, 1450-64.

removed the child and put cream on her. Maria stated that when she asked what happened, Jessica said that Defendant put hot water on her because she urinated in bed. She tried to get up but Defendant won't let her. RA 9, 2975-76.

Maria indicated she was scared of Defendant because he would hit her when she tried to stop him and that's why she didn't do anything about Jessica. Maria testified that Defendant would tamper with the telephone and she had no money as additional reasons why she failed to act. RA 9, 2977; 2984; 2987, 2988. Maria also discussed Defendant beating Jessica the night of her death (RA 9, 2984) and she identified an electrical cord found in a closet basket as one used to tie Jessica up. RA 9, 2982-83. Finally Maria indicated she was ashamed of Jessica's condition and she was afraid of what would happen if she sent Jessica back to Mexico in that condition. Id. Although Maria knew about the concept of battered women's shelters because there were some in Los Angeles, she was unaware that any such facilities existed in Las Vegas. RA 9, 2992.

In addition to Maria's testimony, the Grand Jury was presented with evidence from Dr. James Clark, the pathologist who performed the autopsy, Dan Berkabile, a NLVPD laboratory analyst and Detective Wohler.

Dr. Clark indicated that Jessica had 1st and 2nd degree burns on her lower legs, feet and buttocks as well as numerous bruises of various duration. The burns were recent in origin, probably a few days old as there was little or no scabbing or crusting. The doctor also indicated that the ointment Maria used on the burns would not deter scabbing or crusting or affect his opinion regarding the age of the burns. Dr. Clark indicated cause of death as a stress ulcer followed by peritonitis and that the ulcer was the result of the burns and beatings. Because the bruising and burns marks were inconsistent with accidental infliction, Dr. Clark ruled the death a homicide.[6]

Mr. Berkabile performed comparison analyses between the hairs recovered from the apartment and known hair samples of the five occupants of the apartment, Maria and

[6] Dr. Clark's Grand Jury testimony is not included in the Index, since there was only one area where his testimony was disputed and that is addressed in the trial transcripts later in this motion.

Defendant Lopez and the three children, Jessica, Victor and Francisco. He found that the hair samples taken from wastepaper baskets, a brown electrical/extension cord, a belt and a macramé plant holder were consistent with Jessica's hair and inconsistent with Maria, Defendant, Victor and Franciscos' hair. He indicated hair found intwined in a red/white electrical cord were not consistent with Jessica's hair. RA 12, 3800-3808.

Finally, Detective Wohler testified regarding his interviews with Maria and Defendant as stated above and the items recovered from the apartment. RA 12, 3572.

Although the Grand Jury expressed displeasure with the decision to grant Maria immunity as they believed she should have done something to protect Jessica, they returned a true bill against Defendant for Murder.

C. Pre-Trial Proceedings

The Defendant was arraigned, entered a plea of not guilty to the indictment and requested additional time to file a pre-trial petition for a writ of habeas corpus. The writ was filed on February 28, 1985. The writ raised two issues: the indictment was based on uncorroborated accomplice testimony and the district court improperly granted immunity to Maria.[7]

Defendant argued that Maria was "liable to prosecution, for the identical offense charged against the defendant" pursuant to NRS 175.291(2), i.e. murder, and therefore an accomplice. The State responded by indicating, based upon the physical evidence and Maria's statements, there was no probable cause to charge Maria for murder, because failure to report Defendant's abuse of Jessica was not aiding and abetting murder, only child neglect, citing to *Globensky v. State*, 96 Nev. 113 (1980).

As to immunity, the Defendant asserted that immunity may not be granted if the testimony would subject a person to prosecution in another state or the United States. The Defendant claimed Maria was subject to prosecution under 18 USC § 241 (conspiracy to prevent persons from exercising their rights under the Constitution). The State responded

[7] The pleadings relating to this issue have not been included in the index. They were filed on February 28, 1985. The hearing on the writ and the district court's decision are available electronically on Blackstone. Reporter's Transcript March 14, 1985.

that the federal statute did not apply.

The district court denied the writ. The issue was raised on direct appeal from the judgment of conviction and found to be without merit.

The Defendant filed motions seeking information in advance on the jury panel, use of a written jury questionnaire, use of the services of a clinical psychologist during voir dire, limiting death qualified jurors during guilt phase and enlargement in the number of pre-emptory challenges. Defendant also filed a discovery motion, asking for, among other things, hair analysis reports and any record of convictions on the State's witnesses. PE 1.

D. Trial[8]

1. Opening Statements

At trial, the State argued that Maria was a young woman from a background of extreme poverty and abuse who had married into an abusive relationship. RA 2, 590. Defendant did not want to support another man's child, so Jessica was sent to live with her grandmother. RA 2, 591. Although Defendant hit her occasionally, Maria accepted it as "normal" given her background, illiteracy, illegal status and the isolation created by her language barrier. RA 2, 592.

Although initially the visit was going well, Defendant became increasingly frustrated by Jessica's bedwetting and began beating her and hanging her by her hair. RA 2, 592, 595, 597. When Maria tried to intervene, she too was beaten. RA 2, 602. Defendant's "discipline" of Jessica increased in severity until the morning when he filled the tub with scalding hot water and held Jessica in it. RA 2, 597, 601. The stress and pain created the ulcer and peritonitis that resulted in her death. RA 2, 6022.

The State also emphasized that Maria's inaction was caused by her fear of Defendant and his controlling nature. In addition she believed, and Defendant encouraged the belief,

[8] Shortly after trial began, DDA Jeffers presented Defendant with notes of Ted Salazar, an individual employed by the District Attorney's Office to interpret. DDA Jeffers indicated to the court that he was not aware that Mr. Salazar, a drug and alcohol abuse counselor, was seeing Maria as a counselor as well as acting as interpreter, so he was unaware of the clinical notes Mr. Salazar had made until that day. The record reflects DDA Jeffers was present when Mr. Salazar was translating for an expert hired by the State, Dr. Paul Strauss and probably observed Mr. Salazar making notes while he interpreted, but DDA Jeffers representation to the court appears to be that he was unaware of the nature of the notes, i.e clinical versus translating aides.

that, as she had no money, could not drive, did not speak English, was an illegal alien and had no education, no one would believe her and she would be deported to Mexico without the children. RA 2, 602.

In contrast, the Defendant argued that Maria was lying and that Jessica's injuries were inflicted by Maria herself. RA 2, 609-611. Maria allegedly hated Jessica and was observed by Defendant's relatives to verbally abuse Jessica, while Defendant was described a loving and caring person who would never harm a child. RA 2, 611-12. The Defendant pointed out perceived inconsistencies in Maria's statements; that Jessica was never seen playing, even when Defendant was at work and that Maria had been given immunity allegedly in exchange for her testimony. RA 2, 605-06, 611.

2. State's Case-in-Chief

Dr. James Clark described Jessica's injuries, giving more detail than that presented to the Grand Jury. He indicated that Jessica had extensive 2nd degree burns on her right foot and leg up to the knee, with 1st degree burns on the inner side of the knee. She had 2nd degree burns on her buttocks, genitalia, left ankle, anus and left foot. Pictures of the burns show an almost straight line demarcation between burned areas on the backs of her legs and the unburned areas on the top of her legs. There were no burns on her arms, back, or torso. RA 2, 618-19. Dr. Clark estimated that the burns were not recent, but were at least three days old and could be up to a week as salve that had been applied might affect natural scabbing and crusting.[9] RA 2, 624-25.

Dr. Clark testified that Jessica had two parallel bruises on the inner surface of her left thigh, consistent with a heavy blow by a belt. RA 2, 620. Jessica's right hip, left buttock, left upper abdomen, left anterior chest and arms had severe bruising. She had extensive hemorrages under her scalp and bruises under her chin, two black eyes, left side of her forehead and a swollen upper lip. RA 2, 620-21. Finally, on her upper arms, she had finger mark appearing bruises suggesting she had been forcibly held. RA 2, 621-22. Dr. Clark

[9] This differed from his Grand Jury testimony where he indicated the ointment would have no affect on the burns healing process, however his opinion that the burns were probably around three days old remained the same in both proceedings.

indicated the bruises ranged in age, with the most recent being 3 to 4 days old. RA 2, 622. The bruising was the result of blunt force trauma. RA 2, 620-22, 626. Dr. Clark also noted that a clump of hair was missing from Jessica's scalp. RA 2, 620.

According to Dr. Clark's findings, the trauma caused by the massive burns and/or impacts caused a stress ulcer to develop in Jessica's duodenum, which perforated resulting in peritonitis. Jessica's death would have been slow and painful, accompanied by vomiting, dehydration and loss of appetite. RA 2, 626-28.

On cross-examination, Dr. Clark acknowledged his testimony on the affect of the salve on the burns had changed since the Grand Jury. He indicated he had consulted with colleagues and concluded the ointment would have some affect. RA 2, 631-32. He indicated some of the swelling in the face had subsided and some still existed, but he would have expected more swelling if Jessica's face had been banged against a wall within twelve to twenty hours before her death. RA 2, 633-34. Dr. Clark also admitted he did not initially document a bald spot on Jessica's head where hair had been pulled out, but noted that it was visible in the autopsy tape, which he viewed prior to testifying. RA 2, 634, 638. He noted no bruises were found on Jessica's wrists that would be characteristic of being tied with a rope, belt or electrical cord, but that such bruises would not be visible if they occurred more than eleven days earlier. RA 2, 636-37.

Captain William Jepson of the North Las Vegas Fire Department testified to his observations of Jessica's body when he arrived at the scene and the obvious fact that Jessica was dead and severally bruised about the head. RA 2, 644. He also indicated, when he lifted one pants leg, it was clear this was a criminal matter and that the injuries could not have been caused by a fall from a slide as he had been told. RA 2, 645, 648-50. He stated that when he first asked about the little girl's parents, he was told she had come from Tijuana about two months ago and her parents were still there. RA 2, 647.

Three neighbors of the Lopez family, who lived in apartments with adjacent walls to the Lopez apartment, testified. Simon Schoettmer indicated she saw Jessica occasionally and assumed she was visiting, not living there. RA 2, 666. Schoettmer stated that she heard

arguing next door, starting after Thanksgiving of 1984. RA 2, 671-72. The fighting got louder and more frequent after Christmas. RA 2, 672-73, 684. Schoettmer testified that a male and female voice were yelling in another language (she assumed it was Spanish) and that the female voice sounded scared and the male voice was more aggressive. RA 2, 673-74. She only heard the sounds when Defendant was home. RA 2, 675. She also could here the sound of a child, not a newborn, crying. RA 2, 701-02. Finally, Schoettmer stated that, due to hearing loss problem, the sounds would have to be exceptionally loud for her to hear them. RA 2, 707-08. Schoettmer testified that the child sounded scared, rather than in pain. RA 2, 704. She also indicated that she never saw Jessica playing and that Jessica did not play with Schoettmer's little girl. RA 2, 686.

Charles Mallory testified that he was not aware that Jessica lived next door, but that when his family returned after a Thanksgiving vacation he heard loud arguing and yelling next door. RA 2, 715-17. The male voice was more intense and demanding while the female voice sounded frightened. RA 2, 724-26. He also heard a young child crying and as the yelling increased, music was turned on that covered up the argument. RA 2, 725. He thought it was a little boy crying because that was the only child he knew about, but it could have been a little girl. RA 2, 719. About four days later, he was awakened around 3:40 a.m. by a child crying, heard a loud bump on the wall, then music was turned on which drowned out the child's voice. RA 2, 720-23.

Robin Mallory noted that before Thanksgiving they did not hear any unusual noises coming from the Lopez apartment. RA 2, 756-57. However, after Thanksgiving, she said she heard fighting between a man and a woman as well as a child crying and as the argument increased, music was turned on. RA 2, 757-58. Ms. Mallory stated that around January 6, 1985, she heard a lot of fighting, screaming and banging, then loud music. RA 2, 760-62. She pounded on the wall and sent her brother over to see what was going on because she thought Defendant was hurting Maria. RA 2, 767. After the brother came back, the fighting quieted down for awhile but she could hear a small child crying. Less than an hour later, she heard screaming, yelling and kids crying. RA 2, 761-763. Shortly thereafter she saw

Defendant, Maria, and Jessica out by the shed. RA 2, 763-767. Mallory testified that the Tuesday or Wednesday before Jessica's death, Mallory heard arguing coming from the living room, bathroom and bedroom and what sounded like the slamming of drawers. RA 2, 768-69. Mallory also indicated that the male voice was the aggressor in all these incidents and the noises only occurred when Defendant was home. RA 2, 773, 787-88. The night before Jessica's death was reported, Mallory saw Defendant walking from a car to his apartment. He ignored her instead of giving her his usual smile and he appeared white, pale and scared. RA 2, 768-71, 791. Mallory acknowledged Maria did not appear bruised when she saw her and her opinion that Maria was a victim of domestic violence might have been influenced by knowledge of Jessica's death. RA 2, 776-786.

The next witness was Arturo Montez aka Montes.[10] Montez was not among the witnesses originally interviewed and endorsed by the State. According to the trial transcripts, Montez' name was given to the State as a potential witness during voir dire. Detective Wohler was asked to interview Montez. Wohler recognized the name as the victim in an unrelated burglary/grand larceny Wohler was investigating. Wohler interviewed Montez on March 29, 1985. RA 3, 991-998.

In his statement, and at trial, Montez indicated that, in November of 1984, he lived at 2309 Belmont, down the street from the Lopez family. RA 2, 795. He was living with his wife and son, a six-year old named Peter. RA 2, 796. Montez stated that his son played with Jessica and Victor. RA 2, 798-799. Montez testified that he knew Jessica's Uncle Antonio because he worked with Antonio at Caesar's Palace. He also noted that he was the godfather to Antonio's daughter. RA 2, 799, 807.

Montez testified about two incidents. He said that before Thanksgiving (he couldn't remember the date)[11] Peter and Jessica were playing in front of his house. Defendant called

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[10] It is unclear whether his last name is spelled with an 's' or a 'z'. During the course of the proceedings, he has signed affidavits, statements and receipts using both spellings. For example, at trial and in a post-trial motion, he spelled his name for the court-reporter as M-O-N-T-E-Z. RA 2, 795; RA 10, 3183; 3187, 3225, 3244, 3272, 3316-17. As the trial transcripts refer to him as Montez, that spelling is used throughout this motion.

[11] On cross-examination, Montez indicated the hair incident took place about three or four days before Thanksgiving. Probably the weekend before Thanksgiving. RI 2, 823.

Jessica to come home and when she didn't respond right away, Defendant got angry, picked Jessica up by her hair, and then took her home. Montez stated he told Defendant not to hit Jessica and Defendant told him to mind his own business. Montez also indicated on another occasion he invited the Lopez family for Thanksgiving dinner, but Defendant said no and slammed the door in Montez' face. RA 2, 800-807.

On cross-examination, Montez was extensively questioned about how his name came to the attention of the State. Montez indicated that Wohler had left cards at his home and he assumed it was about the burglary. He didn't get back to Wohler immediately, but eventually talked to him over the phone, probably on March 20th. Wohler indicated he wanted to talk to Montez about the burglary and another matter and asked Montez to come to the police station. RA 2, 811-15. Wohler obtained a statement from Montez on March 29th. DDA Seaton first interviewed Montez while jury selection was occurring. RA 2, 817-18.

Montez indicated he was separated from his wife and son and that they were now living in Michighan. RA 2, 818, 828-29, 830. He stated that he had talked to Antonio Cevallos, Jessica's uncle, sometime around Jessica's funeral and that he discussed what he'd seen with Antonio. According to Montez, Antonio was going to talk to a detective about it. Montez indicated he never saw Antonio after Jessica's funeral. Montez also stated that on the day he saw Defendant pull Jessica up by her hair, he tried to talk to Antonio, but Antonio wasn't home, he was in the hospital or a doctor's appointment. RA 2, 827-29 The nature of the cross-examination questions were intended to infer that Montez had made up the story about what he observed between Jessica and Defendant, possibly at the suggestion of Uncle Antonio.

Detective Wohlers testified, consistent with his grand jury testimony, regarding his observations of Jessica's injuries and his conversations with Maria and Defendant at their apartment. RA 3, 882. He identified various items of physical evidence recovered from, or photographs taken of, the apartment during the January 18th search, including the bent shelf brace, the belt, the clumps of hair found in the wastepaper baskets, the macramé holder, the brown extension cord and the red/white electrical cord. The evidence was admitted. RA 3,

847-860; 863-870. Detective Wohlers also testified on water temperature measurements he took on January 19th or 20th. RA 3, 859-62.

Detective Wohlers discussed his interviews with Maria and Defendant on January 11th. He stated that Maria's interview was done about 2 to 3 hours after she arrived at the NLVPD headquarters and Defendant's was probably over four hours after he arrived. Detective Wohlers indicated Maria was scared and reluctant to talk to him initially. RA 882, 884. She was concerned that she would be deported and separated from the children. RA 3, 883. Detective Wohler also testified to Defendant's statements made before he invoked his Fifth Amendment rights. RA 3, 884.

On cross-examination, Detective Wohler was asked about his failure to secure the apartment and the fact that other people had been in the apartment between January 11th and the execution of the search warrant on January 18th. RA 3, 935-36; 961-62. He also admitted that he took no statements from the Lopez family and that he did not make a tape recording of Defendant's initial statements. RA 3, 977-81; 940. Detective Wohler indicated that he only officially records what he calls a formal statement. He talks to witnesses or suspects and if they have information he deems pertinent to the investigation, he then asks them to make a formal statement which is recorded. He stated for suspects, he gives them Miranda warnings, does an informal pre-interview and then the recorded formal statement, unless they invoke. RA 3, 938-39.

Detective Wohler was also asked about why he waited six days between his initial interview of Maria and his second interview. He replied he was off-duty for a few days and had other cases and he didn't see any urgency. RA 3, 942-43.

With respect to Mr. Montez, Detective Wohler said he was trying to contact Montez before the trial because Montez had reported being the victim of a grand larceny. RA 3, 991-94. About ten days before Detective Wohler's testimony, he was contacted by the district attorney's office and told that Montez had information on the Lopez case. Detective Wohler indicated his understanding that Montez had contacted another witness, or someone connected to the case, and that this person apparently brought Montez' name to the attention

of the District Attorney's Office. RA 3, 994-97. Wohler acknowledged that it was curious that Montez was the only neighbor who reported Jessica playing, but he had no reason to disbelieve Montez' and took Montez' statement at face value. RA 997-98.

Dan Berkabile was the next witness. As with Dr. Clark, his testimony was an expanded version of his Grand Jury testimony. He stated his experience and explained how hair comparison analysis is done using a number of characteristics found in human hair. RA 3, 1007-10. If two hair samples have enough matching characteristics, an expert can opine that they are similar and therefore could have come from the same source and conversely, if they are dissimilar, they would be excluded as coming from the same source. RA 3, 1010-17.

Berkabile examined hairs taken from the belt, brown extension cord (found in the closet basket), the red and white electrical cord, clumps of hair from the wasterpaper baskets and the macramé. RA 3, 1017-21. He indicated that the hairs were similar to Jessica's and dissimilar to Maria, Defendant, Victor and Francisco. RA 3, 1022-1034. Berkabile noted that the distinguishing characteristic between Jessica and Maria was length of the hair; that is, Jessica's hair was longer than Maria's and the samples matched Jessica's, not Maria's, hair length. RA 3, 1024-1025. Berkabile acknowledged that, in his Grand Jury testimony, he indicated the hair taken from the red and white electrical cord was dissimilar to Jessica's. He explained that the discrepancy was due to the short time he had to conduct the examinations prior to the Grand Jury and the small number of samples he was able to review. In the time between the Grand Jury proceedings and the trial, he had done additional work and revised his conclusions based upon a review of additional samples. RA 3, 1038-39, 1041-45.

Finally, Berkabile testified that he reviewed, but did not rely upon, slides of separate hair samples prepared by Carla Nozaiglia of the Las Vegas Metropolitan Police Department Laboratory. RA 1021, 1034-35.

Maria Lopez then testified. She described the same events given in her two statements and Grand Jury testimony but with greater detail. As to her background, Maria

indicated she was born in Zapotiltic, Jalisco, Mexico. RA 3, 1059. She did not know her father. RA 3, 1085-1100. As a child she lived in extreme poverty with her grandparents and her unmarried aunts and uncles. They lived in a large one room building with no running water. They used a ravine located near the house as a bathroom. Maria's mother left Maria to work as a cleaning lady in Tijuana. Meals consisted of beans, with meat once a week. She had one set of clothes and only a first grade education. RA 3, 1085-1090.

Her grandmother and aunt were strict disciplinarians who would beat her, pull her hair, berate her and hit her with a belt. This would occur whenever Maria disobeyed or did her chores improperly. RA 3, 1090-93. Maria cleaned, took care of a pig and planted corn. RA3, 1101-03.

At age 13, Maria went to live with her mother. She watched over her younger siblings and cleaned the house. RA 3, 1104-06. When she was 15, Maria had a relationship with the son of a well-off neighbor and became pregnant with Jessica. RA 3, 1106-08. However, before realizing she was pregnant, Maria was offered a job by her relatives in Los Angeles. She entered the United States illegally and began working for her relatives. RA 3, 1108-12. Jessica was born in the United States in 1980. RA 3, 1060.

After Jessica's birth, Maria returned to Mexico to confront Jessica's father. When he renounced her and refused to acknowledge Jessica, Maria re-entered the United States and worked as a nanny for two years. RA 3, 1113-1125. Her uncle and aunt, Antonio and Rosalinda Cevallos were living in Las Vegas. Maria moved to Las Vegas with Jessica in 1981 when Jessica was about two years old. RA 3, 1126-27.

Jessica's uncle worked at Caesar's Palace. Through him, Jessica met the defendant, Defendant Lopez. Defendant worked with Jessica's uncle. They began dating. RA 3, 1127. Approximately three months into the relationship, Maria became pregnant by Defendant and they decided to marry. RA 3, 1217-18; RA 4, 1377. Maria sent Jessica to live with Maria's mother. This decision was made either because Defendant did not want to raise Maria's illegitimate daughter, or because Defendant did not believe they could support two children. RA 3, 1187-88.

Maria and Defendant had a baby boy, named Victor. Two years went by, and Maria was 7 months pregnant with their second child, Francisco, when Maria asked if Jessica could come for a trial visit over the Thanksgiving/Christmas holidays. RA 3, 1062. Maria hoped that, after the trial visit, Defendant would relent and allow Jessica to live with them. RA 3, 1153-54. Defendant agreed to a trial visit and Jessica was brought to Las Vegas by Uncle Antonio and Aunt Rosalinda Cevallos. RA 3, 1060. Jessica arrived in Las Vegas sometime in Mid-November, 1984. Maria and Defendant were informed that Jessica was a good child, but that she had a bed-wetting problem. RA 3, 1060-61.

Maria indicated that things were fine for the first two weeks of Jessica's visit. However, Defendant was frustrated and angry over Jessica's bedwetting. RA 3, 1063. Maria and Defendant thought Jessica might be doing it deliberately because she was upset about leaving her grandmother. RA 3, 1152. Maria stated Defendant began hitting Jessica with a belt around Thanksgiving. RA 3, 1063. Maria described the same incidents she related in her statements and Grand Jury testimony: beatings with the belt, hanging Jessica by her hair from the plant hook, banging Jessica's head into the wall or toilet bowl. RA 3, 1063-64. Maria also testified as to what Jessica told her Defendant did to Jessica regarding the scalding water in the bathtub and hanging Jessica in the closet on New Year's Eve/Day.[12] RA 3, 1059-61; 1069, 1073-75; 1138-1141.

Maria indicated that she tried to intervene to stop Defendant when he abused Jessica but Defendant either locked Maria out or hit her when she tried to aid Jessica. RA 3, 1065, 1071. For example Maria went into pre-mature labor on December 26th as a result of Defendant striking her when she was defending Jessica. RA 3, 1062. Maria stated she didn't report the abuse because she was in the country illegally, Defendant threatened her, she couldn't drive and Defendant told her if she told anyone she would lose the children. RA 3, 1081-82

With respect to the scalding, Maria indicated she thought it happened a couple of days

[12] Some of the witnesses indicated the Lopez family gathered to celebrate on New Year's Day and others said this occurred on New Year's Eve.

after Francisco's birth. She wasn't sure about the date, but was certain it was the day that Defendant came home early because it was raining and the construction crew was sent home. RA 3, 1073-75. Maria testified that she woke up around 6:00 AM and Defendant had gone to work, but that he came back about two hours later, which is when she confronted him about what happened to Jessica. RA 3, 1072-73. She thought it was on a Tuesday. During cross-examination, she agreed that the day Defendant came home early due to rain was the same day they went to apply for public benefits for Francisco. RA 3, 1149-1150, 1178. Based upon the application date and National Weather Service data that was admitted into evidence, this was January 7, 1985 which was a Monday. RA 3, 1182; RA 4, 1460-62.

Maria testified that while in jail she received a note from Defendant, written in Spanish, and that she gave the note to the detective. She identified Defendant's handwriting and the note. The note said:

> Maria, I love you very much. If I die - - If I die, don't ever forget me in your lifetime. Remember, I love - - I love you today and always.
>
> Why did you do this to me? Tell them that you did it. It's the truth. Nothing is going to happen to you, because you are Mexican. Please.[13]

RA 3, 1079.

Maria indicated that, in addition to the note, Defendant had talked to her the first time they appeared in court and told her that she should take the blame because nothing would happen to her as a Mexican citizen. She stated she asked Defendant who told him that and Defendant said his attorney. RA 3, 1080; 1185-86.

Maria indicated that Defendant did not use the macramé plant holder to hang Jessica, but used a longer electrical cord wrapped into Jessica's hair. RA 3, 1188-89. She did identify the macramé holder as coming from the hook that was used for hanging Jessica. Id.

[13] It is interesting to note that the English translation of the note obtained by Defendant's trial counsel, Kevin Kelly but not admitted at trial (it is dated 1/21/86) is less ambiguous and even more incriminating. That translation reads "Maria, I love you very much, if I die, never forget me during your life. Remember I love you today and always. Why did you do this to me? Answer me back. Tell them you didn't do it, right and nothing will happen because you are Mexican." PE 177.

She stated the brown electrical cord was used to tie Jessica up and that it was the cord used to tie Jessica's hands when Jessica was hung by the closet bracket on New Year's day. RA 3, 1190-91, 1196. Maria indicated, however, it was not the cord used to hang Jessica from the plant hook; that was a longer cord that she still had. RA 3, 1189-90.[14] Maria could not identify the red and white electrical cord as one of the items used on Jessica. RA 3, 1190. Finally, Maria identified the belt as the one Defendant used to beat Jessica. RA 3, 1199.

Maria was questioned about whether she was promised anything for her testimony. She indicated no, that Jose (Officer Tonesco) told her he would help her with the papers to stay in the United States and she might be able to get her papers fixed to permit this but he didn't say please testify and I will do this. Maria stated this took place after one of her statements, but not which statement. RA 3, 1226.

The final witness in the State's case-in-chief was Dr. Paul Strauss, a psychiatrist specializing in treating multi-lingual patients, particularly Spanish speaking individuals. Dr. Strauss also worked as a defense or prosecution forensic psychiatrist in California. RA 3, 1229-1233. Dr. Strauss interviewed Maria on March 24, 1985 in the presence of Ted Salazar, a licensed counselor.[15] Dr. Strauss also met with Maria prior to court, after court and during recesses and was present for a part of her testimony. RA 3, 1224. Based upon his interviews, observances and testing, Dr. Strauss believed Maria might have an organic brain defect as a result of her childhood conditions. RA 3, 1235-42. He noted Maria had extreme difficulty with concepts like dates and times, making change or similar simple tasks. RA 3, 1240-44; 1258. He also indicated she has a passive, submissive personality complicated by the cultural role of women in small Mexican villages where women are expected to be subservient. RA 3, 1242; 1249; 1252-54; 1257; 1262-1264. In his opinion, a person with this type of personality trait would not have the ability to generate a calculated,

[14] Maria apparently gave the longer cord to DDA Jeffers who had Detective Wohler book it into evidence.

[15] Salazar was retained by the District Attorney's Office to assist in translating for Maria during her conversations with District Attorney employees and other witness. At some point Salazar was also counseling Maria or taking clinical notes while translating. RA 3, 1233.

complex lie. RA 3, 1281. On cross-examination Dr. Strauss was asked if Maria was capable of lying and he indicated she was. On redirect Dr. Strauss was permitted to give his opinion that Maria was not lying. RA 3, 1282-83.

3. Defense Case-in-Chief [16]

Antonio Cevallos testified that Maria was his niece and that he brought Jessica from Mexico at Defendant and Maria's request in late 1984. He indicated he met Defendant while working for Caesar's Palace in 1980 and introduced him to a couple of nieces, including Maria, in 1981. Maria and Jessica were living with him and his wife at that time. He stated that Defendant and Maria seemed like a happy couple on the rare occasions he saw them after their marriage. He testified that Maria did not work and earned money only through ironing her sister-in-law's clothes. Defendant wanted Maria to earn more money any way she could, even if it meant working as a prostitute.

Cevallos indicated he never saw Defendant angry and would not describe Defendant as a fighting man. He knew that Defendant was fired from Caesar's for giving ice cream to a co-worker, but still thought Defendant had been a good employee. Cevallos stated that he never observed bruises on Maria or Jessica and never saw Maria mistreat Jessica.

Finally Cevallos testified that on the morning of January 11, 1985 Maria called him. She was upset and wanted him to come over. He thought that was strange because she usually talked to his wife. When he arrived the police were there and he wasn't able to talk to Maria, but he was able to talk briefly to Defendant who said he was sorry that this had happened in his house.

Cevallos was not questioned about his relationship with Arturo Montez and any conversations they had about Jessica's death or what Montez observed. RA 11, 3376.

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[16] The testimony of several defense witnesses' testimony was lost by the court-reporter due to illness. The testimony was reconstructed from notes taken by DDA Seaton, DDA Jeffers, Eve Collenberger and Marshia Reid. Collenberger and Reid were volunteer courtroom observers affiliated with Families of Murder Victims, a non-profit organization dedicated to promoting surviving family members' rights and providing support for surviving family. The reconstructed record involved the testimony of Antonio Cevallos (Maria's uncle), Martha de la Torre (Manuel's sister), Socorra Lopez (Manuel's mother), Armando Lopez (Manuel's brother), Arturo Lopez (Manuel's brother) and Pedro Lopez (Manuel's father).

The next witness was Martha de la Torre, a friend of Defendant's sisters. Torre saw Jessica on two occasions. The first was at Christmastime when the family gathered at another sister's house (Patricia) and the second occurred when Martha visited Maria at the apartment.[17] Martha indicated Maria told Patricia and her that Jessica was a distant relation and they did not know Jessica was Maria's daughter until after she died.

Martha stated that when she observed Maria and Jessica at the apartment, Maria would not allow Jessica to play and told Jessica to take a bath in cold water. Martha said she observed Jessica standing in the tub shivering. Martha indicated Maria never hugged Jessica and Maria called Jessica names such as a bastard and a begger. Martha also stated Maria told her that Maria was sending Jessica back to Mexico. Martha said she never saw Defendant mistreat a child and that she didn't think Maria was afraid of anything.

Martha admitted that she rarely saw Maria and sometimes Maria would remain in the car when Defendant came to visit her. Martha also indicated she was a good friend of Defendant's family. RA 11, 3380-82.

Socorra Lopez, Defendant's mother, testified to Defendant's childhood and how hard Defendant worked to educate himself and help his family. She indicated that Defendant was a good son and had worked part time to support the family while he was in school. She also stated that he went to extra schools to learn how to repair radios and televisions so that he could make something of himself.

Socorro talked about being disappointed because Defendant could not get married in the church, only a chapel, because Maria was pregnant. She noted that she only saw Maria occasionally because most of the time Defendant came to visit by himself. Socorro first met Jessica around Thanksgiving of 1984 at Patricia's house and that Maria introduced Jessica as a cousin's daughter. Maria wouldn't let Jessica play with the other children and seemed indifferent and restrictive towards Jessica. She saw Jessica again on December 24th and 26th and did not notice any bruises on Jessica and on the 26th Jessica played with the other kids.

She described Maria as a cold woman who never wanted to dance with Defendant.

[17] The record is unclear whether this was later that same day or a different date.

She stated that she last saw Defendant and Maria on New Years' eve or day and that Jessica wasn't with them. At some point Defendant left and was gone for an hour, supposedly to get milk for the baby. RA 11, 3383-85.

Armando Lopez, Defendant's brother was the next defense witness. He was 15 years old. Armando met Jessica at Patricia's house on Thanksgiving. The only other time he saw her was at Christmas. He didn't recall anything unusual about either occasion. He described Defendant as a shy and calm person, unlike Armando's other brothers who were wilder. He said Maria wasn't affectionate and he heard Maria tell Defendant to keep his hands to himself one time.

On January 11, 1985 he was the teenager who translated questions and answers between police and firefighters and the family. He remembered Defendant crying, pacing and shaking while Maria acted like nothing had happened. Socorro asked Maria what happened and Maria said she didn't know. It was Armando's father who said they should call the fire department. When the fireman and police asked what happened, Maria told them that Jessica fell in the park while playing.

Armando stated that Defendant treated Victor well and said nothing to Jessica. On the two occasions that he saw Jessica with the family, she stayed on the couch when Maria was present, otherwise Jessica played with the other kids. RA 11, 3386-88.

The next witness was Arturo Lopez, another brother of Defendant's. Arturo testified that on January 10, 1985 he went to Defendant's around 5:00 PM with some bar stools. He knocked on door for five minutes. The lights were not on, but he knew Maria was home because he had talked to her around 4:30 PM. Maria finally answered saying she was watching T.V. and didn't hear him. He didn't see Jessica and the childrens' bedroom door was closed. Defendant wasn't home and Arturo assumed Defendant was with a friend fixing a car from what Defendant said in a conversation earlier that day. RA 11, 3389.

Defendant's father, Pedro, testified that Defendant was a good kid. Pedro disciplined his children with firm words and Defendant never posed a problem. Pedro did not remember when he first met Maria, but he indicated he felt she was a cold, hard strict woman who

didn't want to know the Lopez family. Pedro stated that Maria would not let Jessica play with the other kids, instead she made Jessica sit with her. Defendant was kind to Jessica and even gave her a T.V. for Christmas.

On January 11, 1985 Maria called to say that Jessica was very sick and they went over to the apartment. He told his son to call the fire department. The fire captain came and went into Jessica's bedroom. About twenty minutes later he came out and said Jessica was dead. Defendant fell on his knees crying while Maria just sat holding the baby and showing no emotion. Maria was the one who told the fire people that Jessica's parents were in Tijuana. RA 11, 3390-91.

The defense called Dr. Marv Glovinsky, a clinical psychologist, to rebut Dr. Strauss's testimony and to give an opinion regarding the likelihood that Maria, not Defendant, was the person who had abused Jessica. RA 4, 1295-1305. He criticized some of the tests Dr. Strauss used indicating they were good only for rough screening and any diagnosis of organic brain problems would require much more extensive testing. RA 4, 1305-07; 1315. Dr. Glovinsky agreed, however, that the rough screening reflected Maria suffered from intellectual deprivation, low intellectual functioning and had a submissive dependent personality, but disagreed that there were signs of organic brain dysfunction. RA 4, 1305-07.

Dr. Glovinsky then testified on the psychology of abused children and the fact that abused children were far more likely to become abusers that their non-abused counter-parts. RA 4, 1313. He reviewed Maria's background, Dr. Strauss' report and conducted family interviews. From this he concluded that Maria was more likely to be Jessica's abuser than Defendant. RA 4, 1311-1314.

Patricia Martinez, Defendant's sister, was the next relative to testify for the defense. She described her brother as a noble person who was always good with her children. RA 4, 1320. Patricia stated that she first saw Jessica at a birthday party in November. Maria was not present and Patricia said Jessica told her Maria did not come because Jessica was there. Jessica was cold because she had no sweater and she played with the other children. RA 4,

1320-22. Patricia said when Jessica first came to Las Vegas she played with Patricia's children, but that ended and Patricia thought maybe Maria objected. She remembers Maria telling Jessica to stop playing and fold her clothes. RA 4, 1322-23.

Patricia said that Maria was a bit quiet and more silent than Defendant. RA 4, 1323. Maria would get mad at Defendant for not changing the baby and she thought Defendant and Jessica got along fine. RA 4, 1324. She remembers visiting with Maria about two days after Francisco was born and Maria told Jessica to go in her bedroom and close the door. When Patricia was leaving, Jessica asked if she could come to Patricia's house. RA 4, 1324-25.

When Maria was in labor, Patricia took care of Jessica and Victor. Jessica had no bruises and wasn't burned. RA 4, 1326. Patricia also discussed a conversation she had with Maria on December 31st when she asked why Jessica didn't come. Patricia indicated that Maria said Jessica was with Aunt Rosa and when Patricia complimented Maria on Jessica being a good child, Maria told her Jessica wasn't so good, that Jessica had stolen some baloney and then spoiled her underwear. Maria allegedly wanted to send Jessica back to Mexico. RA 4, 1327-28.

Defendant chose to testify. He described his childhood in Mexico and how he helped his family by working part time while going to school. He talked about how close the family was and how he worked hard to get an education, especially after moving to the United States when he was sixteen. RA 4, 1333-38.

He met Maria in April of 1982. Her uncle introduced them and he thought she was pretty so they started dating twice a week. They were married on July 23, 1982. RA 4, 1338-1341. He said they needed money and that was the reason they didn't have a church ceremony. RA 4, 1341. He met Jessica while they were dating. Maria said Jessica was her niece. RA 4, 1341-42. He never tied Maria up or hit her. Things were fine in the first year of their marriage and then Maria changed. She know longer wanted to have sex with him and was cold to him. RA 4, 1345-46.

Defendant testified that he didn't know Jessica was Maria's daughter until two weeks before she arrived in November of 1984, when Maria announced Jessica was coming to visit

and possibly live with them. He wasn't mad about this and was happy because it would give Victor a playmate. RA 4, 1344-45.

Defendant denied that Uncle Antonio told him about Jessica's bedwetting problem. RA 4, 1346. Defendant said Jessica was a smart and loving child and he treated her no differently than any of the other children. RA 4, 1346-47. He said Maria did not tell people Jessica was her daughter because she was ashamed of Jessica. RA 4, 1348.

Defendant asserted that Maria became angry with Jessica's bedwetting and wanted to send her back to Mexico. RA 4, 1348-49. Maria allegedly took Jessica's mattress to the shed and made her sleep on the floor and that's why they were arguing. RA 4, 1349. Defendant said he noticed Jessica had bruises about two weeks after Thanksgiving and asked Maria why she was hitting the children. RA 4, 1349-50. It got worse and worse and not only did Jessica have bruises but Victor did too. RA 4, 1350-1352. Defendant said he loved her even though he was afraid for the children and they were having more quarrels. He didn't do anything because he was so in love with her. RA 4, 1352.

On New Year's Eve, Jessica was left at home because Jessica didn't take a bath and Maria didn't want her to come when she was dirty. Jessica was watching T.V. RA 4, 1354-55. While at the family gathering, Maria yelled at him because they didn't have enough pampers so he went back to the apartment to get some. He stated he asked Jessica if she wanted to come with him and Jessica said no because Maria would get mad and hit her. Jessica was sleeping when they got back. RA 4, 1355-57.

On January 4, 1985, when he came home around 6:00 P.M., Jessica was on the carpet and she could not move. Defendant said he asked what she was doing and she said I got burned. He asked Maria what happened and Maria told him that she told Jessica to take a bath while Maria was cooking. She heard Jessica screaming and ran into the bathroom but it was too late, Jessica was already burned. Defendant said Jessica told him that Maria took Jessica by her hair into the bathroom, turned on the hot water and forced Jessica into the bathtub. RA 4, 1357-59.

Defendant said he wanted to take Jessica to the hospital but Maria threatened Victor

and the baby if he did. RA 4, 1359. He also said he didn't have time to tell anyone about the burns or go to the police because he was working all day long. RA 4, 1380. Despite his fear for the children, Defendant admitted he left them along all day with Maria while he went to work. RA 4, 1378-1382, 1384. Defendant claimed he was blind; he loved Maria even though Maria called him a pig and a bastard. RA 4, 1359, 1361. Defendant also testified he took no action because he thought Maria would be deported and the baby was only a week old so what would happen to it. RA, 1365. Defendant said it was Maria who beat Jessica with a belt and took her by her hair hitting her head into the wall. [cite] Defendant said he last saw Jessica alive on January 9th when he came back from work. Jessica was in the bedroom playing with Victor and Jessica said she didn't feel too good. Defendant indicated he did not see Jessica on January 10 as he went out at 5:30 A.M. and got back at about 7:00 P.M. and the childrens' door was closed. RA 4, 1365-67.

Defendant said he woke up on January 11th and went to see the children. He found Jessica and cried. He told Maria "look what you did." RA 4, 1368. He testified he lied to the police and firemen, telling them what Maria had allegedly told him, that Jessica had slipped in the tub. RA 4, 1369-1370.

Defendant denied ever meeting Arturo Montez or pulling Jessica's hair. He also denied inflicting any of the other injuries on Jessica. RA 1370-72.

Another of Defendant's brothers, Pedro, Jr., testified next. He indicated he was present at the house on January 10th and he did not see Jessica. RA 4, 1407-08.

Yvonne Lopez, Defendant's sister, was the final family member to testify. She stated that Maria did ironing for her and she saw Jessica with Maria on several occasions. She thought Jessica was afraid of Maria and Maria seemed separated from the child and she wouldn't let Jessica play with the other children. RA 1410-12.

The last witness called by the defense was Dr. Michael Grinberg, a forensic psychiatrist. RA 4, 1418-26. He reviewed the tests conducted by Dr. Strauss and discussed a variety of additional tests that would be needed before a diagnosis of organic brain dysfunction could be made, but agreed that the preliminary tests suggested this possibility.

He indicated that he disagreed with Dr. Strauss' other interpretations of the preliminary tests. In his opinion the tests demonstrated that Maria was a person who held in her emotions and was somewhat deceitful. He also believed the tests showed Maria viewed men as childlike and juvenile, which is not consistent with being subservient or overpowered by males or feeling menaced by them. RA 4, 1426-33.

Dr. Grinsberg stated that people who have been abused as Maria was in her childhood have a greater rate of drug abuse and suicide and, for women, a greater rate of prostitution. He believed that a person with a background like Maria's would be more likely to be an abuser than a person who came from a warm and close family as described by Defendant. In addition, he considered that Maria may have been suffering from post-partum depression. RA 1433-1443.

4. **State's Rebuttal**

Maria was recalled and she denied Defendant's accusations that she abused Jessica. She was not tired of Jessica, but she did tell Defendant that it was better for Jessica to go back to Mexico than be treated like a pig by Defendant. She indicated that the mattress was removed the bed because it stank and that she and Defendant carried it out to the shed. Maria also indicated Victor never had any bruises and the most she ever did was to slap his hand. RA 4, 1465-67.

Maria said Defendant would not let her take Jessica to the hospital because he was worried about money and that he was always complaining about money and they would get calls from creditors about unpaid bills. RA 4, 1468. Maria stated that the Lopez family was always kind to her, but denied that she ever called Jessica names and indicated that Defendant didn't want her to be too friendly with his family. RA 4, 1473-74. Maria indicated Defendant didn't want his family to see Jessica's bruises so they either left Jessica at home or dressed her so as to cover the bruises and then told her not to play with the other children. RA 4, 1474-75.

Officer Jose Troncoso testified about his observations of Maria when he entered the apartment on January 11th. He indicated Maria and Defendant were sitting on a couch.

Maria looked upset and was crying as she had a Kleenex or handkerchief in her hand, wiping her eyes. Defendant was whispering to her and he did not show much emotion. RA 1483-1486. After he saw Jessica's body, he asked both Defendant and Maria what happened and they told him that Maria fell down a slide and that it happened New Year's Day. RA 4, 1486-89.

At the police station, Officer Troncoso stated Defendant initially agreed to talk to them, saying "Sure, I haven't done anything. I don't even know why everyone is accusing me of anything." RA 4, 1493. Defendant then told the officers that Jessica was burned in the shower two weeks ago. Officer Troncoso asked how that happened and Defendant told him "Well maybe she slipped." When Officer Troncoso said that didn't make sense, Defendant said he didn't know how it happened and Defendant did not answer Officer Troncoso when he pointed out that there were no burns on Jessica's arms as might be expected if Jessica had slipped. RA 4, 1495-96.

Officer Troncoso then asked Defendant about the bruises and whether Jessica was going up or down the slide when she fell. Defendant said he didn't know because he wasn't looking in that direction at the time and didn't remember whether Jessica landed at the back or front of the slide when she fell. Defendant also suggested that Jessica might have got the bruises by falling in the shower. RA 4, 1497-99. When Officer Troncoso confronted Defendant that the story did not make sense, Defendant stated: "Go ahead and shoot and kill me. I know you want to. I deserve it. I have nothing to live for." RA 4, 1500.

No other witnesses were called in the guilt phase. Defendant made a motion to strike the electrical cords, macramé and belt as exhibits, which was denied. RA 4, 1552.

7. **Jury Instructions**

The defense specifically waived second-degree murder instructions and requested involuntary manslaughter instructions only. The defense asked for a series of instructions on the definition of an accomplice and the need for corroborating testimony if Maria was an accomplice. The district court refused to give the instructions having already determined that Maria was not, as a matter of law, an accomplice, particularly in light of Defendant's

defense that Maria was solely responsible for Jessica's injuries. RA 4, 1525-29.

8. Closing Arguments

The State made it clear that the issue was whether the jury believed Maria or Defendant. RA 4, 1550. The State emphasized Maria's statements as having more credibility than Defendant's. Maria's story that Defendant abused Jessica and she failed to seek help because of her fear of Defendant was more credible than Defendant's story that Maria abused the children and he was afraid to report her because she might retaliate against the children. RA 4, 1565-67, 1580, 1590-91.

The State also stressed the physical evidence supported that Jessica was abused and tortured and Defendant was the perpertrator. The straight line of the burns made it impossible for the scalding to be the result of Jessica simply slipping in the bath or shower as stated by Defendant. RA 4, 1551-52. The State argued that Maria, being seven months pregnant, could not have lifted Jessica overhead to hang her from the plant hook or closet bracing. The State used a life-size weighted mannequin to illustrate this point. RA 4, 1593-94. The bruises were belt-shaped and extensive and Jessica had a bald spot on her head where hair had been ripped out. In addition, the neighbors stated that the male voice was the aggressor. RA 4, 1560-62, 1578.

When discussing whether or not the hair hanging incidents occurred, the State pointed out physical evidence that corroborated Maria's statements that Jessica had been hung by her hair. The State noted the hair fibers found in electrical cords and the macramé holder, the bald spot on Jessica's scalp where hair had been pulled out, the bent closet bracket and the abudance of clumps of hair found in the apartment wasterpaper baskets. RA 4, 1534-1538. The State then reference Arturo Montez' testimony has additional corroboration that Jessica's hair had been pulled. The State did not argue at that point that the Montez testimony was corroboration that Defendant was the abuser. RA 4, 1538.

The State went on to point out that while it is hard to accept what was done to this child, some of the things obviously happened as shown by the physical evidence and it is therefore likely that Jessica was also hung by her hair:

> If it were just the word of one person, I would have a hard time believing it. I have a hard time believing that some of these things happened in this case. I have trouble coming to grips with it. But we know that they happened. And with all the other things which corroborate Maria's story that she saw the girl hanging from the macramé [sic] and she saw her on the floor of the closet with her own fecal matter all over her mouth and inside of her mouth, with that corroboration, I think it's quite easily, probably expected, given this particular scenario, that Jessica Cevallos was indeed hung by her hair.

RA 4, 1538.

It was not until much later in the argument that the State argued the Montez testimony helped to identify Defendant as the abuser: "He was able to come before you because he had some corroborative evidence; he had something to tell you about this defendant and his actions around Jessica Cevallos." RA 4, 1559. Additional comments regarding Montez can be found at RA 1478-79.

The State argued that Maria might be confused as to exact dates in her testimony and statements, but when tied to an event, that is, the scalding occurred on the day Defendant came home early due to rain, she was consistent. RA 4, 1562-64. The State also indicated that Maria's interactions with Defendant's family, Jessica's isolation and Maria's inaction were more consistent with a woman who suffered domestic violence and abuse, than the theory that Maria was the abuser because she had been abused as a child. RA 4, 1570-74. The State noted that Defendant's family only saw Jessica on one or two occasions and Thanksgiving was one of them. The evidence shows that Jessica was not abused until after Thanksgiving, so there is no inconsistency between a happy, playing Jessica during Thanksgiving and the carefully dressed and controlled Jessica after Christmas, when Defendant and Maria were concealing the bruises and burns. RA 4, 1582-1587.

Finally the State cited to Defendant's note, emphasizing it was not an expression of innocence, but instead should be read to mean that it was true nothing would happened to Maria if she took the blame, so she should tell the police she did it as it could be . RA 4, 1589-90.

The defense argued that the police made up their minds that Defendant was the abuser and therefore made no effort to thoroughly investigate the case. They failed to properly

secure the apartment or perform a search until six days after Jessica's death. Defendant was left sitting at the police station for hours and was interviewed only after the police had conducted an extensive interview with Maria. RA 1605-17. Defendant's statement to the police about killing him was only an expression of his anger that they thought he was guilty. RA 4, 1615-16.

The defendant stressed that Maria showed no emotion over Jessica's death until the fire and police department personnel arrived and that Maria was seen scolding Jessica. RA 4, 1602-03. Defense counsel emphasized it was much more plausible that Jessica's injuries were inflicted by Maria as Maria was an abused child. He pointed out the similarities between what Maria suffered as a child and what was done to Jessica; the beatings with a belt, pulling of hair and strict discipline. Defense counsel stressed evidence that Maria was not a meek or subservient individual. RA 4, 1642-44; 1649-56.

Defense counsel also pointed out that Maria said the red and white electrical cord was never used on Jessica and Maria failed to identify the macramé or brown electrical cord as the devices allegedly used to hang Jessica. RA 4, 1626-1628, 1633. Moreover, Jessica was alone with Maria for most of the day, Jessica did not play with the neighbor children and her presence was so quiet, the neighbors did not know she lived there, indicating even when Defendant wasn't around Jessica wasn't permitted to play, inferring that Maria was an abuser who kept Jessica imprisoned. RA 4, 1620.

Counsel disparaged Montez' testimony, indicating he came out of the blue and just happens to be a friend of Uncle Antonio, suggesting Montez made up his testimony in collusion with Antonio Cevallos. RA 4, 1623-24. He pointed out that Jessica might well have been dead when Aturo came to deliver the bar stools on January 10th and that Maria concealed this fact until Defendant discovered it on January 11th.

9. **Jury Questions**

The jury started deliberating at about 6:00 P.M. on a Thursday evening. On Friday at approximately 4:50 P.M. the jury sent a note to the district judge as follows:

We the jury request a clarification on points of law.

> 1. Pertaining to instruction #10 Involuntary Manslaugher "Without due caution and circumspection" would this be synonamous to "knowledge of"
>
> 2. Does knowledge of torture constitute 'first degree murder'

PE 94.

The district court, after consulting with counsel, asked the jury if they would clarify the question – knowledge of what and by whom. The jury sent a second note:

> 1. If the defendant had any knowledge of any acts leading to the death of the victim, does it constitute "Involuntary Manslaughter"
>
> 2. Does knowledge of torture constitute "first degree murder"

PE 100.

The district court, again after consulting with counsel, replied that "mere presence when a crime is committed is not enough to attach criminal liability." RA 4, 1681-82. The jury asked for no further clarifications and continued its deliberations. At approximately 3:30 P.M. on Saturday afternoon, defense counsel requested that the jury be given supplemental instructions defining the due caution terminology used in the involuntary manslaughter instruction. The district court acknowledged they were accurate statements of the law, but declined to give them because the jury had been deliberating for almost a day with no additional questions and submitting the instructions might be perceived as a directive from the court that the jury impose a verdict of manslaughter. RA 4, 1683-1689. At 10:15 P.M. on Saturday the jury announced it had reached a verdict, finding Defendant guilty of first-degree murder by torture. RA 4, 1690.

9. **Penalty Phase**

No additional evidence was submitted by either side during the penalty phase. Defense counsel entered into an agreement with the State that neither side would present evidence. This barred the State from placing Maria on the stand for a third time. Defense counsel knew Maria had been a powerful witness on rebuttal and did not want the jury to be given the opportunity to hear from her again. In addition, most of the mitigation evidence defense counsel was prepared to admit had already been elicited from Defendant's

family in the guilt phase and, as the verdict clearly indicated the jury did not believe Defendant, defense counsel did not feel the additional mitigating evidence was sufficiently compelling in light of the torture finding to warrant risking additional testimony from Maria. RA 7, 2505-06; 2512-19; 2535-37.

The State's closing argument in the penalty phase was short. The State argued this was a case of the torture of a child and death was the appropriate punishment. Defense counsel went back through the evidence and stressed that much of the evidence was as consistent with Maria as the abuser as Defendant. Defense counsel also emphasized that Maria had received complete immunity, despite bearing some responsibility for not reporting the abuse and the jury should show mercy in light of Defendant's background and the lingering possibility that Maria also abused Jessica. RA 5, 1750-63.

E. Post-Trial Proceedings

Defendant filed four motions for a new trial before and during the pendancy of his appeal. They involved different allegations, namely: 1) two jurors failed, during voir dire, to disclose that they had been the victims of child abuse when asked if they had ever been victims of a crime; 2) Arturo Montez allegedly told a reporter that he was Maria's brother; 3) missing transcripts prohibited adequate review on appeal; and 4) Maria allegedly recanted her trial testimony. All four motions were denied. A more detailed summary of the motions and their dispositions is given below. In addition, numerous post-trial hearings and motions were made regarding the missing portions of the record, which are also discussed below.

1. First Motion for New Trial – 5/8/85 – Juror Misconduct

During voir dire, prospective jurors were told that the case involved the torture and abuse of a four-year-old child. They were not told about the abused becoming the abuser theory of defense. The jury panel was asked if any one had a relative or friend who was abused or accused of being an abuser. The panel was not asked if they themselves were abused as children, although they were asked if they had been victims of a crime. The panel was also asked a catch-all question -- was there anything the parties did not ask that would

impair the juror's ability to be fair and impartial. RA 5, 1770-1775, RA 1.

Two jurors were abused as children. During deliberations they revealed this information to the remaining jurors, indicating that they did not accept the abused/abuser theory because they had not become abusers as a result of being abused. RA 5, 1781-82; 1791-93. After interviewing the jurors, the district court found that the jurors did not believe their childhood experiences would impair their abilities to be fair and as no one had asked if any of the potential jurors were victims of child abuse, they did not think it mattered. The jurors also indicated that they did not believe child abuse was a crime when they were children, so they did not repond to the 'victim of a crime' question. Reporters' Transcripts 4/2/85 and 4/3/85.

The district court concluded that the jurors did not intentionally conceal information or fail to answer a question therefore there was no misconduct during voir dire. The district court further concluded that the jurors were permitted to use their personal experience in evaluating the defense theory of the case and this did not amount to the introduction of extrinsic evidence into the deliberations, therefore no juror misconduct occurred during deliberations. The judge denied the motion. RA 5, 1842-51. On appeal the Nevada Supreme Court affirmed the district court. RA 6, 2197-2227.

2. Second Motion for New Trial – 2/10/86 – Montez

The Defendant filed a motion alleging that the State failed to disclose that Arturo Montez was Maria's brother, possible impeachment evidence. The motion was based on a television news report that showed an interview with Montez. The on-screen picture identified Montez as Maria's brother. Defense submitted an affidavit from the reporter, Candace Armstrong, stating that Montez told her that Jessica was his niece. RA 5, 1852-1876. The State submitted an affidavit from Montez indicating he never made such a representation to the reporter, he was not related to Maria and Jessica and reaffirming his trial testimony was true.[18] DDA Seaton also filed an affidavit in which he stated that no one

[18] By this time Maria had been deported to Mexico and was not available. It should also be noted that Manuel has a brother named Arturo.

who is presumed to be an impartial adjudicator between the parties who can be trusted to accurately relate the extent of his own knowledge of the State's involvement in the federal investigation of him. The failure of the State and trial court to accurately relate the extent of the State's involvement in the investigation of Judge Bongiovanni therefore constitutes an impediment external to the defense which excuses any failure of Mr. Rippo to assert the factual allegations of Claim One previously.

2. Claim Two: Prosecutorial Misconduct

The allegations contained in Claim Two comprise one overarching claim of prosecutorial misconduct that must be considered in its entirety for its effect on the jury's guilt and penalty verdicts. As the U.S. Supreme Court has acknowledged, "we follow the established rule that the state's obligation under Brady v. Maryland, 373 U.S. 83 (1963), to disclose evidence favorable to the defense, turns the on the cumulative effect of all such evidence suppressed by the government, and we hold that the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention." Kyles v. Whitley, 514 U.S. 419, 421 (1995); see, e.g., Jimenez v. State, 112 Nev. 610, 623, 918 P.2d 687, 695 (1996). Mr. Rippo will address the substantive elements of his Brady and false testimony claims below, however, for present purposes, what is important is that this Court consider all of the evidence in Claim Two together to assess its prejudicial effect on the jury's verdict. See, e.g., Jackson v. Brown, 513 F.3d 1057, 1071, 1076 (9th Cir. 2008).[28] In the context of the State's compliance with constitutional disclosure obligations, it is irrelevant whether the State's failure to disclose evidence and failure to correct false testimony was done intentionally or negligently. See, e.g., Jimenez, 112 Nev. at 619-20, 918 P.2d at 693 (noting that "the prosecutor's motive or reason for withholding evidence is immaterial" and rejecting as irrelevant district court's finding that the failure to disclose was "inadvertent not intentional").

As a matter of state and federal law, the fact that the instant case is a capital case

[28] The failure to provide a cumulative consideration of a claim of prosecutorial misconduct renders a state court's decision contrary to clearly established federal law. See, e.g., Castleberry v. Brigano, 349 F.3d 286, 291-92 (6th Cir. 2003) ("Because the state court applied only an item-by-item determination of materiality, the decision is contrary to the Supreme Court's decision in Kyles, 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed.2d 490.").

mandates heightened scrutiny of Mr. Rippo's claim of prosecutorial misconduct. In the context of the State's suppression of material exculpatory and impeachment evidence and failure to correct false testimony, this Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." Kyles, 514 U.S. at 422 (citations and quotations omitted). Therefore, this Court must "independently review the record to ensure that the prosecution's blatant and repeated violations of a well-settled constitutional obligation did not deprive petitioner of a fair trial." Id. at 455 (Stevens, J. concurring). The discussion that follows reveals that the instant case is one of those rare cases where the State's prosecutorial misconduct is so extensive and egregious that Mr. Rippo should be able to obtain relief without any showing of prejudice. See Brecht v. Abrahamson, 507 U.S. 619, 638 n.9 (1993). Even if Mr. Rippo was required to demonstrate prejudice, however, he can certainly do so in the instant case.

In its motion, the State argues that Mr. Rippo's claim is procedurally barred because he failed to raise the claim on direct appeal or during the first post-conviction proceeding. See Motion at 41. In addition, the State argues that Mr. Rippo was not reasonably diligent in raising his Brady and false testimony claims before this Court after discovering the evidence in support of it. See id. Mr. Rippo will first address the failure of prior state counsel to raise the claim, and further explain why present counsel exercised reasonable diligence in investigating and raising the claim before this Court.

Clearly established state and federal law squarely rejects the State's argument that Mr. Rippo waived his claim by failing to exercise reasonable diligence, see Motion at 41, as entirely irrelevant to the State's free-standing constitutional obligation to set the record straight and correct false testimony. The Court addressed this precise issue in the cases of Strickler v. Greene, 527 U.S. 263 (1999), and Banks v. Dretke, 540 U.S. 668 (2004). The Nevada Supreme Court followed Strickler and Banks in Mazzan v. Warden, 116 Nev. 48, 993 P.2d 25, 37 (2000), and State v. Bennett, 119 Nev. 589, 81 P.3d 1, 6-7 (2003). Strickler, Banks, Mazzan, and Bennett demonstrate that the State's procedural default argument lacks merit.

In Banks v. Dretke, 540 U.S. 668, 676-77 (2004), the state made representations to the defendant before trial that it would provide him with all of the discovery that was relevant to his

case. However, the prosecution subsequently failed to correct one of its witnesses' false testimony at trial regarding their prior contact with the authorities and failed to disclose prior informant work done by another one of its witnesses. See id. at 677-81. Approximately nineteen years after his conviction and death sentence, the petitioner filed a supplemental petition in federal court which included affidavits from the two State witnesses indicating that their trial testimony was false and that the State failed to disclose material exculpatory and impeachment information. See id. at 684. In response, the federal court ordered complete discovery of the prosecution file and granted an evidentiary hearing. See id. at 685. Before the Supreme Court, the State argued that the petitioner was not reasonably diligent in pursuing his Brady claim during state collateral review proceedings and that his claim was therefore procedurally barred. See id. at 688. Specifically, the State argued that the petitioner should have located the State's witnesses, interviewed them, and presented their affidavits in the state post-conviction proceedings. See id.

The Court squarely rejected the State's argument that the lack of diligence of the petitioner meant that his claim was procedurally barred. Specifically, the Court, citing Strickler, discussed the fact that the state had made representations before trial that it was in compliance with its constitutional disclosure obligations, see Banks, 540 U.S. at 692-93,but that it subsequently failed to disclose material impeachment evidence, and did nothing when its witnesses testified falsely at trial. See id. at 693-94. The Court found these facts sufficient to reject the State's argument that the petitioner's claim was procedurally barred because he was not sufficiently diligent: "If it was reasonable for Banks to rely on the prosecution's full disclosure representation, it was also appropriate for Banks to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction. See Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); Strickler, 527 U.S., at 284, 119 S.Ct. 1936." Next, the State argued that the petitioner's claim was procedurally barred because he failed to develop the relevant facts supporting his claim during the state post-conviction proceedings. See Banks, 540 U.S. at 695. The Court again rejected the State's argument: "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed Brady material when the prosecution represents that all such material has been disclosed." Id.

Finally, the Court held that any asserted lack of diligence by the petitioner does not defeat his ability to show cause to excuse procedural default because it is the State that has a free-standing obligation to set the record straight when it fails to disclose evidence and correct false testimony:

> The State here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence," Tr. of Oral Arg. 35, so long as the "potential existence" of a prosecutorial misconduct claim might have been detected, id. at 36. A rule thus declaring that "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process. "Ordinarily we presume that public officials have properly discharged their official duties." [citations] We have several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials." [citations] Courts, litigants, and juries properly anticipate that "obligations [to refrain from improper methods to secure a conviction] . . . plainly rest[ing] upon the prosecuting attorney, will be faithfully observed." [citation] Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation.
>
> The State's second argument is a variant of the first. Specifically, the State argues, and the Court of Appeals accepted, that Banks cannot show "cause because in the 1992 state-court post-conviction proceedings, he failed to move for investigative assistance [to prove his allegations]. . . . We assign no overriding significance to Banks's failure to invoke state court assistance to which he had no clear entitlement. [citation]

Banks, 540 U.S. 668, 696 (2004) (citations omitted). "In summary, Banks's prosecutors represented at trial and in the state post-conviction proceedings that the State had held nothing back. . . . It was not incumbent on Banks to prove these representations false; rather, Banks was entitled to treat the prosecutor's submissions as truthful. Accordingly, Banks has shown cause for failing to present evidence in state court capable of substantiating his . . . Brady claim." Id. at 698.

In Gantt v. Roe, 389 F.3d 908, 912-13 (9th Cir. 2003), the court acknowledged that the free-standing obligation of the State to set the record straight could exist even in circumstances where defense counsel was ineffective in failing to investigate the petitioner's Brady claim:

> The district court concluded that the evidence was not 'suppressed' within the meaning of Brady, because the defense could and should have discovered it itself. While the defense could have been more diligent – and indeed, the defense lawyer's failure to investigate the phone number himself is part of petitioner's ineffective assistance of counsel claim – this does not absolve the prosecution of its Brady responsibilities. As the Supreme Court

> reiterated just last Term, '[a] rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutional bound to accord defendant's due process.' [citation] Petitioner's case presents an even stronger argument for disclosure than does Banks, because defense counsel here relied not merely on the force of Brady itself, but also – as with the prosecution's claims 'open file' policy in Strickler, 527 U.S. at 276 n.13, 119 S.Ct. 1936 – on affirmative representations by the prosecution that it was keeping the defense apprised of developments in the investigation. Though defense counsel could have conducted his own investigation, he was surely entitled to rely on the prosecution's representation that it was sharing the fruits of the police investigation.

Gantt, 389 F.3d at 912-13; see also Scott v. Mullin, 303 F.3d 1222, 1229 (10th Cir. 2002) ("It is not a petitioner's responsibility to uncover suppressed evidence.") (citing Strickler).

The Nevada Supreme Court has followed Strickler and Banks in rejecting any argument by the State that a petitioner's lack of diligence prevents him from demonstrating cause and prejudice to excuse any procedural default of a Brady claim. In Mazzan v. Warden, 116 Nev. 48, 993 P.2d 25, 37 (2000), the petitioner filed a successive state petition. The court, citing Strickler, acknowledged that if the petitioner "proves that the state withheld evidence, that will constitute cause for not presenting his claim earlier." Id. In State v. Bennett, 119 Nev. 589, 81 P.3d 1, 6-7 (2003), the petitioner raised a Brady claim "in an untimely and successive post-conviction habeas petition." The court, citing Mazzan, held that the petitioner could overcome of all of the state procedural default bars if he could demonstrate that his Brady claim had merit. See id. at 7. Neither Mazzan nor Bennett found any lack of diligence by the petitioners in failing to raise the claim sooner as defeating their ability to show cause and prejudice to overcome the procedural default bars. The State's unsupported assertion that it can take refuge behind the procedural default rules to shield itself from its own constitutional violations therefore must be rejected as contrary to clearly established state and federal law.

The State's further assertion that Mr. Rippo failed to specify exactly when he came into possession of the information in his current petition, see Motion at 41, need not detain this Court for long because the evidence it timely regardless of when it was discovered in the course of the federal habeas proceedings. All of the information supporting Claim Two was discovered after federal habeas counsel began representing Mr. Rippo and all of that information was presented to

this Court within one year of its discovery. The State's rank speculation that there was "further delay in bringing the claim," Motion at 74, has no basis in fact. As explained above, the State has always taken the position that any Brady evidence must be presented within one year of its discovery. As the State argued in State v. Lopez, Case No. 068946 (capital case),

> Evidence that was not disclosed by the prosecution at an earlier date in violation of Brady or Giglio can be good cause for failure to raise claims relating to that evidence to that evidence in a timely fashion. The non-disclosure constitutes good cause, while the materiality standard under Brady usually demonstrate prejudice. Mazzan v. Warden, 116 Nev. 48, 61-65, 993 P.2d 25, 26-27 (2000) (Mazzan II). However, as with ineffective assistance of counsel claims, Brady/Giglio issues must be timely brought under NRS 34.726 and NRS 34.800. Boyd v. State, 913 So.2d 1113 (Ala.Crim. App. 2003); DeBruce v. State, 890 So.2d 1068 (Ala. Crim. App. 2003). That is the claim should be brought within a reasonable time period of its discovery, which is presumptively one year after its discovery pursuant to the rationale discussed in Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2000).

State v. Lopez, Case No. 068946, Motion to Dismiss Petition for Writ of Habeas Corpus, at 74 (filed February 15, 2008), Ex. 330. The State is not allowed to play fast and loose with what it represents to be the controlling law, particularly in a capital case. Since the evidence supporting Mr. Rippo's Brady and false testimony claims was presented within one year of its discovery and within one year of the conclusion of the previous post-conviction proceeding, it is inescapable that Mr. Rippo's claim is properly before this Court for a decision on the merits.

Just as important, the State's motion says absolutely nothing about its present ethical and constitutional duty to correct the false testimony of its witnesses, regardless of whether the prosecution knew or should have known that they testified falsely at trial. In short, the State possesses an independent obligation in the instant habeas corpus proceeding to correct false testimony, even if the prosecution did not previously know that it was false. In Hall v. Director of Corr., 343 F.3d 976 (9th Cir. 2003), the court held that the State has a present obligation to correct false testimony during habeas corpus proceedings even if it did not know or have reason to know that the evidence was false when it was offered at trial:

> In Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L.Ed.2d 1217 (1959), Chief Justice Warren wrote for the Court, 'First, it is established that a conviction obtained through use of false evidence, known to be such by the representatives of the State, must

> fall under the Fourteenth Amendment, ... The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' Id. (internal citations omitted).
>
> [The petitioner] does not claim that the prosecution knew that the jailhouse notes were false at the time they were admitted into evidence; however, Hall does argue that to allow his conviction to stand based on the present knowledge that the evidence was falsified, is a violation of his right to due process under the Fourteenth Amendment. Id.

Hall, 343 F.3d at 981 (emphasis added); see also Banks, 540 U.S. at 675 (noting that "the State continued to hold secret the key witnesses' links to the police and allowed their false statements to stand uncorrected" through "direct appeal and state collateral review proceedings"); e.g., Thomas v. Goldsmith, 979 F.2d 746, 749-50 (9th Cir. 1992). In Banks the Supreme Court emphatically rejected the state's proposed rule that "prosecutor may hide, defendant must seek' [as] not tenable in a system constitutionally bound to accord defendants due process." Id. at 696. Therefore, as a matter of state and federal law, it is irrelevant whether the State knew or should have known that the testimony of its witnesses was false when it was offered. Even assuming that the State is otherwise blameless in the false testimony, it has a present obligation to correct his false testimony when it is material to the verdict, and, once again, the State has made it clear in its motion that it has no intention of rectifying the issue absent compulsion from this Court. The issue of the State's knowledge of its witnesses' false testimony is therefore entirely irrelevant to their present ethical and constitutional obligation to rectify the fraud.

With this legal landscape in mind, Mr. Rippo will now discuss the merits of his false testimony and Brady claims to demonstrate cause and prejudice to overcome the procedural default rules raised by the State:

a. Thomas Sims: False Testimony and Failure to Disclose Material Exculpatory and Impeachment Evidence

It is beyond rational dispute that Thomas Sims received substantial benefits directly from the prosecution in exchange for his testimony against Mr. Rippo. In its motion, the State defends against these allegations by asserting that Mr. Sims' false testimony should simply be taken at face value. See Motion at 41-43. For example, the State asserts that the allegation that "prosecutor John Lukens was instrumental in obtaining numerous continuances in the 1993, drug

possession case (C136066)" is "repelled by the record." Motion at 41. Instead of relying upon Sims' false testimony, Mr. Rippo notes that prosecutor John Lukens himself subsequently testified on behalf of the defense that he did in fact continue Mr. Sims' drug case to use as a carrot and stick in order to obtain Sims' cooperation against Mr. Rippo. In his testimony, Mr. Lukens acknowledged that he appeared "in court as a representative of the State of Nevada" in Sims' case "on one or two occasions." 3/4/96 TT at 30. According to Mr. Lukens, "I assume that [Sims' criminal case] is still pending today. It was my intention, with that case, that that will remain pending until the conclusion of the case against Mr. Rippo." Id. at 31. "As much as I could influence it and keep it pending, the answer to the question is yes." Id. at 32. On cross-examination, Mr. Lukens again testified that it was his personal intention to continue Sims' case until after his testimony against Mr. Rippo:

> Q You said you had – to the extent you could, you had something to do with the continuing of Mr. Sims' own personal charges?
>
> A Yes.
>
> Q What?
>
> A It would insure – or it would do the best that it could to insure that Mr. Sims would be present for this trial.

3/4/96 TT at 40-41, see id. at 42. Mr. Seaton subsequently acknowledged that Mr. Lukens "is the person who has been" "causing [Mr. Sims' case] to be continued." Id. Mr. Lukens repeatedly acknowledged that the extension of Sims' case could be considered a benefit. See id. at 31 (acknowledging that "as a general statement" it "is beneficial to a defendant to have his case prolonged"), 53 ("The delay, I assume you could probably consider to be an advantage to him."). It is therefore beyond rational dispute that prosecutor John Lukens continued Mr. Sims' criminal case as a carrot and stick to obtain his cooperation against Mr. Rippo.

Before addressing the rest of Mr. Sims' undisclosed benefits and false testimony, Mr. Rippo believes that it is important to point out the egregious nature of the State's failure to comply with its constitutional disclosure obligations (1) at trial and (2) during the instant habeas proceeding. E.g., Hall v. Director of Corr., 343 F.3d 976, 981 (9th Cir. 2003); Thomas v. Goldsmith, 979 F.2d 746, 749-50 (9th Cir. 1992). There is no question that the continuances of Mr. Sims' criminal case,

where Mr. Lukens made the unusual decision to appear on behalf of the State at Sims' hearings, was a benefit that was never disclosed to the defense at any point in time. It is equally apparent that the current representative for the State should not be heard to make any further representations regarding benefits that may or may not have been received by the State's witnesses. Given that the representative for the State has simply parroted the false testimony of the State's witnesses as if it were the truth without disregard for the benefits that his office actually provided, the State should no longer be heard make representations that receive consideration by this Court in the procedural posture of a motion to dismiss. Until the representative for the State has provided complete disclosure and transparency of the prosecution file and made specific representations under oath that he has attempted to make himself aware of what his office actually provided to the State's witnesses (including the factual bases for those assertions), the representative for the State should not be heard to make either general or specific denials regarding Mr. Rippo's claim. The State's ethical and constitutional obligations estop it from simply parroting the false testimony of its witnesses as if it were the truth. See Berger v. United States, 295 U.S. 78 (1935).

The State's general denial that Sims received the benefit of the federal government refraining to file federal gun charges against him in exchange for his cooperation should likewise be accorded no weight given the current record. In Mr. Lukens' testimony for the defense, he testified that he was well aware of the federal government's interest in filing gun charges against Sims:

> Q To you knowledge, was Tom Sims ever being considered by the federal government in a prosecution involving a gun charge?
>
> A I don't – I don't know. It may be been possible. I don't know what the mechanisms of the federal government with the gun charge are.
>
> But I know that there was some interest by the federal government in that area. But beyond that, what that interest was and the extent of it, I don't know.

3/4/96 TT at 34. Mr. Lukens subsequently admitted to having conversation with Agent Terry Clark from the Bureau of Alcohol and Firearms and/or the United States Attorney's Office regarding Mr. Sims' gun charges:

A The question was: Did I ever have a conversation with Mr. Terry Clark of the ATF?

Q Yes.

A I don't remember whether I had a conver – I don't remember if it was Mr. Clark.

Q Do you remember having any conversations with anybody from the Alcohol, Tobacco and Firearms division of the federal government concerning Tom Sims?

A Yes.

Q So you did have, as you recall, conversations with somebody from the ATF concerning a possible prosecution of Tom Sims.

A It – I don't remember whether it was with ATF or the U.S. Attorney's Office. I – I don't have a recollection of that. I remember speaking with somebody involved in the federal criminal justice system.

3/4/96 TT at 36. Therefore, contrary to the State's unsupported speculation, the prosecutors in Mr. Rippo's case did in fact speak with agents of the federal government regarding the failure to file federal gun charges against Mr. Sims as a benefit for his cooperation against Mr. Rippo. Again, the State's motion does not breathe a word of this evidence.

The most damning evidence, which receives no discussion at all in the State's motion, is that prosecutor John Lukens subsequently testified falsely that he intended to personally ensure that Thomas Sims would receive no favorable consideration whatsoever in his pending criminal cases due to his testimony against Mr. Rippo. After expressly acknowledging on cross-examination by the State that he still was exerting influence over the resolution of Sims' criminal case, see id., at 45-46, Mr. Lukens falsely testified that he would ensure that Sims received no favorable treatment as a result of his testimony against Mr. Rippo:

Q And you were – you were aware that his case is still pending in the system?

A Yes.

Q And in the same light as what you had – to the extent you had involved yourself before, do you plan on trying to have his case dismissed or otherwise treated in a favorable manner after the conclusion of the Rippo case?

A I do not.

Q And you are an administrator in the office of the District Attorney's office, are you not?

A I am a chief deputy.

Q And you are in charge of a particular unit?

A Yes.

Q And you have people working underneath you?

A Yes.

Q And you have control over cases.

A Yes.

Q Is the Sims case going to got forward as it originally had?

6/4/96 TT at 44-45 ("[Q] Just as you had control over the Sims case to some extent before, in terms of its continuance, could you still maintain some control over it as it – . . . . [A] Yes."). Next, the prosecution elicited false testimony from Mr. Lukens that Mr. Sims' criminal case would be adjudicated in the normal course with no benefits to Sims for his cooperation against Mr. Rippo:

Q And how is [Sims' case] going to be treated by the District Attorney from your point of view?

A It will go back to being a regular case that will stand and fall on its own merits.

6/4/96 TT at 46-47.

To top it off, Mr. Lukens falsely testified that the District Attorney's Office intended to seek a habitual criminal adjudication against Thomas Sims. On recross-examination, Mr. Lukens testified that he continued Mr. Sims' case because he knew that if Sims was "convicted of anything, the likelihood of him going to prison was great." 6/4/96 TT at 49. Mr. Lukens further acknowledged that the sentencing range for the underlying criminal charges against Sims totaled at least 27 years in prison. See id. at 50. Finally, prosecutor Lukens testified that his office had the discretion to file habitual criminal charges against Sims, and he falsely represented that one would be filed at the appropriate time:

Q And is that a choice that's within the discretion of the

prosecutor's office?

A No. It's a discretion – in other words, we would file it. We would ask the judge to sentence him as that, but I think it's up – the judge has discretion.

Q Okay.

A So the discretion is with the judge.

Q But the District Attorney has the discretion whether to file the habitual allegations, do they not?

A Yes.

Q And to you knowledge, was that filed against witness Tom Sims?

A It would not have been at that time. It would have been not the appropriate to time to do it.

6/4/96 TT at 52. Mr. Lukens further testified that the "reference to the habitual criminal filing, doesn't apply because those charges are not filed until – you don't seek that until after the conviction of the underlying charges. So its premature." Id. at 53.

In summary, contrary to the false testimony of Sims (upon which the State presently relies), prosecutor John Lukens admitted that (1) he became personally involved in prosecuting Thomas Sims; (2) he purposely continued Sims' criminal cases for the purposes of obtaining Sims' testimony; (3) he contacted federal agents in connections with Sims' pending federal gun charges; (4) he had present oversight of Sims' case; but (5) that he had no intention of allowing Sims favorable consideration on his pending case; and (6) that his office intended to exercise its discretion to file a habitual criminal enhancement on Sims after his conviction which would result in a life sentence if accepted by the court. However, Mr. Lukens' representations that Mr. Sims's criminal case "would rise and fall on its own merits" was false. Instead, as Mr. Rippo explained in his petition, Mr. Sims received the dismissal of a felony charge, conversion of another felony charge to a gross misdemeanor, and a second gross misdemeanor conviction. See Ex. 356. The State also did not file a habitual criminal enhancement against Sims as Mr. Lukens testified at Mr. Rippo's trial. Instead, Mr. Sims' criminal liability was reduced from 27 years (and a life sentence as a habitual criminal) to a $1,500 fine. See id. Mr. Lukens' testimony at Mr. Rippo's trial that Sims would not

receive favorable consideration was therefore false.

Also completely missing from the State's motion to dismiss are the two domestic violence charges against Sims that were dismissed before Mr. Rippo's trial, see Ex. 357, and a second felony drug charge that was converted to a misdemeanor (despite Sims' substantial history of felony convictions for drug charges), and closed without the imposition of any period of probation. See Ex. 357. The State's motion does not breathe a word about these allegations, but simply reiterates Sims' false testimony, which was subsequently repelled conclusively by prosecutor John Lukens in his testimony.[29] Given Lukens' own false testimony, there is reason to believe that these other favorable dispositions on pending charges against Sims were a benefit obtained by Lukens and/or another person in law enforcement or members of the district attorney's office. The fact that these benefits may not have been memorialized in a written document that was formally executed by Sims and the District Attorney's Office as the State speculates, see Motion at 41-42, does not absolve the State of its failure to disclose this evidence or to correct Lukens' false testimony. It also does not matter if Sims himself was ignorant of exact benefits obtained on his behalf by Lukens and Sims' defense attorney, Robert Archie, without Sims' knowledge. See, e.g., Hayes v. Brown, 399 F.3d 972, 987 (9th Cir. 2005) (fact that State witness did not know exact contours of benefits provided by prosecution to defense counsel on his behalf held irrelevant). Instead, the State disclosed none of this information and left it up to the defense to call the prosecutor to prove that the State failed to comply with its constitutional disclosure obligations. To top it off, the prosecutors in Mr. Rippo's case expressly told the court that it was a "legal fiction" to impute benefits to the State that were obtained by other district attorneys in the office, presumably including those very same benefits obtained by John Lukens.

Given the false testimony and failure to comply with the State's constitutional disclosure obligations revealed thus far, it is reasonable to assume that the evidence uncovered is only the "tip of the iceberg" and that additional exculpatory and impeachment evidence is currently sitting in the prosecution file. See, e.g., United States v. Blanco, 392 F.3d 382, 394 (9th Cir. 2004).

[29]The State never suggests that a multiple convicted felon and career criminal informant like Thomas Sims should be believed over prosecutor John Lukens.

"Given the government's suppression of Brady/Giglio material . . . we believe that 'for prophylactic reasons,' [citation], the district court should order full disclosure by the government of any and all potential Brady/Giglio material. . . ." Id. Therefore, for the purposes of a motion to dismiss, this Court cannot conclude as a matter of law that the State did not fail to disclose benefits pertaining to Thomas Sims.

b. Michael Beaudoin: False Testimony and Failure to Disclose Material Exculpatory and Impeachment Evidence

In his petition, Mr. Rippo alleged that State's witness Michael Beaudoin testified falsely that he received no benefits in exchange for his testimony and that the State failed to correct his false testimony on the issue of benefits. Petition at 49-51. The State's argument that Mr. Rippo's claim was waived for failing to raise it on direct appeal, see Motion at 44, is answered above as contrary to clearly established state and federal law which requires the State to set the record straight when it fails to disclose evidence and correct false testimony, and that Mr. Rippo can demonstrate cause and prejudice to overcome any of the default rules by showing that his claim has merit. See pp. 49-55, supra. The State further asserts that defense counsel should have asked Mr. Beaudoin about his pending criminal charges, Motion at 44, yet the record it cites shows that defense counsel did ask about his pending charges, but that Mr. Beaudoin testified falsely in response. And again, the State is apparently under the mis-impression that defense counsel's failure to discover the exact extent of the benefits received by its witnesses somehow lets it off the hook for having to comply with its constitutional disclose obligations in the first place.

Once again, the State's motion asks this Court to simply accept Mr. Beaudoin's false testimony at face value instead of looking at the evidence of how his criminal charges were ultimately handled by the State. For example, the State repeats Mr. Beaudoin's false testimony that he spent "30 days in jail pursuant to plea negotiations" for an arrest on February 1-2, 1992, see Motion at 44, when Mr. Beaudoin's criminal record shows that the charge was actually dismissed on March 10, 1993. See Ex. 358. In addition, the State speculates that "Beaudoin's earlier cases from 1989 to 1991 have no bearing on the instant matter." Motion at 45. On the contrary, Mr. Beaudoin's earlier cases have everything to do with his receipt of benefits from the State since the

State failed to revoke his probation on those convictions and gave him a secret benefit in the form of allowing him to spend six months in jail instead of having to spend four years in prison. In a declaration recently executed by Michael Beaudoin, he explained that he contacted prosecutor Melvyn Harmon and convinced him to (1) dismiss drug charges against him, (2) reduce a felony drug charge to a gross misdemeanor, and (3) allow him to serve six months in jail instead of being revoked on his earlier probation to spend four years in prison (for his 1991 felony conviction). According to Mr. Beaudoin's declaration,

> I was arrested for felony possession of marijuana and meth. I do not recall how much time I was looking at, but I was certain that I would be sent to state prison had I been convicted. In an effort to avoid being sentenced to time in a state penitentiary, I called prosecutor Mel Harmon at some point before I was scheduled to testify at Mr. Rippo's trial and asked him to help me out, especially because I was helping him out by testifying against Michael Rippo.
>
> As a result of my call to Mel Harmon, the prosecutor's office dropped my marijuana charge and reduced my meth possession charge from a felony to a gross misdemeanor. In the end, I was only required to spend six months at the Clark County Detention Center, and I avoided having to go to state prison.

Ex. 366, at 1.

In summary, instead of complying with its constitutional and ethical obligations in the instant proceeding, the State is simply relying upon the false testimony of its witnesses which it represents to be the truth in the face of substantial evidence from both Mr. Beaudoin and his court case files showing that he received undisclosed benefits in exchange for his testimony and that he lied about that fact at trial. And, once again, the State says nothing at all about the dismissal of Mr. Beaudoin's 1995 charges for possession of stolen properly (95-FH-0518X), and his subsequent 1995 felony drug charges (95-F-07735X), which were coincidently continued until the week after Mr. Beaudoin's testimony against Mr. Rippo and then negotiated to two gross misdemeanors. See Ex. 358. As explained above, this is the same remarkable "coincidence" that occurred with Thomas Sims' pending charges which were continued until just after his testimony and then resolved in a favorable manner. Considering the totality of the circumstances, it should come as a surprise to no one that these are not coincidences at all but instead represent undisclosed benefits received by the State's witnesses.

c. Thomas Christos: False Testimony and Failure to Disclose Material Exculpatory and Impeachment Evidence

Mr. Rippo's petition demonstrates that Thomas Christos received undisclosed benefits in the same manner as Mr. Sims and Mr. Beaudoin. In the State's motion, it provides only a general denial that Mr. Christos received benefits on pending criminal charges, see Motion at 45; however, as explained above, the State's arguments are not made in good faith, but seem instead to simply regurgitate the false testimony from its witnesses, without making any representations of whether it has made itself aware of the actual disposition of Christos' criminal charges. Specifically, Mr. Rippo's petition alleges that felony home invasion charges against Christos (94-F-2599X) where continued for over two years until after Mr. Rippo's trial and then dismissed on the grounds that the State was not ready to proceed. See Ex. 363. When the State's general and specific denials have been proven repeatedly wrong, it defies common sense to simply indulge the State's uniformed speculation that the resolution of Christo's charges after Mr. Rippo's trial was simply another miraculous coincidence that has no relation to his cooperation with the State against Mr. Rippo. Mr. Rippo is therefore entitled to discovery and an evidentiary hearing to prove his claims.

d. Jailhouse Witnesses - James Ison, David Levine, and William Burkett (Donald Hill): False Testimony and Failure to Disclose Material Exculpatory and Impeachment Evidence

In his petition, Mr. Rippo alleged that all three of the jail house witnesses that surfaced to testify against him testified falsely regarding details about the offense that were specifically fed to them by the State and the State failed to disclose this fact to defense counsel. Petition at 51-52. Specifically, Mr. Rippo has included a declaration recently obtained from David Levine stating that the critical details from his second statement to the police contained details that were fed to him by the officers and not actually conveyed to him by Mr. Rippo. Ex. 235 to Petition. In a declaration recently obtained from James Ison, he testified that the prosecutors placed him in a room alone with all of the prosecution's discovery in Mr. Rippo's case and had him review those files so that he could testify to the details of the offense as though he had received them directly from Mr. Rippo. Ex. 234 to Petition. The State's motion says nothing about this information on the merits of these allegations or the implication that its representativeness encouraged jail house

witnesses to manufacture false testimony against Mr. Rippo by feeding them inside details of the offense to make them appear credible to the jury.

Mr. Rippo can also show that the State's jailhouse witness, William Burkett, provided false testimony at trial regarding Mr. Rippo purportedly approaching him for assistance in sneaking drugs into prison to poison Diana Hunt. On cross-examination, Mr. Burkett testified for the first time that he had cooperated with the State in another murder prosecution. 3/1/96 TT at 103. Mr. Burkett's status as a career criminal informant was not previously disclosed to the defense. In addition, Mr. Burkett acknowledged that he received a letter from Detective Chandler to the parole board requesting favorable consideration in exchange for his assistance in Mr. Rippo's case. See id. at 100, 112 ("[Q] And you got that letter, right? [A] Yes, sir. [Q] And you got paroled? [A] Yeah."). Mr. Burkett also specifically requested "a letter written to the parole board" during his first "interview" with the police. See id. at 123. To bolster his own credibility, Mr. Burkett further testified that Mr. Rippo approached him requesting that Burkett's girlfriend assist him by sneaking drugs into the women's prison to kill Diana Hunt:

> A He wanted to try to have someone kill Diana to keep her from testifying against him.
>
> Q How would they do that?
>
> A He wanted to know if some way he could send some drugs in there, would my old lady give to [sic] it to her, overdose.
>
> Q An overdose of drugs?
>
> A An overdose, yes.

3/1/96 TT at 98. However, in a recent declaration, Mr. Burkett has acknowledged that this material allegation in his trial testimony was false:

> Michael Rippo never told me that he wanted to have his co-defendant Diana Hunt killed prior to the time of the trial. As far as I knew, Diana Hunt was not going to testify against him because Michael never told me so.
>
> My girlfriend at that time was Amy Annette Rizzot [sic] aka Rene Hill, and she was previously incarcerated in Carson City, Nevada. However, Amy was released from prison in 1988, and I did not know any females who were locked up there at any point during the early 1990s when I was at Ely State Prison with Michael.

Ex. 373, at 1. Mr. Rippo has therefore shown that each of the three jailhouse witnesses who testified against him manufactured false details of the offense to appear credible to the jury and to obtain benefits from the State.

Instead of even issuing a general denial, the State raises strawman arguments that are completely irrelevant in the procedural posture of a motion to dismiss. In its motion, the State argues that "neither of the letters are notarized or in any way authenticated, [and that] each letter was written over 11 years after the Defendant's trial." Motion at 46.[30] The State cites no authority in support of the proposition that sworn declaration signed under penalty of perjury is inadmissible for a pleading purpose, and there is no such authority.[31] The State might have a point if Mr. Rippo were attempting to admit the declarations into evidence during an evidentiary hearing, but that is entirely separate from using the declarations in support of a pleading purpose in a petition. It also should come as no surprise that Mr. Rippo's counsel and other legal agents (including investigators) do not have the luxury of a mobile notary republic to accompany them on investigative interviews with witnesses. As a matter of law, even if there were a rule requiring an affidavit (which there is not), a sworn declaration would serve the same purpose. See, e.g., Russ v. General Motors Corp., 111 Nev. 1431, 1439, 906 P.2d 718, 723 (1995) ("The district court was required to accept the Potter declaration, and any inferences drawn from it, as true during the summary judgment proceeding."); cf. Nev. R. Civ. P. 56(e) (providing for affidavits to defeat motion for summary judgment). "[W]e hold that the distinction between an affidavit and declaration made under penalty of perjury is not such as to affect the substantial rights of the parties . . . ." State Department of Motor Vehicles v. Sanders, 113 Nev. 805, 813, 942 P.2d 145, 150 (1997). In the context of a civil administrative hearing, the Nevada Supreme Court has further acknowledged that

> there is no logical difference for requiring the formalistic protocol of

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[30]The State's complaint regarding the age of the declarations is properly directed at cross-examination of the witnesses, and has no effect whatsoever on the propriety of Mr. Rippo's allegations as admissible for a pleading purpose.

[31]Mr. Rippo notes that the representative for the State has never advanced this argument previously in any case. Mr. Rippo further notes that the representative for the State would be hard pressed to even identify a post-conviction capital case where counsel provided sworn affidavits or declarations in connection with the allegations of a petition.

> a sworn affidavit. Further, the administration of an oath or affirmation no long has a religious significance. Thus, for purposes of administrative hearings of the type involved in this matter, the distinction between a sworn declaration and an affidavit is a distinction without legal difference.

State Department of Motor Vehicles v. Sanders, 113 Nev. 805, 813, 942 P.2d 145, 150 (1997). It bears repeating that the declarations in the instant proceeding are signed under penalty of perjury and they are only admissible for a pleading purpose, which is distinct from their admission during an evidentiary hearing. Given that the declarations in question are only being used for a pleading purpose and not actually admitted in a court of law, the instant case is a much stronger one for considering the declarations Mr. Rippo has proffered than in Sanders. The use of signed declarations made under penalty of perjury therefore does not affect Mr. Rippo's entitlement to a hearing on these allegations.

The State's second argument that it is free to present false testimony without limit as long as the defense attempts to cross-examine its witnesses on that point, see Motion at 46, borders on frivolous.

e. The Law Relating to the State's Presentations of False Evidence and Failure to Disclose Material Exculpatory and Impeachment Evidence

To obtain relief on his false testimony claim, Mr. Rippo need only show that there is "any reasonable likelihood that the false testimony could have affected the judgement of the jury." Hayes v. Brown, 399 F.3d 972, 985 (9th Cir. 2005) (en banc) (emphasis added); Jimenez v. State, 112 Nev. 610, 622, 918 P.2d 687, 694 (1996). "'[I]f it is established that the government knowingly permitted the introduction of false testimony, reversal is virtually automatic.'" Jackson v. Brown, 513 F.3d at 1076, quoting Hayes v. Brown, 399 F.3d at 978, quoting United States v. Wallach, 935 F.2d 445, 456 (2nd Cir. 1991). As explained below, Mr. Rippo can easily make this required showing with respect to the effect of Mr. Sims' false testimony on the trial, on his motions for new trial, and on direct appeal. "[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant)." Kyles v. Whitley, 514 U.S. 419, 434 (1995). "The question

is not whether the defendant would more than likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id. The State argues only that the facts do not support a claim that Mr. Sims' testimony was false and that the State did not withhold evidence. Mr. Rippo respectfully submits that under the Kyles standard, there can be no rational dispute that Mr. Sims' false testimony could have had any reasonable likelihood of affecting the verdict.

Once again, the State's motion completely fails to acknowledge or discuss the controlling materiality standard that applies when the State fails to comply with its constitutional disclosure obligations. As a matter of federal law, non-disclosed evidence is material "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' Kyles, 514 U.S. at 433, 115 S.Ct. 155." Silva v. Brown, 416 F.3d 980, 985-86 (9th Cir. 2005). As Mr. Rippo explained above, "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant)." Kyles v. Whitley, 514 U.S. 419, 434 (1995). "The question is not whether the defendant more than likely than not would have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id.

When a specific request for evidence is made, the controlling state law standard for materiality merely requires a showing of a "reasonable possibility it affected the outcome." Lay v. State, 117 Nev. 1185, 14 P.3d 1256, 1261 (2001) (emphasis added).[32] As explained above, the fact that trial counsel had to resort to calling the trial prosecutor to uncover the benefits received by the

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[32]See, e.g., State v. Bennett, 119 Nev. 589, 81 P.3d 1, 9 (2003) ("specific request" for evidence during litigation of direct appeal means materiality demonstrated "if there is merely a reasonable possibility that the jury would not have returned a verdict of death had it been disclosed"); Mazzan v. Warden, 116 Nev. 48, 993 P.2d 25, 41 (2000) ("general discovery request before trial" and attempt "to examine witnesses in regard to the police investigation" held to be "the functional equivalent of a specific request for the information from the state"); Jimenez v. State, 112 Nev. 610, 918 P.2d 687 (1996) (order of trial court directing "that fully discovery take place pursuant to trial counsel's request" held to be "functional equivalent of a specific request for the information from the State").

State's witnesses constitutes the functional equivalent of a specific request; therefore, the "reasonable possibility" standard applies to the instant case. As explained above, Mr. Rippo is entitled to relief even if the reasonable probability standard applied to him. The primary evidence against Mr. Rippo was from Diana Hunt, who was the initial attacker, who expressly received the dismissal of murder charges, and who was allowed to plead guilty to robbery (and is currently out of prison) in exchange for her testimony purportedly placing Mr. Rippo in the apartment when the victims were killed. There was no physical evidence connecting Mr. Rippo to the crime scene. The only other witnesses that testified against him either convicted felons who received substantial undisclosed benefits or who surfaced from the jail house environment to present false testimony against Mr. Rippo in exchange for probation. Moreover, according to the candid statements of prosecutor William Hehn, he himself did not believe that the State possessed enough information enough evidence to convict Mr. Rippo without the informant witnesses. In his comments to homicide detectives, Mr. Hehn stated that "We still just have Rippo and Diana in possession and use of cc [credit cards] and car. Diana's statement 'they won't be needing it' and Rippo's statements. Still no good . . . but? Can't see it getting better without statements from other suspects." Ex. __, at 33 [07060-SW000575]. Therefore, according to the prosecution's own representations, there was insufficient evidence with which to convict Mr. Rippo without the so called corroborating testimony of the six informant and jail house witnesses. Mr. Rippo can therefore show a reasonable possibility and that the presentation of false testimony affected the jury's verdict.

f. Other Prosecutorial Misconduct

The State entirely fails to address Mr. Rippo's allegation that the State failed to disclosed evidence of statements allegedly made by Mr. Rippo to a parole officer, which were admitted against Mr. Rippo at his penalty hearing. Petition at 53. The State also failed to address Mr. Rippo's allegations that he believes the State is currently suppressing other material exculpatory and impeachment evidence generated by parole and probation regarding Mr. Rippo. Finally, the State failed to address Mr. Rippo's allegations that the State failed to comply with the court's discovery order. The State's failure to address these claims should be deemed a confession that the issue is meritorious. Bates v. Chronister, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating a

Respondent's failure to address an argument in its answering brief as a confession of error) (citing NRAP 31(c); State v. Weber, 100 Nev. 121, 123-24 676 P.2d 1318, 1319-20 (1984); Jacobson v. Best Brands, 97 Nev. 390, 393 n.1, 632 P.2d 1150, 1152 n.1 (1981) (citing NRAP 32(c)).

In Claim Two, Mr. Rippo alleged that his death sentence and conviction are invalid because of the pervasive misconduct by the trial prosecutors, Mel Harmon and Dan Seaton. Where prejudicial prosecutorial misconduct infects the trial with unfairness, the sentence of death is a denial of due process. Greer v. Miller, 483 U.S. 756, 765 (1987); Donnelly, 416 U.S. at 643. See also United States v. Bagley, 473 U.S. 667, 676 (1985); United States v. Agurs, 427 U.S. 97, 108 (1976); Floyd v. Meachum, 907 F.2d 347, 353-55 (2d Cir. 1990) (cumulative effect of repeated and escalating misconduct in closing argument rendered trial fundamentally unfair and violated due process).

The State completely fails to address the pervasive nature of misconduct for which Mr. Harmon and Mr. Seaton are infamous. Instead, the State's first argument is that Mr. Rippo's claims are barred because his counsel failed to object to **any** of the sixty-plus improper comments cited by Mr. Rippo. Motion at 48 (emphasis in original). The State's argument is an admission that trial counsel were ineffective for failing to object to this misconduct and that appellate counsel was ineffective for failing to raise this issue on appeal, and this issue is therefore properly before this Court. Strickland v. Washington, 466 U.S. 668 (1984).

To support his prosecutorial misconduct claim, Mr. Rippo identified multiple issues of specific misconduct:

(1) Improper alignment of the prosecution with the jury

Mr. Rippo argued that the prosecutors improperly aligned themselves with the jury more than sixty times by using terms "we" and "us." Petition at pg. 54-57. The use of "we" or "us" pronouns can be used to indicate citizens or human beings, see Schoels v. State, 114 Nev. 981, 987-8, 966 P.2d 7356, 739 (1988), Motion at 48. When a prosecutor uses the terms ***more than 60 times***, however, it is an improper attempt to align the prosecution with the jury, and such argument violates the prosecutor's obligation not to invoke his personal opinion. See U.S. v. Young, 470 U.S. 1, 18-19 (1985); Berger v. U.S., 295 U.S. 78, 85 (1935); U.S. v. McKoy, 771 F.2d 1207, 1210-1211 (9th Cir.

1985); Floyd v. State, 118 Nev.156, 173, 42 P.3d 249, 261 (2002); Earl v. State, 111 Nev. 1304, 904 P.2d 1029 (1995).

This argument deprived Mr. Rippo of his state and federal constitutional rights to due process because the State aligned itself with the jury and proceeded to argue that the testimony of its witnesses was true and credible. See Petition at 55-57. This alignment with the jury took the credibility determination of the witnesses away from the jury and placed it in the hands of the prosecutors. The State's mischaracterization of the Nevada Supreme Court's decision that the district court's instruction to the jury to base its decision on the evidence before it and not on the attorneys' argument is missplaced. Motion at 48. First, this issue was never presented to the Nevada Supreme Court due to the ineffective assistance of counsel. Second, the misconduct of the prosecution in aligning itself with the jury withdrew from the jury's purview the duty to determine the credibility of the witnesses. No instruction could cure the error. To the extent that this issue was not raised below, trial and appellate counsel were ineffective.

(2) Improper invocation of Mr. Harmon's personal opinion

Mr. Rippo argued that the prosecutors improperly expressed their personal opinions at trial. Pet. at 57. In response, the State explains the statements by the prosecutors as "not injecting his personal viewpoint during closing argument but rather reciting, to the best of his ability and memory, evidence presented at trial." Motion at 49. The State cites no authority for this standard because there is no such authority.

Further, the State omits any discussion of the most offensive statement made by Mr. Harmon that cannot be explained away as a memory of the evidence, when he opined "Thank God, the victim was here to tell us about it, . . ." Pet. at 57. This statement was impermissible on a number of fronts. First, as noted above, the prosecutor may never interject his personal opinion into the trial proceedings. See U.S. v. Young, 470 U.S. 1, 18-19 (1985); Berger v. U.S., 295 U.S. 78, 85 (1935); U.S. v. McKoy, 771 F.2d 1207, 1210-1211 (9th Cir. 1985); Floyd v. State, 118 Nev.156, 173, 42 P.3d 249, 261 (2002); Earl v. State, 111 Nev. 1304, 904 P.2d 1029 (1995).

Further, a prosecutor may never invoke religious authority before the jury and in his

argument against the defendant. Sandoval v. Calderon, 241 F.3d 765, 776-8 (9th Cir. 2000); see also Coe v. Bell, 161 F.3d 320, 351 (6th Cir. 1998); Bennett v. Angelone, 92 F.3d 1336, 1346 (4th Cir. 1996); Cunningham v. Zant, 928 F.2d 1006, 1019-20 (11th Cir. 1991); U.S. v. Giry, 818 F.2d 120, 133 (1st Cir. 1987) (as cited in Sandoval, supra.).

This argument deprived Mr. Rippo of his state and federal constitutional rights to due process because the State aligned itself with the jury. See Pet. at 55-57. This alignment with the jury took the credibility determination of the witnesses away from the jury and placed it in the hands of the prosecutors. No instruction could cure the error. To the extent that this issue was not raised below, trial and appellate counsel were ineffective.

(3) Improper vouching

Mr. Rippo argued that the prosecutors improperly vouched for its witnesses when it argued that their testimony was truthful and when it improperly argued that the witnesses were not provided benefits in exchange for their testimony. Pet. at 57-58, 60. The State does not address the merits of this claim in any fashion. Motion at 49-50. A prosecutor commits misconduct when he improperly vouches for the State's witnesses. King v. State, 116 Nev. 349, 357, 998 P.2d 1172, 1176-77 (2000); U.S. v. Neocochea, 986 F.2d 1273, 1277-78 (9th Cir. 1993); U.S. v. Lew, 875 F.2d 219, 223-24 (9th Cir. 1989). Such vouching is also improper because a prosecutor is not permitted to express his personal opinion during his closing arguments to the jury. See U.S. v. Young, 470 U.S. 1, 18-19 (1985); Berger v. U.S., 295 U.S. 78, 85 (1935); U.S. v. McKoy, 771 F.2d 1207, 1210-1211 (9th Cir. 1985); Floyd v. State, 118 Nev.156, 173, 42 P.3d 249, 261 (2002); Earl v. State, 111 Nev. 1304, 904 P.2d 1029 (1995).

This argument deprived Mr. Rippo of his state and federal constitutional rights to due process because the State aligned itself with the jury. See Pet. at 55-57. This alignment with the jury took the credibility determination of the witnesses away from the jury and placed it in the hands of the prosecutors. No instruction could cure the error. To the extent that this issue was not raised below, trial and appellate counsel were ineffective.

(4) Arguing facts not in evidence.

Mr. Rippo argued that the prosecutors improperly argued facts not in evidence. Pet.

at 58-59. The State argues in response that the Nevada Supreme Court already found the comments to be improper, but harmless error. Motion at 50. Mr. Rippo now argues, however, that the cumulative error of these comments, combined with the extensive Brady and Giglio violations which occurred, deprived Mr. Rippo of a fair trial. Moreover, to the extent that trial, appellate and state post-conviction counsel did not properly marshal the available evidence, they were ineffective.

A prosecutor may not argue facts that are not in evidence. Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974) ("It is totally improper for a prosecutor to argue facts not in evidence. . . ."); Agard v. Portuondo, 117 F.3d 696, 711 (2nd Cir. 1997) (alluding to facts not in evidence is prejudicial and not at all probative), rev'd on other grounds, 529 U.S. 61 (2000); Floyd v. State, 118 Nev. __, 42 P.3d 249, 261 (2002) (it is elementary that "a prosecutor may not make statements unsupported by evidence produced at trial."); Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 586 (1992) (prosecutor may not make statements which evidence at trial cannot support). Further, this argument was improper because it was introduced solely for the purpose of inflaming the passions of the jury. See Cunningham v. Zant, 928 F.2d 1006, 1019 (11th Cir. 1991) ("A prosecutor may not make an appeal to the jury that is directed to passion or prejudice rather than to reason and to an understanding of the law."); Hance v. Zant, 696 F.2d 940, 951 (11th Cir. 1983) ("It is improper that the sentencing phase of the trial not be influenced by passion, prejudice or any other arbitrary factor . . . . With a man's life at stake, a prosecutor should not play on the passions of the jury."), overruled on other grounds by Brooks v. Kemp, 762 F.2d 1383, 1399 (11th Cir. 1985); Floyd v. State, 118 Nev. __, 42 P.3d 249, 261 (2002) ("any inclination to inject personal beliefs into arguments or to inflame the passions of the jury must be avoided. Such comments clearly exceed the boundaries of proper prosecutorial conduct.").

The introduction of this argument deprived Mr. Rippo of his state and federal constitutional rights to due process because the State improperly inflamed the passions of the jury. See Pet. at 55-57. This alignment introduced otherwise inadmissible prior bad act evidence against Mr. Rippo to the jury. Further, the argument improperly concluded for the jury that Ms. Hunt showed anyone marks from a stun belt, even though there was absolutely no evidence admitted at trial to support such an accusation. The prosecutor also became a fact-finder and witness when he

testified as an expert witness about the meaning of detectable ejaculation. Petition at 59. No instruction could cure the error and misconduct. To the extent that this issue was not raised below, trial and appellate counsel were ineffective.

(5) Improper argument to "send a message" to the community

Mr. Rippo argued that the prosecutors improperly argued that the jury should send a message to the community to sentence Mr. Rippo to death, and that the argument deprived him of his state and federal constitutional rights to an individualized sentencing determination. Petition at pg. 59-60. The State argues that the Nevada Supreme Court found this to be proper argument. Motion at 50. Mr. Rippo now argues, however, that the cumulative error of these comments, combined with the extensive Brady and Giglio violations which occurred, deprived Mr. Rippo of a fair trial. Moreover, to the extent that trial, appellate and state post-conviction counsel did not properly marshal the available evidence, they were ineffective. Likewise, Mr. Rippo respectfully submits that the Nevada Supreme Court improperly applied Gregg v. Georgia, infra, to the facts.

It is improper to urge the jury to send a message to the community to cure societal ills. U.S. v. Leon-Reyes, 177 F.3d 816, 822 (9th Cir. 1999) ("A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons whole irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.") (internal citations omitted). But see Collier v. State, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985) (relying on Gregg v. Georgia, to hold that "[o]f course, it may be proper for counsel to go beyond the evidence to discuss general theories of penology such as the merits of punishment, deterrence and the death penalty," but not addressing that the quoted portion of Gregg merely states that "both counsel . . . made lengthy arguments dealing generally with the propriety of capital punishment" and does not hold that this is a proper subject for comment by either party in a criminal trial). Mr. Rippo respectfully submits that the Nevada Supreme Court ruling in Collier

is contrary to established United States Supreme Court law and should be vacated because the court improperly relied upon Gregg v. Georgia, 428 U.S. 153, 186 (1976) in finding the argument permissible even though Gregg addressed legislative authority rather than argument to a jury. See also Ring v. Arizona, 536 U.S. 584, 614-15 (2002) (Breyer J., concurring) (citing numerous studies).

The introduction of this argument deprived Mr. Rippo of his state and federal constitutional rights to due process and a reliable sentence under the Eighth Amendment because the State improperly inflamed the passions of the jury and it removed from the jury its mandated responsibility to make an individualized sentencing determination. No instruction could cure the error and misconduct. To the extent that this issue was not raised below, trial and appellate counsel were ineffective.

(6) Improper shifting of burden of proof

Mr. Rippo argued that the prosecutors improperly shifted the burden of proof to Mr. Rippo and highlighted Mr. Rippo's failure to testify. Pet. at 60. The State does not address this claim on the merits. Motion at 49-50.

Criminal defendants have a constitutional right to the presumption of innocence and that the government prove guilt beyond a reasonable doubt. Estelle v. Williams, 425 U.S. 501, 503 (1976); In re Winship, 397 U.S. 358, 362 (1970). Further, any prosecutorial reference to a defendant's failure to testify is "per se grounds for reversal unless the judge immediately instructs the jury that the defendant had a constitutional right not to testify and advises the jury that the prosecutor's conduct was improper." U.S. v. Hasting, 461 U.S. 499, 504-505 (1983).

The prosecutor's improper shifting of the burden of proof to Mr. Rippo was a violation of his state and federal rights to due process and a fair trial. Further, the improper commentary on Mr. Rippo's failure to testify, and the absence of an immediate curing instruction, was per se prejudicial error.

This misconduct fundamentally deprived Mr. Rippo of his state and federal constitutional rights to due process and a fair trial. No instruction could cure the error and misconduct. To the extent that this issue was not raised below, trial and appellate counsel were ineffective. Mr. Rippo can therefore demonstrate that the prosecutorial misconduct that occurred

in his case rendered his conviction and sentence fundamentally unfair.

3. Claim Twenty-Two: Lethal Injection

Mr. Rippo has shown cause and prejudice to excuse any procedural default of his claim that death by lethal injection constitutes cruel and unusual punishment because (1) the State suppressed its lethal injection protocol until very recently, (2) post-conviction counsel was ineffective for failing to raise the claim previously, and (3) there has been an intervening change in law since the filing of Mr. Rippo's first state post-conviction petition. In its motion, the State asserts, without argument or analysis, that the Supreme Court's recent decision in Baze v Rees, 2008 WL 1733259 (4/16/08) forecloses his claim regarding the constitutionality of the lethal injection protocol in Nevada. See Motion at 83. The State then argues that a claim regarding the constitutionality of the lethal injection protocol is not cognizable in a habeas petition. See Motion at 83-84. The State does not specifically argue that this claim is procedurally barred, and Mr. Rippo alleges, in any event, that he has demonstrated sufficient cause and prejudice to overcome any procedural bars.

Mr. Rippo can show cause to excuse procedural default of Claim Twenty-Two because the State has suppressed the information to support this claim. See, e.g., Banks v. Dretke, 540 U.S. 668,695-698 (2004). The State's motion completely fails to acknowledge or discuss the fact that it is its failure to disclose the protocol that allows him to overcome the procedural default bars. In the past, the Nevada Department of Corrections has refused all requests for disclosure of its execution protocol. See Exs. 370-372. Mr. Rippo received a copy of the protocol, which was requested and received by a member of the media, for the first time in April of 2006. See Ex. 203 to Pet. Mr. Rippo is now able to show that execution by lethal injection in Nevada constitutes cruel and unusual punishment based on its protocol. See Ex. 206 to Pet. Moreover, the scientific evidence showing that the chemicals used in the execution process are likely to cause unnecessary pain was not published until recently. See 205 to Pet. Because the State has suppressed the protocol, Mr. Rippo has been unable to raise his constitutional claim earlier. Therefore, Mr. Rippo can show "cause" to excuse any procedural default of his lethal injection claim.

In addition, post-conviction counsel was ineffective for failing to raise this

meritorious issue sooner. Controlling authority, which the State consistently ignores, clearly holds that Mr. Rippo can show good cause and prejudice to excuse any procedural default bars by demonstrating that post-conviction counsel was ineffective for failing to raise the claims contained in the instant petition. E.g., Crump v. Warden, 113 Nev. 293, 304-05, 934 P.2d 247, 253-54 (1997). While state law may purport to recognize that Mr. Rippo's ability to allege ineffective assistance of post-conviction counsel is not limitless, see State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 112 P.3d 1070, 1077 (2005), the instant petition is his one and only opportunity to raise these allegations. It logically follows that the appropriate time to challenge the effectiveness of first state post-conviction counsel is in a second post-conviction petition that is filed after the conclusion of prior counsel's representation. In short, state law cannot create a right to the effective assistance of post-conviction counsel and then fail to provide any forum for a capital petitioner to vindicate that right. If the Crump decision conveys a substantive right to capital habeas petitioners, then it follows that Mr. Rippo's instant petition is his one and only chance to vindicate that right. Mr. Rippo has therefore made a prima facie showing to overcome the procedural rules cited by the State and must receive discovery and an evidentiary hearing to prove up those allegations.

Furthermore, Mr. Rippo can show cause to overcome any procedural default due to the intervening change in law. Baze constitutes an intervening change in the law that provides good cause and prejudice to overcome the procedural default rules raised by the State. According to the Nevada Supreme Court, "[g]ood cause for failing to file a timely petition or raise a claim in a previous proceeding may be established where the factual or legal basis for the claim was not reasonably available." Bejarano v. State, 122 Nev. __, 146 P.3d 265, 270 (2006). Here, Baze articulates a standard for reviewing lethal injection protocols that was not available at the time Mr. Rippo filed his first state post-conviction petition. Accordingly, Mr. Rippo has good cause to challenge the protocol under the newly announced standard.

Mr. Rippo's discussion of the merits of his lethal injection claim and his response to the State's remaining arguments is contained below. For present purposes, what is clear is that Mr. Rippo's constitutional claim is not procedurally barred.

The State asserts, without argument or analysis, that Mr. Rippo's claim that the lethal

injection protocol in Nevada is unconstitutional is foreclosed by the United States Supreme Court's recent decision in Baze v Rees, 2008 WL 1733259 (4/18/08). See Motion at 83. Though it would undoubtedly be much easier on the State if this were true, the Baze decision does not render all challenges to lethal injection without merit, but, rather, offers a new standard under which lethal injections procedures will henceforth be examined for constitutional adequacy. For the reasons outlined below, the lethal injection protocol in Nevada remains unconstitutional under the new standard announced in Baze.

a. The Lethal Injection Procedures Utilized In Nevada Constitute Cruel and Unusual Punishment Under Baze v. Rees

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 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 so because the extensive guidelines adopted by Kentucky ensured that a lethal injection execution did not inflict unnecessary pain and suffering. Id.

Under Baze, a constitutional challenge to the lethal injection protocol will prevail upon proof that 1) the protocol created a demonstrated risk of severe pain and 2) 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."

Id. (C.J. Roberts, p. 10).[33]

Here, the Nevada execution protocol creates a substantial risk of serious harm which is objectively intolerable. Although the Nevada execution protocol is "confidential," and not generally released, Mr. Rippo obtained a copy of the protocol from the State in April 2006.[34] Nevada's execution manual does not specify what, if any, training in anesthesiology the person(s) administering the lethal injection must have.[35] If an untrained or unskilled executioner fails to deliver sufficient sodium thiopental to ensure adequate anesthetic depth, the inmate will feel the terrifying sensations of slow suffocation from the injection of pancuronium bromide and the excruciating pain of the subsequent injection of potassium chloride.[36] 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 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

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[33] 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." (J. Thomas, Concurrence, p. 1).

[34] This manual may not be valid long, however, as the Nevada execution protocol may have been amended this year. American Civil Liberties Union of Nevada v. Skolnik, et al, Nevada Supreme Court No. 50354

[35] Although the Nevada execution manual suggests 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.

[36] 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).

> pancuronium bromide and pain from the injection of potassium chloride.

Id. (C.J. Roberts, p. 15). The plurality noted 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 . . . .
>
> . . .
>
> 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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> 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. (C.J. Roberts, p. 6, 16). These safeguards instituted by Kentucky to ensure that sodium thiopental rendered the inmate unconscious are what ultimately satisfied the constitutional requirements for an execution protocol.

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 requires that "appropriate medical services personnel" perform a venipuncture,[37] but fails to account for the

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[37] 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

foreseeable circumstance that the executioner(s) will be unable to obtain intravenous access by a needle piercing the skin and entering a superficial vein suitable for the reliable delivery of drugs. Typically, when the executioner is unable to find a suitable vein, the executioner resorts to a "cut down," a surgical procedure used to gain access to a functioning vein. When performed by a non-physician, the risks are great. After the venipuncture, the "medical services personnel will then leave the execution chamber." Ex. 203 to Pet. During the injection of the three drugs, the executioner is in a room separate from the inmate and has no visual surveillance of the inmate. 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 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 few or no safeguards to eliminate the substantial or imminent risks an inmate will suffer the terrifying experience of slow suffocation from the injection of pancuronium bromide and the excruciating pain of the subsequent injection of 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." Id. 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 some undesignated amount of time, and will possibly suffer further painful and lethal injections. Such a protocol unquestionably poses a substantial risk of serious harm. See Pet. at 185-191.

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

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of those personnel and never designates what responsibilities these personnel will have in an execution.

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, muddles 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 serves only to inflict further terror, pain and/or disgrace and, as such, is constitutionally intolerable.

The Baze plurality suggested that alternative methods of execution will support an argument 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. Rippo filed his habeas petition, Mr. Rippo 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; (3) and the protocol procedures independently provided a substantial risk of serious harm. Pet. at 179-185. Mr. Rippo's habeas petition inherently proffered the 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 unconsciousness. 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, Pet. at 182-183 (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.

b. Lethal Injection Procedures May Be Challenged by a Post-Conviction Petition for Writ of Habeas Corpus.

The State contends that lethal injection procedures may not be challenged by a post-conviction petition for writ of habeas corpus. See Motion at 83-84. Contrary to the State's assertions, habeas relief is a viable remedy for petitioners seeking to challenge the validity of lethal injection procedures.

The text of Petitioner's execution warrant, and the language and design of the Nevada statutes governing habeas corpus procedures establish that these procedures are available to challenge lethal injection protocols. Under Nevada law, habeas corpus relief is available where a petitioner "requests relief from a judgment of conviction or sentence in a criminal case." N.R.S. § 34.720(1) (emphasis added). To establish a right to relief, a petitioner must show that the "conviction was obtained, or . . . the sentence was imposed, in violation of the Constitution of the United States or the constitution or laws of [Nevada]." N.R.S. § 34.724.

The text of Petitioner's warrant of execution expressly includes the means of execution as part of Petitioner's sentence. This warrant provides

> IT IS FURTHER ORDERED that . . . the Director of the Department of Prisons, or [his designee] shall carry out said Judgment and Sentence by executing the [Petitioner] by . . . administration [of] an injection of a lethal drug, the drug or combination of drugs to be used for the execution to be selected by the Director of the Department of Prisons after consulting with the State Health Officer.

Ex. 373 at 2. The warrant clearly states that Petitioner is to be executed by lethal injection using a

method selected by the Director of the Department of Prisons after consultation with the State Health Officer. This directive is not physically or logically disjointed from the directive in the warrant issuing Petitioner's death sentence. Consequently, the text of Petitioner's execution warrant expressly includes lethal injection as a means of carrying out Petitioner's death sentence.

Moreover, the plain meaning of the word "sentence" in Nev. Rev. Stat. § 34.720 presupposes that Nevada habeas corpus procedures are available to challenge not only an underlying death verdict, but also the means of carrying out that verdict. A "sentence" is defined as "the judgment that a court formally pronounces after finding a criminal defendant guilty [or] the punishment imposed on a criminal wrongdoer." Black's Law Dictionary 1367 (7th ed. 1999) (emphasis added). "Punishment" is defined as a "sanction – such as a fine, penalty, confinement, or loss or property, right, or privilege – assessed against a person who has violated the law." Id. at 1247 (emphasis added). The use of the word "sanction" in defining "punishment" necessarily includes the means of carrying out a judgment against a person who has violated the law. Thus, the plain meaning of the word "sentence" necessarily includes the means of carrying out a formal judgment against a criminal defendant.

The statutory and constitutional design underlying Nevada habeas corpus rules also require post-conviction procedures to be available to contest a cruel or degrading method of execution under the Eighth Amendment. Under Nevada law, a habeas corpus petitioner seeking relief must show that he was "unlawfully detained, confined, or restrained of his liberty." Nev. Rev. Stat. § 34.360 (emphasis added). A capital habeas corpus petitioner has a liberty interest in ensuring that the means of execution are performed in a humane and non-degrading way. See Gregg v. Ga., 428 U.S. 153, 168 (1973) (noting that the Court recognizes a liberty interest in guaranteeing that a method of punishment does not exceed the Eighth Amendment's limitations). See also McGautha v. Cal., 402 U.S. 183 (1971); Witherspoon v. Ill., 391 U.S. 510 (1968); Trop v. Dulles, 356 U.S. 86, 100 (1968) (plurality opinion); La. ex. rel. Francis v. Resweber, 329 U.S. 459, 464 (1947); In re Kemmler, 136 U.S. 436, 447 (1890); Wilkerson v. Utah, 99 U.S. 130, 134-35 (1879). Thus, because Nevada law allows habeas corpus petitioners to contest unlawful government restraints on liberty and because the Eighth Amendment recognizes a liberty interest in prohibiting an inhumane or

degrading means of punishment, habeas relief is available to challenge Nevada's lethal injection protocols.

Finally, recent United States Supreme Court opinions recognizing civil rights causes of action for lethal injection challenges do not bar using habeas procedures to mount similar challenges. In Nelson v. Campbell, 541 U.S. 642 (2004), and Hill v. McDonough, 126 S. Ct. 2096 (2006), the Court held that certain classes of lethal injection challenges may be brought as civil rights actions under 42 U.S.C. § 1983. Both of these decisions oppose the State's position. In Nelson and Hill, a unanimous Court allowed civil rights plaintiffs to challenge the validity of lethal injection procedures under section 1983. See 541 U.S. at 643; 126 S. Ct. at 2096. Nowhere in its opinions did the Court state or suggest that habeas corpus procedures cannot be used for lethal injection challenges.[38]

c. Petitioner's Lethal Injection Claim is Ripe for Judicial Review.

Petitioner's lethal injection claim is ripe for judicial review. See Doe v. Bryan, 102 Nev. 553 (1986). An issue is ripe for judicial review if it is sufficiently developed so the decision does not involve consideration of unduly abstract future contingencies. Tex. v. U.S., 523 U.S. 296, 298 (1997); see also Abbott Labs v. Gardner, 387 U.S. 136, 148 (1967). The United States Supreme Court has held that a claim is ripe for review where, first, facts underlying the claim are sufficiently fit so a judicial decision does not involve considering unknown or future contingencies; and

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[38]In stating the question presented in Nelson, the Court noted that it decided whether section "1983 is an appropriate vehicle" for a lethal injection challenge. 541 U.S. at 639 (emphasis added). By using the word "an," the Court indicated an intent to not foreclose alternative avenues of relief. Hill similarly certified the question presented as whether a lethal injection challenge "may proceed" under section 1983. 126 S. Ct. at 2099. Hill's permissive use of the word "may" suggests that the Court intended to limit Nelson's holding to the scope of section 1983.

Similarly, in dividing classes of section 1983 suits in Nelson, the Court remarked that "constitutional claims that merely challenge the conditions of a prisoner's confinement... may be brought [under section] 1983 in the first instance." 541 U.S. at 643. As above Hill, Nelson's permissive use of the word "may" shows that the Court intended for section 1983 to be only one remedy to lethal injection procedures. Consistent with Nelson, habeas corpus procedures may still be used to challenge lethal injection protocols.

Finally, the State's reliance on Nelson and Hill is especially misplaced given the fact that the holdings of these cases are limited to the scope of section 1983. Nowhere in either case does the Court address the parameters of the habeas corpus rules, especially the scope of habeas rules governing state proceedings in Nevada. Accordingly, contrary to the State's assertions, lethal injection procedures may be challenged by a post-conviction petition for writ of habeas corpus.

secondly, the parties suffer sufficient personal hardship if the court did not review the claim. Id. at 149. See also Poland v. Stewart, 117 F.3d 1094, 1104 (9th Cir. 1997); Clinton v. Acequia, Inc., 94 F.3d 568, 572 (9th Cir. 1996).

The facts underlying Petitioner's lethal injection claim are sufficiently ripe for review because consideration of these issues does not require unknown or future contingencies. Nevada's lethal injection protocols have been in place since 1983. The State has not, either in this litigation or otherwise, indicated that Nevada's protocols will change in the near future. See Motion at 51-53. Thus, contrary to the State's assertions, Petitioner's lethal injection challenge is sufficiently ripe for judicial review.

Mr. Rippo's claims are ripe for review as a matter of law even if his execution is not imminent. Habeas corpus proceedings are fundamentally different than civil rights actions. The focus of a civil rights action is the manner in which a plaintiff was deprived of his "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. In contrast, the focus of a habeas corpus proceeding is a request for "relief from a judgment of conviction or sentence in a criminal case." Nev. Rev. Stat. § 34.720(1). Imminence is not required to show hardship in a habeas corpus challenge to lethal injection procedures because, unlike a civil rights action (where a violation of a person's current and future rights are challenged), a habeas petitioner is challenging the very essence of his sentence. See Nelson, 541 U.S. at 643 (distinguishing the essence of a civil rights claim from the essence of a habeas corpus proceeding). Accordingly, because imminence is required to show hardship only in the civil rights context, Petitioner's claim should not be dismissed on ripeness grounds.

D. Mr. Rippo Can Demonstrate Good Cause and Prejudice Due to Intervening Changes in the Law.

1. Claim Six: Aiding and Abetting Instruction

In his petition, Mr. Rippo alleged that he could show good cause and prejudice to excuse any procedural default of Claim Six on the grounds of intervening changes in the law that are retroactively applicable to him. Petition at 12, 109-11. In its motion, the State itself admits that Mr. Rippo can demonstrate cause and prejudice when the legal basis for the claim was unavailable to him

in prior proceedings. See Motion at 23 (acknowledging that "[v]alid impediments external to the defense giving rise to 'good cause' could be 'that the factual or legal basis for a claim was not reasonably available to counsel . . . .'") (citations omitted); Bejarano v. State, 122 Nev. __, 146 P.3d 265, 270 (2006).[39] Therefore, since the legal basis for Mr. Rippo's claim arose for the first time after the conclusion of his direct appeal, see Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002), Mr. Rippo can demonstrate cause and prejudice based upon an intervening change in law.

Mr. Rippo has discussed the substantive merits of his constitutional claim above, see pp. 37-38, supra, and he incorporates those arguments as if fully set forth herein. For present purposes, the important point is that Mr. Rippo can independently overcome the procedural default bars cited by the State on the ground of an intervening change in the law that did not exist at the time of his direct appeal.

2. Claim Seven: Premeditation Instruction

Mr. Rippo can demonstrate good cause to re-raise Claim Seven in his petition regarding the invalid jury instruction on premeditation, see e.g., Polk v. Sandoval, 503 F.3d 903, 910-11 (9th Cir. 2007), because the claim is based upon an intervening change in the law that arose after the conclusion of the prior post-conviction proceedings. See Motion at 23 (acknowledging that "[v]alid impediments external to the defense giving rise to 'good cause' could be 'that the factual or legal basis for a claim was not reasonably available to counsel . . . .'") (citations omitted); Bejarano v. State, 122 Nev. __, 146 P.3d 265, 270 (2006); see fn. 38, supra. Not only was the legal basis for the claim unavailable to Mr. Rippo during his trial and direct appeal proceedings, but he actually raised the claim in his first state post conviction proceeding, as the State acknowledges in its motion. See id. at 65. The Nevada Supreme Court's previous erroneous disposition of Mr.

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[39]Sereika v. State, 114 Nev. 142, 145, 955 P.2d 175 (1998) (finding cause for failure to raise issue because "it would have been futile for [the defendant] to object"); Jones v. State, 101 Nev. 573, 576, 580, 707 P.2d 1128 (1985) (finding cause for failure to raise issue given "the futility of objecting to an instruction whose validity has been consistently upheld"); St. Pierre v. State, 96 Nev. 887, 620 P.2d 1240 (1980) ("'Cause' for appellant's failure to object is demonstrated by the fact that objection would have been futile as the imposition of the burden of persuasion on a defendant had been upheld by this court on prior occasions."); Bean v. State, 86 Nev. 80, 85-86, 465 P.2d 133 (1970) (finding good cause to excuse failure to raise Witherspoon issue at trial or on direct appeal, therefore, "there is no merit to the defendant's failure to object in the trial court to the exclusion of the member as a bar to the present claim of error").

Rippo's claim establishes cause and prejudice to excuse any purported procedural default, e.g., Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944 (1994), because the federal courts have found that the Nevada Supreme Court's prior determination of the issue was wrong. See Evans v. State, 117 Nev. 609, 644, 28 P.3d 498, 521 (2001) (cause established when "a federal court concludes that a determination by this court is erroneous"). As explained in detail below, Polk shows that the Nevada Supreme Court neglected to apply clearly established law by failing to apply its Byford decision to cases that occurred before Byford. Mr. Rippo can therefore show cause and prejudice to overcome any state procedural default rules based upon the Nevada Supreme Court's prior erroneous disposition of his claim and an intervening change in the law in federal court.

Mr. Rippo can also overcome the law-of-the-case doctrine as applied to Claim Seven because that claim is based on intervening case law and could not have been raised in earlier proceedings. See Hsu v. County of Clark, 123 Nev. __, 173 P. 3d 724, 729 (2007) (expressly acknowledging "intervening case law" exception to law of case doctrine); Bejarano v. State, 122 Nev. __, 146 P.3d 265, 271 (2006) (disregarding law of the case and stating that "such action is of course warranted if we determine that a new rule with retroactive effect contradicts the law of the case"); Evans, 117 Nev. at 644, 28 P.3d at 521. These claims are based on intervening changes of law that occurred after the conclusion of the previous post-conviction proceeding. "Under these circumstances, the doctrine of the law of the case cannot be applied; to do so would unfairly impose a legal application upon [the petitioner] which we expressly overruled, citing to our published opinion disposing of his direct appeal." State v. Bennett, 119 Nev. 589, 81 P.3d 1, 6 (2003); see also Paine v. State, 110 Nev. 609, 615, 877 P.2d 1025 (1994) (reconsidering law of the case in capital case due to gravity of the sentence); Linn v. Minor, 4 Nev. 462, 465 (1868) (reconsidering law of the case when "cogent reasons and . . . . undoubted manifestation of error"). Claim Seven in Mr. Rippo's petition is therefore not barred by the law-of-the-case doctrine.

In Claim Seven, Mr. Rippo has alleged that the jury instruction defining premeditation failed to meaningfully define the statutory elements of first-degree murder. Mr. Rippo alleged that the instruction given at trial unconstitutionally collapsed the distinct statutory elements of premeditation and deliberation required to find first-degree murder. See Petition at 112-14. In 2000,

the Nevada Supreme Court held that the same premeditation instruction that was given in Mr. Rippo's case "blurs the distinction between first- and second-degree murder," and that lower courts should "cease instructing juries that a killing resulting from premeditation is 'willful, deliberate, and premeditated murder.'" Byford v. State, 116 Nev. 215, 993 P.2d 700 (2000). In Mr. Rippo's first state post conviction proceeding, the Nevada Supreme Court held that "Byford is not retroactive, and use of the Kazalyn instruction in a case predating Byford is no ground for relief." Rippo v. State, 122 Nev. 1086, 146 P. 3d 279, 286 (2006). In 2007, the Ninth Circuit recognized that the Nevada Supreme Court was wrong not to apply Byford retroactively, because the premeditation instruction violates federal due process in pre-Byford cases by blurring the line between first and second-degree murder. Polk v. Sandoval, 503 F.3d 903, 907-08 (9th Cir. 2007). The Ninth Circuit held that the instruction defining premeditation and deliberation unconstitutionally relieved the State of proving the statutory elements of first-degree murder beyond a reasonable doubt. Id. The Nevada Supreme Court's decision not to apply Byford retroactively was wrong, and the Ninth Circuit's decision in Polk constitutes an intervening change in the law, and therefore demonstrates good cause for any asserted procedural limitation to litigate Claim Seven. See Evans v. State, 117 Nev. 609, 644, 28 P.3d 498, 521 (2001) (cause established when "a federal court concludes that a determination by this court is erroneous").

3. Claim Fourteen: Invalid Conviction for Sexual Assault As a Statutory Aggravating Circumstance

Mr. Rippo can demonstrate good cause to raise for the first time Claim Fourteen in his petition regarding the invalid prior violent felony aggravating circumstance because the claim is based upon an intervening change in the law that arose after the conclusion of the prior post-conviction proceedings. See Motion at 23 (acknowledging that "[v]alid impediments external to the defense giving rise to 'good cause' could be 'that the factual or legal basis for a claim was not reasonably available to counsel . . . .'") (citations omitted); Bejarano v. State, 122 Nev. __, 146 P.3d 265, 270 (2006). See fn. 38, supra. According to the U.S. Supreme Court's recent holding in Roper v. Simmons, 125 S.Ct. 1183 (2005), persons who are under the age of eighteen when they committed a capital offense are not eligible for the death penalty. Because of their impulsiveness and

susceptibility, the Court found that juveniles are more likely to engage in reckless behavior without fully understanding the consequences of that behavior, and thus are not eligible for the death penalty for capital offenses. The logical extension of this rationale is to apply it to other convictions which occur prior to the age of majority, which rendered Mr. Rippo eligible for the death penalty. Due to their continuing intellectual development, it is very likely that minors disregard the negative repercussions of their actions not only for the immediate offense but its future impact on their lives. The lack of maturity and underdeveloped sense of responsibility, which decrease a minor's culpability, applies to their earlier criminal actions. Since this reduced culpability prohibits them from being eligible for capital punishment, their prior juvenile convictions should not be permitted to enhance their chances of receiving a death sentence. See, e.g., United States v. Naylor, Jr., 350 F. Supp.2d 521, 524 (W.D. Va. 2005). The reason that Mr. Rippo is raising this claim for the first time now is because he now has a "legal basis for the claim that was not reasonably available" to him at trial, on direct appeal, or in his first state post-conviction proceeding. Roper therefore constitutes good cause to allow Mr. Rippo to raise Claim Fourteen before this Court.

4. Claim Sixteen: Failure to Properly Instruct the Jury Regarding Proof Beyond a Reasonable Doubt

Similarly, Claim Sixteen is not procedurally barred because it is based upon an intervening change in the law. Petition at 12. Claim Sixteen alleges that the trial court failed to instruct the jury on every element of capital eligibility to the constitutionally requisite standard of proof beyond a reasonable doubt. See Petition at 155. The State argues that this claim is procedurally barred for failure to raise the claim sooner. See Motion at 68. Intervening case law has arisen, however, that mandates review of this claim as even the State acknowledges. See Motion at 23; Bejarano v. State, 122 Nev. __, 146 P.3d 265, 270 (2006). The Supreme Court recently held that a failure to properly instruct on this issue is unconstitutional in Blakely v. Washington, 542 U.S. 296 (2004). Thus, Mr. Rippo has demonstrated that intervening case law provides good cause to excuse any purported procedural default of Claim Sixteen.

The State argues on the merits that this claim is belied by the record because the jury was instructed that it had to find at least one aggravating circumstance beyond a reasonable doubt.

See Motion at 68. This argument reflects a misunderstanding of Mr. Rippo's claim. Mr. Rippo acknowledged in his petition that the jury was instructed to find at least one aggravator beyond a reasonable doubt. See Petition at 155. Mr. Rippo's claim centers around the fact that the jury was never instructed that it had to find *the second element of death-eligibility,* that the aggravating circumstances were not outweighed by the mitigation, beyond a reasonable doubt. Id. Thus, Mr. Rippo's claim is not belied by the record, and the State has offered no other arguments regarding the merits of this claim. Mr. Rippo was harmed by the court's failure to properly instruct the jury, because the failure to properly instruct the jury on the standard of proof beyond a reasonable doubt constitutes structural error. Sullivan v. Louisiana, 508 U.S. 275, 279-82 (1993). Accordingly, Mr. Rippo has demonstrated prejudice to overcome procedural default, and is entitled to a new penalty phase based on this claim.

E. Mr. Rippo Can Demonstrate Good Cause and Prejudice Due to Errors by the Trial Court and Habeas Judge.

1. Claim Eight: Failure to Grant Discovery to the Defense

As explained in detail above, Mr. Rippo was deprived of his right to present a defense and to confront the State's witnesses due to the trial court's failure to grant necessary discovery to the defense. See pp. 38-40, supra. Mr. Rippo can demonstrate cause and prejudice to overcome any purported procedural default rules due to the habeas judge's failure to permit factual development of the claim at trial. Specifically, the trial court's refusal to grant the defense discovery of Mr. Rippo's own probation/incarceration records and Diana Hunt's MMPI test scores constitutes an impediment external to the defense which allows Mr. Leonard to overcome any procedural default bars. See, e.g., Starr v. Lockhart, 23 F.3d 1280, 1287 (8th Cir. 1994) (no default where the state trial court improperly denied the petitioner's request for mental retardation expert); Tippet v. Lockhart, 903 F.2d 552, 555 (8th Cir. 1990) (cause established where the state trial court improperly precluded the petitioner from appealing the denial of state post-conviction relief); Huffman v. Wainwright, 651 F.2d 347, 352 (5th Cir. 1981) ("cause" sufficient to excuse procedural default exists where trial court wrongfully denied motion to discover facts that would have shown alleged violation); Pedrero v. Wainwright, 590 F.2d 1383, 1390 (5th Cir. 1979) (cause established to excuse failure to present

claim that petitioner was denied right to present insanity defense where state trial judge misapplied state law in denying request for psychiatrist). If the trial court had permitted discovery of this evidence, Mr. Rippo would have been able to put on mitigation evidence from a future dangerousness expert and would have been able to impeach Diana Hunt's trial testimony. The fact that the trial court refused to grant discovery to Mr. Rippo is therefore an impediment external to the defense that permits him to overcome the procedural default bars raised by the State.

2. Claim Twenty: Limitations Imposed by the Habeas Judge

Mr. Rippo can demonstrate good cause and prejudice to overcome any procedural bars to his petition based on the limitations imposed by the habeas judge. See Petition at 15, 160-76. The State argues in its Motion that Claim Twenty is procedurally barred for failure to raise the issues contained therein in the appeal from the denial of his first state habeas petition. See Motion at 79. As outlined in detail, supra, post-conviction counsel was ineffective in handling Mr. Rippo's first state habeas proceedings, and it is due to his ineffectiveness that these issues were not raised sooner.

The limitations imposed by the habeas judge constitute good cause to overcome procedural default because the judge prevented Mr. Rippo from fully developing and litigating his claims in his first state habeas proceedings. If not for the habeas judge's substitution of counsel shortly before the evidentiary hearing, Mr. Rippo would have been able more adequately and thoroughly to examine witnesses and argue his claims at the hearing. If not for the habeas judge's refusal to allow questioning of trial counsel separately, Mr. Rippo would have been able to demonstrate that trial counsel lacked strategic justifications for many of their actions and inactions. If not for the constant interference, questioning, and arguments by the habeas judge, Mr. Rippo would have had a more fair and adequate opportunity to present his arguments and evidence in a neutral forum. If not for the habeas judge allowing himself to be influenced by and biased toward the State, Mr. Rippo's arguments would have been deemed meritorious. If not for the habeas judge's insistence on speeding the proceedings along, Mr. Rippo would have had adequate time to prepare for and present his claims to the court. And if not for Nancy Becker's refusal to recuse herself from a case in which she had sought or solicited employment from one of the parties, namely the Clark County District Attorney's Office, Mr. Rippo's death sentence would have been reversed on the

appeal from the denial of his habeas petition. As a result of all these limitations, Mr. Rippo did not receive a full and fair opportunity to litigate his post-conviction claims.

The State correctly concedes in its motion that "erroneous rulings by the state courts" can establish good cause sufficient to overcome the procedural bars. See Motion at 23, citing Lozada v State, 110 Nev. 349, 871 P. 2d 944 (1994). Here, the State court erred in placing unfair and unjustified limitations on Mr. Rippo's ability to develop and litigate his claims, and erred in denying his meritorious claims. Accordingly, Mr. Rippo has demonstrated good cause and prejudice to overcome any procedural bars to the instant petition.

F. Mr. Rippo Can Demonstrate Actual Innocence of the Death Penalty in Order to Overcome Any Purported Procedural Default

1. Claim Fourteen: Invalid Prior Violent Felony Conviction and Sentence of Imprisonment Statutory Aggravating Circumstances

In Claim Fourteen, Mr. Rippo has alleged that his death sentence is invalid because it is predicated upon his previous conviction for a sexual assault conviction that occurred when he was a juvenile (as well as the sentence of imprisonment aggravating circumstance), which are invalid as a matter of state law and unconstitutional under the Supreme Court's recent decision in Roper v. Simmons, 543 U.S. 551 (2005). Mr. Rippo notes that he is entitled to a merits review of Claim Fourteen because this claim challenges the validity of the aggravating circumstances found by the jury, and he can overcome the procedural default bars raised by the State because he is actually innocent of that aggravating circumstance. E.g., Leslie v. State, 118 Nev. 773, 59 P.3d 440, 445 (2002); State v Bennett, 119 Nev. 589, 81 P.3d 1, 6-8 (2003). As a matter of state law, Mr. Rippo is actually innocent of the death penalty because he can demonstrate a "reasonable probability that absent the aggravator the jury would not have imposed death . . . ." Leslie, 59 P.3d at 445. Mr. Rippo further incorporates the allegations of Claim Fifteen regarding the Nevada Supreme Court's previous decision to strike three aggravating circumstances as invalid in his case. See Petition at 152-54. Considering all of these claims cumulatively, Mr. Rippo has gone from six aggravating circumstances to one aggravating circumstance at best (but see Claim Thirteen, Petition at 141-45

(challenging the torture aggravating circumstance[40])), which means that Mr. Rippo can demonstrate actual innocence of the death penalty.

G. The Procedural Default Bars Raised by the State Cannot Be Constitutionally Applied to Mr. Rippo.

The State seeks to bar consideration of petitioner's constitutional claims by invoking procedural default rules under Nev. Rev. Stat. §§ 34.726 and 34.810, Motion at 18-22, that are not applied consistently and that do not provide adequate notice of when they will be applied or excused. Refusing to review petitioner's constitutional claims on the basis of these default rules would violate the due process right to adequate notice and the equal protection right to 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. 564-565 (2000) (per curiam); Myers v. Ylst, 897 F.2d 917, 921 (9th Cir. 1990) (equal protection requires consistent application of state law to similarly-situated litigants).

1. Discretionary and Inconsistent Application of Default Rules in General.

The Nevada Supreme 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 default rules contained in Nevada Revised Statutes § 34.726, 34.800, and 34.810. A purely discretionary procedural bar is inadequate to preclude review of the merits of constitutional claims. E.g., Valerio v. Crawford, 306 F.3d 742, 774 (9th Cir. 2002) (en banc); Morales v. Calderon, 85 F.3d 1387, 1391 (9th Cir. 1996). Although the Nevada Supreme Court asserted in Pellegrini v. State, 117, Nev. 860, 34 P.3d 519 (2001), that application of the statutory default rules, some of which were adopted in the 1980s, was mandatory, 34 P.3d at 536, the examples cited below establish that the Nevada Supreme Court has always exercised, and continues to exercise, complete discretion in applying them. See also Ybarra v. Warden, No. 43981, Order Dismissing Appeal (November 28, 2005), Ex. 2, and Ybarra v. Warden, No. 43981, Order Denying Rehearing (February 2, 2006), Ex. 3 (both reiterating that application of the statutory default rules

[40]In the absence of the torture aggravating circumstance, Mr. Rippo is categorically excluded from the class of persons who is eligible for the death penalty under state and federal law.

is mandatory despite alleged inconsistencies in application).

The Nevada Supreme Court has complete discretion to address constitutional claims, when an adequate record is presented to resolve them, at any stage of the proceedings, despite the default rules contained in Nevada Revised Statutes §§ 34.726, 34.800, and 34.810. The Nevada Supreme Court has disregarded default rules and addressed constitutional claims in the exercise of its complete discretion to do so. See, e.g., Bejarano 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); Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676 (1995) (addressing claims asserted to be barred by default rules; "[w]ithout expressly addressing the remaining procedural bases for the dismissal of Bennett's petition, we therefore choose to reach the merits of Bennett's contentions" (emphasis supplied); 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, without discussing or applying default rules); Grondin v. State, 97 Nev. 454, 455-56, 634 P.2d 456 (2981)(entertaining allegation of ineffective assistance of post-conviction counsel raised for the first time on appeal of denial of post-conviction relief and remanding for an evidentiary hearing without requiring allegations of "cause" in a successive petition); Gunter v. State, 95 Nev. 886, 887, 620 P.2d 859 (1980) (court "obligated" to consider constitutional issues raised for the first time on appeal); Krewson v. Warden, 96 Nev. 886, 887, 620 P.2d 859 (1980) (court obligated to consider constitutional issues raised for the first time on appeal); Hardison v. State, 84 Nev. 125, 128, 437 P.2d 868 (1968) ("since appellant's contentions are grounded on constitutional questions this court is obligated to consider them on appeal."); Hill v. Warden, 114 Nev. 169, 178-179, 953 P.2d 1077 (1998) (addressing merits claims raised for first time on appeal from denial of third post-conviction petition because claims "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) (vacating 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) (addressing issue of delay in probable cause determination without indicating that issue not raised at trial or on appeal); Stocks v. Warden, 86 Nev. 758, 760-761, 476 P.2d 469 (1978) (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 court's "choice" to rule on barred claim "within its discretionary power"); Farmer v. Director, No. 18052, Order Dismissing Appeal (March 31, 1988) (addressing two substantive claims on merits (guilty plea involuntary, insufficiency of aggravating circumstances) despite failure to raise on direct appeal), Ex. 104; [41] Farmer v. State, No. 22562, Order Dismissing Appeal (February 20, 1992) (denying claim of improper admission of victim impact evidence on merits despite default), Ex. 105; Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, at 5-6 (November 14, 2002) (granting penalty phase relief sua sponte (on appeal of first state habeas corpus petition) on basis of ineffective assistance of post-conviction counsel without requiring Petitioner to plead "cause" under Nev. Rev. Stat. § 34.726(1) or 810)), Ex. 107; Hardison v. State No. 24195, Order of Remand (May 24, 1994) (addressing claims and granting relief despite timeliness and successive petition procedural bars raised by State), Ex. 109; Hill v. State No. 18253, Order Dismissing Appeal (June 29, 1987) (dismissing untimely appeal from denial of second post-conviction relief petition but sua sponte directing trial court to entertain merits of new petition), Ex. 110; Jones v. State, No. 24497, Order Dismissing Appeal (August 28, 1996) (holding challenge to jurisdiction of court waived by guilty plea, without citing existing state rule that lack of jurisdiction not waivable, e.g., Application of Alexander, 80 Nev. 354, 395 P.2d 615 (1964); Nev. Rev. Stat. § 174.105(3)), Ex. 111; Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (rejecting Petitioner's three-judge panel claims on merits despite direct appeal and subsequent petition bar; rejecting jurisdictional challenge on law of the case grounds, without citing authority that lack of jurisdiction not waivable),

[41] Exhibits 1-9 are being filed with Petitioner's Opposition to Motion to Dismiss; other exhibits cite to the petition on file.

Ex. 112; Milligan v. State, No. 21504, Order Dismissing Appeal (June 17, 1991) (rejecting two substantive claims on merits (error to admit uncorroborated testimony of accomplice, death penalty cruel and unusual) despite failure to raise on direct appeal), Ex. 133; Neuschafer v. Warden No. 18371, Order Dismissing Appeal (August 19, 1987) (addressing merits of claims without 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"), Ex. 116; Nevius v. Sumner (Nevius I) Nos. 17059, 17060, Order Dismissing Appeal and Denying Petition (February 19, 1986) (reviewing first and second collateral petitions in consolidated opinion, without addressing default rules as to second petition), Ex. 117; Nevius v. Warden (Nevius II), No. 29027, Order Dismissing Appeal (October 9, 1996) (entertaining claim in petition filed directly with Nevada Supreme Court despite failure to raise claim in district court; noting that district court had "discretion to dismiss appellant's petition . . . ."), Ex. 118; Nevius v. Warden (Nevius III), Order Denying Rehearing (July 17, 1998) (same), Ex.119; Rogers v. Warden, No. 22858, Order Dismissing Appeal (May 28, 1993) (addressing two claims on merits (objection to M'Naughten test for insanity, 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), Ex. 124; Stevens v. State, No. 24138, Order of Remand (July 8, 1994) (finding cause on basis of failure to appoint counsel in proceeding in which appointment of counsel not mandatory, cf. Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247 (1997)), Ex. 128; Williams v. State, No. 20732, Order Dismissing Appeal (July 18, 1990) (addressing claim in third collateral proceeding on merits without discussion of default rules), Ex. 130; Williams v. State, No. 29084, Order Dismissing Appeal (August 29, 1997) (addressing claim that trial counsel failed to rebut aggravating evidence; claim rejected under law of the case), Ex. 131; Ybarra v. Director, No. 19705, Order Dismissing Appeal (June 29, 1989) (addressing previously-raised claim without reference to default rules), Ex. 132.

The Nevada Supreme Court has failed to apply the one-year rule of Nevada Revised Statutes § 34.726 to bar its review of constitutional claims contained in successive capital habeas petitions. See, e.g., Hill v. State, 114 Nev. 169, 953 P.2d 1077 (1998) (addressing 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), Ex. 106; Nevius v. Warden, No. 29027, Order Dismissing Appeal (October 9, 1996) (successive petition filed August 23, 1996), Ex. 118; Nevius v. Warden, Order Denying Rehearing (July 17, 1998) (successive petition filed February 7, 1997), Ex. 119; Riley v. State, No. 33750, Order Dismissing Appeal (November 19, 1999) (successive petition filed August 26, 1998), Ex. 123; Sechrest v. State, No. 29170, Order Dismissing Appeal (November 20, 1997) (successive petition filed July 27, 1996), Ex. 126; Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (addressing all three-judge panel claims on merits; successive petition filed May 1, 2000), Ex. 112.

The Nevada Supreme Court also routinely disregards the procedural bar arising from failure to raise claims in earlier proceedings. See Valerio v. Crawford, 306 F.3d 742, 778 (9th Cir. 2002); see also Bejarano v. Warden, 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (addressing claim on merits despite default rules); Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676 (1995) (addressing claims asserted to be barred by default rules; "[w]ithout expressly addressing the remaining procedural bases for the dismissal of Bennett's petition, we therefore choose to reach the merits of Bennett's contentions" (emphasis supplied)); 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, without discussing or applying default rules); Hill v. Warden, 114 Nev. 169, 178-179, 953 P.2d 1077 (1998) (addressing merits of claims raised for first time on appeal from denial of third post-conviction petition because claims "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."); Farmer v. State No. 22562, Order Dismissing Appeal (February 20, 1992) (denying claim of improper admission of victim impact evidence on merits despite default), Ex. 105; Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, at 5-6 (November 14, 2002) (granting penalty phase relief sua sponte (on appeal of first state habeas corpus petition) on basis of ineffective assistance of post-conviction counsel without requiring Petitioner to plead or prove "cause" in a successive petition), Ex. 107; Hardison v. State

No. 24195, Order of Remand (May 24, 1994) (addressing claims and granting relief despite timeliness and successive petition procedural bars raised by State), Ex. 109; Neuschafer v. Warden No. 18371, Order Dismissing Appeal (August 19, 1987) (addressing merits of claims without 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"), Ex. 116; Ybarra v. Director No. 19705, Order Dismissing Appeal (June 29, 1989) (addressing previously-raised claim without reference to default rules), Ex. 132.

The Nevada Supreme Court has failed to apply the rebuttable presumption of Nevada Revised Statutes § 34.800(2) to capital habeas petitioners. See, e.g., Bejarano v. Warden, 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (addressing claim on merits despite default rules; successive petition filed approximately five years after direct appeal remittitur issued on January 10, 1989); 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, without discussing or applying default rules; successive petition filed November 12, 1991, approximately five years after direct appeal remittitur issued on April 29, 1986); Hill v. State, 114 Nev. 169, 953 P.2d 1077 (1998) (addressing claims on merits filed directly with the Nevada Supreme Court; successive petition claims filed September 19, 1996, approximately ten years after direct appeal remittitur issued on September 5, 1986); Farmer v. State, No. 29120, Order Dismissing Appeal (November 20, 1997) (successive petition filed August 28, 1995, approximately ten years after direct appeal remittitur issued on September 17,1985), Ex. 106; Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (addressing all three-judge panel claims on merits; successive petition filed May 1, 2000, approximately nine years after direct appeal remittitur issued on October 25, 1991), Ex. 112; Milligan v. Warden, No. 37845, Order of Affirmance (July 24, 2002) (successive petition filed December 1992, approximately seven years after direct appeal remittitur issued on October 15, 1986), Ex. 114; Nevius v. Warden, No. 29027, Order Dismissing Appeal (October 9, 1996) (successive petition filed August 23, 1996, approximately eleven years after direct appeal remittitur issued on December 31, 1985), Ex. 118; Nevius v. Warden, Order Denying

Rehearing (July 17, 1998) (successive petition filed February 7, 1997, approximately twelve years after direct appeal remittitur issued on December 31, 1985), Ex. 119; O'Neill v. State, No. 39143, Order of Reversal and Remand, at 2 (December 18, 2002) (petition filed "more than six years after entry of judgment of conviction" and issuance of remittitur on direct appeal on March 13, 1996), Ex. 121; Riley v. State, No. 33750, Order Dismissing Appeal (November 19, 1999) (successive petition filed August 26, 1998, approximately seven years after direct appeal remittitur issued on July 18, 1991), Ex. 136; Sechrest v. State, No. 29170, Order Dismissing Appeal (November 20, 1997) (successive petition filed July 27, 1996, approximately eleven years after direct appeal remittitur issued on September 18, 1985), Ex. 126; Williams v. State, No. 29084, Order Dismissing Appeal (August 29, 1997) (addressing claim that trial counsel failed to rebut aggravating evidence; claim rejected under law of the case, successive petition filed December, 1992, approximately five years after direct appeal remittitur issued on July 17, 1987), Ex. 130.

The State has admitted that the Nevada Supreme Court disregards procedural default rules on grounds that cannot be reconciled with a theory of consistent application of procedural default rules. Bennett v. State, 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)), Ex. 101; 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 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"), Ex. 120.

The Nevada Supreme Court has found certain constitutional claims procedurally defaulted before those claims could even be raised. In Thomas v. State, 120 Nev. Adv. Rep. 7, 83 P.3d 818, 827 (2004), the court held that claims alleging that the court performs constitutionally-inadequate appellate review must be raised on direct appeal before the court has actually performed appellate review of the defendant's conviction and sentence. Id. at 827. The court also required "specific supporting facts" in order to prevail on such a claim even though such facts would not exist before

appellate review occurs. See id.

The Nevada Supreme Court has also applied inconsistent rules when deciding whether a Petitioner can demonstrate "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. Compare Moran v. State, No. 28188, Order Dismissing Appeal (March 21, 1996) (finding that trial and appellate counsel's representation in first habeas proceeding did not establish "cause" to review merits of claims in subsequent habeas proceeding), Ex. 115, with Nevius v. Warden, Nos. 29027, 29028, Order Dismissing Appeal and Denying Petition (October 9, 1996) (Petitioner "arguabl[y] established "cause" under same circumstances), Ex. 118; Wade v. State, No. 37467, Order of Affirmance (October 11, 2001) (holding sua sponte that Petitioner had established "cause" to allow filing of successive petition in same circumstances), Ex. 129; Hankins v. State, No. 20780, Order of Remand (April 24, 1990) (remanding *sua sponte* for hearing and appointment of new counsel on first habeas petition due to representation by same office at sentencing and in post-conviction proceeding), Ex. 108.

The Nevada Supreme Court has reached diametrically opposite conclusions on whether an erroneous court ruling establishes "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) (concluding 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); see also Birges v. State, 107 Nev. 809, 820 P.2d 764 (1991) (erroneous procedural dismissal establishes "cause" to entertain successive petition); contra Evans v. State, 117 Nev. 609 28 P.3d 498, 521 (2001) (holding Lozada exception applies only when federal court has found previous ruling erroneous). However, the Nevada Supreme Court continues to treat an erroneous court ruling as "cause" in unpublished dispositions without observing the limitation it established in Evans. Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, at 7 n.19 (November 14, 2002) ("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"; citing Lozada v. State), Ex. 107; O'Neill v. State, No. 39143, Order of Reversal and Remand, at 5 & n.13 (December

18, 2002) ("sua sponte" ruling that an erroneous court ruling establishes "cause" to file successive petition; citing Lozada v. State), Ex. 121, (opening brief showing "cause" allegation not raised by Petitioner).

The Nevada Supreme Court has reached inconsistent results on the issue of whether a procedural rule that does not exist at the time of a purported default may preclude the review of the merits of meritorious constitutional claims. Compare Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (applying Nev. Rev. Stat. § 34.726 to preclude review of merits of successive habeas petition when one-year default rule announced for the first time in that case); Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (same), Ex. 112; with State v. Haberstroh, 119 Nev. Adv. Rep. 23, 69 P.3d 676, 681-82 (2003) (refusing to retroactively apply rule that parties may not stipulate out of procedural default rules); Smith v. State, No. 20959, Order of Remand (September 14, 1990) (refusing to apply default rule that was not in existence at the time of the purported default), Ex. 127; Rider v. State, No. 20925, Order (April 30, 1990) (same), Ex. 122.

The Nevada Supreme Court has taken opposite positions on whether application of procedural default rules is waivable by the State. State v. Haberstroh, 119 Nev. 173, 69 P.3d 676, 681-682 (2003), holding that parties could not stipulate to overcome State's procedural defenses, but construing a stipulation as establishing cause to overcome default rules without identifying any theory of cause that such a stipulation would establish or how it existed before the stipulation was entered; contra Doleman v. State, No. 33424, Order Dismissing Appeal (March 17, 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), Ex. 103. see also Jones v. State, No. 24497, Order Dismissing Appeal (August 28, 1996) (holding challenge to jurisdiction of court waived by guilty plea) Ex. 111. The definition of cause is completely amorphous, because it is whatever the Nevada Supreme Court says it is on any particular occasion. See also Rogers v. Warden, No. 36137, Order of Affirmance, at 5-6 (May 13, 2003) (raising miscarriage of justice exception sua sponte but failing to analyze Petitioner's challenge to aggravating circumstance under actual innocence standard), Exs. 124. see also Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part (November 14, 2002) (sua sponte reaching both

theory of cause not litigated in District Court or Supreme Court, and substantive issue, post-Pellegrini), Ex. 107.

Default bars that can be "graciously waived," or disregarded out of "frustration," are not "rules" that bind the actions of courts at all, but are the result of mere exercises of unfettered discretion; and such impediments cannot constitutionally bar review of meritorious claims. 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.)."). The Nevada Supreme 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. Rippo's claims.

The Nevada Supreme Court could not apply any supposed default rules to bar consideration of Mr. Rippo's claims when it has failed to apply those rules to similarly-situated Petitioners, and thus has failed to provide notice of what default rules will be enforced, without violating the equal protection and due process clauses of the Fourteenth Amendment. Bush v. Gore, 531 U.S. 98, 104-109 (2000) (per curiam); Village of Willowbrook v. Olech, 528 U.S. 562, 564-565 (2000) (per curiam); Ford v. Georgia, 498 U.S. 411, 425 (1991).

2. Consideration of the Petition Cannot Be Barred By Applying the Successive Petition Doctrine, Since it is Inconsistently Applied and Petitioner Has Shown Cause to Overcome It.

The State also invokes the successive petition bar imposed by Nev. Rev. Stat. § 34.810. Motion at 19-22. The same arguments made above, which show that the bar of § 34.726 cannot be applied, show that the successive petition bar cannot be applied either. The ineffectiveness of counsel in the initial habeas proceedings preclude application of the successive petition bar based on that proceeding.

Further, the application of the successive petition bar has been explicitly held inadequate to bar review of constitutional claims in later proceedings. E.g., Valerio v. Crawford, 306 F. 3d 742, 776-778 (9th Cir. 2002) (en banc) cert. denied 123 S.Ct. 1788 (2003); see also Koerner v. Grigas, 328 F.3d 1039, 1053 (9th Cir. 2003); cf. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519, 526-529 (2001). The fact that the state and federal courts have reached directly opposite conclusions as to the pattern

of applying this rule indicates that it is not sufficiently clear to satisfy due process standards of notice and equal protection standards of consistent application, under the federal constitution. This Court must therefore address these constitutional issues and conclude that this rule cannot bar review of petitioner's constitutional claims.

III. Conclusion

For the foregoing reasons, Mr. Rippo respectfully requests that this Court deny the State's motion to dismiss his petition for writ of habeas corpus. In the alternative, Mr. Rippo requests that this Court hold the State's motion in abeyance pending discovery and an evidentiary hearing in order to show cause and prejudice to overcome the procedural default bars raised by the State.

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2008, I served a true and correct copy of the **OPPOSITION TO MOTION TO DISMISS** on the following parties by delivering to prison authorities an envelope containing a copy if the foregoing, addressed as follows, and with authorization for payment of full payment of first class postage:

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III. Conclusion

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DATED this 21st day of May, 2008.

FRANNY A. FORSMAN
Federal Public Defender

DAVID ANTHONY
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2008, I served a true and correct copy of the **OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS** on the following parties by delivering to prison authorities an envelope containing a copy if the foregoing, addressed as follows, and with authorization for payment of full payment of first class postage:

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EXH

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO, Petitioner, vs. E. K. McDANIEL, Warden, and CATHERIN CORTEZ-MASTO, Attorney General of the State of Nevada, Respondents.	Case No. C106784 Dept. No. ~~VII~~ XX Date of Hearing: _____ Time of Hearing: _____ (Death Penalty Case)

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OPPOSITION TO MOTION TO DISMISS
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331. Sherman v. McDaniel, Eighth Judicial District Court, Case No. C126969, Reply to Opposition to Motion to Dismiss, filed June 25, 2007.

332. Witter v. McDaniel, Eighth Judicial District Court, Case No. C117513, Reply to Opposition to Motion to Dismiss, filed July 5, 2007.

333. Floyd v. McDaniel, Eighth Judicial District Court, Case No. C159897, Recorder's Transcript of Hearing Re: Defendant's Petition for Writ of Habeas Corpus, filed December 28, 2007.

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * * *

MICHAEL RIPPO,

Appellant,

-vs-

E.K. McDANIEL, et al.,

Respondent.

No. 53626

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reputation of the judicial proceedings.") In this case, Defendant has not established that any of the jurors were actually affected by the comments of the district court. Thus, Defendant has not established error or that such error resulted in prejudice from the district court's comments.

VIII. CLAIM 14: DEFENDANT'S CLAIM REGARDING THE USE OF DEFENDANT'S PRIOR FELONY CONVICTION AS AN AGGRAVATOR IS TIME BARRED.

Defendant contends, for the first time on appeal, that the use of Defendant's prior felony conviction was improper because the guilty plea was not voluntarily, intelligently and knowingly given and Defendant was a minor when he committed the crime. However, Defendant failed to raise this claim in either his first post-conviction habeas petition or on direct appeal, Defendant's claim is time barred. NRS 34.726. As clearly demonstrated by Defendant's Motion to Strike Aggravating Circumstances Numbered 1 and 2 for Specificity as to Aggravating Circumstance Number 4, filed on August 20, 1993, see Petitioner's Ex. # 313. Defendant was well-aware of the issue, and could have raised this claim earlier but failed to do so. Moreover, as Defendant has not demonstrated good cause or actual prejudice, the issue is precluded from review. Therefore, this issue should be dismissed as time barred.

Additionally, to the extent that Defendant alleges the use of his prior felony conviction violates the mandates of Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183 (2005), Defendant's reliance on Roper is misplaced. Roper 543 U.S. at 578, 125 S.Ct. at 1200, held, "The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 *when their crimes were committed.*" (Emphasis added). The defendant in Roper was 17 years of age when he committed murder for which he was sentenced to death. Id., 543 U.S. at 556, 125 S.Ct. at 1187. Unlike Roper, Defendant was an adult when he committed the present capital offense. Thus, Roper is inapposite to the instant case.

IX. CLAIM 15: NEVADA SUPREME COURT'S ERRONEOUS RE-WEIGHING OR HARMLESS ERROR ANALYSIS.

Defendant argues that the Nevada Supreme Court does not have the authority under the Nevada Constitution to re-weigh aggravating factors on appellate review because any re-weighing is a fact-finding exercise, not a legal determination. However, as the Nevada Supreme Court ruled on this exact issue in Defendant's second direct appeal, that ruling is law of the case. Hall, 91 Nev. at 315, 535 P.2d at 798 (where an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is the law of the case and bars further reconsideration.) After striking three of the six original aggravating circumstances pursuant to the Court's 2004 decision in McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), the Court considered the specific issue of whether the jurors could have found that the aggravating circumstances outweighed the mitigating circumstances "even it they had considered only the three valid aggravating circumstances rather than six." Rippo, 122 Nev. ___, 146 P.3d at 284. The Court reviewed the mitigating circumstances presented during the penalty phase, and concluded:

> The evidence in mitigation was not particularly compelling. We conclude beyond a reasonable doubt that the jurors would have found that the mitigating circumstances did not outweigh the three valid aggravating circumstances and, after consideration of the evidence as a whole, would have rendered a sentence of death.

Id. Thus, this issue was already decided by the Court, and is barred from reconsideration by the doctrine of law of the case.

Even assuming, *arguendo*, that Defendant was not precluded from raising this issue, Defendant's claim is without merit as the Nevada Supreme Court has authority to re-weigh the aggravating circumstances against the mitigating circumstances. In Canape v. State, 109 Nev. 864, 882, 859 P.2d 1023, 1035 (1993), the Nevada Supreme Court conducted a test in which it re-weighed the balance of the mitigating and aggravating circumstances, and held that weighing the aggravators and mitigators "pursuant to Clemons does not violate Nevada's Constitution or statutes." "It is a routine task of appellate courts to decide whether the evidence supports a jury verdict and in capital cases in 'weighing' States, to consideration whether the evidence is such that the sentencer could have arrived at the death

sentence that was imposed." Canape, 109 Nev. at 882, 859 P.2d at 1034, (quoting Clemons v. Mississippi, 494 U.S. 738, 748-49, 110 S.Ct. 1441, 1448-49 (1990)); see also Bridges v. State, 116 Nev. 752, 766, 6 P.3d 1000, 1010 (quoting Clemons, 494 U.S. at 741, 110 S.Ct. at 1441) ("[T]he Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review ....") As the Nevada Supreme Court had authority to re-weigh the mitigating evidence in support of Defendant's sentence of death, the Nevada Supreme Court did not impermissibly invade the fact-finding province of the jury in re-weighing of the mitigating evidence.

X. CLAIM 18: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING AUTOPSY PHOTOGRAPHS.

Defendant contends that the district court erred in admitting certain photographs of the victims, over the objection of defense counsel, on the basis that the photographs were gruesome and prejudicial. See TT, 02/27/96, pp. 13-4, 17. Defendant alleges that the photographs were unnecessary and "incited the jury's visceral desire to convict" and sentence Defendant to death. Petitioner's Writ, p. 160. However, it is the State's position that since Defendant failed to raise these issues in either his first post-conviction Petition or on direct appeal, he waived his right to raise them now. See NRS 34.810 and Phelps v. Director of Prisons, 104 Nev. 656, 659, 764 P.2d 1305 (1988) (once the State raises procedural grounds for dismissal, the burden then falls on the defendant to demonstrate both good cause for his failure to present his claim in earlier proceedings and actual prejudice); Thomas v. State, 114 Nev. 1127, 1149, 967 P.2d 1111, 1125 (1999) ("claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings.")

Nonetheless, should this Court find that Defendant demonstrated good cause sufficient to overcome these procedural bars, the State further submits that Defendant's

claims are without merit as the photographs were more probative than prejudicial, and as such, the photographs were properly admitted.

All relevant evidence is admissible, unless its probative value is substantially outweighed by the danger of unfair prejudice. NRS 48.025, NRS 48.035(1). It is within the district court's discretion to determine whether evidence is relevant and whether that evidence is substantially prejudicial. "The admissibility of gruesome photographs showing wounds on the victim's body 'lies within the sound discretion of the district court and, absent an abuse of that discretion, the decision will not be overturned.'" Flores v. State, 120 P.3d 1170, 1180 (2005), (quoting Turpen v. State, 94 Nev. 576, 577, 583 P.2d 1083, 1084 (1978)).

The Nevada Supreme Court has held on numerous occasions that gruesome photographic evidence is admissible when the photos are "utilized to show the cause of death and when it reflects the severity of wounds and the manner of their infliction." Browne, 113 Nev. at 314, 933 P.2d at 192, (citing Theriault, 92 Nev. at 193, 547 P.2d at 674). Therefore, even gruesome photos will be admitted if they aid in ascertaining the truth. Scott v. State, 92 Nev. 552, 556, 554 P.2d 735, 738 (1976). Photographs are admissible "to show the injuries, explain the cause of death and establish the size of the victim." Cutler v. State, 93 Nev. 329, 332, 566 P.2d 809 (1977).

In Byford v. State, 116 Nev. 215, 231, 994 P.2d 700, 711 (2000), the Court stated that admission of photographs into evidence is within the trial court's discretion, and set forth the standards governing the admission into evidence of alleged gruesome photographs:

> "Admission of evidence is within the trial court's sound discretion; this court will respect the trial court's determination as long as it is not manifestly wrong." Colon v. State, 113 Nev. 484, 491, 938 P.2d 714, 719 (1997). Gruesome photos are admissible if they aid in ascertaining the truth. Scott v. State, 92 Nev. 552, 556, 554 P.2d 735, 738 (1976). "Despite gruesomeness, photographic evidence has been held admissible when it accurately shows the scene of the crime or when utilized to show the cause of death and when it reflects the severity of wounds and the manner of their infliction."

Id.

State's Trial Exhibit 31 is a photograph of victim, Denise Lizzie, taken during the autopsy, see TT, 02/27/96, p. 11, and used by Dr. Giles Sheldon Green to show various abrasions to Lizzie's facial area and marks around her neck. TT, 02/27/96, pp. 77-81. Dr. Green testified that the abrasions to Lizzie's checks, chin and forehead were consistent with hitting an object or being hit by an object. TT, 02/27/96, pp. 77-9. The two, brownish/purplish horizontal marks encircling Lizzie's neck indicated that a cord had been wrapped around her neck two times. TT, 02/27/96, pp. 80-1.

In addition, State's Trial Exhibits 53 and 54 were also taken at autopsy and used by Dr. Green to assist the jury in understanding the advanced degree of decomposition to Lauri Jacobson, and the injuries sustained by the victim. TT, 02/27/96, pp. 15, 105-11. Dr. Green noted a small, penetrating wound around Jacobson's right ear, and stated that the wound was caused by a sharp object, such as a small knife. TT, 02/27/96, pp. 107-11. Dr. Green also stated that Jacobson was still alive when she sustained the wound. TT, 02/27/96, pp. 110-11. Thus, the probative value of the crime scene and autopsy photographs was not substantially outweighed by the danger of unfair prejudice and the trial court committed no error in admitting them because the photographs were used to assist medical testimony and ascertain the truth.

XI. CLAIM: 20 NO FAIR OPPORTUNITY TO LITIGATE POST-CONVICTION ISSUES.

Defendant presents a laundry list of reasons in support of his assertion that he was denied a fair opportunity to litigate his post-conviction issues during the evidentiary hearings held on August 20, 2004, and September 10, 2004. However, Defendant should have presented these claims in his 2005 direct appeal from the district court order denying his post-conviction habeas petition but he did not. Thus, to the extent that Defendant failed, in his direct appeal, to raise the above issues and has offered no reason for failing to raise these issues on direct appeal, it is the State's position that said issues were effectively waived per NRS 34.810(1)(b) and Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994).

Notwithstanding that Defendant's claims are procedurally barred, should this Court find that Defendant's claims warrant further consideration, the State further submits that

Defendant's claims lack merit.

Defendant takes issue with the district court's appointment of Christopher Oram, and claims that the late appointment of Mr. Oram to his case rendered the evidentiary hearing unfair. According to Defendant, Christopher Oram was not appointed as appellate counsel until "immediately before the post-conviction hearing." However, it appears that Mr. Oram's representation began in early 2004, approximately eight months prior to the August, 2004, evidentiary hearing. Mr. Oram's Supplemental Habeas Petition was filed on February 10, 2004. Then on July 19, 2004, the Court ordered David Schieck to withdraw from the case as Mr. Schieck was a potential witness in the matter. The Court further ordered that Christopher Oram continue as counsel for Defendant in the upcoming evidentiary hearing. Thus, Mr. Oram had sufficient time in which to prepare for the evidentiary hearing, and there is no indication that Mr. Oram moved to continue the matter because he needed more time to prepare. Moreover, to the extent that Defendant complains that Mr. Oram's late appointment caused him to be ill-prepared, Defendant is merely re-hashing his ineffective assistance of counsel claim.

With regards to Defendant's contention that the district court erred in allowing Defendant's trial attorneys, Steve Wolfson and Phillip Dunleavy, to be "jointly" examined because the joint examination led to "false, misleading, and collusive" testimony, Defendant's claim is untenable. First, Defendant did not object to the joint examination of his trial attorneys. RT, 08/20/04, p. 3. Thus, Defendant failed to preserve this issue for appellate review. Sterling, 108 Nev. at 394, 834 P.2d at 402. Second, although the district court stated that the joint testimony would expedite the proceeding, the district court stated that was only part of the reason:

> COURT: ... There are two reasons for that: One is to expedite and the other is because this has been some 10 years ago that the trial occurred and they might want to confer as these issues arise and see if we can figure out what their recollections are. Would that be agreed?
>
> MR. ORAM: Yes.

RT, 08/20/04, pp. 2-3. Thus, because the trial had been so long ago and it might be difficult to remember from 10 years past, the court specifically sought for each attorney to confer with one another. And in fact, a close reading of the hearing transcript confirms that both trial attorneys had difficulty remembering certain details. See RT, 08/20/04, generally; RT, 09/10/04, generally. As such, Defendant's claim fails.

Additionally, Defendant would have this Court believe that the district court was biased because the court rejected Defendant's claim and found that counsel provided effective assistance of counsel. However, Defendant's claim is utterly without merit. As the sole purpose of the evidentiary hearing was to address the merits of Defendant's ineffective counsel claim, it is only natural that the majority of the district court's inquiries were addressed at Mr. Oram or trial counsel. At times, the court appeared perplexed by allegations raised in Defendant's petition and requested Mr. Oram clarify his position as stated in the petition. Thus, the district court's actions were proper, and the court finding does not constitute judicial bias.

Moreover, the district court was not unduly influenced by the State. It has long been the practice in Nevada that the prevailing party prepares the order or written findings for the Court. See e.g., Foster v. Bank of America Nat. Trust & Sav. Ass'n., 77 Nev. 365, 365 P.2d 313 (1961); Thompson v. Tonopah Lumber Co., 37 Nev. 183, 141 P. 69 (1914). On the issue of preparation of written orders, the local District Court Rules provide as follows:

> **Rule 21. Preparation of order, judgment or decree.**
>
> The counsel obtaining any order, judgment or decree must furnish the form of the same to the clerk or judge in charge of the court.

EDCR Rule 7.21.

It is important to note that Defendant did not object to the district court's findings and conclusions, nor did Defendant make any attempts in the district court to amend the language of the findings and conclusions. Defendant presents his argument for the first time on appeal. However, if Defendant took issue with the district court's findings, he should have filed a motion to amend findings or a motion to correct judgment pursuant to NRS

175.565: "Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders." Defendant did not object to the district court's findings, and impermissibly raises the issue for the first time in the instant petition.

Even so, the Findings of Fact and Conclusions of Law, filed December 1, 2004, accurately reflected the court's oral pronouncement on August 20, 2004, and September 10, 2004. Since the judge made no changes to the order, the only conclusion that can be drawn from the record in this case is that the findings, conclusions, and order accurately reflected the judge's oral ruling from both evidentiary hearings, and as such, Defendant has failed to demonstrate that the court was somehow influenced by the State.

Finally, to the extent Defendant alleges that Justice Becker "faced substantial pressure to rule in favor of the State," and therefore, should have recused herself from Defendant's case, Defendant's bare claim is utterly devoid of any factual support which would entitle him to relief of his claim. Hargrove, 100 Nev. at 502, 686 P.2d at 225 (a defendant seeking post-conviction relief must raise more than conclusory claims for relief; he must support his claims with specific allegations which "if true would entitle him to relief.")

XII. CLAIM 21: THERE WAS NO CUMULATIVE ERROR SUFFICIENT TO JUSTIFY OVERTURNING DEFENDANT'S CONVICTION.

The Nevada Supreme Court has held that under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994), (citing Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986)); see also Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The relevant factors to consider in determining "whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" Big Pond, 101 Nev. at 3, 692 P.2d at 1289. The doctrine of cumulative error "requires that numerous errors be committed, not merely alleged." People v. Rivers, 727 P.2d 394, 401 (Colo.App. 1986); see also People v. Jones, 665 P.2d 127, 131 (Colo.App.

1982). Evidence against the defendant must therefore be "substantial enough to convict him in an otherwise fair trial" and it must be said "without reservation that the verdict would have been the same in the absence of the error." Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988).

Insofar as Defendant failed to establish any error which would have entitled him to relief, there is and can be no cumulative error worthy of reversal. LaPena v. State, 92 Nev. 1, 14, 544 P.2d 1187, 1195 (1976) ("nothing plus nothing plus nothing is nothing."). Defendant's claims of error are meritless. Therefore, cumulative error does not apply. Moreover, as the Nevada Supreme Court already rejected Defendant's claim of cumulative error, see Rippo, 113 Nev. at 1255, 946 P.2d at 1027, this claim is barred from further review by the law of the case doctrine. Hall, 91 Nev. at 314, 535 P.2d at 797.

XIII. CLAIM 22: DEATH BY LETHAL INJECTION IS NOT VIOLATIVE OF THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS.

The United States Supreme Court recently denied this issue in a published opinion. Baze v. Rees, __, S.Ct. __, 2008 WL 1733259 (U.S.S.Ct. 4/16/08). Accordingly, this claim is without merit.

NRS 176.355(1) provides that a sentence of death in Nevada "must be inflicted by an injection of a lethal drug." NRS 176.355(2)(b) requires the Director of the Department of Corrections to "[s]elect the drug or combination of drugs to be used for the execution after consulting with the State Health Officer." A writ of habeas corpus may only be used to request relief from a judgment of conviction or sentence in a criminal case, or to challenge the computation of time. NRS 34.720. To succeed on a post-conviction claim, Defendant must prove his claim that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the constitution or laws of this state. NRS 34.724. Defendant was sentenced to death by lethal injection. Because the specific manner in which Defendant's execution is to be carried out is within the discretion of the Department of Corrections, it is not cognizable in a habeas petition. NRS 176.355. Even if Defendant was successful in challenging the specific method used by the Department of

Corrections, Defendant's sentence would remain unchanged. See also State v. Moore, 272 Neb. 71, 718 N.W.2d 537 (2006).

In Nelson v. Campbell, 541 U.S. 637 (2004), the Court concluded that the appropriate vehicle for a prisoner to challenge a particular lethal injection procedure was an action under 42 U.S.C. §1983, stating **"a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself"** because by altering the procedure, the state could go forward with the execution.

In June 2006, the Court again addressed the proper vehicle for challenging an execution protocol in Hill v. McDonough, 547 U.S. 573, 126 S.Ct. 2096 (2006). The Court observed that, as in Nevada, the implementation of Florida's lethal injection protocol was left to the Department of Corrections. In addition, the Hill court noted that a prior habeas corpus petition filed by the prisoner did not preclude this §1983 action and that the injunction sought by him enjoining the specific procedure would not foreclose the State of Florida from implementing lethal injection by another procedure and, thus, it could not be said that the prisoner's suit sought to establish "'unlawfulness...would render a conviction or sentence invalid.' " 126 S.Ct. at 2099, (quoting Heck v. Humphrey, 512 U.S. 477 (1994)).

CONCLUSION

Based on the foregoing, the State requests this Court DENY Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

DATED this 21st day of April, 2008.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

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CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 21st day of April, 2008, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

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DISTRICT COURT,

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO, Petitioner, vs. E.K. McDANIEL, et al., Respondent.	Case No. C106784 Dept No. XX

OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Michael Damon Rippo hereby opposes the State's motion to dismiss his petition for writ of habeas corpus. This opposition is made and based on the following points and authorities and the entire file herein.

DATED this 21st day of May, 2008.

FRANNY A. FORSMAN
Federal Public Defender

By _____
David Anthony,
Assistant Federal Public Defender

Further, the application of the successive petition bar has been explicitly held inadequate to bar review of constitutional claims in later proceedings. E.g., Valerio v. Crawford, 306 F. 3d 742, 776-778 (9th Cir. 2002) (en banc) cert. denied 123 S.Ct. 1788 (2003); see also Koerner v. Grigas, 328 F.3d 1039, 1053 (9th Cir. 2003); cf. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519, 526-529 (2001). The fact that the state and federal courts have reached directly opposite conclusions as to the pattern of applying this rule indicates that it is not sufficiently clear to satisfy due process standards of notice and equal protection standards of consistent application, under the federal constitution. This Court must therefore address these constitutional issues and conclude that this rule cannot bar review of petitioner's constitutional claims.

III. Conclusion

For the foregoing reasons, Mr. Rippo respectfully requests that this Court deny the State's motion to dismiss his petition for writ of habeas corpus. In the alternative, Mr. Rippo requests that this Court hold the State's motion in abeyance pending discovery and an evidentiary hearing in order to show cause and prejudice to overcome the procedural default bars raised by the State.

DATED this 21st day of May, 2008.

FRANNY A. FORSMAN
Federal Public Defender

DAVID ANTHONY
Assistant Federal Public Defender

I. Introduction

On April 21, 2008, the State filed a motion to dismiss Mr. Rippo's petition for a writ of habeas corpus. Mr. Rippo hereby submits the following opposition to the State's motion requesting that this Court deny the State's motion, or, in the alternative, that this Court hold the State's motion in abeyance pending Mr. Rippo's opportunity to obtain discovery and an evidentiary hearing to demonstrate that he can overcome all the procedural default bars asserted by the State.

II. Argument

In its motion, the State argues that Mr. Rippo's instant petition is time barred under Nev. Rev. Stat. § 34.726, see Motion at 18-19, successive and procedurally barred under Nev. Rev. Stat. § 34.810, see id. at 19-22, and procedurally barred under the doctrine of laches, Nev. Rev. Stat. § 34.800. See id. at 28-29. The State further argues that Mr. Rippo cannot demonstrate good cause and prejudice to overcome the procedural default bars. See id. at 22-25.

As explained below, Mr. Rippo alleged in his petition that the procedural default bars raised by the State cannot be constitutionally applied to him. See pp. 94-104, infra. Even if they did apply, however, Mr. Rippo can show good cause and prejudice to overcome each of the procedural bars. In his petition, Mr. Rippo explained in detail why he could show good cause to either re-raise the claims in his petition or to raise the claims for the first time. See Petition at 9-15. Specifically, Mr. Rippo explained that he can show good cause based upon the State's suppression of evidence, the ineffective assistance of post-conviction counsel (and prior state counsel), and intervening changes in the law. See id. The State's motion does not breathe a word about any of these allegations of good cause, which must be taken as true in the procedural posture of a motion to dismiss. By failing to address the allegations of good cause contained in his petition, Mr. Rippo is left in the position of merely restating those uncontradicted allegations in the instant opposition. The State's motion to dismiss must therefore be denied because this Court cannot conclude as a matter of law that Mr. Rippo's claims are procedurally barred without authorizing discovery and an evidentiary hearing to demonstrate that he can overcome those procedural bars.

A. Standard of Review Applicable to Motions to Dismiss

The State's motion does not discuss or acknowledge the standards applicable to

reviewing a motion to dismiss but it is clear that, under those standards, the petition cannot properly be dismissed. This Court is required to liberally construe Mr. Rippo's petition and accept all the factual allegations of the petition as true. Vacation Village, Inc. v. Hitachi America, Ltd., 110 Nev. 481, 484, 874 P.2d 744, 746 (1994); Doleman v. Meiji Mutual Life Ins. Co., 727 F.2d 1480, 1482 (9th Cir. 1984) ("[f]or purposes of the motion, the allegations of the non-moving party must be accepted as true while the allegations of the moving party which have been denied are assumed to be false."). This Court can dismiss only if "it appears beyond a doubt that the [petitioner] could prove no set of facts which, if accepted by the trier of fact, would entitle him [or her] to relief," Vacation Village, 110 Nev. at 484, 872 P.2d at 746 (citations omitted), and it is obligated to grant an evidentiary hearing "when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). This standard merely requires "something more than a naked allegation" to merit an evidentiary hearing. Id. at 1230; see Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 226 (1984). A claim is "belied by the record" only if it is affirmatively repelled by the record as opposed to a claim that is subject to a factual dispute. See Mann, 46 P.3d at 1230. When resolution of a question of procedural default requires a factual inquiry, the petitioner is entitled to an adequate hearing on the issue, both under state law, see Crump v. Warden, 113 Nev. 293, 305, 934 P.2d 247, 254 (1997), and under federal due process principles.

The allegations of the petition on file, taken as true, establish Mr.Rippo's right to relief on his constitutional claims. As shown below, the petition also alleges that the default rules asserted by the state are either inapplicable in Mr. Rippo's case, excused by showings of cause, or cannot constitutionally be applied in this matter.

B. Mr. Rippo Can Demonstrate Good Cause and Prejudice Due to the Ineffective Assistance of Post-Conviction Counsel.

Controlling authority, which the State consistently ignores, holds that Mr. Rippo can overcome all the procedural bars raised by the State by demonstrating that post-conviction counsel was ineffective. See, e.g., Crump v. Warden, 113 Nev. 293, 304-05, 934 P.2d 247, 253-54 (1997). In his petition, Mr. Rippo spent a considerable amount of time specifically explaining why post-

conviction counsel was ineffective in failing to raise the constitutional claims that are contained in his petition. See Petition at 9-15. The State's motion says nothing about these allegations, which must be taken as true for the purposes of a motion to dismiss.

As a capital habeas petitioner, Mr. Rippo is entitled to the effective assistance of post-conviction counsel. As the State notes in its motion, post-conviction counsel was appointed to represent Mr. Rippo in 1998. See Motion at 4. Post-conviction counsel was appointed under Nev. Rev. Stat. § 34.820(1), which "provides for mandatory appointment of counsel for the first post-conviction petition challenging the validity of conviction or sentence where the petitioner has been sentenced to death." Pellegrini v. State, 117 Nev. 860, 888 n.125, 34 P.3d 519, 538 n.125 (2001). Mr. Rippo was therefore entitled to the effective assistance of counsel in that proceeding. See, e.g., Crump v. Warden, 113 Nev. 293, 305, 934 P.2d 247 (1997). As explained in Crump, if Mr. Rippo "can prove that [post-conviction counsel] committed an error which rises to the level of ineffective assistance, then [he] will have established 'cause' and 'prejudice' under NRS 34.810(1)(b)(3) to overcome procedural default. See Coleman, 501 U.S. at 753-54, 111 S. Ct. at 2566-67." Crump, 113 Nev. at 304-05, 934 P.2d at 254. Accordingly, by showing that post-conviction counsel was ineffective, Mr. Rippo can impute the failure to raise the claims in the instant petition earlier to the State, and he can overcome all the procedural default bars. See id.

The State's motion to dismiss contains a lengthy discussion of each of the procedural default bars, see Motion at 18-22, 28-29, and also purports to address the exceptions to the procedural bars that would allow a habeas petitioner to overcome them. See id. at 22-25. For example, the State correctly acknowledges that Mr. Rippo can show good cause when "there were erroneous rulings by the state courts and the federal district court in denying defendant's first petition." Motion at 23. The State also acknowledges that Mr. Rippo "alleges good cause exists for his failure to raise [certain claims] in an earlier proceeding" and "further contends that good cause exists for re-raising [certain claims] again in the instant petition." Motion at 25. However, the State's motion then fails to acknowledge or address any of Mr. Rippo's allegations of good cause, including his allegations that post-conviction counsel was ineffective. The State's omission in this regard is significant because the State's usual course of action with successive petitions is to

acknowledge that a capital habeas petitioner does have the right to effective assistance of post-conviction counsel, but that any successive petitions challenging counsel's effectiveness must be filed within one year of the conclusion of the previous post-conviction proceeding to be considered on the merits. In Mr. Rippo's case, the State correctly acknowledges in its motion that his instant petition was in fact filed within one year of the conclusion of his previous post-conviction proceeding. See Motion at 5. This fact is of critical importance because, as explained below, even the State agrees that Mr. Rippo is able to raise and litigate a challenge to post-conviction counsel's effectiveness during this one year time period.

As a matter of law, there is no express time limitation in the state statutes for filing a successive petition to litigate the issue of post-conviction counsel's ineffectiveness in a capital case. The statute cited throughout the State's motion, Nev. Rev. Stat. § 34.726, provides in pertinent part as follows:

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the supreme court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> (a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

Nev. Rev. Stat. § 34.726(1). According to the plain meaning of the statute, the fact that Rippo's instant petition was filed more than one year after the issuance of remittitur is only the beginning of the inquiry. Given the second clause in the statute, the Nevada Supreme Court has recognized that § 34.726 "is not a statute of limitations" which means that Mr.Rippo must be "given an opportunity to show either that no default occurred or that there was good cause." Glauner v. State, 107 Nev. 482, 485 n.3, 813 P.2d 1001, 1003 n.3 (1991), superseded by statute on other grounds as stated in Gonzales v. State, 118 Nev. 590, 593 n.5, 53 P.3d 901, 902 n.5 (2002). The most important feature of Nev. Rev. Stat. § 34.726 that is missing from the State's motion is that the statute does not contain an express limitations period for the time during which an otherwise "untimely" state petition must

be filed in order to litigate the issue of post-conviction counsel's ineffectiveness. The only express limitation in the statute is that Mr. Rippo must show that the "delay" in filing the instant petition was not his "fault." This Court should therefore reject the State's invitation to read a limitations period into Nev. Rev. Stat. § 34.726 that does not exist.

However, in the instant case, this Court need not make any decision at all regarding when a successive petition challenging post-conviction counsel's ineffectiveness must be filed because even the State acknowledges that Mr. Rippo's petition was timely filed. As explained above, the State's motion fails to discuss controlling authority which holds that Mr. Rippo can overcome the procedural default bars by demonstrating that post-conviction counsel was ineffective. In other cases, the State has repeatedly acknowledged that capital habeas petitioners are permitted to file a successive petition challenging post-conviction counsel's ineffectiveness as long as those allegations are brought within a reasonable time:

> The State agrees that as a death row petitioner, Defendant had a right to effective assistance of counsel in his first post-conviction proceeding, so he may raise claims of ineffective assistance of post-conviction in a successive petition. See McNelton v. State, 115 Nev. 296, 416 [sic] n.5, 990 P.2d 1263, 1276 n.5 (1999); Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997). However, he must raise these matters in a reasonable time to avoid application of procedural default rules. See Pellegrini v. State, 117 Nev. 860, 869-70, 34 P.3d 519, 525-26 (2001) (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim of ineffective assistance of post-conviction must itself be timely raised:
>
> > 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 must itself not be procedurally defaulted. In other words, a petitioner must demonstrate cause for raising the ineffective assistance of counsel claim in an untimely fashion.
>
> State v. District Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005).

Leonard v. McDaniel, Case No. C126285, Reply to Opposition to Motion to Dismiss, at 7 (filed March 11, 2008), Ex. 329. The State then argued that any delay exceeding one year from the conclusion of the previous post-conviction proceeding renders the petition untimely. See id. at 7-8

(arguing that delay of five years from conclusion of first post-conviction proceeding rendered petition untimely).[1]

The State has further expressly acknowledged that a successive petition filed within one year is presumptively a reasonable period of time in which to file a petition challenging post-conviction counsel's ineffectiveness. In Lopez v. McDaniel, Case No. C-068946 (capital case), the State argued that "any claims relating to ineffective assistance of post-conviction counsel would be required to be filed within one year of the remittitur reflecting denial of the first petition for post-conviction relief or they would be time-barred and could not constitute good cause." Lopez v. McDaniel, Case No. C-068946, State's Motion to Dismiss Petition for Writ of Habeas Corpus, at 71-72 (filed February 15, 2008), Ex. 330.[2] Likewise, in Floyd v. McDaniel, Case No. C159897 (capital case), the State argued that the petitioner "unreasonably delayed his challenges to the effective assistance of post-conviction counsel by pursuing his federal remedies for well over a year." Floyd v. McDaniel, Case No. C159897, State's Opposition to Defendant's Petition for Writ of Habeas Corpus (Motion to Dismiss Petition) (filed September 18, 2007), Ex. 334. In a hearing on

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[1]Accord Sherman v. McDaniel, Case No. C126969, Reply to Opposition to Motion to Dismiss, at 9-10 (filed June 25, 2007) (arguing that three year delay after conclusion of first post-conviction proceeding rendered successive petition untimely), Ex. 331; Witter v. McDaniel, Case No. C117513, Reply to Opposition to Motion to Dismiss, at 6 (filed July 5, 2007) (arguing that six year delay after conclusion of first post-conviction proceeding rendered successive petition untimely), Ex. 332.

[2]The State further argued that:

> any claims of ineffective assistance of post-conviction counsel must be timely made under NRS 34.726 and NRS 34.800 or they are barred. In the instant case, the remittitur on the first state petition for post-conviction relief was issued on December 22, 1994. Therefore all claims alleging ineffective assistance of first post-conviction counsel should have been raised by December 22, 1995. Thus any claims of ineffective assistance of first post-conviction counsel filed after that date are time barred and cannot be used to constitute good cause for delay in raising those claims in a timely fashion.

Lopez v. McDaniel, Case No. C-068946, State's Motion to Dismiss Petition for Writ of Habeas Corpus, at 72 (filed February 15, 2008), Ex. 330.

The State argued that "[e]vidence that could not have been discovered at an earlier date through the exercise of reasonable diligence may constitute good cause if the claims related to that evidence are brought within one year of its discovery." Lopez v. McDaniel, Case No. C-068946, State's Motion to Dismiss Petition for Writ of Habeas Corpus, at 74 (filed February 15, 2008), Ex. 330.

the State's motion to dismiss in the Floyd case, the State, represented by Mr. Owens, argued to the district court that claims of ineffective assistance of post-conviction counsel can be raised in a successive petition but should be brought within one year of the conclusion of the prior proceeding:

> MR. OWENS: Judge this is a second state habeas petition. The procedural rules contemplate everyone getting one state habeas petition. There are a few extraordinary exceptions, one of which is the capital litigants can bring a successive petition to challenge the ineffective assistance of counsel of their post-conviction counsel . . . .
>
> It's my argument that they delayed in going back to federal court and seeking federal remedies for well over a year, almost a year and a half before returning to state court; and that delay of a year and a half and their selection of a federal remedy over coming to – back to state court constitutes a waiver of that claim. You can't delay in bringing your successive petition.

Floyd v. McDaniel, Case No. C159897, Recorder's Transcript of Hearing RE: Defendant's Petition for Writ of Habeas Corpus, at 3 (filed December 28, 2007) (emphasis added), Ex. 333.[3] The State has therefore consistently argued that a successive petition filed in a capital case within one year is presumptively a reasonable period of time in which to raise and litigate claims of ineffective assistance of post-conviction counsel.

In summary, there can be no reasonable dispute that Mr. Rippo's instant petition, which is based upon ineffective assistance of post-conviction counsel, is properly before the Court because (1) Mr. Rippo filed the instant petition within one year of the conclusion of the first post-conviction proceeding, and (2) the State has repeatedly acknowledged in other cases that a successive petition challenging post-conviction counsel's ineffectiveness is timely if brought within one year. This Court therefore does not need to decide whether Mr. Rippo or the State is correct regarding the existence or non-existence of an express limitations period in the statute to challenge post-conviction counsel's ineffectiveness, because the instant petition is properly before the Court even if the State is right. The State's failure to acknowledge or address this argument in its motion to dismiss should

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[3]Mr. Rippo notes that Judge Glass subsequently granted Mr. Floyd an evidentiary hearing to demonstrate ineffective assistance of post-conviction counsel, for a successive petition filed approximately one year and a half after the conclusion of Mr. Floyd's first post-conviction proceeding. See Floyd v. McDaniel, Case No. C159897, Recorder's Transcript of Hearing RE: Defendant's Petition for Writ of Habeas Corpus, at 5-6 (filed December 28, 2007). Ex. 333.

operate as a concession that there is no contrary argument to make on this point.

Since it is now clear that Mr. Rippo's allegations of ineffective assistance of post-conviction counsel are properly before this Court, the only remaining issue is whether Mr. Rippo has come forward with sufficient allegations that counsel was ineffective to merit discovery and an evidentiary hearing. In his petition, Mr. Rippo set forth detailed allegations explaining why post-conviction counsel was ineffective in his case. See Petition at 11-14. In its motion, the State acknowledges these allegations, see Motion at 25, but then completely fails to discuss post-conviction counsel's actual efforts in Mr. Rippo's case. Instead, the State's motion is limited to the issue of whether Mr. Rippo suffered prejudice from post-conviction counsel's ineffectiveness, i.e., whether there is a reasonable probability of a more favorable outcome if post-conviction counsel would have performed effectively. Mr. Rippo will address the issue of deficient performance first and then address prejudice.

There can be no rational dispute that post-conviction counsel was deficient in Mr. Rippo's case.[4] Post-conviction counsel did no investigation whatsoever: he never conducted a witness interview, never sent out a record request, never ensured that he possessed trial counsel's entire file (including work product), never filed a discovery motion, never sought any investigative funds, and never requested the appointment of mental health experts.[5] The supplemental brief filed by post-conviction counsel did not address any issues outside of the record on direct appeal, and consisted of no more than twenty pages of argument which failed to even contain citations to the record or supporting exhibits. See Ex. 335 (supplemental points and authorities), 336 (opening brief

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[4]The instant discussion is confined to the efforts of Christopher Oram, who was appointed after the removal of David Schieck, who represented Mr. Rippo on direct appeal and therefore had a conflict of interest that necessitated his removal. However, as explained in his petition, Mr. Schieck was also ineffective for failing to conduct any investigation other than interviewing Mr. Rippo and moving the court for investigative funds for Ralph Dyment. See Petition at 12-13. There is no indication that Mr. Dyment actually conducted any investigation or collected the funds that were authorized for him. Mr. Dyment is currently deceased.

[5]See, e.g., Ainsworth v. Woodford, 268 F.3d 868, 876 (9th Cir. 2000) (finding counsel ineffective when he "admitted at his deposition that he sought not assistance from a law clerk, paralegal or other attorney in his preparation for the penalty phase, nor did he seek advice or aid from investigators or experts. In addition, he did not seek any state funds to prepare for the penalty phase although funding for the use of investigators and experts in capital cases was available . . . .").

on appeal).[6] In short, counsel treated the habeas proceedings as nothing more than another review of the record created at trial. That approach is antithetical to competent counsel's duty in a habeas proceeding, which is to go beyond the record to establish constitutional violations that the record does not show or that were not adequately litigated by trial or appellate counsel. To cite only the most obvious instance, resort to evidence outside the record is virtually always required to demonstrate prejudicial ineffective assistance of trial counsel.[7] It is axiomatic that a reasonable investigation must take place before counsel can make a strategic choice regarding which issues to include in a habeas petition. See Silva v. Woodford, 279 F.3d 825, 846-47 (9th Cir. 2002); Correll v. Ryan, 465 F.3d 1006, 1015-16 (9th Cir. 2006) ("An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy."). Post-conviction counsel's failure to investigate and raise the issues contained in the instant petition therefore cannot be characterized as a strategic choice to which deference is owed, because counsel did not know about them and could not have made a strategic choice to omit them.[8] The State's motion never attempts to defend the conduct of post-conviction

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[6]Post-conviction counsel's failure to include relevant citations to the record and exhibit references is what caused the Nevada Supreme Court to deny Mr. Rippo's claims on appeal. Of those issues raised by counsel that the court deemed "worthy of comment," the court rejected Mr. Rippo's claim that trial counsel was ineffective in failing to object to a 46 month delay because counsel did "not support this claim with specific factual allegations, references to the record, or citation to relevant authority. Nor does he describe the informant testimony or explain why it was prejudicial." Rippo v. State, 122 Nev. 1086, 146 P.3d 279, 286 (2006). The court rejected post-conviction counsel's claim that trial counsel was ineffective in failing to object to prison photographs of Mr. Rippo because counsel did "not support this claim with references to the record, and the trial transcript shows that his counsel unsuccessfully object to the admission of the photo." Id. The court rejected Mr. Rippo's claim that his jury lacked a fair cross-section of the community because counsel "did not present any evidence that the representation of African Americans in venires is unfair and unreasonable in relation to their numbers in the community, nor did he present evidence that any underrepresentation resulted from their systemic exclusion." Id. at 286-87.

[7]Strickland v. Washington, 466 U.S. 668, 699-700 (1984); Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676 (1995); Wilson v. State, 105 Nev. 110, 114-115, 771 P.2d 583 (1989); In re Marquez, 1 Cal.4th 584, 822 P.2d 435, 446 (1992) ("To determine whether prejudice has been established, we compare the actual trial with the hypothetical trial that would have taken place had counsel competently investigated and presented the . . . defense. [Citation]"); see also Ford v. Warden, 111 Nev. 877, 881, 901 P.2d 123 (1995) (claim that client's mental state prevented counsel from adequately litigating habeas proceeding rejected because counsel did not raise any claims "not ascertainable from records . . . reviewed").

[8]See, e.g., Poindexter v. Mitchell, 454 F.3d 564, 578-79 (6th Cir. 2006) ("The record reflects that . . . counsel failed to conduct virtually any investigation, let alone sufficient investigation to make any strategic choices possible.").

counsel in failing to investigate and raise issues outside of the record on direct appeal. Therefore, Mr. Rippo has necessarily raised sufficient factual allegations regarding post-conviction counsel's ineffectiveness to conduct discovery and an evidentiary hearing to show (1) that counsel was deficient, and (2) that Mr. Rippo suffered prejudice as a result. See Motion at 53.

Mr. Rippo will now discuss the merits of his constitutional claims to show prejudice from post-conviction counsel's ineffectiveness, which allows him to overcome all of the procedural default bars raised by the State.

1. Claim One: Judicial Bias

Mr. Rippo alleges that post-conviction counsel was ineffective in failing to investigate and present the factual allegations supporting his claim of judicial bias. In its motion, the State argues that Mr. Rippo cannot demonstrate prejudice from post-conviction counsel's ineffectiveness because (1) Mr. Rippo's claim is barred by the law of the case from his direct appeal, and (2) because Judge Bongiovanni was not biased against him. See Motion at 30-32. Mr. Rippo will address each of the State's contentions.

Before addressing the State's arguments, it is important to point out that its motion says absolutely nothing about the material factual allegations contained in Mr. Rippo's petition which show that the State was involved in the federal investigation of Judge Bongiovanni. In his petition, Mr. Rippo included a pleading filed by the United States Attorney's Office specifically stating that the Clark County District Attorney's Office was involved in a federal sting operation to present a bogus indictment against Terry Salem and to route Salem's case to Bongiovanni's department to see if he would accept a bribe from Salem. See Ex. 236 to Pet. at 8. Mr. Rippo included citations to an affidavit filed by Special Agent Jerry Hanford of the FBI discussing the role of the District Attorney's Office in the sting operation. See Ex. 237 to Pet. at 5-6. Mr. Rippo included the sworn trial testimony of Terry Salem, Metro Intelligence Detective John Nicholson, Special Agent Hanford, and from Gerard Bongiovanni himself at his federal criminal trial(s) where each witness testified extensively about the State's involvement in the federal criminal investigation. See Exs. 238 to 242, 305, 311 to Pet. The State's motion says nothing about this evidence.

The State's motion also says absolutely nothing about the evidence contained in Mr.

Rippo's petition showing that Judge Bongiovanni knew Ben Spano and his business associate, Denny Mason, the victim of the stolen credit card offense. In Mr. Rippo's petition, he cited to wire tap summaries created by the United Stated States Attorney's Office showing that Bongiovanni was being investigated for favors that he allegedly provided for Ben Spano, including an OR release that Spano requested and obtained for Denny Mason. Ex. 309 to Pet. Mr. Rippo also included trial testimony from Agent Hanford and Gerard Bongiovanni wherein the wire tap conversations between Bongiovanni and Ben Spano were played and discussed. Exs. 242, at 225; 311, at 85. Again, the State says nothing about this evidence or its newly-discovered nexus to the very same federal criminal case that was pending against Bongiovanni at the time he adjudicated Mr. Rippo's case.

The law of the case doctrine does not bar Mr. Rippo's claim because the facts presently before this Court are substantially different than the evidentiary picture before the Nevada Supreme Court on direct appeal. See Hsu v. County of Clark, 123 Nev. __, 173 P.3d 724, 729 (2007) (law of the case doctrine does not apply when "subsequent proceedings produce substantially new or different evidence"). In short, the evidentiary picture is substantially different because, on direct appeal, the Nevada Supreme Court relied upon (1) the prosecutor's false representations at trial that the State of Nevada was not involved in the investigation of Bongiovanni; (2) the trial court's false representations that he was unaware of whether the Las Vegas Metropolitan Police Department was involved in the investigation; (3) the trial court's false representation that he knew nothing more about the investigation than what was contained in the newspapers; and (4) the State's false representations on direct appeal that it had no involvement in the federal investigation. As explained in Mr. Rippo's petition and in the State's motion, the Nevada Supreme Court's dispositive factual finding that the State was not involved in the federal investigation was based upon false evidence. Petition at 30-46; Motion at 30. The State's argument that this Court should blindly follow the Nevada Supreme Court's previous factual finding in the face of new evidence showing beyond any doubt that the court's factual finding was based upon false representations is therefore contrary to the facts and the law. In short, the law of the case doctrine has no application when "subsequent proceedings produce substantially new or different evidence," which is undoubtedly the case here, where the new evidence conclusively repels the Nevada Supreme Court's prior factual

finding that there was no evidence that the State was involved in the federal investigation.

In addition, the law of the case doctrine cannot be applied as a matter of equity given the State's false representations at trial. See Hsu, 173 P.3d at 728 ("equitable considerations justify departure from the law of the case doctrine."). The State's motion contains no discussion, either factual or legal, regarding Mr. Rippo's independent allegations of prosecutorial misconduct for making false representations at trial and on direct appeal regarding the State's lack of involvement in the federal criminal investigation of Judge Bongiovanni. The State also fails to discuss its present ethical and constitutional obligations in the instant habeas proceeding. With respect to its ethical obligations, the representative for the State must comply with Supreme Court Rule 3.3(a)(3) which provides that if "a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." With respect to its constitutional obligations, the representative for the State's "present knowledge" that the prosecution's representations made at trial were false requires that it correct those false representations in the instant habeas proceeding. See, e.g., Hall v. Director of Corr., 343 F.3d 976, 981 (9th Cir. 2004) ("to allow [the defendant's] conviction to stand, based on the present knowledge that the evidence was falsified, is a violation of his right to due process under the Fourteenth Amendment."). Instead of complying with its ethical and constitutional obligations, the State is instead seeking to use the Nevada Supreme Court's ruling on direct appeal as a shield to insulate itself from its own false representations. The State should therefore be equitably estopped from asserting the law of the case doctrine when the previous determination of the Nevada Supreme Court was based upon the prosecution's false representations at trial. Mr. Rippo will address the substantive contours of his prosecutorial misconduct claim below.

In his petition, Mr. Rippo alleged that Judge Bongiovanni was actually and impliedly biased against him due to the States of Nevada's involvement in the federal criminal investigation, due to the trial court's failure to disclose his knowledge of the State's involvement, and due to his failure to disclose his relationship with Ben Spano and Denny Mason. The State's only argument is that this Court should blindly follow the law of the case despite the fact that, in light of the

evidence contained in Mr. Rippo's petition, it is painfully obvious that the facts relied upon by the Nevada Supreme Court on direct appeal were false. The State does not argue that Bongiovanni did not know at the time he made materially incorrect representations at trial regarding his knowledge of the federal investigation that those representations were incorrect. The State's motion also fails to apprehend the nexus between Bongiovanni's failure to disclose his knowledge of Ben Spano and State witness Denny Mason, and the fact that this information went directly to the heart of the federal investigation against Bongiovanni. Therefore, Bongiovanni could not have disclosed his relationship to Denny Mason at Mr. Rippo's trial without implicating himself in the very same federal criminal investigation that was hanging like a cloud over his head at the time of his adjudication of Mr. Rippo's case.

Mr. Rippo is further able to show that Judge Bongiovanni was aware of the District Attorney's involvement in the federal investigation directly before Mr. Rippo's trial. Less than a month after the search warrant was executed on his home, on November 7, 1995, Judge Bongiovanni disqualified himself from adjudicating Salem's criminal case to avoid the appearance of impropriety and implied bias. Ex. 246 to Pet. Contained within the district court case file was an indictment which was sought by Ulrich W. Smith, a deputy district attorney within Clark County District Attorney's Office. Ex. 337 [Indictment], at 6. The indictment listed the lead witness against Mr. Salem as Detective John Nicholson from Metro Intelligence. See id. Also contained within the district court file was the grand jury transcript showing that Mr. Smith from the District Attorney's Office presented the testimony of John Nicholson as the lead witness against Mr. Salem. Ex. 338 [12/15/94 GJ], at 9-30.

Therefore, Mr. Bongiovanni's testimony (in his criminal cases) and actions demonstrate that he was aware of Salem's role in the sting operation before he adjudicated Mr. Rippo's case since he had previously received substantial inside information about Salem from Paul Dottore, but did not choose to disqualify himself from Salem's case until after he became aware of the federal investigation. When the search warrant was executed on his home, Mr. Bongiovanni was informed by Detective Nicholson that he was the target of a bribery investigation, and he was later able to connect Salem's criminal case to the bribery sting given Detective Nicholson's prominent

role in the Salem case. Given this evidentiary picture, Mr. Bongiovanni also would have necessarily known about the involvement of the Clark County District Attorney's Office in the federal investigation.

As a matter of law, the fact that Judge Bongiovanni knew that the State was involved in the federal criminal investigation and failed to disclose that fact renders him actually and impliedly biased against Mr. Rippo. In its motion, the State argues that nothing "in Defendant's recitation of the State's alleged involvement in the investigation has any bearing on Defendant's case." Motion at 32. The State cites no authority in support of the proposition that a criminal investigation of a judge must somehow relate to the particular defendant's case, and there is no such authority. On the contrary, the fact that one of the parties before a judge is part of an active criminal investigation against him (with rumors in the press of an impending indictment) would cause the average person in the position of the judge to be tempted to show favor to the State. In the instant case, Mr. Rippo has shown not just that Bongiovanni knew about the State's involvement, but also the fact that he made materially misleading representations on the record when asked about his knowledge of the investigation. In such circumstances, Judge Bongiovanni should have been disqualified as actually and impliedly biased.

Clearly established federal law provides that Judge Bongiovanni should have been disqualified from adjudicating Mr. Rippo's case when he was the target of a criminal investigation by the prosecution and law enforcement. The applicable standard is whether the facts "would cause a reasonable person to wonder whether [the judge] could be completely neutral and detached when deciding" the case. See P.E.T.A. v. Bobby Berosini, Ltd., 111 Nev. 431, 438, 894 P.2d 337, 341 (1995).[9] The ethical rules applicable to judges likewise require disqualification when "the judge's impartiality might reasonably be questioned." Canon 3E(1) of the Code of Jud. Cond. The High Court has articulated the legal standard as whether the "situation is one 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and

[9]See, e.g., Turner v. State, 114 Nev. 682, 686-88, 962 P.2d 1223, 1225-26 (1998) (judge disqualified from adjudicating case when previously participated as prosecuting attorney); State ex re. Bullion & Exchange Bank v. Mack, 26 Nev. 430, 60 P. 862, 863 (1902) (judge's personal interest in probate estate required disqualification).

true.'" Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822 (1986) (citing Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972)). Once it is established that a judge is biased, reversal of a conviction is automatic and no harmless error analysis is permitted.[10]

In Mr. Rippo's case, "a reasonable person with knowledge of all of the facts pertaining to the nature of the indictment would question the ability of a judge facing prosecution to remain impartial as the presiding jurist in a criminal case." United States v. Jaramillo, 745 F.2d 1245, 1248 (9th Cir. 1984) (affirming grant of mistrial on grounds that district judge was indicted during trial).[11] Mr. Rippo's case provides an even stronger case for disqualifying Judge Bongiovanni than Jaramillo because Judge Bongiovanni was being investigated by the very same office that was prosecuting Mr. Rippo, see Jaramillo, 745 P.2d at 1248 (disqualifying United States Attorney's Office from District of Nevada from criminal investigation of judge from District of Nevada), cf. Getsy v. Mitchell, 495 F.3d 295, 312 (6th Cir. 2007) (finding no bias by trial judge when special prosecutor was used from another county to prosecute judge to avoid appearance of bias), and because the judge in Jaramillo promptly brought all of the relevant facts that were known to him regarding the criminal investigation to the attention of the parties, unlike Judge Bongiovanni in the instant case who concealed the extent of his knowledge of the State's involvement in the investigation. See, e.g., Franklin v. McCaughtry, 398 F.3d 955, 961 (7th Cir. 2005) (district judge's "obvious reluctance to admit" to disqualifying facts constitutes significant evidence of actual bias); cf. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 867 (1988) ("by his silence, [the

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[10]See, e.g., Turner v. State, 114 Nev. 682, 962 P.2d 1223 (1998) ("We conclude that it would be inconsistent with these goals to apply a harmless error analysis to a judge's improper failure to recuse himself. Therefore, we conclude that such failure mandates automatic reversal."); accord Ward v. Village of Monroeville, Ohio, 409 U.S. 57, 83 (1972) Tumey v. Ohio, 273 U.S. 510, 532-34 (1927); Franklin v. McCaughtry, 398 F.3d 955, 960-61 (7th Cir. 2005); Cartalino v. Washington, 122 F.3d 8, 10 (7th Cir. 1997); Stivers v. Pierce, 71 F.3d 732, 748 (9th Cir. 1995); see also Edwards v. Balisok, 520 U.S. 641, 647 (1997) ("A criminal defendant tried before a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him.").

[11]The rule regarding bias is the same if a juror is subject to criminal investigation or prosecution by the same prosecutorial entity that is prosecuting the defendant. See, e.g., State v. McClear, 11 Nev. 39, 1876 WL 4526, at *12 (1876) (requiring disqualification when there is a "pending lawsuit between the juror and the party"); Brooks v. Dretke, 444 F.3d 328, 332 (5th Cir. 2006); State v. Murray, 906 P.2d 542, 557 (Ariz. 1995) (affirming district court's decision to strike person from venire whose mother and brother were subject to recent criminal investigation).

judge] deprived respondent of a basis for making a timely motion for a new trial and also deprived it of an issue on direct appeal."). Mr. Rippo is therefore entitled to relief based solely on these facts, but he can go even farther and show that Judge Bongiovanni's failure to disclose his relationship with Ben Spano and Denny Mason constituted actual bias because his revelation of those facts on the record would have implicated him in the very same criminal investigation that was hanging over him at the time of Mr. Rippo's trial. In such circumstances, the risk that Judge Bongiovanni was not able to hold the "balance, nice, clear and true" is simply too great, see Cartalino v. Washington, 122 F.3d 8, 11 (7th Cir. 1997) (presuming bias in extreme cases), and he should have been disqualified from Mr. Rippo's case.[12]

The case law cited by the State in its motion regarding judges with prior professional relationships with one of the parties is qualitatively different than the instant case. For one, the pressure placed on a judge to curry favor with a party when that party is in the position of participating in and influencing a criminal investigation against the judge is qualitatively different than a mere professional business relationship. In Jacobson v. Manfredi, 100 Nev. 226, 229-30, 679 P.2d 251, 253 (1984), the only relation between the judge and one of the parties was that one of the plaintiffs was a former juvenile probation officer in the same county, and that an aunt of one of the parties was a secretary in the probation department. This relationship is qualitatively distinct from Judge Bongiovanni's relationship with Denny Mason, which was based upon favors that Bongiovanni performed for Ben Spano that were at the heart of the criminal investigation that was being conducted against Bongiovanni. In addition, Denny Mason's dual status as the victim of the stolen credit card offense is qualitatively different than a mere professional association. The cases that the State cites regarding mere professional associations are therefore inapplicable to Mr. Rippo's case.

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[12]The unique facts in the instant case should allay the State's concern that a finding of bias would open the flood gates to all criminal defendants who were tried between November 7, 1995 and March 1996 by Judge Bongiovanni to allege bias. See Motion at 32. The fact that Mr. Rippo's case was a high profile capital case wherein Judge Bongiovanni made materially misleading representations regarding his knowledge of the State's involvement in the criminal investigation and had a relationship to the State's victim witness that centered on the very reason for the criminal investigation against him is what distinguishes Mr. Rippo's case from other criminal defendants in the same time period.

Mr. Rippo is independently entitled to relief on the ground that prosecutorial misconduct rendered his trial fundamentally unfair. As Mr. Rippo explained in his petition, fundamental fairness requires that he be put in the same position that he would have been in had the prosecution not made false representations regarding the State's involvement in the criminal investigation of Bongiovanni. If the prosecution had been candid at trial, it would have disclosed the District Attorney's involvement in the sting operation and the internal audit of Bongiovanni's cases that was being conducted by the office. In such circumstances, it would have been apparent that Judge Bongiovanni was required to disqualify himself, and Mr. Rippo would have received a trial before another judge. The State's motion says nothing about Mr. Rippo's allegations of prosecutorial misconduct, which must be taken as true for the purposes of a motion to dismiss.

Clearly established federal law provides that Mr. Rippo is entitled to discovery and an evidentiary hearing to prove his claim of judicial bias. See, e.g., Bracy v. Gramley, 520 U.S. 899, 909 (1997) (holding that district court erred in failing to permit discovery to support claim of judicial bias). Mr. Rippo still has not received a single page of discovery from the Clark County District Attorney's Office, the Las Vegas Metropolitan Police Department, the Nevada Division of Investigation or the FBI regarding the extent of the State's involvement in the criminal investigation of Bongiovanni, which would shed additional light upon the extent to which Bongiovanni was aware of the State's involvement at the time of Mr. Rippo's trial. Based solely on the evidence now known to Mr. Rippo, he can prove that Bongiovanni knew that Metro was involved in the investigation and that the Clark County District Attorney's Office was involved in the sting operation. The representative for the State has not made any representations that he has made himself aware of the relevant facts known to his office before simply asking this Court to blindly impose the law of the case doctrine, which was predicated on false evidence. On the contrary, the constitutional obligations of the State require that it set the record straight, Banks v. Dretke, 540 U.S. 668, 696 (2004), which must start with complete transparency with respect to its involvement in the criminal investigation of Bongiovanni. This Court therefore cannot conclude as a matter of law that Mr. Rippo is not entitled to relief without permitting discovery and an evidentiary hearing.

The State does not attempt to argue that post-conviction counsel's performance was

not deficient in failing to investigate and raise Mr. Rippo's present claim of judicial bias. Mr. Rippo's judicial bias claim was the centerpiece of his direct appeal. See Rippo v. State, 113 Nev. 1239, 1248-50, 946 P.2d 1017, 1023-24 (1997). Effective post-conviction counsel would have investigated the facts of Judge Bongiovanni's federal investigation and prosecution by reviewing the transcripts, pleadings, and other court files from Bongiovanni's criminal cases as present counsel has done. The failure to investigate those facts was not the product of a strategic decision because no investigation was conducted by post-conviction; therefore, post-conviction counsel was not put in the position of declining to investigate Claim One in favor of other more promising constitutional claims. In any event, this Court cannot conclude as a matter of law in the present procedural posture that post-conviction counsel was effective without authorizing discovery and an evidentiary hearing.

2. Claim Two: Prosecutorial Misconduct

In his petition, Mr. Rippo alleged that post-conviction counsel was ineffective in failing to investigate and raise a claim that the State failed to comply with its constitutional disclosure obligations. See Petition at 11-15, 47-62. In the circumstances of Mr. Rippo's case, effective post-conviction counsel would have investigated whether the State failed to disclose material exculpatory and impeachment evidence: (1) the prosecution repeatedly represented to the trial court on the record that its constitutional disclosure obligations were a "legal fiction," 2/8/96 TT at 131, 149; and (2) the prosecution's entire case against Mr. Rippo was built on informant testimony, including three witnesses that surfaced from the jailhouse environment to testify that Mr. Rippo confessed to them. Post-conviction counsel also should have known that the State's lead witness, Diana Hunt, was allowed to plead guilty to robbery in exchange for the dismissal of murder charges against her in exchange for her testimony against Mr. Rippo. In these circumstances, effective post-conviction counsel would have located the case files for the charges that were pending against the State's witnesses to determine whether they received undisclosed benefits in exchange for their testimony. The State's motion does not assert that post-conviction counsel made a strategic decision not to investigate this claim, nor could it given that post-conviction counsel did not conduct any investigation. Mr. Rippo is therefore entitled to an evidentiary hearing to establish that post-conviction counsel's performance was deficient.

Mr. Rippo will discuss the merits of his claim below to demonstrate prejudice from post-conviction counsel's ineffectiveness. See pp. 49-69, infra. As explained below, Mr. Rippo's primary theory of cause and prejudice to overcome any procedural default is based upon the State's suppression of material exculpatory and impeachment evidence. However, in the circumstances of the instant case, Mr. Rippo can also demonstrate cause and prejudice due to the ineffective assistance of post-conviction counsel.

3. Claim Three: Ineffective Assistance of Trial Counsel During the Penalty Phase

In his petition, Mr. Rippo alleged that post-conviction counsel was ineffective in failing to investigate and raise a claim that trial counsel were ineffective in failing to investigate and present mitigation evidence at his sentencing hearing. Petition at 12-14. Mr. Rippo also alleged in considerable detail what mitigation evidence effective trial counsel would have investigated and presented if they would have performed effectively. Petition at 63-98. The State asserts that "Defendant fails to enumerate what effect they would have had on the outcome of the trial." Motion at 55. However, Mr. Rippo is under no obligation to be clairvoyant: he is only required to allege what evidence trial counsel would have presented had counsel performed effectively. At that point, this Court is in a position to decide whether there is a reasonable probability that one juror would have struck a different balance in the penalty phase if counsel had performed effectively. See Wiggins v. Smith, 510 U.S. 510, 534-38 (2003). Mr. Rippo is not required to plead anything more to obtain relief on his ineffective assistance of trial counsel claims.

In its motion, the State argues that trial counsel possessed a strategic justification for failing to investigate and present the mitigation evidence contained in Mr. Rippo's petition, see Motion at 58, and that Mr. Rippo cannot demonstrate prejudice given the mitigation evidence that was presented at sentencing. Mr. Rippo will address the State's allegations of effective performance first and then address the issue of prejudice.

Mr. Rippo's petition demonstrates that trial counsel were ineffective in failing to conduct a sufficient investigation into the existence of mitigation evidence. In its motion, the State argues that it "was a sound strategy decision for trial counsel to avoid bombarding the jury with

cumulative and redundant testimony and anecdotes about Defendant's happy childhood turned sour because of an abusive step-father and allegedly detached mother, and then further present testimony about how Defendant has been a model prisoner." Motion at 58. For this Court to accept the State's argument, it would have to assume that Mr. Rippo's trial attorneys were actually aware of the mitigation evidence contained in Mr. Rippo's instant petition, and that they made a strategic decision not to present it. The facts in the instant case, however, show that trial counsel never were in an adequate position to make such a strategic decision because they failed to conduct a reasonable investigation in the first place. As the Court explained, just "because counsel has some information with respect to petitioner's background" does not mean that "they were in a position to make a tactical choice not to present a mitigation defense." Wiggins v. Smith, 539 U.S. 510, 527 (2004). Instead, the critical issue is whether the investigation itself was reasonable: "In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Id. The fundamental flaw in the State's motion is that it does not address whether counsel actually made a reasonable decision to abandon their investigation when they did and instead incorrectly assumes that trial counsel did investigate the evidence but consciously chose not to present it.[13] As a matter of law, the State's post hoc rationalization of trial counsel's strategic considerations must be rejected as not accurately reflecting counsel's actual decision-making. See, e.g., Frierson v. Woodford, 463 F.3d 982 (9th Cir. 2006) (rejecting "later stated reasons" for counsel's actions which "appear to be post-hoc rationalizations rather than reasoned or strategic choices"); Brown v. Sternes, 304 F.3d 677, 691 (7th Cir. 2002) ("it is not the role of a reviewing court to engage in *post hoc* rationalization for an attorney's actions by 'constructing strategic defenses that counsel does not offer' or engage in Monday morning

[13]See, e.g., Lambright v. Schiro, 490 F.3d 1103, 1120 (9th Cir. 2007) ("Only after a thorough investigation can a less than complete presentation of mitigating evidence ever be deemed reasonable, and only to the extent that a reasonable strategy supports such a presentation."); Correll v. Ryan, 465 F.3d 1006, 1015-16 (9th Cir. 2006) ("An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy."); Dickerson v. Bagley, 453 F.3d 690, 697 (6th Cir. 2006) ("Without conducting a complete mitigation investigation, counsel did not know what an investigation would reveal and had no basis for making a 'strategic decision'"); Silva v. Woodford, 279 F.3d 825, 846-47 (9th Cir. 2002).

quarterbacking.").[14]

Trial counsels' decision to abandon their mitigation investigation was deficient because it was due to the fact that investigation began at the last minute before Mr. Rippo's sentencing hearing, not due to any sound strategic decision not to investigate further. As the State itself admits in its motion, it was trial counsel's intent to present mitigation evidence from Mr. Rippo's childhood and family background. See Motion at 58. Trial counsel did not begin their mitigation investigation until January 1996 when they first hired Thomas Kinsora, Ph.D, a neuropsychologist, to evaluate Mr. Rippo and briefly interview Mr. Rippo's mother and sister in February 1996. See Exs. 251, 252 to Pet. [Kinsora's Reports]. Mr. Rippo's trial started at the end of January, 1996. On February 13, 1996, Norton Roitman, M.D., a psychiatrist, interviewed Mr. Rippo and interviewed his mother on February 17, 1996. See Ex. 254 to Pet. [Roitman's Report]. The fruits of Kinsora and Roitman's social history interviews were confined to Mr. Rippo's mother and to his own self-reporting. On March 11, 1996, Dr. Roitman submitted an addendum to his report which was based upon his review of documents relating to Mr. Rippo's prior conviction for sexual assault. See Ex. 295 to Pet. These brief interviews by trial counsel's experts were the only substantive interviews that were conducted at the direction of Mr. Rippo's attorneys of mitigation witnesses. Mr. Rippo's penalty hearing began the next day, on March 12, 1996.

Under the circumstances, trial counsel were ineffective in prematurely terminating their investigation into the existence of mitigation witnesses. As explained above, neither trial counsel nor their investigators conducted any substantive mitigation interviews with Mr. Rippo's friends or extended family members. Trial counsels' failure to do so was not the result of any strategic considerations, but was due to the fact that they apparently placed the entire responsibility for doing interviews on their experts, and they did not investigate or make additional mitigation witnesses available to their experts. See Lambright v. Schriro, 490 F.3d 1103, 1120 (9th Cir. 2007) (holding that trial counsel "may not rely for the development and presentation of mitigating evidence

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[14]See, e.g., Dickerson v. Bagley, 453 F.3d 690, 697 (6th Cir. 2006) (rejecting state court's assumption "that counsel's oversights were motivated by strategy, instead of requiring a complete and thorough investigation as mandated by Strickland and its progeny.").

on . . . a court appointed psychologist."); Wallace v. Stewart, 184 F.3d 1112, 1118 (9th Cir. 1999) (holding that limitations in interviews by psychologists "does not relieve the attorneys of their duty to seek out such evidence and bring it to the attention of their experts"). Due to the last moment nature of trial counsels' limited investigation, they were not able to pursue the investigate leads contained in the experts' reports and were not able to expand their investigation to cover the evidence contained in Mr. Rippo's instant petition. As explained in the declaration of Stacie Campanelli, Mr. Rippo's younger sister, due to trial counsels' failure to conduct an adequate investigation, they were not in a position to present any mitigation witnesses at Mr. Rippo's penalty hearing:

> The morning before Michael's penalty hearing began, his trial attorneys, Phillip Dunleavy and Steve Wolfson, had our family in a room together. Michael's trial attorneys asked whether anyone in the family would be willing to testify at the hearing that day about Michael's childhood and family background. Mr. Wolfson said that I should testify at the penalty hearing. Michael's trial attorneys did not ask me what I would testify about before my testimony. Neither of the attorneys took the time to interview me about Michael's childhood or family background before I testified. Mr. Wolfson talked with me briefly about the general topics he would touch on. During the entire time my testimony was discussed, my mother was present. Michael's attorneys never attempted to contact me individually in the years between his arrest and trial in 1996.

Ex. 339, at 1. This type of last minute group interview with family members is routinely found to constitute deficient performance of counsel.[15] Therefore, contrary to the State's unsupported speculation, see Motion at 58, trial counsel's failure to investigate and present sufficient information from mitigation witnesses was not due to any strategic consideration, but was due to the failure to conduct a comprehensive mitigation investigation early enough to actually locate and interview the mitigation witnesses identified in Mr. Rippo's instant petition.

Trial counsel were also ineffective in failing to adequately prepare their mental health

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[15]See, e.g., Correll v. Ryan, 465 F.3d 1006, 1011 (9th Cir. 2006) (finding counsel ineffective for failing to spend more than a few hours interviewing petitioner's family members as a group); Douglas v. Woodford, 316 F.3d 1079, 1088 (9th Cir. 2003) (finding counsel ineffective for failing to "prepare the witnesses adequately for testimony at the penalty phase" which "also meant that the testimony that was introduced was less than compelling").

experts to present mitigation evidence to the jury.[16] As explained above, trial counsel never contacted or interviewed the individuals in Mr. Rippo's background and thus they were not able to make their experts aware of them and were not able to put together a comprehensive social history for their experts. Trial counsel also failed to obtain the school records, juvenile records, and other mental health records that are contained in Mr. Rippo's instant petition and did not make their experts aware of them. The leads to obtain these records are contained in the brief social histories put together by the mental health experts, but there was no time remaining for trial counsel to follow up on those leads before the start of the penalty hearing. Due to the short period of time before the penalty hearing, trial counsel were not able to provide feedback to their experts for additional testing such as by requesting additional testing focusing specifically upon Mr. Rippo's childhood diagnosis of Attention Deficit Disorder and trauma due to the psycho-social stressors in his childhood. See, e.g., Richey v. Bradshaw, 498 F.3d 344, 358 (6th Cir. 2007) (finding counsel ineffective for "limited oversight, supervision and engagement" of expert witness). If trial counsel had requested that their experts conduct follow-up testing on the areas of concern identified from their own reports, trial counsel would have been in the position to present the same information that is contained in Mr. Rippo's instant petition. See Ex. 321 to Pet. [Mack's report], at 30-32. Mr. Rippo can therefore demonstrate that trial counsel were ineffective in failing to properly prepare their experts and failing to follow up with them regarding further testing to address the significant leads contained in their own reports.

Mr. Rippo further can demonstrate prejudice from trial counsel's deficient performance at the penalty hearing. In its motion, the State argues that in "light of the testimony presented in mitigation, and the overwhelming evidence presented at trial, which detailed the horrific manner in which Defendant killed the victims, it is difficult to imagine that the jury would have been

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[16] See, e.g., Daniels v. Woodford, 428 F.3d 1181, 1209-10 (9th Cir. 2005) (counsel ineffective in selection and preparation of expert at capital sentencing); Paine v. Massie, 339 F.3d 1194, 1202-03 (10th Cir. 2003) (same); Roberts v. Dretke, 356 F.3d 632, 639-41 (5th Cir. 2004); Jennings v. Woodford, 290 F.3d 1006, 1013 (9th Cir. 2002) (failure to provide experts with available medical records constitutes ineffective assistance); Silva v. Woodford, 279 F.3d 825, 841-42 (9th Cir. 2002); Wallace v. Stewart, 184 F.3d 1112, 1118 (9th Cir. 1999); Bloom v. Calderon, 132 F.3d 1267, 1271-72 (9th Cir. 1997); Claybourne v. Lewis, 64 F.3d 1373, 1385-87 (9th Cir. 1995); Hendricks v. Calderon, 70 F.3d 1032, 1043 (9th Cir. 1995).

persuaded by stories from the Defendant's grandmother, maternal and paternal aunts and friends." Motion at 57. The State further emphasizes the aggravating nature of the facts themselves, see Motion at 57; however, assuming that the State was right, trial counsel would have had more incentive (rather than less) to conduct a comprehensive mitigation investigation. It should go without saying that the more "overwhelming" the evidence of guilt, the more that counsel is expected to neutralize that fact by investigating and presenting mitigation evidence. Consequently, assuming that the State is correct about the evidentiary picture, that fact would have compelled effective trial counsel to conduct a comprehensive investigation to present the evidence that is contained in Mr. Rippo's instant petition.

A simple comparison of the evidence presented at the penalty hearing with the evidence contained in the instant proceeding demonstrates that he suffered prejudice from counsel's ineffectiveness. See Exs. 339 through 345, 353, 354 [mitigation declarations]. Despite the State's efforts to paint counsel's evidentiary presentation as sufficient, see Motion at 54-59, the Nevada Supreme Court thoroughly reviewed all of the mitigation evidence presented by counsel at sentencing and concluded that the "evidence in mitigation was not particularly compelling." Rippo v. State, 122 Nev. 1086, 146 P.3d 279, 284 (2006). The State's motion does not address the Nevada Supreme Court's characterization of the defense's evidentiary presentation or the clear implication that counsel were ineffective. Given that the State profited from the Nevada Supreme Court's previous factual finding (which was critical to its previous determination of harmless error), it is estopped from asserting for the first time in the instant proceeding that trial counsel presented a compelling evidentiary presentation at his trial.

Mr. Rippo can demonstrate adequate prejudice because the information contained in the instant petition adds measurably to the qualitative weight of the psycho-social stressors in his background. As explained in the State's motion, the only witness who hinted at the difficult upbringing to which Mr. Rippo was subjected was Stacie Campanelli. See Motion at 56. As Ms. Campanelli explained in her declaration,

> At the penalty hearing, I testified generally about the difficulties that Michael faced growing up. However, if Michael's trial attorneys had interviewed me before my testimony, I could have

> told them much more about Michael and my family. I tried to hint at what my step-father, Ollie Anzini, had done to antagonize Michael and others in my family during my testimony.

Ex. 339, at 1. Specifically, the evidentiary presentation at trial failed to contain any of the allegations of sexual abuse, extreme physical abuse, and sadism perpetrated by Mr. Rippo's step-father, Ollie Anzini, on his step-children. Evidence of Mr. Anzini's abuse and mistreatment of his children was also corroborated by other collateral reporting sources. See Exs. 339 through 345, 353, 354 [mitigation declarations]. The qualitative difference between the two evidentiary presentations is pronounced: instead of portraying Mr. Rippo's actions as a child and teenager as a simple act of defiance against a stern step-father, the evidentiary picture before this Court shows that Mr. Rippo was literally raised in a toxic environment of abuse and sadism at the hands of Mr. Anzini. In comparing the evidence in Mr. Rippo's instant petition against what was presented on his behalf at trial, Mr. Rippo has demonstrated the existence of psycho-social stressors from his background that mitigate his offenses, particularly his prior sexual assault conviction which was used as a statutory aggravating circumstance at sentencing.

As a matter of state and federal law, the psycho-social evidence contained in Mr. Rippo's instant petition would have had a reasonable probability of a more favorable outcome if counsel had presented it. In Boyde v. Brown, 404 F.3d 1159, 1176 (9th Cir. 2005), trial counsel presented the testimony of the petitioner's younger sister at his capital sentencing hearing after having his investigator interview her. Trial counsel, however, failed to adequately interview the sister to discover her "allegation that she, Boyde and the other siblings were regularly and violently abused by Boyde's mother and step-father. She also explained that the stepfather had sexually molested the female siblings, and that Boyde had been aware of this abuse from an early age." Id. The court held that "Boyde's history of suffering violent physical abuse, as well as the family history of sexual abuse he had known about growing up, is the sort of evidence that could persuade a jury to be lenient." Id. The court explained that the anecdotal evidence related by the petitioner's younger sister about his childhood was much more persuasive than her testimony at the sentencing hearing. See id. at 1176-77. The court further explained that effective counsel would have used that information to interview other individuals in the petitioner's family to confirm the allegations of

abuse. See id. The court therefore granted the petitioner habeas relief on the grounds that his trial attorney provided ineffective assistance of counsel in the penalty phase of his trial.

Just like Boyde, trial counsel's failure to conduct an adequate interview with Stacie Campanelli prevented them from proffering a much more significant body of mitigation evidence at Mr. Rippo's sentencing hearing, and from pursuing additional investigative leads to corroborate that evidence. Courts have routinely found prejudice from trial counsel's ineffectiveness when counsel failed to investigate and present a much larger body of evidence showing extreme physical abuse and sexual abuse in the defendant's family background. See, e.g., Rompilla v. Beard, 545 U.S. 374, 392-93 (2005); Wiggins v. Smith, 539 U.S. 510, 532, 535 (2004); Williams v. Taylor (Terry), 529 U.S. 362, 396-98 (2000); Boyde v. Brown, 404 F.3d 1159, 1176 (9th Cir. 2005); Stankewitz v. Woodford, 365 F.3d 706, 724 (9th Cir. 2004) ("A more complete presentation, including even a fraction of the details Stankewitz now alleges, could have made a difference."). A cumulative assessment of the evidence that trial counsel failed to present in Mr. Rippo's case would likewise have had a reasonable probability of a more favorable outcome if counsel had presented it.

Mr. Rippo further can demonstrate prejudice due to the fact that an adequate investigation would have led to the presentation of mitigating evidence from their mental health experts. No mental health experts testified at Mr. Rippo's penalty hearing so it is easy for this Court to compare what happened at his trial with what should have happened if trial counsel had performed effectively.[17] Given counsel's failure to investigate the existence of psycho-social stressors in Mr. Rippo's background, he was never able to present testimony from a mental health expert regarding the effect that these factors had relative to the probability of adverse outcomes in the community. Just as important, evidence of Mr. Rippo's neuropsychological impairment, attention deficit hyperactivity disorder, obsessive compulsive disorder, and poly-substance abuse would have been considered mitigating by the jury, particularly when viewed in conjunction with the psycho-social stressors in Mr. Rippo's background. All of this evidence could have been submitted to the jury by

[17] See, e.g., Ainsworth v. Woodford, 268 F.3d 868, 876 (9th Cir. 2000) ("It is likely that the introduction of expert testimony would also have been important in the jury's determination.") (holding that petitioner suffered prejudice from the failure to investigate and present expert testimony regarding the effect of psycho-social stressors on petitioner's mental state).

counsel in a special verdict form for their consideration in connection with their weighing of that evidence against the statutory aggravating circumstances. The State's motion says nothing at all about any of this evidence or the effect that it would have had on the jury's sentencing verdict. It is therefore clear that there is at least a reasonable probability of a more favorable outcome if trial counsel had performed effectively.

Mr. Rippo also suffered prejudice from trial counsel's failure to offer expert testimony that he would perform constructively in the structured setting of a prison. The State's motion says nothing about these allegations. At his penalty hearing, trial counsel presented the testimony of a lay witness, Reverend James Cooper, to testify regarding Mr. Rippo's behavior in prison but that testimony "lacked force without some expert testimony to back it up." Douglas v. Woodford, 316 F.3d 1079, 1090 (9th Cir. 2003). Specifically, a violence risk assessment expert could have explained to the jury that the statistical base rate for violence in prison is low, and could have explained that Mr. Rippo was less likely than the average inmate to commit acts of violence in prison. Such evidence would have been particularly important given Mr. Cooper's limited knowledge of Mr. Rippo's institutional record and the State's emphasis in the penalty hearing on presenting evidence and argument on the issue of future dangerousness. The State's motion says nothing about the effect that a violence risk assessment expert would have had on the jury's sentencing decision. A cumulative consideration of all of the evidence discussed above would therefore have had a reasonable probability of a more favorable outcome if counsel had presented it.

The State's argument regarding the purported heinous nature of the offense itself, see Motion at 57, does not prevent Mr. Rippo from demonstrating prejudice from trial counsels' ineffectiveness. In Williams v. Taylor (Terry), 529 U.S. 362 (2000), the Supreme Court held that ineffective assistance in failing to present mitigating evidence of the defendant's "childhood, filled with abuse and privation," and borderline retardation, was prejudicial, in a case where the capital offense was committed with a mattock, and that included aggravating evidence of two prior felony convictions, an assault on an elderly victim after staring in front of his house, a brutal assault on another elderly victim that left her in a vegetative state, and an arson in jail while the defendant was

awaiting trial. 529 U.S. at 368-370, 397. Mr. Rippo has also cited other cases, not discussed by the State, in which death sentences were vacated, despite the particularly heinous nature of the capital offense, due solely to the failure of trial counsel to investigate and present mitigating evidence at sentencing. E.g., Silva v. Woodford, 279 F.3d 825, 828 (9th Cir. 2002); Turner v. Calderon, 281 F.3d 851 (9th Cir. 2002); Caro v. Woodford, 280 F.3d 1247 (9th Cir. 2002); Jennings v. Woodford, 290 F.3d 1006 (9th Cir. 2002); Ainsworth v. Woodford, 268 F.3d 868 (9th Cir. 2001); Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992) (thirteen murders); Deutscher v. Whitely, 884 F.2d 1152 (9th Cir. 1989). The mitigating evidence left out of the sentencing equation due to counsel's ineffectiveness in this case had the same potential for altering the jury's selection of penalty as the evidence in Williams, and Mr. Rippo can accordingly demonstrate prejudice from counsel's ineffectiveness.

In summary, Mr. Rippo can demonstrate prejudice from post-conviction counsel's ineffective assistance because he can show that his ineffective assistance of trial counsel claim has merit. As explained above, the State's motion says nothing about post-conviction counsel's deficient performance, and the allegations of Mr. Rippo's petition must be taken as true for the purposes of a motion to dismiss. It is therefore inescapable that Mr. Rippo has alleged sufficient factual allegations to receive an evidentiary hearing on his allegations of ineffective assistance.

4. Claims Four & Ten: Ineffective Assistance of Trial Counsel During Voir Dire

In his petition, Mr. Rippo alleged that post-conviction counsel was ineffective for failing to raise a claim regarding trial counsel's ineffective assistance during the voir dire stage of the proceedings. Petition at 11-14. Mr. Rippo also alleged that trial counsel performed ineffectively during voir dire and that counsel on direct appeal was ineffective in failing to raise meritorious constitutional challenges to the voir dire process. Petition at 99-102, 126-32. Specifically, Mr. Rippo alleges that trial counsel were ineffective (1) in failing to specifically ask each of the members of the venire whether they could impose two sentences of life with parole in the circumstances of his case; (2) in failing to ask the jurors whether they could consider specific mitigation evidence; (3) in contaminating the venire and failing to object to the court and prosecution's contamination of the

venire by improperly stating that jurors would have to provide equal consideration to each of the three penalties in the abstract; (4) in failing to move to excuse three biased jurors for cause; (5) in failing to object to the prosecution's overly narrow definition of mitigation evidence; (6) in failing to ensure that a record of peremptory challenges exercised by the parties was made; (7) in failing to raise an objection regarding the trial court's improper injection of levity in the proceedings; and (8) in failing to raise an objection to the prosecution's comments that the decision to vote for the death penalty required a strength of character that a life verdict did not.

In its motion, the State argues that none of Mr. Rippo's factual allegations rise to the level of a constitutional violation because he cannot specifically point to any biased jurors who actually sat on his jury. See Motion at 59-60. At most, the State's arguments are confined to issue number four above, i.e., whether trial counsel unreasonably failed to challenge three biased jurors for cause. As a matter of fact, Mr. Rippo alleged in his petition that trial counsels' ineffectiveness in failing to raise valid for-cause challenges did lead to the sitting of a biased juror, Gerald Berger, on his jury so the State's argument is purely academic. And, as explained below, Mr. Rippo is able to prove that his constitutional rights to due process and an impartial jury were violated even in the absence of a biased juror due to the contamination of the jury as a whole.

Mr. Rippo is able to prove that his constitutional rights to due process and an impartial jury were violated even in the absence of a biased juror. The State's observation that trial judges enjoy broad discretion in conducting voir dire and ruling on challenges for cause, see Motion at 59, does not mean that a judge can do anything without limit as long as it does not result in the sitting of a juror that is specifically identified by Mr. Rippo as biased. On the contrary, Mr. Rippo's right to a fair trial is violated when the trial court's conduct during voir dire undermines the venire's perception of the significance of the trial. See, e.g., Parodi v. Washoe Medical Center, Inc., 111 Nev. 365, 367, 892 P.2d 588, 589 (1995) (finding that trial court's injection of levity during voir dire "prejudiced appellant's right to a fair trial"); State v. Vaughan, 23 Nev. 103, 43 P. 193, 197-98 (1896) (trial court's comments indicating defendant provided inducements to juror required reversal). There was no contention in Parodi or Vaughan that any of the jurors who sat on the plaintiff's jury were biased against him. The same is true of the allegations of prosecutorial misconduct during voir

dire, which also do not require any showing that a particular juror was biased. In short, just because Mr. Rippo must show juror bias to obtain relief on that claim does not mean that all constitutional error occurring during voir dire must also be accompanied by a showing that a juror who sat on Mr. Rippo's jury was biased. The State has cited no authority in support of this proposition, and there is none. The State's motion does not otherwise address the merits of Mr. Rippo's claims, which must be taken as true for the purposes of a motion to dismiss.

Mr. Rippo also need not establish that a specific juror was biased in order to show that a cumulative assessment of counsel's acts and omissions during voir dire deprived him of the right to the effective assistance of counsel. As Mr. Rippo alleged in his petition, the State was permitted to inform the jury that Mr. Rippo allegedly murdered two women by means of asphyxiation, but trial counsel never specifically asked the jurors who sat on his case whether they could consider two sentences of life with parole in such circumstances. Trial counsel also never conducted an adequate mitigation investigation and therefore were not in a position to ask the persons on the venire whether they could consider that evidence in their sentencing determination. These facts demonstrate prejudice from trial counsel's failure to conduct an adequate mitigation investigation regardless of whether a specific juror who sat on the jury was biased. In summary, the more fundamental issue of whether counsel's performance was so deficient during voir dire that the process itself was inadequate to ensure a fair trial before an impartial jury is properly before this Court even if Mr. Rippo cannot also identify a specific juror who was biased as a result of a questions that counsel did not ask.

The use of "equal consideration of penalties" language by the trial court, the prosecution and defense counsel also does not necessarily require that a specific juror who sat on Mr. Rippo's jury be biased. The State correctly acknowledges that this "language is misleading" and has been specifically rejected by the Nevada Supreme Court. See Motion at 60. The State further argues that "In this particular case, the 'equal consideration' language was used by the district court and the parties in questioning venire persons to identify individuals who would not set aside or subordinate personal views and abide by their oath as a juror to follow the law as instructed by the court." Motion at 60. Mr. Rippo agrees with the State on this point and this is exactly why the equal

consideration language contaminated his jury. At the point that the judge and both of the parties are operating under an incorrect assumption regarding the qualifications to be a juror in a capital case and they repeatedly state that incorrect standard to the jury, it is impossible to make the very record that the State says is required because the jury has already been thoroughly contaminated. The contamination aspect of the constitutional claim is therefore distinct from the issue of whether a juror who ultimately sat on Mr. Rippo's jury was biased. See, e.g., Meyer v. State, 119 Nev. 554, 80 P.3d 447, 455 (2003).[18]

The State's argument that trial counsel's failure to object at trial precludes appellate review, see Motion at 74-75, only supports Mr. Rippo's claim of ineffective assistance of trial counsel. The Nevada Supreme Court's plain error rule is irrelevant to Mr. Rippo's ineffective assistance of counsel claim because a prejudice determination assumes that effective counsel would have raised the issue at trial and it would therefore have been preserved for appeal. In addition, even viewing Mr. Rippo's ineffective assistance of direct appeal counsel claim in isolation, he still would have been able to obtain appellate review of his claims since contamination of the jury by the judge would have qualified as plain error requiring reversal. See, e.g., Parodi v. Washoe Medical Center, Inc., 111 Nev. 365, 368-69, 892 P.2d 588, 590-91 (1995). Consequently, the State's plain error arguments are irrelevant when Mr. Rippo's claim of ineffective assistance of trial and appellate counsel are viewed together, and even if they were relevant, that fact would not matter because the trial court's comments qualify as plain error requiring reversal.

The State's arguments regarding the use of peremptory challenges to remove biased jurors from the venire does not address the separate issue of whether trial counsel were ineffective in failing to raise meritorious challenges for cause in order to vindicate Mr. Rippo's statutory right to peremptory challenges. The state law statutory right to exercise peremptory challenges is distinct from the federal constitutional right to peremptory challenges. See, e.g., Kirk v. Raymark Indus., Inc., 61 F.3d 147, 160-61 (3rd Cir. 1995). Mr. Rippo may therefore vindicate his statutory right to peremptory challenges via his Sixth and Fourteenth Amendment right to counsel even if he did not

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[18]See, e.g., Mattox v. United States, 146 U.S. 140, 150 (1892); Remmer v. United States, 347 U.S. 227, 228 (1954); accord Caliendo v. Warden, 365 F.3d 691, 695-97 (9th Cir. 2004).

have an underlying federal constitutional interest in each peremptory challenge.[19] The case law cited by the State would, at most, only apply when counsel is forced to expend a peremptory challenge to remove a biased juror, see Motion at 59-60, but it has no application when the issue is the ineffective assistance of counsel. In this context, Mr. Rippo is able to assert his right to counsel as a means of vindicating his statutory right to peremptory challenges.

Finally, even if the State was right, Mr. Rippo can demonstrate that trial counsel's failure to raise meritorious challenges for cause prevented him from removing a biased juror who was seated on his jury. Due to trial counsel's failure to move to remove Carter Ruess and Isabel Garcia from the venire for cause, counsel was unable to remove Gerald Berger from the venire, and he sat on Mr. Rippo's jury. As Mr. Rippo explained in his petition, Mr. Berger did not believe that a sentence of life without parole actually meant that Mr. Rippo would spend the rest of his life in prison. Due to trial counsel's failure to adequately follow up with Mr. Berger to assure that he would consider a sentence of life without parole in light of his beliefs, the record is left only with Mr. Berger's equivocal statements that he could be fair and impartial in Mr. Rippo's case. Under these circumstances, trial counsel's failure to move to remove Mmes. Ruess and Garcia from the venire was prejudicial because it prevented them from using a peremptory challenge to remove Mr. Berger from the venire. The State's motion concedes that Mr. Rippo can show prejudice under such circumstances, which means that there is a reasonable probability of a more favorable outcome if trial counsel had performed effectively.

In combination, the cumulative effect of trial counsels' ineffective assistance during voir dire was prejudicial. Mr. Rippo can therefore show that post-conviction counsel was ineffective in failing to raise a claim that trial and appellate counsel were ineffective for failing to raise the constitutional issues contained in his petition at trial and on direct appeal.

5. Claim Five: Ineffective Assistance of Trial Counsel During the Guilt and Penalty Phases of Trial

In his petition, Mr. Rippo alleged that post-conviction counsel was ineffective in

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[19] See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 374-80 (1986); Withrow v. Williams, 507 U.S. 680, 691-95 (1993).

failing to adequately raise and litigate claims of ineffective assistance of trial and appellate counsel. See Petition at 9, 12-15, 103-08. In its motion, the State argues that Mr. Rippo's claims are procedurally barred as successive, see Motion at 60-61; however, its argument begs the question of whether post-conviction counsel was ineffective: because counsel's ineffectiveness contributed to the court's decision to deny the claims on the merits, Mr. Rippo can overcome the successive petition procedural bar by showing deficient performance and prejudice.

Mr. Rippo acknowledges that post-conviction counsel previously raised a claim that trial counsel were ineffective for failing to spend a sufficient amount of time with him before trial discussing his case. However, the problem with post-conviction counsel's representation is that he did not conduct any investigation to show that Mr. Rippo suffered prejudice as a result of trial counsels' ineffectiveness. If counsel had conducted a reasonable investigation, he would have pleaded the factual allegations that are contained in Mr. Rippo's instant petition which specifically show prejudice from trial counsels' ineffectiveness. In particular, post-conviction counsel failed to investigate and present evidence of prejudice from trial counsels' failure to conduct an adequate investigation into the existence of mitigation evidence. It is Mr. Rippo's ability to show prejudice that permits him to re-raise the factual allegations of Claim Five in the instant petition.

Mr. Rippo can also demonstrate good cause and prejudice on the grounds that post-conviction counsel failed to support his claims with any citation to the record, either in his supplemental petition or on appeal. On post-conviction appeal, the Nevada Supreme Court expressly declined to entertain any of Mr. Rippo's claims by finding that post-conviction counsel had failed to include any citations to the record. See, e.g., Rippo v. State, 122 Nev. 1086, 146 P.3d 279, 286-87 (2006). In the instant proceeding, Mr. Rippo has cured those deficiencies in his pleadings:

Mr. Rippo can now show that trial counsel were ineffective for failing to argue the correct grounds for excluding a photograph of him in prison clothing that was admitted in the guilt phase of trial. During the prosecution's direct examination of Angela Sposito, they admitted Trial

Exhibit 99, which was a picture of Mr. Rippo in prison clothing. See Ex. 348.[20] 2/6/96 TT at 171-73. Initially, trial counsel objected to the admission of the photo on the ground that it was not relevant given that the witness could not identify whether the photograph looked more similar to Mr. Rippo than he did at trial, see id. at 172-73, but raised no additional objection after the witness arguably provided the necessary foundation by arguing that the photograph should be excluded on the ground that it allowed evidence of other bad acts before the jury, and was substantially more prejudicial than probative.[21] As the State notes in its motion, the Nevada Supreme Court rejected Mr. Rippo's claim on the ground that he failed to include citations to the record in support of his claim. See Motion at 61 n.5; Rippo, 146 P.3d at 286. Post-conviction counsel did not have a strategic justification for failing to support his claim with citations to the record, and the State has never argued otherwise. Mr. Rippo can demonstrate prejudice from counsel's ineffectiveness because the photograph of Mr. Rippo clearly shows him wearing prison garb, which would have necessarily raised an inference with the jury that Mr. Rippo had committed other bad acts. Mr. Rippo can therefore demonstrate good cause and prejudice to re-raise this sub-claim.

Mr. Rippo can now show that trial counsel were ineffective in failing to adequately cross-examine Dr. Green regarding the absence of stun marks on the victims. Specifically, Dr. Green testified at the grand jury proceedings that he had experience with stun guns, and that the fact that the victims were wearing clothing at the time they were assaulted would not have prevented the appearance of marks from the stun gun. See 6/4/92 TT at 224-25. When trial counsel cross-examined Dr. Green at trial, however, they failed to elicit testimony from him about the presence of marks from a stun gun when the victims are wearing clothing, see 2/27/96 TT at 127-49, 157-62, which opened the door to the prosecution's argument in closing that the reason that the victims did

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[20]The State's speculation in its motion that Exhibit 323 may not be the photograph admitted at trial, see Motion at 61 n.5, does not affect Mr. Rippo's right to an evidentiary hearing on this claim where he will have the opportunity to show that Exhibit 323 is in fact the photograph that was admitted at trial as Exhibit 99.

[21]On post-conviction appeal, the Nevada Supreme Court recognized that trial counsel originally raised an objection to the photograph, see Rippo, 146 P.3d at 286, but failed to make any ruling with respect to Mr. Rippo's claim of ineffective assistance of direct appeal counsel due to the failure to include the photograph in the record on appeal.

not have stun-gun marks was because they were wearing clothing. 3/5/96 TT at 216-17. Mr. Rippo can therefore show that trial counsel were ineffective in failing to adequately cross-examine Dr. Green, and that he suffered prejudice from post-conviction counsel's failure adequately to raise a claim regarding trial counsel's ineffectiveness.

The State's motion concedes that post-conviction counsel was ineffective in failing to move in limine to prevent the State and its witnesses from using the term "girls" to describe the victims, and in using that terminology themselves throughout the trial. In its motion, the State argues that Mr. Rippo has not cited to examples in the record where the term "girls" was used, see Motion at 62, but that is only because the term was used so much that it can be found in every volume of the trial transcript used by every actor in the trial.[22] The State's only other argument is that this sub-claim is waived because it was not raised previously, see Motion at 62, but this argument again begs the question of whether post-conviction counsel was ineffective for failing to raise it. The State does not argue that post-conviction counsel had a strategic justification for failing to raise this claim, and that Mr. Rippo did not suffer prejudice as a result. Mr. Rippo agrees with the State that the claim should have been raised earlier by post-conviction counsel, and he seeks a hearing to demonstrate cause and prejudice based on counsel's ineffectiveness.

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[22] See, e.g., 1/31/96 TT at 39 (Wolfson query to potential juror, two instances); 2/1/96 TT at 14 (Wolfson query to potential juror); 2/2/96 TT at 55, 57, 66, 67, 68 (Harmon opening statement); 2/2/96 TT at 87, 89 (twice) (Wolfson opening statement); 2/2/96 TT at 155 (three times), 159, 161 (twice), 162 (Wolfson's queries to witness Darryl Johnson); 2/6/96 TT at 11, 156 (Hunt testimony); 2/6/96 TT at 56, 92 (Hunt testimony); 2/6/96 TT at 45 (Liston testimony); 2/7/96 TT at 47, 58 (twice), 59, 60, 61, 62 (three times) (Sims testimony); 2/8/96 TT at 10, 24 (Dunleavy's queries to Sims); 2/8/96 TT at 40 (twice) (Wolfson's queries to Lukens); 2/8/96 TT at 49 (Seaton's query to Lukens); 2/8/96 TT at 58, 59 (Wolfson's queries to Archie); 2/8/96 TT at 102, 105 (Wolfson's queries to Lowry); 2/8/96 TT at 159 (Dunleavy's query to Harmon); 2/26/96 TT at 8 (Dunleavy's query to Sims); 2/27/96 TT 46, 47 (Wolfson's queries to Connell); 2/27/96 TT at 128, 237 (three times), 139, 140, 144, 145 (four times) (Wolfson's queries to Green); 2/28/96 TT at 119 (Wolfson's query to Errichetto); 2/29/96 TT at 172, 182 (twice), 183, 190 (Seaton's queries to Levine); 2/29/96 TT at 175, 181 (Levine's testimony); 3/1/96 at 92, 93 (twice), 94 (twice), 110 ("two little girls"), 111 (twice) ("two little girls") (Hill's testimony); 3/1/96 TT at 93, 94 (Seaton's queries to Hill); 3/1/96 TT at 133, 134 (four times), 135 (four times), 136, 137 (twice), 139, 141, 150, 161, 163, 164 (twice) (Ison's testimony); 3/1/96 TT at 134 (twice), 135 (twice), 150 (Seaton's queries to Ison); 3/1/96 TT at 149 (Court's statement); 3/1/96 TT at 157, 162 (Dunleavy's queries to Ison); 3/4/96 TT at 28 (Wolfson's query to Lukens); 3/6/96 TT at 40, 50, 72, 81, 85 (Seaton's closing (guilt phase)); 3/5/96 TT at 136 (Dunleavy close (guilt phase)); 3/5/96 TT at 168, 169 (Wolfson's close (guilt phase)); 3/13/96 TT at 196 (Louise Lizzi testimony); 3/14/96 TT at 33 (Robert Duncan testimony); 3/14/96 at 134, 140 ("young girls") (Wolfson close (penalty)).

6. Claim Six: Aiding and Abetting Instruction

In his petition, Mr. Rippo alleged that post-conviction counsel was ineffective in failing to raise a claim that the jury instruction on aiding and abetting was defective. Petition at 11-15, 109-11. Mr. Rippo has demonstrated good cause to overcome procedural default due to the ineffectiveness of post-conviction counsel in failing to raise the issue in the first state post conviction proceeding. Specifically, effective post-conviction counsel would have been aware that the Nevada Supreme Court clarified the law in this respect in Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002), and would have raised a claim in his supplemental petition.[23] In addition, trial counsel and direct appeal counsel were ineffective for failing to raise the issue. Mr. Rippo can demonstrate prejudice because there is a reasonable probability of a more favorable outcome if the issue had been raised on appeal or post-conviction.

The State argues that Mr. Rippo was neither charged nor convicted under a theory of accomplice liability, and therefore he could not have been prejudiced by the instructions regarding accomplice liability. See Motion at 63-65. However, the fact that Mr. Rippo was not charged as an aider and abettor exacerbates, rather than mitigates, the prejudicial effect of the aiding and abetting jury instruction. The grand jury was not presented with a theory of Mr. Rippo as an accomplice, and thus did not indict Mr. Rippo on such a theory. Despite failing to present an accomplice theory to the grand jury, the State decided on March 16, 1994 that it intended to amend the indictment to reflect an accomplice theory of liability. Ex. 367. On April 20, 1994, the Court denied the motion, but granted the State's request that the jury be instructed on aiding and abetting. 4/20/94 RT at 2. At the close of the guilt phase of the trial, the jury was instructed on accomplice liability. See Petition Ex. 18 at 24, 25, 27, 28 (Instructions Numbered: 22, 23, 25, 26). Thus, despite the fact that neither the grand jury nor the judge had authorized the State to charge Mr. Rippo as an accomplice, the jury was instructed that it could find Mr. Rippo guilty as an accomplice, without the further necessary requirement that it must find the specific intent to commit murder under the accomplice theory of liability. Because of the risk that the jury found Mr. Rippo guilty as an accomplice, he

[23] Sharma was subsequently held retroactive in Mitchell v. State, 122 Nev. __, 149 P.3d 33, 38 (2006), during the pendency of Mr. Rippo's post-conviction appeal.

suffered prejudice as a result of the court's failure to adequately instruct the jury. The improper aiding and abetting instruction so infected the trial that due process was violated, thus entitling Mr. Rippo to relief.

7. Claim Eight: Failure to Grant Discovery to the Defense

In his petition, Mr. Rippo alleged that post-conviction counsel was ineffective in failing to raise a claim that the trial court and trial counsel denied Mr. Rippo the right to discovery of evidence in support of his defense. Petition at 12-15. In its motion, the State argues that Mr. Rippo's claim is procedurally barred and should have been raised in the previous post-conviction proceeding. See Motion at 73-74. Mr. Rippo agrees with the State that Claim Eight should have been raised by post-conviction counsel previously, but asserts that post-conviction counsel was ineffective in failing to do so.[24] As Mr. Rippo explained previously at length, the instant petition properly places the issue of post-conviction counsel's effectiveness before this Court for a decision on the merits. The State's motion says absolutely nothing about post-conviction counsel's failure to raise the claim, and its omission should operate as a concession that post-conviction counsel was deficient in failing to raise the issue. Effective defense counsel would have reviewed the record, including the transcript of the hearing on September 20, 1993, see 9/20/93 TT at 3, and the court's order denying Mr. Rippo discovery of his own prison and probation records, see Ex. 365, and would have sent out a record request to obtain those records to show prejudice. The problem is that post-conviction counsel never did any investigation, so there can be no assertion that he failed to send out a record request because he was doing some other investigatory task. The only remaining issue is whether Mr. Rippo can demonstrate prejudice from post-conviction counsel's deficient performance.

Mr. Rippo can demonstrate prejudice from post-conviction counsel's ineffectiveness because he can show that the trial court's order and trial counsel's ineffectiveness deprived him of the right to present a defense. The State's penalty phase evidentiary presentation devoted substantial effort to showing that Mr. Rippo purportedly would be a danger to others if sentenced to life in

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[24]Mr. Rippo's claim was arguably susceptible to review on direct appeal; however, appeal counsel was not in a position to state what was contained in the files that were not provided to the defense because this information was outside of the record. Mr. Rippo has argued both that appeal and post-conviction counsel were ineffective in failing to raise Claim Eight.

prison. See, e.g., 3/12/96 TT at 126-33 (testimony of Don Miner, probation officer for Clark County Juvenile Services, regarding Mr. Rippo's confinement in Spring Mountain Youth Camp), 147-63 (testimony of Robert Sergi, probation officer at Spring Mountain Youth Camp and Mr. Rippo's case worker), 3/13/96 TT at 38-64 (testimony of Tom Maroney, probation supervisor at the Clark County Family Court, regarding Mr. Rippo's certification as an adult and alleged escape from juvenile facility), 119-36 (testimony of Howard Lee Saxon, adult parole and probation officer regarding Mr. Rippo's violation of the conditions of his parole), 143-53 (testimony of Eric Karst, correctional officer with the Nevada Department of Prisons regarding the discovery of contraband in Mr. Rippo's cell), 167-71 (testimony of Gerry Lynne Shehan, correctional officer with the Las Vegas Metropolitan Police Department regarding purported threats from Mr. Rippo). To rebut this evidence, Mr. Rippo required discovery of his prior incarceration and probation files to show that he had never committed any acts of assault against any other inmates or correctional officers during his previous stay in prison. Had Mr. Rippo been able to provide this information to an expert, he would have been able to present expert testimony that he would perform positively in a structured setting and would not pose a danger to others.

As a matter of state and federal law, the failure to permit Mr. Rippo discovery of his own incarceration and probation records constituted a deprivation of due process and a reliable sentence. "Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of Lockett[v. Ohio, 438 U.S. 586 (1978)] and Eddings [v. Oklahoma, 455 U.S. 104 (1982)] that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.' Gardner v. Florida, 430 U.S. 349, 362, 97 S.Ct. 1197, 1207, 51 L.Ed.2d 393 (1977)." Skipper v. South Carolina, 476 U.S. 1, 5 n.1 (1986); accord Davis v. Coyle, 475 F.3d 761, 770-74 (6th Cir. 2007). In addition, as a matter of state law, the department of corrections was required to provide Mr. Rippo's records to him upon his request. Nev. Rev. Stat. §§ 179A.100(5), 179A.100(1)(b), 179A.150(1)(b); accord 83 Nev. Op. Att'y Gen. 9, *1 (1983). The failure to provide Mr. Rippo with his own records as required by statute requires reversal of the sentencing verdict, see,

e.g., Shields v. State, 97 Nev. 472, 473, 634 P.2d 468, 468-69 (1981) (police reports attached to pre-sentence report must be disclosed pursuant to statute), and the result would be the same even without a statute requiring disclosure when it is necessary to protect Mr. Rippo's constitutional rights.[25] Mr. Rippo can therefore demonstrate that the trial court's (and trial counsels' acquiescence) failure to provide Mr. Rippo with his own records deprived him of due process and a reliable sentence

The trial court also deprived Mr. Rippo of his right to due process and confrontation by failing to disclose Diana Hunt's MMPI ("Minnesota Multi phasic Personality Inventory") records for the purposes of impeachment. As Mr. Rippo explained in his petition, Ms. Hunt scored well above the average on the amorality scale. See Ex. 233 to Petition. By definition, an amoral person is not a credible person who can be trusted to tell the truth.[26] It follows that defense counsel should have been able to obtain discovery of Ms. Hunt's MMPI scores for the purpose of impeaching her. Given the importance of Ms. Hunt's testimony as Mr. Rippo's co-defendant and the only witness who allegedly placed Mr. Rippo in the victims' home on the day of the offense, Mr. Rippo should have been permitted discovery of Ms. Hunt's MMPI scores for the purposes of impeaching her credibility. Cf. Lobato v. State, 120 Nev. 512, 96 P.3d 765, 771-72 (2004). The State's motion does not argue that the trial court did not err in failing to disclose Ms. Hunt's MMPI scores. Mr. Rippo can therefore demonstrate prejudice from post-conviction counsel's ineffectiveness in failing to raise Claim Eight and he is entitled to an evidentiary hearing to prove his claims.

8. Claim Eleven: Failure to Provide a Cautionary Instruction Regarding Accomplice Testimony

Mr. Rippo has demonstrated good cause for failing to raise Claim Eleven regarding the cautionary instruction due to ineffective assistance of post-conviction counsel. Direct appeal

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[25]See, e.g., Davis v. Alaska, 415 U.S. 308, 319-21 (1974); Rice v. State, 113 Nev. 1300, 1315-16, 949 P.2d 262, 271-72 (1997) (defendant entitled to third party's pre-sentence report when report used against defendant at sentencing); Stinnett v. State, 106 Nev. 192, 195-96, 789 P.2d 579, 581 (1990) (granting defendant discovery of confidential reports to show bias of government witness); Hickey v. Eighth Judicial District Court, 105 Nev. 729, 733-34, 782 P.2d 1336, 1339 (1989); Nicklo v. Peter Pan Playskool, 97 Nev. 73, 76-77, 624 P.2d 22, 24-25 (1981).

[26]The dictionary defines amoral as:
1. not involving questions of right or wrong; without moral quality; neither moral nor immoral.
2. having no moral standards, restraints, or principles; unaware of or indifferent to questions of right or wrong: a completely amoral person. See http://dictionary.reference.com/browse/amorality.

counsel was ineffective for failing to raise the issue, and this error was compounded by post-conviction counsel's failure to raise the claim, and failure to allege direct appeal counsel's ineffectiveness on this issue. Mr. Rippo was prejudiced by counsel's failure to raise this claim because he had a reasonable probability of success on direct appeal and in his first state post-conviction proceeding had counsel performed effectively.

When the State adduces testimony from a witness who has received benefits as a result of the testimony, the terms of the quid pro quo must be fully disclosed to the jury, the defendant or his counsel must be allowed to fully cross-examine the witness concerning the terms of the bargain, and the jury must be given a cautionary instruction. Sheriff Humboldt County v. Acuna, 107 Nev. 664, 819 P.2d 197 (1991); Champion v. State, 87 Nev. 542, 490 P.2d 1056 (1971). The Buckley case indicates that a cautionary instruction is "favored" even when the testimony is corroborated in "critical respects." Buckley v. State, 95 Nev. 602, 600 P.2d 227 (1979); see also James v. State,105 Nev. 873, 784 P.2d 965 (1989). Here, several witnesses received benefits in exchange for their testimony, thus the jury should have been instructed to view their testimony with caution. This error was not harmless because Diana Hunt was the State's star witness and received benefits from the State, and six other witnesses for the State either received benefits, were accomplices, or were jailhouse informants. Mr. Rippo further incorporates the discussion of Claim Two regarding the State's presentations of false testimony and failure to disclose material exculpatory and impeachment information regarding their witnesses as explained below. See pp. 49-69, infra. Had the jury been properly instructed to view the testimony of all of these witnesses with caution, there is a reasonable probability that Mr. Rippo would not have been convicted. Accordingly, Mr. Rippo has demonstrated prejudice to over come procedural default.

9. Claim Twelve: Improper Victim Impact Statements

In his petition, Mr. Rippo alleged that the trial court erred in admitting cumulative and highly prejudicial victim impact evidence at the penalty phase of his trial. See Pet. at 136. Mr. Rippo further alleged that post-conviction counsel was ineffective for failing to raise a claim of ineffective assistance of direct appeal counsel for failing to raise this claim. Petition at 11-15. The State contends that this claim is successive and barred by law of the case, except that any claims

regarding the photo albums are waived for failure to raise them sooner. Motion at 34-35.

As explained in detail, supra, post-conviction counsel was ineffective in handling Mr. Rippo's case. On direct appeal and in his first state post-conviction, counsel for Mr. Rippo failed to point to specific testimony that was cumulative or prejudicial, but instead argued that victim impact was improper generally under the statutory scheme. Post-conviction counsel was likewise ineffective for failing to allege the specific instances of improper victim impact testimony, failing to demonstrate the prejudicial nature of the photo albums, and failure to argue that direct appeal counsel was ineffective for failing to do the same. See Exs. 335, 336. In the instant petition, on the other hand, Mr. Rippo has made specific claims regarding prejudicial victim impact evidence that was presented in his case. Thus, the evidence presented in the instant petition is substantially different than that which has been presented in earlier proceedings. The law-of-the-case doctrine does not bar reconsideration of this claim because "subsequent proceedings [have] produce[d] substantially new or different evidence." See Hsu v. County of Clark, 173 P. 3d 724, 729 (Nev. 2007) (recognizing exceptions to law of case doctrine adopted by courts in other states and federal system); see also Bejarano v. State, 146 P. 3d 265 (Nev. 2006) (holding "the doctrine of the law of the case is not absolute, and we have the discretion to revisit the wisdom of our legal conclusions if we determine such action is warranted."). Therefore, post-conviction counsel's ineffectiveness for failing to develop the facts necessary to support this claim both excuses any procedural default and renders the law-of-the-case doctrine inapplicable.

Regarding the merits of the claim, the State argues only that the victim impact evidence was relevant to the jury's determination of the appropriate sentence. See Motion at 34-35. What the State ignores, however, is that determining the relevance of the testimony is not the end of the inquiry. Rather, under Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597 (1991), the relevance of the evidence must be weighed against its prejudicial effect to determine if it rendered the trial fundamentally unfair. When weighing the probative value of the evidence against its potential for prejudice, courts must consider the nature and amount of mitigation evidence presented by the defense. See U.S. v. Paul, 217 F.3d 989 (8th Cir. 2000) (volume and emotional impact of the victim impact evidence offered at the sentencing phase of murder trial did not violate defendant's due

process rights, where defendant was also able to present extensive mitigating evidence through the testimony of his mother). Where the defense makes a strong mitigation presentation, victim impact evidence may not be as prejudicial, but where the defense makes little or no mitigation presentation, the risk of prejudice resulting from a strong victim impact presentation is increased substantially. See U.S. v. Nelson, 347 F.3d 701 (8th Cir. 2003) (victim impact testimony, comprising approximately 101 of the more than 1100 pages of trial transcript and consisting of statements by victim's sisters, mother, classmate, friend, and teacher, was not so unduly prejudicial as to render capital defendant's murder trial fundamentally unfair, particularly in light of defendant's presentation of mitigating evidence on his own behalf, including testimony from a psychologist, his mother, brothers, aunts, and numerous other witnesses). Where trial counsel fails to present significant mitigation evidence, the risk of prejudice resulting from victim impact testimony is great, and courts must therefore limit the presentation of victim impact testimony in cases where there is little or no mitigation being presented by the defense.

Here, only three people testified in mitigation and only eight pictures were introduced of Mr. Rippo when he was a child, while five people testified to victim impact and over thirty pictures of the victims were introduced along with other mementos in the form of photo albums and scrapbooks chronicling the victim's lives. See Exs. __ [victim photo album pictures]. When the voluminous victim impact testimony in this case is compared against the weak mitigation presentation, the prejudice to Mr. Rippo becomes clear. The trial court's failure to limit the victim impact presentation resulted in Mr. Rippo's penalty hearing being fundamentally unfair.

Furthermore, even considering the victim impact testimony alone, without regard for the weak mitigation presentation, the volume and nature of the evidence was prejudicial and rendered Mr. Rippo's trial fundamentally unfair. In Salazar v. State, 90 S.W.3d 330, 337-39 (Tex. Crim. App. 2002), the Texas Court of Criminal Appeals found admission of a video montage of the victim's life to be improper victim impact evidence. In so holding, the court noted that "the punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial." Id. at 335-36. The court cautioned that "'*victim impact*

and character evidence may become unfairly prejudicial through sheer volume. Even if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice. . .'" Id. at 336 citing Mosley v. State, 983 S.W.2d 249, 261-62 (Tex. Crim. App.1998) (emphasis in original). The court found particularly reprehensible the number of photographs introduced of the victim when he was a child, given that he had ben murdered as an adult:

> Nearly half of the photographs showed Jonathon Bishop as an infant, toddler or small child, but appellant murdered an adult, not a child. He extinguished Jonathon Bishop's future, not his past. The probative value of the vast majority of these "infant-growing-into-youth" photographs is *de minimis*. However, their prejudicial effect is enormous because the implicit suggestion is that appellant murdered this angelic infant; he killed this laughing, light-hearted child; he snuffed out the life of the first-grade soccer player and of the young boy hugging his blond puppy dog. The danger of unconsciously misleading the jury is high. While the probative value of one or two photographs of an adult murder victim's childhood might not be substantially outweighed by the risk of unfair prejudice, what the State accurately characterizes as a "seventeen-minute montage" of the victim's entire life is very prejudicial both because of its "sheer volume," and because of its undue emphasis upon the adult victim's halcyon childhood.

Id. at 337. Similarly, in U.S. v Sampson, 335 F. Supp.2d 166, 192 (D. Mass. 2004), a federal district court excluded a video montage of the victim's life, concluding that the video was unfairly prejudicial "in light of the fact that the jury heard powerful, poignant testimony about [the victim's] full life and the impact of his loss on his family, and saw photographs of him in conjunction with this testimony. The video, given its length and the number of photos displayed, would have constituted an extended emotional appeal to the jury and would have provided much more than a "quick glimpse" of the victim's life.

Mr. Rippo's case is very similar to Salazar and Sampson. Though the State presented photo albums and scrapbooks, rather than a video tape, the volume and nature of the evidence was very similar to that which the court found inappropriate in Salazar. The State presented dozens of pictures of the victims, most of which depicted the victims when they were children. See Exs. __ [victim photo album pictures]. The many pictures of the victims when they were children, combined with testimony of five family members, posed an extreme risk of prejudice to Mr. Rippo, and resulted in a penalty phase that was fundamentally unfair. Mr. Rippo has demonstrated good cause

for re-raising parts of the claim, and failing to raise other parts, due to the ineffective assistance of prior counsel, and has demonstrated prejudice due to the volume and nature of the victim impact evidence. Accordingly, Mr. Rippo can overcome any procedural default as to this claim, and based on the merits should be granted a new penalty hearing free from the contaminating effects of improper victim impact evidence.

10. Claim Fourteen: Invalid Prior Violent Felony Conviction Statutory Aggravating Circumstance

Mr. Rippo alleged in his petition that post-conviction counsel was ineffective in failing to raise a claim that appeal counsel was ineffective in failing to challenge the jury's finding of the statutory aggravating factors of a prior violent felony conviction and sentence of imprisonment on the ground that they are based on an invalid conviction. Petition at 12-15, 146-51.

In its motion, the State fails to address the merits of Mr. Rippo's contention that the prior violent felony aggravator was invalid because the guilty plea was not intelligently and knowingly given. See Motion at 75. Mr. Rippo's jury was instructed that the crime of murder could be aggravated by Mr. Rippo's prior violent felony conviction for sexual assault in 1982. See Ex. 327 to Pet. at 9. Mr. Rippo's conviction should not have been presented to the jury, however, because it was invalid, being the result of a guilty plea that was deficient. There, Mr. Rippo was improperly instructed by the trial court regarding his eligibility for probation, thus rendering the guilty plea invalid because it was not knowingly and intelligently given. Furthermore, Mr. Rippo failed to admit to having committed the necessary elements of the offense, further rendering the plea invalid under Nevada law. Highby v. Sheriff, 86 Nev. 774, 476 P.2d 959 (1970). See also Hanley v. State, 97 Nev. 130, 624 P.2d 1387 (1981). Because Mr. Rippo's plea of guilty to the crime of rape was invalid, his conviction of the offense was invalid and it should not have been admitted to aggravate Mr. Rippo's conviction for murder. Mr. Rippo alleges that he suffered prejudice as a result of the trial court's failure to strike the invalid aggravator as there is a reasonable probability that the jury would not have returned the death penalty had the trial court correctly stricken the introduction of Mr. Rippo's prior conviction in aggravation.

Regarding Mr. Rippo's contention that his 1982 conviction should not have been

admitted as an aggravating circumstance under Roper v. Simmons, 125 S.Ct. 1183 (2005), because it was committed when Mr. Rippo was under the age of eighteen, the State argues that Roper is "inapposite to the instant case" because Mr. Rippo was over eighteen when he is alleged to have committed the instant offense. This argument completely misconstrues Mr. Rippo's claim, and ignores the analysis of Roper included in Mr. Rippo's Petition. Obviously Mr. Rippo was over eighteen when he was alleged to have committed the instant offense. Just as obvious is the fact that he was under eighteen when he was alleged to have committed the 1982 offense. In Nevada, a person convicted of murder cannot receive the death penalty unless the jury finds that a statutory circumstance aggravated the murder and that the aggravating circumstance outweighs any mitigating circumstances. One of the aggravating circumstances which made Mr. Rippo eligible for the death penalty was his 1982 conviction. Thus, a crime Mr. Rippo committed when he was under eighteen made him eligible to receive the death penalty for a crime he committed when he was over eighteen. While Roper held only that the death penalty was an unconstitutional punishment for crimes committed when a person was under eighteen, its analysis applies to situations in which a person committed a crime when he was over eighteen but became eligible for the death penalty based on a crime he committed when he was under eighteen. See, e.g., United States v. Naylor, Jr., 350 F. Supp.2d 521, 524 (W.D. Va. 2005). Because of their impulsiveness and susceptibility, the Supreme Court in Roper found that juveniles are more likely to engage in reckless behavior without fully understanding the consequences of that behavior, and thus they should not be eligible for the death penalty. The same rationale applies here. Mr. Rippo's impulsiveness and susceptibility made him more likely to commit the 1982 offense, thus, according to the Supreme Court's analysis, he has reduced culpability for that crime. Because of his reduced culpability for the 1982 offense, Mr. Rippo should not have been eligible for the death penalty in the instant case based on the 1982 offense.

11. Claim Eighteen: Gruesome Photographs

Mr. Rippo has demonstrated good cause for failing to raise this claim in his first post-conviction proceeding due to the ineffective assistance of post-conviction counsel. Petition at 11-15. In addition, direct appeal counsel was ineffective for failing to raise this issue. Mr. Rippo can

demonstrate prejudice because these photographs were not necessary to the State's case, and they improperly incited the jury's visceral desire to convict Mr. Rippo and sentence him to death based on the extent to which the victims' bodies had decomposed. The State introduced a total of twenty six photographs of various parts of the victim's bodies, twenty two of which depicted the victim's injuries. See Exs. 349, 350, 368 [state's exhibits 21, 24, 26, 27, 28, 31, 32, 34, 38, 39, 40, 41, 42, 45, 46, 47, 48, 51, 53, 54, 56, 57, 58, 60, 61, 62]. Of the photographs introduced, State's Exhibits 31, 53, and 54 are the most prejudicial, and the least probative. See Exs. 349, 350, 369 [state's exhibits 31, 53, 54].

While State's Exhibit 54 (Ex. 369) arguably depicts an injury that no other photograph depicts, State's Exhibits 31 (Ex. 349), and in particular 53 (Ex. 350), have no probative value whatsoever. Any injuries depicted in State's Exhibit 31 (Ex. 349) are better depicted in State's Exhibits 26, 32, and 34 (Ex. 368 at 3, 6, 7), rendering State's Exhibit 31 (Ex 349) duplicative and of no significant probative value. Exs. 368 at 3, 349, 368 at 6, 7 [State's exhibits 26, 31, 32, 34]. State's Exhibit 31 (Ex. 349) was gruesome, and because the injuries depicted in that photograph were already depicted in other less gruesome photographs, the probative value of the photograph was outweighed by its prejudicial effect. More importantly, State's Exhibit 53 does not depict any injuries, and is extremely gruesome. See ex. 350 [State's exhibit 53]. The only thing State's Exhibit 53 depicts is the extent of decomposition the victim's body had undergone prior to being discovered– a fact which had no bearing on Mr. Rippo's trial and was of no probative value whatsoever. This exhibit was extremely gruesome, and was clearly introduced solely to inflame the passions of the jurors to convict Mr. Rippo. The probative value of this photograph was far outweighed by its prejudicial effect.

"A photograph lends dimension to otherwise non-dimensional testimonial evidence. That an erroneous admission of a photograph would cause undue prejudice is certain. The extent of that prejudice is immeasurable." Sipsas v. State, 102 Nev. 119, 124 n.6, 716 P.2d 231, 234 n.6 (1986). In Mr. Rippo's case, there were twenty six disturbing photographs introduced, and two in particular – State's Exhibits 31 and 53 (Exs. 349, 350) – were extremely gruesome and prejudicial. If not for the admission of these disturbing and prejudicial photographs, there is a substantial

likelihood the results of the proceeding would have been different.

12. Counsel Were Ineffective for Failing to Raise Petitioner's Lethal Injection Claim.

As stated in the instant petition, trial counsel were ineffective under the Sixth Amendment to the United States Constitution for failing to object to and properly litigate and argue Petitioner's lethal injection claim. Petition at 179-92. Additionally, direct appeal counsel was ineffective under the Sixth Amendment, and state post-conviction counsel was ineffective under Nevada State law, for failing to object to and properly litigate these claims, issues, and errors. Petition at 11-15. If not for counsel's ineffectiveness, there is a reasonable probability of a more favorable outcome.

Mr. Rippo's discussion of the merits of his lethal injection claim is contained below. See pp. 76-86, infra. For present purposes, what is important is that Mr. Rippo can demonstrate additional cause for failing to raise the claim earlier due to post-conviction counsel's ineffectiveness.

C. Mr. Rippo Can Demonstrate Good Cause and Prejudice Due to the State's Failure to Disclose Material Exculpatory and Impeachment Information.

1. Claim One: Judicial Bias

In his petition, Mr. Rippo alleged that the State and the trial court's failure to disclose evidence of the State's involvement in the criminal investigation of Judge Bongiovanni establish cause and prejudice to excuse any procedural default of Claim One. Petition at 11-12, 30-46. As Mr. Rippo explains in detail below, the false representations of the prosecution and the trial court constitute an impediment external to the defense because Mr. Rippo and his trial attorneys had the right to rely upon the accuracy of those representations. See, e.g., Mazzan v. Warden, 116 Nev. 48, 993 P.2d 25, 37 (2000); State v. Bennett, 119 Nev. 589, 81 P.3d 1, 6-7 (2003).[27] The State's motion says nothing about this allegation of cause and instead simply implores this Court to impose the law of the case doctrine, see Motion at 30-32, which is based upon the State's false testimony at trial and on appeal. Mr. Rippo was even more justified in relying upon the representations of the trial court

[27] Accord Banks v. Dretke, 540 U.S. 668, 676-77 (2004); Gantt v. Roe, 389 F.3d 908, 912-13 (9th Cir. 2003); Hall v. Director of Corr., 343 F.3d 976, 981 (9th Cir. 2003); see pp. 49-55, infra.