STATE OF NEVADA

COUNTY OF _____

AFFIDAVIT OF SERVICE

_____being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which this affidavit is made. That affiant received the Subpoena on the _____ day of _____,20____, and served the same on the _____ day of _____,20____, by delivering a copy of the witness at (state address) _____
_____.

_____
Signature of Affiant

SUBSCRIBED AND SWORN to before me this
_____ day of _____, 20____.

_____
NOTARY PUBLIC in and for
County of _____,
State of Nevada.

ITEMS TO BE PRODUCED

SEE ATTACHED EXHIBIT A

OPPS
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- MICHAEL DAMON RIPPO, #0619119 Defendant.	CASE NO: C106784 DEPT NO: XIV

OPPOSITION TO MOTION FOR DISCOVERY

DATE OF HEARING: 6/18/08
TIME OF HEARING: 9:00 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 Opposition to Defendant's Motion for Discovery.

This opposition 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

Statement of the Case

In May of 1996, Rippo was convicted of two counts of First Degree Murder and was sentenced to death for the strangulation and torture of Denise Lizzie and Laurie Jacobson. The Nevada Supreme Court affirmed on direct appeal. Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997). Rippo filed his first Petition for Writ of Habeas Corpus on December 4, 1998, and was represented first by David Schieck and then by Christopher Oram. Trial counsel Steve Wolfson and Phillip Dunleavy as well as appellate counsel David Schieck gave testimony and were examined at an evidentiary hearing in 2004. On December 1, 2004, the district court denied Rippo's petition and issued Findings of Fact and Conclusions of Law. On appeal, the Nevada Supreme Court affirmed on November 16, 2006. Rippo v. State, 122 Nev. ___, 146 P.3d 279 (2006). Thereafter, Rippo initiated federal habeas corpus proceedings in Case No. 2:07-CV-00507-ECR-PAL on April 18, 2007. Rippo then filed the instant successive state petition for writ of habeas corpus on January 15, 2008, to exhaust state remedies. On April 21, 2008, the State filed its Response and Motion to Dismiss. Rippo has now filed a Motion for Leave to Conduct Discovery which the State opposes as premature.

ARGUMENT

Rippo's motion requests the issuance of approximately 45 subpoenas and at least six depositions. This discovery request is made in the context of a successive habeas petition filed nearly ten (10) years after issuance of Remittitur following direct appeal. To date, this court has not yet ruled on whether any of the issues in the petition are viable at this stage of the proceedings and survive summary dismissal. In fact, the State has moved to dismiss the petition in its entirety and has alleged there are no disputed facts that require an evidentiary hearing. If Rippo's claims are procedurally defaulted as the State alleges and he would not be entitled to relief even if his claims were true, then discovery is inappropriate. Following argument on the State's Motion to Dismiss, if this court finds that any particular issue survives the procedural bars and warrants an evidentiary hearing, the issue of discovery may

be addressed at that time.

Only after a petition survives a motion to dismiss and claims are found warranting an evidentiary hearing may a party invoke discovery to the extent "good cause" is shown. NRS 34.780. The district court must first make a determination upon review of all the briefs and documents filed whether an evidentiary hearing is required. NRS 34.770. If the petitioner is not entitled to relief and an evidentiary hearing is not required, the petition must be dismissed "without a hearing." Id. If the judge determines that an evidentiary hearing is required, "he shall grant the writ and shall set a date for the hearing." Id. This finding and the setting of a date for this hearing are necessary prerequisites to post-conviction discovery under NRS 34.780. Only if an evidentiary hearing is required may the record be expanded with additional materials and exhibits obtained through discovery. NRS 34.790. The post-conviction statutes dictate the precise procedures and sequence for resolving post-conviction petitions and do not afford discovery rights at this stage of the proceedings.

Although not controlling, Federal law and procedure similarly restrict a habeas petitioner's right to conduct post-conviction discovery. Only "in appropriate circumstances, a district court, confronted by a petition for habeas corpus which establishes a prima facie case for relief, may use or authorize the use of suitable discovery procedures...." Harris v. Nelson, 394 U.S. 286, 290, 89 S. Ct. 1082, 1086 (1969); see also Mayberry v. Petsock, 821 F.2d 179, 185 (3d Cir. 1987) ("Unless the petition itself passes scrutiny, there would be no basis to require the state to respond to discovery requests"). Federal courts do not allow prisoners to use federal discovery for fishing expeditions to investigate mere speculation. Calderon v. United States District Court for the Northern District of California, 98 F.3d 1102, 1106 (1996); see also Ward v. Whitley, 21 F.3d 1355, 1367 (5th Cir. 1994) ("federal habeas court must allow discovery and an evidentiary hearing only where a factual dispute, if resolved in the petitioner's favor, would entitle him to relief.... Conclusory allegations are not enough to warrant discovery under Rule 6...; the petitioner must set forth specific allegations of fact. Rule 6...does not authorize fishing expeditions."); United States ex rel. Nunes v. Nelson, 467 F.2d 1380, 1380 (9th Cir. 1972) (state prisoner "is not entitled to

discovery order to aid in the preparation of some future habeas corpus petition.")

Rippo's discovery motion prematurely argues "good cause" without first meeting the prerequisites of NRS 34.770 and 34.780. Rippo is not entitled to discovery on claims that are procedurally defaulted. Such claims fail to establish a prima facie case for relief and are subject to summary dismissal. Only where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief, is the court under a duty to provide the necessary facilities and procedures for an adequate inquiry. McDaniel v. United States District Court For the District of Nevada, 127 F.3d 886, 888 (1997). Any discussion of "good cause" for discovery is premature at this stage and must wait until after resolution of the State's Motion to Dismiss. The State reserves the right to challenge good cause at a later date should this court find that any of the claims survive the Motion to Dismiss and warrant an evidentiary hearing.

THEREFORE, the State respectfully requests that Defendant's request for discovery be denied at this time.

DATED this 6th day of June, 2008.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

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

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of Opposition to Motion for Discovery, was made this 9th day of June, 2008, by facsimile transmission to:

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Eileen Davis

Employee for the District Attorney's Office

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SUBJECT: Michael Damon Rippo, C106784

DATE: June 9, 2008

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REPLY

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MICHAEL DAMON RIPPO,
#0619119

Defendant.

CASE NO: C106784

DEPT NO: XIV

REPLY TO OPPOSITION TO MOTION TO DISMISS

DATE OF HEARING: 6/18/08
TIME OF HEARING: 9:00 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.

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

Introduction

In May of 1996, Rippo was convicted of two counts of First Degree Murder and was sentenced to death for the strangulation and torture of Denise Lizzie and Laurie Jacobson. The Nevada Supreme Court affirmed on direct appeal. Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997). Rippo filed his first Petition for Writ of Habeas Corpus on December 4, 1998, and was represented first by David Schieck and then by Christopher Oram. Trial counsel Steve Wolfson and Phillip Dunleavy as well as appellate counsel David Schieck gave testimony and were examined at an evidentiary hearing in 2004. On December 1, 2004, the district court denied Rippo's petition and issued Findings of Fact and Conclusions of Law. On appeal, the Nevada Supreme Court affirmed on November 16, 2006. Rippo v. State, 122 Nev. ___, 146 P.3d 279 (2006). Thereafter, Rippo initiated federal habeas corpus proceedings in Case No. 2:07-CV-00507-ECR-PAL on April 18, 2007. Rippo then filed the instant successive state petition for writ of habeas corpus on January 15, 2008, to exhaust state remedies. On April 21, 2008, the State filed its Response and Motion to Dismiss. Rippo filed an Opposition to Motion to Dismiss on May 21, 2008, to which the State now replies.

Claim 1 – Judicial Bias

The Federal Public Defender's investigation has not turned up any new information that was not already known to trial counsel and previously raised as an issue in this case. More than a decade ago, trial counsel knew and alleged that the State was involved in the federal sting operation by indicting Terry Salem and manipulating the random assignment of the case and also that Bongiovanni failed to disclose a prior relationship with witness Denny Mason who was the business partner of reputed Buffalo mob associate Ben Spano. Neither Brady nor ineffectiveness of post-conviction counsel constitute "good cause" for re-arguing these ten-year old facts. Notably, Bongiovanni was acquitted of any wrongdoing in Federal Court and even if true, none of the alleged facts demonstrate judicial bias in favor of the State during Rippo's trial. Law of the case continues to control because the facts are not

substantially different.

Claim 2 – Prosecutorial Misconduct

The trial record shows the defense was well aware that several witnesses had past or pending criminal cases against them and cross-examined regarding continuances, quashed bench warrants, and future benefits. Twelve years later, the various dispositions of such collateral cases are not new evidence of undisclosed inducements, but are consistent with the trial testimony that no benefits were given and that such cases would rise or fall on their own merit. The State has never suppressed such case dispositions (which are a matter of public record), they are not favorable to the defense as either exculpatory or impeaching, and none of the allegations are material so as to undermine confidence in the verdict. None of the jailhouse informants have recanted their testimony that Rippo confessed to the murders. Contrary to the Federal Public Defender's argument, even legitimate Brady claims are procedurally barred when the basis for the claim was known and it was either not brought in an earlier proceeding or within an applicable time bar. Hutchison v. Bell, 303 F.3d 720 (6th Cir. 2002). The alleged ineffectiveness of post-conviction counsel also does not constitute "good cause" for re-raising the claim where no new material facts are alleged and the claim would not have resulted in a different conviction or sentence for Rippo.

Claim 3 – Ineffective Assistance of Counsel During Penalty Phase

To prevail on this claim, Rippo must show that he would not have received the death penalty if trial counsel had presented the additional witnesses and mitigation evidence now alleged. Strickland v. Washington, 466 U.S. 668, 686-687, 104 S.Ct. 2052 (1984) (Must show that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different). The Nevada Supreme Court's conclusion that the "evidence in mitigation was not particularly compelling" remains unaltered even in light of the additional mitigation witnesses and evidence now alleged by the defense. The "new" family history evidence is cumulative to what was already presented or is different only in degree and detail. Recent psychological testing fails to reveal any significant or persuasive diagnosis that would have compelled a verdict less than death. Given the strength of the

State's case in aggravation which included the tortuous strangulation of two young women and Rippo's prior conviction for sexual assault, nothing new in mitigation alleged by the defense would have had a reasonable probability of altering the outcome of the case.

Claims 4 & 10 – Ineffective Assistance of Counsel During Voir Dire

Under Strickland, it is not enough to allege attorney error during voir dire, but Rippo must also show that he would not have been convicted and sentenced to death if voir dire had been done differently. Absent the actual seating of a biased juror, prejudice under Strickland can not be established. The allegation that juror Gerald Berger was biased and could have been challenged for cause is a mischaracterization and belied by the record. At this stage of the proceedings, Rippo must further show that this claim would have been successful on post-conviction had attorney David Schieck or Chris Oram raised it. Because Rippo can not show prejudice, the voir dire claims are without merit.

Claim 5 – Ineffective Assistance of Trial Counsel

Most of the current allegations of ineffectiveness are belied by the record and are directly refuted by the evidentiary hearing testimony of trial counsel Phillip Dunleavy and Steve Wolfson during post-conviction proceedings in 2004. To the extent new allegations are made, none are so substantial that they would have changed the outcome of the case. Even if first post-conviction counsel had raised the new issues they would not have succeeded on the merits because there is no reasonable probability the result would have been different. Thus, it can not constitute good cause for raising such issues in a successive petition.

Claim 6 – Aiding and Abetting Instruction

Neither intervening case law nor the ineffectiveness of post-conviction counsel provide good cause for raising this claim in a successive petition. Although Sharma applies to cases that became final before Sharma was decided in 2002, it does so not because it is a retroactive "new rule" but because it was held to be a "clarification" of the law. Mitchell v. State, 122 Nev. 1269, 149 P.3d 33 (2006). The distinction is critical because as a clarification of law, the basis for the claim was always available to Rippo and is now

procedurally barred. Sharma is not a retroactive "new rule" that provides good cause as an intervening change in law. Furthermore, because the jury unanimously found Rippo guilty of the underlying robbery charges, the jury must have also agreed unanimously upon the associated felony-murder theories. Sharma applies solely to aiding and abetting a specific intent crime and not to felony-murder which requires no intent to kill at all. This claim would not have prevailed on the merits even if post-conviction counsel had raised it.

Claim 7 – Premeditation Instruction

Although Polk v. Sandoval was published in 2007, the basis for the 9th Circuit's ruling was not new law but was Federal precedent decided decades earlier and which has always been available to Rippo. Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007). At the time of Rippo's trial, Nevada defined murder in accord with the so-called *Kazalyn* instruction and viewed the term "deliberate" as simply redundant to "premeditated." There is no unconstitutional mandatory presumption or failure to instruct on a material element where premeditation and deliberation are synonymous. It was not until the year 2000 that Nevada departed from the *Kazalyn* instruction and changed the definition of murder to include willful, deliberate and premeditated as three distinct elements. Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). The Polk decision does not address retroactivity of Byford and the law of the case remains that Nevada's change in the premeditation/deliberation instruction has only prospective application. Garner v. State, 116 Nev. 770, 6 P.3d 1013 (2000). Furthermore, because of Rippo's conviction under a felony-murder theory, any error would be held harmless. Bridges v. State, 116 Nev. 752, 6 P.3d 1000, 1008 (2000).

Claim 8 – Failure to Grant Discovery

The trial court's granting of the motion to quash the subpoena for department of prisons records was done at the request of Rippo's trial counsel because he had worked out a resolution with the attorney general. Rippo has failed to show that his trial attorneys did not have the alleged discovery or that having it would have changed the outcome of the case. Neither judicial error nor ineffective assistance of post-conviction counsel provide good cause where no prejudice can be shown.

Claims 9, 13, 15, 17, 19, and 21

The Federal Public Defender's Opposition contains no discussion or mention of these claims and the State is satisfied with its initial response to these claims in its motion to dismiss.

Claim 11 – No Cautionary Instruction

An instruction on paid informant credibility was unnecessary on the facts of the case and even where appropriate does not constitute reversible error even according to the authority cited by the Federal Public Defender. Diane Hunt was not a paid informant and the jury was given a general instruction on witness credibility as well as accomplice corroboration. Post-conviction counsel was not remiss for failing to raise an issue that would not have been successful, which means there is no good cause to raise it now in a successive petition.

Claim 12 – Improper Victim Impact Statements

While law of the case may not apply where the facts are substantially different, law of the case "cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Hogan v. State, 109 Nev. 952, 959, 860 P.2d 710, 715 (1993). The Federal Public Defender is not offering new or substantially different evidence concerning the victim impact statements in this case, but is simply more specific and detailed in its argument. This is insufficient to overcome the law of the case when this issue was denied on direct appeal and again in the first post-conviction proceedings.

Claim 14 – Invalid Prior Violent Felony Conviction

The Federal Public Defender alleges good cause to challenge this aggravator in a successive petition based on ineffective assistance of post-conviction counsel, intervening changes in the law, and actual innocence. Rippo's guilty plea to sexual assault in 1982 is presumptively valid, particularly where it was entered into on the advice of counsel. Jezierski v. State, 107 Nev. 395, 812 P.2d 355 (1991). The validity of a prior conviction used for sentence enhancement may not be collaterally attacked in a subsequent offense. See

e.g., U.S. v. Martinez-Martinez, 295 F.3d 1041 (9th Cir. 2002). Neither Roper v. Simmons nor U.S. v. Naylor hold that a prior juvenile crime of violence may not be used as an aggravating circumstance for a murder committed after the age of 18. Without such case authority, Rippo is not actually innocent of this aggravator and post-conviction counsel could not have successfully raised such a novel and meritless issue.

Claim 16 – Reasonable Doubt Instruction

Blakely v. Washington 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." Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004). 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 or that the instruction used in this case was erroneous. Blakely does not support Defendant's position and neither Blakely nor Apprendi are timely raised four and eight years, respectively, after they became law.

Claim 18 – Prejudicial Photographs

Ineffective assistance of post-conviction counsel constitutes good cause for raising this issue in a successive petition only if not raising it earlier fell below an objective standard of reasonableness and there is a reasonable probability the claim would have been successful such that post-conviction relief would have been granted reversing either Rippo's death sentences or convictions. See Strickland, supra. The discretionary admission of cumulative "gruesome" photographs in a double murder death penalty case is not the kind of reversible error that satisfies Rippo's heavy burden of proof.

Claim 20 – Limitations Imposed by Habeas Judge

If the habeas judge erred in conducting the first post-conviction proceedings, such issues could have been raised in the subsequent appeal. Judicial error does not explain or provide good cause for failing to raise these issues on appeal. While a capital litigant has a right to counsel on post-conviction, NRS 34.820, there is no right to counsel on appeal from

post-conviction. Therefore, appellate counsel's failure to raise an issue can not constitute good cause for overcoming the procedural bars and raising such issues in a successive petition. The issue of Justice Becker's disqualification on appeal was previously raised by the Federal Public Defender in a motion to recall Remittitur and was denied by the Nevada Supreme Court in an order filed on September 11, 2007.

Claim 22 – Lethal Injection Protocol

It is not necessary to respond to the Federal Public Defender's allegations of good cause to overcome the procedural bars or the merits of the claim, because the discretionary procedure selected by the director of prisons for an execution is not cognizable in a post-conviction petition which can only challenge the validity of the judgment of conviction or sentence:

> In the instant case, the plaintiff seeks review of the method by which the sentence will be carried out, rather than a review of the fact that he was sentenced to death. He asserts that the defendants, acting under color of state law, will violate his Eighth Amendment and First Amendment rights by their use of California's lethal injection protocol. Thus, Beardlee's claim is more properly considered as a "conditions of confinement" challenge, which is cognizable under § 1983, than as a challenge that would implicate the legality of his sentence, and thus be appropriate for federal habeas review.

Beardslee v. Woodford, 395 F.3d 1064, 1068-9 (9th Cir. 2005). Federal District Courts have also held the same:

> The contested method of lethal injection can be shown neither to be statutorily mandated nor to be the sole method by which the State of Texas may accomplish its chosen method of execution. In addition, the Plaintiff is not challenging the State's right to execute him. The Court finds, therefore, that Plaintiff's attack on the method of lethal injection does not comprise an attack on the death sentence itself. Accordingly, Plaintiff's motion for relief properly falls within § 1983 and not within federal habeas corpus.

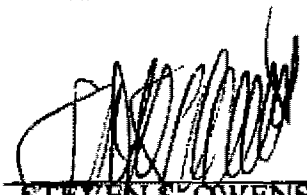
Harris v. Johnson, 323 F.Supp.2d 797 (S.D.Tex., 2004). Rippo is not arguing that lethal injection is an unconstitutional sentence, but that it might be implemented in an

unconstitutional manner. The validity of Rippo's death sentences in the judgment of conviction remain entirely unaffected by what the prison director may or may not do in the future.

DATED this_____day of June, 2008.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

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

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of Reply to Opposition to Motion to Dismiss, was made this 9th day of June, 2008, by facsimile transmission to:

DAVID S. ANTHONY
FAX # (702) 388-5819

Eileen Davis

Employee for the District Attorney's Office

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DISTRICT COURT,

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO, Petitioner, vs. E.K. McDANIEL, et al., Respondents.	Case No. C-106784 Dept No. XX

REPLY TO OPPOSITION TO MOTION FOR LEAVE TO CONDUCT DISCOVERY

Petitioner Michael Damon Rippo hereby replies to the State's opposition to his motion for leave to conduct discovery. This reply is made and based on the following points and authorities and the entire file herein.

Respectfully submitted this 16th day of September, 2008.

FRANNY A. FORSMAN
Federal Public Defender

David Anthony,
Assistant Federal Public Defender

I. Mr. Rippo's Discovery Motion Is Not Premature

The State's argument that Mr. Rippo's discovery motion is premature is illusory because there is nothing in the state statutory scheme preventing this Court from issuing a ruling on the discovery motion contemporaneously with its ruling on the State's motion to dismiss. The State's only discernable argument in its opposition is that Mr. Rippo's motion should be denied because it is premature under Nev. Rev. Stat. §§ 34.770, 34.780. Opp. at 2-4. However, there is nothing in either of these statutes which prevents this Court from entertaining Mr. Rippo's discovery motion at the same time it is considering the State's motion to dismiss. On the contrary, common sense dictates that this Court must consider the evidence that Mr. Rippo intends to discover and present at an evidentiary hearing when deciding whether to grant such a hearing. Otherwise, if this Court granted the State's motion to dismiss, then Mr. Rippo would never receive an opportunity to move for formal discovery at all. Assuming for a moment that the State was right on this point, this Court could simply remedy the issue by announcing its decision on the State's motion first and then immediately follow that ruling with a ruling on Mr. Rippo's discovery motion. The bottom line is that the State's ripeness argument finds no support in either the statutory scheme or common sense, and should be rejected.

Nev. Rev. Stat. § 34.780(2) directs that discovery may be allowed after a "writ has been granted," and a date has been set for an evidentiary hearing. See Opp. at 3. Interpreting this language to mean that Mr. Rippo is not entitled to the discovery necessary to litigate the State's allegations of procedural default produces an absurd result. The language in Nev. Rev. Stat. § 34.780(2) applies to an antiquated time when the Nevada district courts followed procedures that involved: (1) writs being regularly "granted," and (2) a "formal return" which required the petitioner to be produced in court for a detention hearing. See Nev. Rev. Stat. §§ 34.390(i); 34.400; 34.410, 34.420, 34.430, 34.440, 34.470, 34.480. Under current district court procedures, however, the "granting of the writ" does not occur until after the completion of an evidentiary hearing. See Nev. Rev. Stat. § 34.390(i) (granting writ subject to limitations of sections "34.720 to 34.830, inclusive"). The practical effect of this procedural change is to make the language in Nev. Rev. Stat. § 34.780(2)

vague, ambiguous and completely inapplicable. As stated above, it is absurd that this Court cannot grant Mr. Rippo discovery until after it "grant[s] the writ," since after the writ is granted, Mr. Rippo will no longer need discovery. See, e.g., Eller Media Co. v. City of Reno, 118 Nev. 767, 59 P.3d 437, 438 (2002) (statutes construed to avoid absurd results).

The State's position on this point elevates form over substance and has no proper place in the current statutory scheme. Declining to rule upon Mr. Rippo's discovery motion until after his petition survives the procedural bars produces the absurd result that Mr. Rippo would not be able to obtain the discovery necessary to prove that his petition should not be procedurally barred. Such a result defies logic and this Court should avoid construing Nev. Rev. Stat. § 34.780(2), in this manner. Id. The Nevada Supreme Court's decision in Crump v. Warden, 113 Nev. 293, 305, 934 P.2d 247, 254 (1997), holds that Mr. Rippo is entitled to an evidentiary hearing to show cause and prejudice to overcome any asserted procedural default, which carries with it the right to conduct discovery to overcome procedural default. See, e.g., Payne v. Bell, 89 F. Supp.2d 967, 970 (W.D. Tenn. 2000). The Crump decision therefore demonstrates that the State's argument about the discovery statute is not tenable and should be rejected.[1]

II. The State's Arguments In its Reply to the Motion to Dismiss Demonstrate Why Formal Discovery Is Necessary.

A. Judicial Bias (Claim One)

The State's reply to its motion to dismiss admits all of the relevant factual allegations supporting Mr. Rippo's claim of judicial bias thereby justifying the discovery he seeks. The crux of Mr. Rippo's judicial bias claim is that the trial court was actually and apparently biased against him due to judge's knowledge of the State's involvement in the sting operation and federal investigation of the judge, and due to the fact that both the judge and the representatives for the State made materially incorrect representations on the record regarding the State's involvement and the

[1] If the State's argument was correct, Crump would not have been able to receive an evidentiary hearing on the issue of cause and prejudice in the first place because that petitioner received an evidentiary hearing but was not ultimately able to make the required showing of prejudice to overcome the procedural bars. The fact that Crump received an evidentiary hearing in the first place despite his ultimate inability to overcome the procedural bars based solely on the face of his petition demonstrates why the State's present argument is misdirected.

judge's knowledge of the State's involvement. Opposition to Motion to Dismiss at 11-19. In its reply, the State admits that both Judge Bongiovanni and the State's representatives were aware of the State's involvement in the criminal investigation; however, the State incorrectly asserts that trial counsel was also aware of the State's involvement: "More than a decade ago, trial counsel knew and alleged that the State was involved in the federal sting operation by indicting Terry Salem and manipulating the random assignment of the case and also that Bongiovanni failed to disclose a prior relationship with witness Denny Mason who was the business partner of reputed Buffalo mob associate Ben Spano." Reply at 2. In other words, the State has acknowledged for the first time in its reply that all of the material factual allegations supporting Mr. Rippo's claim of judicial bias are true, but it asserts (without citation to the record) that the disqualifying facts were common knowledge to the judge and the parties.

The State's candid acknowledgment in its reply brief is irreconcilably inconsistent with the assertions in its motion to dismiss, see Motion at 30, with all of its prior representations, and with the findings of the Nevada Supreme Court on direct appeal. In his petition, Mr. Rippo explained at length that the State made false representations on the record at trial regarding its involvement in the investigation of the trial judge and that the judge himself made materially untrue representations regarding his own knowledge of the State's involvement. Petition at 30-33. The State made the same false representations on direct appeal. Id. at 33. Mr. Rippo then explained that the Nevada Supreme Court specifically rejected his claim of judicial bias by adopting as fact the false representations made by the State: "No evidence exists that the State was either involved in the federal investigation or conducting its own investigation of Judge Bongiovanni." Rippo v. State, 113 Nev. 1239, 1248-49, 946 P.2d 1017, 1023 (1997). Therefore, contrary to the State's present post hoc rationalization, the present record repels its assertion that trial counsel knew about the State's involvement in the federal investigation of Judge Bongiovanni. The State cites no evidence in the record supporting its assertion, and there is none. The State's representations in its reply brief are irreconcilably inconsistent with all of its prior representations, which demonstrates exactly why this Court must authorize the discovery sought in Mr. Rippo's motion.

The fact that Judge Bongiovanni was ultimately acquitted of the federal criminal charges against him, Opp. at 2, does not change the fact that he was biased against Mr. Rippo. In his petition, Mr. Rippo acknowledged that Judge Bongiovanni was acquitted of the criminal charges, see Petition at 30; however, an innocent man has an incentive just like a guilty man to show bias in favor of a party when he knows that the party is participating in a criminal investigation of him: the appearance of impropriety and actual bias of the judge is the same in both instances. In addition, just because Judge Bongiovanni was acquitted of federal criminal offenses does not mean that he was acting ethically given his substantial inside knowledge of the Salem case from his discussions with Paul Dottore, including whether Salem would be released on his own recognizance and whether Judge Bongiovanni's close friend and business associate, Peter Flangas, would represent Salem. Morever, the State's concession that the judge knew Denny Mason, the victim of the stolen credit card offense, but failed to disclose his relationship to Mason is independent of any criminal conduct and is itself a disqualifying fact. As explained in Mr. Rippo's petition, if the trial judge had been forthcoming regarding his relationship to Mason, he risked incriminating himself in the very same criminal investigation. In such circumstances, the risk of bias is too great and the burden of persuasion shifts to the State to show that Judge Bongiovanni was not biased. See, e.g., Cartalino v. Washington, 122 F.3d 8, 11 (7th Cir. 1997) (citing Tumey v. Ohio, 273 U.S. 510, 535 (1927)). Ultimately, the fact that the judge actively misled defense counsel when the issue of his disqualification was raised is strong proof that the judge subjectively believed that his knowledge of the State's involvement in the investigation disqualified him from adjudicating Mr. Rippo's case. Therefore, the fact that Judge Bongiovanni was ultimately acquitted of the federal criminal offenses two years after Mr. Rippo's trial does not change the fact that the average person in the position of Judge Bongiovanni posed an unacceptable risk of harboring a bias against Mr. Rippo at the time.

In summary, by admitting that the State and Judge Bongiovanni always knew all about the Clark County District Attorney's and state law enforcement's involvement in the federal criminal investigation, the State has demonstrated exactly why the discovery that Mr. Rippo seeks is necessary to litigate his judicial bias claim at an evidentiary hearing. See, e.g., Bracy v. Gramley,

520 U.S. 899, 909 (1997).

B. Ineffective Assistance of Counsel: Penalty Phase (Claim Three)

Just as above, the State's reply brief demonstrates that Mr. Rippo's claim of ineffective assistance of trial counsel is meritorious and that he should be permitted the discovery he seeks to support it. In its reply, the State no longer takes issue with Mr. Rippo's contention that trial counsel's performance was deficient in failing to adequately prepare for the penalty phase of his trial until after the trial had already begun. See Opposition to Motion to Dismiss at 20-24; see, e.g., Jells v. Mitchell, __ F.3d __, 2008 WL 3823058, at *9-12 (6th Cir. August 18, 2008) (finding counsel ineffective for failing to prepare for penalty phase until after the start of trial, for failing to utilize mitigation specialist in preparing a social history, and for failing to prepare mental health expert to testify) (citing authorities). Indeed, the State confirms counsel's ineffectiveness by relying upon the Nevada Supreme Court's previous finding that the "evidence in mitigation was not particularly compelling." Reply at 3. The State's reply therefore confirms the fact that trial counsel (and post-conviction counsel) were ineffective in failing to investigate and present mitigation evidence at Mr. Rippo's penalty hearing.

The State's brief assertion that Mr. Rippo did not suffer prejudice from trial counsel's ineffectiveness is disproved by the allegations in Mr. Rippo's petition. The State acknowledges that the evidence presently before this Court is "different only in degree and detail" from the evidence presented at his penalty hearing. Reply at 3. However, as Mr. Rippo explained in his opposition, the difference in degree and detail is the very reason why Mr. Rippo suffered prejudice from counsel's ineffectiveness. See, e.g., Boyde v. Brown, 404 F.3d 1159, 1176 (9th Cir. 2005). Opposition to Motion to Dismis at 25-29. At Mr. Rippo's penalty hearing, none of the evidence of sexual abuse, extreme physical abuse, or sadism perpetrated by Mr. Rippo's step-father was presented to the jury. At Mr. Rippo's penalty hearing, no evidence was presented regarding the neuropsychological impairment and psycho-social stressors in Mr. Rippo's background as recounted in the petition before this Court. At Mr. Rippo's penalty hearing, there was no expert testimony whatsoever regarding the effects that these factors had on Mr. Rippo's behavior. At the time of Mr.

Rippo's penalty hearing, there was no expert testimony that he would make a positive adjustment in a prison setting to rebut the State's penalty phase presentation of future dangerousness. Considering the full weight of this evidence and viewing it altogether, this Court cannot conclude in the procedural posture of a motion to dismiss that there is not a reasonable probability that one juror would have struck a different balance in the penalty phase if the evidence contained in Mr. Rippo's petition had been investigated and presented.

In summary, given that the State has conceded the issue of trial counsel's deficient performance, Mr. Rippo must be permitted the discovery he seeks to show the exact extent to which he suffered prejudice from trial counsel's ineffectiveness. In light of the substantial and compelling mitigation evidence presently before this Court, Mr. Rippo can make an even stronger case to justify the discovery he seeks to flesh out the full extent of the prejudice he suffered from trial counsel's ineffectiveness.

C. Prosecutorial Misconduct (Claim Two)

The State's reply says nothing about the fact that its representatives presented false testimony at Mr. Rippo's trial regarding the absence of benefits to its informant witnesses. In its motion to dismiss, the State simply parroted Thomas Sims' false testimony that he had not received (and did not anticipate receiving) any benefits in exchange for his testimony. See Motion at 41-43. In his opposition, Mr. Rippo explained that Sims' testimony was irreconcilably inconsistent with the testimony of prosecutor John Lukens. See Opposition to Motion to Dismiss at 57-62. The State's reply asserts that "the various dispositions of such collateral cases are not new evidence of undisclosed inducements, but are consistent with the trial testimony that no benefits were given and that such cases would rise and fall on their own merit." Reply at 3. The State is now apparently parroting Mr. Lukens' false testimony that he would personally ensure that Sims would receive no benefits in the case that was held over his head until after his testimony. However, that assertion is repelled by the disposition in Sims' case which is contrary to Lukens' testimony that he intended to seek habitual criminal treatment for Sims which could have resulted in a life sentence. Instead, Sims' felonies were all converted to misdemeanors and he was given a $1,500 fine. The State's

motion says nothing about the other pending criminal cases against Sims that were dismissed during the same relevant time period. This is the very reason that Mr. Rippo must be allowed the discovery he seeks from the District Attorney's Office and the federal authorities regarding the failure to pursue federal gun charges against Sims and the other benefits discussed above.

The State's reply says nothing at all about the newly discovered evidence Mr. Rippo obtained from Michael Beaudoin that he received quid pro quo benefits by contacting the prosecutor in Mr. Rippo's case, which resulted in the conversion of pending felony drug charges into misdemeanors in order to ensure that he did not have to go to prison (which was a certainty given his substantial record for felony drug arrests and convictions). Ex. 366 to Opposition to Motion to Dismiss. The State's reply says nothing about this evidence, or of the other favorable dispositions received by Mr. Beaudoin with respect to his numerous pending criminal charges. The State's argument that trial counsel was aware of these benefits finds no support in the record. The State's reply also says nothing about the fact that Sims, Beaudoin, and Thomas Christos all had their criminal charges continued until after their testimony against Mr. Rippo before they received favorable dispositions on their pending cases.

The State's reply also says absolutely nothing about the false testimony and impeachment evidence regarding the details of the offense that were fed to the jail house informants by the State and its representatives to bolster their credibility. The State's reply does not address the declaration of James Ison, which states that he was placed by the prosecutors in a room alone with all of the discovery in Mr. Rippo's case in order to familiarize himself with the details of the case. Ex. 234 to Petition. The State's reply does not address the declaration of David Levine, which states that the critical factual details contained in his second interrogation statement were fed to him by law enforcement. Ex. 235 to Petition. The State does not address or attempt to correct the false testimony from William Burkett that Mr. Rippo attempted to enlist his girlfriend to poison Diana Hunt. Ex. 373 to Opposition to Motion to Dismiss.

In conclusion, the State should not be heard to make any representations regarding the extent of the benefits received by its witnesses or whether their testimony was false before Mr. Rippo

receives complete transparency in terms of discovery. In its motion to dismiss and reply, the representative for the State has made no assurances that he has reviewed the prosecution files in Mr. Rippo's case (as well as in the cases of its witnesses), before simply parroting back the false testimony of its witnesses. As Mr. Rippo explained in his opposition to motion to dismiss, the State's representative has a present ethical and constitutional obligation to set the record straight in the instant case. See, e.g., Thomas v. Goldsmith, 979 F.2d 746, 749-50 (9th Cir. 1992); Hall v. Dir. of Corr., 343 F.3d 976, 981 (9th Cir. 2003). However, the representative for the State has never made any representations that he has reviewed the documents the District Attorney's Office is currently concealing to determine whether they support Mr. Rippo's prosecutorial misconduct claim.

As a matter of controlling state law, by pleading a "defense that places at-issue the subject matter of the privileged material over which he has control," the State has waived any objection that it could have raised to prevent disclosure of the prosecution file. See, e.g., Wardleigh v. Second Judicial District Court, 111 Nev. 345, 354, 891 P.2d 1180, 1186 (1995). As explained by the court.

> selective use of privileged information by one side may 'garble' the truth. The privilege 'suppress[es] the truth, but that does not mean that it is a privilege to garble it; . . . it should not furnish one side with what may be false evidence and deprive the other side of the means of detecting the imposition.' [citations] In other words, 'where a party injects part of a communication as evidence, fairness demands that the opposing party be allowed to examine the whole picture.'

Id. (emphasis in original, citations omitted). The court further explained that an in-issue waiver specifically occurs when a party pleads a defense which places the material within its control in play. See id. at 356, 891 P.2d at 1187.

It should go without saying that Mr. Rippo's constitutional right to adjudicate his prosecutorial misconduct claim trumps any objection that the State could raise to prevent disclosure of the contents of the prosecution file,[2] and the State has not asserted (and cannot) any specific objection to disclosure. The point is the State is presently attempting to make representations

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[2] See, e.g., 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); Shields v. State, 97 Nev. 472, 473, 634 P.2d 468, 468-69 (1981).

relating to information that it is presently concealing in the prosecution file while simultaneously raising factual defenses to Mr. Rippo's claim. By choosing this course of action, the State has placed the documents in the prosecution file at issue and should be required to disclose that information before it is allowed to make any further representations regarding the undisclosed benefits and false testimony of its witnesses.

On the issue of good cause, the State has not attempted to address any of the legal allegations contained in Mr. Rippo's opposition to motion to dismiss that he can show good cause to overcome any purported procedural default by showing that the State suppressed material exculpatory and impeachment information. Opposition to Motion to Dismiss at 51-55; see, e.g., Mazzan v. Warden, 116 Nev. 48, 66-67, 993 P.2d 25, 37 (2000); State v. Bennett, 119 Nev. 589, 598-99, 81 P.3d 1, 6-7 (2003). The State alleges that post-conviction counsel's ineffectiveness cannot constitute good cause, yet it fails to address the allegations contained in Mr. Rippo's opposition to dismiss that counsel was ineffective, see Opposition to Motion to Dismiss at 19-20, or cite to any supporting authority (and there is none). This Court therefore cannot conclude in the present procedural posture that Mr. Rippo's prosecutorial misconduct claim is procedurally barred before authorizing formal discovery.

III. Conclusion

For the foregoing reasons, Mr. Rippo respectfully requests that this Court grant his motion for leave to conduct formal discovery so that he can receive a full and fair opportunity to litigate his constitutional claims at an evidentiary hearing.

Respectfully submitted this 16th day of September 2008.

FRANNY A. FORSMAN
Federal Public Defender

David Anthony,
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with Rule 5(b) of the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on the 16th day of September 2008, a true and correct copy of the foregoing **REPLY TO OPPOSITION TO MOTION FOR LEAVE TO CONDUCT DISCOVERY** was deposited in the United States mail, first class postage prepaid, addressed to counsel as follows:

Catherine Cortez Masto
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Heather Procter
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Employee of the Federal Public Defender

TRAN

CASE NO. C106784

DEPT. NO. XX

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

THE STATE OF NEVADA,

Plaintiff,

vs.

MICHAEL D. RIPPO,

Defendant.

REPORTER'S TRANSCRIPT
OF
HEARING

BEFORE THE HON. DAVID T. WALL, DISTRICT COURT JUDGE
MONDAY, SEPTEMBER 22, 2008
8:30 a.m.

APPEARANCES:

For the Plaintiff: STEVEN S. OWENS, ESQ.
Deputy District Attorney

For the Defendant: DAVID S. ANTHONY, ESQ.
Federal Public Defender

Reported by: Angela K. Lee, CCR #789

LAS VEGAS, CLARK COUNTY, NEVADA
MONDAY, SEPTEMBER 22, 2008
8:30 a.m.

* * *

PROCEEDINGS

THE COURT: All right. This is C106784. Appearances for the record.

MR. ANTHONY: Good afternoon, Your Honor. David Anthony from the Federal Public Defender's office.

THE COURT: It's still morning.

MR. ANTHONY: What's that?

THE COURT: It's still morning.

MR. ANTHONY: Oh, it's still morning. Good morning.

MR. OWENS: He's just anticipating how long it might be. Steve Owens for the State of Nevada.

THE COURT: All right. And waive his presence today, Mr. Rippo's presence today?

MR. ANTHONY: Yes, Your Honor.

THE COURT: All right. It's on for the State's motion to dismiss the petition to leave to conduct additional discovery. In some respects they're connected, the issues, but the motion to dismiss was actually filed first, so, Mr. Owens, do you wish to be heard?

MR. OWENS: Sure. This is a capital murder

case, Judge, two deceased victims. The defendant was sentenced to death. There was six aggravators total when the verdict came back. Those have since been reduced down.

But there was a first post-conviction petition. Trial counsel by the way was Phil Dunleavy and Steve Wolfson. There was a first trial – first post-conviction petition in 1998. Took a few years to work its way through that.

There was an evidentiary hearing. Phil Dunleavy, Steve Wolfson, and appellate counsel, David Schieck, all testified at that hearing in 2004 over two days of evidentiary hearing in front of Judge Mosley, and the petition was denied in 2004.

It was affirmed on appeal in '06, and it's at that time that the Nevada Supreme Court applied the new McConnell case and struck half the aggravators, the three felony aggravators, leaving us still with three. They did conduct a harmless error analysis and said it would not have affected the jury's death verdict.

Rehearing was denied. Remittitur issued. They went to Federal Court, and fairly quickly they got back here on the instant second State habeas petition.

There are three procedural bars that we argue apply. The first is the one-year time bar, and that's from issuance of remittitur following direct appeal. I don't

have the actual date of issuance of remittitur, but I know that cert was denied in October of '98.

THE COURT: November 5th, 1998, I think is right.

MR. OWENS: November 5th of '98 remittitur issues, and so any petition filed after that, one year after that date, would technically be barred under the one-year time bar absent showing a good cause and prejudice.

The current petition is also procedurally barred under 34.810 because it's a successive petition. You're only supposed to have one bite at the apple, one chance to raise all your post-conviction issues. And there's very limited circumstances under which you can file a new second petition.

In a capital case you can on occasion show good cause and prejudice by asserting such things as actual innocence or ineffective assistance of post-conviction counsel because they're entitled to post-conviction counsel on a capital case. So there's all sorts of good causes and prejudice which are really the subject of -- of the argument here today.

There's also a third time bar, the five-year time bar. I think that runs from a couple of different dates, but from conviction I think is one of the dates.

Anyway, we're well past five years.

And there's a presumption of prejudice to the State, prejudice in terms of having to retry this should the petition be granted at this point which is now some 12 years after the first trial. Prejudice also in terms of conducting an evidentiary hearing or responding to the claims and coming up with answers for things that they're alleging happened 10, 12 years ago.

It's been a long time, memories have faded, and we don't have anyone with percipient knowledge really of what was going on there. And it's hard to reconstruct things. That's why we have these procedural bars. They want to get all these claims done and out of the way early on in the case. So I have alleged application of all three bars and that they have not shown good cause or prejudice.

I note that there are some -- I went down through the claims, not just stopping at a -- a summary argument that they're procedurally barred, but I actually go through the merits of the claims, at least insofar as to show there is no good cause or prejudice from the bar.

The first issue they raise was the -- showing the bias of Judge Bongiovanni due to Nevada's involvement in the Federal investigation. It's my argument that is an old claim. That is nothing new that trial counsel wasn't aware of and already raised.

Right after the trial there was a motion for new trial, and that was heard not in front of Bongiovanni, but in front of a different judge. I forget who it was right now. But a separate judge heard the motion for new trial -- Judge Brennan -- and denied it, and then that was also the subject of the direct appeal. Those issues were worked into the direct appeal.

And both things now that the Federal PD is claiming that they just recently discovered in the Federal investigation are contained in the pleadings of what trial counsel knew back in 1996 was that motion for new trial and that subsequent appeal: Number one, that the DA -- their allegation is that the DA misrepresented it was not involved in the investigation; and, number two, that Bongiovanni misrepresented that he did not know Denny Mason.

Both of those facts were known to defense counsel in 1996 through the Federal investigation. They said we've got Federal documents from the Federal investigation showing that the State was privy to or took part in this random -- manipulation of the random assignment of cases.

Now for me to come back 12 years later and try to sort all that out and explain it, I don't know that I can do that because I wasn't here, and I don't know exactly

everything that happened.

What I do know is that they knew since 1996 about these allegations, and they can't just sit back and then 12 years later ask for a hearing on the merits on it and ask for an evidentiary hearing to flush all this out where the basis of the claim is available to them. And they knew about it. They can't sit back and delay in bringing it.

And so it's my position they have no good cause for explaining why they've delayed in bringing it, and we don't even need to reach the prejudice prong at this point on prejudice in going back and trying to reconstruct exactly what happened.

Claim 2 they say is a Brady violation, failure to correct false testimony and pattern of misconduct. There were several witnesses who testified. They were cross-examined by the defense at trial about whether or not they were receiving inducements. Further testimony.

Some of these witness have went back and forth on redirect, re-recross, back and forth several times examining them, are you sure you don't expect to get any benefit here, and the witnesses all said no, other than Diana Hunt, a codefendant, who said I agreed that I pled guilty to robbery, and I agreed to give testimony. That was elicited.

But there's other witnesses in Thomas Simms and Michael Beaudoin and a Thomas Christos who the Federal PD is now saying that they had inducements given to them, and their evidence of inducements come from publicly available documents from Justice Court and/or District Court showing that these witnesses had other cases, all of which was known at the time of trial. They were cross-examined on that, the fact that they had pending cases or that they had cases in the past.

And the Federal Public Defender is saying that, well, because, like, for instance, Thomas Simms, because he got a continuance in 1993 on his drug case, well, the trial here was '96. But because he got a continuance on one date, that's -- three years before trial, that's an indication he got some inducement in exchange for his testimony.

People get plea bargains all the time, and they get continuances all the time, and they have cases dismissed all the time, and it's not tied to testimony. There's nothing to indicate that that continuance had anything to do with and was something that was granted -- offered by the State in exchange for his cooperation.

Likewise, they point out reduced charges on a possession of marijuana case in 1993. Again, three years before the trial Thomas Simms had a marijuana case that was

reduced down. Every marijuana case is reduced down. That's not an indication that there was some inducement.

Likewise, battery domestic violence cases were dismissed in '93 and '94. I don't know why those were dismissed, but they get dismissed all the time if the victim doesn't show up.

I am prejudiced now from going back to '93 and '94. That is quite a long time -- 12, 14 years ago -- trying to find -- and we don't have these cases anymore; they've all been destroyed -- trying to find out the actual reasons of why a particular case was destroyed. I shouldn't have to.

They have the burden of showing good cause and prejudice to overcome the procedural bar, not me, and they can't show good cause why they are just now coming forward with these public documents, public records, of other cases that these witnesses had that have always been available to them, and the outcome alone is not a sufficient allegation to tie it and link it to some bargain or inducement in exchange for testimony.

Likewise, if some of the witnesses had pending cases that two or three years after trial were dismissed or were resolved in some way, that doesn't undermine the trial testimony that they weren't expecting any favor, they weren't offered any favor, they weren't going to get any

favor.

The fact that somewhere down the road their cases were resolved is entirely consistent with the trial testimony. They're missing that -- that link to show that there was some sort of inducement or delay. What they're going on is that there was some delayed bargain. We're going to -- we can tell the jury that there is no inducement, and then we'll take care of you down the road.

That's the allegation they're making, and the fact that they simply show a case was resolved afterwards does not merit that kind of look and examination now 12 years after the fact.

They claim ineffective assistance in investigating and presenting mitigating evidence. Well, that's a claim that should have been raised on first post conviction, and I believe it was in part. They've now got some additional allegations here of what the defense attorneys could have done in mitigation.

There was no impediment external to the defense that prevented them from coming forward with this much sooner than some ten years now after the trial for the first time, ten years afterwards saying, look, there's additional family members that could have been called and friends that could have been called. Those were all within the unique knowledge of the defendant. He knows who his

family and friends are. The State didn't prevent him from raising that.

And I've read through what all those witnesses would purportedly say. I don't see it being as too terribly -- I don't see it as being much more or very much different than what was already presented at trial. The witnesses are basically saying about the same thing, that Rippo had a stepfather who died early in his life and that the stepfather was -- would demean women in front of Rippo, and he was too hard on Rippo, and he had these challenges to overcome.

I don't see them saying much of anything different that the jury didn't already hear, and so I characterize it as simply cumulative. Yes, they have new witnesses that weren't called. Yes. Would they have said anything very much different? No. And if it wouldn't -- if it's not substantial enough to change the outcome of the case, then they can't overcome the procedural bars.

They have to show good cause why they're just now coming up with this new mitigation evidence and prejudice, that if they had been allowed to put on all of this additional mitigation, that it would have affected the outcome, that the jury probably wouldn't have voted for death.

The Supreme Court has conducted harmless error

analysis once before on this case on the death penalty, and they did it in the context of McConnell. They took away three of our aggravators, and they still said the case -- the State's case was so compelling here with two women strangled and tortured with a stun gun and a prior crime of violence, sexual assault on a woman who Rippo let live, who he had also strangled in the same way, almost to the point that she passed out, and used a stun gun on her.

That is damning evidence in front of a jury, and there's very little in the way of mitigation evidence that they're going to be able to come up with now to show that the result would have been different had they just added another family member or two in there or another friend or some other witness.

I think those are their main claims that they're going after. Most the others seem fairly -- fairly stock, and I've responded to them. I don't know if the Court wants me to go piece by piece through every single thing. I can do so. But I think our analysis in the briefs is fairly adequate.

And, again, they're mostly going on these first two or three claims, so I am going to submit it at this point on that argument and let them respond at this time.

THE COURT: All right. Anything you want to add to Claim No. 22 about lethal injection?

MR. OWENS: I can talk about lethal injection. Absolutely. That was resolved in my mind by the U.S. Supreme Court recently in Baze v. Rees. My primary contention here is that we don't need to get into the merits of it. This has been my argument all along. We've never had a case go up where I had a final ruling on it by the Nevada Supreme Court.

But my position is this claim can't be raised in post conviction because the judgment of conviction is always going to say that he's convicted of murder and sentenced to death by lethal injection. No matter what we do with that, we can't affect and change the behavior of the -- or the discretion of the director of prisons. He's the one charged with how he's going to implement the lethal injection. He decides the protocol.

There's nothing this Court can do in the context of this case, a collateral attack on the judgment of conviction, that can dictate to the director of prisons to change protocol. It has to be done by some other vehicle -- a civil rights action or a request for declaratory relief.

I know they raised the issue here in Nevada in the Castillo case, and they did it by extraordinary writ petition. I'm not sure that that was the proper vehicle either, but the Supreme Court at least granted a stay of

Castillo's execution, and they held that case in abeyance until Baze v. Rees was resolved. And then the parties all agreed the issue was moot, and they dropped it, and Castillo got his case going again.

But I don't think it's properly raised in a post-conviction petition, and even if it were, I think Baze v. Rees has put an end to that -- to that argument.

THE COURT: All right. Couple of procedural questions. One is it's under the old case number. I know that the -- the writs are captioned Rippo versus McDaniel, the warden, and the State's been using The State versus Rippo. I just --

MR. ANTHONY: You know, that's a common thing that occurs, Your Honor. The reason it does is because, as the Court is aware, habeas corpus is kind of a quasi civil-criminal proceeding --

THE COURT: Correct.

MR. ANTHONY: -- and the statutes talk about who our defendant is, and the defendant is the warden.

THE COURT: Right.

MR. ANTHONY: And so that's why we caption the captions the way that we do.

THE COURT: But it's still under the same case number. I guess that's my question. It's not -- when I saw yours, I knew that that's what was done. But I was

wondering if there's a case number filing as well where you filed a new petition and it generated a new civil case number. I'm not aware that there is, but --

MR. ANTHONY: Well, it's an interesting issue that the Court raises about whether it should get a new case number. I mean reasonable minds could maybe differ on whether that should be the case.

THE COURT: I just want to make sure I have everything under one umbrella. It looks like everything. Even yours are filed under 106784, so I'm presuming --

MR. ANTHONY: That's correct.

THE COURT: -- that I have everything.

MR. ANTHONY: And maybe that should simplify the issue, and hopefully everything that was previously before different Courts --

THE COURT: That's fine.

MR. ANTHONY: -- is before this Court.

THE COURT: What's the status of the -- is there a concurrent Federal proceeding going on?

MR. ANTHONY: There is, Your Honor. We currently have -- the State's asked for several continuances to respond to our Federal petition. At the current time they have not responded to it.

THE COURT: Okay.

MR. ANTHONY: So what we've done is -- back in

the olden days we would wait for a stay order from the Federal court, but what's happened in the meantime is, you know, the State has become more -- more vigorous about their assertion of procedural default, and in order to rectify the arguments that they bring up, it forces us to make decisions much quicker than the Federal Court makes them.

So if the Court's okay, I'll start with my argument.

THE COURT: Sure. And you can -- I should have indicated to you, but I mean there were certain of the claims that you haven't addressed. I don't see that as any type of waiver either way.

MR. OWENS: Okay.

MR. ANTHONY: Thank you, Your Honor.

I think it's important in cases like this to probably start out with where both parties agree, and the first thing that the parties agree to is that Mr. Rippo has the right to the effective assistance of post-conviction counsel.

As the Court acknowledged, this was a case where the remittitur issued in 1998. For all cases that counsel is appointed to after January 1st of 1993, there's a mandatory right to counsel. The Nevada Supreme Court has held that when you have the right to counsel, that carries

with it the right to effective assistance of counsel, and the -- I don't think that there's any dispute with the State on this issue.

The next issue that arises is did we allege the issue of ineffective assistance of post-conviction counsel in a timely manner, and that kind of explains -- that's why I was trying to explain why we've come back here before we got a stay from the Federal Court.

We've litigated this issue with the State probably a half a dozen times, and every time we do, what they say is we need to come back within one year of the issuance of the remittitur in the first State post-conviction proceeding to assert this allegation of good cause.

And it's our position that the statute doesn't actually have an express time limitation, but even if they're correct and even if they're right, that we have to do it within one year, that's why we came back here so quickly on this. Mr. Owens acknowledged we did come here much quick -- much more quickly than has been the case in previous cases. So I don't think that there's any dispute that we have timely raised this allegation of cause which is based upon ineffective assistance of post-conviction counsel.

The next issue that needs to be resolved is

whether post-conviction counsel's performance was deficient, and this is an issue again where the State hasn't proffered any contrary argument on this point.

Our argument is that this: That first post-conviction counsel was ineffective because he failed to basically do any research outside the record on direct appeal.

As the Court is aware, post-conviction proceedings, the whole purpose for having them is to have investigation that goes outside of the record on direct appeal, to look for issues of ineffective assistance of trial counsel, to look for issues of potential Brady violations, or any other constitutional issues you can't tell from the record itself. And that's where we submit that counsel was deficient. Counsel didn't do any investigation. Counsel didn't attach any exhibits to their petition.

We allege that by failing to do any sort of investigation, that counsel was deficient, and I don't think that the State has posed any contrary arguments to say that there's a strategy in not doing any investigation, and I don't think they could make that argument with a straight face.

So what we're left with, Your Honor, is that we're left with whether or not Mr. Rippo was prejudiced

from post-conviction counsel's ineffectiveness, and what that takes us back to is that takes us to the merits of the claims themselves because if we can show that the claims have merit, we can -- we can in essence step into post-conviction counsel's shoes, and we can litigate the issues that he would have litigated if he would have been performing effectively.

And my understanding from the way that the State has argued this particular case is we look to the merits of the claims in the petition to see whether or not we can overcome the procedural bars, and that's why we're talking about the merits.

So with that said, I would like to go ahead and start addressing the merits of these claims. I'll try to follow the same order that Mr. Owens used.

Obviously the first claim that we're looking at here is a claim of judicial bias. We have alleged two theories of cause. The first allegation was that post-conviction counsel was ineffective. If post-conviction counsel would have thoroughly reviewed the record on direct appeal, he would have seen that this was the primary first argument that was raised on direct appeal.

Our argument is this, that post-conviction counsel would have done what I did which is that he would

have gone over to Federal Court, he would have asked for the case file, he would have read the case file, and he would have -- and he would have compared Judge Bongiovanni's testimony of those two trials against his representations that were made at the time of Mr. Rippo's trial. And we argue that because he didn't do that, that falls below the objective standard of reasonableness.

We've also alleged as cause that the State suppressed material exculpatory and impeachment information. And when I say the State, I'm referring not just to the Clark County District Attorney's office. I'm also referring to the trial judge himself.

Now, as far as the merits go, I think the only point of contention that I can see that the State is arguing is -- is that they're -- I mean what happened is, is at trial this argument gets raised, and the issue becomes is the Clark County District Attorney's office involved in the investigation of the judge.

And when the issue is raised, the State comes, they make representations, they say we spoke with the District Attorney, we spoke with his first in command, Judge Thompson -- excuse me -- District Attorney Thompson, and Judge -- Judge Bell -- District Attorney Bell. Excuse me. I'm trying to think back. And we've talked with them, and they have represented to us that the State has

absolutely no involvement in this criminal case.

And then the point is asked to the judge. They ask the judge, do you know about whether or not the State is involved in this, and the judge says, look, all I know is what's contained in the newspapers. And then they ask him, well, do you know whether or not Metro is involved? He says, no, I don't know whether or not Metro is involved in this investigation. So that's the record we have at trial.

Then we have the record on direct appeal. We have the State arguing in their answering brief that the State had no involvement, that there were completely different entities involved, and that there was no pressure put on Judge Bongiovanni.

Then we have the Nevada Supreme Court's direct appeal. The Nevada Supreme Court buys or signs off on the representations made by the trial judge and the representations made by the State, that the State had no involvement whatsoever, and that's their basis for denying the claim.

Then, you know, we file this instant writ, and the State argues the same thing in their motion to dismiss, that the Court should deny it because it's law of the case, because the Nevada Supreme Court already found that the State wasn't involved.

Then for the first time -- and this is what's interesting to me -- is the State says the first time in their reply to the motion to dismiss, you know what? You're right. The State was involved. The State was involved in the sting operation against the judge where they received a phonecall from the FBI asking them to present a bogus indictment for an individual named Terry Salem. They asked him to -- they asked the DA's office and the chief judge of the Eighth Judicial District Court to coordinate with each other so that that case was assigned to Judge Bongiovanni's department, and then the idea was to see whether or not Judge Bongiovanni would proceed to take any bribes from this individual. So in fact the Clark County District Attorney's office was involved.

And also what we can show just from Judge Bongiovanni's testimony in the Federal cases is that he knew Metro was involved, and he also knew that the Nevada Department of Investigation was involved in this, and he also knew that Metro Intelligence was involved in this.

So if you look at what the State has been saying since the beginning of this case, all the way through what they're saying now, what they're saying right now is not consistent with what they were previously representing. These are not consistent representations.

The only issue that remains here is whether or

not trial counsel was or was not aware of the State's involvement. The State alleges without citing to the record itself that, oh, yeah, this was common knowledge. This was common knowledge to the judge, it was common knowledge to the State, and it was common knowledge to the trial attorneys.

But if you look at the record which we've cited in detail, the record shows that trial counsel was in the dark on this. The record shows that they were making basically bare allegations in asking for a hearing, and they never got a hearing. All they got in response were these misleading representations that we're not involved, we're not involved, don't worry about it.

So basically that's the reason that we argue that we can show cause because defense attorneys have the right to rely upon what they're told by the judge, and they have a right to rely upon what they're told by the State. We don't have to automatically assume that the State is lying. That's not how the system works.

The State has ethical responsibilities to be candid to the Court, and also the trial judge himself has an obligation to be candid, and when that doesn't happen, that is a ground for excusing any failure to previously raise this issue in court, and that's one of our theories of cause.

So the remaining issue here is was or wasn't trial counsel aware of these things. Our assertion is the record itself shows that they weren't aware. Now, they assert that they were aware, but that creates what's called a factual dispute.

When you have a factual dispute, the only way to resolve it is with an evidentiary hearing where we put up Mr. Dunleavy and Mr. Wolfson and we ask them what they were aware of. And I think what the record is going to show very clearly is that they were left in the dark and that they were misled and that they were prevented, based upon these representations, from bringing forward a meritorious motion to disqualify the judge.

It also unfolds into this other argument about the trial judge's relationship with one of the victims in the case. The name of the individual was Denny Mason. He was the victim of the stolen credit card offenses. And, again, the State in their reply says, look. Everyone knew that the judge knew this person. He just contends that it's not -- it just doesn't matter. It doesn't disqualify the judge.

Our -- our assertion, Your Honor, is this: That if you look at all of the -- the totality of the circumstances here and if you look at the standard for obtaining relief, the standard is whether a reasonable

person would wonder whether the judge could remain impartial under the circumstances.

Our contention is that the trial judge's own actions in not disclosing his actual knowledge of the State's involvement combined with his failure to disclose his relationship to the victim witness is sufficient circumstantial evidence to show that he was actually biased and that he should have been disqualified from hearing the case.

And that brings us to the discovery motion where we're attempting to obtain discovery of information from the District Attorney's office, from Metro, and from the Nevada -- the Nevada Division of Investigation to show that, yes, Judge Bongiovanni was aware of these things at trial and just didn't disclose them. And our argument is, is that would disqualify him from the case. We've cited ample case law to the Court.

If the Court finds judicial bias, there's no further harmless error that's permitted, and reversal is automatic because if you have a biased judge, that constitutes what is called structural error into the proceedings, and it's not susceptible to harmless error.

Now, we've also alleged as the State has noted -- well, let me make sure I've addressed the State's arguments. They argue that trial counsel knew about it.

I've addressed that. That's a factual dispute. And then they say look at the motion for a new trial. But, again, if the Court looks at the motion for a new trial which we've included to the petition, it has nothing about any of this stuff. And in response, the State just parrots back the same representations that they made at trial.

So as to the Claim 3 in the petition, we have alleged that trial counsel was ineffective at the penalty phase of trial. We've alleged as cause that post-conviction counsel was ineffective. In the State's argument, basically they say this argument is barred because it could have been raised previously.

But the thing is, that's exactly our argument, it could have been raised previously, and it would have been raised previously if Mr. Rippo would have received effective assistance from his post-conviction attorney. The State has never argued that post-conviction counsel was ineffective -- or was effective which brings us to whether or not the claim itself has merit.

As far as whether the claim has merit, I'm sure the Court is familiar with the Strickland standard. It requires a showing of deficient performance and a required showing of prejudice. The showing of prejudice requires that we show a reasonable probability that but for counsel's errors, the results of the penalty phase

proceedings would have been different.

So if we look at the issue of deficient performance, again, this is an issue the State originally contests in their motion to dismiss, but in the reply to the motion to dismiss they don't address -- they don't address this particular issue.

What we've argued is, is that trial counsel is ineffective because they started their investigation too late. They started it two weeks before trial started, and they only had a psychiatrist and a psychologist see Mr. Rippo I think it was only two days before the penalty hearing even started.

It's our argument that they were ineffective because to do a sufficient mitigation presentation actually takes a substantial amount of time. In this case trial counsel had at least three years to do a mitigation workup in this case, but instead they wait until two weeks before trial, and then they started working on it.

But the problem is, is what they dig up brings up too little too late. All they have is they have a psychologist interview Mr. Rippo. They get good leads from that psychologist. They get good leads to some of the records that I'm asking the Court to approve subpoenas for such as psychiatric records when he was ten years old they didn't obtain, other evidence in the social history -- the

small social history done by the psychologist saying that there was a very negative relationship between Mr. Rippo and the stepfather.

Our argument is that if trial counsel would have been effective, he would have started this investigation a long time ago. And if he would have started it a long time ago, he would have branched out slowly and slowly, and eventually he would have presented the jury with the same evidence that I'm presenting to the Court today.

If you look at the declarations that we've attached to the petition and to the opposition to motion to dismiss, they say it was only on the day that the penalty hearing began that trial counsel was sitting in a room with all the family members, and what they asked was is there anyone here in the room that would be willing to testify on behalf of Mr. Rippo? And eventually they settled on Stacie Campanelli, his younger sister.

The problem is, is that's all that happened. There wasn't an individual interview with her. They didn't take the time to work with her, and they didn't take the time to talk with her alone. If they would have, they would have presented to the jury what I am now presenting to the Court.

And I think if you look at the State's answer, they say, look. It's the same, but it's different in terms

of degree and detail. And our argument, Your Honor, is that the degree and the detail is very different from what you're seeing now versus what the jury saw at the time of the trial.

There's allegations about sexual abuse by the stepfather against his daughters. There's allegations of extreme physical abuse, allegations of locking Mr. Rippo in confined spaces like closets for a substantial period of time, and this is corroborated by multiple collateral sources who could have been contacted if trial counsel would have started this mitigation workup earlier, but they didn't.

So the reason that they didn't go farther isn't because they had a strategy. It's because the penalty phase was starting, and they had no more time to do additional work.

What we've shown to the Court -- I mean basically what this comes down to is the only factual dispute that remains is whether or not we can show prejudice which is whether we can show a reasonable probability that the outcome of the proceedings would have been different if trial counsel would have performed effectively.

Our argument is, is that these allegations of sexual abuse, these allegations of extreme physical abuse,

we have an expert report showing neuropsychological impairment. Also it includes poly substance abuse. We have alleged that counsel was ineffective for not presenting expert testimony that Mr. Rippo would perform positively in a structured setting of a prison.

If you compare what was presented to the jury against what's presented to the Court, our argument is, is that that at least entitles us to discovery in an evidentiary hearing.

As Mr. Owens noted in his representations, the Nevada Supreme Court looked at this issue previously and they said, look. This stuff isn't particularly compelling. But that's based upon the record that was available at trial.

My argument is that that proves that counsel's performance was deficient. This Court can compare that evidence against what's being now presented, and that's really the question, about whether we should even get a hearing to demonstrate whether we can make that showing. Our argument is that we can make that showing.

As Mr. Owens noted, the Nevada Supreme Court struck three aggravating circumstances. Again, that also changes the picture before the Court that was before the jury.

We have also made an argument that the prior

sexual assault aggravating circumstance is invalid under new authority under the case of Roper v. Simmons which came out in 2004 which was after Mr. Rippo's previous petition had been dismissed, and Roper says that you can't sentence a juvenile to death. Our argument is that that rationale also applies when you're using a statutory aggravating circumstance to make someone eligible for the death penalty.

So our argument is, is that not only should this Court look at the mitigation evidence that wasn't presented, this Court should also look at the qualitative weight of the remaining statutory aggravating circumstances.

Our argument is that in light of intervening authority, that the Court couldn't consider that aggravating circumstance, and the State has already acknowledged that three aggravators have been struck. So we're looking at one to two aggravators versus the mitigation evidence that we would like to present at a hearing, and that's -- that's our argument on the argument of ineffective assistance of trial counsel.

The last argument that I would like to address is the issue of prosecutorial misconduct. This is flagged as Claim 2 in the petition. Our argument for good cause is, again, that the State's failure to disclose material

exculpatory and impeachment information is an impediment external to the defense.

Mr. Owens argues that this was -- some of this evidence was publicly available. However, if you look at the case that we've cited to the Court, the case is called Banks v. Dretke. It's a big case from the U.S. Supreme Court from 2004.

And in Banks, the State was making the same argument that they're making here today which is that if you would have been diligent, if you would have looked at the court files for all these guys, if you would have been more diligent, if you would have investigated harder, you would have found this stuff.

But what the U.S. Supreme Court said is that's not how things work. The prosecutor still has a freestanding obligation to do what is ethical, to disclose material exculpatory and impeachment evidence, and also has a duty to correct false testimony, and that duty is independent of trial counsel's obligations.

We cited a case to the Court from the Ninth Circuit that says, look. You can have cause from prosecutorial misconduct and from ineffective assistance of counsel at the same time. Those aren't mutually exclusive. And we've argued both theories of cause to the Court today which is both that post-conviction counsel ought to have

done this investigation. He should have gone and looked in these court case files.

But even if he hadn't, it wouldn't matter because the State still has a freestanding obligation. They have ethical responsibilities. And even the representative for the State today has the same ethical responsibilities to continue to disclose material exculpatory and impeachment information and to correct false testimony when it appears.

Now, we've talked a little bit about the case dispositions here. The State says that Mr. Simms received one continuance, but that wasn't a benefit. Your Honor, Thomas Simms received 18 continuances starting from 1993 until a week after he testified against Mr. Rippo. So he got 18 continuances.

Then we put -- then I -- in the opposition we put on -- or excuse me. At trial they put on the testimony of Prosecutor John Lukens, and Prosecutor Lukens said, yeah, I became counsel on Simms' case, and I did all of those continuances for him because I wanted to make sure that he was available as a witness here today.

But he further testifies to the jury that I'm going to tell you that his case is going to rise and fall on its own merits, and he says, we're going to file a habitual criminal notice on this guy, and he says -- well,

he talks about making a phonecall to someone from the ATF, I mean Terry Clark, and says, well, but there really wasn't any benefit there. We didn't -- the Feds did not pursue ex-felon in possession of a firearm charges on him.

But that really begs the question, given this other totality of the evidence that we're looking at which is that the prosecutor says we're going to file a habitual criminal notice on this guy, but then one week later what happens instead? They convert all the felonies to gross misdemeanors, and he gets a $1,500 fine. So he goes from looking at a life sentence in prison to a $1,500 fine a week after his testimony.

And basically that's the same things that happens with these other witnesses. It's the same strange coincidence. And it happens also with the witness Michael Beaudoin. We've attached a declaration from Mr. Beaudoin saying that, look. I got caught again for felony distribution of methamphetamine. I called up the prosecutor on the phone, and I wanted him to get me out of jail. And the prosecutor, Melvin Harmon, agreed to convert my felony charges to misdemeanors and to let me serve jail time, and I didn't have to go to prison. That was a benefit that occurred before Mr. Rippo's trial, and no one here is disputing that it wasn't disclosed.

And, again, I don't know how this necessarily

would have been one that would have been apparent from the public record either because, again, like Mr. Owens states, it's always hard to prove these things just by looking at a docket sheet. It's much -- once you talk to the witness though, we have, you know, the declaration from the witness stating that it was a quid pro quo benefit or that he called the prosecutor, and the prosecutor did that for him in exchange. And even if it wasn't quid pro quo, it still existed before Mr. Rippo's trial which means that it should have been disclosed.

We have the same thing with Thomas Christos. We have a guy who has a felony home invasion charge, and then it's continued and it's continued, and then again, you know, a month or two after Mr. Rippo's trial, it's converted again to a misdemeanor or actually that one might have been dismissed. I'm not sure.

But anyway, then we have these -- we have these three jailhouse witnesses. I don't think the State's disputed anything about these jailhouse witnesses. I think one of the most egregious cases is the one of James Ison who testifies that Mr. Rippo confessed to him.

But we have a declaration from Mr. Ison that says that before I went to testify, the prosecutors put me in a room alone with all the discovery in the case, and they let me look at it so that I could give details so it

would look like I knew, that Mr. Rippo had actually confessed to me. And we can't look at that and say that wouldn't have provided a ground for impeachment.

We have the same thing with the jailhouse snitch David Levine. He gives one statement to the police where he says that Mr. Rippo confesses but has no details. So then they get a second statement from him. And then we've got a declaration from Mr. Levine who says, look. Those details that I put in my second statement were actually fed to me. They actually told me about the extension cords and the ligatures and what was used to kill the victim. And so when I said it in the supplemental police report, these were facts that were being fed to me.

And, again, the issue is: Would these things have impeached this witness if they would have been disclosed, and I don't really think there can be any dispute on this fact that they would have.

So what does that leave us with? That leaves us with what is the prejudice? The prejudice is for the Brady violations whether there's any reasonable possibility that the outcome would have been different if these things would have been disclosed.

The standard for false testimony is whether there's any reasonable likelihood the false testimony affected the verdict, and we submit that we can make that

standard, Your Honor, because what the State basically had is a codefendant, Diana Hunt, who expressly received benefits, and then they paraded I think about six informant witnesses in front of the jury. They did that for a reason. Because they needed to corroborate the testimony of the codefendant, Diana Hunt.

Our argument is, is that all of these benefits would have been material if you look at them all together, and that's why we've asked for discovery and hearing because now the question is what did the State know and when did they know it.

Now I'm not leveling any charges against Mr. Owens personally, but I don't know what he's done to make himself aware of the files in the prosecution file, whether there's material exculpatory impeachment evidence sitting in there right now or whether he's going to look at the codefendant's files or the files of Mr. Simms or Mr. Beaudoin.

And the bottom line is this: That he's asserting as a defense that there were no benefits. Well, that really begs the question of whether there were benefits and whether there's evidence of benefits sitting in their files.

That's why we're arguing that we need discovery and a hearing, because we can't show actual knowledge by

the prosecution unless we can look at their files. Otherwise you could never prove actual knowledge 12 years after the fact. Their notes that they created before and during trial are the best evidence of what they knew at the time. That's why we're arguing that we need discovery of these things.

Very briefly I wanted to address this Court's question to the State about the lethal injection claim. The State argues the case of Baze v. Rees and says that we are foreclosed under Baze.

The one salient distinction I think this Court can distinguish from the Baze case is that in Baze they testified about how the Kentucky medical personnel went through common and new trainings they did over and over to make sure that they were competent when they were administering the lethal drugs. We don't have any such evidence in this case that the people who are conducting the lethal injection process have done any training at all. Nothing. There's no evidence of training.

The second thing that distinguishes this case from Baze is that in this case in Nevada the person who's injecting the chemicals is in a separate room and can't see the inmate.

And we've included in a declaration from Mark Heath who is an expert in anesthesiology, and he's talked

about how it contravenes all medical standards to do something like that where you're injecting lethal chemicals into a person who's in a separate room where you can't see them because you have to see whether or not they're conscious or unconscious before you inject the last chemical. If you don't, then it causes that cruel and unusual punishment which is that you have a person who is unconscious and slowly suffocating to death.

But you just can't tell because the second chemical masks the appearance of the person suffocating, and it makes the process pleasant to view by the people who watch the lethal injection so the person is not flopping around. But what you really have is a person who's slowly suffocating to death, and that's why we would argue that this case is distinct from Baze.

One other claim, and then I'll finish. Just with respect to the victim impact testimony, Your Honor, on Claim 12, the one thing that I would like to point out is, is that when this claim was raised on direct appeal and when it was raised on post conviction, they didn't include any exhibits with the claim.

And the exhibits that they should have included were these scrapbooks from the two victims that were created by the victims' families, and they were entered into evidence, and the scrapbooks show the victims as, you

know, young girls in Girl Scouts; young girls doing these things, you know, going to their first prom; this, that, and the other.

And the reason that we've argued that that's prejudicial is because, you know, there were in fact two murders here, but they were murders of adult women and weren't murders of two young children. And our argument is, is that by putting these scrapbooks into evidence about, you know, showing them excessively as children, that that was a prejudicial thing for Mr. Rippo.

And if the Court looks at that together with the other ineffective assistance of trial counsel, we assert that it would have made a difference, at least for one juror, and that's all we have to show to get a hearing.

Thank you. And if the Court has any questions –

THE COURT: All right. Thank you very much. Mr. Owens.

MR. OWENS: I will go through in the same order responding to the issues raised. As to judicial bias in Claim 1, they're alleging ineffective assistance of counsel for not reviewing the Federal file, suppressing material evidence, and that we are admitting the State's involvement.

I did not intend to admit anything in any brief

that I filed in this case. I don't know what happened. I wasn't there. I wasn't part of the proceeding. I'm simply looking at the documents the Federal Public Defender has provided which indicates there was a conversation with a deputy of our office and that there – that's the only place I'm getting that is from their own documents. So I don't intend to say that we were involved. I simply don't know.

And we don't need to reach the merits of that. As interesting as that is, that was known before, and they say that – that I haven't cited to the record and that this wasn't raised in the motion for a new trial. I did bring with me here today – and it may not be part of the record in front of Your Honor, so I made copies – but it was definitely part of the record in this case, and this is the reply brief from direct appeal.

May I approach?

THE COURT: Yes.

MR. OWENS: Directing Your Honor's attention to page 2, and I'm going to quote part of it, and this a document filed by David Schieck on direct appeal. He says, specific – quote, specifically part of the investigation proceedings against Judge Bongiovanni involved a manipulation of the random assignment of cases so that particular cases would track to his department. If the

office of the District Attorney were involved in any aspect of this situation, then the representations put on the record during trial were inaccurate. Only an evidentiary hearing done in the light of the information released with the discovery in the Federal case can answer the questions that have arisen.

So they have received discovery in the Federal case that helped them make an allegation that the State was involved in the manipulation of a random assignment of cases. That's the exact same thing that the Federal Public Defender is here saying today, that they have recently received discovery in the Federal case that suggests the State was involved in the random manipulation of cases.

That allegation is ten years old, ten years old. They've known about that. It's the same old claim come up again. I also noted in the documents from the Federal discovery provided to me by Mr. Anthony that a chief judge was involved, and we know from very recent history in this case that only the chief judge has the power to manipulate the random assignment of cases.

And so in context – and I don't know. I wasn't there, so this isn't testimony. But I can put two and two together and – and – and very easily see how a chief judge would be able to manipulate and put the case in front of Bongiovanni.

I would also note that – that that was done in December of 1994 that that case got tracked in front of Judge Bongiovanni. Stew Bell did not take office until January of 1995, a month later. To what extent he was privy to the tracking of that case, I don't know. But he took office a month later. It is almost – it is a year later that the newspaper starts printing reports about some Federal investigation about Judge Bongiovanni in the middle of this trial, a year later.

So I can easily see how a prosecutor in court could represent that he talked to Stew Bell and said that the DA's office is not involved in any Federal investigation. If we were involved with that manipulation of the case and we had knowledge of it, it was a year earlier.

And I don't know that even on the facts as they're alleged here that we would have any reason to indicate that that case that we might have helped through the chief judge who would be the only one who had authority to do that – of course, we are the only ones that can file a case, so I can see how this might have come about.

But why would we think that that necessarily was the same Federal investigation that's being reported on a year later in the newspaper? The Federal investigation was extensive. This case in front of Bongiovanni was just one

part of that case. There was a lot of facts, a lot of details coming out on the case that they haven't shown that we had any involvement in at all.

What they have shown is that we filed a case and before Stew Bell took office. It was apparently at the request of the Federal investigators, but they haven't shown that we misrepresented things in court a year later when we said we're not involved in what's going on now. Here's this newspaper. Here's all this talk about Bongiovanni taking all sorts of bribes in all sorts of areas. They haven't shown that we've had any involvement in that part of the investigation that led to the charges that arose in the middle of trial.

All they've shown is exactly the same thing that they alleged a decade ago, and here we are still in the same place we were a decade ago. They can't just sit back and let this stew and then ten years later say, well, now we want to get to the bottom of it, now we want to put Judge Bell on the stand, now we want to put on the prosecutor, now we want to find out who the chief judge was and get to the bottom of all this that happened.

They haven't alleged anything here that isn't consistent and can't be reconciled with an understanding of how things transpired and the dates. And what the facts ultimately would show, I don't know, but it's too late.

It's procedurally barred.

They only get that under the guise of this Brady claim, that we withheld things from them. They had that in 1998. So their good cause and prejudice to overcome the procedural bar and raise this now ten years later just isn't there. That's my response on judicial bias.

The same goes for Denny Mason. It's been a while since I've looked at the motion for new trial. If it's not in there, then it's in the opening brief on direct appeal. It's in the brief somewhere. I've read it. If the Court needs me – in fact, let's see. I might have it here in my notes when I last looked at this when the defense knew that Bongiovanni – yeah, it's in there.

That was the subject of the motion for new trial. Bongiovanni failed to disclose his business relationship with Denny Mason's business partner, Vince Spano, who was purportedly a member of the Buffalo La Cosa Nostra gang. That's what was in the motion for new trial.

THE COURT: Not really a gang.

MR. OWENS: Well, whatever –

THE COURT: I've never heard of La Cosa Nostra being referred to as a gang from what I understand.

MR. OWENS: All right. But that was the subject of the motion for a new trial, so that was in there. Again, I would have to go back and look at it, and perhaps

Your Honor will.

If there's any dispute of fact here, it's about what the record shows or doesn't show. I'm suggesting their allegations are belied by the record, that they didn't have knowledge of this. That doesn't create a dispute of fact that has to be resolved necessarily in an evidentiary hearing. We can show they knew these allegations and that it's not a Brady violation, and there's no good cause to dive into it at this point.

Ineffective assistance of post-conviction counsel -- well, ineffective assistance of trial counsel in presenting mitigating evidence is their claim. They only get there through the allegation that post-conviction counsel was ineffective, and so -- and then they jump right into the merits.

Well, it's not that easy. Yes, you look at the merits to get some insight about the prejudice, but you still have to have this two-step process. You look at it through the prism of these procedural bars. They have to show that post-conviction counsel, David Schieck and Chris Oram, were ineffective in failing to raise the ineffectiveness of trial counsel. And it gets more complicated.

Mr. Anthony can only raise ineffective assistance of post-conviction counsel as good cause. It's

not every allegation of post-conviction counsel that errors that amounts -- that raises to good cause. It's only those errors where it's so egregious that if post-conviction counsel had done things differently, they would have been successful, and the writ would have been granted, and Rippo would have earned himself a new trial or a new penalty hearing. Only those errors in post-conviction counsel can they raise now as having good cause.

And now stepping into the shoes of Chris Oram and David Schieck, they could have only raised allegations of ineffective assistance of trial counsel. Under Strickland they would have to show that their performance fell below an objective reasonable standard as of 1996 when this trial occurred, not by today's standards, not by the Federal Public Defender's standards.

They have one or two capital cases per attorney in their office. That's not the reality of practice here in Clark County. We have attorneys that have multiple cases. That doesn't make them per se ineffective just because they didn't get around to doing some of the things that the Federal Public Defender would have all their time and money to focus on and do an entire workup.

In 1996 we have to look at what the state of practice was here in Nevada, and then they -- post-conviction counsel David Schieck would have had to

have shown that trial counsel was ineffective, fell below an objective standard at the time, and that, once again, the outcome would have been different, that trial counsel was so remiss in their duties in presenting mitigating evidence, that had they done things differently, again, the outcome would have been different. The jury wouldn't have voted on death.

Again, I focus on the strength of the State's case in aggravation. There's very little in the way of mitigation that's going to overcome that woman who came in and testified that she had been sexually assaulted and stunned with a stun gun and choked with a ligature and with Rippo's hands to the point of blacking out in the very same way that these two women now that were the subject of the murder, very similar except that the two women died and there was no evidence of sexual assault with them.

But hearing that woman take the stand and knowing that Rippo had done this before, that's the most compelling evidence. There's very little in the way of mitigation that's going to overcome that.

And what do they have now here after 12 years of new mitigation evidence that they say that David Schieck should have gone and done and should have found out? Well, we know that the trial attorneys did consult a psychologist and a psychiatrist, apparently just not the right one. Now

12 years later the Federal Public Defender has a new expert.

I would argue that is just not going to suffice to reopen a case that's this old. You can always go to a new expert and get a new opinion. You can always find some expert somewhere, and I don't know how many experts they consulted before they got the one that they put in this petition.

The fact is that trial counsel did consult a psychologist and a psychiatrist. His only argument is that they didn't have enough time. Again, we look at the realities of trial practice in the Eighth Judicial District Court in 1996 and attorneys that have a heavy case load, the fact is they still got those reports done.

And the fact that some other psychologist now would add something new? What actually does he have new? I didn't actually hear. Maybe it was this neuropsychological impairment. Again, is that -- whatever that is, whatever that means, is that going to be substantial enough that that would have persuaded our jury not to sentence Rippo to death?

He mentions sexual abuse. I think it was just in regards to Rippo's sisters, not as to Rippo. I'm not sure how exactly that would be relevant and how that would come out unless Rippo himself was the subject of some sort

of sexual abuse that the jury didn't hear about.

They're saying sexual abuse of Rippo's sisters. They're just portraying the stepfather as a bad man. I don't know that that's really mitigation evidence that would have been that useful.

Physical abuse, locking him in a closet, that he would perform positively in prison. Well I know that trial counsel did elicit some of that information. Trial counsel called James Cooper who was a vocational instructor, laundry, dry cleaning, and pressing at the prison, and he was a prison minister at Jean, saying that Rippo had no disciplinaries in prison, and he didn't get the prison tattoo and would do just well in prison. That sounds like the same sort of thing here. They would just use a different expert to elicit the same testimony.

They called Robert Duncan who was Rippo's stepfather saying that Rippo had jobs after his release from prison, he overhauled engines at home, he never was a problem. He had girlfriends. Probation officer only came by once. He didn't get the help he needed in prison. The mother was under medication. He elicited that kind of information.

The defense -- counsel at trial also called the defendant's sister, Stacie Roterdan, who said the stepfather did not encourage Rippo; that the father died;

the stepfather, James Anzinni (phonetic) would gamble with Rippo's allowance and paycheck; and he was always hard on Rippo, would push him, and tell him he was never going to amount to nothing; that he loved us, but was very hard on us; would degrade women in front of Rippo; that Stacie Roterdan and her mother would visit Rippo in prison; Rippo was good with children and made sure everyone had a good Christmas.

And then there was a letter from Carol Duncan. That was Rippo's -- that was Rippo's mother. She agreed to send Rippo to Spring Mountain, but he didn't get the help that he needed. He wasn't there -- she wasn't there for him when the husband was dying of cancer. That Rippo did well in the prison environment.

Finally, Rippo gave an allocution saying that he pled guilty to the prior sexual assault in order to spare the victim and that he prays for the victims' families.

That's the substance of the case in mitigation that trial counsel did put on. It's not that they put on nothing at all. It's just that with 12 years and with the resource of the Federal government, they have been able to do more investigation.

But what they haven't covered is either cumulative or so minor in nature it's not going to overcome the aggravating strength of the State's aggravating cases,

and on that basis I would urge you to deny that claim.

THE COURT: Let me just ask you, and maybe it's reiterating something that you've already talked about.

This interplay between -- the distinction between the issues of waiver or successive petitions under 34.810 and the requirement for good cause, that there be some impediment external to the defense which prevented their compliance or made it so that they couldn't raise certain issues, it's not enough just to say or is it enough just so say, well, post-conviction counsel the first time around was ineffective, so we can -- we can reach these issues again, and the issues that would prevent that ordinarily under 34.810 don't apply.

Do you understand my question?

MR. OWENS: I think so. Yes, they're entitled to effective assistance on post conviction.

THE COURT: Right.

MR. OWENS: And I think the way that that's reconciled with the law that says that there has to be an impediment external to the defense. I think that is the fact that counsel was appointed under law. Therefore, that's consistent, that post-conviction counsel was the stumbling block that prevented them from getting it because counsel wasn't performing as the constitutionally mandated counsel.

THE COURT: Okay.

MR. OWENS: And they did get back here in a timely manner, and I don't think that -- that following first post-conviction petition that there is a per se one-year time bar. That's the one year time bar under 7 -- .726.

I have argued on occasion that at a minimum we're looking at at least you have -- do you have any claims against post-conviction counsel filed within one year, otherwise it doesn't make sense. But I use that simply as a guideline. The Nevada Supreme Court has never come out and said there's one-year time bar following the first post-conviction proceedings that you have to get back in the State court. They say that you simply have to do so without unreasonable delay.

And just because you might get back in State court timely on one issue doesn't mean you get to automatically jump into the shoes of first post-conviction counsel and redo all of the first post-conviction proceedings, an issue by issue process that we go through, an analysis. Look at the merits of the claim and make a decision about whether or not they've shown good cause and prejudice to raise that particular claim based on post-conviction counsel's errors in a successive petition.

Claim 14, Roper v. Simmons they say invalidates

the prior sexual assault. That's an interesting legal argument. I'm not aware of any court anywhere that has extended Roper v. Simmons to say that you can never use a juvenile conviction in any context in a capital case as an aggravator. That wasn't the holding in Roper. Roper v. Simmons simply said that those who are mentally retarded are less culpable; therefore, they're not subject to the death penalty.

Now that's a huge leap to say that, well -- I'm sorry. It wasn't mental retardation, was it? It was juveniles. Juveniles are less culpable. Their brains haven't fully developed; therefore, they're not subject to the death penalty for murders that occur when they're a juvenile.

They never took that next step that says, well, that prior convictions committed as a juvenile can't be used as an aggravator. No court anywhere has held that. And in a successive petition this, oh, I don't think this is the time to try to extend legal authority, if there's a case on point that said that, then bring it, and then that might be good cause to reexamine that aggravator. And then maybe you wouldn't have been sentenced to death had we not had that aggravator. But without that authority to overcome the procedural bars that they have a novel legal argument, that's not grounds to overcome the procedural

bars.

Claim 2, the prosecutorial misconduct. I absolutely agree, Banks v. Dretke, that we have a duty to disclose exculpatory evidence and to correct false testimony. I haven't seen any false testimony that needs correcting. I haven't seen any exculpatory evidence that needs disclosing.

You know, that case with Tom Simms was a drug case, and John Lukens was off spouting about how we were going to habitualize Tom Simms. All that may have done was impress upon Tom Simms that he's not getting any deal out of the State, we're going full bore on him.

The fact that we may not have actually filed a habitual after the trial and had a drug case reduced to gross misdemeanors is not inconsistent with the negotiations that everyone else in the community gets. We simply don't have the time to go hard on drug cases.

The fact that John Lukens may have been saying -- saying we're going for a life sentence, if anything bolsters the fact that Simms didn't think he was getting anything. He thought he was going away for life. The reality is we can't habitualize somebody on a drug case. Everyone knows that. This was possession with intent to sell.

Again, the subsequent outcome in and of itself,

the fact that the case was negotiated in a manner that is not entirely inconsistent or with what the charges were and with what would be a normal negotiation is not any indication of exculpatory evidence that needed to be disclosed.

They were aware that he had cases. He was aware -- they were aware that he had cases negotiated. They were aware that these witnesses had pending cases. The fact that those pending cases were resolved in a particular manner is not evidence of any sort of inducement.

In Goings -- I think Tom Simms's case was marijuana that was reduced down to the gross misdemeanor. The Goings case was also drugs. He had two prior felony convictions related to drugs. On redirect the State asked him about his then pending charges and whether he was offered any deals in exchange for his testimony. None of this changes the fact that these witnesses and the prosecutors asked questions, and the witnesses said I haven't been offered any.

The fact that their cases are later dealt in whatever manner that they're handled does not mean it influenced their testimony. As far as they're aware, they're not getting any deals. And as far as I've seen with the negotiations that have happened, there was no

outstanding great deal that any other criminal defendant would not have otherwise gotten.

James Ison and David Levine, yes, I understand that 12 years later they have some letters now that say that, well, the DA put us into a room and let us look at discovery. I wasn't there. I don't know whether that's true or not. Frankly it doesn't matter. James Ison and David Levine have never recanted the fact in these letters that Rippo confessed to them.

The dispute comes about whether Rippo showed them the precise manner in which he strangled the two girls to death, whether he actually did in fact wrap something around his arm and say this is how I strangled out the girls. That's what that letter is saying now, is that that information was fed to him. I can't imagine that would be true.

But we don't need to go there because he hasn't changed -- even if he had changed, I wouldn't be saying we need to have an evidentiary hearing, but he hasn't changed his testimony. This is a snitch. We can't expect that all snitches are going to -- and people with criminal records in jail who overhear things are going to be consistent for 20, 30, 40, years. But the fact that 12 years later he says part of his testimony was not entirely true doesn't undermine the rest of his testimony that Rippo confessed to

him.

And certainly without that, I don't think they have grounds to reopen that. They don't have the good cause or the prejudice to show that the outcome would have been different. Even under the allegations that they're making, even accepting them as true, James Ison would still say that Rippo confessed to him the murder, and he would simply say to us I'm told how exactly he strangled them out, but Rippo still confessed to the murder.

Lethal injection, again, on Claim 22, the Attorney General isn't part of this -- this case right now. The Attorney General represents the director of prisons. The director of prisons is not a named party in this case. Through a post-conviction petition this Court doesn't have any authority to direct the director of prisons to do or not do anything. He's not part of this. And that's why a post-conviction petition isn't the right procedure.

This only affects the judgment of conviction. You can change whether or not he's sentenced to death by lethal injection because that's in the judgment of conviction, but you can't in this proceeding purport to tell the director of prisons what procedure to do or not do.

There is no execution eminent for Mr. Rippo. He has years and years and years of appeals ahead of him, and

the protocol that the prison undergoes is under revision in light of A and B briefs. They're reexamining that all the time.

I don't -- I'm not even sure what the protocol is in effect now, if they've modified it since Baze v. Rees. If they haven't, I'm sure they will be, and by the time the next execution comes up, I'm sure they will probably raise a claim under the lethal injection, and we'll see what the protocol is at that time. The issue will be right, but the director of prisons will be in the lawsuit. It's not right. It's not properly raised here.

I can't address for the Court Claim 12, this victim impact and photos and the scrapbooks. That is one of the claims I did not see as being a significant claim. I did not prepare on that other than what is already in our briefs. I don't even remember the scrapbooks, and I would have to submit that one to Your Honor's discretion as contained in our briefs.

Thanks.

THE COURT: All right. Anything else very briefly just on the new issues he may have raised?

MR. ANTHONY: I'll try to be brief, Your Honor. I think one point that's important to make, especially on this judicial bias issue, is that I hear a lot of I don't know what happened, we don't know what happened, and I

think that's kind of the point, and I think it's kind of the reason why we would be seeking an evidentiary hearing.

But the reply brief that Mr. Owens provided to the Court was an exhibit to the petition. The problem is, is that these things only slowly leaked out of the news as news reports happened about the Federal investigation. But these were news reports that were long after the trial, and the problem is, is that all we have is this one isolated sentence that doesn't have any index cite, and the Nevada Supreme Court chose to make an adverse factual finding based upon all of this other evidence that had come out in the court below that we have subsequently shown is not true.

And so basically their response of, well, we don't really know what happened, I think that really bolsters the reason for having an evidentiary hearing because it's important that we know what the facts are before we make a decision.

With this argument about Denny Mason, we also included the motion for a new trial as an exhibit before this Court. One piece of information that I think is significant is Exhibit 248 to the petition. That's actually a trap and trace order that we recently discovered just from dumb luck. That is a trap and trace order where Ben Spano calls up Judge Bongiovanni's chambers, and he

obtains an OR release on behalf of Denny Mason, the same person who's the victim witness in this case.

I would submit to the Court that this newly discovered evidence puts the failure to disclose the existence of Mr. Mason in an entirely different light because if Judge Bongiovanni would have disclosed that he knew Mason, he would have been incriminating himself on the record in -- with respect to the very Federal proceedings that were pending against him.

Our argument, Your Honor, is that when you have circumstances like that, the risk of bias is so great that there are certain circumstances where you can presume that a judge is biased because the risk is too great because he couldn't have been candid on the record without incriminating himself in the Federal investigation. I think that's a very important point, and it's based upon newly discovered evidence.

As to the Brady arguments, I'll submit that to the Court. If the Court looks at all these coincidences, I think there's one too many coincidences here just to blow this off and to say that these dispositions were something that occurred normally. If you look at them all together, it shows that they were not done normally.

Very briefly on ineffective assistance of trial counsel. He talked about the 1996 standards. Your Honor,

those are the same standards we're under today which are the ABA model guidelines from 1989. They were applied in Wiggins v. Smith which is a 2003 case to a 1989 case. That's – and now we got a 1996 case.

So the standards are the same. You got to do a reasonable investigation. You can't start your sentencing investigation two weeks before trial starts and expect something comprehensive to turn up.

Mr. Owens argues that we're arguing that we should just get another expert. I'm not arguing that. I'm saying that you should have sufficiently prepared the experts you chose. I'm not saying you go out and get ten experts, just that you just need to prepare the ones that you chose.

We talked about the sexual abuse of the sisters. I have not alleged that Mr. Rippo was sexually abused by his stepfather, but what I would submit to the Court is when you look at someone's social history, the fact that something like that is going on in the family is a significant topic that's worthy of discussion by a psychologist because you know that affects the dynamics of a family when some of the family members are being sexually abused. So we would argue that that still is relevant mitigation evidence.

And one last point, Your Honor, and then I'll be

finished. As to this Roper argument, the State has argued that there's no supporting authority. We did have a chance to cite to the Court in the petition some Federal cases where the Federal courts refused to adjudicate someone as a habitual criminal because of priors that were committed when they were a juvenile.

What we're arguing is, is that that has even more force when you're talking about the death penalty because there's a lot more at stake in a death penalty case than a habitual criminal adjudication. If those courts are right where they say you can't adjudicate someone as a habitual criminal for conduct that occurred when they were a juvenile, then certainly that that – that holding should carry over into the death penalty context, and I don't think there's any tension – or any extension of new authority just to say that that's what the law is with respect to Roper.

Thank you.

THE COURT: Other than what's been submitted as essentially the opposition to the State's motion to dismiss as well as the motion for leave to conduct discovery, there wasn't anything else that you wanted to add on the right to conduct discovery.

MR. ANTHONY: No.

THE COURT: Do you understand?

MR. ANTHONY: I think –

THE COURT: I mean they're sort of derivative. We can overcome some of these procedural bars by conducting discovery. We'll figure what we want to do. But they're kind of intertwined.

MR. ANTHONY: Our contention is that they're related, and as this Court looks at the motion to dismiss and as the Court looks at our motion for leave to conduct discovery, the Court can see where we're going, what we're looking for, and why that would establish prejudice. So we would argue that those are interrelated.

THE COURT: All right. I'm going to take the matter under advisement. It will stand submitted at this point.

Are there upcoming dates on the Federal one?

MR. ANTHONY: We have a response due to the Federal petition actually this week, but to be honest with you, Your Honor, I imagine that the Nevada Attorney General's office might be seeking another extension. That's just my guess. So we don't have anything imminent coming up.

THE COURT: All right. Thank you.

MR. ANTHONY: Thank you.

MR. OWENS: Thanks, Judge.

So it's just under advisement then, no date?

THE COURT: Yeah, no date. No date.

MR. OWENS: We'll be notified by minute order or something or –

THE COURT: We'll go off the record.

* * *

ATTEST: Full, true, and accurate transcript.

Angela K Lee

ANGELA K. LEE, CCR #789

CRIMINAL COURT MINUTES

92-C-106784-C STATE OF NEVADA vs Rippo, Michael D

CONTINUED FROM PAGE: 059

10/27/08 08:00 AM 00 MINUTE ORDER RE: DESISION: STATE'S MTN TO DISMISS & DEFT'S MTN FOR DISCOVERY

HEARD BY: David Wall, Judge; Dept. 20

OFFICERS: Carol Foley, Court Clerk

PARTIES: NO PARTIES PRESENT

This matter having come before the Court on September 22, 2008, on the State's Motion to Dismiss and Michael Rippo's Motion for Leave to Conduct Discovery, Steven Owens. Esq., appearing on behalf of the State, and David Anthony, Esq., appearing on behalf of Mr.. Rippo, his presence having been waived, and the Court having heard argument and having taken the matter under advisement, hereby finds as follows:

Mr. Rippo's instant Petition for Writ of Habeas Corpus, filed January 15, 2008, is procedurally time-barred under NRS 34.276, which requires dismissal absent good cause for the delay and a showing of prejudice. Additionally, for certain claims, the petition is barred by NRS 34.810(2) as a successive petition, addressing issues previously raised on direct appeal or in prior post-conviction proceedings (or an appeal therefrom) and/or address issues for which the controlling law of the case has been determined previously (claims 1, 2, 3, 5, 7, 9, 12, 13, 15, 16, 17, 19 & 21).

The Court finds certain claims are barred under NRS 34.810(1)(b) as successive as the issues could have been raised on direct appeal or in a prior petition for post-conviction relief or an appeal therefrom (claims 2, 4, 6, 8, 10, 11, 14, 18, & 20). The Court finds that Mr. Rippo has failed to establish good cause for failing to present these claims in any earlier proceeding, and has failed to establish actual prejudice.

Further, the Court finds that certain issues raised by Mr. Rippo are not cognizable in this post-conviction petition (claim 22).

Based on the foregoing, the State's Motion to Dismiss the Petition is hereby GRANTED. Mr. Rippo's Motion for Leave to Conduct Discovery is DENIED as moot. Counsel for the State is directed to prepare the appropriate Findings of Fact, Conclusions of Law and Order consistent with the foregoing.

CLERK'S NOTE: A copy of this minute order to be placed in the attorney folder(s) of Mr. Owens and Mr. Anthony.

David Anthony - AFPD

ORDR

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MICHAEL DAMON RIPPO,
#0619119

Defendant.

CASE NO: C106784

DEPT NO: XX

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 9/22/08
TIME OF HEARING: 8:30 A.M.

THIS CAUSE having come on for hearing before the Honorable DAVID T. WALL, District Judge, on the 22nd day of September, 2008, on the State's Motion to Dismiss and Michael Damon Rippo's Motion for Leave to Conduct Discovery, STEVEN S. OWENS, ESQ., appearing on behalf of the State, and DAVID ANTHONY, ESQ., appearing on behalf of Mr. Rippo, his presence having been waived, and the Court having heard argument and having taken the matter under advisement, hereby finds as follows:

FINDINGS OF FACT

Mr. Rippo's instant Petition for Writ of Habeas Corpus, filed January 15, 2008, is procedurally time-barred under NRS 34.726, which requires dismissal absent good cause for the delay and a showing of prejudice. Additionally, for certain claims, the petition is barred by NRS 34.810(2) as a successive petition, addressing issues previously raised on direct

appeal or in prior post-conviction proceedings (or an appeal therefrom) and/or address issues for which the controlling law of the case has been determined previously (claims 1, 2, 3, 5, 7, 9, 12, 13, 15, 16, 17, 19 & 21).

The Court finds certain claims are barred under NRS 34.810(1)(b) as successive as the issues could have been raised on direct appeal or in a prior petition for post-conviction relief or an appeal therefrom (claims 2, 4, 6, 8, 10, 11, 14, 18, & 20). The Court finds that Mr. Rippo has failed to establish good cause for failing to present these claims in any earlier proceeding, and has failed to establish actual prejudice.

Further, the Court finds that certain issues raised by Mr. Rippo are not cognizable in this post-conviction petition (claim 22).

The record shows that more than a decade ago, Rippo's trial counsel knew and alleged that the State was involved in the Federal sting operation by indicting Terry Salem and manipulating the random assignment of the case and also that Bongiovanni failed to disclose a prior relationship with witness Denny Mason who was the business partner of reputed Buffalo mob associate Ben Spano. Accordingly, neither Brady nor ineffectiveness of post-conviction counsel constitutes good cause for re-arguing these ten-year old facts in a successive petition.

The record shows that Rippo's trial counsel was well aware that several witnesses had past or pending criminal cases against them and cross-examined regarding continuances, quashed bench warrants, and future benefits. Twelve years later, the various dispositions of such collateral cases are not new evidence of undisclosed inducements, but are consistent with the trial testimony that no benefits were given and that such cases would rise or fall on their own merit.

The State has never suppressed such case dispositions (which are a matter of public record), they are not favorable to the defense as either exculpatory or impeaching, and none of the allegations are material so as to undermine confidence in the verdict. None of the jailhouse informants have recanted their testimony that Rippo confessed to the murders. Accordingly, neither Brady nor ineffectiveness of post-conviction counsel constitutes good

cause for re-raising these claims where no new material facts are alleged and there is no reasonable probability of a different conviction or sentence for Rippo.

The Nevada Supreme Court's conclusion that the "evidence in mitigation was not particularly compelling" remains unaltered even in light of the additional mitigation witnesses and evidence now alleged by the defense. The "new" family history evidence is cumulative to what was already presented. Recent psychological testing fails to reveal any significant or persuasive diagnosis that would have compelled a verdict less than death. Given the strength of the State's case in aggravation which included the tortuous strangulation of two young women and Rippo's prior conviction for sexual assault, nothing new in mitigation alleged by the defense would have had a reasonable probability of altering the outcome of the case.

Any alleged intervening case authority fails to establish new grounds that were previously unavailable to Rippo, has no application to this case, or does not stand for the proposition alleged. Accordingly, intervening case authority does not provide good cause for the instant petition.

CONCLUSIONS OF LAW

"Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory." State v. Eighth Judicial Dist. Court, 121 Nev. 225, 112 P.3d 1070, 1074 (2005). Post-conviction habeas petitions that are filed several years after conviction unreasonably burden the criminal justice system. Id. "The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Id.

Under the mandatory provisions of NRS 34.726(1), absent a showing of good cause and prejudice, a defendant must file a petition that challenges the validity of a judgment or sentence within one year after entry of the judgment or if an appeal has been taken from the judgment, within one year after the Nevada Supreme Court issues its Remittitur.

NRS 34.810(2) requires dismissal of claims which could have been raised in earlier proceedings or which were raised in a prior petition or proceeding and determined on the merits unless the Court finds both good cause for failure to bring such issues previously and

actual prejudice to the defendant.

Once the State raises procedural grounds for dismissal, the burden then falls on the defendant "to show that good cause exists for his failure to raise any grounds in an earlier petition and that he will suffer actual prejudice if the grounds are not considered." Phelps v. Dir. of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

To establish good cause, a defendant must demonstrate that some impediment external to the defense prevented compliance with the mandated statutory default rules. Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). Even legitimate Brady claims are procedurally barred when the basis for the claim was known and it was either not brought in an earlier proceeding or within an applicable time bar. Hutchison v. Bell, 303 F.3d 720 (6th Cir. 2002).

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, 888, 34 P.3d 519, 538 (2001) (holding "[u]nder the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief"); Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996). 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 v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975). While law of the case may not apply where the facts are substantially different, law of the case "cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Hogan v. State, 109 Nev. 952, 959, 860 P.2d 710, 715 (1993).

In order to assert a claim for ineffective assistance of counsel, Defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-687, 104 S.Ct. 2052 (1984); Ennis v. State, 122 Nev. 694, 137 P.3d 1095, 1102 (2006). Under this test, Defendant must show: (1)

that his counsel's representation fell below an objective standard of reasonableness; and (2) that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-688 and 694, 104 S.Ct. at 2064; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada).

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, 502, 686 P.2d 222, 225 (1984). Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Id.

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. See also, Hill v. McDonough, 547 U.S. 573, 126 S.Ct. 2096 (2006).

Although Sharma applies to cases that became final before Sharma was decided in 2002, it does so not because it is a retroactive "new rule" but because it was held to be a "clarification" of the law. Mitchell v. State, 122 Nev. 1269, 149 P.3d 33 (2006). The distinction is critical because as a clarification of law, the basis for the claim was always available to Rippo and is now procedurally barred.

Although Polk v. Sandoval was published in 2007, the basis for the 9th Circuit's ruling was not new law but was Federal precedent decided decades earlier and which has always been available to Rippo. Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007). The Polk decision does not address retroactivity of Byford and the law of the case remains that Nevada's change in the premeditation/deliberation instruction has only prospective application. Garner v. State, 116 Nev. 770, 6 P.3d 1013 (2000). Furthermore, because of Rippo's conviction under a felony-murder theory, any error would be held harmless. Bridges v.

State, 116 Nev. 752, 6 P.3d 1000, 1008 (2000).

The validity of a prior conviction used for sentence enhancement may not be collaterally attacked in a subsequent offense. See e.g., U.S. v. Martinez-Martinez, 295 F.3d 1041 (9th Cir. 2002). Neither Roper v. Simmons nor U.S. v. Naylor hold that a prior juvenile crime of violence may not be used as an aggravating circumstance for a murder committed after the age of 18.

Blakely v. Washington 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." Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004). 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). Blakely does not support Defendant's position and neither Blakely nor Appendi are timely raised four and eight years, respectively, after they became law.

Only after a petition survives a motion to dismiss and claims are found warranting an evidentiary hearing may a party invoke discovery to the extent "good cause" is shown. NRS 34.780. Federal courts do not allow prisoners to use federal discovery for fishing expeditions to investigate mere speculation. Calderon v. United States District Court for the Northern District of California, 98 F.3d 1102, 1106 (1996). Only where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief, is the court under a duty to provide the necessary facilities and procedures for an adequate inquiry. McDaniel v. United States District Court For the District of Nevada, 127 F.3d 886, 888 (1997).

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ORDER

Based on the foregoing, the State's Motion to Dismiss the Petition is hereby GRANTED. Mr. Rippo's Motion for Leave to Conduct Discovery is DENIED as moot.

DATED this _____ day of November, 2008.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

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

OFFICE OF THE DISTRICT ATTORNEY
CRIMINAL APPEALS UNIT

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County Counsel

STEVEN S. OWENS
Chief Deputy

NANCY BECKER
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FACSIMILE TRANSMISSION

Fax No. (702) 382-5815

Telephone No. (702) 671-2750

TO: David Anthony FAX#: (702) 388-5819

FROM: Steven S. Owens

SUBJECT: Michael Rippo, C106784

DATE: November 17, 2008

David,
The following Findings will be submitted to Judge Wall on November 24, 2008.
Sincerely,
Steven S. Owens

NO. OF PAGES, EXCLUDING COVER PAGE: __7__
Please call (702) 671-2750 if there are any problems with transmission

OPPS
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Attorney for Petitioner

DISTRICT COURT,

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO Petitioner, vs. E.K. McDANIEL, et al. Respondents.	Case No. C106784 Dept No. XX

OBJECTION TO PROPOSED ORDER

Petitioner Michael Damon Rippo hereby objects to the proposed Findings of Fact, Conclusions of Law, and Order prepared by the State in connection with this Court's order dismissing Mr. Rippo's petition for writ of habeas corpus. This objection is made and based upon the transcript of the argument on the State's motion to dismiss, this Court's minute order, dated October 27, 2008, the State's proposed order, and the entire file herein.

Respectfully submitted this 21st day of November, 2008.

FRANNY A. FORSMAN
Federal Public Defender

David Anthony,
Assistant Federal Public Defender

I. Introduction

On October 27, 2008, this Court issued a minute order denying Mr. Rippo's petition for writ of habeas corpus in its entirety and denying his discovery motion without an evidentiary hearing. Ex. 1. On November 17, 2008, the State provided Mr. Rippo with a copy of its proposed Findings of Fact, Conclusion of Law and Order, Ex. 2, which it intends to provide to the Court. Pursuant to Byford v. State, 124 Nev. 67, 156 P.3d 691, 691 (2007) (citing NCJC Canon 3B(7)), Mr. Rippo hereby submits the following objections to the proposed order submitted by the State. Cf. Toner v. Babcock, 97 Nev. 369, 369, 632 P.2d 1140, 1140 (1981) (rehearing and reconsideration permitted before entry of order).

II. Argument

A. The Proposed Order's Finding that Post-Conviction Counsel was Effective is Irreconcilably Inconsistent with the Finding that the Claims in Mr. Rippo's Petition Could Have Been Raised in the First Post-Conviction Proceeding.

Mr. Rippo objects to the State's proposed order on the ground that this Court's finding that he cannot demonstrate good cause contradicts its finding that first post-conviction counsel could have raised the issues contained in the instant petition. The State's proposed order contains the following language from this Court's minute order, see Ex. 1, dated October 27, 2008:

> The Court finds that certain claims are barred under NRS 34.810(1)(b) as successive as the issues could have been raised on direct appeal or in a prior petition for post-conviction relief or on appeal therefrom (claims 2, 4, 6, 8, 10, 11, 14, 18 & 20). The Court finds that Mr. Rippo has failed to establish good cause for failing to present these claims in any earlier proceeding, and has failed to establish actual prejudice.

Ex. 2, at 2.[1] This Court's finding that the above listed claims "could have been raised" "in a prior petition for post-conviction relief" is irreconcilably inconsistent with its subsequent finding that "Mr. Rippo has failed to establish good cause for failing to present these claims in an earlier proceeding."

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[1]The State's proposed order also contains a finding that "the basis for the claim [under Mitchell v. State, 122 Nev. 1269, 149 P.3d 33 (2006)] was always available to Rippo and is now procedurally barred." Ex. 2, at 5 (lines 20-21). However, this finding supports Mr. Rippo's contention that first post-conviction counsel was ineffective in failing to raise a claim that direct appeal counsel was ineffective in failing to challenge the aiding and abetting instruction, as well as a substantive challenge to the instruction itself based on controlling authority that was available to post-conviction counsel. See Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

It is unclear from this Court's minute order whether it gave any consideration at all to Mr. Rippo's claim of ineffective assistance of post-conviction counsel; however, assuming that it did as required by the law, this Court cannot conclude that (1) counsel's performance was not deficient when (2) he could have raised the issues listed above but failed to do so. When the State argued at the hearing that Mr. Rippo's allegations of ineffective assistance of trial counsel "should have been raised in the first post-conviction," Ex. 3, at 10, Mr. Rippo explained that "that's exactly our argument, it could have been raised previously, and it would have been raised previously if Mr. Rippo would have received effective assistance from his post-conviction attorney." Id. at 26. The State acknowledged at the hearing that "the law says that there has to be an impediment external to the defense. I think that is the fact that counsel was appointed under the law. Therefore, that's consistent, that post-conviction counsel was the stumbling block that prevented them from getting it because counsel wasn't performing as the constitutionally mandated counsel." Id. at 52. Therefore, as the State itself acknowledged at the hearing, by showing that post-conviction counsel's performance was deficient, Mr. Rippo can show good cause to overcome the state procedural default rules.

The hearing transcript establishes that there was never any dispute that post-conviction counsel's performance was deficient since he never attempted any investigation of facts outside of the record on direct appeal and failed to even include relevant citations to the trial record and to attach any exhibits to the petition. As Mr. Rippo explained at the hearing, there was no dispute (1) that Mr. Rippo was entitled to effective assistance of post-conviction counsel, (2) that his allegations of ineffective assistance of post-conviction counsel were raised in a timely manner, and (3) that counsel was ineffective for failing to conduct any pretense of an investigation in Mr. Rippo's case. See Ex. 3, at 16-18. As Mr. Rippo argued at the hearing, there was no dispute as to whether post-conviction counsel's performance was deficient, the only point of contention was whether he suffered prejudice from counsel's ineffectiveness:

> The next issue that needs to be resolved is whether post-conviction counsel's performance was deficient, and this is an issue again where the State hasn't proffered any contrary argument on this point.

> Our argument is this: That first post-conviction counsel was ineffective because he failed to basically do any research outside of the record on direct appeal.
>
> As the Court is aware, post-conviction proceedings, the whole purpose for having them is to have investigation that goes outside of the record on direct appeal, to look for issues of potential Brady violations, or any other constitutional issues you can't tell from the record itself. And that's where we submit that counsel was deficient. Counsel didn't do any investigation. Counsel didn't attach any exhibits to their petition.
>
> We allege that by failing to do any sort of investigation, that counsel was deficient, and I don't think that the State has posed any contrary arguments to say that there's a strategy in not doing any investigation, and I don't think they could make that argument with a straight face.
>
> So what we're left with, Your Honor, is that we're left with whether or not Mr. Rippo was prejudiced from post-conviction counsel's ineffectiveness, and what that takes us back to is that takes us to the merits of the claims themselves because if we can show that the claims have merit, we can – we can in essence step into post-conviction counsel's shoes, and we can litigate the issues that he would have litigated if he would have performed effectively.
>
> And my understanding from the way the State has argued this particular case is we look to the merits of the claims in the petition to see whether or not we can overcome the procedural bars, and that's why we're talking about the merits.

Ex. 3, at 17-19. The remaining arguments by the parties focused exclusively on whether Mr. Rippo could show that his claims had merit in order to establish prejudice to overcome the state procedural default rules.

Assuming that this Court applied controlling law and actually considered Mr. Rippo's allegations of ineffective assistance of post-conviction counsel, see, e.g., Crump v. Warden, 113 Nev. 293, 304-05, 934 P.2d 247, 253-54 (1997), this Court cannot conclude both that Mr. Rippo's claims (1) could have been raised in the first post-conviction proceeding, but that (2) he cannot show deficient performance by counsel in order to establish good cause. Mr. Rippo recognizes that this Court need not address the issue of post-conviction counsel's deficient performance if it concludes as a matter of law that he suffered no resulting prejudice. See Strickland v. Washington, 466 U.S. 668, 697 (1984) ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."). Given that the only dispute between the parties concerned the issue of prejudice, see generally Ex. 3, this Court cannot conclude in the procedural posture of a motion to dismiss that post-conviction counsel was

effective, particularly because counsel can never have a strategic justification for failing to conduct any investigation at all. 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."). Mr. Rippo therefore requests that this Court delete the language from the proposed order finding that he cannot establish good cause when the uncontradicted evidence in the record establishes that post-conviction counsel's performance was deficient.

B. Mr. Rippo Objects to the Language in the Proposed Order Which is Based Upon Misstatements of Facts and Law

Pages two through six of the State's proposed order contain findings which are not contained in this Court's minute order. These findings appear to be lifted from State's reply to the motion to dismiss, and they must be scrutinized by this Court to determine whether they reflect the Court's actual intent. Mr. Rippo specifically objects to the following language contained in the proposed order:

1. Mr. Rippo objects to the proposed finding that trial counsel were aware of the State's involvement in the sting operation of Judge Bongiovanni, Ex. 2, at 2 (lines 11-17), because this finding constitutes a clear misstatement of the pertinent facts in the record. This language is derived from the State's reply to the motion to dismiss. See Reply at 2. At the hearing on the motion, Mr. Rippo specifically took issue with the State's assertion that trial counsel were aware of the State's role in the federal investigation. See Ex. 3, at 22-24, 59-60. Mr. Rippo pointed out that this assertion was repelled by the record which demonstrates that trial counsel had no knowledge of the State's involvement, and that trial counsel were actively misled by both the State and the trial court on this issue. See 2/5/96 TT at 4-11. Because this Court refused to authorize discovery or an evidentiary hearing to resolve any purported disputed issues of fact, this Court cannot conclude on the current record that trial counsel were aware of the State's involvement in the investigation of the trial judge when the record shows the exact opposite. Mr. Rippo therefore requests that this Court delete the language in the proposed order which is based upon a misstatement of the facts.

2. Mr. Rippo objects to the language in the proposed order that "[t]he validity of a prior conviction used for a sentence enhancement may not be collaterally attacked in a subsequent offense." Ex. 2, at 6 (lines 2-6). This language is not contained in any of the prior pleadings or in this Court's minute order. This statement is contrary to controlling state law which provides that "a defendant must be allowed to challenge the constitutional sufficiency of a prior judgment of conviction in any proceeding where that judgment is offered for enhancement purposes." Dressler v. State, 107 Nev. 686, 692, 819 P.2d 1288, 1292 (1991).[2] The case cited by the State, United States v. Martinez-Martinez, 295 F.3d 1041 (9th Cir. 2002), is based upon Custis v. United States, 511 U.S. 485 (1994), and Custis has been expressly rejected by the Nevada Supreme Court:

> the State argues that review of [the defendant's] prior convictions should be limited in light of the United States Supreme Court's decision in Custis v. United States, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994). However, we decline this opportunity to adopt such a strict rule limiting collateral attacks and note that we are not bound by the Custis decision as it involved a federal sentencing law not at issue here and merely establishes the floor for federal constitutional purposes as to when collateral attacks of prior convictions may be prohibited.

Paschall v. State, 116 Nev. 911, 913 n.2, 8 P.3d 851, 852 n.2 (2000). Mr. Rippo therefore requests that this Court delete the above language from the proposed order as contrary to controlling law.

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[2]See also Dressler, 107 Nev. at 694 n.3, 819 P.2d at 1293 n.3 ("a defendant must be afforded an opportunity in any proceeding in which a prior judgment of conviction is offered for enhancement purposes to challenge the constitutional validity of the prior conviction.").

III. Conclusion

For the foregoing reasons, Mr. Rippo respectfully requests that this Court delete the language discussed above from the State's proposed order. Given the arguments and the positions of the parties at the hearing, this Court's denial of Mr. Rippo's petition must necessarily have been based upon an absence of a showing of prejudice to overcome the procedural default bars, and not based upon a finding that post-conviction counsel was effective. Mr. Rippo further requests that this Court delete the misstatements of fact and law discussed above from the proposed order.

DATED this 21st day of November, 2008.

FRANNY A. FORSMAN
Federal Public Defender

By _____
David Anthony,
Assistant Federal Public Defender

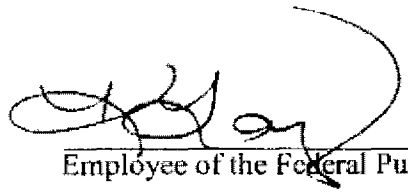
Attorney for Petitioner

CERTIFICATE OF SERVICE

In accordance with Rule 5(b) of the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on the 21st day of November, 2008, a true and correct copy of the foregoing **OBJECTION TO PROPOSED ORDER** was deposited in the United States mail, first class postage prepaid, addressed to counsel as follows:

Catherine Cortez Masto
Attorney General
Heather Procter
Deputy Attorney General
Criminal Justice Division
100 North Carson Street
Carson City, Nevada 89701-4717

David Roger, Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155



Employee of the Federal Public Defender

Exhibit 1

CRIMINAL COURT MINUTES

92-C-106784-C STATE OF NEVADA vs Rippo, Michael D

CONTINUED FROM PAGE: 059

10/27/08 08:00 AM 00 MINUTE ORDER RE: DESISION: STATE'S MTN TO DISMISS & DEFT'S MTN FOR DISCOVERY

HEARD BY: David Wall, Judge; Dept. 20

OFFICERS: Carol Foley, Court Clerk

PARTIES: NO PARTIES PRESENT

This matter having come before the Court on September 22, 2008, on the State's Motion to Dismiss and Michael Rippo's Motion for Leave to Conduct Discovery, Steven Owens. Esq., appearing on behalf of the State, and David Anthony, Esq., appearing on behalf of Mr.. Rippo, his presence having been waived, and the Court having heard argument and having taken the matter under advisement, hereby finds as follows:

Mr. Rippo's instant Petition for Writ of Habeas Corpus, filed January 15, 2008, is procedurally time-barred under NRS 34.276, which requires dismissal absent good cause for the delay and a showing of prejudice. Additionally, for certain claims, the petition is barred by NRS 34.810(2) as a successive petition, addressing issues previously raised on direct appeal or in prior post-conviction proceedings (or an appeal therefrom) and/or address issues for which the controlling law of the case has been determined previously (claims 1, 2, 3, 5, 7, 9, 12, 13, 15, 16, 17, 19 & 21).

The Court finds certain claims are barred under NRS 34.810(1)(b) as successive as the issues could have been raised on direct appeal or in a prior petition for post-conviction relief or an appeal therefrom (claims 2, 4, 6, 8, 10, 11, 14, 18, & 20). The Court finds that Mr. Rippo has failed to establish good cause for failing to present these claims in any earlier proceeding, and has failed to establish actual prejudice.

Further, the Court finds that certain issues raised by Mr. Rippo are not cognizable in this post-conviction petition (claim 22).

Based on the foregoing, the State's Motion to Dismiss the Petition is hereby GRANTED. Mr. Rippo's Motion for Leave to Conduct Discovery is DENIED as moot. Counsel for the State is directed to prepare the appropriate Findings of Fact, Conclusions of Law and Order consistent with the foregoing.

CLERK'S NOTE: A copy of this minute order to be placed in the attorney folder(s) of Mr. Owens and Mr. Anthony.

David Anthony AFPD

EXHIBIT 2

ORDR
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MICHAEL DAMON RIPPO,
#0619119

Defendant.

CASE NO: C106784
DEPT NO: XX

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 9/22/08
TIME OF HEARING: 8:30 A.M.

THIS CAUSE having come on for hearing before the Honorable DAVID T. WALL, District Judge, on the 22nd day of September, 2008, on the State's Motion to Dismiss and Michael Damon Rippo's Motion for Leave to Conduct Discovery, STEVEN S. OWENS, ESQ., appearing on behalf of the State, and DAVID ANTHONY, ESQ., appearing on behalf of Mr. Rippo, his presence having been waived, and the Court having heard argument and having taken the matter under advisement, hereby finds as follows:

FINDINGS OF FACT

Mr. Rippo's instant Petition for Writ of Habeas Corpus, filed January 15, 2008, is procedurally time-barred under NRS 34.726, which requires dismissal absent good cause for the delay and a showing of prejudice. Additionally, for certain claims, the petition is barred by NRS 34.810(2) as a successive petition, addressing issues previously raised on direct

appeal or in prior post-conviction proceedings (or an appeal therefrom) and/or address issues for which the controlling law of the case has been determined previously (claims 1, 2, 3, 5, 7, 9, 12, 13, 15, 16, 17, 19 & 21).

The Court finds certain claims are barred under NRS 34.810(1)(b) as successive as the issues could have been raised on direct appeal or in a prior petition for post-conviction relief or an appeal therefrom (claims 2, 4, 6, 8, 10, 11, 14, 18, & 20). The Court finds that Mr. Rippo has failed to establish good cause for failing to present these claims in any earlier proceeding, and has failed to establish actual prejudice.

Further, the Court finds that certain issues raised by Mr. Rippo are not cognizable in this post-conviction petition (claim 22).

The record shows that more than a decade ago, Rippo's trial counsel knew and alleged that the State was involved in the Federal sting operation by indicting Terry Salem and manipulating the random assignment of the case and also that Bongiovanni failed to disclose a prior relationship with witness Denny Mason who was the business partner of reputed Buffalo mob associate Ben Spano. Accordingly, neither Brady nor ineffectiveness of post-conviction counsel constitutes good cause for re-arguing these ten-year old facts in a successive petition.

The record shows that Rippo's trial counsel was well aware that several witnesses had past or pending criminal cases against them and cross-examined regarding continuances, quashed bench warrants, and future benefits. Twelve years later, the various dispositions of such collateral cases are not new evidence of undisclosed inducements, but are consistent with the trial testimony that no benefits were given and that such cases would rise or fall on their own merit.

The State has never suppressed such case dispositions (which are a matter of public record), they are not favorable to the defense as either exculpatory or impeaching, and none of the allegations are material so as to undermine confidence in the verdict. None of the jailhouse informants have recanted their testimony that Rippo confessed to the murders. Accordingly, neither Brady nor ineffectiveness of post-conviction counsel constitutes good

cause for re-raising these claims where no new material facts are alleged and there is no reasonable probability of a different conviction or sentence for Rippo.

The Nevada Supreme Court's conclusion that the "evidence in mitigation was not particularly compelling" remains unaltered even in light of the additional mitigation witnesses and evidence now alleged by the defense. The "new" family history evidence is cumulative to what was already presented. Recent psychological testing fails to reveal any significant or persuasive diagnosis that would have compelled a verdict less than death. Given the strength of the State's case in aggravation which included the tortuous strangulation of two young women and Rippo's prior conviction for sexual assault, nothing new in mitigation alleged by the defense would have had a reasonable probability of altering the outcome of the case.

Any alleged intervening case authority fails to establish new grounds that were previously unavailable to Rippo, has no application to this case, or does not stand for the proposition alleged. Accordingly, intervening case authority does not provide good cause for the instant petition.

CONCLUSIONS OF LAW

"Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory." State v. Eighth Judicial Dist. Court, 121 Nev. 225, 112 P.3d 1070, 1074 (2005). Post-conviction habeas petitions that are filed several years after conviction unreasonably burden the criminal justice system. Id. "The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Id.

Under the mandatory provisions of NRS 34.726(1), absent a showing of good cause and prejudice, a defendant must file a petition that challenges the validity of a judgment or sentence within one year after entry of the judgment or if an appeal has been taken from the judgment, within one year after the Nevada Supreme Court issues its Remittitur.

NRS 34.810(2) requires dismissal of claims which could have been raised in earlier proceedings or which were raised in a prior petition or proceeding and determined on the merits unless the Court finds both good cause for failure to bring such issues previously and

actual prejudice to the defendant.

Once the State raises procedural grounds for dismissal, the burden then falls on the defendant "to show that good cause exists for his failure to raise any grounds in an earlier petition and that he will suffer actual prejudice if the grounds are not considered." Phelps v. Dir. of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

To establish good cause, a defendant must demonstrate that some impediment external to the defense prevented compliance with the mandated statutory default rules. Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). Even legitimate Brady claims are procedurally barred when the basis for the claim was known and it was either not brought in an earlier proceeding or within an applicable time bar. Hutchison v. Bell, 303 F.3d 720 (6th Cir. 2002).

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, 888, 34 P.3d 519, 538 (2001) (holding "[u]nder the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief"); Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996). 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 v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975). While law of the case may not apply where the facts are substantially different, law of the case "cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Hogan v. State, 109 Nev. 952, 959, 860 P.2d 710, 715 (1993).

In order to assert a claim for ineffective assistance of counsel, Defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-687, 104 S.Ct. 2052 (1984); Ennis v. State, 122 Nev. 694, 137 P.3d 1095, 1102 (2006). Under this test, Defendant must show: (1)

that his counsel's representation fell below an objective standard of reasonableness; and (2) that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-688 and 694, 104 S.Ct. at 2064; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada).

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, 502, 686 P.2d 222, 225 (1984). Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Id.

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. See also, Hill v. McDonough, 547 U.S. 573, 126 S.Ct. 2096 (2006).

Although Sharma applies to cases that became final before Sharma was decided in 2002, it does so not because it is a retroactive "new rule" but because it was held to be a "clarification" of the law. Mitchell v. State, 122 Nev. 1269, 149 P.3d 33 (2006). The distinction is critical because as a clarification of law, the basis for the claim was always available to Rippo and is now procedurally barred.

Although Polk v. Sandoval was published in 2007, the basis for the 9th Circuit's ruling was not new law but was Federal precedent decided decades earlier and which has always been available to Rippo. Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007). The Polk decision does not address retroactivity of Byford and the law of the case remains that Nevada's change in the premeditation/deliberation instruction has only prospective application. Garner v. State, 116 Nev. 770, 6 P.3d 1013 (2000). Furthermore, because of Rippo's conviction under a felony-murder theory, any error would be held harmless. Bridges v.

State, 116 Nev. 752, 6 P.3d 1000, 1008 (2000).

The validity of a prior conviction used for sentence enhancement may not be collaterally attacked in a subsequent offense. See e.g., U.S. v. Martinez-Martinez, 295 F.3d 1041 (9th Cir. 2002). Neither Roper v. Simmons nor U.S. v. Naylor hold that a prior juvenile crime of violence may not be used as an aggravating circumstance for a murder committed after the age of 18.

Blakely v. Washington 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." Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004). 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). Blakely does not support Defendant's position and neither Blakely nor Appendi are timely raised four and eight years, respectively, after they became law.

Only after a petition survives a motion to dismiss and claims are found warranting an evidentiary hearing may a party invoke discovery to the extent "good cause" is shown. NRS 34.780. Federal courts do not allow prisoners to use federal discovery for fishing expeditions to investigate mere speculation. Calderon v. United States District Court for the Northern District of California, 98 F.3d 1102, 1106 (1996). Only where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief, is the court under a duty to provide the necessary facilities and procedures for an adequate inquiry. McDaniel v. United States District Court For the District of Nevada, 127 F.3d 886, 888 (1997).

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ORDER

Based on the foregoing, the State's Motion to Dismiss the Petition is hereby GRANTED. Mr. Rippo's Motion for Leave to Conduct Discovery is DENIED as moot.

DATED this _____ day of November, 2008.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

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

EXHIBIT 3

TRAN

CASE NO. C106784

DEPT. NO. XX

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

THE STATE OF NEVADA,

Plaintiff,

vs.

MICHAEL D. RIPPO,

Defendant.

REPORTER'S TRANSCRIPT
OF
HEARING

BEFORE THE HON. DAVID T. WALL, DISTRICT COURT JUDGE
MONDAY, SEPTEMBER 22, 2008
8:30 a.m.

APPEARANCES:

For the Plaintiff: STEVEN S. OWENS, ESQ.
Deputy District Attorney

For the Defendant: DAVID S. ANTHONY, ESQ.
Federal Public Defender

Reported by: Angela K. Lee, CCR #789

LAS VEGAS, CLARK COUNTY, NEVADA
MONDAY, SEPTEMBER 22, 2008
8:30 a.m.

* * *

PROCEEDINGS

THE COURT: All right. This is C106784. Appearances for the record.

MR. ANTHONY: Good afternoon, Your Honor. David Anthony from the Federal Public Defender's office.

THE COURT: It's still morning.

MR. ANTHONY: What's that?

THE COURT: It's still morning.

MR. ANTHONY: Oh, it's still morning. Good morning.

MR. OWENS: He's just anticipating how long it might be. Steve Owens for the State of Nevada.

THE COURT: All right. And waive his presence today, Mr. Rippo's presence today?

MR. ANTHONY: Yes, Your Honor.

THE COURT: All right. It's on for the State's motion to dismiss the petition to leave to conduct additional discovery. In some respects they're connected, the issues, but the motion to dismiss was actually filed first, so, Mr. Owens, do you wish to be heard?

MR. OWENS: Sure. This is a capital murder

case, Judge, two deceased victims. The defendant was sentenced to death. There was six aggravators total when the verdict came back. Those have since been reduced down.

But there was a first post-conviction petition. Trial counsel by the way was Phil Dunleavy and Steve Wolfson. There was a first trial -- first post-conviction petition in 1998. Took a few years to work its way through that.

There was an evidentiary hearing. Phil Dunleavy, Steve Wolfson, and appellate counsel, David Schieck, all testified at that hearing in 2004 over two days of evidentiary hearing in front of Judge Mosley, and the petition was denied in 2004.

It was affirmed on appeal in '06, and it's at that time that the Nevada Supreme Court applied the new McConnell case and struck half the aggravators, the three felony aggravators, leaving us still with three. They did conduct a harmless error analysis and said it would not have affected the jury's death verdict.

Rehearing was denied. Remittitur issued. They went to Federal Court, and fairly quickly they got back here on the instant second State habeas petition.

There are three procedural bars that we argue apply. The first is the one-year time bar, and that's from issuance of remittitur following direct appeal. I don't

have the actual date of issuance of remittitur, but I know that cert was denied in October of '98.

THE COURT: November 5th, 1998, I think is right.

MR. OWENS: November 5th of '98 remittitur issues, and so any petition filed after that, one year after that date, would technically be barred under the one-year time bar absent showing a good cause and prejudice.

The current petition is also procedurally barred under 34.810 because it's a successive petition. You're only supposed to have one bite at the apple, one chance to raise all your post-conviction issues. And there's very limited circumstances under which you can file a new second petition.

In a capital case you can on occasion show good cause and prejudice by asserting such things as actual innocence or ineffective assistance of post-conviction counsel because they're entitled to post-conviction counsel on a capital case. So there's all sorts of good causes and prejudice which are really the subject of -- of the argument here today.

There's also a third time bar, the five-year time bar. I think that runs from a couple of different dates, but from conviction I think is one of the dates.

Anyway, we're well past five years.

And there's a presumption of prejudice to the State, prejudice in terms of having to retry this should the petition be granted at this point which is now some 12 years after the first trial. Prejudice also in terms of conducting an evidentiary hearing or responding to the claims and coming up with answers for things that they're alleging happened 10, 12 years ago.

It's been a long time, memories have faded, and we don't have anyone with percipient knowledge really of what was going on there. And it's hard to reconstruct things. That's why we have these procedural bars. They want to get all these claims done and out of the way early on in the case. So I have alleged application of all three bars and that they have not shown good cause or prejudice.

I note that there are some -- I went down through the claims, not just stopping at a -- a summary argument that they're procedurally barred, but I actually go through the merits of the claims, at least insofar as to show there is no good cause or prejudice from the bar.

The first issue they raise was the -- showing the bias of Judge Bongiovanni due to Nevada's involvement in the Federal investigation. It's my argument that is an old claim. That is nothing new that trial counsel wasn't aware of and already raised.

Right after the trial there was a motion for new trial, and that was heard not in front of Bongiovanni, but in front of a different judge. I forget who it was right now. But a separate judge heard the motion for new trial – Judge Brennan – and denied it, and then that was also the subject of the direct appeal. Those issues were worked into the direct appeal.

And both things now that the Federal PD is claiming that they just recently discovered in the Federal investigation are contained in the pleadings of what trial counsel knew back in 1996 was that motion for new trial and that subsequent appeal. Number one, that the DA – their allegation is that the DA misrepresented it was not involved in the investigation; and, number two, that Bongiovanni misrepresented that he did not know Denny Mason.

Both of those facts were known to defense counsel in 1996 through the Federal investigation. They said we've got Federal documents from the Federal investigation showing that the State was privy to or took part in this random -- manipulation of the random assignment of cases.

Now for me to come back 12 years later and try to sort all that out and explain it, I don't know that I can do that because I wasn't here, and I don't know exactly

everything that happened.

What I do know is that they knew since 1996 about these allegations, and they can't just sit back and then 12 years later ask for a hearing on the merits on it and ask for an evidentiary hearing to flush all this out where the basis of the claim is available to them. And they knew about it. They can't sit back and delay in bringing it.

And so it's my position they have no good cause for explaining why they've delayed in bringing it, and we don't even need to reach the prejudice prong at this point on prejudice in going back and trying to reconstruct exactly what happened.

Claim 2 they say is a Brady violation, failure to correct false testimony and pattern of misconduct. There were several witnesses who testified. They were cross-examined by the defense at trial about whether or not they were receiving inducements. Further testimony.

Some of these witness have went back and forth on redirect, re-recross, back and forth several times examining them, are you sure you don't expect to get any benefit here, and the witnesses all said no, other than Diana Hunt, a codefendant, who said I agreed that I pled guilty to robbery, and I agreed to give testimony. That was elicited.

But there's other witnesses in Thomas Simms and Michael Beaudoin and a Thomas Christos who the Federal PD is now saying that they had inducements given to them, and their evidence of inducements come from publicly available documents from Justice Court and/or District Court showing that these witnesses had other cases, all of which was known at the time of trial. They were cross-examined on that, the fact that they had pending cases or that they had cases in the past.

And the Federal Public Defender is saying that, well, because, like, for instance, Thomas Simms, because he got a continuance in 1993 on his drug case, well, the trial here was '96. But because he got a continuance on one date, that's – three years before trial, that's an indication he got some inducement in exchange for his testimony.

People get plea bargains all the time, and they get continuances all the time, and they have cases dismissed all the time, and it's not tied to testimony. There's nothing to indicate that that continuance had anything to do with and was something that was granted -- offered by the State in exchange for his cooperation.

Likewise, they point out reduced charges on a possession of marijuana case in 1993. Again, three years before the trial Thomas Simms had a marijuana case that was

reduced down. Every marijuana case is reduced down. That's not an indication that there was some inducement.

Likewise, battery domestic violence cases were dismissed in '93 and '94. I don't know why those were dismissed, but they get dismissed all the time if the victim doesn't show up.

I am prejudiced now from going back to '93 and '94. That is quite a long time – 12, 14 years ago – trying to find -- and we don't have these cases anymore; they've all been destroyed -- trying to find out the actual reasons of why a particular case was destroyed. I shouldn't have to.

They have the burden of showing good cause and prejudice to overcome the procedural bar, not me, and they can't show good cause why they are just now coming forward with these public documents, public records, of other cases that these witnesses had that have always been available to them, and the outcome alone is not a sufficient allegation to tie it and link it to some bargain or inducement in exchange for testimony.

Likewise, if some of the witnesses had pending cases that two or three years after trial were dismissed or were resolved in some way, that doesn't undermine the trial testimony that they weren't expecting any favor, they weren't offered any favor, they weren't going to get any

favor.

The fact that somewhere down the road their cases were resolved is entirely consistent with the trial testimony. They're missing that – that link to show that there was some sort of inducement or delay. What they're going on is that there was some delayed bargain. We're going to – we can tell the jury that there is no inducement, and then we'll take care of you down the road.

That's the allegation they're making, and the fact that they simply show a case was resolved afterwards does not merit that kind of look and examination now 12 years after the fact.

They claim ineffective assistance in investigating and presenting mitigating evidence. Well, that's a claim that should have been raised on first post conviction, and I believe it was in part. They've now got some additional allegations here of what the defense attorneys could have done in mitigation.

There was no impediment external to the defense that prevented them from coming forward with this much sooner than some ten years now after the trial for the first time, ten years afterwards saying, look, there's additional family members that could have been called and friends that could have been called. Those were all within the unique knowledge of the defendant. He knows who his

family and friends are. The State didn't prevent him from raising that.

And I've read through what all those witnesses would purportedly say. I don't see it being as too terribly – I don't see it as being much more or very much different than what was already presented at trial. The witnesses are basically saying about the same thing, that Rippo had a stepfather who died early in his life and that the stepfather was – would demean women in front of Rippo, and he was too hard on Rippo, and he had these challenges to overcome.

I don't see them saying much of anything different that the jury didn't already hear, and so I characterize it as simply cumulative. Yes, they have new witnesses that weren't called. Yes. Would they have said anything very much different? No. And if it wouldn't – if it's not substantial enough to change the outcome of the case, then they can't overcome the procedural bars.

They have to show good cause why they're just now coming up with this new mitigation evidence and prejudice, that if they had been allowed to put on all of this additional mitigation, that it would have affected the outcome, that the jury probably wouldn't have voted for death.

The Supreme Court has conducted harmless error

analysis once before on this case on the death penalty, and they did it in the context of McConnell. They took away three of our aggravators, and they still said the case – the State's case was so compelling here with two women strangled and tortured with a stun gun and a prior crime of violence, sexual assault on a woman who Rippo let live, who he had also strangled in the same way, almost to the point that she passed out, and used a stun gun on her.

That is damning evidence in front of a jury, and there's very little in the way of mitigation evidence that they're going to be able to come up with now to show that the result would have been different had they just added another family member or two in there or another friend or some other witness.

I think those are their main claims that they're going after. Most the others seem fairly – fairly stock, and I've responded to them. I don't know if the Court wants me to go piece by piece through every single thing. I can do so. But I think our analysis in the briefs is fairly adequate.

And, again, they're mostly going on these first two or three claims, so I am going to submit it at this point on that argument and let them respond at this time.

THE COURT: All right. Anything you want to add to Claim No. 22 about lethal injection?

MR. OWENS: I can talk about lethal injection. Absolutely. That was resolved in my mind by the U.S. Supreme Court recently in Baze v. Rees. My primary contention here is that we don't need to get into the merits of it. This has been my argument all along. We've never had a case go up where I had a final ruling on it by the Nevada Supreme Court.

But my position is this claim can't be raised in post conviction because the judgment of conviction is always going to say that he's convicted of murder and sentenced to death by lethal injection. No matter what we do with that, we can't affect and change the behavior of the – or the discretion of the director of prisons. He's the one charged with how he's going to implement the lethal injection. He decides the protocol.

There's nothing this Court can do in the context of this case, a collateral attack on the judgment of conviction, that can dictate to the director of prisons to change protocol. It has to be done by some other vehicle – a civil rights action or a request for declaratory relief.

I know they raised the issue here in Nevada in the Castillo case, and they did it by extraordinary writ petition. I'm not sure that that was the proper vehicle either, but the Supreme Court at least granted a stay of

Castillo's execution, and they held that case in abeyance until Baze v. Rees was resolved. And then the parties all agreed the issue was moot, and they dropped it, and Castillo got his case going again.

But I don't think it's properly raised in a post-conviction petition, and even if it were, I think Baze v. Rees has put an end to that – to that argument.

THE COURT: All right. Couple of procedural questions. One is it's under the old case number. I know that the – the writs are captioned Rippo versus McDaniel, the warden, and the State's been using The State versus Rippo. I just –

MR. ANTHONY: You know, that's a common thing that occurs, Your Honor. The reason it does is because, as the Court is aware, habeas corpus is kind of a quasi civil-criminal proceeding –

THE COURT: Correct.

MR. ANTHONY: – and the statutes talk about who our defendant is, and the defendant is the warden.

THE COURT: Right.

MR. ANTHONY: And so that's why we caption the captions the way that we do.

THE COURT: But it's still under the same case number. I guess that's my question. It's not – when I saw yours, I knew that that's what was done. But I was

wondering if there's a case number filing as well where you filed a new petition and it generated a new civil case number. I'm not aware that there is, but –

MR. ANTHONY: Well, it's an interesting issue that the Court raises about whether it should get a new case number. I mean reasonable minds could maybe differ on whether that should be the case.

THE COURT: I just want to make sure I have everything under one umbrella. It looks like everything. Even yours are filed under 106784, so I'm presuming –

MR. ANTHONY: That's correct.

THE COURT: – that I have everything.

MR. ANTHONY: And maybe that should simplify the issue, and hopefully everything that was previously before different Courts –

THE COURT: That's fine.

MR. ANTHONY: – is before this Court.

THE COURT: What's the status of the – is there a concurrent Federal proceeding going on?

MR. ANTHONY: There is, Your Honor. We currently have – the State's asked for several continuances to respond to our Federal petition. At the current time they have not responded to it.

THE COURT: Okay.

MR. ANTHONY: So what we've done is – back in

the olden days we would wait for a stay order from the Federal court, but what's happened in the meantime is, you know, the State has become more – more vigorous about their assertion of procedural default, and in order to rectify the arguments that they bring up, it forces us to make decisions much quicker than the Federal Court makes them.

So if the Court's okay, I'll start with my argument.

THE COURT: Sure. And you can – I should have indicated to you, but I mean there were certain of the claims that you haven't addressed. I don't see that as any type of waiver either way.

MR. OWENS: Okay.

MR. ANTHONY: Thank you, Your Honor.

I think it's important in cases like this to probably start out with where both parties agree, and the first thing that the parties agree to is that Mr. Rippo has the right to the effective assistance of post-conviction counsel.

As the Court acknowledged, this was a case where the remittitur issued in 1998. For all cases that counsel is appointed to after January 1st of 1993, there's a mandatory right to counsel. The Nevada Supreme Court has held that when you have the right to counsel, that carries

with it the right to effective assistance of counsel, and the – I don't think that there's any dispute with the State on this issue.

The next issue that arises is did we allege the issue of ineffective assistance of post-conviction counsel in a timely manner, and that kind of explains – that's why I was trying to explain why we've come back here before we got a stay from the Federal Court.

We've litigated this issue with the State probably a half a dozen times, and every time we do, what they say is we need to come back within one year of the issuance of the remittitur in the first State post-conviction proceeding to assert this allegation of good cause.

And it's our position that the statute doesn't actually have an express time limitation, but even if they're correct and even if they're right, that we have to do it within one year, that's why we came back here so quickly on this. Mr. Owens acknowledged we did come here much quick – much more quickly than has been the case in previous cases. So I don't think that there's any dispute that we have timely raised this allegation of cause which is based upon ineffective assistance of post-conviction counsel.

The next issue that needs to be resolved is

whether post-conviction counsel's performance was deficient, and this is an issue again where the State hasn't proffered any contrary argument on this point.

Our argument is that this: That first post-conviction counsel was ineffective because he failed to basically do any research outside the record on direct appeal.

As the Court is aware, post-conviction proceedings, the whole purpose for having them is to have investigation that goes outside of the record on direct appeal, to look for issues of ineffective assistance of trial counsel, to look for issues of potential Brady violations, or any other constitutional issues you can't tell from the record itself. And that's where we submit that counsel was deficient. Counsel didn't do any investigation. Counsel didn't attach any exhibits to their petition.

We allege that by failing to do any sort of investigation, that counsel was deficient, and I don't think that the State has posed any contrary arguments to say that there's a strategy in not doing any investigation, and I don't think they could make that argument with a straight face.

So what we're left with, Your Honor, is that we're left with whether or not Mr. Rippo was prejudiced

from post-conviction counsel's ineffectiveness, and what that takes us back to is that takes us to the merits of the claims themselves because if we can show that the claims have merit, we can -- we can in essence step into post-conviction counsel's shoes, and we can litigate the issues that he would have litigated if he would have been performing effectively.

And my understanding from the way that the State has argued this particular case is we look to the merits of the claims in the petition to see whether or not we can overcome the procedural bars, and that's why we're talking about the merits.

So with that said, I would like to go ahead and start addressing the merits of these claims. I'll try to follow the same order that Mr. Owens used.

Obviously the first claim that we're looking at here is a claim of judicial bias. We have alleged two theories of cause. The first allegation was that post-conviction counsel was ineffective. If post-conviction counsel would have thoroughly reviewed the record on direct appeal, he would have seen that this was the primary first argument that was raised on direct appeal.

Our argument is this, that post-conviction counsel would have done what I did which is that he would

have gone over to Federal Court, he would have asked for the case file, he would have read the case file, and he would have -- and he would have compared Judge Bongiovanni's testimony of those two trials against his representations that were made at the time of Mr. Rippo's trial. And we argue that because he didn't do that, that falls below the objective standard of reasonableness.

We've also alleged as cause that the State suppressed material exculpatory and impeachment information. And when I say the State, I'm referring not just to the Clark County District Attorney's office. I'm also referring to the trial judge himself.

Now, as far as the merits go, I think the only point of contention that I can see that the State is arguing is -- is that they're -- I mean what happened is, is at trial this argument gets raised, and the issue becomes is the Clark County District Attorney's office involved in the investigation of the judge.

And when the issue is raised, the State comes, they make representations, they say we spoke with the District Attorney, we spoke with his first in command, Judge Thompson -- excuse me -- District Attorney Thompson, and Judge -- Judge Bell -- District Attorney Bell. Excuse me. I'm trying to think back. And we've talked with them, and they have represented to us that the State has

absolutely no involvement in this criminal case.

And then the point is asked to the judge. They ask the judge, do you know about whether or not the State is involved in this, and the judge says, look, all I know is what's contained in the newspapers. And then they ask him, well, do you know whether or not Metro is involved? He says, no, I don't know whether or not Metro is involved in this investigation. So that's the record we have at trial.

Then we have the record on direct appeal. We have the State arguing in their answering brief that the State had no involvement, that there were completely different entities involved, and that there was no pressure put on Judge Bongiovanni.

Then we have the Nevada Supreme Court's direct appeal. The Nevada Supreme Court buys or signs off on the representations made by the trial judge and the representations made by the State, that the State had no involvement whatsoever, and that's their basis for denying the claim.

Then, you know, we file this instant writ, and the State argues the same thing in their motion to dismiss, that the Court should deny it because it's law of the case, because the Nevada Supreme Court already found that the State wasn't involved.

Then for the first time -- and this is what's interesting to me -- is the State says the first time in their reply to the motion to dismiss, you know what? You're right. The State was involved. The State was involved in the sting operation against the judge where they received a phonecall from the FBI asking them to present a bogus indictment for an individual named Terry Salem. They asked him to -- they asked the DA's office and the chief judge of the Eighth Judicial District Court to coordinate with each other so that that case was assigned to Judge Bongiovanni's department, and then the idea was to see whether or not Judge Bongiovanni would proceed to take any bribes from this individual. So in fact the Clark County District Attorney's office was involved.

And also what we can show just from Judge Bongiovanni's testimony in the Federal cases is that he knew Metro was involved, and he also knew that the Nevada Department of Investigation was involved in this, and he also knew that Metro Intelligence was involved in this.

So if you look at what the State has been saying since the beginning of this case, all the way through what they're saying now, what they're saying right now is not consistent with what they were previously representing. These are not consistent representations.

The only issue that remains here is whether or

not trial counsel was or was not aware of the State's involvement. The State alleges without citing to the record itself that, oh, yeah, this was common knowledge. This was common knowledge to the judge, it was common knowledge to the State, and it was common knowledge to the trial attorneys.

But if you look at the record which we've cited in detail, the record shows that trial counsel was in the dark on this. The record shows that they were making basically bare allegations in asking for a hearing, and they never got a hearing. All they got in response were these misleading representations that we're not involved, we're not involved, don't worry about it.

So basically that's the reason that we argue that we can show cause because defense attorneys have the right to rely upon what they're told by the judge, and they have a right to rely upon what they're told by the State. We don't have to automatically assume that the State is lying. That's not how the system works.

The State has ethical responsibilities to be candid to the Court, and also the trial judge himself has an obligation to be candid, and when that doesn't happen, that is a ground for excusing any failure to previously raise this issue in court, and that's one of our theories of cause.

So the remaining issue here is was or wasn't trial counsel aware of these things. Our assertion is the record itself shows that they weren't aware. Now, they assert that they were aware, but that creates what's called a factual dispute.

When you have a factual dispute, the only way to resolve it is with an evidentiary hearing where we put up Mr. Dunleavy and Mr. Wolfson and we ask them what they were aware of. And I think what the record is going to show very clearly is that they were left in the dark and that they were misled and that they were prevented, based upon these representations, from bringing forward a meritorious motion to disqualify the judge.

It also unfolds into this other argument about the trial judge's relationship with one of the victims in the case. The name of the individual was Denny Mason. He was the victim of the stolen credit card offenses. And, again, the State in their reply says, look. Everyone knew that the judge knew this person. He just contends that it's not -- it just doesn't matter. It doesn't disqualify the judge.

Our -- our assertion, Your Honor, is this: That if you look at all of the -- the totality of the circumstances here and if you look at the standard for obtaining relief, the standard is whether a reasonable

person would wonder whether the judge could remain impartial under the circumstances.

Our contention is that the trial judge's own actions in not disclosing his actual knowledge of the State's involvement combined with his failure to disclose his relationship to the victim witness is sufficient circumstantial evidence to show that he was actually biased and that he should have been disqualified from hearing the case.

And that brings us to the discovery motion where we're attempting to obtain discovery of information from the District Attorney's office, from Metro, and from the Nevada -- the Nevada Division of Investigation to show that, yes, Judge Bongiovanni was aware of these things at trial and just didn't disclose them. And our argument is, is that would disqualify him from the case. We've cited ample case law to the Court.

If the Court finds judicial bias, there's no further harmless error that's permitted, and reversal is automatic because if you have a biased judge, that constitutes what is called structural error into the proceedings, and it's not susceptible to harmless error.

Now, we've also alleged as the State has noted -- well, let me make sure I've addressed the State's arguments. They argue that trial counsel knew about it.

I've addressed that. That's a factual dispute. And then they say look at the motion for a new trial. But, again, if the Court looks at the motion for a new trial which we've included to the petition, it has nothing about any of this stuff. And in response, the State just parrots back the same representations that they made at trial.

So as to the Claim 3 in the petition, we have alleged that trial counsel was ineffective at the penalty phase of trial. We've alleged as cause that post-conviction counsel was ineffective. In the State's argument, basically they say this argument is barred because it could have been raised previously.

But the thing is, that's exactly our argument, it could have been raised previously, and it would have been raised previously if Mr. Rippo would have received effective assistance from his post-conviction attorney. The State has never argued that post-conviction counsel was ineffective -- or was effective which brings us to whether or not the claim itself has merit.

As far as whether the claim has merit, I'm sure the Court is familiar with the Strickland standard. It requires a showing of deficient performance and a required showing of prejudice. The showing of prejudice requires that we show a reasonable probability that but for counsel's errors, the results of the penalty phase

proceedings would have been different.

So if we look at the issue of deficient performance, again, this is an issue the State originally contests in their motion to dismiss, but in the reply to the motion to dismiss they don't address -- they don't address this particular issue.

What we've argued is, is that trial counsel is ineffective because they started their investigation too late. They started it two weeks before trial started, and they only had a psychiatrist and a psychologist see Mr. Rippo I think it was only two days before the penalty hearing even started.

It's our argument that they were ineffective because to do a sufficient mitigation presentation actually takes a substantial amount of time. In this case trial counsel had at least three years to do a mitigation workup in this case, but instead they wait until two weeks before trial, and then they started working on it.

But the problem is, is what they dig up brings up too little too late. All they have is they have a psychologist interview Mr. Rippo. They get good leads from that psychologist. They get good leads to some of the records that I'm asking the Court to approve subpoenas for such as psychiatric records when he was ten years old they didn't obtain, other evidence in the social history -- the

small social history done by the psychologist saying that there was a very negative relationship between Mr. Rippo and the stepfather.

Our argument is that if trial counsel would have been effective, he would have started this investigation a long time ago. And if he would have started it a long time ago, he would have branched out slowly and slowly, and eventually he would have presented the jury with the same evidence that I'm presenting to the Court today.

If you look at the declarations that we've attached to the petition and to the opposition to motion to dismiss, they say it was only on the day that the penalty hearing began that trial counsel was sitting in a room with all the family members, and what they asked was is there anyone here in the room that would be willing to testify on behalf of Mr. Rippo? And eventually they settled on Stacie Campanelli, his younger sister.

The problem is, is that's all that happened. There wasn't an individual interview with her. They didn't take the time to work with her, and they didn't take the time to talk with her alone. If they would have, they would have presented to the jury what I am now presenting to the Court.

And I think if you look at the State's answer, they say, look. It's the same, but it's different in terms

of degree and detail. And our argument, Your Honor, is that the degree and the detail is very different from what you're seeing now versus what the jury saw at the time of the trial.

There's allegations about sexual abuse by the stepfather against his daughters. There's allegations of extreme physical abuse, allegations of locking Mr. Rippo in confined spaces like closets for a substantial period of time, and this is corroborated by multiple collateral sources who could have been contacted if trial counsel would have started this mitigation workup earlier, but they didn't.

So the reason that they didn't go farther isn't because they had a strategy. It's because the penalty phase was starting, and they had no more time to do additional work.

What we've shown to the Court -- I mean basically what this comes down to is the only factual dispute that remains is whether or not we can show prejudice which is whether we can show a reasonable probability that the outcome of the proceedings would have been different if trial counsel would have performed effectively.

Our argument is, is that these allegations of sexual abuse, these allegations of extreme physical abuse,

we have an expert report showing neuropsychological impairment. Also it includes poly substance abuse. We have alleged that counsel was ineffective for not presenting expert testimony that Mr. Rippo would perform positively in a structured setting of a prison.

If you compare what was presented to the jury against what's presented to the Court, our argument is, is that that at least entitles us to discovery in an evidentiary hearing.

As Mr. Owens noted in his representations, the Nevada Supreme Court looked at this issue previously and they said, look. This stuff isn't particularly compelling. But that's based upon the record that was available at trial.

My argument is that that proves that counsel's performance was deficient. This Court can compare that evidence against what's being now presented, and that's really the question, about whether we should even get a hearing to demonstrate whether we can make that showing. Our argument is that we can make that showing.

As Mr. Owens noted, the Nevada Supreme Court struck three aggravating circumstances. Again, that also changes the picture before the Court that was before the jury.

We have also made an argument that the prior

sexual assault aggravating circumstance is invalid under new authority under the case of Roper v. Simmons which came out in 2004 which was after Mr. Rippo's previous petition had been dismissed, and Roper says that you can't sentence a juvenile to death. Our argument is that that rationale also applies when you're using a statutory aggravating circumstance to make someone eligible for the death penalty.

So our argument is, is that not only should this Court look at the mitigation evidence that wasn't presented, this Court should also look at the qualitative weight of the remaining statutory aggravating circumstances.

Our argument is that in light of intervening authority, that the Court couldn't consider that aggravating circumstance, and the State has already acknowledged that three aggravators have been struck. So we're looking at one to two aggravators versus the mitigation evidence that we would like to present at a hearing, and that's -- that's our argument on the argument of ineffective assistance of trial counsel.

The last argument that I would like to address is the issue of prosecutorial misconduct. This is flagged as Claim 2 in the petition. Our argument for good cause is, again, that the State's failure to disclose material

exculpatory and impeachment information is an impediment external to the defense.

Mr. Owens argues that this was -- some of this evidence was publicly available. However, if you look at the case that we've cited to the Court, the case is called Banks v. Dretke. It's a big case from the U.S. Supreme Court from 2004.

And in Banks, the State was making the same argument that they're making here today which is that if you would have been diligent, if you would have looked at the court files for all these guys, if you would have been more diligent, if you would have investigated harder, you would have found this stuff.

But what the U.S. Supreme Court said is that's not how things work. The prosecutor still has a freestanding obligation to do what is ethical, to disclose material exculpatory and impeachment evidence, and also has a duty to correct false testimony, and that duty is independent of trial counsel's obligations.

We cited a case to the Court from the Ninth Circuit that says, look. You can have cause from prosecutorial misconduct and from ineffective assistance of counsel at the same time. Those aren't mutually exclusive. And we've argued both theories of cause to the Court today which is both that post-conviction counsel ought to have

done this investigation. He should have gone and looked in these court case files.

But even if he hadn't, it wouldn't matter because the State still has a freestanding obligation. They have ethical responsibilities. And even the representative for the State today has the same ethical responsibilities to continue to disclose material exculpatory and impeachment information and to correct false testimony when it appears.

Now, we've talked a little bit about the case dispositions here. The State says that Mr. Simms received one continuance, but that wasn't a benefit. Your Honor, Thomas Simms received 18 continuances starting from 1993 until a week after he testified against Mr. Rippo. So he got 18 continuances.

Then we put -- then I -- in the opposition we put on -- or excuse me. At trial they put on the testimony of Prosecutor John Lukens, and Prosecutor Lukens said, yeah, I became counsel on Simms' case, and I did all of those continuances for him because I wanted to make sure that he was available as a witness here today.

But he further testifies to the jury that I'm going to tell you that his case is going to rise and fall on its own merits, and he says, we're going to file a habitual criminal notice on this guy, and he says -- well,

he talks about making a phonecall to someone from the ATF, I mean Terry Clark, and says, well, but there really wasn't any benefit there. We didn't -- the Feds did not pursue ex-felon in possession of a firearm charges on him.

But that really begs the question, given this other totality of the evidence that we're looking at which is that the prosecutor says we're going to file a habitual criminal notice on this guy, but then one week later what happens instead? They convert all the felonies to gross misdemeanors, and he gets a $1,500 fine. So he goes from looking at a life sentence in prison to a $1,500 fine a week after his testimony.

And basically that's the same things that happens with these other witnesses. It's the same strange coincidence. And it happens also with the witness Michael Beaudoin. We've attached a declaration from Mr. Beaudoin saying that, look. I got caught again for felony distribution of methamphetamine. I called up the prosecutor on the phone, and I wanted him to get me out of jail. And the prosecutor, Melvin Harmon, agreed to convert my felony charges to misdemeanors and to let me serve jail time, and I didn't have to go to prison. That was a benefit that occurred before Mr. Rippo's trial, and no one here is disputing that it wasn't disclosed.

And, again, I don't know how this necessarily

would have been one that would have been apparent from the public record either because, again, like Mr. Owens states, it's always hard to prove these things just by looking at a docket sheet. It's much -- once you talk to the witness though, we have, you know, the declaration from the witness stating that it was a quid pro quo benefit or that he called the prosecutor, and the prosecutor did that for him in exchange. And even if it wasn't quid pro quo, it still existed before Mr. Rippo's trial which means that it should have been disclosed.

We have the same thing with Thomas Christos. We have a guy who has a felony home invasion charge, and then it's continued and it's continued, and then again, you know, a month or two after Mr. Rippo's trial, it's converted again to a misdemeanor or actually that one might have been dismissed. I'm not sure.

But anyway, then we have these -- we have these three jailhouse witnesses. I don't think the State's disputed anything about these jailhouse witnesses. I think one of the most egregious cases is the one of James Ison who testifies that Mr. Rippo confessed to him.

But we have a declaration from Mr. Ison that says that before I went to testify, the prosecutors put me in a room alone with all the discovery in the case, and they let me look at it so that I could give details so it

would look like I knew, that Mr. Rippo had actually confessed to me. And we can't look at that and say that wouldn't have provided a ground for impeachment.

We have the same thing with the jailhouse snitch David Levine. He gives one statement to the police where he says that Mr. Rippo confesses but has no details. So then they get a second statement from him. And then we've got a declaration from Mr. Levine who says, look. Those details that I put in my second statement were actually fed to me. They actually told me about the extension cords and the ligatures and what was used to kill the victim. And so when I said it in the supplemental police report, these were facts that were being fed to me.

And, again, the issue is: Would these things have impeached this witness if they would have been disclosed, and I don't really think there can be any dispute on this fact that they would have.

So what does that leave us with? That leaves us with what is the prejudice? The prejudice is for the Brady violations whether there's any reasonable possibility that the outcome would have been different if these things would have been disclosed.

The standard for false testimony is whether there's any reasonable likelihood the false testimony affected the verdict, and we submit that we can make that

standard, Your Honor, because what the State basically had is a codefendant, Diana Hunt, who expressly received benefits, and then they paraded I think about six informant witnesses in front of the jury. They did that for a reason. Because they needed to corroborate the testimony of the codefendant, Diana Hunt.

Our argument is, is that all of these benefits would have been material if you look at them all together, and that's why we've asked for discovery and hearing because now the question is what did the State know and when did they know it.

Now I'm not leveling any charges against Mr. Owens personally, but I don't know what he's done to make himself aware of the files in the prosecution file, whether there's material exculpatory impeachment evidence sitting in there right now or whether he's going to look at the codefendant's files or the files of Mr. Simms or Mr. Beaudoin.

And the bottom line is this: That he's asserting as a defense that there were no benefits. Well, that really begs the question of whether there were benefits and whether there's evidence of benefits sitting in their files.

That's why we're arguing that we need discovery and a hearing, because we can't show actual knowledge by

the prosecution unless we can look at their files. Otherwise you could never prove actual knowledge 12 years after the fact. Their notes that they created before and during trial are the best evidence of what they knew at the time. That's why we're arguing that we need discovery of these things.

Very briefly I wanted to address this Court's question to the State about the lethal injection claim. The State argues the case of Baze v. Rees and says that we are foreclosed under Baze.

The one salient distinction I think this Court can distinguish from the Baze case is that in Baze they testified about how the Kentucky medical personnel went through common and new trainings they did over and over to make sure that they were competent when they were administering the lethal drugs. We don't have any such evidence in this case that the people who are conducting the lethal injection process have done any training at all. Nothing. There's no evidence of training.

The second thing that distinguishes this case from Baze is that in this case in Nevada the person who's injecting the chemicals is in a separate room and can't see the inmate.

And we've included in a declaration from Mark Heath who is an expert in anesthesiology, and he's talked

about how it contravenes all medical standards to do something like that where you're injecting lethal chemicals into a person who's in a separate room where you can't see them because you have to see whether or not they're conscious or unconscious before you inject the last chemical. If you don't, then it causes that cruel and unusual punishment which is that you have a person who is unconscious and slowly suffocating to death.

But you just can't tell because the second chemical masks the appearance of the person suffocating, and it makes the process pleasant to view by the people who watch the lethal injection so the person is not flopping around. But what you really have is a person who's slowly suffocating to death, and that's why we would argue that this case is distinct from Baze.

One other claim, and then I'll finish. Just with respect to the victim impact testimony, Your Honor, on Claim 12, the one thing that I would like to point out is, is that when this claim was raised on direct appeal and when it was raised on post conviction, they didn't include any exhibits with the claim.

And the exhibits that they should have included were these scrapbooks from the two victims that were created by the victims' families, and they were entered into evidence, and the scrapbooks show the victims as, you

know, young girls in Girl Scouts; young girls doing these things, you know, going to their first prom; this, that, and the other.

And the reason that we've argued that that's prejudicial is because, you know, there were in fact two murders here, but they were murders of adult women and weren't murders of two young children. And our argument is, is that by putting these scrapbooks into evidence about, you know, showing them excessively as children, that that was a prejudicial thing for Mr. Rippo.

And if the Court looks at that together with the other ineffective assistance of trial counsel, we assert that it would have made a difference, at least for one juror, and that's all we have to show to get a hearing.

Thank you. And if the Court has any questions –

THE COURT: All right. Thank you very much. Mr. Owens.

MR. OWENS: I will go through in the same order responding to the issues raised. As to judicial bias in Claim 1, they're alleging ineffective assistance of counsel for not reviewing the Federal file, suppressing material evidence, and that we are admitting the State's involvement.

I did not intend to admit anything in any brief

that I filed in this case. I don't know what happened. I wasn't there. I wasn't part of the proceeding. I'm simply looking at the documents the Federal Public Defender has provided which indicates there was a conversation with a deputy of our office and that there – that's the only place I'm getting that is from their own documents. So I don't intend to say that we were involved. I simply don't know.

And we don't need to reach the merits of that. As interesting as that is, that was known before, and they say that – that I haven't cited to the record and that this wasn't raised in the motion for a new trial. I did bring with me here today -- and it may not be part of the record in front of Your Honor, so I made copies – but it was definitely part of the record in this case, and this is the reply brief from direct appeal.

May I approach?

THE COURT: Yes.

MR. OWENS: Directing Your Honor's attention to page 2, and I'm going to quote part of it, and this a document filed by David Schieck on direct appeal. He says, specific – quote, specifically part of the investigation proceedings against Judge Bongiovanni involved a manipulation of the random assignment of cases so that particular cases would track to his department. If the

office of the District Attorney were involved in any aspect of this situation, then the representations put on the record during trial were inaccurate. Only an evidentiary hearing done in the light of the information released with the discovery in the Federal case can answer the questions that have arisen.

So they have received discovery in the Federal case that helped them make an allegation that the State was involved in the manipulation of a random assignment of cases. That's the exact same thing that the Federal Public Defender is here saying today, that they have recently received discovery in the Federal case that suggests the State was involved in the random manipulation of cases.

That allegation is ten years old, ten years old. They've known about that. It's the same old claim come up again. I also noted in the documents from the Federal discovery provided to me by Mr. Anthony that a chief judge was involved, and we know from very recent history in this case that only the chief judge has the power to manipulate the random assignment of cases.

And so in context -- and I don't know. I wasn't there, so this isn't testimony. But I can put two and two together and -- and -- and very easily see how a chief judge would be able to manipulate and put the case in front of Bongiovanni.

I would also note that -- that that was done in December of 1994 that that case got tracked in front of Judge Bongiovanni. Stew Bell did not take office until January of 1995, a month later. To what extent he was privy to the tracking of that case, I don't know. But he took office a month later. It is almost -- it is a year later that the newspaper starts printing reports about some Federal investigation about Judge Bongiovanni in the middle of this trial, a year later.

So I can easily see how a prosecutor in court could represent that he talked to Stew Bell and said that the DA's office is not involved in any Federal investigation. If we were involved with that manipulation of the case and we had knowledge of it, it was a year earlier.

And I don't know that even on the facts as they're alleged here that we would have any reason to indicate that that case that we might have helped through the chief judge who would be the only one who had authority to do that -- of course, we are the only ones that can file a case, so I can see how this might have come about.

But why would we think that that necessarily was the same Federal investigation that's being reported on a year later in the newspaper? The Federal investigation was extensive. This case in front of Bongiovanni was just one

part of that case. There was a lot of facts, a lot of details coming out on the case that they haven't shown that we had any involvement in at all.

What they have shown is that we filed a case and before Stew Bell took office. It was apparently at the request of the Federal investigators, but they haven't shown that we misrepresented things in court a year later when we said we're not involved in what's going on now. Here's this newspaper. Here's all this talk about Bongiovanni taking all sorts of bribes in all sorts of areas. They haven't shown that we've had any involvement in that part of the investigation that led to the charges that arose in the middle of trial.

All they've shown is exactly the same thing that they alleged a decade ago, and here we are still in the same place we were a decade ago. They can't just sit back and let this stew and then ten years later say, well, now we want to get to the bottom of it, now we want to put Judge Bell on the stand, now we want to put on the prosecutor, now we want to find out who the chief judge was and get to the bottom of all this that happened.

They haven't alleged anything here that isn't consistent and can't be reconciled with an understanding of how things transpired and the dates. And what the facts ultimately would show, I don't know, but it's too late.

It's procedurally barred.

They only get that under the guise of this Brady claim, that we withheld things from them. They had that in 1998. So their good cause and prejudice to overcome the procedural bar and raise this now ten years later just isn't there. That's my response on judicial bias.

The same goes for Denny Mason. It's been a while since I've looked at the motion for new trial. If it's not in there, then it's in the opening brief on direct appeal. It's in the brief somewhere. I've read it. If the Court needs me -- in fact, let's see. I might have it here in my notes when I last looked at this when the defense knew that Bongiovanni -- yeah, it's in there.

That was the subject of the motion for new trial. Bongiovanni failed to disclose his business relationship with Denny Mason's business partner, Vince Spano, who was purportedly a member of the Buffalo La Cosa Nostra gang. That's what was in the motion for new trial.

THE COURT: Not really a gang.

MR. OWENS: Well, whatever --

THE COURT: I've never heard of La Cosa Nostra being referred to as a gang from what I understand.

MR. OWENS: All right. But that was the subject of the motion for a new trial, so that was in there. Again, I would have to go back and look at it, and perhaps

Your Honor will.

If there's any dispute of fact here, it's about what the record shows or doesn't show. I'm suggesting their allegations are belied by the record, that they didn't have knowledge of this. That doesn't create a dispute of fact that has to be resolved necessarily in an evidentiary hearing. We can show they knew these allegations and that it's not a Brady violation, and there's no good cause to dive into it at this point.

Ineffective assistance of post-conviction counsel -- well, ineffective assistance of trial counsel in presenting mitigating evidence is their claim. They only get there through the allegation that post-conviction counsel was ineffective, and so -- and then they jump right into the merits.

Well, it's not that easy. Yes, you look at the merits to get some insight about the prejudice, but you still have to have this two-step process. You look at it through the prism of these procedural bars. They have to show that post-conviction counsel, David Schieck and Chris Oram, were ineffective in failing to raise the ineffectiveness of trial counsel. And it gets more complicated.

Mr. Anthony can only raise ineffective assistance of post-conviction counsel as good cause. It's

not every allegation of post-conviction counsel that errors that amounts -- that raises to good cause. It's only those errors where it's so egregious that if post-conviction counsel had done things differently, they would have been successful, and the writ would have been granted, and Rippo would have earned himself a new trial or a new penalty hearing. Only those errors in post-conviction counsel can they raise now as having good cause.

And now stepping into the shoes of Chris Oram and David Schieck, they could have only raised allegations of ineffective assistance of trial counsel. Under Strickland they would have to show that their performance fell below an objective reasonable standard as of 1996 when this trial occurred, not by today's standards, not by the Federal Public Defender's standards.

They have one or two capital cases per attorney in their office. That's not the reality of practice here in Clark County. We have attorneys that have multiple cases. That doesn't make them per se ineffective just because they didn't get around to doing some of the things that the Federal Public Defender would have all their time and money to focus on and do an entire workup.

In 1996 we have to look at what the state of practice was here in Nevada, and then they -- post-conviction counsel David Schieck would have had to

have shown that trial counsel was ineffective, fell below an objective standard at the time, and that, once again, the outcome would have been different, that trial counsel was so remiss in their duties in presenting mitigating evidence, that had they done things differently, again, the outcome would have been different. The jury wouldn't have voted on death.

Again, I focus on the strength of the State's case in aggravation. There's very little in the way of mitigation that's going to overcome that woman who came in and testified that she had been sexually assaulted and stunned with a stun gun and choked with a ligature and with Rippo's hands to the point of blacking out in the very same way that these two women now that were the subject of the murder, very similar except that the two women died and there was no evidence of sexual assault with them.

But hearing that woman take the stand and knowing that Rippo had done this before, that's the most compelling evidence. There's very little in the way of mitigation that's going to overcome that.

And what do they have now here after 12 years of new mitigation evidence that they say that David Schieck should have gone and done and should have found out? Well, we know that the trial attorneys did consult a psychologist and a psychiatrist, apparently just not the right one. Now

12 years later the Federal Public Defender has a new expert.

I would argue that is just not going to suffice to reopen a case that's this old. You can always go to a new expert and get a new opinion. You can always find some expert somewhere, and I don't know how many experts they consulted before they got the one that they put in this petition.

The fact is that trial counsel did consult a psychologist and a psychiatrist. His only argument is that they didn't have enough time. Again, we look at the realities of trial practice in the Eighth Judicial District Court in 1996 and attorneys that have a heavy case load, the fact is they still got those reports done.

And the fact that some other psychologist now would add something new? What actually does he have new? I didn't actually hear. Maybe it was this neuropsychological impairment. Again, is that -- whatever that is, whatever that means, is that going to be substantial enough that that would have persuaded our jury not to sentence Rippo to death?

He mentions sexual abuse. I think it was just in regards to Rippo's sisters, not as to Rippo. I'm not sure how exactly that would be relevant and how that would come out unless Rippo himself was the subject of some sort

of sexual abuse that the jury didn't hear about.

They're saying sexual abuse of Rippo's sisters. They're just portraying the stepfather as a bad man. I don't know that that's really mitigation evidence that would have been that useful.

Physical abuse, locking him in a closet, that he would perform positively in prison. Well I know that trial counsel did elicit some of that information. Trial counsel called James Cooper who was a vocational instructor, laundry, dry cleaning, and pressing at the prison, and he was a prison minister at Jean, saying that Rippo had no disciplinaries in prison, and he didn't get the prison tattoo and would do just well in prison. That sounds like the same sort of thing here. They would just use a different expert to elicit the same testimony.

They called Robert Duncan who was Rippo's stepfather saying that Rippo had jobs after his release from prison, he overhauled engines at home, he never was a problem. He had girlfriends. Probation officer only came by once. He didn't get the help he needed in prison. The mother was under medication. He elicited that kind of information.

The defense -- counsel at trial also called the defendant's sister, Stacie Roterdan, who said the stepfather did not encourage Rippo; that the father died;

the stepfather, James Anzinni (phonetic) would gamble with Rippo's allowance and paycheck; and he was always hard on Rippo, would push him, and tell him he was never going to amount to nothing; that he loved us, but was very hard on us; would degrade women in front of Rippo; that Stacie Roterdan and her mother would visit Rippo in prison; Rippo was good with children and made sure everyone had a good Christmas.

And then there was a letter from Carol Duncan. That was Rippo's -- that was Rippo's mother. She agreed to send Rippo to Spring Mountain, but he didn't get the help that he needed. He wasn't there -- she wasn't there for him when the husband was dying of cancer. That Rippo did well in the prison environment.

Finally, Rippo gave an allocution saying that he pled guilty to the prior sexual assault in order to spare the victim and that he prays for the victims' families.

That's the substance of the case in mitigation that trial counsel did put on. It's not that they put on nothing at all. It's just that with 12 years and with the resource of the Federal government, they have been able to do more investigation.

But what they haven't covered is either cumulative or so minor in nature it's not going to overcome the aggravating strength of the State's aggravating cases,

and on that basis I would urge you to deny that claim.

THE COURT: Let me just ask you, and maybe it's reiterating something that you've already talked about.

This interplay between -- the distinction between the issues of waiver or successive petitions under 34.810 and the requirement for good cause, that there be some impediment external to the defense which prevented their compliance or made it so that they couldn't raise certain issues, it's not enough just to say or is it enough just so say, well, post-conviction counsel the first time around was ineffective, so we can -- we can reach these issues again, and the issues that would prevent that ordinarily under 34.810 don't apply.

Do you understand my question?

MR. OWENS: I think so. Yes, they're entitled to effective assistance on post conviction.

THE COURT: Right.

MR. OWENS: And I think the way that that's reconciled with the law that says that there has to be an impediment external to the defense. I think that is the fact that counsel was appointed under law. Therefore, that's consistent, that post-conviction counsel was the stumbling block that prevented them from getting it because counsel wasn't performing as the constitutionally mandated counsel.

THE COURT: Okay.

MR. OWENS: And they did get back here in a timely manner, and I don't think that -- that following first post-conviction petition that there is a per se one-year time bar. That's the one year time bar under 7 -- .726.

I have argued on occasion that at a minimum we're looking at at least you have -- do you have any claims against post-conviction counsel filed within one year, otherwise it doesn't make sense. But I use that simply as a guideline. The Nevada Supreme Court has never come out and said there's one-year time bar following the first post-conviction proceedings that you have to get back in the State court. They say that you simply have to do so without unreasonable delay.

And just because you might get back in State court timely on one issue doesn't mean you get to automatically jump into the shoes of first post-conviction counsel and redo all of the first post-conviction proceedings, an issue by issue process that we go through, an analysis. Look at the merits of the claim and make a decision about whether or not they've shown good cause and prejudice to raise that particular claim based on post-conviction counsel's errors in a successive petition.

Claim 14, Roper v. Simmons they say invalidates

the prior sexual assault. That's an interesting legal argument. I'm not aware of any court anywhere that has extended Roper v. Simmons to say that you can never use a juvenile conviction in any context in a capital case as an aggravator. That wasn't the holding in Roper. Roper v. Simmons simply said that those who are mentally retarded are less culpable; therefore, they're not subject to the death penalty.

Now that's a huge leap to say that, well – I'm sorry. It wasn't mental retardation, was it? It was juveniles. Juveniles are less culpable. Their brains haven't fully developed; therefore, they're not subject to the death penalty for murders that occur when they're a juvenile.

They never took that next step that says, well, that prior convictions committed as a juvenile can't be used as an aggravator. No court anywhere has held that. And in a successive petition this, oh, I don't think this is the time to try to extend legal authority, if there's a case on point that said that, then bring it, and then that might be good cause to reexamine that aggravator. And then maybe you wouldn't have been sentenced to death had we not had that aggravator. But without that authority to overcome the procedural bars that they have a novel legal argument, that's not grounds to overcome the procedural

bars.

Claim 2, the prosecutorial misconduct. I absolutely agree, Banks v. Dretke, that we have a duty to disclose exculpatory evidence and to correct false testimony. I haven't seen any false testimony that needs correcting. I haven't seen any exculpatory evidence that needs disclosing.

You know, that case with Tom Simms was a drug case, and John Lukens was off spouting about how we were going to habitualize Tom Simms. All that may have done was impress upon Tom Simms that he's not getting any deal out of the State, we're going full bore on him.

The fact that we may not have actually filed a habitual after the trial and had a drug case reduced to gross misdemeanors is not inconsistent with the negotiations that everyone else in the community gets. We simply don't have the time to go hard on drug cases.

The fact that John Lukens may have been saying – saying we're going for a life sentence, if anything bolsters the fact that Simms didn't think he was getting anything. He thought he was going away for life. The reality is we can't habitualize somebody on a drug case. Everyone knows that. This was possession with intent to sell.

Again, the subsequent outcome in and of itself,

the fact that the case was negotiated in a manner that is not entirely inconsistent or with what the charges were and with what would be a normal negotiation is not any indication of exculpatory evidence that needed to be disclosed.

They were aware that he had cases. He was aware – they were aware that he had cases negotiated. They were aware that these witnesses had pending cases. The fact that those pending cases were resolved in a particular manner is not evidence of any sort of inducement.

In Goings – I think Tom Simms's case was marijuana that was reduced down to the gross misdemeanor. The Goings case was also drugs. He had two prior felony convictions related to drugs. On redirect the State asked him about his then pending charges and whether he was offered any deals in exchange for his testimony. None of this changes the fact that these witnesses and the prosecutors asked questions, and the witnesses said I haven't been offered any.

The fact that their cases are later dealt in whatever manner that they're handled does not mean it influenced their testimony. As far as they're aware, they're not getting any deals. And as far as I've seen with the negotiations that have happened, there was no

outstanding great deal that any other criminal defendant would not have otherwise gotten.

James Ison and David Levine, yes, I understand that 12 years later they have some letters now that say that, well, the DA put us into a room and let us look at discovery. I wasn't there. I don't know whether that's true or not. Frankly it doesn't matter. James Ison and David Levine have never recanted the fact in these letters that Rippo confessed to them.

The dispute comes about whether Rippo showed them the precise manner in which he strangled the two girls to death, whether he actually did in fact wrap something around his arm and say this is how I strangled out the girls. That's what that letter is saying now, is that that information was fed to him. I can't imagine that would be true.

But we don't need to go there because he hasn't changed – even if he had changed, I wouldn't be saying we need to have an evidentiary hearing, but he hasn't changed his testimony. This is a snitch. We can't expect that all snitches are going to – and people with criminal records in jail who overhear things are going to be consistent for 20, 30, 40, years. But the fact that 12 years later he says part of his testimony was not entirely true doesn't undermine the rest of his testimony that Rippo confessed to

him.

And certainly without that, I don't think they have grounds to reopen that. They don't have the good cause or the prejudice to show that the outcome would have been different. Even under the allegations that they're making, even accepting them as true, James Ison would still say that Rippo confessed to him the murder, and he would simply say to us I'm told how exactly he strangled them out, but Rippo still confessed to the murder.

Lethal injection, again, on Claim 22, the Attorney General isn't part of this – this case right now. The Attorney General represents the director of prisons. The director of prisons is not a named party in this case. Through a post-conviction petition this Court doesn't have any authority to direct the director of prisons to do or not do anything. He's not part of this. And that's why a post-conviction petition isn't the right procedure.

This only affects the judgment of conviction. You can change whether or not he's sentenced to death by lethal injection because that's in the judgment of conviction, but you can't in this proceeding purport to tell the director of prisons what procedure to do or not do.

There is no execution eminent for Mr. Rippo. He has years and years and years of appeals ahead of him, and

the protocol that the prison undergoes is under revision in light of A and B briefs. They're reexamining that all the time.

I don't – I'm not even sure what the protocol is in effect now, if they've modified it since Baze v. Rees. If they haven't, I'm sure they will be, and by the time the next execution comes up, I'm sure they will probably raise a claim under the lethal injection, and we'll see what the protocol is at that time. The issue will be right, but the director of prisons will be in the lawsuit. It's not right. It's not properly raised here.

I can't address for the Court Claim 12, this victim impact and photos and the scrapbooks. That is one of the claims I did not see as being a significant claim. I did not prepare on that other than what is already in our briefs. I don't even remember the scrapbooks, and I would have to submit that one to Your Honor's discretion as contained in our briefs.

Thanks.

THE COURT: All right. Anything else very briefly just on the new issues he may have raised?

MR. ANTHONY: I'll try to be brief, Your Honor. I think one point that's important to make, especially on this judicial bias issue, is that I hear a lot of I don't know what happened, we don't know what happened, and I

think that's kind of the point, and I think it's kind of the reason why we would be seeking an evidentiary hearing.

But the reply brief that Mr. Owens provided to the Court was an exhibit to the petition. The problem is, is that these things only slowly leaked out of the news as *news reports happened about the Federal investigation.* But these were news reports that were long after the trial, and the problem is, is that all we have is this one isolated sentence that doesn't have any index cite, and the Nevada Supreme Court chose to make an adverse factual finding based upon all of this other evidence that had come out in the court below that we have subsequently shown is not *true.*

And so basically their response of, well, we don't really know what happened, I think that really bolsters the reason for having an evidentiary hearing because it's important that we know what the facts are before we make a decision.

With this argument about Denny Mason, we also included the motion for a new trial as an exhibit before this Court. One piece of information that I think is significant is Exhibit 248 to the petition. That's actually a trap and trace order that we recently discovered just from dumb luck. That is a trap and trace order where Ben Spano calls up Judge Bongiovanni's chambers, and he

obtains an OR release on behalf of Denny Mason, the same person who's the victim witness in this case.

I would submit to the Court that this newly discovered evidence puts the failure to disclose the existence of Mr. Mason in an entirely different light *because if Judge Bongiovanni would have disclosed that he* knew Mason, he would have been incriminating himself on the record in – with respect to the very Federal proceedings that were pending against him.

Our argument, Your Honor, is that when you have circumstances like that, the risk of bias is so great that there are certain circumstances where you can presume that a *judge* is biased because the risk is too great because he couldn't have been candid on the record without incriminating himself in the Federal investigation. I think that's a very important point, and it's based upon newly discovered evidence.

As to the Brady arguments, I'll submit that to the Court. If the Court looks at all these coincidences, I think there's one too many coincidences here just to blow this off and to say that these dispositions were something that occurred normally. If you look at them all together, it shows that they were not done normally.

Very briefly on ineffective assistance of trial counsel. He talked about the 1996 standards. Your Honor,

those are the same standards we're under today which are the ABA model guidelines from 1989. They were applied in Wiggins v. Smith which is a 2003 case to a 1989 case. That's -- and now we got a 1996 case.

So the standards are the same. You got to do a reasonable investigation. You can't start your sentencing investigation two weeks before trial starts and expect something comprehensive to turn up.

Mr. Owens argues that we're arguing that we should just get another expert. I'm not arguing that. I'm saying that you should have sufficiently prepared the experts you chose. I'm not saying you go out and get ten experts, just that you just need to prepare the ones that you chose.

We talked about the sexual abuse of the sisters. I have not alleged that Mr. Rippo was sexually abused by his stepfather, but what I would submit to the Court is when you look at someone's social history, the fact that something like that is going on in the family is a significant topic that's worthy of discussion by a psychologist because you know that affects the dynamics of a family when some of the family members are being sexually abused. So we would argue that that still is relevant mitigation evidence.

And one last point, Your Honor, and then I'll be

finished. As to this Roper argument, the State has argued that there's no supporting authority. We did have a chance to cite to the Court in the petition some Federal cases where the Federal courts refused to adjudicate someone as a habitual criminal because of priors that were committed when they were a juvenile.

What we're arguing is, is that that has even more force when you're talking about the death penalty because there's a lot more at stake in a death penalty case than a habitual criminal adjudication. If those courts are right where they say you can't adjudicate someone as a habitual criminal for conduct that occurred when they were a juvenile, then certainly that that -- that holding should carry over into the death penalty context, and I don't think there's any tension -- or any extension of new authority just to say that that's what the law is with respect to Roper.

Thank you.

THE COURT: Other than what's been submitted as essentially the opposition to the State's motion to dismiss as well as the motion for leave to conduct discovery, there wasn't anything else that you wanted to add on the right to conduct discovery.

MR. ANTHONY: No.

THE COURT: Do you understand?

MR. ANTHONY: I think --

THE COURT: I mean they're sort of derivative. We can overcome some of these procedural bars by conducting discovery. We'll figure what we want to do. But they're kind of intertwined.

MR. ANTHONY: Our contention is that they're related, and as this Court looks at the motion to dismiss and as the Court looks at our motion for leave to conduct discovery, the Court can see where we're going, what we're looking for, and why that would establish prejudice. So we would argue that those are interrelated.

THE COURT: All right. I'm going to take the matter under advisement. It will stand submitted at this point.

Are there upcoming dates on the Federal one?

MR. ANTHONY: We have a response due to the Federal petition actually this week, but to be honest with you, Your Honor, I imagine that the Nevada Attorney General's office might be seeking another extension. That's just my guess. So we don't have anything imminent coming up.

THE COURT: All right. Thank you.

MR. ANTHONY: Thank you.

MR. OWENS: Thanks, Judge.

So it's just under advisement then, no date?

THE COURT: Yeah, no date. No date.

MR. OWENS: We'll be notified by minute order or something or --

THE COURT: We'll go off the record.

* * *

ATTEST: Full, true, and accurate transcript.

Angela K. Lee

ANGELA K. LEE, CCR #789

NOED

FILED

MAR 16 2009

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: C106784
Dept No: XX

NOTICE OF ENTRY OF DECISION AND ORDER

PLEASE TAKE NOTICE that on March 11, 2009, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on March 16, 2009.

EDWARD A. FRIEDLAND, CLERK OF THE COURT

By: _____
Brandi J. Wendel, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 16 day of March 2009, I placed a copy of this Notice of Entry of Decision and Order in:

The bin(s) located in the Office of the District Court Clerk of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division

☑ The United States mail addressed as follows:
Michael Damon Rippo # 17097
P.O. Box 1989
Ely, NV 89301

David Anthony, Esq.
411 E. Bonneville Ave., #250
Las Vegas, NV 89101

_____
Brandi J. Wendel, Deputy Clerk

ORIGINAL

ORDR
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
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200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
MICHAEL DAMON RIPPO,
#0619119
Defendant.

CASE NO: C106784
DEPT NO: XX

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 9/22/08
TIME OF HEARING: 8:30 A.M.

THIS CAUSE having come on for hearing before the Honorable DAVID T. WALL, District Judge, on the 22nd day of September, 2008, on the State's Motion to Dismiss and Michael Damon Rippo's Motion for Leave to Conduct Discovery, STEVEN S. OWENS, ESQ., appearing on behalf of the State, and DAVID ANTHONY, ESQ., appearing on behalf of Mr. Rippo, his presence having been waived, and the Court having heard argument and having taken the matter under advisement, hereby finds as follows:

FINDINGS OF FACT

Mr. Rippo's instant Petition for Writ of Habeas Corpus, filed January 15, 2008, is procedurally time-barred under NRS 34.726, which requires dismissal absent good cause for the delay and a showing of prejudice. Additionally, for certain claims, the petition is barred by NRS 34.810(2) as a successive petition addressing issues previously raised on direct

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appeal or in prior post-conviction proceedings (or an appeal therefrom) and/or address issues for which the controlling law of the case has been determined previously (claims 1, 2, 3, 5, 7, 9, 12, 13, 15, 16, 17, 19 & 21).

The Court finds certain claims are barred under NRS 34.810(1)(b) as successive as the issues could have been raised on direct appeal or in a prior petition for post-conviction relief or an appeal therefrom (claims 2, 4, 6, 8, 10, 11, 14, 18, & 20). The Court finds that Mr. Rippo has failed to establish good cause for failing to present these claims in any earlier proceeding, and has failed to establish actual prejudice.

Further, the Court finds that certain issues raised by Mr. Rippo are not cognizable in this post-conviction petition (claim 22).

The record shows that more than a decade ago, Rippo's trial counsel knew and alleged that the State was involved in the Federal sting operation by indicting Terry Salem and manipulating the random assignment of the case and also that Bongiovanni failed to disclose a prior relationship with witness Denny Mason who was the business partner of reputed Buffalo mob associate Ben Spano. Accordingly, neither Brady nor ineffectiveness of post-conviction counsel constitutes good cause for re-arguing these ten-year old facts in a successive petition.

The record shows that Rippo's trial counsel was well aware that several witnesses had past or pending criminal cases against them and cross-examined regarding continuances, quashed bench warrants, and future benefits. Twelve years later, the various dispositions of such collateral cases are not new evidence of undisclosed inducements, but are consistent with the trial testimony that no benefits were given and that such cases would rise or fall on their own merit.

The State has never suppressed such case dispositions (which are a matter of public record), they are not favorable to the defense as either exculpatory or impeaching, and none of the allegations are material so as to undermine confidence in the verdict. None of the jailhouse informants have recanted their testimony that Rippo confessed to the murders. Accordingly, neither Brady nor ineffectiveness of post-conviction counsel constitutes good

cause for re-raising these claims where no new material facts are alleged and there is no reasonable probability of a different conviction or sentence for Rippo.

The Nevada Supreme Court's conclusion that the "evidence in mitigation was not particularly compelling" remains unaltered even in light of the additional mitigation witnesses and evidence now alleged by the defense. The "new" family history evidence is cumulative to what was already presented. Recent psychological testing fails to reveal any significant or persuasive diagnosis that would have compelled a verdict less than death. Given the strength of the State's case in aggravation which included the tortuous strangulation of two young women and Rippo's prior conviction for sexual assault, nothing new in mitigation alleged by the defense would have had a reasonable probability of altering the outcome of the case.

Any alleged intervening case authority fails to establish new grounds that were previously unavailable to Rippo, has no application to this case, or does not stand for the proposition alleged. Accordingly, intervening case authority does not provide good cause for the instant petition.

CONCLUSIONS OF LAW

"Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory." State v. Eighth Judicial Dist. Court, 121 Nev. 225, 112 P.3d 1070, 1074 (2005). Post-conviction habeas petitions that are filed several years after conviction unreasonably burden the criminal justice system. Id. "The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Id.

Under the mandatory provisions of NRS 34.726(1), absent a showing of good cause and prejudice, a defendant must file a petition that challenges the validity of a judgment or sentence within one year after entry of the judgment or if an appeal has been taken from the judgment, within one year after the Nevada Supreme Court issues its Remittitur.

NRS 34.810(2) requires dismissal of claims which could have been raised in earlier proceedings or which were raised in a prior petition or proceeding and determined on the merits unless the Court finds both good cause for failure to bring such issues previously and

actual prejudice to the defendant.

Once the State raises procedural grounds for dismissal, the burden then falls on the defendant "to show that good cause exists for his failure to raise any grounds in an earlier petition and that he will suffer actual prejudice if the grounds are not considered." Phelps v. Dir. of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

To establish good cause, a defendant must demonstrate that some impediment external to the defense prevented compliance with the mandated statutory default rules. Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). Even legitimate Brady claims are procedurally barred when the basis for the claim was known and it was either not brought in an earlier proceeding or within an applicable time bar. Hutchison v. Bell, 303 F.3d 720 (6th Cir. 2002).

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, 888, 34 P.3d 519, 538 (2001) (holding "[u]nder the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief"); Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996). 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 v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975). While law of the case may not apply where the facts are substantially different, law of the case "cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Hogan v. State, 109 Nev. 952, 959, 860 P.2d 710, 715 (1993).

In order to assert a claim for ineffective assistance of counsel, Defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-687, 104 S.Ct. 2052 (1984); Ennis v. State, 122 Nev. 694, 137 P.3d 1095, 1102 (2006). Under this test, Defendant must show: (1)

that his counsel's representation fell below an objective standard of reasonableness; and (2) that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-688 and 694, 104 S.Ct. at 2064; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada).

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, 502, 686 P.2d 222, 225 (1984). Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Id.

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. See also, Hill v. McDonough, 547 U.S. 573, 126 S.Ct. 2096 (2006).

Although Sharma applies to cases that became final before Sharma was decided in 2002, it does so not because it is a retroactive "new rule" but because it was held to be a "clarification" of the law. Mitchell v. State, 122 Nev. 1269, 149 P.3d 33 (2006). The distinction is critical because as a clarification of law, the basis for the claim was always available to Rippo and is now procedurally barred.

Although Polk v. Sandoval was published in 2007, the basis for the 9th Circuit's ruling was not new law but was Federal precedent decided decades earlier and which has always been available to Rippo. Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007). The Polk decision does not address retroactivity of Byford and the law of the case remains that Nevada's change in the premeditation/deliberation instruction has only prospective application. Garner v. State, 116 Nev. 770, 6 P.3d 1013 (2000). Furthermore, because of Rippo's conviction under a felony-murder theory, any error would be held harmless. Bridges v.

State, 116 Nev. 752, 6 P.3d 1000, 1008 (2000).

The validity of a prior conviction used for sentence enhancement may not be collaterally attacked in a subsequent offense. See e.g., U.S. v. Martinez-Martinez, 295 F.3d 1041 (9th Cir. 2002). Neither Roper v. Simmons nor U.S. v. Naylor hold that a prior juvenile crime of violence may not be used as an aggravating circumstance for a murder committed after the age of 18.

Blakely v. Washington 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." Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004). 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). Blakely does not support Defendant's position and neither Blakely nor Appendi are timely raised four and eight years, respectively, after they became law.

Only after a petition survives a motion to dismiss and claims are found warranting an evidentiary hearing may a party invoke discovery to the extent "good cause" is shown. NRS 34.780. Federal courts do not allow prisoners to use federal discovery for fishing expeditions to investigate mere speculation. Calderon v. United States District Court for the Northern District of California, 98 F.3d 1102, 1106 (1996). Only where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief, is the court under a duty to provide the necessary facilities and procedures for an adequate inquiry. McDaniel v. United States District Court For the District of Nevada, 127 F.3d 886, 888 (1997).

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ORDER

Based on the foregoing, the State's Motion to Dismiss the Petition is hereby GRANTED. Mr. Rippo's Motion for Leave to Conduct Discovery is DENIED as moot.

DATED this 5 day of ~~November, 2008~~ March, 2009.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

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

CERTIFICATE OF FACSIMILE

I hereby certify and affirm that I faxed a copy of the foregoing Findings of Fact, Conclustions of Law and Order to the attorney of record listed below on November 24, 2008.

David Anthony
Assistant Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89101

Eileen Davis

Employee, Clark County
District Attorney's Office

SSO/ed

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*** ERROR TX REPORT ***
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OFFICE OF THE DISTRICT ATTORNEY
CRIMINAL APPEALS UNIT

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District Attorney

CHRISTOPHER J. LALLI
Assistant District Attorney

TERESA M. LOWRY
Assistant District Attorney

MARY-ANNE MILLER
County Counsel

STEVEN S. OWENS
Chief Deputy

NANCY BECKER
Deputy

FACSIMILE TRANSMISSION

Fax No. (702) 382-5815

Telephone No. (702) 671-2750

TO: David Anthony **FAX#:** (702) 388-5819

FROM: Steven S. Owens

SUBJECT: Michael Rippo, C106784 - Findings

DATE: November 24, 2008

NO. OF PAGES, EXCLUDING COVER PAGE: ___9___

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OFFICE OF THE DISTRICT ATTORNEY
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TO: David Anthony FAX#: (702) 388-5819

FROM: Steven S. Owens

SUBJECT: Michael Rippo, C106784

DATE: November 17, 2008

David,
The following Findings will be submitted to Judge Wall on November 24, 2008.
Sincerely,
Steven S. Owens

NOTC
FRANNY A. FORSMAN
Federal Public Defender
Nevada Bar No. 00014
DAVID ANTHONY
Assistant Federal Public Defender
Nevada Bar No. 7978
Assistant Federal Public Defender
411 Bonneville Avenue, Suite 250
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Facsimile: (702) 388-5819

Attorneys for Petitioner

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. I (Death Penalty Case)

NOTICE OF APPEAL

NOTICE is hereby given that the Petitioner, Michael Damon Rippo, appeals to the Nevada Supreme Court from the Finding of Fact, Conclusions of Law and Order entered and served in this action on March 16, 2009 by Notice of Entry of Decision and Order. The Findings of Fact,

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Conclusions of Law and Order was entered on March 11, 2009 by the Honorable David T. Wall, Department XX.[1]

Respectfully submitted this 15th day of April, 2009.

FRANNY A. FORSMAN
Federal Public Defender

DAVID ANTHONY
Assistant Federal Public Defender
Nevada Bar No. 7978
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101

Attorneys for Petitioner

[1]Mr. Rippo's case was transferred from Department XX to Department I on December 28, 2008.

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that pursuant to NRCP 5(b), on this 15th day of April, 2009, she caused to be deposited for mailing, in the United States mail, postage prepaid, a true and correct copy of the foregoing Notice of Appeal, addressed to opposing counsel as follows:

David Roger
Clark County District Attroney
Steve S. Owens
Chief Deputy District Attorney
200 Lewis Ave.
Las Vegas, Nevada 89155

Catherine Cortez Masto
Attorney General
555 East Washington Avenue, 3rd Floor
Las Vegas, Nevada 89101

An employee of the Federal Public Defender

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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3 4	Reporter's Transcript of Proceedings: Jury Trial, Vol. II; 1:30 p.m.	01/30/96	JA00642-JA00725 JA00726
4	Reporter's Transcript of Proceedings: Jury Trial, Vol. III; 3:30 p.m.	01/30/96	JA00727-JA00795
4	Reporter's Transcript of Proceedings: Jury Trial, 11:15 AM	01/31/96	JA00796-JA00888
4 5	Reporter's Transcript of Proceedings: Jury Trial, 2:30 PM	01/31/96	JA00889-JA00975 JA00976-JA01025
5	Reporter's Transcript of Proceedings: Jury Trial, Vol. I; 10:20 a.m.	02/01/96	JA01026-JA01219
5	Reporter's Transcript of Proceedings: Jury Trial, Vol. VI; 10:20 a.m.	02/02/96	JA01220-JA01401
5B	Reporter's Transcript of Proceedings: Jury Trial, Vol. 1, 1:30 p.m.	02/05/96	JA01401-001 to JA01401-179
5 6	Reporter's Transcript of Proceedings: Jury Trial, Vol. II; 2:30 p.m.	02/02/96	JA01402-JA01469 JA01470-JA01506

Vol.	Title	Date	Page
7	Reporter's Transcript of Proceedings: Jury Trial, 10:15 AM	02/06/96	JA01507-JA01688
8	Reporter's Transcript of Proceedings: Jury Trial, 2:30 PM	02/06/96	JA01689-JA01766
8	Reporter's Transcript of Proceedings: Jury Trial, 1:45 PM	02/07/96	JA01767 JA01872
8 9	Reporter's Transcript of Proceedings: Jury Trial, 10:15 AM	02/08/96	JA01887-JA01938 JA01939-JA02054
9 10	Reporter's Transcript of Proceedings: Jury Trial, 10:45 AM	02/26/96	JA02055-JA02188 JA02189-JA02232
10	Reporter's Transcript of Proceedings: Jury Trial, 11:00AM	02/27/96	JA02233-JA02404
11	Reporter's Transcript of Proceedings: Jury Trial, Vol. I, 10:30 a.m.	02/28/96	JA02405-JA02602
12 13	Reporter's Transcript of Proceedings: Jury Trial, Vol. I, 10:35 a.m.	02/29/96	JA02630-JA02879 JA02880-JA02885
13	Reporter's Transcript of Proceedings: Jury Trial 9:00 AM	03/01/96	JA02886-JA03064
13	Reporter's Transcript of Proceedings: Jury Trial Vol. I, 10:30 a.m.	03/04/96	JA03065-JA03120
14	Reporter's Transcript of Proceedings: Jury Trial, 11:00 a.m.	03/05/96	JA03121-JA03357
16	Reporter's Transcript of Proceedings: Jury Trial Vol. 1 11:30 a.m.	03/13/96	JA03594-JA03808
17	Reporter's Transcript of Proceedings: Jury Trial, 9:30 AM	03/14/96	JA03841-JA04001
3	Reporter's Transcript of Proceedings: Motions Hearing	03/18/94	JA00575-JA00582
3	Reporter's Transcript of Proceedings: Motions Hearing	04/14/94	JA00591-JA00618
15	Reporter's Transcript of Proceedings: Penalty Phase 10:00 a.m.	03/12/96	JA03413-JA03593
2 3	Reporter's Transcript of Proceedings Re: Defendant's Motion to Disqualify District Attorney's Office	03/07/94	JA00403-485 JA00486-564

Vol.	Title	Date	Page
2	Reporter's Transcript of Proceedings re: Oral Request of District Attorney	01/31/94	JA00322-JA00333
3	Reporter's Transcript of Proceedings: Ruling on Defense Motion	03/11/94	JA00570-JA00574
17	Reporter's Transcript of Proceedings: Sentencing	05/17/96	JA04014-JA04036
15	Reporter's Transcript of Proceedings: Verdict	03/06/96	JA03403-JA03411
2	Response to Defendant's Motion for Discovery of Institutional Records and Files Necessary to His Defense	02/07/94	JA00351-JA00357
36 37	State's Motion to Dismiss and Response to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction)	04/23/08	JA08673-JA08746 JA08747-JA08757
2	State's Motion to Expedite Trial Date or in the Alternative Transfer Case to Another Department	02/16/93	JA00268-JA00273
2	State's Opposition to Defendant's Motion for Discovery and State's Motion for Reciprocal Discovery	10/27/92	JA00260-JA00263
2	State's Opposition to Defendant's Motion to Exclude Autopsy and Crime Scene Photographs	02/07/94	JA00346-JA00350
18	State's Opposition to Defendant's Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction)	10/14/02	JA04154-JA04201
2	State's Response to Defendant's Motion to Strike Aggravating Circumstance Numbered 1 and 2 and for Specificity as to Aggravating Circumstance Number 4	02/14/94	JA00367-JA00370
18	State's Response to Defendant's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)	04/06/04	JA04259-JA04315
2	State's Response to Motion to Disqualify the District Attorney's Office and State's Motion to Quash Subpoenas	02/14/94	JA00358-JA00366
18	Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction)	02/10/04	JA04206-JA04256

Vol.	Title	Date	Page
17 18	Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction)	08/08/02	JA04052-JA04090 JA04091-JA04153
15	Verdicts	03/06/96	JA03399-JA03402
16	Verdicts and Special Verdict	03/14/96	JA03835-JA03840

Exhibit 162

Exhibit 162

Subp

District Court

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO,

Petitioner,

-vs-

E.K. McDANIEL, Warden of the Nevada State Prison at Ely, Nevada,

Respondent.

Case No. C106784
Dept. No. XX

SUBPOENA

☐ **Regular** ☒ **Duces Tecum**

THE STATE OF NEVADA SENDS GREETINGS TO:

NANCY BECKER
200 Lewis Ave.
Las Vegas, Nevada 89101

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the _____ day of _____, 2008 at the hour of _____. The address where you are required to appear is 411 E. Bonneville, Suite 250, Las Vegas, Nevada, 89101.You are required to bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

Issued at the request of:

SHIRLEY B. PARRAGUIRRE, CLERK OF THE COURT

By: _____
DEPUTY CLERK **Date**

David S. Anthony
Assistant Federal Public Defender
411 E. Bonneville, Suite 250
Las Vegas, Nevada 89101
Attorneys for Petitioner

STATE OF NEVADA

COUNTY OF _____

AFFIDAVIT OF SERVICE

_____being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which this affidavit is made. That affiant received the Subpoena on the _____ day of _____,20_____, and served the same on the _____ day of _____,20_____, by delivering a copy of the witness at (state address) _____
_____.

_____
Signature of Affiant

SUBSCRIBED AND SWORN to before me this
_____ day of _____, 20_____.

_____
NOTARY PUBLIC in and for
County of _____,
State of Nevada.

ITEMS TO BE PRODUCED

SEE ATTACHED EXHIBIT A

EXHIBIT A
SUBPOENA DUCES TECUM

TO: NANCY BECKER
200 Lewis Ave.
Las Vegas, Nevada 89101

General Instructions:

YOU ARE COMMANDED to produce and permit inspection and copying of the following designated books, documents or tangible things as (a) kept in the usual course of business, or (b) organized and labeled to correspond with the categories as set forth below. Nev. R. Civ. P. 45.

If any of the books, documents, records or tangible things listed below are not being produced by you based on a **claim of privilege** or any other reason, please expressly state the basis or privilege claimed and describe the nature of the documents, communications or other things sufficient to enable a contest of the claim. Nev. R. Civ. P. 45(d).

Please complete a **Certificate of Custodian of Records** in the form set forth in Nev. Rev. Stat. 52.260. If you are claiming that any of the documents described above have been destroyed or purged, please provide a **Certificate of Destruction**, evidencing what was destroyed and the date, as set forth in Nev. Rev. Stat. 239.124; Nev. Admin. Code ch, 239, §.

Please produce or permit inspection and copying of all sealed and/or unsealed, official and/or non official files, records, documents, phone records investigative materials, microfiched logbooks, handwritten logbooks, data compilations from which information can be obtained, and/or tangible things including, but not limited to, the following:

1. All letters, memoranda, notes, files, and documents related to Nancy Becker's negotiations for and acceptance of employment at the Clark County District Attorney's Office, including but not limited to:
   a. Any written offers of employment by the Clark County District Attorney's office to Nancy Becker, whether accepted, declined, retracted, countered, or modified;
   b. Any and all letters, notes, memoranda, or other writings generated during negotiations between Nancy Becker and the Clark County District Attorney's Office concerning her potential for employment;
   c. Any letters, notes, memoranda, or other writings expressing an interest in having Nancy Becker employed by the Clark County District Attorney's Office, whether generated by Nancy Becker, a representative of Nancy Becker, an employee of the Clark County District Attorney's Office, or a representative of the Clark County District Attorney's Office;

d. Any and all applications for employment at the Clark County District Attorney's Office submitted by or on behalf of Nancy Becker before December 22, 2006;
e. Any and all letters, notes, memoranda, or other writings regarding Nancy Becker's employment plans following her term on the Nevada Supreme Court;
f. Any and all letters, notes, memoranda, or other writings containing the date of hire and/ or the employment start date for Nancy Becker by the Clark County District Attorney's Office;

2. Any and all correspondence exchanged between Nancy Becker and any employee of the Clark County District Attorney's Office between October 2006 and January 16, 2007, including but not limited to:
   a. Letters exchanged between Nancy Becker and the Clark County District Attorney's Office;
   b. Emails exchanged between Nancy Becker and the Clark County District Attorney's Office;
   c. Records of telephone calls exchanged between Nancy Becker and the Clark County District Attorney's Office;
   d. Notes, memos, or other writings evidencing communication between Nancy Becker and the Clark County District Attorney's Office;
3. Electronic data regarding all above to include: voice mail messages and files; back-up voice mail files; e-mail messages and files; back-up e-mail files; deleted e-mails; data files; program files; backup and archival tapes; temporary files; system history files; web site information stored in textual, graphical or audio format; web site log files; cache files; cookies; and other electronically recorded information. The disclosing party shall take reasonable steps to ensure that it discloses any back-up copies of files or archival tapes that will provide information about any "'deleted' electronic data." This list is not exhaustive.

If you are claiming that any of the documents described above have been destroyed or purged, please return the Certificate of Destruction enclosed for that purpose, evidencing what was destroyed and the date.

Exhibit 163

Exhibit 163

Subp

District Court

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO,

Petitioner,

-vs-

E.K. McDANIEL, Warden of the Nevada State Prison at Ely, Nevada,

Respondent.

Case No. C106784
Dept. No. XX

SUBPOENA

☐ **Regular** ☒ **Duces Tecum**

THE STATE OF NEVADA SENDS GREETINGS TO:

CLARK COUNTY HUMAN RESOURCES DEPARTMENT
Attn: Records
500 S. Grand Central Pkwy.
Las Vegas, Nevada 89155

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the _____ day of _____, 2008 at the hour of _____. The address where you are required to appear is 411 E. Bonneville, Suite 250, Las Vegas, Nevada, 89101.You are required to bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

Issued at the request of:

SHIRLEY B. PARRAGUIRRE, CLERK OF THE COURT

By: _____
DEPUTY CLERK **Date**

David S. Anthony
Assistant Federal Public Defender
411 E. Bonneville, Suite 250
Las Vegas, Nevada 89101
Attorneys for Petitioner

STATE OF NEVADA

COUNTY OF _____

AFFIDAVIT OF SERVICE

_____being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which this affidavit is made. That affiant received the Subpoena on the _____ day of _____,20____, and served the same on the _____ day of _____,20____, by delivering a copy of the witness at (state address) _____
_____.

_____
Signature of Affiant

SUBSCRIBED AND SWORN to before me this
_____ day of _____, 20____.

_____
NOTARY PUBLIC in and for
County of _____,
State of Nevada.

ITEMS TO BE PRODUCED

SEE ATTACHED EXHIBIT A

EXHIBIT A
SUBPOENA DUCES TECUM

TO: CLARK COUNTY HUMAN RESOURCES DEPARTMENT
ATTN: Records
500 S. Grand Central Pkwy.
Las Vegas, Nevada 89155

General Instructions:

YOU ARE COMMANDED to produce and permit inspection and copying of the following designated books, documents or tangible things as (a) kept in the usual course of business, or (b) organized and labeled to correspond with the categories as set forth below. Nev. R. Civ. P. 45.

If any of the books, documents, records or tangible things listed below are not being produced by you based on a **claim of privilege** or any other reason, please expressly state the basis or privilege claimed and describe the nature of the documents, communications or other things sufficient to enable a contest of the claim. Nev. R. Civ. P. 45(d).

Please complete a **Certificate of Custodian of Records** in the form set forth in Nev. Rev. Stat. 52.260. If you are claiming that any of the documents described above have been destroyed or purged, please provide a **Certificate of Destruction**, evidencing what was destroyed and the date, as set forth in Nev. Rev. Stat. 239.124; Nev. Admin. Code ch, 239, §.

Information requested on the following individual:

Nancy Becker

Please produce or permit inspection and copying of all sealed and/or unsealed, official and/or non official files, records, documents, investigative materials, microfiched logbooks, handwritten logbooks, data compilations from which information can be obtained, and/or tangible things including, but not limited to, the following:

1. All letters, memoranda, notes, files, and documents related to the recruitment and hiring of former Nevada Supreme Court Justice Nancy Becker by the Clark County District Attorney's Office, including but not limited to:
   a. Any written offers of employment, whether accepted, declined, retracted, countered, or modified;
   b. Any and all letters, notes, memoranda, or other writings generated during negotiations between Nancy Becker and the Clark County District Attorney's Office concerning her potential for employment;
   c. Any letters, notes, memoranda, or other writings expressing an interest in having Nancy Becker employed by the Clark County District Attorney's

Office, whether generated by Nancy Becker, a representative of Nancy Becker,an employee of the Clark County District Attorney's Office, or a representative of the Clark County District Attorney's Office;

d. Any and all correspondence exchanged between Nancy Becker and any employee of the Clark County District Attorney's Office between November 6, 2006 and January 16, 2007;

e. Any and all applications for employment at the Clark County District Attorney's Office submitted by or on behalf of Nancy Becker before December 22, 2006;

f. Any and all letters, notes, memoranda, or other writings regarding Nancy Becker's employment plans following her term on the Nevada Supreme Court;

g. Any and all letters, notes, memoranda, or other writings containing the date of hire and/ or the employment start date for Nancy Becker by the Clark County District Attorney's Office;

2. Electronic data regarding all above to include: voice mail messages and files; back-up voice mail files; e-mail messages and files; back-up e-mail files; deleted e-mails; data files; program files; backup and archival tapes; temporary files; system history files; web site information stored in textual, graphical or audio format; web site log files; cache files; cookies; and other electronically recorded information. The disclosing party shall take reasonable steps to ensure that it discloses any back-up copies of files or archival tapes that will provide information about any "'deleted' electronic data." This list is not exhaustive.

If you are claiming that any of the documents described above have been destroyed or purged, please return the Certificate of Destruction enclosed for that purpose, evidencing what was destroyed and the date.

Exhibit 164

Exhibit 164

Subp

District Court

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO,

Petitioner,,

-vs-

E.K. McDANIEL, Warden of the Nevada State Prison at Ely, Nevada, CATHERINE CORTEZ MASTO, Attorney General of the STATE of NEVAD,

Respondents.

Case No. C106784
Dept. No. XX
Docket

SUBPOENA

☐ **Regular** ☒ **Duces Tecum**

THE STATE OF NEVADA SENDS GREETINGS TO:

Nassau County Department of Social Services
Attn: Alan Licht
60 Charles Lindberg Blvd.
Uniondale, New York 11553-3656

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the _____ **day of** _____ **,2008** at the hour of _____. The address where you are required to appear is 616 South Eighth Street, Las Vegas, Nevada, 89101. You are required to bring with you at the time of your appearance anyitems set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

Issued at the request of:

SHIRLEY B. PARRAGUIRRE, CLERK OF THE COURT

By: _____
DEPUTY CLERK Date

DAVID ANTHONY
ASSISTANT FEDERAL PUBLIC DEFENDER
411 E. BONNEVILLE #250, LAS
Attorney for Petitioner

STATE OF NEVADA

COUNTY OF _____

AFFIDAVIT OF SERVICE

_____ being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which this affidavit is made. That affiant received the Subpoena on the _____ day of _____,20____, and served the same on the _____ day of _____,20____, by delivering a copy of the witness at (state address) _____.

_____

Signature of Affiant

SUBSCRIBED AND SWORN to before me this _____ day of _____, 20____.

_____

NOTARY PUBLIC in and for
County of _____,
State of Nevada.

ITEMS TO BE PRODUCED

SEE ATTACHED EXHIBIT A

RIPPO v. STATE et al.,

ATTACHMENT "A"
SUBPOENA DUCES TECUM

TO: NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES

OR: PERSON(S) MOST KNOWLEDGEABLE with regard to official and/or non-official records, documents and materials storage, retention, nature of and content of files of the ***Nassau County Department of Social Services***

YOU ARE COMMANDED to produce and permit inspection and copying of the following designated books, documents or tangible things as (a) kept in the usual course of business, or (2) organized and labeled to correspond with the categories as set forth below. Nev. R. Civ. Pro. 45.

If any of the books, documents, records or tangible things listed below are not being produced by you based on a claim of privilege or any other reason, please expressly state the basis or privilege claimed and describe the nature of the documents, communications or other things sufficient to enable a contest of the claim. Nev. R. Civ. Pro. 45(d).

Please complete a Certificate of Custodian of Records, in the form set forth in N.R.S. 52.260. Please produce or permit inspection and copying all sealed, unsealed, official and/or non official memoranda, correspondence, materials, files, tests, and/or documents of the following items and things concerning:

Carole Ann Campanelli (aka Carole Ann Duncan)
DOB 12/28/1942
SSAN 068-34-9587
and children (Michael Campanelli, Carole Ann Campanelli (daughter), Stacie Campanelli)

This request includes, without limitation:

1. All applications for benefits;
2. All documents reflecting denial of any benefits;
3. All reports or other documents reflecting the type of benefits granted;
4. Reports or other documents reflecting payment of benefits and amounts;
5. All personal financial reporting documents;
6. All claims information;
7. All disability records;
8. All medical records;
9. All documents reflecting use of medical care providers (including providers' addresses);
10. Billings to the Social Services Division from medical care providers for services rendered;
11. Employment records and/or histories;

12. Correspondence;
13. Notes;
14. Memoranda;
15. Status reports;
16. Case worker files;
17. Referrals to other governmental agencies;
18. Document reflecting cessation and/or termination of benefits;
19. Any other documents in your possession regarding the above-named individuals;
20. A list of any and all purged, deleted or destroyed documents, or documents transferred to storage;
21. Any and all microfilm, microfiche documents;
22. Electronic data regarding all above to include: voice mail messages and files; back-up voice mail files; e-mail messages and files; back-up e-mail files; deleted e-mails; data files; program files; backup and archival tapes; temporary files; system history files; web site information stored in textual, graphical or audio format; web site log files; cache files; cookies; and other electronically recorded information. The disclosing party shall take reasonable steps to ensure that it discloses any back-up copies of files or archival tapes that will provide information about any "deleted electronic data." This list is not exhaustive.

If you are claiming that any of the documents described above have been destroyed or purged, please provide a copy of Certificate of Destruction, evidencing what was destroyed and the date.

Exhibit 165

Exhibit 165

Subp

District Court

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO,

Petitioner,,

-vs-

E.K. McDANIEL, Warden of the Nevada State Prison at Ely, Nevada, CATHERINE CORTEZ MASTO, Attorney General of the STATE of NEVAD,

Respondents,

Case No. C106784
Dept. No. XX
Docket

SUBPOENA

☐ **Regular** ☒ **Duces Tecum**

THE STATE OF NEVADA SENDS GREETINGS TO:

Clark County School District
Student Data Services
4260 Eucalyptus Avenue - Bldg. B
Las Vegas, Nevada 89121

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the _____ **day of** _____**,2008** at the hour of _____. The address where you are required to appear is 616 South Eighth Street, Las Vegas, Nevada, 89101. You are required to bring with you at the time of your appearance anyitems set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

Issued at the request of:

SHIRLEY B. PARRAGUIRRE, CLERK OF THE COURT

DAVID ANTHONY
ASSISTANT FEDERAL PUBLIC DEFENDER
411 E. BONNEVILLE #250, LAS
Attorney for Petitioner

By: _____
DEPUTY CLERK Date

STATE OF NEVADA

COUNTY OF _____

AFFIDAVIT OF SERVICE

_____being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which this affidavit is made. That affiant received the Subpoena on the _____ day of _____,20____, and served the same on the _____ day of _____,20____, by delivering a copy of the witness at (state address) _____
_____.

_____
Signature of Affiant

SUBSCRIBED AND SWORN to before me this
_____ day of _____, 20____.

_____
NOTARY PUBLIC in and for
County of _____,
State of Nevada.

ITEMS TO BE PRODUCED

SEE ATTACHED EXHIBIT A

RIPPO v. STATE et al.,

ATTACHMENT "A"
SUBPOENA DUCES TECUM

TO: Clark County School District
Student Data Services
4260 Eucalyptus Avenue - Bldg. B
Las Vegas, Nevada 89121

OR: PERSON(S) MOST KNOWLEDGEABLE with regard to official and/or non-official records, documents and materials storage, retention, nature of and content of files of the ***Clark County School District***

YOU ARE COMMANDED to produce and permit inspection and copying of the following designated books, documents or tangible things as (a) kept in the usual course of business, or (2) organized and labeled to correspond with the categories as set forth below. Nev. R. Civ. Pro. 45.

If any of the books, documents, records or tangible things listed below are not being produced by you based on a claim of privilege or any other reason, please expressly state the basis or privilege claimed and describe the nature of the documents, communications or other things sufficient to enable a contest of the claim. Nev. R. Civ. Pro. 45(d).

Please complete a Certificate of Custodian of Records, in the form set forth in N.R.S. 52.260. Please produce or permit inspection and copying all sealed, unsealed, official and/or non official memoranda, correspondence, materials, files, tests, and/or documents of the following items and things concerning:

Stacie Campanelli aka Stacie Roterdam aka Stacie Gliszczynski
on behalf of Brianna Roterdam
DOB: 10/04/1969
SSAN: 530-82-4882

Carole Ann Campanelli
DOB: 05/23/1968
SSAN: 530-82-4875

This letter constitutes a formal request for any and all records, duplicates of all records, documents, files, notes, confidential and intelligence documents and tangible things maintained by and in the legal or physical custody of the Clark County School District, from the time it was collected, including without limitation the categories of documents listed in the attachment to this letter, specifically including notes, files, and confidential documents, as well as any tangible evidence or items in your possession, relating or referring to the above-identified individuals.

Exhibit 166

Exhibit 166

Subp

District Court

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO,

Petitioner,,

-vs-

E.K. McDANIEL, Warden of the Nevada State Prison at Ely, Nevada, CATHERINE CORTEZ MASTO, Attorney General of the STATE of NEVAD,

Respondents.

Case No. C106784
Dept. No. XX
Docket

SUBPOENA

☐ **Regular** ☒ **Duces Tecum**

THE STATE OF NEVADA SENDS GREETINGS TO:

CLARK COUNTY DISTRICT ATTORNEY
CUSTODIAN OF RECORDS, CRIMINAL DIVISION
200 E. Lewis Avenue
Las Vegas, Nevada 89155

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the _____ **day of** _____, **2008** at the hour of _____. The address where you are required to appear is 616 South Eighth Street, Las Vegas, Nevada, 89101. You are required to bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

Issued at the request of:

SHIRLEY B. PARRAGUIRRE, CLERK OF THE COURT

By: _____
DEPUTY CLERK Date

DAVID ANTHONY
ASSISTANT FEDERAL PUBLIC DEFENDER
411 E. BONNEVILLE #250, LAS
Attorney for Petitioner

STATE OF NEVADA

COUNTY OF _____

AFFIDAVIT OF SERVICE

_____being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which thisaffidavit is made. That affiant received the Subpoena on the _____ day of _____,20____, and served the same on the _____ day of _____,20____, by delivering a copy of the witness at (state address) _____
_____.

_____
Signature of Affiant

SUBSCRIBED AND SWORN to before me this
_____ day of _____, 20____.

_____
NOTARY PUBLIC in and for
County of _____,
State of Nevada.

ITEMS TO BE PRODUCED

SEE ATTACHED EXHIBIT A

RIPPO v. STATE et al.,

ATTACHMENT A
SUBPOENA DUCES TECUM

TO: CLARK COUNTY DISTRICT ATTORNEY
CUSTODIAN OF RECORDS, CRIMINAL DIVISION
200 E. Lewis Avenue
Las Vegas, Nevada 89155

General Instructions:

YOU ARE COMMANDED to produce and permit inspection and copying of the following designated books, documents or tangible things as (a) kept in the usual course of business, or (b) organized and labeled to correspond with the categories as set forth below. Fed. R. Civ. P. 45.

If any of the books, documents, records or tangible things listed below are not being produced by you based on a **claim of privilege** or any other reason, please expressly state the basis or privilege claimed and describe the nature of the documents, communications or other things sufficient to enable a contest of the claim. Fed. R. Civ. P. 45(d).

Please complete a **Certificate of Custodian of Records** in the form set forth in Nev. Rev. Stat. 52.260. If you are claiming that any of the documents described above have been destroyed or purged, please provide a **Certificate of Destruction**, evidencing what was destroyed and the date, as set forth in Nev. Rev. Stat. 239.124; Nev. Admin. Code ch, 239, § .

Please produce or permit inspection and copying of all sealed and/or unsealed, official and/or non official files, records, documents, investigative materials, grand jury materials (including notes), microfiched logbooks, handwritten logbooks, data compilations from which information can be obtained, electronic files, and/or tangible things including, but not limited to, the following:

All files or records relating to the Clark County District Attorney's participation in the investigation and prosecution of former Judge Gerard Bongiovanni, including without limitation any and all records, duplicates of all records, documents, files, memoranda, notes, confidential and intelligence documents and tangible things maintained by and in the legal or physical custody of the Clark County District Attorney's Office from the time it was collected, including without limitation the categories of documents listed in the attachment to this letter, specifically including notes, files, and confidential documents, as well as any tangible evidence or items in your possession, relating or referring to former Judge Bongiovanni. This request includes without limitation all files, documents, and records generated by Ulrich Smith, Bill Koot, Rex Bell, Stewart Bell, Charles Thompson, Melvn Harmon, and Dan Seaton.

All files or records which mention or relate to an internal audit of the civil or criminal cases or other matters that were assigned to former Judge Bongiovanni's department, including without limitation, all documents prepared by or at the direction of Charles Thompson.

All files or records which mention or relate to Terry Salem or Paul Dottore. All documents which relate to the federal investigation and prosecution of former Judge Bongiovanni that were generated by other entities, including but not limited to state and federal law enforcement.

Exhibit 167

Exhibit 167

Subp

District Court

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO,

Petitioner,,

-vs-

E.K. McDANIEL, Warden of the Nevada State Prison at Ely, Nevada, CATHERINE CORTEZ MASTO, Attorney General of the STATE of NEVAD,

Respondents.

Case No. C106784
Dept. No. XX
Docket

SUBPOENA

☐ **Regular** ☒ **Duces Tecum**

THE STATE OF NEVADA SENDS GREETINGS TO:

Office of the United States Attorney
Daniel C. Bogden
333 Las Vegas Blvd. South #5000
Las Vegas, Nevada 89101

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the _____ **day of** _____,**2008** at the hour of _____. The address where you are required to appear is 616 South Eighth Street, Las Vegas, Nevada, 89101. You are required to bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

Issued at the request of:

SHIRLEY B. PARRAGUIRRE, CLERK OF THE COURT

DAVID ANTHONY
ASSISTANT FEDERAL PUBLIC DEFENDER
411 E. BONNEVILLE #250, LAS
Attorney for Petitioner

By: _____
DEPUTY CLERK Date

STATE OF NEVADA

COUNTY OF _____

AFFIDAVIT OF SERVICE

_____being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which this affidavit is made. That affiant received the Subpoena on the _____ day of _____,20____, and served the same on the _____ day of _____,20____, by delivering a copy of the witness at (state address) _____
_____.

_____

Signature of Affiant

SUBSCRIBED AND SWORN to before me this
_____ day of _____, 20____.

_____

NOTARY PUBLIC in and for
County of _____,
State of Nevada.

ITEMS TO BE PRODUCED

SEE ATTACHED EXHIBIT A

RIPPO v. STATE et al.,

ATTACHMENT "A"
SUBPOENA DUCES TECUM

TO: Office of the United States Attorney
Daniel C. Bogden
333 Las Vegas Blvd. South #5000
Las Vegas, Nevada 89101

OR: PERSON(S) MOST KNOWLEDGEABLE with regard to official and/or non-official records, documents and materials storage, retention, nature of and content of files of the ***Office of the United States Attorney***

YOU ARE COMMANDED to produce and permit inspection and copying of the following designated books, documents or tangible things as (a) kept in the usual course of business, or (2) organized and labeled to correspond with the categories as set forth below. Nev. R. Civ. Pro. 45.

If any of the books, documents, records or tangible things listed below are not being produced by you based on a claim of privilege or any other reason, please expressly state the basis or privilege claimed and describe the nature of the documents, communications or other things sufficient to enable a contest of the claim. Nev. R. Civ. Pro. 45(d).

Please complete a Certificate of Custodian of Records, in the form set forth in N.R.S. 52.260. Please produce or permit inspection and copying all sealed, unsealed, official and/or non official memoranda, correspondence, materials, files, tests, and/or documents of the following items and things concerning:

All documents which mention or relate to (1) communications between Gerard Bongiovanni and/or his defense counsel or other representatives with representatives for the United States Attorney's Office, dated on or before April 16, 1996, (2) all documents in its possession or control relating to the Clark County District Attorney's Office, the Las Vegas Metropolitan Police Department, or the Nevada Division of Investigation's assistance or other actions in a federal investigation of Gerard Bongiovanni, (3) all documents generated by or communications to and from the Clark County District Attorney's Office, the Las Vegas Metropolitan Police Department, or the Nevada Division of Investigation, (4) all documents relating to plea discussions with Gerard Bongiovanni on or before April 16, 1996; (5) the sealed search warrant created by Special Agent Jerry Hanford in connection in connection with the search of Gerard Bongiovanni's property, and (6) all wiretaps, transcripts or other recordings in the Bongiovanni investigation which mention or relate to Ben Spano or Denny Mason.

Exhibit 168

Exhibit 168

Subp

District Court

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO,

Petitioner,,

-vs-

E.K. McDANIEL, Warden of the Nevada State Prison at Ely, Nevada, CATHERINE CORTEZ MASTO, Attorney General of the STATE of NEVAD,

Respondents

Case No. C106784
Dept. No. XX
Docket

SUBPOENA
☐ **Regular** ☒ **Duces Tecum**

THE STATE OF NEVADA SENDS GREETINGS TO:

CLARK COUNTY DISTRICT ATTORNEY
CUSTODIAN OF RECORDS, VICTIM/WITNESS ASSISTANCE CENTER
200 E. Lewis Avenue
Las Vegas, Nevada 89155

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the _____ **day of** _____, **2008** at the hour of _____. The address where you are required to appear is 616 South Eighth Street, Las Vegas, Nevada, 89101. You are required to bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

Issued at the request of:

SHIRLEY B. PARRAGUIRRE, CLERK OF THE COURT

DAVID ANTHONY
ASSISTANT FEDERAL PUBLIC DEFENDER
411 E. BONNEVILLE #250, LAS
Attorney for Petitioner

By:_____
DEPUTY CLERK Date

STATE OF NEVADA

COUNTY OF _____

AFFIDAVIT OF SERVICE

_____, being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which this affidavit is made. That affiant received the Subpoena on the _____ day of _____, 20_____, and served the same on the _____ day of _____, 20_____, by delivering a copy of the witness at (state address) _____ _____.

_____

Signature of Affiant

SUBSCRIBED AND SWORN to before me this _____ day of _____, 20_____.

_____

NOTARY PUBLIC in and for
County of _____,
State of Nevada.

ITEMS TO BE PRODUCED

SEE ATTACHED EXHIBIT A

RIPPO v. STATE et al.,

ATTACHMENT A
SUBPOENA DUCES TECUM

TO: CLARK COUNTY DISTRICT ATTORNEY
CUSTODIAN OF RECORDS, VICTIM WITNESS
200 E. Lewis Avenue
Las Vegas, Nevada 89155

General Instructions:

YOU ARE COMMANDED to produce and permit inspection and copying of the following designated books, documents or tangible things as (a) kept in the usual course of business, or (b) organized and labeled to correspond with the categories as set forth below. Fed. R. Civ. P. 45.

If any of the books, documents, records or tangible things listed below are not being produced by you based on a **claim of privilege** or any other reason, please expressly state the basis or privilege claimed and describe the nature of the documents, communications or other things sufficient to enable a contest of the claim. Fed. R. Civ. P. 45(d).

Please complete a **Certificate of Custodian of Records** in the form set forth in Nev. Rev. Stat. 52.260. If you are claiming that any of the documents described above have been destroyed or purged, please provide a **Certificate of Destruction**, evidencing what was destroyed and the date, as set forth in Nev. Rev. Stat. 239.124; Nev. Admin. Code ch, 239, § .

Information requested on the following individuals and/or cases:

Name/Identification Information	**Case Numbers**
Diana L. Hunt-Rice-Bracy SS# 530-72-8328 DOB: 12/27/1968 Metro ID#1191448	**C106663**
David Levine SS# 530-84-0229 DOB: 06/24/1967 Metro ID# 0589284	**96F11242X** **C136975**

Name/Identification Information	Case Numbers
Thomas M. Christos SS# 530-36-9787 DOB: 12/16/1950 Metro ID#0203921	**94F02599X** **98M11109X** **99M13522** **99W08312** **7786394-3** **85M00778Q** **86T02720X**
Michael Beaudoin SS# 530-80-3414 – also uses 476-30-3414, 330-80-3414, 530-848285 DOB: 01/22/1962 – also uses 03/22/65 Metro ID# 0677023	**92T01630X** **C102962 (91F4782B)** **C95279 (89F6462)** **C134430 (95F07735X)** **C130797X (95FH0518X)** **C152763** **C148089** **C140799** **C73331** **89F-3032** **89T-1312** **C69091** **C69090** **C69088** **C69089** **C339226** **87M2537** **87T1276** **92F1631X** **92F1613X** **90F05534A**
James Robert Ison SS# 263-43-3200 DOB: 05/19/1959 Metro ID# 0902654	**86074948X** **86F02323X** **92FH0031X** **C74948**
William Clinton Burkett DOB 11/01/1959 SS#: 431-08-7285 **AKA** **Donald A. Hill** DOB 11/03/1959 SS#: 431-08-7285	**Unknown**

Name/Identification Information	Case Numbers
Thomas Sims SS#530-54-9360 DOB 01-11-1958 Metro ID#0735379	**97M13084X** **93M12323X** **93F09533X** **C136066**
Michael Rippo DOB: 02/26/1965 SSAN: 530-82-1903	**C106784**

The documents to be produced are the complete files of the Victim Witness Assistance Center of the Clark County District Attorney's Office, including, but not limited to, any and all records of communications with any of the above-listed individuals, payments made to any of the above-listed individuals, referrals to any public agencies, any monetary or non-monetary assistance provided to the above-listed individuals, and any reports or other information generated relating or referring to the above identified persons.

Exhibit 169

Exhibit 169

FRANNY A. FORSMAN
Federal Public Defender
Nevada Bar No. 00014
DAVID ANTHONY
Assistant Federal Public Defender
Nevada Bar No. 7978
STEPHANIE KICE
Nevada Bar No. 10105
Assistant Federal Public Defender
411 Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101
Telephone: (702) 388-6577
Facsimile: (702) 388-5819

Attorneys for Petitioner

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. XX Date of Hearing: _____ Time of Hearing: _____ (Death Penalty Case)

[PROPOSED] **ORDER**

Upon motion of counsel and good cause appearing,

IT IS HEREBY ORDERED that the Clark County Victim Witness Assistance Center produce the records of the following individuals, if any exist:

Diana L. Hunt-Rice-Bracy
SS# 530-72-8328
DOB: 12/27/1968
Metro ID#1191448

David Levine
SS# 530-84-0229
DOB: 06/24/1967
Metro ID# 0589284

Thomas M. Christos
SS# 530-36-9787
DOB: 12/16/1950
Metro ID#0203921

Michael Beaudoin
SS# 530-80-3414 – also uses 476-30-3414, 330-80-3414, 530-848285
DOB: 01/22/1962 – also uses 03/22/65
Metro ID# 0677023

James Robert Ison
SS# 263-43-3200
DOB: 05/19/1959
Metro ID# 0902654

Thomas Sims
SS#530-54-9360
DOB 01-11-1958
Metro ID#0735379

William Clinton Burkett
DOB 11/01/1959
SS#: 431-08-7285
AKA
Donald A. Hill
DOB 11/03/1959
SS#: 431-08-7285

Michael Rippo aka Michael Campanelli
DOB: 02/26/1965
SSAN: 530-82-1903

The documents to be produced are the complete files of the Victim Witness Assistance Center of the Clark County District Attorney's Office, including, but not limited to, payments made to any of the above-listed individuals, referrals to any public agencies, any monetary or non-monetary assistance provided to the above-listed individuals, and any reports or other information generated relating or referring to the above identified persons..

DATED this _____ day of _____ 2008.

_____
DISTRICT COURT JUDGE

Submitted by:
FRANNY A. FORSMAN
Federal Public Defender

_____
DAVID ANTHONY
Assistant Federal Public Defender
STEPHANIE KICE
Assistant Federal Public Defender

EXHIBIT 170

EXHIBIT 170

Subp

District Court

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO,

Petitioner,,

-vs-

E.K. McDANIEL, Warden of the Nevada State Prison at Ely, Nevada, CATHERINE CORTEZ MASTO, Attorney General of the STATE of NEVAD,

Respondents,.

Case No. C106784
Dept. No. XX
Docket

SUBPOENA

☐ **Regular** ☒ **Duces Tecum**

THE STATE OF NEVADA SENDS GREETINGS TO:

Office of Legal Services
Executive Offices for United States Attorneys -- FOIA
ROOM 6320, PAT BUILDING
6TH and D Streets, N.W.
Washington, D.,C. 20530

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the _____ **day of** _____ **,2008** at the hour of _____. The address where you are required to appear is 616 South Eighth Street, Las Vegas, Nevada, 89101. You are required to bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

Issued at the request of:

SHIRLEY B. PARRAGUIRRE, CLERK OF THE COURT

By:_____
DEPUTY CLERK Date

DAVID ANTHONY
ASSISTANT FEDERAL PUBLIC DEFENDER
411 E. BONNEVILLE #250, LAS
Attorney for Petitioner

STATE OF NEVADA

COUNTY OF _____

AFFIDAVIT OF SERVICE

_____being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which this affidavit is made. That affiant received the Subpoena on the _____ day of _____,20____, and served the same on the _____ day of _____,20____, by delivering a copy of the witness at (state address) _____
_____.

_____
Signature of Affiant

SUBSCRIBED AND SWORN to before me this
_____ day of _____, 20____.

_____
NOTARY PUBLIC in and for
County of _____,
State of Nevada.

ITEMS TO BE PRODUCED

SEE ATTACHED EXHIBIT A

RIPPO v. STATE et al.,

ATTACHMENT A
SUBPOENA DUCES TECUM

TO: Office of Legal Services
Executive Offices for United States Attorneys
ROOM 6320, PAT BUILDING
6TH and D Streets, N.W.
Washington, D.,C. 20530

General Instructions:

YOU ARE COMMANDED to produce and permit inspection and copying of the following designated books, documents or tangible things as (a) kept in the usual course of business, or (b) organized and labeled to correspond with the categories as set forth below. Fed. R. Civ. P. 45.

If any of the books, documents, records or tangible things listed below are not being produced by you based on a **claim of privilege** or any other reason, please expressly state the basis or privilege claimed and describe the nature of the documents, communications or other things sufficient to enable a contest of the claim. Fed. R. Civ. P. 45(d).

Please complete a **Certificate of Custodian of Records** in the form set forth in Nev. Rev. Stat. 52.260. If you are claiming that any of the documents described above have been destroyed or purged, please provide a **Certificate of Destruction**, evidencing what was destroyed and the date, as set forth in Nev. Rev. Stat. 239.124; Nev. Admin. Code ch, 239, § .

Please produce or permit inspection and copying of all sealed and/or unsealed, official and/or non official files, records, documents, investigative materials, microfiched logbooks, handwritten logbooks, data compilations from which information can be obtained, electronic files, and/or tangible things including, but not limited to, the following:

All documents which mention or relate to (1) communications between Gerard Bongiovanni and/or his defense counsel or other representatives with representatives for the United State's Attorney's Office, dated on or before April 16, 1996, (2) all documents in its possession or control relating to the Clark County District Attorney's Office, the Las Vegas Metropolitan Police Department, or the Nevada Division of Investigation's assistance or other actions in a federal investigation of Gerard Bongiovanni, (3) all documents generated by or communications to and from the Clark County District Attorney's Office, the Las Vegas Metropolitan Police Department, or the Nevada Division of Investigation, (4) all documents relating to plea discussions with Gerard Bongiovanni on or before April 16, 1996; (5) the sealed search warrant

created by Special Agent Jerry Hanford in connection in connection with the search of Gerard Bongiovanni's property, and (6) all wiretaps, transcripts or other recordings in the Bongiovanni investigation which mention or relate to Ben Spano or Denny Mason.

EXHIBIT 171

EXHIBIT 171

Subp

District Court

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO,

Petitioner,,

-vs-

E.K. McDANIEL, Warden of the Nevada State Prison at Ely, Nevada, CATHERINE CORTEZ MASTO, Attorney General of the STATE of NEVAD,

Respondents.

Case No. C106784
Dept. No. XX
Docket

SUBPOENA
☐ **Regular** ☒ **Duces Tecum**

THE STATE OF NEVADA SENDS GREETINGS TO:

Federal Bureau of Investigation
J. Edgar Hoover Building
935 W, Pennsylvania Avenue, N.W.
Washington, D.C. 20535-0001

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the _____ **day of** _____, **2008** at the hour of _____. The address where you are required to appear is 616 South Eighth Street, Las Vegas, Nevada, 89101. You are required to bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

Issued at the request of:

SHIRLEY B. PARRAGUIRRE, CLERK OF THE COURT

DAVID ANTHONY
ASSISTANT FEDERAL PUBLIC DEFENDER
411 E. BONNEVILLE #250, LAS

By:_____

DEPUTY CLERK Date

STATE OF NEVADA

COUNTY OF _____

AFFIDAVIT OF SERVICE

_____being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which this affidavit is made. That affiant received the Subpoena on the _____ day of _____,20_____, and served the same on the _____ day of _____,20_____, by delivering a copy of the witness at (state address) _____
_____.

_____
Signature of Affiant

SUBSCRIBED AND SWORN to before me this
_____ day of _____, 20_____.

_____
NOTARY PUBLIC in and for
County of _____,
State of Nevada.

ITEMS TO BE PRODUCED

SEE ATTACHED EXHIBIT A

RIPPO v. STATE et al.,

ATTACHMENT A
SUBPOENA DUCES TECUM

TO: Federal Bureau of Investigation
J. Edgar Hoover Building
935 W, Pennsylvania Avenue, N.W.
Washington, D.C. 20535-0001

General Instructions:

YOU ARE COMMANDED to produce and permit inspection and copying of the following designated books, documents or tangible things as (a) kept in the usual course of business, or (b) organized and labeled to correspond with the categories as set forth below. Fed. R. Civ. P. 45.

If any of the books, documents, records or tangible things listed below are not being produced by you based on a **claim of privilege** or any other reason, please expressly state the basis or privilege claimed and describe the nature of the documents, communications or other things sufficient to enable a contest of the claim. Fed. R. Civ. P. 45(d).

Please complete a **Certificate of Custodian of Records** in the form set forth in Nev. Rev. Stat. 52.260. If you are claiming that any of the documents described above have been destroyed or purged, please provide a **Certificate of Destruction**, evidencing what was destroyed and the date, as set forth in Nev. Rev. Stat. 239.124; Nev. Admin. Code ch, 239, § .

Please produce or permit inspection and copying of all sealed and/or unsealed, official and/or non official files, records, documents, investigative materials, microfiched logbooks, handwritten logbooks, data compilations from which information can be obtained, electronic files, and/or tangible things including, but not limited to, the following:

All records which mention or relate to (1) wiretap recordings, summaries or transcripts of such that relate to a criminal investigation of Gerard Bongiovanni and include references to Ben Spano or Denny Mason, (2) all documents which mention or relate to the Las Vegas Metropolitan Police Department and the Clark County District Attorney's Office and relate to a criminal investigation of Gerard Bongiovanni, (3) all communications to and from these entities relating to the Bongiovanni investigation, (4) the sealed search warrant created by Special Agent Jerry Hanford in connection in connection with the search of Gerard Bongiovanni's property; and (5) all documents generated by the Las Vegas Metropolitan Police Department, the Nevada Department of Investigation, or the Clark County District Attorney's Office in the possession or

control of Federal Bureau of Investigation and relating to a criminal investigation of Gerard Bongiovanni.

EXHIBIT 172

EXHIBIT 172

Subp

District Court

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO,

Petitioner,,

-vs-

E.K. McDANIEL, Warden of the Nevada State Prison at Ely, Nevada, CATHERINE CORTEZ MASTO, Attorney General of the STATE of NEVAD,

Respondents.,

Case No. C106784
Dept. No. XX
Docket

SUBPOENA

☐ **Regular** ☒ **Duces Tecum**

THE STATE OF NEVADA SENDS GREETINGS TO:
CUSTODIAN OF RECORDS
CRIMINAL INTELLIGENCE SECTION
HOMELAND SECURITY BUREAU
SPECIAL OPERATIONS DIVISION
LAS VEGAS METROPOLITAN POLICE DEPARTMENT
400 E. Stewart Avenue
Las Vegas, NV 89101

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the _____ **day of** _____,**2008** at the hour of _____. The address where you are required to appear is 616 South Eighth Street, Las Vegas, Nevada, 89101. You are required to bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

Issued at the request of:

SHIRLEY B. PARRAGUIRRE, CLERK OF THE COURT

By:_____
DEPUTY CLERK Date

DAVID ANTHONY
ASSISTANT FEDERAL PUBLIC DEFENDER
411 E. BONNEVILLE #250, LAS
Attorney for Petitioner

STATE OF NEVADA

COUNTY OF _____

AFFIDAVIT OF SERVICE

_____being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which this affidavit is made. That affiant received the Subpoena on the _____ day of _____,20____, and served the same on the _____ day of _____,20____, by delivering a copy of the witness at (state address) _____.

_____

Signature of Affiant

SUBSCRIBED AND SWORN to before me this _____ day of _____, 20____.

_____

NOTARY PUBLIC in and for
County of _____,
State of Nevada.

ITEMS TO BE PRODUCED

SEE ATTACHED EXHIBIT A

RIPPO v. STATE et al.,

ATTACHMENT "A"
SUBPOENA DUCES TECUM

TO: CUSTODIAN OF RECORDS
CRIMINAL INTELLIGENCE SECTION
HOMELAND SECURITY BUREAU
SPECIAL OPERATIONS DIVISION
LAS VEGAS METROPOLITAN POLICE DEPARTMENT
400 E. Stewart Avenue
Las Vegas, NV 89101

YOU ARE COMMANDED to produce and permit inspection and copying of the following designated books, documents or tangible things as (a) kept in the usual course of business, or (b) organized and labeled to correspond with the categories as set forth below. Nev. R. Civ. Pro. 45.

If any of the books, documents, records or tangible things listed below are not being produced by you based on a claim of privilege or any other reason, please expressly state the basis or privilege claimed and describe the nature of the documents, communications or other things sufficient to enable a contest of the claim. Nev. R. Civ. Pro. 45(d).

Please produce all documents which mention or relate to (1) the federal criminal investigation of Gerard Bongiovanni, (2) all documents generated by John Nicholson or Metro Intelligence regarding the investigation of Gerard Bongiovanni, (3) all documents generated by Michael Abbott or the Nevada Division of Investigation regarding the investigation of Gerard Bongiovanni, and (4) all statements or communications from Gerard Bongiovanni and/or his defense counsel to these entities.

Please complete a Certificate of Custodian of Records, in the form set forth in NRS 52.260. If you are claiming that any of the documents described above have been destroyed or purged, please provide a copy of Certificate of Destruction, evidencing what was destroyed and the date, as set forth in NRS 239.124; NAC 239.251.

EXHIBIT 173

EXHIBIT 173

Subp

District Court

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO,

Petitioner,,

-vs-

E.K. McDANIEL, Warden of the Nevada State Prison at Ely, Nevada, CATHERINE CORTEZ MASTO, Attorney General of the STATE of NEVAD,

Respondents,.

Case No. C106784
Dept. No. XX
Docket

SUBPOENA

☐ **Regular** ☒ **Duces Tecum**

THE STATE OF NEVADA SENDS GREETINGS TO:

Leo P. Flangas, Esq.
600 S. Third Street
Las Vegas, Nevada 89101

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the _____ **day of** _____,**2008** at the hour of _____. The address where you are required to appear is 616 South Eighth Street, Las Vegas, Nevada, 89101. You are required to bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

Issued at the request of:

SHIRLEY B. PARRAGUIRRE, CLERK OF THE COURT

By:_____
DEPUTY CLERK Date

DAVID ANTHONY
ASSISTANT FEDERAL PUBLIC DEFENDER
411 E. BONNEVILLE #250, LAS
Attorney for Petitioner

STATE OF NEVADA

COUNTY OF _____

AFFIDAVIT OF SERVICE

_____being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which thisaffidavit is made. That affiant received the Subpoena on the _____ day of _____,20_____, and served the same on the _____ day of _____,20_____, by delivering a copy of the witness at (state address) _____
_____.

_____
Signature of Affiant

SUBSCRIBED AND SWORN to before me this
_____ day of _____, 20_____.

_____
NOTARY PUBLIC in and for
County of _____,
State of Nevada.

ITEMS TO BE PRODUCED

SEE ATTACHED EXHIBIT A

RIPPO v. STATE et al.,

ATTACHMENT "A"
SUBPOENA DUCES TECUM

TO: Leo P. Flangas, Esq.
600 S. Third Street
Las Vegas, Nevada 89101

OR: PERSON(S) MOST KNOWLEDGEABLE with regard to official and/or non-official records, documents and materials storage, retention, nature of and content of files of the ***Law Office of Leo P. Flangas***

YOU ARE COMMANDED to produce and permit inspection and copying of the following designated books, documents or tangible things as (a) kept in the usual course of business, or (2) organized and labeled to correspond with the categories as set forth below. Nev. R. Civ. Pro. 45.

If any of the books, documents, records or tangible things listed below are not being produced by you based on a claim of privilege or any other reason, please expressly state the basis or privilege claimed and describe the nature of the documents, communications or other things sufficient to enable a contest of the claim. Nev. R. Civ. Pro. 45(d).

Please complete a Certificate of Custodian of Records, in the form set forth in N.R.S. 52.260. Please produce or permit inspection and copying all sealed, unsealed, official and/or non official memoranda, correspondence, materials, files, tests, and/or documents of the following items and things concerning:

The complete defense file in the federal prosecution of Gerard Bongiovanni, including without limitation: (1) all documents or records of correspondence with the Clark County District Attorney's Office, the Las Vegas Metropolitan Police Department, the Nevada Division of Investigation relating to the investigation of Mr. Bongiovanni; (2) all documents or records generated by the Clark County District Attorney's Office, the Las Vegas Metropolitan Police Department, the Nevada Division of Investigation relating to the investigation of Mr. Bongiovanni; (3) all documents or records of correspondence between the Federal Bureau of Investigation or the United States Attorney's Office dated on or before April 16, 1996; (4) all documents or records generated by the Federal Bureau of Investigation or the United States Attorney's Office; (5) all wire taps, transcripts or other recordings in the subject investigation which mention or relate to Ben Spano or Denny Mason; and (6) all documents which mention or relate to Paul Dottore or Terry Salem.

EXHIBIT 174

EXHIBIT 174

Subp

District Court

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO,

Petitioner,,

-vs-

E.K. McDANIEL, Warden of the Nevada State Prison at Ely, Nevada, CATHERINE CORTEZ MASTO, Attorney General of the STATE of NEVAD,

Respondents.

Case No. C106784
Dept. No. XX
Docket

SUBPOENA
☐ **Regular** ☒ **Duces Tecum**

THE STATE OF NEVADA SENDS GREETINGS TO:
CUSTODIAN OF RECORDS
NEVADA DEPARTMENT OF INVESTIGATION

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the _____ **day of** _____, **2008** at the hour of _____. The address where you are required to appear is 616 South Eighth Street, Las Vegas, Nevada, 89101. You are required to bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

Issued at the request of:

SHIRLEY B. PARRAGUIRRE, CLERK OF THE COURT

DAVID ANTHONY
ASSISTANT FEDERAL PUBLIC DEFENDER
411 E. BONNEVILLE #250, LAS
Attorney for Petitioner

By:_____
DEPUTY CLERK Date

STATE OF NEVADA

COUNTY OF _____ **AFFIDAVIT OF SERVICE**

_____, being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which this affidavit is made. That affiant received the Subpoena on the _____ day of _____, 20_____, and served the same on the _____ day of _____, 20_____, by delivering a copy of the witness at (state address) _____ _____.

_____

Signature of Affiant

SUBSCRIBED AND SWORN to before me this _____ day of _____, 20_____.

_____

NOTARY PUBLIC in and for
County of _____,
State of Nevada.

ITEMS TO BE PRODUCED

SEE ATTACHED EXHIBIT A

RIPPO v. STATE et al.,

ATTACHMENT "A"
SUBPOENA DUCES TECUM

TO: CUSTODIAN OF RECORDS
NEVADA DEPARTMENT OF INVESTIGATION

YOU ARE COMMANDED to produce and permit inspection and copying of the following designated books, documents or tangible things as (a) kept in the usual course of business, or (b) organized and labeled to correspond with the categories as set forth below. Nev. R. Civ. Pro. 45.

If any of the books, documents, records or tangible things listed below are not being produced by you based on a claim of privilege or any other reason, please expressly state the basis or privilege claimed and describe the nature of the documents, communications or other things sufficient to enable a contest of the claim. Nev. R. Civ. Pro. 45(d).

Please produce all documents which mention or relate to (1) the federal criminal investigation of Gerard Bongiovanni, (2) all documents generated by John Nicholson or Metro Intelligence regarding the investigation of Gerard Bongiovanni, (3) all documents generated by Michael Abbott or the Nevada Division of Investigation regarding the investigation of Gerard Bongiovanni, and (4) all statements or communications from Gerard Bongiovanni and/or his defense counsel to these entities.

Please complete a Certificate of Custodian of Records, in the form set forth in NRS 52.260. If you are claiming that any of the documents described above have been destroyed or purged, please provide a copy of Certificate of Destruction, evidencing what was destroyed and the date, as set forth in NRS 239.124; NAC 239.251.

EXHIBIT 175

EXHIBIT 175

Subp

District Court

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO,

Petitioner,,

-vs-

E.K. McDANIEL, Warden of the Nevada State Prison at Ely, Nevada, CATHERINE CORTEZ MASTO, Attorney General of the STATE of NEVAD,

Respondents.,

Case No. C106784
Dept. No. XX
Docket

SUBPOENA

☐ **Regular** ☒ **Duces Tecum**

THE STATE OF NEVADA SENDS GREETINGS TO:
CUSTODIAN OF RECORDS
UNITED STATES BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the _____ **day of** _____ **,2008** at the hour of _____. The address where you are required to appear is 616 South Eighth Street, Las Vegas, Nevada, 89101. You are required to bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

Issued at the request of:

SHIRLEY B. PARRAGUIRRE, CLERK OF THE COURT

DAVID ANTHONY
ASSISTANT FEDERAL PUBLIC DEFENDER
411 E. BONNEVILLE #250, LAS
Attorney for Petitioner

By: _____
DEPUTY CLERK Date

STATE OF NEVADA

COUNTY OF _____

AFFIDAVIT OF SERVICE

_____being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which this affidavit is made. That affiant received the Subpoena on the _____ day of _____,20_____, and served the same on the _____ day of _____,20_____, by delivering a copy of the witness at (state address) _____
_____.

_____
Signature of Affiant

SUBSCRIBED AND SWORN to before me this
_____ day of _____, 20_____.

_____
NOTARY PUBLIC in and for
County of _____,
State of Nevada.

ITEMS TO BE PRODUCED

SEE ATTACHED EXHIBIT A

RIPPO v. STATE et al.,

ATTACHMENT "A"
SUBPOENA DUCES TECUM

TO: CUSTODIAN OF RECORDS
UNITED STATES BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

YOU ARE COMMANDED to produce and permit inspection and copying of the following designated books, documents or tangible things as (a) kept in the usual course of business, or (b) organized and labeled to correspond with the categories as set forth below. Nev. R. Civ. Pro. 45.

If any of the books, documents, records or tangible things listed below are not being produced by you based on a claim of privilege or any other reason, please expressly state the basis or privilege claimed and describe the nature of the documents, communications or other things sufficient to enable a contest of the claim. Nev. R. Civ. Pro. 45(d).

Please complete a Certificate of Custodian of Records, in the form set forth in NRS 52.260. If you are claiming that any of the documents described above have been destroyed or purged, please provide a copy of Certificate of Destruction, evidencing what was destroyed and the date, as set forth in NRS 239.124; NAC 239.251.

Please produce or permit inspection and copying of all sealed and/or unsealed, official and/or non official files, records, documents, investigative materials, microfiched logbooks, handwritten logbooks, data compilations from which information can be obtained, electronic files, and/or tangible things including, but not limited to, the following:

All documents which mention or relate to Thomas Sims, SS # 530-54-9360, in relation to a potential or anticipated federal criminal investigation of Mr. Sims between 1992 and 1996, including but not limited to the following: (1) all records of communications between the Clark County District Attorney's Office or the Las Vegas Metropolitan Police Department regarding Mr. Sims dated between 1992 and 1996, including but not limited to communications with John Lukens, Theresa Lowry, Melvyn Harmon, and Dan Seaton; (2) all documents generated by the Clark County District Attorney's Office or the Las Vegas Metropolitan Police Department which mention or relate to Mr. Sims; (3) all documents generated by the Bureau of Alcohol, Tobacco and Firearms regarding Thomas Sims, including but not limited to a federal investigation for the charge(s) of ex-felon in possession of a firearm; and (4) all communications from the United States Attorney's Office regarding the disposition of criminal charges against Thomas Sims.

EXHIBIT 176

EXHIBIT 176

Subp

District Court

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO,

Petitioner,,

-vs-

E.K. McDANIEL, Warden of the Nevada State Prison at Ely, Nevada, CATHERINE CORTEZ MASTO, Attorney General of the STATE of NEVAD,

Respondents.

Case No. C106784
Dept. No. XX
Docket

SUBPOENA

☐ **Regular** ☒ **Duces Tecum**

THE STATE OF NEVADA SENDS GREETINGS TO:
ROBERT ARCHIE, ESQ.

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the _____ **day of** _____,**2008** at the hour of _____. The address where you are required to appear is 616 South Eighth Street, Las Vegas, Nevada, 89101. You are required to bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

Issued at the request of:

SHIRLEY B. PARRAGUIRRE, CLERK OF THE COURT

By:_____
DEPUTY CLERK Date

DAVID ANTHONY
ASSISTANT FEDERAL PUBLIC DEFENDER
411 E. BONNEVILLE #250, LAS
Attorney for Petitioner

STATE OF NEVADA

COUNTY OF _____

AFFIDAVIT OF SERVICE

_____ being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which this affidavit is made. That affiant received the Subpoena on the _____ day of _____,20_____, and served the same on the _____ day of _____,20_____, by delivering a copy of the witness at (state address) _____

_____.

_____

Signature of Affiant

SUBSCRIBED AND SWORN to before me this _____ day of _____, 20_____.

_____

NOTARY PUBLIC in and for
County of _____,
State of Nevada.

ITEMS TO BE PRODUCED

SEE ATTACHED EXHIBIT A

RIPPO v. STATE et al.,

ATTACHMENT "A"
SUBPOENA DUCES TECUM

TO: ROBERT ARCHIE, ESQ.

YOU ARE COMMANDED to produce and permit inspection and copying of the following designated books, documents or tangible things as (a) kept in the usual course of business, or (b) organized and labeled to correspond with the categories as set forth below. Nev. R. Civ. Pro. 45.

If any of the books, documents, records or tangible things listed below are not being produced by you based on a claim of privilege or any other reason, please expressly state the basis or privilege claimed and describe the nature of the documents, communications or other things sufficient to enable a contest of the claim. Nev. R. Civ. Pro. 45(d).

Thomas Simms
SS#530-54-9360
DOB 01-11-1958

Please produce all documents relating to your representation of Thomas Simms between 1992 and 1997. This requests includes but is not limited to the following: (1) all documents reflecting communications to or from the Clark County District Attorney's Office or its representatives; (2) all documents reflecting communications to or from the Las Vegas Metropolitan Police Department or its representatives; (3) all documents reflecting communications to or from the Henderson Police Department or its representatives; (4) all documents generated by the entities specified above; (5) all documents, notes or memoranda reflecting the disposition of civil or criminal charges against Mr. Sims; and (6) all documents which mention or relate to John Lukens, Theresa Lowry, Melvyn Harmon, or Dan Seaton.

Please complete a Certificate of Custodian of Records, in the form set forth in NRS 52.260. If you are claiming that any of the documents described above have been destroyed or purged, please provide a copy of Certificate of Destruction, evidencing what was destroyed and the date, as set forth in NRS 239.124; NAC 239.251.

EXHIBIT 177

EXHIBIT 177

Subp

District Court

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO,

Petitioner,,

-vs-

E.K. McDANIEL, Warden of the Nevada State Prison at Ely, Nevada, CATHERINE CORTEZ MASTO, Attorney General of the STATE of NEVAD,

Respondents.,

Case No. C106784
Dept. No. XX
Docket

SUBPOENA

☐ **Regular** ☒ **Duces Tecum**

THE STATE OF NEVADA SENDS GREETINGS TO:

CUSTODIAN OF RECORDS
State of Nevada, Department of Corrections
5500 Snyder Ave., Bldg. 17
Carson City, Nevada 89701

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the _____ **day of** _____ **,2008** at the hour of _____. The address where you are required to appear is 616 South Eighth Street, Las Vegas, Nevada, 89101. You are required to bring with you at the time of your appearance anyitems set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

Issued at the request of:

SHIRLEY B. PARRAGUIRRE, CLERK OF THE COURT

By:_____
DEPUTY CLERK Date

DAVID ANTHONY
ASSISTANT FEDERAL PUBLIC DEFENDER
411 E. BONNEVILLE #250, LAS
Attorney for Petitioner

STATE OF NEVADA

COUNTY OF _____

AFFIDAVIT OF SERVICE

_____ being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which this affidavit is made. That affiant received the Subpoena on the _____ day of _____, 20____, and served the same on the _____ day of _____, 20____, by delivering a copy of the witness at (state address) _____

_____.

_____

Signature of Affiant

SUBSCRIBED AND SWORN to before me this
_____ day of _____, 20____.

_____

NOTARY PUBLIC in and for
County of _____,
State of Nevada.

ITEMS TO BE PRODUCED

SEE ATTACHED EXHIBIT A

EXHIBIT A
SUBPOENA DUCES TECUM

TO: CUSTODIAN OF RECORDS
State of Nevada, Department of Corrections
5500 Snyder Ave., Bldg. 17
Carson City, Nevada 89701

OR: PERSON(S) MOST KNOWLEDGEABLE with regard to official and/or non-official records, documents and materials storage, retention, nature of and content of files of the ***Execution Protocol for the State of Nevada, Department of Corrections***

YOU ARE COMMANDED to produce and permit inspection and copying of the following designated books, documents or tangible things as (a) kept in the usual course of business, or (2) organized and labeled to correspond with the categories as set forth below. Nev. R. Civ. Pro. 45.

If any of the books, documents, records or tangible things listed below are not being produced by you based on a claim of privilege or any other reason, please expressly state the basis or privilege claimed and describe the nature of the documents, communications or other things sufficient to enable a contest of the claim. Nev. R. Civ. Pro. 45(d).

Please complete a Certificate of Custodian of Records, in the form set forth in N.R.S. 52.260. Please produce or permit inspection and copying all sealed, official and/or non official memoranda, materials, files, tests, and/or documents including electronically stored media[1] of the following documents and things concerning:

1. Any and all documents from the Nevada Department of Corrections (NDOC) relating to the matter of lethal injection and its administration, including, but not limited to:

   a. A complete, unredacted copy of the current version of NDOC's Execution Manual;
   b. Complete, unredacted copies of all previous versions of the Execution Manual and all previous execution protocols;
   c. Any and all documents relating to the creation or provenance of NDOC's

[1] Electronic data to include: voice mail messages and files; back-up voice mail files; e-mail messages and files; back-up e-mail files; deleted e-mails; data files; program files; backup and archival tapes; temporary files; system history files; web site information stored in textual, graphical or audio format; web site log files; cache files; cookies; and other electronically recorded information. The disclosing party shall take reasonable steps to ensure that it discloses any back-up copies of files or archival tapes that will provide information about any "deleted" electronic data. This list is not exhaustive.

Execution Manual;

d. Any and all documents relating to the qualification of the person(s) who created NDOC's Execution Manual;

e. Any and all correspondence between NDOC and other states or other states' Departments of Correction regarding execution protocol;

f. Any and all documents relating to any research, investigations, or tests related to the creation of the Execution Manual;

g. Any and all documents relating to the administration of lethal injection which describe any revisions or changes in the process from its inception to the present;

h. Any and all documents identifying all drugs used in lethal injection and the manufacturer of those drugs;

i. Any and all documents relating to the dosages of the drugs (amounts and concentrations) used in lethal injection, the method of dosage calculation, and any consideration, if any, that NDOC gives to inmate weight, height, venous integrity, prior drug usage, and/or physical condition in determining the dosage of lethal injection drugs;

j. Any and all documents relating to the relation between the timing of the lethal injection and the time and quantity of food or beverage last ingested by the inmate;

k. Any and all documents relating to the protocol for IV insertion, the type of IV setup, and the method(s) of venous access used;

l. Any and all documents relating to the protocol for deciding when the use of a cut down is necessary;

m. Any and all documents relating to the number of syringes used, the sequence and timing of injections, the use of flush solutions, and the flow rate of the drugs;

n. Any and all documents relating to the decision that the execution cannot be stopped (and the inmate revived) after the flow of chemicals has begun;

o. Any and all documents relating to what constitutes the "appropriate medical services personnel" to effectuate the venipuncture;

p. Any and all documents relating to the topology of the execution chamber, including but limited to documents pertaining to what view, if any, the executioner(s) has of the inmate and IV during the lethal injection;

2. Any and all documents from NDOC relating to the qualifications, credentialing, experience, employment history (including discipline, complaints, and malpractice complaints), criminal record (whether or not resulting in conviction), any background checks performed, medical training that they have received at any time, and any history of drug use of persons involved in administering lethal injection, including, but not limited to, the persons who perform or are responsible for the performance of the following tasks:

a. pre-execution examination of physical health of inmate, including assessment of inmate's venous integrity and ability to achieve peripheral IV access;

b. drug mixing;
c. syringe preparation;
d. IV line set-up;
e. patency of catheters/IV lines;
f. inmate removal from cell;
g. strap down;
h. catheter insertion;
i. drug administration;
j. assessment of plane of anesthesia;
k. cardiac monitoring;
l. pronouncement of death;

3. Any and all documents from the Nevada Department of Corrections (NDOC) relating to the actual preparation for and execution by lethal injection of Nevada inmates, beginning with the execution of Carroll Cole in 1985, up to the present date, including, but not limited to, the following:

a. Any and all "Exhibit 'A'" forms, as referenced in the NDOC Execution Manual or any other similar form documenting the execution of an inmate by lethal injection in the State of Nevada;
b. Any and all "Execution Checklists," as referenced in the NDOC Execution Manual;
c. Any and all execution logs, including, but not limited to written reports, videotape recordings of executions, still photographs, audiotapes, EKG tapes/logs, and reports logging the timing of drug administration and inmate respiration;
d. Any and all documents relating to the procurement of the lethal injection drugs, the quantity of the lethal injection drugs used, and the disposal of unused lethal injection drugs;
e. Any and all witness lists;
f. Any and all documents relating to the identity and qualification of the personnel involved in administering the lethal injection;

4. Any and all documents relating to determination and pronouncement of the cause of previously executed inmates' deaths, including, but not limited to, the following:

a. autopsy reports, including photographs or diagrams;
b. toxicology reports (including, but not limited to, measurements of the presence of execution chemicals in the bloodstream);
c. certificates of death;

5. Any and all documents relating to the procedure for NDOC's planned administration of lethal injection in the future, including, but not limited to, the timing of each step of the process, the identity of each person involved in the administration of lethal injection and, a description of the extent of medical

training, if any, of each of these persons;

6. Any and all documents pertaining to the above-referenced executions by lethal injection that were produced by anyone associated with any part of the creating, maintaining, transporting, and administering the drugs used in the lethal injection procedure, including, but not limited to, the following persons:

   a. any and all wardens of NDOC;
   b. the director of NDOC;
   c. the physician summoned by the warden or director of NDOC;
   d. the medical director of NDOC;
   e. any and all staff of NDOC;
   f. any and all EMT persons;
   g. any and all persons selected by the director of NDOC to administer the lethal injection pursuant to NRS § 176.355;

7. Any other notes (printed, typed, or handwritten), reports, statements, photographs, supplemental reports, interview notes, interview summaries, narratives, affidavits, files, audio and video recordings, drawings, sketches, physical evidence, inventory logs, chronologies, summaries, witness statements, witness interviews, and witness affidavits which are responsive to the forgoing requests;

If you are claiming that any of the documents described above have been destroyed or purged, please provide a copy of Certificate of Destruction, evidencing what was destroyed and the date, as set forth in N.R.S. 239.124; N.A.C. 239.251.

EXHIBIT 178

EXHIBIT 178

Subp

District Court

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO,

Petitioner,,

-vs-

E.K. McDANIEL, Warden of the Nevada State Prison at Ely, Nevada, CATHERINE CORTEZ MASTO, Attorney General of the STATE of NEVAD,

Respondents,,

Case No. C106784
Dept. No. XX
Docket

DEPOSITION SUBPOENA

☒ **Regular** ☐ **Duces Tecum**

THE STATE OF NEVADA SENDS GREETINGS TO:

Howard Skolnik, Director
Nevada Department of Corrections
5500 Snyder Ave., Bldg. 17
Carson City, Nevada 89701

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the _____ **day of** _____,**2008** at the hour of _____. The address where you are required to appear is 411 E. Bonneville, Suite 250, Las Vegas, Nevada, 89101. You are required tobring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

Issued at the request of:

SHIRLEY B. PARRAGUIRRE, CLERK OF THE COURT

By:_____
DEPUTY CLERK Date

DAVID ANTHONY
ASSISTANT FEDERAL PUBLIC DEFENDER
411 E. BONNEVILLE #250, LAS
Attorney for Petitioner

STATE OF NEVADA

COUNTY OF _____

AFFIDAVIT OF SERVICE

_____being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which this affidavit is made. That affiant received the Subpoena on the _____ day of _____,20____, and served the same on the _____ day of _____,20____, by delivering a copy of the witness at (state address) _____
_____.

_____
Signature of Affiant

SUBSCRIBED AND SWORN to before me this
_____ day of _____, 20____.

_____
NOTARY PUBLIC in and for
County of _____,
State of Nevada.

ITEMS TO BE PRODUCED

SEE ATTACHED EXHIBIT A

EXHIBIT 179

EXHIBIT 179

Subp

District Court

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO,

Petitioner,,

-vs-

E.K. McDANIEL, Warden of the Nevada State Prison at Ely, Nevada, CATHERINE CORTEZ MASTO, Attorney General of the STATE of NEVAD,

Respondents.,

Case No. C106784
Dept. No. XX
Docket

DEPOSITION SUBPOENA

☒ **Regular** ☐ **Duces Tecum**

THE STATE OF NEVADA SENDS GREETINGS TO:

Robert Bruce Bannister, D.O.
Medical Director
Nevada Department of Corrections
5500 Snyder Ave., Bldg. 17
Carson City, Nevada 89701

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the _____ **day of** _____,**2008** at the hour of _____. The address where you are required to appear is 411 E. Bonneville, Suite 250, Las Vegas, Nevada, 89101. You are required to bring with you at thetime of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

Issued at the request of:

SHIRLEY B. PARRAGUIRRE, CLERK OF THE COURT

DAVID ANTHONY
ASSISTANT FEDERAL PUBLIC DEFENDER
411 E. BONNEVILLE #250, LAS
Attorney for Petitioner

By:_____
DEPUTY CLERK Date

STATE OF NEVADA

COUNTY OF _____

AFFIDAVIT OF SERVICE

_____being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which thisaffidavit is made. That affiant received the Subpoena on the _____ day of _____,20_____, and served the same on the _____ day of _____,20_____, by delivering a copy of the witness at (state address) _____
_____.

_____

Signature of Affiant

SUBSCRIBED AND SWORN to before me this
_____ day of _____, 20_____.

_____

NOTARY PUBLIC in and for
County of _____,
State of Nevada.

ITEMS TO BE PRODUCED

SEE ATTACHED EXHIBIT A

EXHIBIT 180

EXHIBIT 180

Subp

District Court

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO,

Petitioner.,

-vs-

E.K. McDANIEL, Warden of the Nevada State Prison at Ely, Nevada, CATHERINE CORTEZ MASTO, Attorney General of the STATE of NEVAD,

Respondents.,

Case No. C106784
Dept. No. XX
Docket

DEPOSITION SUBPOENA

[x] Regular [ ] Duces Tecum

THE STATE OF NEVADA SENDS GREETINGS TO:

Warden Bill Donat
Nevada Department of Corrections
5500 Snyder Ave., Bldg. 17
Carson City, Nevada 89701

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the _____ **day of** _____**,2008** at the hour of _____. The address where you are required to appear is 411 E. Bonneville, Suite 250, Las Vegas, Nevada, 89101. You are required tobring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

Issued at the request of:

SHIRLEY B. PARRAGUIRRE, CLERK OF THE COURT

By:_____
DEPUTY CLERK Date

DAVID ANTHONY
ASSISTANT FEDERAL PUBLIC DEFENDER
411 E. BONNEVILLE #250, LAS
Attorney for Petitioner

STATE OF NEVADA

COUNTY OF _____

AFFIDAVIT OF SERVICE

_____being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which thisaffidavit is made. That affiant received the Subpoena on the _____ day of _____,20_____, and served the same on the _____ day of _____,20_____, by delivering a copy of the witness at (state address) _____
_____.

_____
Signature of Affiant

SUBSCRIBED AND SWORN to before me this
_____ day of _____, 20_____.

_____
NOTARY PUBLIC in and for
County of _____,
State of Nevada.

ITEMS TO BE PRODUCED

SEE ATTACHED EXHIBIT A

EXHIBIT 181

EXHIBIT 181

Subp

District Court

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO,

Petitioner,,

-vs-

E.K. McDANIEL, Warden of the Nevada State Prison at Ely, Nevada, CATHERINE CORTEZ MASTO, Attorney General of the STATE of NEVAD,

Respondents.,

Case No. C106784
Dept. No. XX
Docket

DEPOSITION SUBPOENA

☒ **Regular** ☐ **Duces Tecum**

THE STATE OF NEVADA SENDS GREETINGS TO:

Stacy Giomi
Fire Chief
Carson City , Nevada

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the _____ **day of** _____**,2008** at the hour of _____. The address where you are required to appear is 411 E. Bonneville, Suite 250, Las Vegas, Nevada, 89101. You are requiredto bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

Issued at the request of:

SHIRLEY B. PARRAGUIRRE, CLERK OF THE COURT

By:_____
DEPUTY CLERK Date

DAVID ANTHONY
ASSISTANT FEDERAL PUBLIC DEFENDER
411 E. BONNEVILLE #250, LAS
Attorney for Petitioner