Exhibit 3

Exhibit 3

TRAN

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

GREGORY NEAL LEONARD,

Defendant.

CASE NO. C126285

DEPT. II

BEFORE THE HONORABLE VALORIE J. VEGA, DISTRICT COURT JUDGE

THURSDAY, MARCH 13, 2008

TRANSCRIPT OF PROCEEDING

DEFENDANT'S MOTION FOR LEAVE TO CONDUCT DISCOVERY,
DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

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

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

RECORDED BY: LISA LIZOTTE, COURT RECORDER

THURSDAY, MARCH 13, 2008 AT 10:38 A.M.

THE COURT: On page 15, State versus Gregory Neal Leonard, C126285. The record shall reflect Mr. Owens present for the State and Mr. Anthony present from the Federal Public Defender's office.

This is the time set for hearing on a couple of different motions. We have a Defendant's motion for leave to conduct discovery. We have the Defendant's petition for writ of habeas corpus. The State has lodged an op -- a return in opposition as well as a counter motion for dismissal.

How would counsel like to proceed with the argument?

MR. OWENS: Well I'll go first if --

MR. ANTHONY: That's fine with me.

MR. OWENS: All right, then. Since it's our motion to dismiss, it's important to understand the procedural posture here. This is a second State post-conviction proceeding. Your Honor signed the findings denying the first post-conviction in 2002. So, this is the sec -- the case has now come back a second time and it's some five years after the first post-conviction proceedings were denied by you. And your denial of the first proceedings without an evidentiary hearing was upheld on appeal by the Nevada Supreme Court the following year in 2003.

There's no right to bring a successive or second State habeas petition. They have to show good cause and prejudice. It's intended that everybody get one bite at the apple. They bring all their claims in the first petition or be forever barred.

Now there are a few limited circumstances under which they can file a second successive habeas petition. And they've alleged a number of factors of good cause. I filed a reply brief that addressed some of those claims just on the 11th

of this week. And, so, I don't know if the Court had got that.

THE COURT: I did.

MR. OWENS: Okay. I'd addressed all their claims of good cause and prejudice, and I'm focusing mostly on the good cause for the failure to bring this petition until October 22nd, 2007. I concede that there's at least one claim that would overcome the procedural bars and that is the *McConnell* claim that strikes our one and only aggravator. I've litigated that time and time again. I don't see any other way to make any legal argument to preserve the death penalty in this case.

And, so, I have conceded that that one and only death aggravator must be stricken and we'll have to go back for a new penalty hearing. I advise all the parties that we will be filing an amended notice of intent to seek the death penalty adding a new aggravator that was not previously available to us, and that is the conviction, now, in the other Leonard case, the -- where the victim is Tony Antee. We don't have to litigate that right now, but I'm just advising the parties that we will still intend to seek the death penalty in this case at some future date, even though our one and only death aggravators will have to be stricken because of *McConnell*.

Absent the *McConnell* claim, all the other -- because that *McConnell* case has been made retroactive and they can show good cause and prejudice that he would not have been death eligible without that one aggravator. And, so, that's why that claim survives the procedural bars. It's our argument that all the other claims, if they had to do with the penalty hearing they are mooted because we are green to go back for a new penalty hearing. All the other claims relative to the guilt phase of the trial, that they haven't shown good cause and prejudice. They allege several claims of -- that there's new authority that like -- kind of like *McConnell*. Well I've addressed their new authority that was raised for the first time in their opposition

to my motion to dismiss. None of it's on point. None of it gives the Defendants a right to bring a new petition here. Much of it hasn't changed the law here in the State of Nevada nor has it been found retroactive to somebody's case, who has been final on direct appeal from 1999, is when remitter issued in this case.

The other claims -- and the time that I'm looking at and I'm focusing on, is that time between the first post-conviction proceedings and this second post-conviction proceeding and that's a time of about five years. Now if they want to allege that first post-conviction counsel was ineffective, I think that was Carmine Colucci, they have a right to do that in a capital case. But they have to do it in a timely manner. Five years is not a timely manner to raise claims of ineffective assistance of post-conviction counsel. They can't sit over there in Federal Court for five years and pursue their relief there, pursue their claims there, and then come back to State Court many years later and try to raise these claims.

In regards to their *Brady* allegations, they, Federal Public Defender, obtained this information two and a half years prior to coming back here to State Court. We know that because they funneled all of this information about Jesus Cintron and his alleged inducements. They funneled that to Chris Oram in the other Antee murder case, where their victim's Tony Antee in the other case.

Christopher Oram filed a brief alleging all those inducements in June of 2005 in the other case and in there he says that the Federal Public Defender contacted him in April of 2005 and gave him all of those documents. So, their claims that they didn't -- they just recently came upon some of these documents and these Justice Court records is not accurate. They sat in Federal Court for two and a half years having all the documentation that they've now filed, finally, October 22nd of 2007. Under the *Colley* case, they can't do that. They can't sit there and wait.

So, this case is different from the Antee case. They didn't timely bring those Jesus Cintron *Brady* claims. Those are not inducements anyway. They do nothing more than confirm what inducements or alleged inducements were brought out in the Antee trial and which were part of the subject of appeal in the Antee case.

In 2001, there's a published opinion where the Supreme Court looked at these alleged inducements and they said they're not inducements. Yes, Jesus was -- got his car out of impound. Yes, the DA went and obtained an OR for Jesus Cintron in this case and; yes, the DA helped him get a couple extensions of time in Justice Court. The Court said that the -- in the other case, on direct appeal, they said that has a minimal value. Now I know they've added a few documents to those claims. Those are the documents that came forward in April of 2005 that they had, and that's my argument that they had nothing more of any substance to what was all -- not already known in the Antee trial in 1999 and was resolved in that 2001 appeal in the other case.

So, they don't have -- they waited too long, they don't have good cause, and they can't show prejudice to overcome the procedural bars. They're not entitled to an evidentiary hearing because they make the argument: Well, to prove good cause and prejudice, I need discovery and I need an evidentiary hearing. That's not what the law is. The law says you have to make an allegation, which if true, would entitle you to relief. To be entitled to relief, they have to overcome these procedural bars by a high standard now, clear and convincing evidence.

None of their allegations, even if true, would entitle them to relief. That's why there's no need to have any sort of factual evidentiary hearing on it and that's why they're not entitled to discovery. Only if the Court were to set -- if there were some dispute of fact or some claim that they had made that would entitle them

to relief, meaning striking -- that he'd get a new trial. Only if they had a claim like that would there be a need to flush out some facts, hold an evidentiary hearing, and then allow the parties discovery. But they're not allowed discovery to go fishing in hopes of finding some new evidence, some new claim that they can raise.

The successive petition that needs to be summarily disposed of 'cause they can't show good cause, they don't need any subpoenas or depositions to show good cause. The good cause was them sitting over there in Federal Court for five years or at least two and a half years that we know of for some of these claims.

MR. ANTHONY: Your Honor, I think, that before starting with my argument, it's important to point out the areas where the State and I are in agreement. And as Mr. Owens mentioned at the very beginning, we are in agreement that there needs to be a new penalty hearing in this case. There was only one aggravating circumstance, which was robbery. And as the State acknowledged in its motion to dismiss, given the *McConnell* case, that aggravating circumstance is no longer valid which means that there are no remaining aggravating circumstances and Mr. Leonard is entitled to a new penalty hearing.

I didn't have anything in addition to add to that unless the Court has any questions. If not, then --

THE COURT: I do just because of what Mr. Owens raised in his argument that I had not foreseen which was I assumed that with the new penalty phase, it would go the jury to determine life, life without, or a term of years. But now he's indicating that there may a future filing with a new aggravator and so, I think -- that's something that I had not anticipated. So, I guess we're going to have to wait for the filing and then set a briefing schedule on that issue down the road.

MR. ANTHONY: Yeah, that's correct, Your Honor. I mean, like Mr. Owens

mentioned I -- as to what we're doing here today, that's not necessarily relevant because there's no aggravators remaining. It's their prerogative to do whatever it is they think they want to do when we come to the issue of a re-trial, and we can litigate those issues, file a motion to strike, and see what we get. And that's something that we can decide down the road. But the important thing for our purposes today is that Mr. Leonard is entitled to a new penalty hearing.

So, as far as the structure of my argument today, I wasn't going to address any of the other penalty phase issues because they would be moot with the ruling that Mr. Leonard's entitled to a new penalty hearing. So, I only wanted to very briefly address, Your Honor, some of the issues that go to the guilt phase of Mr. Leonard's trial.

There are four claims that I wanted to just discuss briefly. The first claim is claim 8 in our petition, which argues that the felony murder instruction that was given to the jury was inadequate.

As the State notes in their motion to dismiss, this was a claim that Mr. Leonard raised at trial and this was also an issue that he raised on direct appeal. And the issue was rejected when he raised it back in 1997 on direct appeal. However, now we have new intervening authority. We have the *Nay* case which is the case that I cited in my opposition to motion to dismiss. That's a case, an en banc case, from the Nevada Supreme Court that just came out last December. And in that case, the Nevada Supreme Court held that it was a jury instructional error for the jury only to be instructed on the definition of robbery and then to simply be told as to felony murder, that if you find robbery that means that you, by definition, have a felony murder conviction.

In the *Nay* case, the Court said that -- if -- when the jury instructions

allow a finding of an intent to take property from a victim who's already deceased, that that can't support a conviction for felony murder. It's what they call an afterthought robbery. And if you look at the State's theory of this case all the way throughout, if you look at their opening statements, if you look at the evidence they presented, if you look at their closing arguments, it was always their theory that Mr. Leonard killed the victim, left the victim's home, and then returned to take the victim's possessions.

So, our argument and the argument that was raised at trial was -- is that Mr. Leonard was entitled to a jury instruction telling the jury that there had to be an intent to take property at the time that the force was used against the victim. And that was the fundamental jury instructional error that occurred in this case.

I'm just going to briefly address the issues in Mr. Owens' reply. He concedes that if there wasn't a legal basis for Mr. Leonard's claim, then he has good cause to re-raise the claim before the Court today. And that's the good cause that we're able to show to actually bring the claim.

He states in his reply that there was a finding by the Nevada Supreme Court that there was sufficient evidence of felony murder. The problem is, is that there's a difference between a sufficiency of the evidence claim and a jury instruction claim. When you have a sufficiency of the evidence claim, the question is whether any reasonable fact finder could have found Mr. Leonard guilty beyond a reasonable doubt. That's a very, very lenient standard. It doesn't require much. There's a big difference, though, when you have a jury instructional error. When you have a jury instruction error, the prejudice question is whether the jury could have construed the jury instruction in a manner that was improper. And that's all you have to show when you have a jury instructional error, and that issue was not

addressed on direct appeal.

The State also argues in its reply that the *Nay* case cannot be applied retroactively. My advice, Your Honor, is retroactivity is a very complex issue. And if the Court is concerned about that, we would be willing to submit briefing on that particular issue, because we have no doubt whatsoever that *Nay* would be applied retroactively to Mr. Leonard. The reason it would be applied retroactively is the same reason that *McConnell* is retroactive. And that is -- it's called a Substantive Rule of Criminal Law. Whenever you take a criminal statute and you narrow it, that's called a Substantive Rule of Criminal Law, and those decisions always have to be made retroactive. That's the same reason that *McConnell* is retroactive is because they took a very broad, capital murder statute and then they made it narrow. That's the same thing that they're doing in *Nay*. They take what could be a very broad interpretation of the felony murder statute and they narrow it, and they say: We can apply it in situations where the intent to take property arises after forces use or after the victim is killed. So, that would be why it should be applied retroactively today. Mr. Owens says it hasn't been applied retroactively yet, but the decision just came out two months ago and that's what we're doing here today is arguing that it should be applied retroactively.

Mr. Owens also says in his reply that the jury was affirmatively instructed in the *Nay* case that the intent was irrelevant, but that's not the facts in this case. But if you look at the facts in this case, if you look at jury instruction number 11, it specifically says that you can have another intent altogether at the time the victim is killed and that doesn't matter as long as you subsequently take the victim's property. That's the same reason that it was prejudicial in *Nay* and that's the reason it's prejudicial today for Mr. Leonard.

The last argument he makes is that the closing arguments were different but really the closing arguments were the same. The Prosecutor told them in closing, if you find robbery, you got felony murder. That's what they said in *Nay* and that's what they said in this case. So, our argument would be that it's prejudicial in *Nay* just as it's prejudicial in Mr. Leonard's case.

We also -- I wanted to discuss, very briefly, claim 10. Claim 10 is also based upon an intervening change in law. Mr. Owens has acknowledged that when you have a new legal basis that wasn't previously available, that that would constitute good cause for re-raising the claim today. Under the *Polk* case, the argument is is that in Mr. Leonard's case, the jury instructions omitted the element of deliberation and that that was constitutional error. Mr. Owens raises the argument about retroactivity. But if you look in the *Polk* case, the *Polk* case says that their decision is based upon a 1979 U.S. Supreme Court case. The case is called *Sandstrom v. Montana*. And *Sandstrom* says that you can't omit an element of a criminal offense and then -- in a jury instruction and send the case to the jury. And that's been the law since 1979.

So, when Mr. Owens talks about whether it should be retroactive or not, again, that's an issue we should probably brief on paper. But it's certain that it would be retroactive because this is a constitutional rule that's existed since 1979. And, again, like I stated previously, this would be considered a substantive rule of criminal law because you're actually narrowing the scope of a criminal statute.

In the *Byford* case, the Nevada Supreme Court said: Look, the element of deliberation actually means something. It means something in addition to premeditation. It means that a person has to dispassionately reflect upon the gravity of their actions as necessary to find first degree murder.

Our argument is that Mr. Leonard's jury instructions omitted that element and that's why he should be entitled to relief.

Mr. Owens, again, raises the sufficiency of the evidence issue which was raised on direct appeal. But as I explained previously, a jury instruction claim has a different prejudiced component than a sufficiency of the evidence claim, which is very favorable to the prosecution, whereas a jury instruction issue just says: Would a reasonable jury, looking at these instructions, have been confused on this issue? And if you look at the instructions, they didn't -- they said that premeditation, if you found it, meant that you also found deliberation too. And that's why the jury would have been confused. And that means that we can show prejudice and should be able to obtain relief.

Mr. Owens argues that we didn't preserve the issue at trial. However, we did preserve the issue at trial. On pages 85 and 86 of the trial transcript from August 14th of '97, Mr. Shieck, the trial attorney, specifically raised a claim that the premeditation instruction was invalid because it omitted the element of deliberation. And as Mr. Owens also acknowledges in his motion to dismiss, that argument was raised on direct appeal but it was rejected under the law as it existed at the time. Now the law is different and our argument is is that the law should be applied to Mr. Leonard because it's bases upon authority going all the back to 1979.

We also have claim 3 in our petition. Claim 3 argues that Phyllis Fineberg, who was one of the State's witnesses, contaminated different members of the jury. If you look at exhibit 265, we have a declaration from Lynn Weaver, who was a juror who sat on the jury and explained that she was subject to the same contaminating information that Leopold Turenne was subject to, and that was a person who was removed from the jury. When that happened at trial, the State said

it was the best thing to do, to remove Mr. Turenne from the trial. But what happened is, is that they allowed him to stay on the jury until the jury was sent out to deliberate, which gave him the opportunity to contaminate other people in the jury what that same information. And from our declaration from Ms. Weaver, we've been able to show that she, in fact, was contaminated with that information.

The argument that Mr. Owens raises as to his reply is that we can't show good cause to do it at this late of a date. However, our argument that we raised in our opposition was is that whenever you have the denial of an evidentiary hearing on a claim, that's an impediment that external to the defense. There was good reason to believe that Mr. Turenne could have contaminated other jurors. Our argument is that he was entitled to a hearing on that issue in the first post-conviction hearing, and the fact that he was denied a hearing can't be attributed to him. It can't be considered his fault that he wasn't allowed to develop that evidence.

The other showing of good cause is by showing ineffective assistance of post-conviction counsel. And Mr. Owens mentioned that Mr. Colucci was the post-conviction attorney. What we've been able to show is that Mr. Colucci did not do any investigation in the case. He took a petition that was *Pro Se* that had been done by JoNell Thomas, then he cut and pasted it into his letterhead on his pleadings, and then he filed it almost unchanged. And that's all he did in this case. And, you know, he didn't go out and interview any jurors and his failure to do that could constitute good cause for failing to raise the claim in the first post-conviction hearing. And we've been able to show cause, based upon the fact that he didn't do it, and prejudice, based upon the fact that Ms. Weaver was contaminated by that same information. And if he would have interviewed Ms. Weaver, he would have been able to bring to the Court, back in 2000, the same information that we're

bringing to the Court today. And that's what we're arguing is the difference between what happened in the past versus what's in front of the Court now.

The last claim I want to talk about, and I'll sit down here, is claim 6 and that's our claim that alleges that the State failed to disclose material exculpatory and impeachment information. Mr. Owens brings up what happened on direct appeal, that this was decided in the Antee case.

The problem is that the record on direct appeal consisted of Peggy Leen's representations on the record and the testimony that she elicited from Jesus Cintron that said: We gave this guy some money for a secret witness, but we didn't do anything else for him. And that's what both she and Mr. Cintron testified to. On direct appeal, the Nevada Supreme Court relied upon those representations to deny this claim. Our argument is if you look at the exhibits 36 through 40 of the petition, those are bench memos of Judge Oesterle, where she's being approached, off the record, by Peggy Leen to get benefits for Mr. Cintron. All of those benefits that are in those bench memos were not disclosed at the time of trial and they were inconsistent with the representations that Ms. Leen made on the record back in the Antee trial.

Our argument is that the difference in the record should dictate a different result. The State has argued that we should have presented these claims earlier. However, when we found the evidence, what we did is we filed a motion to unseal all those records in State Court. And I attached a declaration to my opposition talking about the efforts that it took to actually obtain that information from State Court. We weren't able to obtain a motion to unseal from Judge Bixler until December 6th of 2006. And the information that we have on Phyllis Fineberg was disclosed for the first time on November 3rd of 2006. And our position is that we

were reasonably diligent within one year of gathering all that information. We presented it to this Court and our argument is that under those circumstances, we've been sufficiently diligent and our discovery motion should be entertained, and we should be allowed to look at their prosecution file because for all we know, it could just be the tip of the iceberg. They could have a whole bunch of more stuff in there that we've never even looked at yet.

So, basically, Your Honor, all we're asking for is a hearing and the ability to take a look at what they've got. I mean, you know, it's their obligation to set the record straight when they don't disclose evidence and that's all we're asking for. It's just a chance to take a look at what they have in their files and to get a hearing on it. And with that, that's all I have for those claims.

Thank you, Your Honor.

MR. OWENS: If I could be heard just briefly. I do have with me the filing by Chris Oram in the other Antee case. If the Court would indulge me, I'd like to provide the Court with a copy of it because it sets forth all the claims that the Federal Public Defender just talked about and said he didn't get until 2006.

This document indicates that he gave all those bench memos -- he didn't have to wait for an order unsealing it from Judge Bixler. He had all those bench memos. He had all the sticky notes from the Justice Court files and he gave him to Chris Oram in April of 2005 and then sat back in Federal Court for two and a half years before filing them here.

The State has provided discovery in this case many, many, many, many times. They never liked the way that we provide discovery. They always allege that there are, yet, hidden things. Many of these inducements that they have raised in the other Antee murder case, many of them came after this murder case.

They were Peggy Leen going to the judge after. Some of them occurred before this murder trial, which was in August of '97, but many of their alleged inducements happened in September, October, November, December of 1997, after this trial was done and over with. That's why they're more properly raised in the other case. Now there were some that pre-dated it, but all those things have been known at least since the 1999 Antee murder case where it was argued at that time, and when it went up on appeal in the Antee case and there was a ruling -- published opinion in 2001, where the Court looked at all that stuff. The fact that Peggy Leen went over there, we don't need bench memos to know that. Peggy Leen admitted, in 1999, in the Antee case, that she went over to the Justice of the Peace, Nancy Oesterle, and induced her to give the Defendant more time. All they've done is corroborate what was already known and shown to the Defendant in the '99 Antee case in which the Supreme Court said: Those aren't inducements. They're -- the value of them is marginal and would not have made a difference in that case.

On this retroactivity, that's their burden of proof. They didn't allege this in the petition. They raised these cases in their opposition. Even then, they don't raise retroactively of these cases. I raised it for the first time two days ago in my reply to their opposition. They have the burden to come forward and say: Here's this case law that would be applicable to the Defendant because he's retroactive and here is our explanation. I think it's too late in the game for them to keep shifting on the issues and now saying: Well, yeah, let's brief retroactivity. They'd like us to brief these issues ad nauseam for four or five years like they've done in the other *Leonard* case.

Polk did not change the law in Nevada on this deliberation instruction. In 2000 in the *Byford* case, the Nevada Supreme Court said: We're going to start

instructing differently on premeditation and deliberation and this is prospective only. Then they came out later in *Garner* and they said: We meant what we said in *Byford*. It is not retroactive. That remains the current law as far as the Nevada Supreme Court is concerned; the *Caslin* instruction's constitutional and there is no need for that opinion in *Byford* to be applied retroactively.

The *Polk* case does not change that. *Polk*, by the 9th Circuit, they can't decide whether Nevada law is retroactive and *Polk* didn't reach that issue, didn't talk about retroactivity. So, that just simply is not an issue.

And as for the *Christopher Nay* case, that new opinion that just came down a little bit ago, there has been no ruling that it's retroactive. Maybe they want to make the claim here because of -- that was my response.

This case is 11 years old, and they can't keep raising challenges to jury instructions. The law, at the time, was accurate and the Supreme Court looked at that felony murder instruction at the law at the time and they said: This is the law in Nevada. But they said even if it wasn't, and even if we were to recognize this afterthought murder theory, it would have not provided any relief to the Defendant. I read that opinion on direct appeal as expressly rejecting the argument that they're making now that now that the Supreme Court has changed their mind and are going to adopt this new rule, that that would have made a difference to them. So, even if it were retroactive, I think it's barred. Factually, the Supreme Court's already looked at that and considered it and said the Defendant wouldn't have gotten any relief because of it.

The Lynn Weaver contamination of the jury thing. They had -- this came up in trial in 1997. Everybody knew that Phyllis Fineberg had talked to some of the jurors and they've had 10, 11 years to go interview these jurors. They can't,

11 years later, come and say: Well, we finally got around to interviewing the jurors and here's one that had some additional information that we didn't know about. They can't blame that on the Court for not granting them an evidentiary hearing 'cause they previously did not make a specific allegation, which if true, would have entitled them to relief. It was incumbent on them to go out and interview. Nobody told them they couldn't interview. They always interview these witnesses and these jurors after a jury trial. So, that is -- was within the Defendant's sole right to do and his -- he can't start blaming it and saying it's not his fault that that wasn't done.

I think I've addressed all of his issues and unless the Court has further questions, I'll submit it with that.

THE COURT: I have no further questions. Mr. Oram's supplemental brief will be marked as the State's number 1 for purposes of today's hearing.

[Pause in proceeding]

In the petition for writ of habeas corpus, there are 23 claims. The Court, at this time, does grant the State's motion to dismiss as to claims 2 through 23. They all are time barred, successive, and previously affirmed on appeal constituting law of the case and are barred under NRS 34.726, 34.810, and *Leonard versus State*, 114 Nevada 1196 from 1998.

On the jury instruction challenged claims, those challenges under the new *Nay* and *Polk* decisions have been brought too late, are factually barred, and entitlement to retroactive application has not been shown. Because of the Nevada Supreme Court's ruling in *Byford*, I'm going to make further findings on each claim individually.

On claim number 2, denied as barred by law of the case under *Leonard versus State*, 114 Nevada 1196 from 1998.

Under claim 3, that dismissed, pursuant to the law of the case, under *Leonard v. State*, 114 Nevada 1196 from 1998.

Claim 4, motion to dismiss granted pursuant to *Sterling versus State*, 108 Nevada 391 at 394 from 1992; *McGuire versus State*, 100 Nevada 153 from 1984. The objection, not having been raised, was waived and prejudice was not shown. This is also denied, pursuant to law of the case, *Leonard versus State*, 114 Nevada 1196 from 1998.

Claim 5, dismissed pursuant to the law of the case, under the *Batson versus Kentucky* decision, 476 U.S. 79 from 1986 and *Leonard versus State*, 114 Nevada 1196 from 1998.

Claim 6, the Court finds that the Defendant could have filed his claims but chose to pursue Federal habeas relief instead. The value of the impeachment evidence is quite limited and issues are precluded under the law of the case from the Antee case as well.

On this, the dismissal shall enter because the claims were not raised in the post -- in the first post-conviction petition nor on direct appeal and the Defendants waive the right to raise them at this point under NRS 34.810, *Phelps versus Director of Prisons*, 104 Nevada 656 from 1988. Also, the Defendant has not shown good cause to overcome the procedural bars. So, the dismissal is also under *Colley versus State*, 105 Nevada 235 from 1989. Again, any impeachment value is quite limited and highly unlikely to have had any affect on the ultimate outcome.

Under claim number 7, the dismissal enters as this claim is barred by the law of the case under *Leonard versus State*, 114 Nevada 1196 at 1213 from 1998.

Claim 8 is dismissed, as barred by law of the case, under *Leonard*

versus State, 114 Nevada 1196 at 1208 from 1998.

Claim 9 is dismissed, pursuant to the law of the case, under *Leonard versus State*, 114 Nevada 1196 at 1210 to 1211 from 1998.

Claim 10 is dismissed, pursuant to the law of the case, under *Leonard versus State*, 114 Nevada 1196 from 1998 and also pursuant to *Scott versus State*, 92 Nevada 552 from 1976.

Claim 11 is dismissed, as belied by the record, pursuant to the law of the case, under *Leonard versus State*, 114 Nevada 1196 from 1998 and being time barred under NRS 34.726 and 34.810.

Claim 12 is dismissed, as barred by the law of the case, under *Leonard versus State*, 114 Nevada 1196 at 1211 to 1215 from 1998.

Claim 13 is dismissed, pursuant to the law of the State, under *Leonard versus State*, 114 Nevada 1196 at 1206 from 1998.

Claim 14 is denied pursuant -- or the motion to dismiss is granted pursuant to *Leonard versus State*, 114 Nevada 1196 from 1998.

Claim 15, on penalty phase hearsay, is dismissed pursuant to the law of the case, *Leonard versus State*, 114 Nevada 1196 at 1213 to 1214 from 1998. And I believe that this particular claim is also going to be rendered moot by the ruling that shall come shortly on claim 1 of the petition.

On claim 16, a dismissal is pursuant to the law of the case, in *Leonard versus State*, 114 Nevada 1196 at 1213 to14 from 1998.

Claim 17 is dismissed, pursuant to the law of the case, under *Leonard versus State*, 114 Nevada 1196 from 1998.

Claim 18 is dismissed, pursuant to the law of the case, under *Leonard versus State*, 114 Nevada 1196 from 1998.

Claim 19 is denied as the claim was waived for failing to be raised on direct appeal, pursuant to NRS 34.810, and is not meritorious either based upon the Nevada Supreme Court's decision in *McKenna versus State*, 101 Nevada 338 from 1985.

Claim 20 is dismissed as the Defendant has not made a sufficient showing that his claims are meritorious and could not show that he was prejudiced nor that the outcome would have been any different. And that is pursuant to *Strickland versus Washington*, 466 U.S. 668 from 1984 and *Doyle versus State*, 116 Nevada 148 from 2000, and also time barred pursuant to NRS 34.726.

Claim 21 is dismissed as the Defendant has not shown that his claim is meritorious nor that he was prejudiced nor that the outcome would have been any different. This is pursuant to *Strickland versus Washington*, 466 U.S. 668 from 1984 and *Doyle versus State*, 116 Nevada 148 from 2000, and this is also time barred under NRS 34.726.

Claim 22 is dismissed, pursuant to the law of the case, under *Leonard versus State*, 114 Nevada, 1996, at 1216 from 1998.

Claim 23 is denied, pursuant to the Nevada Supreme Court's decision, and that *State versus McConnell*, 120 Nevada 1056 from 2004 and *State versus Jon, J-O-N*, 46 Nevada 418 from 1923.

The Court does hereby grant the Defendant's petition for writ of habeas corpus on claim 1. With regard to the felony murder aggravating factor, in light of the Nevada Supreme Court's decision under *McConnell versus State*, 120 Nevada 1043 from 2004, which the Nevada Supreme Court clearly indicated had retroactive application in the decision it issued under *Bejarano, B-E-J-A-R-A-N-O, versus State*, 122 Nevada, the advanced opinion 92 from 2006.

Without the prior sentence previously opposed, I believe should be ordered vacated at this time. Counsel are both nodding their head up and down. So, the prior sentence is ordered vacated. There will be a new penalty phase hearing.

With regard to the Defendant's motion for leave to conduct discovery, in light of the findings and the rulings on the other motions and the further finding that the Defendant has not shown good cause as required under NRS 34.780, that motion is denied pursuant to same statute.

The Court will ask that Mr. Owens prepare a global order and pass it by Mr. Anthony for review prior to submission to the Court. Do we need to set a briefing schedule or you just going to file the notice and then --

MR. OWENS: Well we'll -- I submit findings to Mr. Anthony. We'll get the findings filed. I don't know whether they will want to take an appeal from the denial of the guilt phase issues. I want to appeal to the granting of the penalty -- the new penalty hearing because I conceded that point. They may want to take an appeal. If they don't, I will transfer this file over to MVU at some future date and they'll be responsible for doing the penalty hearing but --

MR. ANTHONY: Just so the Court is aware, we do intend to take an appeal as to the guilt phase issues so --

MR. OWENS: So, there's no need for -- to set anything in this department. It will be stayed while they pursue that appeal.

THE COURT: Okay. So, the parties will stipulate for the stay of the penalty phase pending the appeal on the other issues and the claims 2 through 23?

MR. ANTHONY: Certainly.

MR. OWENS: Yes.

THE COURT: Very well.

MR. OWENS: May I approach with an order for a transcript from today's hearing?

THE COURT: Yes.

MR. OWENS: I appreciate the detail in the Court's order. That will make it easy to prepare findings.

THE COURT: The order for the transcript has been signed and returned to Mr. Owens.

MR. OWENS: Thank you.

THE COURT: You're welcome.

MR. OWENS: Thanks, Judge.

THE COURT: You're welcome.

[Proceeding concluded at 11:22 a.m.]

[Matter recalled at 11:37 a.m.]

THE COURT: The Court recalls the case on page 15, State versus Gregory Neal Leonard, C126285. The Court neglected to, on the record, waive Mr. Leonard's appearance for the purposes of today's arguments on the motions the Court heard, so the Court does that at this time.

[Proceeding concluded at 11:38 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case.

Patricia Slattery

PATRICIA SLATTERY
Court Recorder/Transcriber

Exhibit 2

Exhibit 2

OPPS
DAVID ROGER
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STEVEN S. OWENS
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200 Lewis Avenue
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Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- JOSE ECHAVARRIA #0930241 Defendant.	CASE NO: C95399 DEPT NO: VIII

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

DATE OF HEARING: September 17, 2007
TIME OF HEARING: 10:30 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Petition For Writ Of Habeas Corpus (Post-Conviction).

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

A. Facts of the Case[1]

On June 25, 1990, FBI Agent John Bailey entered the Security Pacific Bank at 1140 East Desert Inn Road, Las Vegas, Nevada. He entered the building on official business to serve subpoenas for an investigation he was conducting. At approximately 11:45 a.m., on that same date, Jose Echavarria entered the bank hoping to rob it. Before Echavarria left the bank he had gunned down Agent Bailey in front of a dozen witnesses.

When Echavarria entered the bank he was disguised as a woman. He wore a black curly wig, a dress, and makeup. He had a gauze pad taped onto his cheek, and wore a cast on his arm. Echavarria approached bank teller Connie Velasquez. He took out his wallet, removed two one-hundred dollar bills, and placed them on Velasquez' counter. She assumed that he wanted change. When Velasquez turned around Echavarria pointed a gun at her. She was frightened, and jumped backward four feet and screamed.

Another employee, Helen Loudermilk, responded to Connie Velasquez' scream. When Loudermilk went over to Velasquez' window, she heard Echavarria state in perfect English, "Oh shit, shut up." He picked the hundred dollar bills up, and put them back in his wallet. Echavarria then tucked the gun into his waist and proceeded to walk towards the door.

During this time, Agent Bailey was across the room working with Sharon Hicks. When Agent Bailey heard the commotion he ran over to the tellers to ascertain what the problem was. After learning about Echavarria's threat to Velasquez, Bailey located Echavarria and yelled, "Halt, this is the FBI." Agent Bailey pulled out his gun and clearly identified himself as an FBI agent. Echavarria turned, looked back at Agent Bailey, and continued walking towards the bank exit.

Agent Bailey again yelled for Echavarria to stop. When Echavarria ignored Bailey's

[1] Facts taken from State's Answering Brief on Direct Appeal. (citations omitted).

second command, Agent Bailey fired a warning shot that shattered the bank's front door. Agent Bailey then put Echavarria against the wall and searched him. He removed Echavarria's wallet and placed it on top of a nearby candy machine. Agent Bailey did not have his handcuffs with him, so he gave Sharon Hicks his car keys and asked her to retrieve them from his car. Agent Bailey then asked Helen Loudermilk to call the FBI office.

Agent Bailey sat Echavarria in a chair and waited for Sharon Hicks to arrive with his handcuffs. Suddenly, Echavarria jumped out of the chair and ran into Agent Bailey, knocking the agent into a wall. The two men began to scuffle on the ground when Echavarria backed up a few feet and retrieved his weapon. Echavarria picked up the gun, and quickly assumed a shooting position with his gun pointed down toward the floor. He told Agent Bailey to give up his gun. He paused for about three or four second before he fired into the chest of Agent Bailey. There was a long pause after the first shot, then Echavarria fired at least two more shots. Some witnesses heard three shots, while others heard as many as four. Echavarria ran from the scene.

Two of the shots entered Agent Bailey's chest, and a third shattered his arm. At 11:55 a.m., paramedics arrived at the bank. When paramedic Anthony Riveria arrived he saw Agent Bailey in a blood soaked shirt, lying in a supine position. Agent Bailey was awake but very pale and very moist. The pain had sent him into shock. Agent Bailey was then taken to University Medical Center Hospital, where he died at 2:30 p.m.

As the shooting was going on inside, a blue Firebird suddenly sped into the parking lot and came to a halt. Echavarria's roommate, Carlos Gurry, jumped out of the driver's seat and gestured and yelled to Echavarria. Echavarrria was running from the bank towards the vehicle. He leaped over a hedge, got in the passenger side, and the two men sped away.

A police officer arriving on the scene only a minute later found a motorcycle laying on its side in the handicapped space at the Security Pacific Bank. He ran the motorcycle's license plate number through the Department of Motor Vehicles (DMV) and found out that the plate did not belong to the motorcycle that it was attached to.

The plate, in fact, belonged to Richard Osborne and had been used to "coldplate" or

disguise the motorcycle. Richard Osborne was contacted and he explained that he had a good view of the person who stole his license plate. He positively identified Gurry as the thief. Subsequent fingerprinting revealed that Gurry had recently handled the stolen license plate.

Because the license plate did not match the vehicle, the VIN (vehicle identification number) on the motorcycle was run through DMV records. In this manner, the motorcycle was traced to its rightful owner, Echavarria.

The police on the scene also found Echavarria's wallet, which was still laying on top of the candy dispenser. Inside it were the two hundred dollar bills that had been thrown on Connie Velasquez' counter. Also inside the wallet was a book of bank deposit slips with account numbers on them. The account numbers were registered to Carlos Gurry.

Based on these facts, the records of both Gurry and Echavarria were searched. It was determined that the two men were roommates at 528 Calcaterra Circle, Apartment C. The police then obtained a search warrant for the roommates' apartment. When they arrived at the apartment, they found that no one was at home. On the floor, however, was the license plate from Echavarria's motorcycle and a screwdriver. Later, fingerprinting of the plate would reveal that Gurry had just recently been handling it.

Other incriminating evidence was found outside of the apartment. In the dumpster approximately 30-40 yards north of the apartment, they found a visa credit card application form that had been removed from the Security Pacific Bank. Again, fingerprinting would later reveal that this application had been recently handled by both Echavarria and Gurry.

The dumpster also revealed a card with "C. Williams Costume Shop" written on it. Clerks at the costume shop would later explain their recollections of two men who resembled Gurry and Echavarria who came into the store to look at wigs and casts.

While the police officers were investigating the apartment, Gurry returned to his residence. He was arrested and taken into custody by Nevada officials. Echavarria, in the meantime, had fled Las Vegas for Juarez, Mexico.

On June 26, 1990, at 2:30 a.m., he arrived at the house of his former girlfriend, Maria

Garcia, in Ciudad Juarez, Mexico. When Garcia's husband appeared displeased by Echavarria's presence, Echavarria pointed his gun at him and told him to leave. Maria Garcia gave Echavarria six hundred dollars and told him to leave. She noticed that Echavarria was driving a blue Firebird – the same one used as the "getaway" car.

Echavarria later met with Garcia's brother Jorge. He told Jorge Garcia that there had been a problem in a Las Vegas bank and that he had shot a person three times. He never claimed that the shooting was an act of self-defense. He explained that his plan was to buy a plane ticket in Garcia's name and fly to the Bahamas. Before going to the airport, Echavarria handed Garcia two guns to hide, one of which was the murder weapon. He also asked Garcia to dispose of the blue Firebird.

Later, on June 26, 1990, the Juarez police captured Echavarria. Maria Garcia was present at the jail where Echavarria was held in custody. She heard him cry. She explained that what she heard were tears from repentance and fear. They were not tears from inflicted pain as he later claimed. The next morning, on June 27, 1990, Echavarria confessed to the murder of Agent John Bailey.

In addition to his confession to Jorge Garcia and the Mexican Police, Echavarria continued to confess to others that he ran into. He confessed to the FBI. He confessed to El Paso news reporter Patricia Aguayo. He confessed to a Deputy United States Marshall that he had "f_ _ _ _ d up a gringo." The Aguayo confession, however, was unique. It included a newly designed, never before mentioned, claim of self-defense.

Echavarria was deported from Mexico on June 27, 1990. The Mexican Immigration officials sent him back to El Paso, Texas. After a removal hearing in El Paso, Echavarria was flown to Las Vegas. There, he was taken into custody by Nevada officials.

B. Procedural History

Jose Lorrente Echavarria, hereinafter Defendant Echavarria was indicted by the Clark County Grand Jury for the following crimes: Murder with Use of a Deadly Weapon, Conspiracy to Commit Robbery, Burglary with Intent to Commit Robbery, and Escape with

a Dangerous Weapon, committed at and within the County of Clark, State of Nevada, on or about June 25, 1990.

A jury trial was conducted from March 11, 1991, through April 3, 1991. The jury returned verdicts on April 4, 1991. Defendant Echavarria was found guilty on all counts; Defendant Gurry was found guilty on all counts except the Escape charge.

The penalty phase was held April 8th through 10th, 1991. On April 11, 1991, the jury returned their verdicts. Defendant Echavarria was sentenced to death and Defendant Gurry was sentenced to two (2) consecutive terms of life with the possibility of parole.

Defendant Echavarria filed a direct appeal through defense counsel David Schieck alleging the following issues:

1. Whether Intentional Prosecutorial Misconduct Mandates Reversal of the Death Penalty.
2. Was it Reversible Error to Refuse the Deliberation Instruction Tendered by Defendant Echavarria at the Guilt Phase.
3. Was the Anti-Sympathy Instruction Given at the Penalty Hearing Unconstitutionally Restricted Consideration of Mitigating Evidence.
4. Whether the Court's Limitation on Defendant Echavarria's Right to Allocution Was a Denial of Due Process and Violated the Eighth Amendment.
5. Whether the Marcum Notice and Procedure Was Reasonable and Violated Defendant Echavarria's Fifth, Sixth and Fourteenth Amendment Rights.
6. Whether the Reasonable Doubt Instruction Given by the Trial Court Not Only Was in Contravention of Legislative Mandate but Also Violated Due Process of Law, Etc.
7. Whether the Outrageous Comments by the Court and the Prosecutor Denied Defendant Echavarria a Constitutionally Fair Trial.
8. Whether it Was a Violation of the State and Federal Constitution to allow the Prosecution to Urge a Weighing of the Status of the Victim and Defendant Echavarria.
9. Did Juror Misconduct Deprive Defendant Echavarria of Due Process and a Fair and Impartial Jury.
10. Whether the Denial of the Ability to Inquire of Jurors at the Motion for New Trial Denied Defendant Echavarria of Due Process of Law and the Right to Effective Assistance of Counsel and of a Fair, Impartial Jury.
11. Did the Court Err in Refusing to Give an Instruction Limiting the Felony-Murder Doctrine.

12. Was it Reversible Error to Refuse the Specific Intent Instruction Offered with Respect to the Escape Charge.
13. Whether the Court Erred in Not Suppressing the Statement Given to the Mexican Police as Being the Result of Physical and Inherently Unreliable.
14. Whether Prejudicial Overlapping and Multiple Use of the Same Facts as Separate Aggravating Circumstances Resulted in the Arbitrary and Capricious Infliction of the Death Penalty.

Defendant Gurry filed a direct appeal through the Clark County Public Defender's Office alleging the following issues:

1. Pervasive Misconduct by a Prosecutor Denied Defendant Gurry a Fair Trial.
2. Judicial Conduct Contributed to the Denial of a Fair Trial.
3. The Trial Court Erred in Refusing to Permit the Identification Expert of Defendant Gurry to Testify.
4. The Trial Court Erred in Admitting Testimony Pertaining to a Gun Owned by Defendant Gurry, but Which Gun Was Not Involved in the Robbery or Homicide.
5. Juror Misconduct Occurred During the Guilt-phase.
6. The Trial Court Failed to Instruct the Jury as to What Constitutes Use of a Deadly Weapon by an Aider and Abettor.
7. The Trial Court Failed to Instruct the Jury as to When a Robbery Is Completed Pertaining to the Application of the Felony Murder Rule to an Aider and Abettor.
8. An Unconstitutional Reasonable Doubt Instruction Was Given.

The Nevada Supreme Court published an opinion in response to Defendants' respective appeals. Echavarria v. State, 108 Nev. 734, 839 P.2d 589 (1992).[2] The Nevada Supreme Court affirmed both Defendants' convictions holding: "(1) juror did not act improperly in looking up definition of murder and capital punishment in encyclopedia at his home in order to determine whether his religious beliefs would constitute impediment to his ability to serve as juror; (2) [Defendant Gurry] should have been allowed to present expert testimony regarding difficulties of cross cultural identifications; but (3) erroneous exclusion of evidence constituted mere harmless error." Echavarria, at 734, 839 P.2d at 589.

[2] The published opinion is attached hereto as Exhibit 1 for the Court's convenience.

The Defendants respectively filed petitions for writ of habeas corpus. On September 13, 1993, Defendant Gurry filed a proper person petition for writ of habeas corpus alleging ineffective assistance of counsel. On July 28, 1995, Defendant Echavarria filed a petition for writ of habeas corpus through his defense counsel Lizzie Hatcher alleging: (1) ineffective assistance of counsel, (2) errors by the trial court and (3) prosecutorial misconduct. On November 7, 1995, the district court issued its Order Denying Petition for Post-Conviction Relief including Findings of Fact. See Exhibit 2. Defendants Echavarria and Gurry then appealed the district court's denial of their respective petitions for writ of habeas corpus.

On December 20, 1996, the Nevada Supreme Court issued an unpublished Order Dismissing Appeal. See Exhibit 3. Among other things, the Court found any prosecutorial misconduct was harmless beyond a reasonable doubt, there was no prejudice resulting from the alleged deficiency of counsel, and the naked claims of ineffective assistance of counsel did not warrant an evidentiary hearing. Remittitur issued December 29, 1997.

For the next ten years, Defendant Echavarria chose to pursue relief in the federal courts by litigating a federal petition for writ of habeas corpus from April 17, 1998, through March 26, 2007. Echavarria now returns to State court and has filed a second and successive state petition for writ of habeas corpus on May 10, 2007, to which the State now responds and moves to dismiss.

ARGUMENT

DEFENDANT'S PETITION SHOULD BE DISMISSED AS UNTIMELY AND SUCCESSIVE

A. NRS 34.726 bars Defendant's petition as untimely

Defendant's conviction and sentence were affirmed on September 3, 1992. Defendant filed the instant petition on May 10, 2007. This is a delay of almost fifteen (15) years; well beyond the statutory deadline of one year delineated in NRS 34.726. Defendant argues that the failure to raise claims was also the result of ineffective assistance of counsel throughout

the past 15 years. This argument is both absurd and without merit. Likewise, it fails to account for Defendant's failure to file a petition since the first one was denied in 1995.[3]

NRS Chapter 34 creates a variety of procedural bars which a defendant must be in compliance with or his petition is not cognizable. The first limitation is contained in NRS 34.726. That statute states in pertinent part:

> 1. Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the supreme court issues its remittitur.

Contrary to Defendant's assertions, the plain language of the statute applies to any petition that challenges the validity of a judgment or sentence. See Dickerson v. State, 114 Nev. 1084, 967 P.2d 1132 (1998). Nevada Revised Statute 34.726 was enacted, in the words of the Nevada Supreme Court, to create limitations on post-conviction remedies because:

> Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. **In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions.** A showing of prejudice is thus essential to prevent the filing of successive and meritless petitions for post-conviction relief.

Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994) (emphasis added). Therefore, Defendant's failure to file this successive petition within one year procedurally bars a review of the petition by the district court. Successive petitions are only heard in extraordinary cases where a defendant can show both cause for the delay and actual prejudice. NRS 34.810; Bejarano v. Warden, 112 Nev. 1466, 929 P.2d 922 (1996).

B. The State Pleads Laches per NRS 34.800(2)

In addition, subsection 2 of NRS 34.800 creates a rebuttable presumption of prejudice

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[3] Defendant's pursuit of habeas corpus relief in federal court does not constitute "good cause" for his failure to file petition for post-conviction relief within one year after resolution of appeal, as required by statute. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989); See also Shumway v. Payne, 223 F.3d 982 (9th Clr. 2000)(finding that upon remand from federal court, Defendant would be barred from presenting claims under Washington Post-Conviction Relief statute.) Current counsel has represented Defendant since 1998. Counsel may not raise his own ineffectiveness.

to the State if "[a] period of five years [elapses] between the filing of a judgment of conviction, an order imposing sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction ... ." See NRS 34.800. The statute also requires that the State plead laches in its motion to dismiss the petition. Defendant's direct appeal was dismissed by the Nevada Supreme Court on September 3, 1992. Defendant filed the instant petition for writ of habeas corpus on May 10, 2007. Since nearly fifteen years elapsed between the affirmance of Defendant's conviction and the filing of this petition, subsection 2 of NRS 34.800 directly applies in this case.

Many of Defendant's claims were mixed questions of law and fact that would have required the State to prove facts that were over a decade old. Nevada Revised Statute 34.800 was enacted to protect the State from having to go back years later to reprove matters that have become ancient history. There is a rebuttable presumption of prejudice for this very reason and the doctrine of laches must be applied.

Since the remedy Defendant seeks is a new trial, the determination of the issues on the merits would not be based on a purely legal analysis. If courts were to require an evidentiary hearing on long delayed petitions such as in this case, the State would have to call and find long lost witnesses whose once vivid recollections have faded and re-gather evidence that, in many cases, has been lost or destroyed because of the lengthy passage of time. Therefore, not only is this case barred by the one year rule, it is also barred by the doctrine of laches. See Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 268 (1984).

C. The Petition is Successive

As noted previously, the Nevada Legislature added a section severely limiting successive petitions. Defendant's petition is not only barred because it was untimely filed, it is barred because it is successive. Nevada Revised Statute 34.810, entitled **"Additional Reasons for Dismissal of Petition"**, creates a statutory scheme which prevents a successive petition from being heard.

Pertinent portions of NRS 34.810 state:

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

3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
(a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
(b) Actual prejudice to the petitioner.

In order to show good cause, Defendant has the burden of demonstrating that there was an impediment external to the defense which prevented him from complying with the state procedural default rules. Lozada v. State , 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). Good cause for the delay is defined as "a substantial reason; one that affords a legal excuse." Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). Defendant's pursuit of habeas corpus relief in federal court does not constitute "good cause" for his failure to file petition for post-conviction relief within one year after resolution of appeal, as required by statute. Id. In order to establish prejudice, a petitioner must demonstrate that the alleged errors worked to his actual and substantial disadvantage. Hogan v. Warden , 109 Nev. 952, 959, 860 P.2d 710, 716 (1993).

In addition, dismissal of the instant petition will not prejudice the defendant. The defendant has no legal basis to challenge his conviction, as he has raised many of the issues before, either on direct appeal or in his prior petitions. Thus, the district court's dismissal of this petition as time barred would be proper and would not prejudice the defendant. A finding of prejudice is required to avoid the time bar of NRS 34.726. In regard to this requirement, the Nevada Supreme Court has held that "requiring prejudice to excuse the filing of untimely petitions helps to ensure that claims are raised before evidence is lost or memories fade. Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies." Lozada, 110 Nev. at 358, 871 P.2d at 950. Because Defendant is unable to provide either

good cause or prejudice so as to avoid application of the statute, the petition must be dismissed.

Nevada Revised Statute 34.726, clearly indicate that the one year rule is to apply to all petitions for writ of habeas corpus. Defendant had an opportunity to address the issues he raises in this petition in his first petition in 1995. As the speakers to the legislature pointed out during the consideration of the changes to post-conviction relief, the combination of statutes merely streamlined the process. It does not take away any habeas remedy. There was no denial of due process or equal protection.

D. Nevada Courts Consistently Apply Procedural Defaults.

Defendant asserts that the Nevada Supreme Court as well as the district courts do not have to follow the procedural rules contained in NRS 34.720 to 34.830 et. seq. because those rules are not consistently applied. In essence, Defendant argues that this Court should ignore the law because it has been ignored in the past.

The Ninth Circuit Court of Appeals has put to rest any allegation that Nevada has been inconsistent, finding:

> [Defendant] argues, however, that the Nevada Supreme Court's procedural bar rules are not adequate because that court does not consistently apply them. To be adequate, a state's procedural rule must be consistently applied. Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir.1994).
>
> We reject [Defendant]'s argument. The Nevada Supreme Court has consistently applied the state rule which prohibits review of the merits of an untimely claim unless the petitioner demonstrates cause. See, e.g., Birges v. State, 107 Nev. 809, 820 P.2d 764, 765-66 (1991); Glauner v. State, 107 Nev. 482, 813 P.2d 1001, 1003 (1991); Colley v. State, 105 Nev. 235, 773 P.2d 1229, 1230 (1989). Even before the Nevada State Legislature adopted the procedural rules which bar [Defendant]'s claims in state court, the Nevada Supreme Court dismissed petitions without reviewing the merits if the delay was unreasonable and prejudicial. Groesbeck v. State, 100 Nev. 259, 679 P.2d 1268, 1269 (1984).
>
> . . .
>
> We conclude that the Nevada Supreme Court consistently

> applies its procedural rules to bar review of the merits of an untimely claim in the absence of a showing of cause and lack of prejudice to the State. Our review of the merits of [Defendant]'s claims, therefore, is precluded unless [Defendant] can establish cause and prejudice or that a miscarriage of justice would result in the absence of our review.

Moran v. E.K. McDaniel, 80 F.3d 1261, 1269-70 (1996) (citations omitted); see Bargas v. Burns, 179 F.3d 1207, 1211-13 (9th Cir. 1999) (the court concluded that the Nevada Supreme Court "firmly established and regularly followed" Nevada law in finding claims procedurally barred when raised in a subsequent petition and not raised on appeal); Valerio, 112 Nev. at 389-90, 915 P.2d at 878. Also, the Nevada Supreme Court had repeatedly upheld Nevada's procedural bars against attacks that they are unconstitutional or are applied in an arbitrary and capricious manner. See Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001). The latest word in this line of cases came just last year when the Court again held that the bars are mandatory and have been consistently applied. State v. Dist. Ct. (Riker), 121 Nev.Adv.Op. 25, 112 P.3d 1070 (2005). Thus, Defendant's assertion in this regard has been soundly and repeatedly rejected by the Nevada Supreme Court.

Defendant's reliance on Rippo is misplaced. Contrary to Defendant's assertion, the Nevada Supreme Court did not disregard the procedural bars. Instead, the Court in Bejarano v. State, 122 Nev.Adv.Op. 92, 146 P.3d 265 (2006) and Rippo v. State, 122 Nev. Adv. Op. 93, 146 P.3d 279 (2006) held that the **petitioners established good cause to overcome** the procedural bars. Good cause for failing to file a timely petition or raise a claim in a previous proceeding may be established where the factual or legal basis for the claim was not reasonably available. Bejarano, at 270. In the present case, based on the precedent established in Rippo and Bejarano, the State concedes that a challenge under McConnell establishes good cause to overcome procedural bars as they relate to **that single issue of whether Defendant's death sentence may be upheld** in the absence of the aggravators based upon the convictions for burglary and robbery. Defendant raised that issue in Claim 1. Based on the forgoing, Defendant's claim that the procedural bars are not consistently

applied is without merit in regard to Claims 2-21.

E. Defendant Failed to Establish Good Cause for Failing to File his Successive Petition in a Timely Manner and the Issues Raised or that Could Have Been Raised are Procedurally Barred

With the limited exception of Claim 1, Defendant failed to establish good cause for failing to file his successive petition in a timely manner and the issues raised or that could have been raised are procedurally barred. Defendant acknowledged in his successive petition for writ of habeas corpus that some of the issues raised in the petition had been previously raised in prior proceedings. It has long been the rule in Nevada that "[t]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969); see also Bejarano v. State, 106 Nev. 840, 801 P.2d 1388 (1990). Nevada Revised Statute 34.810(2) states that "[a] second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different ground for relief and that the prior determination was on the merits ... ." Nevada Revised Statute 34.810(1)(b) states that the district court should dismiss a petition for habeas corpus if the defendant's conviction was based on a trial and the grounds could have been raised in a direct appeal or a prior petition for writ of habeas corpus unless the Court finds both good cause for failure to bring such issues previously and actual prejudice to the defendant. Good cause is "an impediment external to the defense which prevented [the petitioner] from complying with the state procedural rules." Crump v. Warden, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997).

The only hint of a "good cause" argument put forth by Defendant, as to the reason for his failure to include these issues in either his previous appeal or petition for post-conviction relief, is Defendant's blanket assertion that all the issues raised in the instant petition could not be raised previously due to ineffective assistance of counsel through all stages of the

proceedings.[4] In Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), the Court held that 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. Defendant fails to provide any evidence to support the blanket claim of ineffective assistance of counsel. As such the allegations made by Defendant are merely naked and are insufficient to provide any post-conviction relief.

I. ANY McCONNELL ERROR IN THE FELONY-AGGRAVATORS WAS HARMLESS BEYOND A REASONABLE DOUBT

McConnell held it impermissible to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated. McConnell v. State, 120 Nev. 1043, 102 P.2d 606 (2004). McConnell was recently held to apply retroactively. Bejarano v. State, 122 Nev. Adv. Op. 92 (Nov. 16, 2006).

In the instant case, the State proceeded on alternate theories of liability for first degree murder which included premeditation, felony murder, and escape. The jury returned a general verdict of guilt for first degree murder without specifying any particular theory of liability. At the conclusion of the penalty phase, the jury found three aggravating circumstances, namely: 1) in the commission of a burglary, 2) in the commission of a robbery, and 3) to prevent or avoid lawful arrest or to effect an escape from custody. The two felony-aggravators of burglary and robbery are based upon the same felonies upon which the felony-murder theory of liability was predicated.

Whether the subsequent invalidation of these two felony-aggravators will result in a new penalty hearing is determined by a harmless error analysis. If two of the three aggravators are stricken, the issue becomes, "Is it clear beyond a reasonable doubt that absent the invalid aggravators the jury still would have imposed a sentence of death?" Bejarano v. State, 122 Nev. Adv. Op. 92 (Nov. 16, 2006). The invalid burglary and robbery

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[4] The State concedes that Defendant's McConnell Argument satisfies good cause if Defendant can show that he was prejudiced but all others should be dismissed. *See* Bejarano v. State, 122 Nev.Adv.Op. 92, 146 P.3d 265 (2006); Rippo v. State, 122 Nev. Adv. Op. 93, 146 P.3d 279 (2006).

aggravators both pertained to the felony-murder aspect of the case from the trial phase and all of the State's penalty phase evidence remains intact and unchanged. The sentencing jury was already familiar with the burglary and robbery aspect of the case and was instructed that in determining the appropriate penalty to be imposed it could consider all evidence introduced in the prior guilt phase.

During the penalty phase of the trial, the State presented no new evidence on the aggravating circumstances but relied instead upon the evidence that had been heard during trial regarding the burglary, robbery and escape. The State called only three witnesses as to "other matter" or character evidence. Oscar Lopez was Echavarria's neighbor and testified to an incident he witnessed when a teenager friend touched Echavarria's car while passing by. Echavarria got mad and said, "If you ever touch my car again, I'll kill you." Jose Briones was the husband of Echavarria's girlfriend, Maria Garcia, and testified about the night Echavarria returned to Juarez, Mexico after murdering the FBI agent. Echavarria demanded money from Maria and when Jose tried to intervene, Echavarria threatened him with a firearm by pointing it at him. Finally, Miguel Puga of the Juarez police testified that Echavarria resisted arrest at the airport and threatened that he would have "wiped out" two or three of their agents if he had been armed. Even without the burglary and robbery aggravators, the penalty phase evidence would have been no different and Echavarria still would have been death eligible by virtue of the valid remaining avoid-lawful-arrest aggravator. The jury found no mitigating circumstances sufficient to outweigh the aggravating circumstances and beyond a reasonable doubt, Echavarria still would have been sentenced to death.

Defendant insists that McConnell operates not just to invalidate the two felony-aggravators in this case, but also the only remaining aggravator that the murder was to prevent or avoid lawful arrest or to effect an escape from custody. However, the Nevada Supreme Court recently declined to extend the McConnell analysis on felony-aggravators to the avoid-lawful arrest aggravator:

> Blake suggests that in his case, like McConnell, the theoretical application of the preventing-a-lawful-arrest aggravating circumstance may constitutionally narrow the class of persons eligible for the death penalty but that the practical effect is so slight as to render the aggravator unconstitutional. He asserts that virtually every murder case involves some antecedent crime that provides a motive to avoid or prevent an arrest for that crime by murdering the victim. Therefore, Blake argues that although theoretically a case could be envisioned where such preliminary crimes do not exist, such crimes virtually always exist as a practical matter.
>
> Blake's reliance on McConnell is unpersuasive. The concerns expressed by this court in McConnell are not present in Blake's case.

Blake v. State, 121 Nev. 779, 121 P.3d 567 (2005). Contrary to the argument of Echavarria, the avoid-lawful arrest aggravator is already constitutionally narrow and its use as both an aggravator and as a theory of liability for first degree murder does not violate the constitution. The Nevada Supreme Court has consistently upheld the validity of NRS 200.033(5), which states that an aggravating circumstance may be that the "murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody." Evans v. State, 112 Nev. 1172, 1196, 926 P.2d 265, 280-81 (1996); Canape v. State, 109 Nev. 864, 874-75, 859 P.2d 1023, 1030 (1993); Cavanaugh v. State, 102 Nev. 478, 486, 729 P.2d 481, 486 (1986). In Cavanaugh, the Court held that NRS 200.033(5) was unambiguous. Cavanaugh, 102 Nev. at 486, 729 P.2d at 486. In Cavanaugh the Court also held, and later affirmed in Evans, that the arrest need not be imminent and the victim need not actually be involved in effectuating an arrest for purpose of NRS 200.033(5). Id.

On the facts of the present case, FBI Agent John Bailey was actually involved in effectuating Echavarria's arrest at the time Echavarria struggled against him, regained his firearm, and shot three times into Agent Bailey's arm and chest which facilitated his escape to Mexico. Overwhelming evidence exists to support the jury's finding of this aggravating circumstance. In every published opinion where the Nevada Supreme Court has considered the prejudicial impact of subsequently invalidated felony-aggravators under McConnell, the error has been found harmless. Bejarano v. State, 122 Nev. ___, 146 P.3d 265 (2006); Rippo v. State, 122 Nev. ___, 146 P.3d 279 (2006); Archanian v. State, 122 Nev. ___, 145 P.3d

1008 (2006). This is consistent with the U.S. Supreme Court's analysis when a felony-aggravator is subsequently found invalid. Brown v. Sanders, 126 S.Ct. 884 (2006). The State urges the same result in this case. The State submits that any error in the use of the burglary and robbery aggravators was harmless beyond a reasonable doubt and Echavarria was not prejudiced thereby.

II. DEFENDANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL ARE SUCCESSIVE BECAUSE THE DISTRICT COURT HAS ALREADY HELD THAT COUNSEL WERE NOT INEFFECTIVE.

The issue of ineffective assistance of counsel was raised in Defendant's first petition for post-conviction relief filed in 1995. In its order denying relief, the district court found as follows:

> This Court finds the defense allegation of ineffective representation of counsel to be totally without merit. The Court has a vivid recollection of the trial proceedings and concludes from its memory of the excellent representation provided Echavarria by his attorney Michael Stuhff that Mr. Stuhff was not affected by the matters pending against him and he was an effective and able advocate at trial on behalf of Echavarria. Further, Echavarria was represented by two counsel at his trial and penalty hearing. The defense petition entirely ignores the presence, involvement and capable performance of Michael Stuhff's co-counsel, David Schieck, Esq. . . . This Court observes that Echavarria has failed to identify any act or omission of his counsel in his Petition for Post-Conviction Relief that would suffice as a legal basis for supporting his claim that the trial representation of his lawyers was deficient.

See Exhibit 2, Order Denying Petition filed Nov. 7, 1995, at pp. 2-3. The Nevada Supreme Court affirmed the district court's denial of relief on December 20, 1996. See Exhibit 3.

As noted previously, Defendant's petition is successive. Nevada Revised Statute 34.810, entitled "**Additional Reasons for Dismissal of Petition,**" creates a statutory scheme which prevents a successive petition from being heard. Pertinent portions of NRS 34.810 state:

> 2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds

are alleged, the judge or justice finds that the failure of the Defendant to assert those grounds in a prior petition constituted an abuse of the writ.

3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
   (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
   (b) Actual prejudice to the petitioner.

In order to show good cause, Defendant has the burden of demonstrating that there was an impediment external to the defense which prevented him from complying with the state procedural default rules. Lozada v. State , 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). Good cause for the delay is defined as "a substantial reason; one that affords a legal excuse." Colley v. State , 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). Defendant's pursuit of habeas corpus relief in federal court does not constitute "good cause" for his failure to file petition for post-conviction relief within one year after resolution of appeal, as required by statute. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989). In order to establish prejudice, a petitioner must demonstrate that the alleged errors worked to his actual and substantial disadvantage. Hogan v. Warden, 109 Nev. 952, 959, 860 P.2d 710, 716 (1993).

A. Inadequate Offense Investigation

Echavarria first claims that his trial counsel failed to conduct an adequate investigation and gave up on the guilt phase because it was hopeless. Echavarria was charged with murder under alternative theories of premeditation, felony-murder, and escape. It is beyond dispute and has been conceded and admitted by Echavarria on numerous occasions that he killed the FBI Agent in the course of a bank robbery and while trying to escape from custody. Echavarria left his motorcycle, fingerprints, and wallet containing his identification behind at the bank. Truly, Echavarria's guilt for First Degree Murder can not be challenged.

As new evidence of the kind of investigation that could have been conducted, Echavarria offers only Jerry Chisum, a crime reconstructionist. Defendant's Ex. 234. Chisum concludes that there was a struggle for the revolver when it was fired and that

physical evidence shows the witness statements as to the direction of the shots to be inconsistent. Id. This is not new evidence. The jury heard eyewitness accounts from approximately a dozen bank employees and patrons who observed different parts of the incident from varying perspectives often with contradictory or inconsistent testimony.

However, the jury also heard about gun powder residue on the victim's hand and clothing and heard expert testimony about the two feet muzzle-to-garment distance. Several witnesses observed and testified about a struggle between Echavarria and the FBI Agent over the weapon:

> There appeared to be a struggle between the two of them, it looked like they were both grasping, you know – I don't know who was holding whose hands, but the upper wrist right here. And there was still a gun in what I believed to be Agent Bailey's hands and there was a struggle between the two of them.

14 ROA 2694[5]. Jerry Chisum's report sixteen years after the fact does nothing to further the jury's understanding of how the crime happened. Just because the first shot may have occurred during a struggle over the firearm does not exonerate Echavarria of First Degree Murder. The prosecutor explained the irrelevance of such an argument:

> And it's murder one regardless of whether the killing was intentional, unintentional, or accidental, if it occurred during the commission of the felony offenses. And it also doesn't matter whether it was intentional, unintentional, or accidental, if it occurred during an escape from lawful custody.

27 ROA 5077. Even Chisum does not dispute that after the first shot was fired, the FBI Agent was either falling backward or was on his back on the floor for the subsequent shots to his body. Defendant's Ex. 234. Such a report on crime reconstruction produced more than fifteen years after the crime remarkably contributes nothing to the jury's understanding of how the crime occurred.

[5] "ROA" refers to the Record on Appeal from direct appeal.

B. Inadequate understanding of mitigation

Echavarria's current counsel, who probably has never tried a capital case to a jury, presumes to have superior knowledge about theoretical legal arguments that would have better persuaded the jury on mitigation. In the real world, legal theories that sound good to an appellate attorney on paper do not necessarily translate into a successful argument to a capital jury. Such is the case with the lengthy discourse in the current petition which discusses the finer points of moral culpability, criminal responsibility, and free choice.

Bottom line, Echavarria's trial counsel who had much experience persuading and convincing juries in capital cases effectively presented and argued mitigation evidence. Contrary to the argument in the current petition, trial counsel did show Echavarria's relative moral culpability by eliciting testimony about Echavarria's altruistic motive for the robbery to bring his mother to the United States from Cuba, his alleged torture at the hands of Mexican police, his unfamiliarity with police procedures in the United States, his misunderstanding about self-defense, the shock of being shot at by the FBI Agent and the language barrier and lack of knowledge of the FBI Agent's identity as a law enforcement officer. Theoretical arguments aside, the fact remains that Echavarria chose to rob a bank and needlessly murdered an innocent FBI Agent rather than submit to arrest – for that the jury said he deserved to die. It is preposterous to suggest that a different argument by counsel would have changed this result.

C. Inadequate v. Adequate Punishment Investigation

Defendant claims that his trial counsel did an inadequate job of investigating his family and social history in preparation for the penalty phase. For instance, Defendant claims that he perjured himself when he testified that he served in the Cuban military service in Ethiopia and that his trial attorneys were ineffective in this regard. Although Defendant did serve in the Cuban military, he now claims he never went to Ethiopia. Any perjury in this regard is solely Defendant's own fault and can not be attributed to his counsel who had no reason to doubt the veracity of this information. It also is of no consequence as it was only the fact of Defendant's military training and service that was used to the prosecutor's

advantage, not the particular place of service such as in Ethiopia.

The remainder of this claim focuses on family and social history as learned from Defendant's family in Cuba who allegedly were not contacted by trial counsel. Apparently, there is an uncle in Florida who has put current counsel in touch with Defendant's family in Cuba. However, Defendant has always been aware of his own upbringing and family history and has no one to blame but himself for not pursuing this information sooner or asking his trial counsel to contact the uncle in Florida. Unlike current counsel who with federal resources had a decade to amass this social history, trial counsel in 1991 had only eight months and limited resources in which to investigate and prepare for both trial and penalty hearing. Notwithstanding these limitations, Defendant's trial counsel did a remarkable job at investigating and eliciting favorable mitigation testimony to support their theory of the case.

In the penalty phase, Defendant's attorneys called ten witnesses. **Tania Villa Moises** was Defendant's neighbor who had known Defendant for about three years. 28 ROA 5207. She testified that she brought her mother-in-law to the United States from Cuba and the costs and legal procedures associated with it. Id. Her husband, **Pedro Moises**, then testified that he had known Defendant in Havana, Cuba, and escaped to the United States on an inner tube with Defendant. 28 ROA 5216. They survived four days at sea without food. Id. Defendant had lived with and supported his mother in Cuba and was also gainfully employed during his time in Las Vegas. Id. Defendant expressed a desire to find a way to bring his mother to the United States as Pedro had done. Id. **Mercedes Puig** testified she was an immigrant from Cuba who had met Defendant here in Las Vegas and had made Defendant the godfather of one of her daughter because he played and interacted with her children so well. 28 ROA 5233. She testified that Defendant was Catholic, that she has never seen him drink or do drugs, and that he missed his family in Cuba very much. Id. **Baudillo Hernandez** testified that he came from Cuba on a raft four years earlier and was Defendant's friend. 28 ROA 5242. He testified that Defendant was very good with Ms. Puig's children, that Defendant did not drink or use drugs, and that he was very worried about his mother in Cuba. Id. **Redda Mehari** was director of the Resettlement Program for

Catholic Relief Services and was Defendant's caseworker. 28 ROA 5247. He testified about a general fear of military and uniforms experienced by refugees from oppressive governments. Id. Defendant expressed a desire to pursue an education and maintain employment. Id. **Elisa Gonzalez** was an acquaintance of Defendant's who testified that he was good with children, wanted to have a family of his own, and that he would attend church with her on occasion. 28 ROA 5258. She also testified that Defendant told her he was sorry for shooting the man in the bank and would not have shot him if he had known he was an FBI agent. Id. She also testified that Defendant and his girlfriend were expecting a baby but lost the child and that this made Defendant very sad. Id. **Ricardo Gonzalez** was a good friend of Defendant's and testified that Defendant would help him by giving him rides in his car to go grocery shopping, to the culinary union, or to family entertainment. 28 ROA 5267. He knew that Defendant was not violent and the crime at the bank was an aberration for Defendant who was under a lot of pressure and was obsessed with bringing his mother out of Cuba. Id. **Suzanna Reyes** testified that Jose Brionas, who was the ex-husband of Defendant's girlfriend, denied in his interview that Defendant had threatened or pointed a gun at him. 29 ROA 5328. **Luis Magallanes** was a representative of the human rights commission in Juarez, Mexico, who discussed the many complaints of torture, including electrical shock, made against the Chihuahua State Police, especially Commandant Rubalcava.

Finally, **Jose Echavarria** testified at length about his university education, being drafted into the Cuban army, employment in his father's construction business, his parent's separation and differing political beliefs, and his escape from communist Cuba in an inner tube after four days at sea without food. 29 ROA 5376. He came to Las Vegas through a Catholic work program where he found employment at various hotels and casinos and in the construction field. Id. He testified about his intense desire to bring his mother to the United States from Cuba, but that it would cost about ten thousand dollars. Id. He then described his version of what happened in the bank – how he was scared, had difficulty understanding English, was shot at from behind, did not know it was an FBI agent, and only shot the agent

after he would not stop moving. Id. He further testified to his girlfriend's miscarriage and the effect that had on him, how he did not threaten his girlfriend's ex-husband, and the physical abuse and torture he claims to have suffered at the hands of the Mexican police. Id.

The time for Echavarria to challenge the effective assistance of counsel at trial and on appeal was during the first post-conviction proceedings in 1995. That time has long passed. The rules pertaining to post-conviction relief and society's interest in the finality of criminal judgments do not afford a criminal defendant the luxury of waiting an additional twelve years to bring such claims to the attention of the state court. Given that trial counsel in the present case had eight months to investigate and prepare for trial, it is not unreasonable to require that claims of ineffective assistance of counsel be made in a similar timely fashion. What federal appellate counsel can drudge up over the course of a ten year investigation with seemingly limitless federal resources and an embarrassingly light caseload, hardly constitutes a reasonable standard for effective assistance of trial counsel in state court in 1991. Defendant's current claims of ineffective assistance of counsel are procedurally defaulted and without merit.

III. ALLEGED BRADY VIOLATION

In Claim 5, Defendant alleges a Brady violation for withholding photographs from the east camera in the bank which purportedly show the eyewitnesses were not in a position to observe the events about which they testified at trial. Defendant fails to allege how or when he came into possession of such photographs if they were not already in his possession as part of the original trial discovery in this case. Such information is necessary to determine whether Defendant has timely raised this issue with the State court once the facts became known to him. Nonetheless, even assuming the photographs were withheld by the State they are immaterial and would not have changed the outcome of the case.

Defendant overlooks that the still photographs do not depict fluid movement of eyewitnesses but only capture particular positions once every three seconds. 14 ROA 2554. In this regard, eyewitness Paul Rodrigues testified, "We were just kind of glancing at him

occasionally, but I was looking at him right when this happened." 15 ROA 2813. Still photographs taken every three seconds would not capture the kind of short and quick glimpses in this case as described by the witnesses. Also, because the murder was not captured by the east camera, the timing of witness movements and positions from that perspective can not be correlated precisely with the events of the murder at the other end of the room.

The jury heard from numerous bank patrons and employees who were eyewitnesses to various aspects of the chain of events leading up to the murder. No one witness clearly observed all events; nor were the witnesses all consistent with one another. Defendant's trial counsel made the very same argument now advanced by Defendant in the current petition:

> And if you have a question as to a particular witness, could this witness have seen this particular event from the vantage point they were at. It's very likely that you will be able to perceive that individual if you can recall what each of the witnesses looked like. . . . Look at the photographs and see who was where and what they could really see . . . Look at the photographs and they will illustrate to you whether or not certain individuals could see certain events as they transpired.

27 ROA 5042-43. The eyewitness statements did not precisely correspond to the photographs admitted at trial, but this fact did not prevent the jury from considering this fact and convicting Defendant anyway. Photographs from a different camera showing additional inconsistencies with the eyewitness accounts would not have affected the outcome. The State's pursuit of a theory of felony-murder further makes any inconsistencies irrelevant. Defendant admitted he killed the FBI Agent in the commission of a robbery and the precise sequence of events of the struggle and positioning of the Defendant and his victim is a non-issue.

Furthermore, the psychological theories of Dr. Elizabeth Loftus concerning the "misinformation effect" would not have changed the outcome. Co-Defendant Gurry raised this issue on direct appeal and the Nevada Supreme Court found it to be harmless error. Unlike Gurry's identification which was uncertain, Echavarria's identification was not in

question. He was observed on videotape, he left his wallet, identification and motorcycle at the scene, and he confessed to several witnesses in addition to the Mexican authorities. The jury was aware and counsel argued the relevant facts about eyewitness accounts and Dr. Loftus's expert testimony would not have made a difference in the case.

IV. GROUNDS BARRED BY LAW OF THE CASE

It has long been the rule in Nevada that "[t]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969); see also Bejarano v. State, 106 Nev. 840, 801 P.2d 1388 (1990). The Nevada Supreme Court has already considered and rejected previously Echavarria's claims of judicial bias (Claims 3 and 21), juror misconduct (Claim 4), tortured confession (Claims 9 and 14), prosecutorial misconduct (Claim 11), and erroneous jury instructions (Claims 12 and 13). See Echavarria v. State, 108 Nev. 734, 839 P.2d 589 (1992).

On direct appeal, Echavarria's appellate counsel in an argument entitled "Outrageous Comments by the Court and the Prosecutor Denied Echavarria a Constitutionally Fair Trial," referenced several disparaging judicial comments made towards Defendant's counsel, including threats of sanctions and accusations of unethical conduct. Appellant's Opening Brief, No. 22354, pp. 62-72. These arguments on direct appeal included several incidents where Judge Lehman was hostile to the defense, criticized Defendant's counsel Mr. Stuhff, and threatened him with sanctions for contacting jurors and delaying the case. The Nevada Supreme Court denied these claims finding they "lack merit."

To the extent the defense also alleges in Claims 3 and 21 judicial bias on grounds that Judge Lehman had been investigated by the FBI, the allegation similarly lacks merit. Neither the court nor the prosecutor withheld this information but affirmatively brought it to the attention of counsel for co-defendant Gurry at a minimum as the defense admits. Even accepting as true the allegation that Echavarria's counsel were not aware of the FBI investigation, the fact that Gurry's counsel did not move to disqualify the judge on that basis

belies any claim that Echavarria's counsel would have done so. Even if such a motion had been filed, there is no reasonable likelihood that the motion would have been granted or that the outcome of the case would have been different if some other judge had overseen the case. Any alleged wrongdoing on the Colorado River Commission was unrelated to Lehman's ability to preside over a murder trial of an FBI agent and any potential prejudice or bias would have been against the FBI, not Defendant. The allegations simply do not meet the criteria for disqualification of a district court judge pursuant to NRS 1.230 and Canon 3 of the Nevada Code of Judicial Conduct.

Allegations of juror misconduct were first raised by trial counsel in a motion for new trial and were denied following an evidentiary hearing. These issues were renewed on direct appeal and specifically concerned jurors Ardys Pool, Charles Ivy, and Thomas Stramat. These issues are now law of the case. Allegations in Claim 4 that Defendant's counsel was intimidated and did not investigate juror misconduct fully are belied by the fact that Lehman recused himself from this evidentiary hearing which was heard and decided by Judge Leavitt instead. Submission of juror affidavits disclosing deliberations and thought processes was denounced on direct appeal as violative of NRS 50.065(2). See also, Riebel v. State, 106 Nev. 258, 263, 790 P.2d 1004, 1008 (1990).

Claim 9 and 14 are nothing more than a re-argument of the already vigorously litigated issue concerning torture and Defendant's confession. Trial counsel moved to suppress the confession and elicited compelling testimony from a representative of the human rights commission in Juarez, Mexico, about corruption and torture by the Mexican Judicial police. The motion to suppress was denied and the jury was allowed to consider the evidence of torture and voluntariness of the confession but still convicted Defendant. On direct appeal the Nevada Supreme Court found as follows:

> Echavarria's allegations of physical abuse are not taken lightly by this court. However, our review of the record of the suppression hearing convinces us that the admission of Echavarria's confession was proper . . . . The conclusion by the district court that the confession was not coerced is supported by substantial evidence and we will not disturb it on appeal.

Echavarria v. State, 108 Nev. 734, 839 P.2d 589 (1992). Accordingly, this issue is now law of the case no matter how much current counsel disagrees with this finding.

In Claim 11, Defendant re-asserts prosecutorial misconduct based on the prosecutor's reference to "savage blood lust." This comment was objected to at trial and on appeal the Nevada Supreme Court held as follows:

> Echavarria complains that he was prejudiced by the prosecutor's use of the phrase "savage blood lust" in the penalty phase as a reason for killing Agent Bailey. The impact of the phrase over a four-week trial, especially when the jury was instructed to disregard it, provides no basis for concluding that Echavarria was deprived of a fair trial.

Echavarria v. State, 108 Nev. 734, 839 P.2d 589 (1992). Accordingly, this issue is now law of the case and Defendant has shown no good cause for revisiting it in the context of a post-conviction petition.

The jury instruction issues Defendant now raises in Claims 12 and 13 were likewise considered on direct appeal and found to be without merit. Specifically, the omission of a jury instruction defining deliberation was raised on direct appeal as the second issue in Defendant's Opening Brief entitled "It was Reversible Error to Refuse the Deliberation Instruction Tendered by Echavarria at the Guilt Phase." See Defendant's Opening Brief, No. 22354, at pp. 38-42. No such instruction was required at the time. Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000); Garner v. State, 116 Nev. 770, 6 P.3d 1013, at 1024-25 (2000). Similarly, the anti-sympathy instruction given in the penalty phase was previously raised as Defendant's third appellate issue entitled, "The Anti-Sympathy Instruction Given at the Penalty Hearing Unconstitutionally Restricted Consideration of Mitigating Evidence." See Defendant's Opening Brief, No. 22354, at pp. 43-48. The Nevada Supreme Court has repeatedly held there is no error in such an instruction. Riley v. State, 107 Nev. 205, 215-16, 808 P.2d 551, 557 (1991); Hogan v. State, 103 Nev. 21, 25, 732 P.2d 422, 424 (1987).

V. GROUNDS BARRED BECAUSE THEY COULD HAVE BEEN RAISED ON DIRECT APPEAL

Nevada Revised Statute 34.810, entitled "**Additional Reasons for Dismissal of Petition,**" creates a statutory scheme which prevents a successive petition from being heard. Pertinent portions of NRS 34.810 state that if new and different grounds are alleged, the judge or justice finds that the failure of the Defendant to assert those grounds in a prior petition constituted an abuse of the writ. The following issues could have been raised in Defendant's first direct appeal. Defendant has failed to demonstrate good cause for failing to raise the issues.

The Batson issue raised in Claim 6 would not have been successful even if timely raised on appeal or post-conviction. Under Batson, once Defendant has made a prima facie case of racial discrimination in the exercise of a peremptory challenge, the State need only come forward with a race-neutral explanation that need not be persuasive or even plausible so long as it is not a pretext for purposeful discrimination. Batson v. Kentucky, 476 U.S. 79 (1986); Purkett v. Elem, 514 U.S.765, 766-67 (1995). In regards to juror Rodney Goings who had an "interesting haircut" and admitted the police treated him "like dirt" when he was arrested once, there was an abundance of race-neutral reasons for challenging him. 13 ROA 409. A reviewing court must give great deference to the district court's finding that the Batson motion was "totally without merit." Hernandez v. New York, 500 U.S. 352 (1991). Appellate counsel was effective for not raising this Batson challenge on appeal because the State had several race-neutral reasons for exercising its peremptory challenge and any such claim would not have had merit.

Defendant has failed to articulate why Claim 7 involving inaccurate interpretation could not have been raised on appeal or post-conviction. In fact, Co-Defendant Gurry raised this exact claim in his opening brief on direct appeal for an entire sentence that was omitted from Eliza Gonzalez's testimony when her interpreter failed to translate that part of her testimony. No error was found on direct appeal. In State v. Van Phan, 675 P.2d 848 (Kan. 1984), the Kansas Court addressed a number of interpreter issues that have relevance here:

> Courts have recognized, as is all too evident from this case, that words in one language may not have an exact companion in another language and it is therefore impossible in certain circumstances for an interpreter to convey the precise language of the witness to the court. In Seniuta v. Seniuta, 334 N.E.2d 261 (Ill. 1965), the Illinois Court of Appeals declared an interpreter's account of the answers of a witness need not be literal as long as the answers of the interpreter and the witness amounted to the same thing. Indeed, there are situations in which the interpreter may testify to the sense in which he or she understood the witness. [citations omitted]. See also United States v. Guerra, 334 F.2d 138, 143 . . . . [There is no] absolute require on an interpreter to give a literal translation. Rather, the interpreter's translation must be to the best of his skill and judgment.

Van Pham at 860-61. To have a jury hear various interpretations involving fine shadings of meanings of the same word or phrase would certainly confuse a jury. None of Defendant's alleged interpreter errors was so prejudicial that it can constitute a ground for relief in a successive habeas petition.

In Claim 8 Defendant asserts that his conviction and sentence are in violation of extradition treaties between the United States and Mexico and that the death penalty should not have been available. Defendant's counsel at trial made this same argument in a motion to dismiss or in the alternative to bar the death penalty. 2 ROA 291-320. Following an evidentiary hearing, the trial judge ruled there was overwhelming evidence Defendant was deported, not extradited. 8 ROA 1410. Defendant was a Cuban national who was admitted into the United States as a resident alien when he murdered Agent Bailey and fled to Mexico where he committed additional crimes. Defendant was deported by a Mexican immigration judge as an undesirable alien. No extradition treaties between the United States and Mexico were implicated.

In Claim 10 Defendant alleges a violation of Article 36 of the Vienna Convention for not informing Defendant he had a right to notify the Cuban consular officials of his arrest. However, even assuming the Convention creates judicially enforceable rights, such claims are still subject to a State's regular procedural default rules. Sanchez-Llamas v. Oregon, 126 S.Ct. 2669 (2006). Assuming the State violated Defendant's right of consular notification, the claim is procedurally defaulted in a successive petition and Defendant has not even

shown that the Vienna Convention is judicially enforceable.

Claims 16, 17, 18, 19 and 20 are all boilerplate claims which could have been raised previously in this case and are without merit. The Nevada Supreme Court has repeatedly denied such claims in published opinions and Defendant fails to show that any of them would have been successful if timely raised in this case. The Nevada Supreme Court has found that a defendant in a capital murder prosecution is not prejudiced by having a popularly elected trial judge. Haberstroh v. Warden, Nevada State Prison, 119 Nev. 173, 182, 69 P.3d 676, 685 (2003). Just because judges are elected does not make them hostile to the defense. Id. In addition, a judge is presumed not to be biased and the burden is on the party making the challenge to show that a judge will not be fair in carrying out their duties. Goldman v. Bryan, 104 Nev. 644, 764 P.2d 1296 (1988). The mere general allegation that judges are impartial based on the fact that they are elected does not overcome the presumption that judges are unbiased.

The Nevada Supreme Court has held that under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994), *citing* Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986); *see also* Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The relevant factors to consider in determining "whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" Big Pond, 101 Nev. at 3, 692 P.2d at 1289. The doctrine of cumulative error "requires that numerous errors be committed, not merely alleged." People v. Rivers, 727 P.2d 394, 401 (Colo.App. 1986); *see also* People v. Jones, 665 P.2d 127, 131 (Colo.App. 1982). Evidence against the defendant must therefore be "substantial enough to convict him in an otherwise fair trial" and it must be said "without reservation that the verdict would have been the same in the absence of the error." Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988).

Insofar as Defendant failed to establish any error which would have entitled him to

relief, there is and can be no cumulative error worthy of reversal. Chief Justice E.M. Gunderson observed in his dissenting opinion in LaPena v. State, 92 Nev. 1, 14, 544 P.2d 1187, 1195 (1976), "nothing plus nothing plus nothing is nothing." In the instant case, all of Defendant's claims of error amount to "nothing," therefore, cumulative error does not apply.

Furthermore, it is of note that a defendant "is not entitled to a perfect trial, but only a fair trial..." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975), *citing* Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974). In the case at bar, Defendant received a fair trial. The issue of Defendant's guilt or innocence was never a close question. All the errors alleged here are without merit. Therefore, this claim must be dismissed.

VI. DEFENDANT'S CLAIM THAT LETHAL INJECTION METHOD IS CRUEL AND UNUSUAL PUNISHMENT IS WITHOUT MERIT

In Claim 15 Defendant asserts that his death sentence is invalid due to the execution protocol.

A. Lethal Injection As a Form of Execution is Constitutional

NRS 176.355(1) provides that a sentence of death in Nevada "must be inflicted by an injection of a lethal drug." NRS 176.355(2)(b) requires the Director of the Department of Corrections to "[s]elect the drug or combination of drugs to be used for the execution after consulting with the State Health Officer." See also NRS 453.377(6)(providing that otherwise controlled substances may be legally released by a pharmacy to the Director of the Department of Corrections for use in an execution); NRS 454.221(2)(f).

In State v. Jon, 46 Nev. 418, 211 P. 676 (1923), the Nevada Supreme Court stated:

> We must presume that the officials intrusted (sic) with the infliction of the death penalty by the use of gas will administer a gas which will produce no such results, and will carefully avoid inflicting cruel punishment. That they may not do so is no argument against the law.
> ...The legislature has determined that the infliction of the death penalty by the administration of lethal gas is human, and it would indeed by not only presumptuous, but boldness on our part, to substitute our judgment for theirs.
> ...The present statute provides that the judgment of death shall be inflicted by

> the administration of lethal gas, and that a suitable and efficient inclosure and proper means of the administration of such gas for the purpose shall be provided. We cannot see that any useful purpose would be served by requiring greater detail.

In State v. McConnell, 120 Nev. ____, 102 P.3d 606, 616 (2004), the Nevada Supreme Court, found the Jon Court's reasoning to remain sound when concluding that the current method of lethal injection was not cruel and unusual punishment. Since then, a number of defendants have challenged the three drug succession commonly used in carrying out the execution. To date, no court has found either lethal injection in general or the specific lethal injection protocol to be unconstitutional. See Bieghler v. State, 839 N.E. 691 (Ind. 2005); Abdur'Rahman v. Bredesen, 181 S.W.3d 292 (Tenn. 2005); Aldrich v. Johnson, 388 F.3d 159 (5th Cir. 2004)(lethal injection in Texas); Reid v. Johnson, 333 F.Supp.2d 543 (E.D.Va. 2004); Harris v. Johnson, 376 F.3d 414 (5th Cir. 2004); People v. Snow, 65 P.3d 749, 800-01 (Cal. 2003). Sims v. State, 754 So.2d 657 (Fla. 2000); State v. Webb, 750 A.2d 448 (Conn. 2000); LaGrand v. Stewart, 133 F.3d 1253, 1265 (9th Cir. 1998)

B. Procedural Bars

Defendant's challenge to the lethal injection protocol is procedurally barred. Lethal injection has been the method of execution in Nevada since 1983. Defendant was first sentenced to death in 1996. In challenging the execution protocol, Defendant relies on several documents which appear to support his position that inadequate anesthesia can cause pain and suffering during the execution. Without addressing the relative merits of each exhibit proffered by Defendant, it is clear that each has been known[6] and available for a considerable time prior to the date of this petition. Defendant fails to offer any indication why he has failed to raise this issue in a timely petition.

[6] Each of the alleged "botched executions" is over 10 years old. Only two of the executions took place in Nevada. In neither case, did the Defendant state that the condemned were in pain. Bridges complained of "the injustice of signing a petition." Defendant fails to explain how the statutory requirement of signing a petition to protect due process rights equates to "cruel and unusual punishment."

C. Post Conviction Writ of Habeas Corpus is not the proper vehicle to challenge the execution protocol.

NRS 34.720 provides that the provisions of NRS 34.720 to NRS 34.830 inclusive, apply only to petitions for writs of habeas corpus in which the petitioner:

1. Request relief from a judgment of conviction or sentence in a criminal case; or

2. Challenges the computation of time he has served pursuant to a judgment of conviction.

There is nothing in the statutory language or the legislative history that permits Defendant to challenge the execution protocol. To succeed in a post-conviction claim, Defendant must prove his claim that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the constitution or laws of this state. NRS 34.724. Defendant was sentenced to death by lethal injection. The specific protocol under which Defendant's execution is to be carried out is within the discretion of the Department of Corrections. NRS 176.355. Even if Defendant was successful in challenging the specific **protocol** used by the Department of Corrections, Defendant's **sentence** would remain unchanged. See also State v. Moore, 272 Neb. 71, 718 N.W.2d 537 (2006).

Two recent United States Supreme Court cases have addressed a similar issue. In Nelson v. Campbell, 541 U.S. 637, 124 S.Ct. 2117 (2004), the Court concluded that the appropriate vehicle for a prisoner to challenge a particular lethal injection procedure was an action under 42 U.S.C. §1983, stating **"a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself"** because by altering the procedure, the state could go forward with the execution.

In June 2006, the Court again addressed the proper vehicle for challenging an execution protocol in Hill v. McDonough, ____ U.S. ____, 126 S.Ct. 2096 (2006). The Court observed that, as in Nevada, the implementation of Florida's lethal injection protocol was left to the Department of Corrections. The Hill court also noted that a prior habeas corpus petition filed by the prisoner did not preclude this §1983 action and that the

injunction sought by him enjoining the specific procedure would not foreclose the State of Florida from implementing lethal injection by another procedure and, thus, **it could not be said that the prisoner's suit sought to establish "'unlawfulness [that] would render a conviction or sentence invalid.' "** 126 S.Ct. at 2099, *quoting* Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364 (1994).

D. Ripeness

This issue is not ripe. Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief. Doe v. Bryan, 102 Nev. 553, 728 P.2d 443 (1986). It is well-settled in federal and state criminal litigation that a controversy must be ripe for judicial consideration. See Kress v. Corey, 65 Nev. 1, 26, 189 P.2d 352, 364 (1948). The purpose of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Poland v. Stewart, 117 F.3d 1094, 1104 (9th Cir. 1997) quoting, Clinton v. Acequia, Inc. 94 F.3d 568, 572 (9th Cir. 1996).

> An issue is not ripe for review, 'where the existence of the dispute itself hangs on future contingencies that may or may not occur.' Where there is no danger of imminent and certain injury to the party, an issue has not 'matured sufficiently to warrant judicial intervention.' The United States Supreme Court has stated a two prong test for determining the ripeness of a claim: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'

Poland, 117 F.3d at 1104 (internal citations omitted.). Here, as in Poland, Defendant has failed to meet either part of the ripeness test.

The lethal injection protocol is not fit for a judicial decision at this juncture. The Death Penalty in the United States and in Nevada has evolved. Until 1911, executions in Nevada were carried out by hanging the condemned. In 1911, the legislature provided that a death row inmate could choose to die by shooting. On May 14, 1913, a three-gun execution machine was used to put the condemned to death. In 1921, the legislature eliminated hanging and shooting as a method of execution, and provided for execution by lethal gas. The gas chamber was used to carry out executions from 1924 until 1979. In 1983, the

Legislature changed the authorized method of execution to lethal injection. See 1983 Nev. Stat., ch. 601, § 1, at 1937. In State v. McConnell, 120 Nev. ____, 102 P.3d 606, 616 (2004), the Nevada Supreme Court, concluded that the current method of lethal injection was not cruel and unusual punishment.

In 2006, a death row inmate in California brought an action under 42 U.S.C. §1983 seeking to enjoin the state from executing him by lethal injection alleging that, due to a combination of circumstances, executing him by lethal injection pursuant to the prison's protocol would constitute cruel and unusual punishment. Morales v. Hickman, 438 F.3d 926 (9th Cir., Feb 19, 2006). On February 14, 2006, seven days prior to a scheduled execution, the United States District Court for the Northern District of California conditionally denied a death row inmate's preliminary injunction if the State of California complied with certain criteria in carrying out the execution. Id. However, the District Court required that, for the execution to proceed, the State of California was required to (1) certify, in writing, that they would use only sodium thiopental or another barbiturate or combination of barbiturates in [Morales's] execution; OR (2) agree to independent verification, through direct observation and examination by a qualified individual or individuals, in a manner comparable to that normally used in medical settings where a combination of sedative and paralytic medications is administered, that [Morales] in fact is unconscious before either the pancurium bromide or potassium chloride is injected...the presence of such person shall be continuous until Plaintiff is pronounced dead. Morales v. Hickman, 415 F.Supp.2d 1037, 1047 (N.D. Cal. 2006). The state of California accepted the anesthesiologist option, agreeing to have two anesthesiologists on hand, one inside the execution chamber and one in reserve. Morales, 438 F.3d at 929. In all other respects, the California execution protocol remained unchanged.[7]

[7] The execution did not take place due to an unwillingness of medical personnel to participate. On April 21, 2006, Willie Brown was executed in North Carolina under a revised protocol that uses a bispectral index (BIS) monitor, a device that, according to the State, can monitor Brown's level of consciousness during the execution procedure. [The State] will not administer lethal drugs until *after* total unconsciousness of the plaintiff has been verified through use of the BIS monitor. Thus, [Brown's] concerns about human error are greatly mitigated by the use of this independent check on [his] level of consciousness before the potentially pain-inducing injections ··· begin. Whatever concerns might be

Since then, several states have either stayed executions or identified new protocols under which the death sentence is to be carried out.[8] Unlike the defendants who sought stays or revised procedures, Defendant is not in imminent danger of execution. Defendant has not yet exhausted his state[9] or federal remedies. It would be premature for this court to consider Nevada's execution protocol which may be altered by the time Defendant's sentence is carried out. Thus, there is no hardship to Defendant in withholding consideration. See Poland, 117 F.3d at 1104. Therefore, any challenge to the method of lethal injection is not ripe for review and must be dismissed.

CONCLUSION

For all the foregoing reasons, Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) should be dismissed.

DATED this 23rd day of July, 2007.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

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

raised about this "machine" or about the propriety of using it in executions, it is apparent to this court that the BIS monitor has been used reliably for a decade and is used in many anesthesia procedures across the country to determine an individual's level of consciousness. *See* Brown v. Beck, 445 F.3d 752 (4th Cir. April 20, 2006).

[8] The governor of South Dakota stayed the execution of Elijah Page on the day it was to be carried out because of concerns about the state's lethal injection process. (Sioux Falls Argus Leader, Aug. 29, 2006). Oklahoma now doubles the dose of sodium pentothal initially administered to the inmate. (Associated Press, Aug. 21, 2006).

[9] Clearly, Defendant may appeal this court's order denying relief, then return to federal habeas corpus litigation on this and his other First Degree Murder conviction (District Court #C79346). Moreover, Defendant may also bring an action under 42 U.S.C. §1983. See Hill v. McDonough, 126 S.Ct. 2096 (June 12, 2006).

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of STATE'S OPPOSITION TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND MOTION TO DISMISS was made this 23rd day of July, 2007, by facsimile transmission to:

DAVID ANOTHINY
FAX #(702) 388-5819

Eileen Davis
Employee for the District Attorney's Office

SSO/ed

Exhibit 1

Exhibit 1

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CLERK OF COURT

MEMO
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MANUEL SAUCEDO LOPEZ,
#0397706

Defendant.

CASE NO: C068946

DEPT NO: I

STATE'S POST-HEARING MEMORANDUM

DATE OF HEARING: 06/01/10
TIME OF HEARING: 11:00 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through NANCY A. BECKER, Deputy District Attorney, and files this Memorandum regarding the evidentiary hearing held on December 4, 2009 and the issue of good cause to excuse untimely and procedurally barred post-conviction claims.

This Memorandum is made and based upon all the papers and pleadings on file herein, the attached points and authorities, testimony and exhibits admitted in the evidentiary hearing and the entire court record.

I. Procedural Posture

Petitioner was convicted of First Degree (Torture) Murder involving the death of his

step-daughter, six year old Jessica Cevallos (Ceballos)[1], in 1985. Lopez's conviction and sentence were upheld on direct appeal in 1989. Lopez's first state post-conviction petition was denied after an evidentiary hearing in 1992 and the denial was affirmed in 1997. Lopez filed his first federal post-conviction petition on December 2, 1994. After three years of discovery/investigation, an amended petition was filed. In 1997 the amended petition was dismissed to exhaust state remedies. Lopez filed a second state post-conviction petition in 1998 which was dismissed as procedurally barred and the dismissal was affirmed in 2001. Lopez then filed a second federal habeas petition in April, 2001. After conducting discovery for six years, an amended federal petition was filed and that case was stayed pending exhaustion of state remedies. Lopez filed the current third state post-conviction petition on June 5, 2007.

Lopez acknowledges the claims contained in the petition are procedurally barred under NRS 34.726 (one-year barr). The state has also asserted the petition is barred under NRS 34.800 (laches) and NRS 34.810 (waiver, successive and abuse of writ). Lopez is challenging both his conviction and his sentence. Lopez also acknowledges he must demonstrate either good cause and prejudice or actual innocence to excuse or overcome the procedural bars.

The state has argued, and the court has concurred, that for purposes of judicial economy, it would address the good cause prong before turning to the prejudice prong or actual innocence. In that regard, this Court set an evidentiary hearing for Lopez to demonstrate when he learned, or could reasonably have learned, through due diligence, of facts giving rise to the claims and why he waited until June 5, 2007 to raise those claims in state court. (Evidentiary Hearing Transcript "EHT" 12/4/09, p. 10).

[1] Jessica's surname is spelled with a "v" or a "b" in different documents. The charging documents use "v" so that is the spelling used throughout this memorandum. The State notes that the letter "v" is pronounced as "b" in many Hispanic cultures, consequently causing confusion in the correct spelling. Sometimes the name becomes 'anglesized' when the family substitutes "b" for the "v" because it is easier than constantly correcting the spelling. This may be why the name is spelled differently in different documents. Similarly, the "c" in Cevallos is pronounced as if it were an "s" and thus in the evidentiary hearing transcript the name appears as Seballos in in some places.

II. Summary of Claims

Under the general umbra of "prosecutorial misconduct" Lopez has essentially raised three claims: 1) The State knowlingly presented false testimony under Mooney v. Holohan, 294 U.S. 103 (1935) or failed to correct the record under Napue v. Illinois, 360 U.S. 264 (1959); 2) The State failed to disclose exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963); United States v. Agurs, 427 U.S. 97 (1976) and United States v. Bagley, 473 U.S. 667 (1985); and 3) The State failed to disclose impeachment evidence pursuant to Giglio v. United States, 405 U.S. 150 (1972).

Lopez asserts that he has newly discovered evidence, the seventeen (17) pieces of information discussed in his pleadings; that the State allegedly had in its possession or the possession of investigating agents under Kyles v. Whitley, 514 U.S. 419 (1995). Lopez contends the state failed to disclose the evidence to defense counsel in any of the previous proceedings. Contrary to Lopez's inaccurate representations of the state's position, the state contests each of these claims. The state maintains that much of the information was either disclosed or was reasonably or equally available to the defense and, as such, does not fall within Brady and its prodigy. The state also disputes that some of the information was in its possession under Kyles or that it knowlingly presented false testimony or had any reason to suspect any testimony was false until Lopez filed his exhibits in federal court. Finally, the state disputes many of Lopez's conclusions that false testimony was actually presented.

The state has simply noted that before addressing the merits of the claims in the context of overcoming the procedural bars, that is, whether good cause and prejudice or actual innocence exists, Lopez must first prove he brought the claims to state court in a reasonable time period from the date of their discovery. For that reason, the state has not addressed the merits of the claims at this stage of the proceedings. This does not mean the state does not dispute the claims.

It is the state's position, depending upon the particular item, that any claim related to that item was known, or could have been known through due diligence, either: 1) At trial; 2) During the post-trial motion litigation; or 3) During the first or second state post-conviction

petitions. In addition, even if this Court finds a particular claim was not reasonably available during prior proceedings, the state asserts Lopez brought the claims two to five years after they were discovered and thus they are untimely.

III. Controlling Law

Lopez argues that the state did not disclose the seventeen items and thus good cause has been shown for Lopez's failure to raise any of its claims during earlier proceedings. Lopez also contends that he raised the claims in a timely fashion, after he finished discovery in his federal habeas action. Finally, Lopez asserts he was not required to raise each claim individually, which would have resulted in seventeen separate petitions. These arguments ignore a substantial body of state and federal law to the contrary.

First, even assuming the prosecution failed to disclose information pursuant to Brady, Giglio, Mooney or Napue, the non-disclosure does not constitute good cause for delay in bringing a claim if the information was known, or could have been known through reasonable due diligence. Second, once a defendant has sufficient facts to raise a claim, it must be raised within statutory time periods, or if no statute applies, within a reasonable time from its discovery. Discovery to locate additional evidence in support of a claim can be conducted after the claim has been timely filed and does not constitute good cause for delayed filing. Third, once an initial timely petition has been filed, any new claims discovered during the course of the proceedings, and which were not reasonably available at an earlier date, will be timely and may be added by supplemental pleadings. The case law below discusses these concepts in depth.

A. Due Diligence

Nevada has looked to federal law in determining what constitutes good cause for delay in raising a post-conviction claim. A petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules Hathaway v. State, 119 Nev. 248, 71 P.3d 503, 506 (2003); *citing* Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi v. Director, 105 Nev. 63, 769 P.2d 72 (1989); *see also*

Crump v. Warden, 113 Nev. 293, 295, 934 P.2d 247, 252 (1997); Phelps v. Director, 104 Nev. 656, 764 P.2d 1303 (1988).

An external impediment generally means that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable. Hathaway, 71 P.3d at 506; *quoting* Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986).

Although federal and other state-law post-conviction proceedings may not be identical to Nevada's statutes, the concept of reasonable availability is a common feature. A claim is reasonably available if the facts giving rise to the claim were discoverable using reasonable care and diligence. McClesky v. Zant, 499 U.S. 467, 493 (1991). In McClesky, defendant raised three prosecutorial misconduct claims, a *Massiah*[2] Sixth Amendment violation, a *Brady* claim and a *Giglio* matter. The issue was whether good cause existed to avoid application of the federal abuse of the writ doctrine. The government was alleging that the claims were barred because they had not been raised in previous state and federal court proceedings. The United States Supreme Court applied the good cause and prejudice standard to both federal procedural bars and the general common law abuse of the writ doctrine.

The High Court recognized that the failure of the State to disclose documents or information that might support the claims would not constitute good cause if the defendant could have discovered the information independently through the exercise of due diligence. That is, a court looks at what defendant knew and did, not what he didn't know. McClesky at 497-498.

> That McCleskey did not possess, or could not reasonably have obtained, certain evidence fails to establish cause if other known or discoverable evidence could have supported the claim in any event. "[C]ause ... requires a showing of some external impediment *preventing* counsel from constructing or raising the claim.". . . For cause to exist, the external impediment, whether it be government interference or the reasonable unavailability of the factual basis for the claim, must have prevented petitioner

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[2] Massiah v. United States, 377 U.S. 201 (1964),

> from raising the claim. . .the question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim. . .The requirement of cause in the abuse-of-the-writ context is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition. If what petitioner knows or could discover upon reasonable investigation supports a claim for relief in a federal habeas petition, what he does not know is irrelevant. Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim.

Id. The court then analyzed the facts and found the *Messiah* claim was barred for lack of diligence, regardless of any alleged State concealment. Id. at 502.[3] Nevada has statutorily adopted the due diligence concept in NRS 34.800(1)(a) which states that petitioner must show the claim could not have been known through the exercise of reasonable diligence.

Subsequent to McCleskey, the Supreme Court reaffirmed the concept of due diligence in Gray v. Netherland, 518 U.S. 152 (1996). Grey involved a *Brady* allegation and the court noted that where the factual basis for a claim was previously available good cause is not shown. Id. at 161-162. Finally, the High Court found a lack of due diligence in the investigation of a potential *Brady* claim in Williams v. Taylor, 529 U.S. 420, 437-40 (2000).

Other federal and state courts that have addressed this issue concur that if facts supporting a claim were reasonably available to the defense, a claim is barred regardless of government disclosure issues. For example, the Eleventh Circuit Court of Appeals found a *Brady* claim procedurally barred because the information which the government allegedly failed to disclose was contained in public records reasonably available to the defense and which defense had reason to investigate. *See* Bell v. Bell (Warden), 512 F.3d 223, 235 (11th Cir. 2008). The Court noted that where information was available though due diligence no *Brady* claim was possible and therefore no good cause was shown for excusing the procedural bars. Id. *See also* Matthews v. Ishee, 486 F.3d 883, 890-891 (6th Cir. 2007);

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[3] However, good cause was found as to the *Brady* and *Gigio* claims.

Ward v. Hinsley, 377 F.3d 719, 723-25 (7th Cir. 2004); Carriger v. Lewis, 971 F.2d 329, 330 (9th Cir. 1992).[4]

State courts with case law or statutes similar to Nevada's also hold that the failure of the prosecution to disclose information is not governmental interference or an external impediment that prevents counsel from filing a claim if the claim was reasonably available through due diligence. The Pennsylvania Supreme Court found *Brady*, *Giglio*, and *Napue* claims were barred when defense failed to demonstrate they were not discoverable through due diligence at an earlier date. Commonwealth v. Breakiron, 781 A.2d 94, 98-100 (Penn. 2001). Likewise, the Florida Supreme Court held a *Brady* claim did not excuse procedural bars where the claim was reasonably discoverable through due diligence at an earlier date or proceedings. Bolender v. State, 658 So.2d 82, 84-85 (Fla. 1995). *See also* State v. Sims, 761 N.W.2d 527 (Neb. 2009)(timeliness determined from when defendant knows or should have known facts supporting claim); Graham v. State, 661 S.E. 2d 337 (S.C. 2008)(time runs from date petitioner knew or should have known of facts giving rise to claim).

Lopez cites to a civil RICO case in support of his arguments that he was entitled to wait until federal discovery concluded before filing his claims. Siragusa v. Brown, 114 Nev. 1284, 971 P.2d 901 (1998). Lopez claims that Siragusa stands for the proposition that the time period for calculating a statute of limitations issue runs from the date a petitioner/plaintiff discovers all of the facts supporting his claim. Assuming Siragusa has any bearing in light of Nevada's specific cases in the post-conviction context, it does not stand for this proposition. Rather its language mirrors the case law cited above, the time period runs from the time a petition discovers facts that would support a claim, not all of the evidence petitioner would introduce to prove a claim. In fact, the Nevada Supreme Court rejected the argument in that case that federal litigation (in that case bankruptcy proceedings) would toll running of the state statute of limitations). Siragusa at 1394, 971 P.2d at 807-08.

[4] Eventually Carriger overcame the procedural bars on the basis of actual innocence. *See* Carriger v. Stewart, 132 F.3d 463, 477-79 (9th Cir. 1997).

The Nevada Supreme Court noted that concealment was irrelevant if Siragusa could have discovered the information through due diligence. Id.

The United States Supreme Court recognized, however, a narrow exception to the due diligence requirement in Strickler v. Greene, 527 U.S. 263 (1999). In Strickler, the defendant did not conduct a due diligence pre-trial investigation for *Brady/Giglio* materials because the counsel knew that the prosecutor had an 'open file' policy and relied on the policy to provide all statutory and *Brady/Giglio* material. All evidence would be in the prosecutor's files and these were reviewable at anytime by the defense. The defense did review the files, but certain impeachment/exculpatory notes and statements were not in the files, although they were in possession of the investigating police agency. Id. at 275-277. In subsequent post-conviction proceedings, post-conviction counsel moved for discovery of any *Brady/Giglio* information. The government opposed the discovery asserting that all *Brady/Giglio* material would already have been disclosed pursuant to the 'open file' policy. Strickler at 278.

The Fourth Circuit Court of Appeals concluded that the information contained in the police files could have been discovered through due diligence by the use of subpoena's and discovery during the first state post-conviction petition. Therefore good cause for overcoming the untimely claim was not proven. Id. at 279.

First, the Supreme Court confirmed the continuing validity of McClesky and Gray and distinguished them from the facts in Strickler. Id. at 287. The court noted several factors: 1) The prosecution disclosed some of the witness statements and interview notes, thus there was no reason to believe additional notes existed; 2) Defense counsel reasonably relied upon the prosecution's open file policy in not conducting pre-trial discovery; 3) The prosecution opposed discovery on the basis of the open file policy in post-conviction proceedings; 4) Post-conviction counsel had insufficient information to support additional discovery in light of the prosecution's assertions; 5) The underlying witness refused to speak to the defense counsel and 6) The claim was timely raised once it was discovered. Id. at

285-288. Because of these factors, the Supreme Court concluded the failure to use due diligence was excused and the procedural bars were overcome. Id.

Subsequently, the Supreme Court discussed this issue again in Banks v. Dretke, 540 U.S. 668 (2004). In Banks, prior to trial, the prosecutor affirmatively told defense counsel that formal discovery was not necessary as the prosecutor would provide counsel with all "required discovery." Id. at 674-75. The government failed to provide defense counsel with a lengthy transcript/statement of a witness and to disclose the witness was a paid informant. Further, the prosecution failed to correct inaccurate testimony regarding these issues when the witness testified. Id. at 674-75. The government also failed to disclose the information during subsequent post-conviction proceedings. Banks at 675-76. However, Banks discovered some of the information through independent investigation during post-trial proceedings. As a result, Banks raised a *Brady* claim in his third state post-conviction petition. The government opposed the petition and specifically denied the allegations in the claim, attaching affidavits to that affect. Id. at 682-683. The petition was denied.

Subsequently, in federal habeas discovery, Banks gathered additional evidence to support his claim and obtained the previously undisclosed statement and informant information. The Supreme Court held that the affirmative representations by the government that *Brady/Giglio* had been complied with were sufficient to relieve Banks of his due diligence requirements in light of the fact that Banks lacked any significant information that would have allowed him to seek additional discovery in state court. Id. at 697-698. Banks reasonably relied upon those representations and timely filed his claims when he discovered them. Id. For those reasons, the procedural bars were excused.

Strickler and Banks make it clear that good cause to excuse a procedural default is not shown when the "newly discovered" information was reasonably available at an earlier date though a due diligence investigation. However where defense counsel reasonably relies upon a prosecutor's affirmative conduct and forgoes investigation, or the government opposes the investigation and represents all requested material has been disclosed, due

diligence is satisfied. The Bell and Matthews Circuit Court cases cited above illustrate the interplay between McClesky, Gray, Strickler and Banks.

In Bell, one of the witnesses at trial was a convicted felon informant who was housed with the defendant. Prior to trial, the State did not disclose meetings that occurred with the witnesses wherein the witness was requesting certain assistance with housing and prison conditions as well as parole eligibility. Bell at 228-29. However, the defense knew of some of the information and cross-examined the witness about it at trial. Id. at 228-230. The witness also received allegedly favorable treatment on pending criminal charges and was subsequently released on early parole. Id. The Eleventh Circuit concluded that the individual prosecutor's notes would not have been discoverable through due diligence as Bell had no way of knowing of their existence. However, the public sentencing records and criminal history of the witness were reasonably available and Bell had sufficient information to warrant further pre-trial or post-conviction discovery which was not done. The court, in effect, concluded because the information was available, there could be no *Brady* violation and therefore no good cause. And because counsel had investigated, there was no reasonable reliance upon an 'open file' policy or government representation. Bell at 236.

Banks was also discussed and distinguished by the Sixth Circuit in Matthews. In Matthews, a jailhouse informant and another witness allegedly received favorable plea bargains about two weeks after they testified. Matthews argued this was evidence of a pre-existing deal which should have been disclosed. Matthews at 884. Evidence of the negotiations and resulting sentences were matters of public record. Information regarding one of the witnesses was discovered and timely raised through post-trial investigation in state court. Information regarding the other witness was not discovered until after the claim on that witness was procedurally barred. Id. at 889-90.

Matthews asserted that because the prosecution argued there were no deals during closing argument, it was reasonable not to conduct an investigation as to the witness and due diligence was satisfied. The Court rejected this reasoning. Like the Eleventh Circuit, the Court noted the information was a matter of public record and information in Matthew's

possession would lead a reasonable person to investigate further regardless of the closing arguments. And, in fact, defense counsel did not rely upon the arguments as to one witness and there was no reason proffered for why such reliance applied to the second witness. Matthews at 890-891. The court noted that because the claim was reasonably available, *Brady* did not apply and it did not constitute good cause to overcome the procedural bars. Id.

Thus the mere fact that the information was known to the government and was not previously disclosed is not enough to constitute good cause to overcome a procedural bar. In Williams v. Taylor, *supra*, the United States Supreme Court reiterated this position. In Williams, the defendant raised four claims in a federal habeas petition.: 1) The existence of an alleged undisclosed informal plea bargain; 2) Failure to disclose a psychiatric report on the co-defendant filed in a separate case; 3) Newly discovered jury misconduct and 4) Knowledge by the prosecutor and failure to disclose the misconduct. Williams, 529 U.S. at 427-428. The issue was whether Williams exercised diligence in developing his claims in state court. Failure to do so would prohibit an evidentiary hearing on those claims in federal court and result in a procedural bar on the claims. Id.

Although discussing the concept of diligence in light of statutory language and not specifically on federal procedural defaults, the Court's statements regarding diligence have some bearing when considering good cause in the procedural fault context. The Supreme Court noted that:

> The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts. The purpose of the fault component of "failed" is to ensure the prisoner undertakes his own diligent search for evidence. Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend, as the Commonwealth would have it, upon whether those efforts could have been successful

Id. at 434-35. The High Court found lack of diligence as to one of the claims, the psychiatric report. The court states it was part of a public record and that based upon trial testimony,

there was reason to examine the public file in question. In fact, the public file was actually reviewed and the court concluded, that review would alert counsel to a potential *Brady* claim. Id. at 437-40. The same was not true of the other claims. Nothing in the trial or other public record would have alerted counsel to investigate. Williams at 441-44. *See also*, Harbison v. Bell, 408 F.3d 823 (6th Cir. 2005)(information available five years earlier); Commonwealth v. Sattazahn, 869 A.2d 529 (Pa. 2005)(public record discoverable through due diligence); Agan v. Florida, 560 So2d 222 (Fla. 1990)(claim reasonably available from public record).

The above cases demonstrate the type of analysis this court should use in determining whether Lopez' claims were reasonably available in the sixteen years proceeding his second federal habeas petition.

B. Timely Filing of Discovered Claims

1. Basic Law

Even if this Court decides that the claims are based on new evidence not reasonably discoverable prior to the federal discovery proceedings in 2002, it must still determine if the claims were timely filed in state court was they were discovered. Again, it is Lopez, not the state, who bears the burden of showing good cause for any delay. A petitioner must demonstrate when they first learned of the facts giving rise to the claim, why they delayed filing the claim and that the delay was reasonable. Loveland v. Hatcher, 231 F.3rd 640, 644 (9th Cir. 2000); Hathaway v. State, 119 Nev. 248, 255; 71 P.3rd 503, 507-08 (2003).

Loveland and Hathaway both involved ineffective assistance of counsel for failing to file a Notice of Appeal when requested. Id. In both cases, the claims were time-barred and the allegation was whether the claim was reasonably available prior to the running of the one-year time bar and, if not, was the claim filed within a reasonable period of discovering the facts supporting the claim. The questions involved whether an appeal had been requested, whether the attorney affirmatively represented an appeal would be filed, when the petitioner discovered no appeal was filed and the reasonableness of the delay in filing the

claim once discovered. Id. Both cases were remanded for evidentiary hearings on those issues.

It is the state's position that while the Nevada Supreme Court has not specifically adopted a time-limit on reasonable delay, it has suggested that anything outside of the one-year statutory period contemplated under NRS 34.726 would be unreasonable. Pelligrini v. State, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001).[5] In Pelligrini, the Supreme Court was considering how long petitioners would have from the effective date of NRS 34.726 to file a successive petition for cases that were already time-barred on the effective date. The court concluded that one-year was reasonable. Id. The state contends that this same rationale should apply to claims based on alleged newly discovered evidence. If petitioners file claims more than one-year from the date they were discovered, it is per se unreasonable. If they file within one-year, it may still be unreasonable depending upon the circumstances. All of Lopez' claims were filed more than one year from the date they were discovered and, as such, Lopez has not shown good cause for the delay. It makes no sense to say a defendant gets more time to file a successive petition on a newly discovered claim that he would to file an initial petition. *See also* Commonwealth v. Fahy, 737 A.2d 214 (Pa.1999)(discussing due diligence and reasonableness in context similar to Pelligrini and Hathaway.)

Lopez argues that the term "reasonable" should be interpreted under common law laches doctrines and that the state has the burden of proving prejudice as a result of any delay. This completely ignores Nevada's statutory scheme. Each of the specific procedural bar statutes, NRS 34.726 (one-year limit), NRS 34.800 (laches) and NRS 34.810 (waive/successive/abuse of writ) place the onus on the petitioner to demonstrate good cause and prejudice for overcoming or excusing a procedural bar. Placing the burden on the state in cases of allegedly newly discovered evidence would undermine the statutes and the intent of the legislature. No case law is cited to support this unique view.

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[5] Lopez attached a transcript from another habeas case involving Michael Rippo (C # 106784) to one of his Memorandums and argues that the State is taking different positions in the two cases. DDA Becker is conflicted from any involvement with the Rippo case and thus does not discuss strategies amongst cases. However, from reading the transcript, the State asserts it is not taking inconsistent positions. The State would also note that the public record Blackstone Minutes reflect the Rippo petition was dismissed as procedurally barred. See attached Exhibit 1.

2. Discovery of Claim

The time period for filing a newly discovered claim runs from the time that a petitioner knew, or should have known, of the facts that give rise to the claim. Hathaway, 117 Nev. at 254-55, 34 P.3d at 507-08. McClesky v. Zant, 499 U.S. at 476-77 (no explanation why claim not pursued at an earlier date, when were facts known.). In addition, when analyzing the reasonableness of the delay, the question is whether the information known to the defendant supported a claim. If it did, then the claim was ripe for filing and a petitioner may not delay filing the claim until he gathers all the evidence that would support the claim. McCleskey at 497-98. *See also* Commonwealth v. Abu-Jamal, 941 A.2d 1263 (PA 2008)(*Brady* claim - facts known for a year but waited until reduced to affidavit to file); Charboneau v. State, 174 P.3d. 870, 875 (Idaho 2007)(*Brady* issue - time measured from discovery of facts supporting claim, not possession of last piece of evidence relating to claim).

Finally, once a petitioner is put on notice of a claim, he may not delay filing of the claim while he pursues other remedies. Abu-Jamal at 1269. In particular, pursuit of federal remedies does not constitute good cause because it does not involve an impediment external to the defense. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989). As noted at the hearing, Colley continues to be cited by the Nevada Supreme Court for this proposition. (State's Hearing Exhibit "SHE" 15-18, Evidentiary Hearing Transcript "EHT" 12/04/09, p 4-8). Nor is Nevada the only state to speak on this issue. The Florida Supreme Court also rejected federal court litigation as good cause:

> Johnson also seeks to avoid the application of the rule by arguing that he should not be penalized because his counsel was asserting different claims in federal court during the period of 1982 to 1987. Despite the admonition against piecemeal litigation in collateral proceedings, Sanders v. United States, 373 U.S. 1 (1963), counsel in the postconviction hearing below candidly stated that when Johnson's lawyers decided to go to federal court, they elected to raise only certain claims and assumed that they could always come back to state court and raise others. However, there was nothing to prevent the filing of a motion for postconviction relief in state court while Johnson's federal claims were pending.

Johnson v. State, 536 So.2d 1009, 1011 (Fla. 1989). In fact, when considering good cause for an untimely federal petition, the United States Supreme Court has also rejected the concept that the time spent pursuing a remedy in one court should constitute good cause for an untimely filing in another court. Pace v. DiGuglielmo, 544 U.S. 408, 418-419 (2005). *See also*, Deaton v. Arkansas, 285 S.W.3d 611 (Ark. 2008)(pursuit of pardon does not excuse untimely post-conviction petition); State v. Milne, 842 A.2d 140 (N.J. 2004)(pursuit of federal proceedings does not excuse untimely petition); Green v. State, 576 S.E.2d 182 (S.C. 2003)(pursuit of federal proceedings does not toll state limitations periods).

Here Lopez had sufficient information to put him on notice of his claims between 2002 and 2004. Yet he waited until he completed federal discovery before filing the claims so that he could gather additional documents as evidence of those claims. Nothing prohibited Lopez from asserting the claims in state court within one year of their discovery. Lopez could have filed a petition and continued or sought discovery thereafter in either federal or state court.

C. Piecemeal Litigation

Lopez asserts if he was required to file his successive state petition when he discovered the claim and before concluding federal discovery it would result in piecemeal litigation. This is factually and legally untrue. Under Nevada law, once a petition is filed, it can be supplemented with the addition of new claims at anytime. NRS 34.250(3); State v. Powell, 122 Nev. 751, 757-58, 138 P.3d 453, 457-58 (2006). Thus Lopez could have filed his first *Brady/Giglio/Napue* claim and then added any additional claim that came to light during discovery. Lopez would still have to prove that the newly discovered evidence and/or claim was not reasonably available at an earlier date through due diligence, but there would be no need for seventeen separate petitions.

IV. Common Due Diligence Analysis

In determining the reasonable availability of the seventeen (17) items of information upon which Lopez bases his claims, certain facts regarding Lopez' counsel actions prior to the involvement of the Federal Public Defender's Office are relevant to most of the

information. These facts, and an analysis common to all items, are discussed below. The analysis of each piece of information is contained in Section V.

On March 36, 1985 Lopez filed a pre-trial motion for discovery. In it he requested copies of reports, statements or other evidence that fell within the previous version of NRS 174.235. Lopez has presented no evidence that the State opposed the motion or responded with assertions of an 'open file' policy claiming the motion was unnecessary. The district court granted the motion. (Petition Exhibit "PE" # 1; SHE 6, p. 909).

During trial, Lopez claimed *Brady* violations relating to the alleged late disclosure of reports or notes involving Dr. Paul Strauss and Ted Salazar. Both were denied and the denials upheld on appeal. (SHE 6).

No evidence has been presented from the trial or previous petition records that Lopez relied upon an 'open file' policy or 'open file' representations in lieu of a due diligence investigation. Lopez moved for discovery and argued the State had certain documents or knowledge in its possession and failed to disclose it in a timely fashion. Trial, appellate and/or post-conviction counsel did not testify at the evidentiary hearing before this Court on this, or any other, issue.

The 'open file' evidence presented with the current Petition consists of the November 28, 2006 affidavit of trial/appellate counsel, Kevin Kelly. In it, Mr. Kelly cites a list of documents and avers he did not have those documents prior to or post-trial and that he relied on the State's 'open file' policy and did not do a due diligence investigation prior to trial which would have revealed these documents. (PE 316, SHE 14).[6] Mr. Kelly assumed all exculpatory and impeachment evidence would be contained in the prosecutor's file. But he indicates that the actual 'open file' policy meant he was free to review the Clark County

[6] The State does not concede that the documents listed in the affidavit fall within the purview of Brady, Giglio or Kyles. As an example, the Clark County Detention Center records of Arturo Montez (Montes) and Rosaura Tanon's notes are not records of an investigating agency, a paid informant, a jailhouse informant or a co-defendant. However, for purposes of this stage of the proceedings, the Court must assume the seventeen (17) pieces of information could be considered *Brady* items. The State mentions this only because failure to note the State's position consistently results in statements by Lopez that the State does not "seriously contest" or "agrees" or "concedes" Lopez' interpretation of the documents and information. This is true of all seventeen (17) pieces of information. The State wishes to avoid such averments in future pleadings. (EHT 11-15).

District Attorney Office's criminal file and view whatever evidence it contained at anytime.[7] While Mr. Kelly may be sincere in his assertions, they are made between twenty-one and nineteen years after the events, i.e. pre-trial, post-trial and appeal litigation. They are also phrased in the precise language designed to mirror Strickler and Banks. The state submits they must be viewed with the proverbial "grain of salt."

Even assuming Mr. Kelly reasonably relied upon the District Attorney's Office's then existing 'open file' policy prior to and during trial, he admits he did not do so post-trial.

> Once it became apparent after trial that the prosecution failed to disclose material exculpatory and impeachment information regarding Arturo Montes[8] and Maria Lopez, I retained an investigator and conducted an investigation into whether the state failed to disclose its constitutional obligations.

(Petition Exhibit "PE" 316, SHE 14, p. 4; EHT 102-03). This is born out by the post-trial record, the Petition Exhibits and Joint Exhibits.

Mr. Kelly investigated whether Montez was Maria Lopez' uncle based upon a T.V. interview in 1986. He filed a motion for a new trial based on that investigation. (JE 1.13). In response to that motion, DDA Seaton filed an affidavit indicating nothing in his previous interviews with Montez or any other information in the case suggested Montez was related to Maria and thus the state had no exculpatory evidence on this issue to disclose. (JE 2.7).

Kelly's affidavit does not state he relied on that DDA Seaton's affidavit to discontinue any investigation on Montez and the record reflects just the opposite. Mr. Kelly ran a SCOPE on Montez not later than early 1987. The SCOPE reflected a November 10, 1984 DUI arrest as well as other traffic and DUI arrests through February 26, 1986. (Joint Exhibit "JE" 2.11). At some point in 1987, based on his investigation of Montez, Kelly

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[7] The State is not saying that it is only responsible for what was in the D.A. file. The State is well aware it is charged with constructive knowledge of any Brady or Giglio information contained in an investigating agency file under Kyles. The State contends however, that the 'open file' allegations in Mr. Kelly's affidavit are far short of the 'open file' policies and statements discussed in Strickler and Banks.

[8] Whether the spelling is Montes or Montez depends on which transcript or document one is referring to as the witness used both spellings on different occasions. Because Montez spelled his name at trial and evidentiary hearings with a "z" not an "s" the State uses that spelling throughout this memorandum, except when quoting from a specific source.

learned an Ernest Mercado was a cellmate of Montez during one of his incarcerations. Mr. Kelly ran a SCOPE on Mercado no later than early 1987. (JE 2.12)[9] Mercado was located and a statement obtained that Lopez argued was inconsistent with Montez' trial testimony. (JE 2.17). Also in 1987, Mr. Kelly conducted an intensive interview of Maria Lopez in Mexico and of the primary detective on the case, R.C. Wohlers. (JE 1.16, 1.18, 1.22, 1.26, 1.41). The results of these investigations led to the filing of a fourth motion for new trial, a motion for re-hearing and a motion to disqualify the District Attorney's Office. (JE 1.17, 1.25, 1.27, 1.29). The motions asserted various *Brady/Gigio/Mooney/Napue* claims regarding Montez and Maria.

There is no evidence that during this post-trial investigation and motions practice Mr. Kelly, formally or informally, requested records from the North Las Vegas Police Department, Clark County Detention Center, North Las Vegas Detention Center, Clark County Justice Court, North Las Vegas Municipal Court and/or the Bureau of Immigration and Naturalization Services. Lopez presented no evidence that Mr. Kelly was relying on any 'open file' policy at this time or that anyone from the District Attorney's Office indicated there was no need for an investigation as a result of an 'open file' policy. There is no evidence suggesting DDA Seaton discouraged Mr. Kelly, in fact the record leads to a different conclusion, DDA Seaton did not agree with Mr. Kelly's assertions that the information he discovered demonstrated either Montez or Maria gave false testimony or that the State violated *Mooney/Napue*. (JE 1.19, 1.20, 1.22, 1.23, 1.25, 1.28, 1.29, 1.30, 2.7). Mr. Seaton's only assertions were that he interviewed Montez and Maria prior to trial and he believed their testimony to be true based upon the consistency between their observations and the testimony of other witnesses and physical evidence. (JE 1.23, p. 2, 2.7).

Moreover, the record also reflects Mr. Kelly did not rely on the affidavits of Seaton, Wohlers, and the secondary detective, Jose Tronosco and cease investigating. Quite to the contrary, Kelly did more investigation on Maria and Montez, interviewed Wohlers, and filed

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[9] The exact date of the SCOPE printouts mentioned in this Memorandum is unknown as they are not dated, however the parties agree they were run, at the latest, in early 1987 because the Fourth Motion for New Trial involving allegations regarding Montez and a statement from Mercado were filed in March and April of 1987.

a motion for rehearing. (JE 1.26, 1.27). Part of the motion argued that the state submitted inaccurate affidavits regarding the timing of any immigration discussions and was based on the Wohler interview. (JE 1.27).

The record reflects that Mr. Kelly was not relying on any 'open file' or prosecution representations during post-trial discovery. Mr. Kelly investigated Maria and Montez. The records relating to them, the INS and the murder investigation were readily available. He never sought to review them formally or informally. The state offered no impediment to their access and, in fact, Mr. Kelly must have had some access to criminal history information because he ran SCOPEs and learned that Mercado was Montez' cellmate. Detective Wohler met with Lopez' investigator. Maria met with Mr. Kelly. There is no evidence that Kelly tried to locate Montez or that Montez refused to meet with Kelly. Rather than prove reliance upon an 'open file' policy under Strickler and Banks, the record demonstrates just the opposite. There was no state impediment to discovery of records through the use of due diligence and Mr. Kelly certainly believed Montez and Maria lied. Mr. Kelly simply never asked for the records in question and he had the same notice of potential claims as current counsel.

The same situation holds true for the post-conviction attorneys who represented Lopez prior to the appointment of the Federal Public Defender's Office. In his first state post-conviction petition, Lopez was represented by Annette Quintana and William Smith. Both are now deceased. The record reflects Ms. Quintana did seek investigative and expert services and those requests were granted. (SHE 9, EHT 103; Volume 7, Record on Appeal "ROA", First State Post-Conviction Petition, pp. 1241, 1244). The record also demonstrates Ms. Quintana did some investigation of Maria because a SCOPE was run on her revealing a post-trial shoplifting citation in October 1985 and Lopez' investigator learned that the Las Vegas Metropolitan Police Department turned Maria over to immigration. (JE 1.33, 1.34). The first state post-conviction petition contained a *Brady/Giglio* claim based on this information alleging it should have been disclosed during post-trial litigation. (7 ROA 1314, Claim 1). There is no evidence demonstrating Quintana or Smith formally or informally

requested Clark County Detention Center, North Las Vegas Police Department, METRO, Immigration, District Attorney or any other records and was denied access to, or relied upon, any 'open file' policy or representations with respect to such records. There was no state impediment as in Strickler and Banks. The records were readily accessible and available through due diligence in the first State post-conviction proceedings.

Subsequently, Dan Polsenberg, N. Patrick Flanagan and Michael Pescetta represented Lopez in his first federal habeas petition between 1994 and 1997. (SHE 13, p. 2). Mr. Polsenberg also represented Lopez in the second state post-conviction petition. When the first federal habeas petition was dismissed to exhaust state remedies, the Order specifically noted that Lopez' counsel had the opportunity and resources to conduct a thorough investigation. (SHE 11, EHT 103-04). The investigation took approximately three years and resulted in an amended petition containing one hundred five (105) claims. (SHE 11). Lopez requested and was granted broad leave to conduct discovery. (SHE 13, p. 3). No evidence has been presented that Lopez requested, informally or formally, Clark County Detention Center, North Las Vegas Police Department, METRO, Immigration, District Attorney or any other records involved in the seventeen (17) items. No evidence was presented that the State impeded discovery or that these attorneys relied upon any 'open file' assertions in foregoing discovery. Again there is no evidence to support a Stricker or Banks impediment.

Finally there is the discovery conducted by the Federal Public Defender's Office. First, the FPD had sufficient information to file the second federal petition and a motion for discovery on the claims cited in the petition by 2002. (EHT 109-113). The discovery was to look for additional evidence to support the claims, not fish for new claims. Id. By the time the discovery motion was filed in 2002, Lopez had sufficient new information to file a state petition and seek discovery just as he did in Federal Court.

The FPD made informal requests for information from various agencies. (JE 4.1-4.24). The FPD filed a lengthy motion for discovery in Lopez' second federal habeas petition based upon information received pursuant to those requests. (JE 4.25, 4.26). The Attorney General, who represents the State in federal proceedings, did not oppose the motion

and stipulated to an order granting discovery. (JE 4.28, EHT 57). Subpoena's were served on METRO, NLVPD, NLV Fire Department, INS and other agencies for their files involving either the investigation, Maria's immigration status or detention files on Montez. Documents from these agencies were received in 2002 and 2003 (JE List). Carla Noziglia's bench notes were received in 2004. (JE 3.3A). All of these documents were readily available through due diligence and the discovery process in the first state petition for post-conviction relief and the first federal habeas petition. Lopez presented no evidence explaining why the same letters, motion and subpoenas could not have been issued years earlier.

In addition to the formal discovery, the FPD interviewed and obtained declarations from a variety of other sources or individuals including former counsel on the second federal petition, Valencia (whose file apparently also contained Kelly, Quintana and Polsenberg files), Families of Murder Victims, Arturo Montez (Montes), Rosalinda Ceballos (Cevallos), Carlos Montes, Theodore Salazar, R.C. Wohlers and Dan Berkabile. With the exception of Wohlers and Berkabile, this information was obtained in 2002-2004. (JE List). Wohlers and Berkabiles' statements were obtained in 2006. (JE 2.30, 3.10). Again, Lopez presented no explanation indicating why these individuals or agencies were not contacted during the investigations in the first state and federal petitions. Excepting Carlos Montes, all of these individuals were known to the defense at the time of trial. The trial and post-conviction records that led the FPD to investigate and request the information were known and possessed by previous counsel. And Carlos Montes was located while investigating Arturo's background. There is no evidence that the State impeded access to these individuals or that previous counsel relied upon any 'open file' representations under Strickler and Banks. They were easily discoverable under due diligence.

The Clark County District Attorney's Office was served with three subpoena's. (JE 4.29-4.31). The CCDA did respond seeking time to gather the information and review the scope of the subpoena's. (JE 4.33, 4.48, 4.52, 4.54, 4.55, 4.57). However, the previous Capital Case Coordinator, Clark Peterson, failed to produce the documents or file a motion

challenging them in a timely fashion, resulting in a motion to compel. (JE 4.59) However, when Chief Deputy District Attorney Steven S. Owens was appointed to that position, he immediately took prompt action on the subpoenas. (JE 4.64-4.49).

CDDA Owens did contest the scope of the subpoenas, but he did not make any 'open file' representations nor did the FPD rely on any representations and forego discovery. Id. The District Attorney's Office produced most of the requested documents on June 10, 2004. It contested production of the remaining documents and CDDA Owens sent letters indicating the Office's position and asking for a more detailed basis for the documents. (JE 4.64-4.69). Additional documents were produced when the FDA explained how they related to a claim. Id. The District Attorney's Office indicated any further disputes would need to be resolved by the Federal Court. (JE 4.69).

A series of motions and additional production took place. (JE 4.59, 4.62, 4.70-4.73, 4.78, 4.81, 4.90, 4.92, 4.94, 4.97, 4.98) The Federal Court did not hold the District Attorney's Office in contempt. Rather it decided the objections, sometimes ruling in the District Attorney's favor, sometimes ruling in Lopez' favor. (JE 4.63, 4.79, 4.80, 4.96, 4.99).

A review of the Joint Exhibit List demonstrates that almost all of the documents produced were duplicates of public filings or agency reports that were already in Lopez' possession. The majority of the documents were produced on June 10, 2004. Of the documents referenced in the Joint Exhibit List, only four, JE 1.14, 2.5, 2.8 and 2.29, were not produced in June, 2004.[10] Of those four, three were documents already possessed by Lopez, JE 1.14, 2.5 and 2.8). The last document produced was the DMV social security number inquiry which returned to Arthur Danny Montes and which had previously been mislabeled as an NCIC report. (JE 2.29). This was produced on July 6, 2006 after the federal court heard the parties various positions and granted or denied the requests relating to specific documents. (JE 4.70-4.73, 4.78, 4.79-4.99).

[10] Two other documents have production dates of 2.20.08, JE 1.18 and JE 1.57, but this is obviously an error as both are declarations that were developed by the FPD and were not in the District Attorney's Office until the Third State Petition was filed and these were attached as exhibits to the Petition.

Lopez could easily have filed a petition alleging his *Brady/Giglio/Mooney/Napue* claims in 2002, let alone in 2004, when he had sufficient specific factual allegations to support his claims. EHT 96-98. The remaining discovery was for additional evidence. Counsel could have talked to Wohlers or Berkabile anytime from the trial to 2004, let alone 2006. The same is true of some minor declarations such as Christian Ochoa and Guillermo Tanon. The existence of Rosaura Tanon was known in 2003.

By 2004, Lopez had evidence indicating Montez was in custody most of the days when he claimed he saw Lopez pull and drag Jessica. He had a declaration stating Montez' trial testimony was false and that everything he said was "fed to him" by the prosecutors. He had declarations indicating Montez' was not known to Rosalinda Ceballos and Montez had no son. He had obtained the witness vouchers. Lopez possessed Noziglia's report and bench notes which he claims impeached Berkabile's trial testimony and are exculpatory. He had the extension cord report. Lopez had Maria's immigration records, the Rosaura Tanon notes, the denial of charges document, Maria's 1/11/85 statement tape, the deposition motion and the Ted Salazar documents. These constituted more than enough facts to give notice of potential *Brady/Giglio/Mooney/Napue* claims.

The District Attorney's Office did nothing to prevent, impede or discourage Lopez from filing a state court petition while the federal discovery litigation was pending from 2004 to 2007. Lopez chose to wait until he had Wohler's declaration, Berkabile's deposition and the NLET document before filing in state court. None of these were necessary to file the state petition. He chose to litigate discovery issues for three years in Federal District Court because he perceived it to be a friendlier forum, rather than file his state petition and litigate those issues in state court or amend his state petition when federal discovery was completed. This is not an impediment external to the defense and does constitute good cause for the delay in filing his claims under Colley and Pace and the other cases cited above. Placing legitimate discovery disputes before a court is not the same as the actions taken by the prosecution in Banks and Strickler.

Lopez believed that Montes presented false testimony and ceased to rely on any State beliefs or representations to the contrary almost twenty (20) years ago, yet Lopez failed to use due diligence to locate information that was readily available. As such he has not proved good cause for his delay in filing these claims.

V. Individual Evidence Analysis.

For purposes of assessing the good cause prong, it is the State's position that even if Lopez could prove that the seventeen (17) documents and the information they contain were: 1) In the possession of the prosecution or an investigating agency; 2) Constituted exculpatory or admissible impeachment evidence; and 3) That Montez should be considered in the same category as co-defendants, paid informants or jail informants under Giglio, Lopez still needs to prove that the facts/documents were not reasonably available through due diligence prior to the FPD's discovery and that the claims associated with those facts were filed within a reasonable time of their discovery. As noted below, Lopez has not met this burden.

A. Arturo Montez (Montes)

1. METRO Arrest and Detention Records (JE 2.24)

As noted above, trial counsel investigated Montez post-trial. A SCOPE printout reflecting his arrest record to date was run at the latest in 1987. (JE 2.11). That printout indicated Montez was arrested for DUI on November 4, 1984 and for other warrants and offenses at other times. Id. Montez testified that the incident he saw between Jessica and Lopez occurred two to three weeks before Thanksgiving, 1984. 14 ROA 2807-12. On cross-examination Montez thought the weekend before Thanksgiving was probably the time period. (SHE 4, 818, 14 ROA 2828-29). Counsel obviously did some investigation into jail records because he discovered Ernesto Mercado was Montez' cellmate and obtained a statement from him. (JE 2.12, 2.17). The records were readily available through subpoena and could have been obtained in 1987, and the intervening years, as easily as they were in 2002.

Lopez presented no evidence as to why previous counsel, having this information, did not seek complete production of Montez' arrest and jail records. In addition, the records were in the possession of current counsel since December 23, 2002, but Lopez waited until June, 2007 to file his *Brady/Giglio/Mooney/Napue* claims based on this information. The only reason given for the delay was the desire to complete discovery in Federal Court. (EHT 30-32). Five years is an unreasonable time period and Federal Court litigation does not constitute good cause for delay under Nevada law. Nothing prevented Lopez from filing his state petition at an earlier date and requesting additional discovery based on this information or even requesting the state court stay the state petition pending completion of the federal discovery. Thus Lopez failed to meet his burden of proof on this issue.

2. Witness Voucher (JE 2.26)

Assuming statutory witness fees constitute a payment or benefit for testifying, in as much as these were statutory payments (EHT 114-15) and thus common knowledge, trial and previous post-conviction counsel were on notice of the witness fees and could certainly have requested this document at an earlier date. No evidence was presented indicating it was not readily available through due diligence. In any event, the document was received on June 10, 2004 and Lopez waited three years to file a *Giglio* claim based upon the document. This is an unreasonable time period and federal court discovery is not good cause to excuse the delay. Nothing prevented Lopez from filing his state petition at an earlier date and requesting discovery or a stay. Thus Lopez failed to meet his burden of proof on this issue.

3. Rosalinda Ceballos (Cevallos) Declaration (JE 2.27)

Rosalinda Ceballos is the wife of Antonio Ceballos, Maria's uncle. Her name and relationship to Maria was known to trial and previous post-conviction counsel. (SHE 1) In her statement, she indicates Maria told her that Manuel hit Maria and Jessica. No evidence has been presented that Rosalinda was unavailable or refused to talk to trial or previous post-conviction counsel or why her information on Montez could not have been discovered prior to 2004 through due diligence.

Antonio Ceballos testified for the defense and could easily have been examined about his relationship, or lack thereof, with Arturo Montez. Trial counsel obviously thought Ceballos located Montez to support Maria's testimony. (EHT 116-19, 21 ROA 3800-3807, SHE 8). Lopez asserts because there is no transcript for that testimony, it is possible he was examined (and presumably did not reveal this information). Lopez presents no evidence to support this speculation. Mr. Kelly was given a chance to review the notes and if this issue were a major part of his cross-examination he would certainly have brought that to the attention of the trial court during the hearings on the reconstruction of the record. He did not. (3 ROA 621, 4 ROA 635, 664, 684 – motions and transcripts of hearings to reconstruct the record based on notes). And all four of the notes used to reconstruct the record make no mention of this issue. Id.

Lopez did not use due diligence in interviewing Rosalinda on this matter. Moreover, her declaration was obtained on October 8, 2004 and Lopez waited almost three years more before filing his state claims based on this information. It was not reasonable for him to wait to the conclusion of federal discovery before filing a state petition and his delay is entirely the result of his own actions and not an impediment external to the defense. Good cause has not been demonstrated.

4. Carlos Montes Declaration (JE 2.28)

Carlos Montes is Arturo Montez' brother. His declaration was obtained on November 16, 2004. At trial, Mr. Kelly cross-examined Montez regarding his testimony about his family, in particular his missing wife. (SHE 4, 808; 817-20; 14 ROA 2834-40). Obviously counsel had concerns about all aspects of Montez' testimony. Even assuming the state would have constructive knowledge of Carlos, Lopez presented no evidence of an external impediment that prevented him from investigating Montez' family background or that Carlos Montes' testimony was not reasonably discoverable through due diligence. Current counsel's decision to investigate Montez' family was based upon Maria's 1987 declaration that she did not know Montez. (EHT 82-83). That observation was just as available to trial and previous post-conviction counsel. Lopez waited almost three years after discovering this

information to file his claim and again his only explanation for the delay was the desire to finish federal discovery. Lopez failed to demonstrate good cause.

5. Arturo Montez (Montes) Declaration (JE 2.25)

Once Lopez received Montez' detention records, Lopez wanted to find Montez' and confront him with the records. (EHT 66-68). Montez' declaration was obtained in November 19, 2004. No explanation was given for the delay between obtaining the records in 2002 and locating Montez in 2004. Trial counsel did not rely on any state representations in forgoing an investigation into Montez. (SHE 14). Trial counsel ran the SCOPE demonstrating Montez was in custody November of 1984 and tracked down a cellmate who provide a statement that appeared to contradict Montez' trial testimony. Despite this, trial counsel apparently did not seek discovery of Montez' complete detention or arrest files, investigate Montez' family background or interview the Ceballos' about their relationship with Montez. Nor did any of the previous post-conviction counsel seek such discovery. Nor has any evidence been presented that trial or previous post-conviction counsel attempted to locate Montez' to confront him with what information they did have. Had they done this type of due diligence, it is reasonable to believe the same type of declaration would have been available at an earlier date.

Even if this Court concludes due diligence was satisfied, Lopez waited more than two years after discovery before filing his claim. Nothing prevented Lopez from filing the current state petition and seeking either state discovery or a stay of the state petition for a reasonable time pending completion of the discovery litigation in state court. As with the other items of information, Lopez chose to wait until he gathered all possible evidence to support a claim before he filed it. (EHT 76-77). This is contrary to the case law and does not constitute good cause.

6. NLET DMV Printout (JE 2.29)

This is the document that was mistakenly labeled an NCIC report during the federal discovery litigation between Lopez and the District Attorney's Office. The undersigned attorney informed Lopez' counsel that the document reflected a DMV inquiry by social

security number. The document indicates the social security number returned to an Arthur Danny Montes and the inquiry was run sometime in February of 1986. After receiving this information, Lopez, for the first time, thought to request DMV records on that name and discovered grounds to allege that Montez fraudulently applied for a driver's license. Lopez alleges this information should have been disclosed to the defense under *Giglio/Kyles*

During the Federal Court discovery litigation, the District Attorney's Office asserted, based on its then mistaken belief this was an NCIC report, that this involved confidential criminal history information that required a specific court order and that it did not appear to be *Brady/Giglio* material. (JE 4.67, p. 3). The Federal District Court eventually concluded as it related to Montez' there was a sufficient nexus to a possible *Brady/Giglio* claim and ordered it disclosed. (JE 4.96, p. 11-12). The document was produced on June 30, 2006.

First, Montez' DMV records have been readily available through due diligence for years. While a defendant is not required to look everywhere for potential impeachment material, where a defendant has notice of facts that could present a potential claim, he must use due diligence in investigating the claim. Here trial counsel, based upon the 1987 SCOPE printout, jail records that led to Ernesto Mercado and the interview with Mercado, was on notice of Montez' criminal history. There is no evidence that the failure to investigate further was caused by any external impediment or 'open file' representation.

In any event, upon receiving the document, Lopez waited almost a year before filing the state petition. Lopez asserts it was reasonable for him to wait until he had this document, completed his Federal discovery, drafted his amended Federal habeas petition and seek stay and abeyance of the Federal petition before he filed his state petition. He also contends that after filing the federal petition; the Attorney General's Office and he engaged in negotiations and that explains the rest of the one year delay.

As the prevailing case law notes, a decision to litigate in another forum does not constitute good cause for failing to file a timely claim as it is not an impediment external to the defense. Good cause has not been shown on this issue.

7. Wohlers 2006 Declaration (JE 2.30)

Lopez contends that he wanted to interview Detective Wohlers about how Wohlers first located Montez and other matters. Lopez decided to wait until all other evidence was obtained before interviewing Wohlers. (EHT 79-80). Detective Wohlers has not only been available for the last twenty-five years but was interviewed voluntarily in 1987. (JE 2.20). The interview was candid and Wohlers made no attempt to avoid questions. Mr. Kelly was on notice this was an issue and could have investigated this why he was exploring the benefits and promises issue. The matter of what Wohlers meant by a secondary assignment in his trial testimony could have been explored through due diligence then when Wohlers was actually still working. Moreover, Wohlers could have been interviewed in the five years the Federal petition was pending before July 14, 2006. Lopez presented no evidence why this information could not have been obtained at an earlier date. The claim relating to this information was then not filed for almost another year after its alleged discovery and pursuit of Federal discovery does not constitute good cause.

B. Forensic Evidence

1. Extension Cord Property Report (JE 3.11)

Sometime during the trial, Maria brought a brown extension cord to DDA Jeffers. It was the cord she referred to in testimony. DDA Jeffers gave the cord to Wohlers to book into evidence and Wohlers generated a report reflecting this. The NLVPD records, including this report, could have been subpoenaed in the first state and federal petitions. No discovery was opposed by the state in either petition and no 'open file' representations were made. The information was available through due diligence. The FPD received the report on May 23, 2003 and then another eighteen (18) months passed until the FPD inspected the actual cord on December 16, 2004. The *Brady* claim related to this cord was not filed until June, 2007, almost two and half years later.

First, trial counsel was aware of the cord's existence at the time of trial. Maria testified that she did not think the brown extension cord marked as an exhibit was the one used to hang Jessica by her hair from the macramé hook. (SHE 4, 1175, 1178, 1183). She

indicated the exhibit cord was used to tie Jessica's hands and that the cord used in the hanging was in a Toy Box at home. (SHE 4, 1177-78, 1183-85, EHT 108-09). She discovered it when she was cleaning out the box. (SHE 4, 1183-85, Eht 108-09).

Second, Kevin Kelly's affidavit does not list this document as one he did not receive. (SHE 14). It does list an April 22, 1985 report and perhaps this is just a typographical error, but even then the affidavit does not indicate he was unaware that Maria had brought the cord to Ray Jeffers, only that he was unaware of the report.

Lopez was aware of the cord's existence during trial. He could easily have requested the cord be brought to court or taken any other action to secure it in 1985. The fact that counsel did not suggests he viewed the cord. Regardless it was certainly available to be inspected through due diligence at the time of trial and the reports were available for discovery during the first State and Federal petitions.

Even after allegedly discovering the cord's existence for the first time, Lopez waited over four years to file his *Brady/Mooney/Napue* claim in state court. Again, the only reason for the delay was the desire to finish federal discovery. Good cause for the delay has not been demonstrated.

2. Noziglia 4/4/85 Report (JE 3.3)

The trial transcripts reflect that Kevin Kelly knew Carla Noziglia had examined hair samples recovered from a belt, macramé holder and two extension cords. (SHE 5, EHT 106-07). Lopez stipulated that Dan Berkabile, the NLVPD analyst had seen the slides Noziglia prepared and thus all the samples. Id. Nothing in the record indicates trial counsel was unaware of the report. Defense counsel and the prosecutors had obviously discussed whether Noziglia would testify. Lopez now asserts the report was not discovered until May 21, 2002 simply because a copy of the report was not found in trial counsel's file. (EHT 106-07). However, the record also reflects trial counsel misplaced documents in the file, namely a note given to him by his client and magazine given to him by Lopez' relatives. (8 ROA 1513-14, 1467-1500 – testimony of Kelly at evidentiary hearing – First State Petition).

In addition, Kevin Kelly's affidavit does not mention this report as one of the documents he did not have prior to trial nor does it indicate he was unaware of the results. Yet it does indicate he had not seen Noziglia's bench notes. (SHE 14).

The State asserts the defense had this report prior to trial. More importantly, the report was readily available through due diligence during the discovery conducted in the first State and Federal petitions. Finally, Lopez waited five years to file his claims relating to this evidence so that he could complete federal discovery. The document itself, plus counsel's affidavit that it was not contained in the previous attorney's files, created a sufficient factual basis to present a claim. Once you have facts to support a claim, you may not delay filing the claim why you try to gather additional evidence to support the claim. Good cause has not been shown.

3. Carla Noziglia's Bench Notes (JE 3.3A)

As with the report; the notes were available through due diligence during the first State and Federal post-conviction petitions. There is no evidence demonstrating such a request was not made because of prosecution 'open file' assertions. The notes consist of a series of measurements. Lopez asserts each number represents the total length of a strand of hair and is considerably shorter than the measurements described by Dan Berkabile in his testimony and inconsistent with Jessica's hair. This is the FPD's interpretation of the notes. [cite]

Lopez received the bench notes on September 14, 2004. He waited until 2006 to request permission to take Dan Berkabile's deposition where he asked Berkabile to review the notes. By this time, Berkabile didn't remember his on report, let alone Noziglia's involvement in the case. (JE 3.10, p. 50). Berkabile indicated the numbers could also represent measurements of segments of a hair which, if combined, would give the total length of the hair and those measurements were consistent with Berkabile findings and testimony. (JE 3.10, p. 50-59). Of course, only Noziglia knows what the measurement mean.

Lopez has offered no testimony explaining the two year delay in seeking Berkabile's deposition or what efforts were made to locate Noziglia. Morever, Lopez waited almost three years before filing a *Brady* claim based on these notes and the April 4. 1985 report. Nothing prevented Lopez from filing this claim at an earlier date and the delay was unreasonable. Good cause does not exist.

4. Berkabile 2006 Deposition (JE 3.10)

As noted above, Lopez interpretation of Noziglia's notes was presented to Berkabile via a deposition taken on August 29, 2006. Contrary to Lopez's representations, Berkabile did not confirm he did not analyze the same hair samples or review the samples Noziglia did. Rather Berkabile acknowledged that if Noziglia's notes were interpreted as the FPD was interpreting them, then that conclusion would be true. (JE 3.10, 50-59). However Berkabile also indicated he believed the measurements were not of total hair lengths and when combined they were consistent with his analysis. (Id.; EHT 104-06).

Regardless of the interpretation, Lopez had Noziglia report, at the latest, in 2002. He then waited two years to request any back-up data and two more years from the receipt of the bench notes to seek permission to depose Berkabile. Then almost another year passed before a claim was filed based on the information. This is not due diligence. No good cause has been shown for the delay in raising this claim.

C. Maria Lopez

1. Rosaura Tanon Notes (JE 1.45)

Assuming Families of Murder Victims and Rosaura Tanon can be considered State investigating agents under Kyles, the fact that Families of Murder Victims were monitoring this case was known at trial. Moreover, when the issue of reconstructing missing portions of the trial transcript was raised, notes taken by two representatives of Families were used in the reconstruction. (3 ROA 621; 4 ROA 635, 664, 685 – motions regarding reconstruction of record). Thus Lopez' has been aware of the organization's existence and that members had notes since the post-trial motions in 1986 and 1987. In addition, in 1987, Lopez learned in an interview with Detective Wohlers that Wohlers gave Maria a NALA (Nevada

Association of Latin Americans) card and told Maria they could help her with community assistance agencies. (JE 1.25, p. 4). Rosaura Tanon's notes indicate she was affiliated with NALA – those initials, and NALA's phone number, appear on the face of the notes. (EHT 126).

Yet Lopez waited over twenty (20) years to investigate the Families' files and never sought to investigate NALA. Had trial or prior post-conviction counsel exercised due diligence, they would have discovered Tanon's notes many years ago when she was still alive and could explain their meaning. No evidence was presented linking this delay to any 'open file' representation of the State as none was made.

Even after receiving the notes in February of 2002, Lopez did not file his claim for five years because he chose to continue to conduct discovery in federal district court. By 2004 he had nothing more to connect Tanon to the District Attorney's Office than he did in 2002 and he still waited another three years to file his claim because he wanted to complete federal discovery. (EHT 84-86). Good cause has not been proven.

2. Immigration Records (JE 1.47)

At the time of the Grand Jury proceedings Maria was in custody. The Grand Jury was informed that she had been transported to the Immigration and Naturalization Service offices to apply for a temporary visa pending trial the day before the Grand Jury proceedings. (SHE 2). Some INS records were in trial counsel's possession during trial. Id. At trial Maria indicated Officer Tronosco told her he would help her apply (fill out forms) to stay in the United States. (SHE 2, EHT 120. 123-25). Both Wohlers and Maria provided more information on immigration issues in their post-trial interviews. (JE 1.16, 1.18, 1.26). The issue of whether the state's actions constituted a benefit or promise was hotly contested in the fourth motion for a new trial. (JE 1.17, 1.22, 1.24, 1.25, 1.27, 1.28, 1.29). Even assuming the INS is an investigating agency under Kyles, this fact was known in January, 1985 and the files were available for review through due diligence over the last twenty-five (25) years. They could have been requested or reviewed during discovery in the first state and federal petitions. The FPD sought the documents based on Maria's 1987 interview

which should just as easily put prior counsel on notice of a potential claim and the need to review the INS file. (EHT 83).

The INS documents not previously provided were received by the FPD on March 3, 2003. Lopez waited over four (4) years before filing his claim. No evidence was presented demonstrating the delay in requesting the files was the result of an 'open file' representation. It is not reasonable for Lopez to pursue four (4) years of federal discovery before bringing his claim to State court. Lopez could have filed his state petition and sought discovery or a stay thereafter. Lopez failed to demonstrate good cause for the delay.

3. Denial of Charges Document (JE 1.49)

At the time of the Grand Jury, Lopez knew no charges would be filed against Maria and she had been granted immunity. (SHE 2). If the exact date of the denial was important, that information was certainly available through Detective Wohlers. Nor is there any indication the state would not have provided that information if asked or that Lopez sought the information and abandoned any investigation in this area on an 'open file' basis. And we know Lopez was not relying on any 'open file' concept post-trial. (SHE 14). This information was available for years through due diligence.

The Notice was received by Lopez on May 23, 2003. Lopez waited four (4) years before filing the claim. This is not a reasonable time period and Lopez' decision to conclude federal discovery before filing was not good cause.

4. Interrogation Tape of Maria 1/11/85

At trial, Wohlers indicated a tape existed that formed the bases for Maria's formal 1/11/85 typed and signed statement. (SHE 961-63). Lopez has known about the tape since 1985. Lopez apparently waited until he filed his second federal habeas petition to request a copy of and translate this tape, although Mr. Kelley's affidavit does not list the tape as an item he did not have prior to trial. (SHE 14). Lopez' translation/transcription differs from the statement Maria signed. It is these differences that form the basis for the claim. The tape was received by Lopez on February 10, 2004. Lopez has no explanation for not requesting and translating the tape at an earlier proceeding. No evidence was presented indicating

Lopez refrained from doing so as a result of any 'open file' representations. Since the tape was reasonably available through due diligence for about nineteen (19) years, good cause for the delay in filing the claim was not shown. Morever, Lopez waited another two years after discovering the claim to file in state court. Because he chose to delay filing pending conclusion of federal discovery, he failed to demonstrate he was prevented from filing by an impediment external to the defense and good cause has not been shown.

5. Ex Parte Deposition Motion (JE 1.54)

The State drafted an ex parte motion to conduct a deposition of Maria on February 11, 1985. The copy in the District Attorney's Office prosecution file is not file stamped and no file-stamped copy is contained in the exhibits. The State has not checked the District Court Clerk's Office to determine if the document was ever filed and submits the circumstances indicate it was not. Lopez received the document on June 10, 2004.

Contrary to the assertions in Lopez' pre-trial and post-trial memorandums, the document itself simply states that while Maria is currently abiding by INS conditions, the state may wish to depose her to preserve her testimony should she fail to continue to cooperate with INS. It mentions nothing about Rosaura Tanon or Theodore Salazar. On the basis of this document, Lopez speculates that the State hired Rosaura Tanon for a deposition although Lopez has not produced any evidence to support that statement. The state did hire Theodore Salazar to act as an interpreter for DDA's Jeffries and Seaton when they spoke to Maria but there is no indication he would have been used for a deposition. (JE 1.57). In all such formal proceedings, Maria-Theresa Rivera (now Rivera-Rogers), the District Court certified interpreter, was used.

Regardless of the interpretation placed upon the document, Lopez waited two years before filing his claim based on its content. This is an unreasonable period of time as there was no need to conclude federal discovery before filing a state petition. Good cause does not exist to excuse the procedural bars.

6. Ted Salazar Documents (JE 1.52, 1.53 and 1.57)

Ted Salazar was a friend of DDA Ray Jeffers' wife. He was asked to translate for DDA Seaton and Jeffers and was paid for those services. (JE 1.57). There is no evidence he was hired for any other purpose. However, Salazar was a licensed counselor and apparently saw Maria in that capacity of a few occasions. (JE 1.57). In that regard Salazar took some clinical notes. (JE 1.14). He was never listed or called as a witness. (EHT 126-27).

When Jeffers was informed of the clinical notes, he made a copy of the notes and turned them over to trial counsel during trial. (SHE 6). Trial counsel motioned for sanctions under *Brady* claiming that the state knew about the notes and failed to disclose them in a timely fashion and the matter was litigated. Id. In that context, DDA Jeffers made a statement that Salazar did not "work" for the District Attorney's Office. Id. Lopez claims the letters at question prove Salazar was working for the D.A. Putting aside what DDA Jeffers meant by "working" (translating versus expert counseling services), Salazar's existence was known since trial. Trial and post-conviction counsel were free to interview Salazar about his relationship with the District Attorney's Office for years. There is no evidence the state interfered with Lopez' ability to talk to Salazar. In fact, Mr. Kelly did talk to him. [cite] This information was readily available through due diligence.

Finally, Lopez waited about eighteen (18) months to file his claim once he received the letters and declaration in 2004 and this is not a reasonable time period. Again, there was no reason why a petition could not have been filed at an earlier date and claims added through a supplement when discovery was completed in state court. Good cause has not been demonstrated.

7. Rosalinda Ceballos ("Cevallos") Declaration (JE 1.56)

Lopez asserts the Declaration states Ceballos was present during an interview on January 17, 1985. No such statement is contained in the declaration. *See* Section V(A)(3) for the remainder of the State's response on this document.

8. Wohlers Declaration (JE 2.30)

See Reponse under Section V(A)(7) above.

VI. Conclusion

Based upon information received in trial and the first post-conviction proceedings; Lopez conduct formal and informal discovery. The information, and the notice it gave to Lopez of possible *Brady/Giglio/Mooney/Napue* claims, was as available to previous trial and post-conviction counsel as it was to current counsel. Despite that notice, Lopez did not use due diligence in seeking the seventeen (17) items discussed above. In addition, when Lopez had facts sufficient to assert his claims, he waited between three and five years to file those claims in state court. It was not reasonable for him to do so and completion of federal court discovery is not good cause under Nevada and federal law. For these reasons the court should find no good cause has been shown for the delay in bringing the claims and Lopez has not met his burden of overcoming the applicable procedural bars.

DATED this 21 day of April, 2010.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
NANCY A. BECKER
Deputy District Attorney
Nevada Bar #000145

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 20th day of March, 2009, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

DAVID S. ANTHONY
Assistant Federal Public Defender
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101

Eileen Davis

Employee for the District Attorney's Office

NAB//ed

District Case Inquiry - Minutes

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Case 92-C-106784-C **Just Ct. Case#** 91-GJ-00138 **Status** INACTIVE

Plaintiff State of Nevada **Attorney** Roger, David J.

Defendant Rippo, Michael D **Attorney** Anthony, David S.

Judge Mosley, Donald M. **Dept.** 14

Event 10/27/2008 at 08:00 AM MINUTE ORDER RE: DECISION: STATE'S MTN TO DISMISS & DEFT'S MTN FOR DISCOVERY

Heard By Wall, David

Officers Carol Foley, Court Clerk

Parties	0000 - S1	State of Nevada	No
	0001 - D1	Rippo, Michael D	No

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.

Due to time restraints and individual case loads, the above case record may not reflect all information to date.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * * * *

MICHAEL DAMON RIPPO,

Appellant,

vs.

E.K. McDANIEL, Warden, Ely State Prison, CATHERINE CORTEZ MASTO, Attorney General of Nevada,

Respondents.

Case No. 53626

EXHIBITS TO REQUEST TO TAKE JUDICIAL NOTICE

1. Lopez v. McDaniel, State's Post-Hearing Memorandum, Case No. C068946, Eighth Judicial District Court. 04/22/2010

2. Echavarria v. McDaniel, Motion to Dismiss, Case No. C95399, Eighth Judicial District Court. 07/23/2007

3. Leonard v. McDaniel, Transcript of Proceedings, Case No. C126285, Eighth Judicial District Court. 03/13/2008

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 17th day of June, 2010. Electronic Service of the foregoing **EXHIBITS TO REQUEST TO TAKE JUDICIAL NOTICE** shall be made in accordance with the Master Service List as follows:

Steven Owens, Deputy District Attorney

Katrina Manzi,
An Employee of the Federal Public Defender