IN THE SUPREME COURT OF THE STATE OF NEVADA

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MICHAEL DAMON RIPPO,

Appellant,

vs.

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

Respondents.

Case No. 53626

APPELLANT'S REPLY BRIEF

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

Eighth Judicial District Court, Clark County

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I. THE DISTRICT COURT ERRED IN FAILING TO GRANT MR. RIPPO DISCOVERY AND AN EVIDENTIARY HEARING TO PROVE GOOD CAUSE AND PREJUDICE BASED ON INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL.

In his opening brief, Mr. Rippo explained that there is good cause to allow a review of the merits of his constitutional claims based on controlling authority which allows him to vindicate his right to the effective assistance of post-conviction counsel. See, e.g., Crump v. Warden, 113 Nev. 293, 304-05, 934 P.2d 247, 253-54 (1997). In the proceedings below and in the current appeal, the state has never disputed that post-conviction counsel was ineffective for failing to investigate and raise any constitutional claims contained outside the record on direct appeal. Op. Br. at 5-9. Given the state's concession, Mr. Rippo will not re-argue this issue. As Mr. Rippo explained in his opening brief, the only dispute between the parties was on the issue of prejudice, i.e., whether Mr. Rippo could show a reasonable probability of a more favorable outcome if post-conviction counsel had performed effectively. This issue was the focus of Mr. Rippo's opening brief, and this is the only issue relating to post-conviction counsel's ineffectiveness that is properly before the Court in the instant appeal.

In its answering brief, the state now argues for the first time ever that Mr. Rippo's allegation of good cause based on ineffective assistance of post-conviction counsel is itself procedurally barred. Ans. Br. at 24-27. This argument was never raised by the state below. On the contrary, the state conceded at the hearing before the district court that Mr. Rippo's allegations of good cause were raised in a "timely manner," within one year of the issuance of remittitur from the denial of the first post-conviction petition. 48 JA 11599. In its answering brief, the state now invites the Court to dream up a shorter time period for filing a successive petition to raise a claim of ineffective assistance of post-conviction counsel. The state now argues that Mr. Rippo's particular allegation of good cause either (1) expired before post-conviction counsel was even appointed to represent him; (2) expired one year from the denial of the petition while the post-conviction appeal was still pending; or (3) expired at some other undefined point in time after the denial of the first post-conviction

appeal (but before one year). Ans. Br. at 26-27. The state exhorts the Court to dream up a shorter time frame and retroactively apply it to Mr. Rippo despite its acknowledgment that "there is not a single published case" that specifies any of the shorter time frames contained in the state's answering brief. Ans. Br. at 27. Mr. Rippo will address the state's new timeliness argument and then explain why he suffered prejudice from post-conviction counsel's ineffectiveness.

A. Mr. Rippo's Claim of Ineffective Assistance of Post-Conviction Counsel Was Timely Raised and is Properly Before the Court

1. The State Has Waived Any Argument Regarding the Timeliness of Mr. Rippo's Allegations of Ineffective Assistance of Post-Conviction Counsel For Failing to Raise it Below.

This Court should hold that the state has waived its argument that his allegation of good cause based on ineffective assistance of post-conviction counsel is itself untimely due to its failure to raise the issue below. See Delgado v. American Family Ins. Group, 125 Nev. __, 217 P.3d 563, 566 n. 4 (2009).[1] Mr. Rippo notes that counsel for the state has a pattern and practice of withholding critical arguments that should have been raised previously, then later imploring "the court to consider the argument it was now making." Polk v. State, 126 Nev. __, 2010 WL 2224467, at *2 (2010) (holding that the state confessed error under NRAP 31(d) by failing to address issue until oral argument). Just as in Polk, the state's "appellate practice causes prejudice to [Mr. Rippo's] ability to adequately prepare or respond" to its arguments. Id. at *4. Specifically, if Mr. Rippo had received adequate notice of the state's argument in the district court, he would have responded by attaching court pleadings filed by the Clark County District Attorney's Office and hearing transcripts, including pleadings filed by counsel for the respondents, in which the state took the exact opposite position and argued that an allegation of ineffective assistance of post-conviction counsel is timely when raised within one year from the issuance of remittitur from the denial of the first state post-

[1] Accord Pope v. Motel 6, 121 Nev. 307, 319, 114 P.3d 277, 285 (2005) (alternative ground for affirmance waived when not raised below or considered by district court); Lytle v. Household Mfg., Inc., 494 U.S. 545, 552 n. 3 (1990) (same).

conviction petition. The fact that the state withheld this argument below has necessitated the filing of the accompanying request to take judicial notice of court records that were filed by the state in other cases to show that its argument is not only contrary to its representations below, but also contrary to the argument that it has advanced in several other capital habeas cases. Mr. Rippo therefore requests that this Court hold that the state has waived its argument regarding the timeliness of his allegation of ineffective assistance of post-conviction counsel.

Assuming that this Court does not find the state's argument waived, Mr. Rippo will now address the state's argument that his allegation of ineffective assistance of post-conviction counsel is untimely, and then discuss the district court's failure to make an express ruling on this issue.

2. The State's Present Position is Directly Contrary to the Position it Took in the District Court

In the district court, the state took the position that Mr. Rippo's allegation of ineffective assistance of post-conviction counsel was timely raised. In his petition, Mr. Rippo alleged as "cause" that he received ineffective assistance of post-conviction counsel in his first state post-conviction proceeding, a proceeding in which he had the right to effective assistance of counsel. 19 JA 4427. The state's motion to dismiss below did not breathe a word about this allegation, and did not even contain the phrase "ineffective assistance of post-conviction counsel." See 36 JA 8673-8746, 37 JA 8747-8757. In its reply to Mr. Rippo's opposition to motion to dismiss, the state simply said that ineffectiveness of post-conviction counsel did not constitute good cause, but it never argued that the claim was itself untimely. 48 JA 11564-JA 11573. At the hearing on the state's motion, the state squarely acknowledged that Mr. Rippo's allegations of good cause were raised in a timely manner:

> [T]hey're entitled to effective assistance on post-conviction . . . they did get back here in a timely manner, and I don't think that- that following first post-conviction petition that there is a per se one year time bar . . . I have argued on occasion that at a minimum we're looking at at [sic] least you have– do you have any claims against post-conviction counsel filed within one year,

> otherwise it doesn't make sense. But I use that simply as a guideline. The Nevada Supreme Court has never come out and said there's one-year time bar following the first post-conviction proceedings that you have to get back in the State court. They say that you simply have to do so without unreasonable delay.

48 JA 11599 [9/22/08 RT at 52-53] (emphasis added). In his opening brief, Mr. Rippo specifically mentioned the state's concession. Op. Br. at 6. In its answering brief, the state completely ignores the concessions that it made below, and it makes no attempt whatsoever to reconcile those representations with its present position. "The settled rule in this state is that a party on appeal cannot assume an attitude or adopt a theory inconsistent with or different from that taken at the hearing below." Force v. Peccole, 77 Nev. 143, 151, 360 P.2d 362, 366 (1961) (quotations omitted). This Court therefore need look no farther than the state's own representations below to conclude that its present argument is thoroughly meritless.

3. The State's Present Position is Directly Contrary to the Position That it Has Taken in Other Capital Habeas Cases

The state has represented in multiple capital cases that petitioners get at least one year following the completion of the first state post-conviction proceeding within which to file a claim of ineffective assistance of post-conviction counsel. In Lopez v. McDaniel, Case No. C068946, the state argued that "any claims relating to ineffective assistance of post-conviction counsel would be required to be filed within one year of the remittitur reflecting denial of the first petition for post-conviction relief or they would be time-barred and could not constitute good cause." 37 JA 8957-8958. The state further argued that:

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

Lopez v. McDaniel, Case No. C068946, State's Motion to Dismiss Petition for Writ of Habeas Corpus, at 72 (filed February 15, 2008), 37 JA 8958. More recently, in April, 2010

– almost a month after it filed its answering brief in the instant case – the state argued in a post-hearing memorandum in Lopez that there is a one-year time frame for successive petitions:

> 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. 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.

Ex. 1[2], at 13. In Floyd v. McDaniel, Case No. C159897, the state argued that the petitioner "unreasonably delayed his challenges to the effective assistance of post-conviction counsel by pursuing his federal remedies for well over a year."[3] 38 JA 9027. In Echavarria v. McDaniel, Case No. C95399, the state argued that "Defendant's failure to file this successive petition within one year procedurally bars a review of the petition." Ex. 2, at 9. The state has therefore consistently argued that a successive petition filed in a capital case within one year is presumptively a reasonable period of time in which to raise and litigate claims of ineffective assistance of post-conviction counsel. Once again, this Court need look no further than the state's representations in these cases to find that its present argument is thoroughly meritless.

4. The State is Estopped From Advancing its Present Timeliness Argument

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[2]Exhibit references in this Reply refer to the documents submitted with the Motion to Take Judicial Notice.

[3]Accord Sherman v. McDaniel, Case No. C126969, Reply to Opposition to Motion to Dismiss, at 9-10 (filed June 25, 2007) (arguing that three year delay after conclusion of first post-conviction proceeding rendered successive petition untimely), 38 JA 9000; Witter v. McDaniel, Case No. C117513, Reply to Opposition to Motion to Dismiss, at 6 (filed July 5, 2007) (arguing that six year delay after conclusion of first post-conviction proceeding rendered successive petition untimely), 38 JA 9009; Leonard v. McDaniel, Case No. C126285, Reply to Opposition to Motion to Dismiss, at 7 (filed March 11, 2008) (arguing that five year delay after conclusion of first post-conviction proceeding rendered successive petition untimely), 37 JA 8877; Leonard v. McDaniel, Case No. C126285, Transcript of Proceedings, at 4 (March 13, 2008) ("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.") (argument of Mr. Owens), Ex. 3 at 4.

Principles of judicial and equitable estoppel prevent the state from advancing its present argument that Mr. Rippo's claim of ineffective assistance of post-conviction counsel is untimely. Under the doctrines of judicial and equitable estoppel, the state cannot now reverse the position it took in the district court in this and multiple other cases in order to suit its current objectives. See Whaley v. Belleque, 520 F.3d 997 (9th Cir. 2008). "Judicial estoppel is an equitable doctrine that is intended to protect the integrity of the judicial process by preventing a litigant from playing fast and loose with the courts." Wagner v. Prof'l Eng'rs in Cal. Gov't, 354 F.3d 1036, 1044 (9th Cir.2004) (internal quotation marks omitted);see also Russell v. Rolfs, 893 F.2d 1033, 1037-38 (9th Cir.1990). In the instant case, the elements of judicial estoppel apply because the state chose to posture the case below by conceding that Mr. Rippo's allegations of good cause were timely, but that he could not show prejudice, and the state prevailed on this legal position below. The elements of equitable estoppel also apply because the state has always been aware of the relevant facts, and Mr. Rippo relied on the state's position below in fashioning both his overall litigation strategy and his arguments in his opening brief. See In the Matter of the Harrison Living Trust, 121 Nev. 217, 223, 112 P.3d 1058, 1061-62 (2005). The state is therefore estopped from arguing for the first time on appeal that Mr. Rippo's allegation of ineffective assistance of post-conviction counsel is untimely.

5. One Year From the Issuance of the Remittitur from the First Post-Conviction Appeal is a Presumptively Reasonable Time for Mr. Rippo to Vindicate His Right to the Effective Assistance of Post-Conviction Counsel.

Assuming that this Court is willing to overlook the state's litigation conduct, the Court should still conclude that one year from the issuance of remittitur is a presumptively reasonable time to vindicate Mr. Rippo's right to the effective assistance of post-conviction counsel. Starting with the plain language in the statute, the one-year time frame of NRS 34.726 applies only to a timely petition. However, when an "untimely" petition is filed to vindicate the right to the effective assistance of post-conviction counsel, the only thing that must be shown is that the delay was not the "fault of the petitioner." NRS 34.726(1)(a). As

the state acknowledges in its answering brief, "there is not a single published case" that discusses when a successive petition must be filed to vindicate the right to the effective assistance of post-conviction counsel. Ans. Br. at 27. Likewise, in the district court, the state represented that the "Nevada Supreme Court has never come out and said there's one-year time bar following the first post-conviction proceedings that you have to get back in the State court. They say that you simply have to do so without unreasonable delay." 48 JA 11599 [9/22/08 RT at 52-53]. Mr. Rippo and the state are in complete agreement on this point: in the absence of an express time frame in the statute, the applicable time period is simply an issue of reasonableness, and Mr. Rippo respectfully submits that one-year from the conclusion of the first post-conviction proceeding is a presumptively reasonable time to vindicate the right to the effective assistance of post-conviction counsel.

Without identifying any statutory authority or case law, the state invites this Court in its answering brief to dream up a shorter time frame and retroactively apply it to Mr. Rippo's case. Instead of mustering a single principled position, the state instead uses as scattershot approach and argues that the time period for filing a successive petition expired either (1) before post-conviction counsel was appointed, (2) while the first post-conviction appeal was pending, or (3) sometime after the conclusion of the first post-conviction proceeding but before one year. Ans. Br. at 24-28. The state's first position is nonsensical as the expiration of the opportunity to vindicate the right to the effective assistance of post-conviction counsel before counsel is appointed or during counsel's representation would effectively erase the right itself: a right that cannot be vindicated is no right at all. See Catazano by Catzano v. Wing, 103 F.3d 223, 229 (2d Cir. 1996) (acknowledging equitable "principle of ubi jus ibi remedium ('where there is a right there is a remedy')"). The state also ignores controlling authority from this Court which holds that delays occasioned by post-conviction counsel or the appointment of counsel are not the fault of the petitioner under NRS 34.726(1)(a). See Bennett v. State, 111 Nev. 1099, 1102, 901 P.2d 676, 679 (1995) (delays occasioned by appointment and representation of post-conviction counsel not the fault of the petitioner under section 34.726(1)(a)). This Court must therefore reject any argument by the state that

the opportunity to vindicate the right to the effective assistance of post-conviction counsel expires before counsel's appointment or during counsel's representation.

The state's argument that Mr. Rippo's claim of ineffective assistance of post-conviction counsel is untimely because he "waited another three years" after the district court denied his first petition to file the instant petition is also contrary to this Court's case law for the same reasons discussed above. Once Mr Rippo's first state post-conviction petition was denied by the district court in December 2004, Mr. Rippo appealed, and this Court did not affirm the district court's denial until January 16, 2007. Mr. Rippo then filed the instant petition on January 15, 2008, within one year of this Court's decision. Thus, the three years within which the state complains Mr. Rippo should have filed the instant petition constitute the two years this Court took to decide the post-conviction appeal, and the one year the state has previously represented petitioners have within which to bring successive petitions.

The state's argument that Mr. Rippo should have filed a petition alleging the ineffective assistance of post-conviction counsel while said counsel was still litigating the appeal from denial of the first state post-conviction directly contradicts this Court's case law. This Court has squarely recognized that the right to effective assistance of post-conviction counsel extends to the appeal from denial of a first post-conviction petition, thus it defies reason for petitioners to have to raise claims alleging the ineffective assistance of their counsel during the pendency of an appeal in which further instances of ineffectiveness could occur. See, e.g., Middleton v. Warden, Nevada State Prison, 120 Nev. 664, 668-69, 98 P.3d 694, 697-98 (2004). Furthermore, as this Court held in Nika v. State, 120 Nev. 600, 606-07, 97 P.3d 1140, 1145 (2004), no default rule could be imposed before this Court's decision on post-conviction appeal because (1) Mr. Rippo did not have access to this Court's opinion on post-conviction appeal; (2) he had no opportunity to conduct an investigation into counsel's ineffectiveness; (3) his counsel still owed him a duty of loyalty; and (4) litigating such a claim would require waiver of the attorney-client privilege. Finally, it would cause a considerable burden to the courts of this state if a capital petitioner were required to file a second petition while the first one was still pending, when a grant of relief would render the

issue entirely moot. Accordingly, under this Court's precedents, the state's position that claims of ineffective assistance of counsel must be filed during the pendency of an appeal from denial of a first post-conviction petition is untenable and should be rejected.

The state's final argument that the time frame for asserting ineffective assistance of post-conviction counsel expires at some undefined point in time before one year is not based on any statutory authority or case law, and lacks any coherent explanation. The state's citation to Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989), is a red herring, because Mr. Rippo has never claimed that the federal habeas proceedings establish good cause for any delay. In fact, Mr. Rippo filed the instant petition before he filed his amended petition in federal court, so there is no merit to the state's claim that he opted to pursue federal remedies instead of returning to state court to present his claim of ineffective assistance of post-conviction counsel. It should go without saying that some investigation must take place before Mr. Rippo can file a successive petition alleging that post-conviction counsel was ineffective. Otherwise, if he had filed the same petition that had previously been denied by this Court, it would have been subject to immediate dismissal "based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995); see NRS 34.810(3). There is therefore no merit to the state's contention that Mr. Rippo should have filed his claim of ineffective assistance of post-conviction counsel before he had any facts to support it.

6. This Court Cannot Announce and Apply a Shorter Time Frame Without Violating State and Federal Due Process Notice Principles

Assuming that this Court agreed to manufacture a new rule regarding the time frame for alleging ineffective assistance of post-conviction counsel, it cannot apply such a rule to Mr. Rippo without violating state and federal due process principles. As the state notes in its brief, "there is not a single published case" that specifies a particular time period for filing a successive petition based on ineffective assistance of post-conviction counsel. Ans. Br. at 27. Given the state's concession, it is beyond dispute that there is no "clearly established" procedural default rule, see Ford v. Georgia, 498 U.S. 411, 424-425 (1991) ("only a 'firmly

established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court"), and this Court cannot both announce and retroactively apply such a rule to Mr. Rippo's petition which was filed over two years ago. See, e.g., State v. Haberstroh, 119 Nev. 173, 181, 69 P.3d 676, 681-82 (2003).[4] The only semblance of a procedural rule in effect at the time Mr. Rippo filed the instant petition was the requirement that claims be raised within a reasonable time, and according to the state's representations, one-year is presumptively reasonable. This Court therefore cannot both announce and retroactively apply a shorter time frame for alleging ineffective assistance of post-conviction counsel without violating state and federal due process notice principles. See Lankford v. Idaho, 500 U.S. 110, 124-26 (1991)[5].

B. The District Court Erred in Failing to Make an Express Ruling on Mr. Rippo's Claim of Ineffective Assistance of Post-Conviction Counsel

In his opening brief, Mr. Rippo explained that the district court's order must independently be reversed because the court failed to make an express ruling on his claim of ineffective assistance of post-conviction counsel. Op. Br. at 4-10. In its order, the court made findings that Mr. Rippo's claims could have been previously raised in the first post-

[4]See Robinson v. Ignacio, 360 F.3d 1044, 1054 (9th Cir. 2004) (petitioner had no notice of rule precluding state from stipulating away procedural default rules when state supreme court announced rule for first time after filing of petition); Collier v. Bayer, 408 F.3d 1279, 1286 (9th Cir. 2005) (no notice of rule regarding timeliness of post-conviction action from amended judgment of conviction when petition filed before state supreme court first announced rule); Fields v. Calderon, 125 F.3d 757, 761-63 (9th Cir. 1997) (petitioner had no notice in 1981 of procedural rule announced in 1994); Calderon v. United States District Court (Hayes), 103 F.3d 72, 75 (9th Cir. 1996) (to be adequate to bar review, "controlling state procedural bar is the one in place at the time the claim should have been raised"); Fahy v. Horn, 516 F.3d 169, 187 (3d Cir. 2008) ("state rule must have been announced prior to its application in the petitioner's case"); Bronshtein v. Horn, 404 F.3d 700, 709 (3d Cir. 2005); Reynolds v. Ellingsworth, 23 F.3d 756, 766-767 (3d Cir. 1994); Thomas v. Davis, 192 F.3d 445, 452-453 (4th Cir. 1999) ("[o]bviously, a rule sought to be applied for the first time cannot have been consistently or regularly applied in the past"); White v. Bowersox, 206 F.3d 776, 781 (8th Cir. 2000) (state default ruling not adequate to bar review when rule announced in "decision in [petitioner's] case"); Anderson v. Attorney General of Kansas, 342 F.3d 1140, 1143-1144 (10th Cir. 2003); Liegakos v. Cooke, 928 F. Supp. 799, 805-06 (E.D. Wis. 1996).

[5]The fact that the state itself has not been able to take a consistent position on this issue shows that there is no existing rule that is clear enough to give adequate due process notice to habeas petitioners as to when a filing would be timely.

conviction proceeding, but failed to reconcile this finding with Mr. Rippo's allegation that this proved that counsel's performance was deficient. Mr. Rippo filed an objection to the proposed order to clarify the court's ruling and to remove legal findings from the court's order that were contrary to controlling state law, 48 JA 11612-11647, but the court subsequently signed the state's proposed findings of fact and conclusions of law verbatim without giving any indication whatsoever that it had considered Mr. Rippo's objections.

In its answering brief, the state does not address the internal inconsistencies in the district court's order, the misstatements of law, or the failure to consider Mr. Rippo's objections to the order, but instead points the court to passing references that it inserted into the proposed order that briefly state that ineffective assistance of post-conviction counsel does not constitute good cause. Ans. Br. at 25-26. However, the state's passing references to ineffective counsel in the order it drafted do not address the internal inconsistencies in the court's order or the implication that the court never considered Mr. Rippo's objections to the order. Cf. Jefferson v. Upton, __ S. Ct. __, 2010 WL 2025209, at *7 (2010) (no presumption of correctness attaches to findings of fact drafted by state which did not consider input of non-prevailing party and "adopts findings that contain internal evidence suggesting that the judge may not have read them").[6] In the present procedural posture, the district court could not properly eject Mr. Rippo's claims by finding that they could have been raised in the first post-conviction proceeding without saying anything about whether post-conviction counsel's performance was deficient. In such circumstances, it is unclear whether the district court considered Mr. Rippo's allegations of good cause, and the court's decision must be reversed so that the court can make proper findings in the first instance.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT MR. RIPPO COULD NOT SHOW PREJUDICE FROM INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL AND THE STATE'S FAILURE TO DISCLOSE EVIDENCE WITHOUT PERMITTING DISCOVERY AND AN EVIDENTIARY HEARING

A. Judicial Bias

[6] Accord Ex parte Ingram, __ So.3d __, 2010 WL 996543, at *5-6 (Ala. 2010).

In his opening brief, Mr. Rippo alleged that the trial court was biased against him due to the state's involvement in a federal criminal investigation of the judge and due to the judge's failure to disclose his relationship to the state's victim witness, Denny Mason, which would have implicated him in the federal investigation. Op. Br. at 11-27. In its answering brief, the state argues that Mr. Rippo's claim is barred under the law of the case doctrine based on this Court's finding on direct appeal that the state was not involved in the criminal investigation, Ans. Br. at 29-30, and also that the claim is barred because everyone, including trial counsel, knew at the time of trial that the state was in fact involved in the criminal investigation. Ans. Br. at 30-31. The state's answering brief therefore simultaneously embraces two positions that are irreconcilably inconsistent. In his opening brief, Mr. Rippo argued that the state's failure to make a good faith attempt to determine the nature of its involvement in the criminal investigation was the reason why he was entitled to discovery and an evidentiary hearing. Op. Br. at 26-27. Instead of making any attempt to clarify the matter, the state's answering brief exacerbates the problem thereby causing prejudice to Mr. Rippo's ability to respond. Cf. Polk, 126 Nev. __, 2010 WL 2224467, at *2 (2010). However, Mr. Rippo will now attempt to address both of the state's mutually exclusive positions.

The state's answering brief concedes that the facts are substantially different than they were on direct appeal, given its present acknowledgment that the state was involved in the criminal investigation of the trial court, which means the law of the case doctrine does not apply. See Hsu v. County of Clark, 123 Nev. 625, 173 P.3d 724, 729 (2007).[7] As explained in both Mr. Rippo's opening brief and the state's answering brief, this Court's ruling on

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[7] Accord Pellegrini v. State, 117 Nev. 860, 884-85, 34 P.3d 519, 535 (2001) ("it was appropriate for this court in applying the law of the case doctrine to address whether the facts were substantially the same in both appeals."); Masonry & Tile Contractors Assn. v. Jolley, Urga, & Wirth, Ltd., 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) ("substantially different evidence" justifies reconsideration of the law-of-the-case). This Court is free to revisit the issue of judicial bias, and principles of equity dictate that it should, because the evidentiary picture before this Court now is substantially different than it was when the claim was first raised on direct appeal. See Hsu, 173 P.3d at 728 ("equitable considerations justify departure from the law of the case doctrine").

direct appeal was predicated on a finding that the state was not involved in the investigation of the trial court. Op. Br. at 11-14, Ans. Br. at 29-30. To rebut this false assertion, Mr. Rippo notes that the state's answering brief acknowledges that the state was in fact involved in the investigation, Ans. Br. at 30, but it asserts that "this allegedly 'new' information was known by Defendant's trial counsel back in 1996 through the federal investigation into Judge Bongiovanni." Ans. Br. at 30. The state drafted the order for the district court's signature which contains the very same finding that the state was involved in the criminal investigation, but that trial counsel were aware of that fact. 48 JA 11605.[8] This Court's ruling on direct appeal therefore cannot constitute the law of the case, because the state's present representations and the district court's order negate the central premise of the Court's decision, i.e., that the state was not involved in the criminal investigation at all. The facts are therefore substantially different than they were on direct appeal and the law of the case doctrine does not apply.[9]

The state's newly minted position that trial counsel were aware of the state's involvement in the investigation is repelled by the record and constitutes a violation of NRAP 28(e). In his opening brief, Mr. Rippo carefully set forth all of the representations made by the state and the trial court to show that trial counsel were materially misled as to the state's involvement in the criminal investigation, and to show that trial counsel did not know these facts. Op. Br. at 11-14. The state's answering brief does not cite to any part of the trial record in support of this assertion as required by NRAP 28(e), but instead to the oral argument of the representative for the state below and to the motion for new trial that was filed by Mr. Rippo, which alleged on information and belief that the trial judge knew the

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[8]Despite making these arguments and drafting the court's order, the representative for the state hedged at the hearing below and made it clear that he had no intention of making himself aware of the facts that were known to his office regarding their involvement in the investigation of the trial judge. Op. Br. at 26-27.

[9]Appellant notes that the state had a federal constitutional obligation to correct its false representations about its involvement in the investigation whether or not defense counsel knew or suspected that they were false. See United States v. LaPage, 231 F.3d 488, 491-92 (9th Cir. 2000) (Kleinfeld, J.).

state's victim witness, Denny Mason. Ans. Br. at 30-31.[10] These references do not show that trial counsel knew that the state was involved in the criminal investigation, and the pertinent references to the trial record demonstrate beyond any doubt that trial counsel were not aware of the state's involvement in the criminal investigation.

Now that the factual record has been clarified, Mr. Rippo notes that the state's answering brief says nothing about overwhelming evidence presently before the Court showing the extent of the state's involvement in the federal investigation. Specifically, the evidence shows that the trial judge knew that the Clark County District Attorney's Office was an integral part of the sting operation to bait him into taking bribes from the litigants before him, Op. Br. at 15, 17; that the judge knew that Metro Intelligence and the Nevada Division of Investigation were involved in the investigation, id. at 16-17; that the District Attorney's Office was conducting its own investigation of the trial judge, id. at 18; and that the trial judge did not disclose his relationship to the state's victim witness, Denny Mason, because it would have implicated him in the federal investigation. Op. Br. at 19-20. Other than advocating inconsistent positions and materially misstating the facts, the state's answering brief says nothing about whether these facts, if true, would entitle Mr. Rippo to discovery and

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[10]The Motion for New Trial filed by trial counsel in 1996 alleged only that Judge Bongiovanni "faced possible indictment by a federal grand jury," and "had a unique relationship with . . . Denny Mason," but did not contain a single citation to any exhibits or evidence supporting its bare contentions regarding Bongiovanni's bias. 17 JA 4002-4007. The state's Opposition to Motion for New Trial is riddled with attacks against the defense for failing to present evidence in support of its bare allegations. 17 JA 4009 ("the defense does not offer any specific factual finding in support of its naked allegations"); 17 JA 4010 ("The defense motion for a new trial has not presented one iota of evidence which contradicts the previous declarations of Judge Bongiovanni made on the record in his denial of the motion for recusal."); ("General- nonspecific allegations do not satisfy the Nevada standard for newly discovered evidence."); ("Naked allegations are not facts."); ("The defense further asserts that it '. . . has learned that reputed Buffalo mob associate Ben Spano is the business partner of Denny Mason' . . . . Upon what does the defense base this contention and how does this information relate to the trial proceedings of Michael Rippo?"); ("The motion has not demonstrated a single fact upon which a reviewing court could determine that the rulings in the Rippo case were somehow related to a relationship the trial judge had with an associate of Denny Mason."). See Banks v. Dretke, 540 U.S. 668, 695 (2004) ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed Brady material when the prosecution represented that all such material has been disclosed.").

an evidentiary hearing to show that the trial court was biased. See Op. Br. at 21-23 (discussing legal standard for proving bias).

The state's final argument that Mr. Rippo cannot show specific prejudice from the trial court's bias is entirely irrelevant under clearly established federal law which holds that the presence of a biased decisionmaker constitutes structural error. In other words, Mr. Rippo does not need to point to any adverse ruling by the trial court and the state's allegation that the evidence was overwhelming is irrelevant. See Op. Br. at 22 n.13 (citing authorities). Mr. Rippo notes that the state has not attempted to cite any apposite authority in support of its position, and there is none. Cf. NRAP 28(a)(8)(A) (requiring citations to authority). Given the state's failure to cite any supporting authority, Mr. Rippo continues to rely upon the controlling authority cited in his opening brief which holds that the presence of a biased judge constitutes structural error and is not susceptible to harmless error. The district court's decision must therefore be reversed.

B. Prosecutorial Misconduct

The state's arguments relating to Mr. Rippo's claim of prosecutorial misconduct demonstrate why post-conviction counsel's performance was deficient and also why the district court erred in failing to consider Mr. Rippo's corresponding allegation of good cause. The state attacks all Mr. Rippo's claims of prosecutorial misconduct on the ground that they are untimely. Ans. Br. at 32-42. Specifically, the state contends that "Defendant had two prior opportunities to raise these claims, however Defendant chose not to do so." Ans. Br. at 42. The state further complains that "no good cause or prejudice [is] offered by Defendant to excuse this decade long delay," but Mr. Rippo explained in his petition, at oral argument in the district court, and in his opening brief that his attorneys' ineffectiveness constitutes good cause. The state continues to ignore these arguments, and it has never once attempted to explain why counsel's ineffectiveness is insufficient to demonstrate good cause to overcome the procedural bars.

Furthermore, counsel's diligence is completely independent of the state's free-standing obligation to set the record straight in the instant case which also establishes good

cause. See, e.g., Gantt v. Roe, 389 F.3d 908, 912-13 (9th Cir. 2003).[11] The state alleges that all the evidence supporting Mr. Rippo's allegations of prosecutorial misconduct were "public court records that . . . could have been acquired by Defendant . . . through exercising some reasonable diligence." Ans. Br. at 34-35. This position is the same one that was squarely rejected by the High Court in Banks v. Dretke, 540 U.S. 668 (2004), which is that the prosecutor can hide and the defendant must seek, see id. at 696, and this is true even if some of the documents were eventually located in the public record. See Wilson v. Beard, 589 F.3d 651, 664 (3d Cir. 2009) ("the fact that a criminal record is a public document cannot absolve the prosecutor of her responsibility to provide that record to defense counsel."). Mr. Rippo filed a motion for discovery of all favorable and exculpatory evidence long before trial, 2 JA 254-259, which was granted by the trial court. 2 JA 2645-265. Clearly established state and federal law provide that Mr. Rippo can demonstrate cause to overcome any purported procedural default because he has a right to rely upon the state's "open file," policy, 11 JA 2555 [2/28/96 TT at 150], as well as its compliance with the trial court's discovery order. See State v. Bennett, 119 Nev. 589, 601-02, 81 P.3d 1, 9-10 (2003); Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000).[12] The district court's emphasis on trial counsel's diligence therefore does not absolve the state of its constitutional disclosure obligations. If anything, the state's suppression in the face of trial counsel's dogged attempt to get the state's witnesses to testify honestly only strengthens Mr. Rippo's showing of cause by highlighting the egregious nature of the state's suppression of evidence.[13]

1. Witness Intimidation

The state dismisses as a "minute detail" the fact that no court has ever "acknowledged

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[11] See also Scott v. Mullin, 303 F.3d 1222, 1229 (10th Cir. 2002) ("It is not a petitioner's responsibility to uncover suppressed evidence.").

[12] See, e.g., Banks v. Dretke, 540 U.S. 668, 696 (2004).

[13] See United States v. Shaffer, 789 F.2d 682, 690 (9th Cir. 1986); United States v. Burnside, 824 F. Supp. 1215, 1262 (N.D.Ill. 1993) ("governmental actions which mislead defendants about the nature of Brady material estop the government from later claiming that the defense lacked diligence in obtaining those materials").

Mr. Lukens' testimony at trial regarding his involvement in securing benefits for the state's witnesses and his conduct during the discovery litigation." Ans. Br. at 52. Far from being a minute detail, this fact is critical to Mr. Rippo's argument that this Court's prior decision on the issue of witness intimidation, specifically, and prosecutorial misconduct, generally, was in error and should be revisited. Mr. Rippo has re-raised his allegations of prosecutorial misconduct in intimidating witnesses because the undisclosed benefits subsequently obtained by the state's witnesses demonstrate prejudice from the trial court's failure to disqualify the Clark County District Attorney's Office, and must be considered cumulatively by this Court with all of the prosecutorial misconduct that occurred in Mr. Rippo's case to determine whether the failure to disqualify the office violated his due process rights.

2. Thomas Sims

The state's arguments regarding Thomas Sims assume that a three-time convicted felon should be believed over the sworn testimony of a prosecutor, and completely ignore the false testimony of the prosecutor. As Mr. Rippo explained in his opening brief, the state's position in the instant petition was that Sims' testimony that he did not anticipate to receive any benefits should simply be taken at face value. Ans. Br. at 33-34. Contrary to Sims' testimony, prosecutor John Lukens testified that he took the unusual move of appearing as counsel of record for the state on Sims' pending cases, 13 JA 3094 [3/4/96 TT at 30], and that he intentionally assumed control of the case and continued it at least eighteen times in order to secure Sims' presence and testimony at Mr. Rippo's trial. 13 JA 3095-3096, 3104-3106, 3108-3110 [See id. at 31-32, 40-42, 44-46]. In the procedural posture of a motion to dismiss, this Court cannot simply accept the state's present representations, when Mr. Rippo has not received a single page of discovery and where the state has never made any good faith effort to review the information in its own possession before making representations regarding what its office did on Sims' behalf. In addition, in light of the favorable dispositions received by Sims on pending criminal cases, as compared against the testimony of Mr. Lukens that he intended to file a habitual criminal notice against Sims, 9 JA 1941-1942, Mr. Rippo has shown that the state failed to correct Lukens' false testimony, which is

true even if Sims did not personally anticipate receiving any benefits in exchange for his testimony.[14] The state's answering brief says nothing at all regarding Lukens' false testimony.

The state's argument that Mr. Rippo "refused to disclose when he acquired these public records" regarding Sims and Michael Beaudoin, Ans. Br. at 35, 37 is belied by the record and the state's naked speculation regarding the way in which they were obtained constitutes a violation of NRAP 28(e). When the state made a passing reference in its motion to dismiss to the date of discovery of this evidence, Mr. Rippo specifically responded in his opposition to motion to dismiss by explaining that the evidence was discovered for the first time in connection with counsel's investigation in the federal habeas proceedings and that the evidence was timely filed in state court within one year of its discovery. 37 JA 8812. At the hearing on the motion to dismiss, the state did not further develop this issue, but instead chose to attack the claim on the merits. 48 JA 11600. The findings of fact and conclusions of law that the state drafted also says nothing about any issue regarding the date of discovery of the evidence. The state's bald assertion that "these records were provided to him by the State," Ans. Br. at 35, constitutes a violation of NRAP 28(e). The state has never attempted at any point in time to provide Mr. Rippo with any discovery of undisclosed benefits received by its witnesses; it opposed his motion for discovery; and it made representations regarding what the District Attorney's Office did for the state's witnesses without making any good faith effort to become aware of the facts. The state's assertion that it provided the records to Mr. Rippo is therefore frivolous and constitutes a violation of NRAP 28(e).

3. Michael Beaudoin

The state's arguments regarding the undisclosed benefits received by Michael Beaudoin are made without acknowledging or addressing the declaration that Beaudoin recently executed that is attached to the instant petition. The state argues that Mr. Rippo's

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[14] See Hayes v. Brown, 399 F.3d 972, 981 (9th Cir. 2005) (en banc) ("The fact that the witness is not complicit in the falsehood is what gives the false testimony the ring of truth, and makes it all the more likely to affect the judgment of the jury.").

allegations with regards to Michael Beaudoin fail under Brady because "there never was a deal consummated," so "there was no favorable evidence to withhold." Ans. Br. at 36. However, Mr. Beaudoin has admitted in a sworn declaration that he called prosecutor Melvyn Harmon upon his arrest for drug charges and was able to secure a misdemeanor disposition on the felony drug offenses in exchange for his cooperation. 41 JA 9934. Mr. Beaudoin's justice court records are consistent with the quid pro quo arrangement that he described in his statement, including his own-recognizance release, the quashing of bench warrants, the continuation of his case until just after his testimony in Mr. Rippo's trial, his receipt of misdemeanor convictions, and his six-month jail term. The state's answer does not breathe a word about Beaudoin's declaration, which demonstrates that Beaudoin both received undisclosed benefits, and lied about those benefits on the stand. As with Sims, the fact that Beaudoin testified that he did not receive any benefits or inducements for his testimony does not demonstrate, as the state contends, that "Defendant's claim is belied by the record," Ans. Br. at 36, but rather shows unequivocally, in light of Beaudoin's sworn declaration, that the prosecutor knowingly allowed Beaudoin to testify falsely.

The state contends that "by no later than the date of Mr. Beaudoin's testimony, when Beaudoin discussed his pending charges at trial, Defendant learned of this information." Ans. Br. at 37. Though Mr. Rippo may have discovered at trial that Beaudoin had pending charges, he could not have discovered that Beaudoin had brokered a quid pro quo deal with the prosecutor in exchange for his testimony precisely because Beaudoin testified falsely about this very issue. The state cannot be heard to argue that Mr. Rippo knew about a deal, of which the state itself allowed the witness to deny the existence under oath. The evidence before this Court shows that Beaudoin received a deal, and neither the state, the district court, nor this Court can conclude otherwise in the procedural posture of a motion to dismiss without authorizing discovery and an evidentiary hearing.

4. Thomas Christos

The state contends that "Defendant failed . . . to offer a shred of evidentiary support for the bald assertion that a deal must have been struck between the State and Mr. Christos."

Ans. Br. at 37. Mr. Rippo did, however, offer as evidence the court records related to Christos' criminal charges which indicate that he was charged in March 1994 with felony home invasion, but that after he testified against Mr. Rippo the charges were dismissed. 41 JA 9852-9907. Once again, the resolution of Christos' criminal charges is consistent with the pattern of benefits received by all the other state witnesses where pending criminal charges were continued for an inordinate amount of time until coincidentally just after their testimony against Mr. Rippo then resolved in a favorable manner after the trial. Mr. Rippo respectfully submits that this pattern evinces more than just a remarkable coincidence, and that he is entitled to discovery from the prosecution and law enforcement to determine whether Christos received undisclosed benefits in exchange for his cooperation.

5. Jailhouse Informants

The state alleges that "the central issue of both Brady claims [related to David Levine and James Ison] centers on the discrepancies between two different statements that each witness gave to the police," and that the "subject matters of . . . the varied descriptions of Defendant's confession to each, were repeatedly delved into on cross-examination." Ans. Br. at 38. The state's characterization of this claim is, however, flawed and completely ignores the content of the sworn declarations recently obtained from Messrs. Ison and Levine explaining that the reason each gave varying statements was because the state allowed each of them to view the evidence against Mr. Rippo between giving their first and second statements. 27 JA 6435-6438. The state's answering brief does not breathe a word about Mr. Rippo's allegation that the details to which Ison and Levine testified were fed to them by state actors, and that this basis for their impeachment was not disclosed to the defense. In fact, the state has never controverted these allegations or the implication that its representatives encouraged jailhouse witnesses to manufacture false testimony against Mr. Rippo by feeding them inside details of the offense to make them appear credible to the jury. The testimony of Ison and Levine was significant and the fact that they were fed evidence by the state prior to their testimony was undoubtedly material, and disclosure of this fact could have convinced the jury that the prosecution's entire penalty phase presentation was

lacking in credibility. E.g., Hayes v. Brown, 399 F.3d 972, 988 (9th Cir. 2005) ("Such a disclosure would have had a devastating effect on the credibility of the entire prosecution case."). At minimum, the district court's rejection of this claim without a hearing was error, and its decision must therefore be reversed and remanded. E.g., Buffalo v. Sunn, 854 F.2d 1158, 1165 (9th Cir. 1988) (district court erred in determining whether cause existed on conflicting affidavits).

The state challenges the authenticity of the declarations executed by David Levine and James Ison, arguing that "each cannot be relied upon as evidence of an alleged Brady claim." Ans. Br. at 38. As explained above, however, the state does not challenge the substance of the letters, other than to say that the issues contained within the letters were already addressed on cross-examination at trial. Ans. Br. at 38-39. The authenticity of the declarations is an issue that must be addressed at an evidentiary hearing where Mr. Rippo is allowed to call both Mr. Ison and Mr. Levine to testify.

C. Ineffective Assistance of Counsel for Failing to Investigate and Present Mitigating Evidence

The district court decision must be reversed because it discounted the exact same kinds of evidence that the Florida Supreme Court unreasonably discounted in Porter v. McCollum, 130 S. Ct. 447, 454 (2009) – psychological impairment[15] and childhood abuse.[16] The qualitative difference between the evidence presented at trial and the evidence presented in the instant petition is pronounced: instead of portraying Mr. Rippo's actions as a child and teenager as simple acts of defiance against a stern step-father, the evidentiary picture before this Court shows that Mr. Rippo was raised in a literally toxic environment of abuse and sadism at the hands of his step-father. 19 JA 4478-4483. Evidence of Mr. Rippo's

[15] "[I]t was not reasonable to discount entirely the effect that [testimony from a mental health expert] might have had on the jury". Porter v. McCollum, 130 S. Ct. 447, 455 (2009).

[16] "It is unreasonable to discount to irrelevance the evidence of [Rippo's] abusive childhood, especially when that kind of history may have particular salience for a jury evaluating [Rippo's] behavior in his relationship with [the victims]." Porter, 130 S. Ct. at 455.

neuropsychological impairment, attention deficit hyperactivity disorder, obsessive compulsive disorder, and poly-substance abuse would also have been considered mitigating by the jury, particularly when viewed in conjunction with the psycho-social stressors in Mr. Rippo's background. Id. In comparing the evidence in Mr. Rippo's instant petition against what was presented on his behalf at trial, Mr. Rippo has demonstrated the existence of psycho-social stressors from his background that mitigate his offenses, particularly his prior sexual assault conviction which was used as a statutory aggravating circumstance at sentencing. It was unreasonable for the district court to discount this important mitigation evidence, and it is clear under Porter that the district court's decision should be reversed for failing to give the newly presented evidence adequate weight in the procedural posture of a motion to dismiss.

The state's argument that "trial counsel wisely made the strategic choice not to overload the jury with witness after witness telling the same hard luck story about his client," Ans. Br. at 47, is not only belied by the record, but negated by decades of case law to the contrary. As an initial manner, the "record" does not contain any evidence that trial counsel made any sort of strategic choice not to conduct further investigation, precisely because Mr. Rippo was never given an evidentiary hearing in which he could have asked trial counsel whether there was in fact such a strategy. The evidence attached to the instant petition shows that counsel began their investigation into the existence of mitigation evidence by conducting a group interview with Mr. Rippo's family on the morning of the penalty hearing, 39 JA 9282, which repels the state's so-called strategic justification, because counsel cannot make a strategic choice not to investigate something that they do not know about and did not take the time to pursue. The state's assertion that there was a strategic justification for not conducting an adequate mitigation investigation is therefore nothing more than pure post hoc speculation, which cannot be accepted in the procedural posture of a motion to dismiss.[17]

[17] See, e.g., Frierson v. Woodford, 463 F.3d 982 (9th Cir. 2006) (rejecting "later stated reasons" for counsel's actions which "appear to be post-hoc rationalizations rather than reasoned or strategic choices"); Brown v. Sternes, 304 F.3d 677, 691 (7th Cir. 2002)

As explained above, the evidence Mr. Rippo contends his trial attorneys were ineffective for failing to present was qualitatively different from the evidence presented at trial. The only witness at trial who even hinted at the difficult upbringing to which Mr. Rippo was subjected was Stacie Campanelli, and she only "testified generally about the difficulties that Michael faced growing up." 39 JA 9282. The evidentiary presentation at trial failed to contain any of the allegations of sexual abuse, extreme physical abuse, and sadism perpetrated by Mr. Rippo's step-father, Ollie Anzini, on his step-children. Furthermore, given counsels' failure to investigate the existence of psycho-social stressors in Mr. Rippo's background, they were never able to present testimony from a mental health expert regarding the effect that these factors had on him. 36 JA 8566-8596. Second, trial counsel never made any "decision," let alone a "strategic" one, not to present the aforementioned evidence because they never conducted a sufficient investigation to uncover this evidence. It is axiomatic that a reasonable investigation must take place before counsel can make a strategic choice regarding which issues to present to the jury. See Silva v. Woodford, 279 F.3d 825, 846-47 (9th Cir. 2002); Correll v. Ryan, 465 F.3d 1006, 1015-16 (9th Cir. 2006) ("An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy."). Finally, the case law is clear that "the investigation and presentation of some mitigating evidence is not sufficient to meet the constitutional standard, if counsel fails to investigate reasonably available sources or neglects to present mitigating evidence without a strong strategic reason." Wilson v. Sirmons, 536 F. 3d 1064, 1074 (10th Cir. 2008).[18] Trial counsels' failure to investigate forecloses the possibility that their failure to present evidence

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("it is not the role of a reviewing court to engage in *post hoc* rationalization for an attorney's actions by 'constructing strategic defenses that counsel does not offer' or engage in Monday morning quarterbacking.").

[18] See, e.g., Porter v. McCollum, 130 S.Ct. 447, 454 (2009) ("It is unquestioned that under the prevailing professional norms . . . counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'"); Rompilla v. Beard, 545 U.S. 374, 392-93 (2005); Wiggins v. Smith, 539 U.S. 510, 532, 535 (2004); Williams v. Taylor (Terry), 529 U.S. 362, 396-98 (2000); Boyde v. Brown, 404 F.3d 1159, 1176 (9th Cir. 2005); Stankewitz v. Woodford, 365 F.3d 706, 724 (9th Cir. 2004) ("A more complete presentation, including even a fraction of the details Stankewitz now alleges, could have made a difference.").

was the result of a strategic decision. Accordingly, the district court erred in failing to permit discovery and an evidentiary hearing on this claim.

D. Jury Instructions

1. Premeditation Instruction

Controlling authority from this Court holds that Mr. Rippo can demonstrate good cause to re-raise his challenge to the invalid instruction on premeditation, based on intervening law from the federal courts holding that Mr. Rippo's claim has merit. See, e.g., Lozada v. State, 110 Nev. 349, 357-58, 871 P.2d 944 (1994) (failure of court to recognize "meritorious claim" "constitutes an external force which excuses the filing of a successive petition"), modified by Evans v. State, 117 Nev. 609, 643-644, 28 P.3d 498 (2001) (cause exists when "a federal court concludes that a determination by this court is erroneous").[19] The state argues that Mr. Rippo's claim "could have been raised previously," Ans. Br. at 50, but then acknowledges that "[t]his very same Kazalyn instruction challenge was already considered by this Court on Defendant's appeal from the denial of his First Petition." Ans. Br. at 49. There is good cause for raising this claim now, based on the legal unavailability of his claim on direct appeal, this Court's erroneous disposition of his claim (as per the ruling of the federal court) on appeal from denial of his first state post-conviction petition, and Mr. Rippo's exercise of maximum possible diligence under the circumstances. As explained below, Mr. Rippo can also demonstrate prejudice because the invalid premeditation instruction states a claim of federal constitutional error. Consequently, Mr. Rippo can overcome the procedural bars raised by the state and imposed by the district court below to receive a merits consideration of his claim.

The state correctly acknowledges that this Court recently held in Nika v. State, 124 Nev. __, 198 P.3d 839, 842, 849-51 (2008), that its previous decision in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), should not apply retroactively to cases that were final before that decision. The Court arrived at its conclusion by dismissing the distinction between the

[19] See Chambers v. McDaniel, 549 F.3d 1191, 1199-1200 (9th Cir. 2008); Polk v. Sandoval, 503 F.3d 903, 911 (9th Cir. 2007).

statutory terms "premeditation" and "deliberation" as a simple matter of semantics, wherein this Court's (and other states') jurisprudence has diverged on the issue of whether the substantive content of the term "deliberation" is fairly contained within the term "premeditation." Nika, 198 P.3d at 845-47; see also Byford, 116 Nev. at 244-47, 994 P.2d at 719-21. This Court ultimately concluded in Nika that there was no claim of federal constitutional error under Sandstrom v. Montana, 442 U.S. 510 (1979), cf. Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), because there was no distinct statutory element of "deliberation" at the time that Mr. Rippo's case was final that was not contained within the element of premeditation. See Nika, 198 P.3d at 849 ("The fundamental flaw, however, in Polk's analysis is the underlying assumption that Byford merely re-affirmed a distinction between 'willfulness,' 'deliberation,' and 'premeditation.'").

a. Mr. Rippo's Constitutional Vagueness Challenge to Kazalyn Instruction is Meritorious in Light of this Court's Decision in Nika.

The state argues that "since there is no retroactive application of Byford, Defendant did not suffer any constitutional deprivations that would entitle him to relief." Ans. Br. at 51. However, the state's argument completely ignores the constitutional vagueness problem created by this Court's decision in Nika. The premeditation instruction violated Mr. Rippo's right to due process because, as acknowledged in Byford, it removed any rational distinction between first- and second-degree murder. The complete absence of any distinction between first- and second-degree murder received no mention in this Court's consideration of the presence of federal constitutional error in Nika. This Court's extensive discussion of the semantic distinction and conflation of the terms premeditation and deliberation is a strawman argument that fails to address the more fundamental problem of the absence of any substantive distinction between second degree murder based on malice aforethought and first-degree murder.[20] In Nika, this Court noted that its historical decisions have always

[20]The out-of-state cases cited by the Court in Nika in support of its decision do not address the constitutional vagueness problem arising from the use of the Kazalyn instruction. Each of the cases cited by this Court dealt with a sufficiency of the evidence

consistently recognized that premeditation and deliberation are not synonymous with malice aforethought. See Nika v. State, 124 Nev. __, 198 P.3d 839, 845-46 (2008). This Court further recognized at the time Mr. Rippo's case was final that its precedents "had reduced 'deliberation' to a synonym of 'premeditation' and then had further reduced 'premeditation and deliberation' to 'intent.'" Nika, 198 P.3d at 847. Likewise, in Byford, the Court recognized that its prior opinions had changed the law in such a way that there was a "complete erasure" of the "distinction between first- and second-degree murder." Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000).

This Court's language in Nika, Byford, and Hern is clear and unmistakable: at the time of Mr. Rippo's trial, this Court had changed the law and "erased" and "obliterated" the distinction between first- and second-degree murder. There is simply no other way to interpret this Court's precedents or to escape the conclusion that the crime of first-degree

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challenge by the defendant, see Wilson v. State, 936 So.2d 357, 363-65 (Miss. 2006), Sanders v. State, 392 So.2d 1280, 1281-84 (Ala. App. 1980), not a claim of jury-instructional error. As the Mississippi Supreme Court acknowledged in Wilson, "deliberate indicates a full awareness of what one is doing and generally implies careful and unhurried consideration of the consequences." Wilson, 936 So.2d at 364. When properly framed as an issue of jury-instructional error, the Mississippi courts would not hesitate to reject the Kazalyn instruction as failing to distinguish between first and second-degree murder. See, e.g., Williams v. State, 729 So.2d 1181, 1185-86 (Miss. 1999) (reversing first-degree murder conviction for failing to properly instruct the jury on the meaning of "deliberate design"). This Court's observation that West Virginia treats the terms "premeditation" and "deliberation" as synonymous, Nika, 198 P.3d at 847 (citing State v. Worley, 96 S.E. 56 (W. Va. 1918)), also fails to address the critical distinction between first and second-degree murder: "In West Virginia, deliberation means the defendant considered the taking of another's life while in a cool and deliberate state of mind [citation]. It is 'deliberation' that separates first degree murder from second degree murder." State v. Miller, 476 S.E.2d 535, 547 (W. Va. 1996). In other words, the out-of-state cases cited by this Court provide no support for its decision; to the contrary, the very same states would reject the Kazalyn instruction because it fails to include the element of cool, careful, and actual reflection while at the same time permitting the concept of "instantaneous" premeditation. See State v. Thompson, 65 P.3d 420, 427 (Ariz. 2003) ("We conclude . . . that if the only difference between first and second degree murder is the mere passage of time, and that length of time can be 'as instantaneous as successive thoughts of the mind,' then there is no meaningful distinction between first and second degree murder.") (construing first-degree murder statute to avoid constitutional vagueness challenge); e.g., State v. Dann, 74 P.3d 231, 239 (Ariz. 2003) (reversing first-degree murder convictions and acknowledging that "if a court's instruction or a prosecutor's comment to the jury signals that the mere passage of time will suffice to establish the element of premeditation, those instructions or comments constitute error").

murder and the Kazalyn instruction were unconstitutionally vague at the time of Mr. Rippo's trial. Under the state and federal constitutions, penal statutes must give "fair notice" of what is forbidden, e.g., Gallegos v. State, 123 Nev. ___, 163 P.3d 456, 458-459 (2007); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); and "the more important aspect of the vagueness doctrine 'is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement.'" Kolender v. Lawson, 461 U.S. 352, 358 (1983), quoting Smith v. Goguen, 415 U.S. 566, 574-575 (1974). "[A]bsent adequate guidelines, a criminal law may permit a standardless sweep, which would allow the police, prosecutors, and juries to 'pursue their personal predilections.'" Silvar v. Dist. Ct., 122 Nev. 289, 293, 129 P.3d 682, 685 (2006) (emphasis added), quoting Kolender, 461U.S. at 358; Gallegos, 163 P.3d at 461. This Court's opinion in Nika says nothing whatsoever with respect to the constitutional vagueness problems with the first-degree murder statute at the time of Mr. Rippo's trial or the corresponding infirmity in the Kazalyn instruction.

This Court's analysis in Nika acknowledges, in reviewing the precedents existing at the time of his trial, that there was no coherent distinction between first and second-degree murder; and, if this Court could not harmonize its precedents (which caused it to declare that it had simply changed the law), there is no possibility that "ordinary people can understand what conduct is prohibited" as first-degree murder under the Kazalyn instruction. Kolender, 461 U.S. at 357. Even more important, however, is that the "complete erasure" of the distinction between first- and second-degree murder left juries with no "adequate guidelines" for determining when a homicide is first- rather than second-degree murder. The absence of such adequate standards does not merely "encourage arbitrary and discriminatory enforcement," Kolender, 461 U.S. at 357 (citations omitted), but virtually ensures it. A state system that limits the application of the death penalty to first-degree murders, but then erases the distinction between first- and second-degree murders, necessarily results in arbitrary imposition of the death penalty in violation of the Eighth Amendment. Basing death-eligibility on a vague aggravating factor invites "arbitrary and capricious application of the death penalty." Stringer v. Black, 503 U.S. 222, 228, 235-236 (1992); cf. Jones v. State, 101

Nev. 573, 582, 707 P.2d 1128 (1985) (high degree of premeditation is a prerequisite to death eligibility). Basing death eligibility on a conviction of a capital offense, when the conviction is predicated upon a vague definition of the elements that are supposed to distinguish it from second-degree murder, is even more arbitrary and capricious. This Court must therefore address the constitutional vagueness argument that flows from its decision in Nika and hold that the Kazalyn instruction violated Mr. Rippo's federal due process rights.

b. The Inconsistency Between this Court's Interpretation of the Law in Garner and Nika Constitutes a Violation of State and Federal Due Process Principles.

This Court's decision in Nika also fails to address the due process violation caused by this Court's retroactive and unforeseeable change in its interpretation of the state of the law from a clarification to a change in the law. See Bouie v. City of Columbia, 378 U.S. 347, 354 (1964). In Garner v. State, 116 Nev. 770, 6 P.3d 1013 (2000), this Court held that Byford constituted a clarification of pre-existing law and was therefore not a new rule:

> Although Byford expressly abandons some recent decisions of this court, it also relies on longstanding statutory language and other prior decisions of this court in doing so. Basically, Byford interprets and clarifies the meaning of a pre-existing statute by resolving conflicting lines in prior case law. Therefore, its reasoning is not altogether new.

Garner, 116 Nev. at 789 n.9, 6 P.3d at 1025 n.9 (emphasis added).[21] This Court further held that the failure to raise the challenge to the Kazalyn instruction in pre-Byford cases constituted ineffective assistance of trial counsel that would preclude appellate review of the claim. See id. However, in Nika this Court changed its mind and decided that Byford was actually a change in the law, not a clarification. Nika, 198 P.3d at 849-50. To attain this result, this Court was forced to disavow "language in Garner [that] could be interpreted" as a ruling that Byford was a clarification of pre-existing law. See Nika, 198 P.3d at 850 n.71.

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[21] This Court's terminology is identical to the terminology that it has previously used to find that a rule is not "new" for retroactivity purposes. See Colwell v. State, 118 Nev. 807, 819, 59 P.3d 463, 472 (2003) ("When a decision merely interprets and clarifies an existing rule . . . and does not announce an altogether new rule of law, the court's interpretation is merely a restatement of existing law.") (quoting Buffington v. State, 110 Nev. 124, 127, 868 P.2d 643, 645 (1994)). The "new rule" formulation of Colwell and Buffington received no mention by this Court in Nika.

In other words, to avoid conducting a merits review of the claim in Garner, this Court ruled that Byford was a clarification of the law; however, when confronted with the due process issue raised by intervening law in Fiore v. White, 531 U.S. 225, 228 (2001), this Court changed course in Nika and ruled that it had changed the law to avoid having to apply Byford retroactively to cases that were final. These positions are mutually exclusive of one another. The only thing consistent in the Court's decisions is the denial of relief. Mr. Rippo respectfully submits that this Court cannot change course on its own interpretation of the state of the law pre-Byford consistent with federal due process principles. Under Bouie, this Court's re-characterization of the state of the law (pre-Byford) in Nika violates the due process clause in light of this Court's original (and irreconcilably inconsistent) characterization of the law in Garner.

c. The Failure to Apply Byford Retroactively as a Substantive Rule of Criminal Law Violates State and Federal Due Process Principles.

Finally, this Court's failure to decide in Nika whether Byford was a substantive rule of criminal law warranting retroactive application was contrary to controlling authority and violated federal due process principles. Starting with Colwell v. State, 118 Nev. 807, 817, 59 P.3d 463, 470 (2003), this Court recognized that a new rule will apply retroactively on collateral review when the "rule is actually substantive, not procedural." In Ennis v. State, 122 Nev. 694, 137 P.3d 1095, 1099-1100 (2006), this Court likewise acknowledged that substantive rules must be applied retroactively. In Bejarano v. State, 122 Nev. 1066, 146 P.3d 265, 272-73 (2006), this Court further acknowledged that "a new substantive rule is more properly viewed not as an exception to that requirement, but as a rule that will generally apply retroactively." The Court subsequently held in Bejarano that this Court's decision in McConnell must apply retroactively because "McConnell concerned the reach of Nevada's death penalty law, determining under what circumstances and to whom it could be constitutionally applied," and that absent "retroactive application of this rule, there would be 'a significant risk that a defendant . . . faces a punishment that the law cannot impose.'" Id. at 274. Finally, in Mitchell v. State, 122 Nev. 1269, 149 P.3d 33, 38 n.25 (2006), this Court

followed Bejarano and applied a decision regarding the elements of accomplice liability retroactively as a substantive rule of criminal law:

> rules like that of Sharma, which address the elements of an offense, are perhaps more accurately characterized as new substantive rules, which are generally applied retroactively, not as new procedural rules that are applied retroactively only if they fall under an exception to the general bar on retroactive application of new procedural rules.

Mitchell, 149 P.3d at 38 n.25.

This Court's failure to decide in Nika whether Byford was a substantive rule of criminal law is irreconcilable with Colwell and its progeny. In Nika, this Court purported to "reaffirm our decisions in Clem and Colwell and maintain our course respecting retroactivity analysis – if a rule is new but not a constitutional rule, it has no retroactive application to convictions that are final at the time of the change in the law." Nika, 198 P.3d at 850. To achieve this result, this Court had to "disavow any language in Mitchell v. State, suggesting that a new non-constitutional rule of criminal procedure applies retroactively." Id. at 850 n.78. As explained above, however, Mitchell was not concocted out of whole cloth; instead, it was the last case in a long line of consistent authority, starting with Colwell, and including Ennis, Bejarano, and Rippo, to hold that retroactive application was warranted for "substantive rules" that "include decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations placing particular conduct beyond the state's power to punish." Ennis, 137 P.3d at 1099-1100 (citations omitted, emphasis added). In short, this Court will retroactively apply substantive rules of criminal law and constitutional determinations placing particular conduct beyond the state's power to punish. This Court's conflation of these two distinct issues in Nika and its citation to Clem v. State, 119 Nev. 615, 81 P.3d 521 (2003), are inconsistent with Colwell and its progeny. This Court's cursory dismissal of Mitchell as an aberration was in error, because it was based on a consistent line of authority which the Nika decision simply ignored by citing to Clem – a decision that was itself an aberration and whose rationale subsequently has been undermined by the High Court. See below.

If this Court refuses to determine whether Byford should apply retroactively to Mr. Rippo as a substantive rule of criminal law it will violate his federal due process rights. Specifically, the retroactivity principles enunciated in Schriro v. Summerlin, 542 U.S. 348 (2004), establish a constitutional floor that bind state courts under the federal due process clause.[22] While this Court may choose to provide greater retroactivity than exists in federal habeas proceedings, it may not provide less: "Federal law simply 'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.'" See Danforth v. Minnesota, 128 S. Ct. 1029, 1045 (2008) (citation omitted). It does not matter whether this Court characterizes Byford as a super-legislative change in the law or whether it characterizes Byford as a non-constitutional ruling, Nika, 198 P.3d at 849-50, because Colwell and Summerlin both require retroactive application when a decision of the Court narrows the scope of a criminal statute; otherwise, "there would be 'a significant risk that a defendant . . . faces a punishment that the law cannot impose.'" Bejarano v. State, 122 Nev. 1066, 146 P.3d 265, 274 (2006) (citation omitted); e.g., Bousley v. United States, 523 U.S. 614, 619-20 (1998) (retroactivity not an issue when the court "decides the meaning of a criminal statute").

This Court's attempt to distinguish Bousley in Clem was based on the erroneous belief that "Bousley addresses only the retroactivity of the United States Supreme Court decisions interpreting the meaning of federal criminal statutes. It does not bind this court." Clem v. State, 119 Nev. 615, 629, 81 P.3d 521, 531 (2003).[23] This unsupported assumption was

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[22]This Court has repeatedly acknowledged that "Nevada is merely required to adhere to the minimum requirements of Teague (1989)." Clem v. State, 119 Nev. 615, 629, 81 P.3d 521, 531 (2003); accord Colwell v. State, 118 Nev. 807, 819, 59 P.3d 463, 471 (2002) (court may provide greater retroactivity than is required by federal law "as long as we give new federal constitutional rules at least as much retroactive effect as Teague does.").

[23]The Court also mused that "we think Bousley's rule for United States Supreme Court decisions interpreting federal statutes can be understood as correlative to the rule reiterated in Fiore for state court decisions clarifying state statutes." Clem v. State, 119 Nev. 615, 629, 81 P.3d 521, 531 (2003). As a normative matter, this Court is correct that the High Court does not engage in the unseemly practice of changing its prior interpretations of the law to achieve a particular result, but that is due to its respect for

disproved a year later when the High Court decided Summerlin and applied its substantive rule of criminal law jurisprudence to a case arising out of state court – a fact acknowledged by this Court in Ennis and Bejarano but ignored in Nika. See Bejarano, 146 P.3d at 272-73 n.39; Ennis, 137 P.3d at 1100 n.16 ("In Schriro, however, the Court concluded that 'they are more accurately characterized as substantive rules not subject to the bar.'"). Mr. Rippo therefore requests that this Court reconcile its plainly inconsistent jurisprudence and apply Byford retroactively to him as required under federal due process principles as a substantive rule of criminal law.

The state's answering brief says nothing at all regarding Mr. Rippo's detailed discussion demonstrating that the instructional error was harmful in the circumstances of his case. Op. Br. at 79-82. Mr. Rippo therefore requests that this Court reverse the order of the district court and grant him a new trial.

2. Failure of the Jury Instructions to Require that Aggravating Circumstances Outweigh Mitigation Beyond a Reasonable Doubt

The state argues, based on this Court's decision in McConnell v. State, 125 Nev. __, 212 P.3d 307, 314-15 (2009), that "there is no requirement to instruct the jury that the State must prove that the aggravating circumstances must outweigh the mitigating circumstances beyond a reasonable doubt," Ans. Br. at 57. The state, however, ignores Mr. Rippo's analysis of why McConnell was wrongly decided. As Mr. Rippo explained in his opening brief, this Court's decision in McConnell clearly misapprehends the issue by conflating Nevada's death penalty scheme, in which the decision of whether the aggravators outweigh the mitigators is part of the eligibility determination, with other states' death penalty schemes in which that decision is part of the selection determination. Op. Br. at 61-62. The state does not address this argument, or any of Mr. Rippo's arguments as to why McConnell directly

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principles of stare decisis as well as an understanding of the proper province of the judiciary's role in our constitutional system of separation of powers. See Neal v. United States, 516 U.S. 284, 295 (1996) ("We . . . do not have the same latitude to forsake prior interpretations of a statute."). There is no indication in Bousley that the Court would condone a different rule governing the interpretation of federal statutes if it felt free to declare that it could simply change the law by judicial fiat.

contradicts precedent from the United States Supreme Court, as well as this Court's own precedent. In light of the many federal and state cases with which McConnell contradicts, this Court should revisit the wisdom of its decision in that case.

As this Court explained in Hollaway v. State, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000), "[u]nder Nevada's capital sentencing scheme, two things are necessary before a defendant is eligible for death: the jury must find unanimously and beyond a reasonable doubt that at least one enumerated aggravating circumstance exists, and each juror must individually consider the mitigating evidence and determine that any mitigating circumstances do not outweigh the aggravating." Furthermore, this Court has acknowledged that:

> This second finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada, and we conclude that it is in part a factual determination, not merely discretionary weighing. So even though Ring expressly abstained from ruling on any "Sixth Amendment claim with respect to mitigating circumstances," we conclude that Ring requires a jury to make this finding as well: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt."

Johnson v. State, 118 Nev. 787, 802-803, 59 P.3d 450, 460 (2002) (quoting Apprendi v. New Jersey, 530 U.S. 466, 482-483 (2000)).

The erroneous nature of this Court's decision in McConnell was acknowledged in Harrison v. Gillespie, 596 F.3d 551, 564 (9th Cir. 2010), where the court noted this Court's failure to cite to its own authority or any relevant Sixth Amendment cases post-dating Apprendi in support of its decision:

> We are puzzled by one aspect of the law of Nevada. For years, the Nevada Supreme Court expressly recognized that "[t]o obtain a death sentence, the State must prove beyond a reasonable doubt that at least one aggravating circumstance exists and that the aggravating circumstance or circumstances outweigh any mitigating evidence." Gallego v. State, 117 Nev. 348, 23 P.3d 227, 239 (2001) (en banc) (emphasis added); see also Johnson, 59 P.3d at 460 (quoted supra p. 2790); Witter v. State, 112 Nev. 908, 921 P.2d 886, 896 (1996) (per curiam) ("[T]he death penalty is an available punishment only if the state can prove beyond a reasonable doubt at least one aggravating circumstance exists, and that the aggravating circumstance or circumstances outweigh the mitigating evidence offered by the defendant." (emphasis added)), abrogated on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). Recently, however, the Nevada Supreme Court stated that

> "[n]othing in the plain language of [the relevant statutory] provisions requires a jury to find, or the State to prove, beyond a reasonable doubt that no mitigating circumstances outweighed the aggravating circumstances in order to impose the death penalty" and that the court itself "has imposed no such requirement." McConnell v. State, 212 P.3d 307, 314-15 (Nev.2009) (per curiam). In support of that assertion, the court cited only cases decided in and before 1995, and did not acknowledge its contrary decisions issued in and after 1996.

Id. at 564. As the Ninth Circuit noted in Harrison, this Court's decision in McConnell ignores a decade of its own case law and fails to cite to any relevant Sixth and Fourteenth Amendment authority as it did in Johnson. This Court should therefore reconsider its decision in McConnell.

The failure to instruct the jury on the burden of proof beyond a reasonable doubt violated Mr. Rippo's right to due process of law, a jury trial, and a reliable sentence, and constitutes structural error which is reversible per se.

3. Jury Instruction Requiring Unanimity to Find Mr. Rippo Ineligible for the Death Penalty.

In his opening brief, Mr. Rippo argued that the jury instruction in the penalty phase requiring jury unanimity before they could consider a life sentence violates his right to a jury trial under Andres v. United States, 333 U.S. 740, 746-52 (1948), his due process right to receive an instruction regarding a lesser included non-capital offense under Beck v. Alabama, 447 U.S. 625 (1980), and his Eighth Amendment right to a reliable sentence. 20 JA 4572.

The state contends that Mr. Rippo's good cause allegation regarding former Justice Becker's failure to recuse herself from Mr. Rippo's sharply divided 4-3 appeal "is utterly devoid of any factual support which would entitle him to relief of [sic] his claim." Ans. Br. at 58. But Mr. Rippo has specifically alleged that the tie-breaking justice in the 4-3 split during his last appeal, former Justice Nancy Becker, was seeking employment with the Clark County District Attorney's Office at the time of this Court's decision. Mr. Rippo has specifically alleged facts supporting that allegation, such as the fact that on November 7, 2006, Justice Becker lost her bid for re-election, and apparently began seeking other employment; the fact that on November 16, 2006, this Court affirmed the denial of post-

conviction relief by a vote of four to three with Justice Becker joining the narrow majority; and the fact that on January 4, 2007, it was reported in the Las Vegas Review Journal that the Clark County District Attorney's Office ("CCDA") had extended an offer of employment to former Justice Becker. See John L. Smith, Las Vegas Review Journal, January 4, 2007. If Ms. Becker was actually seeking employment with the CCDA at the time she voted on Mr. Rippo's previous appeal, then there is a "reasonable inference of bias or impropriety," Snyder v. Viani, 112 Nev. 568, 576, 916 P.2d 170, 175 (1996), from Ms. Becker's failure to recuse herself from participating in Mr. Rippo's prior appeal, and he is entitled to relief. Accordingly, Mr. Rippo has made specific allegations which if true would entitle him to relief. It was therefore error for the district court to deny this claim on procedural grounds without first giving Mr. Rippo the opportunity to conduct discovery and an evidentiary hearing to prove up his allegations. This Court can obviate any intrusive inquiry into former Justice Becker's potential contact with the Clark County District Attorney's Office by simply reconsidering Mr. Rippo's claim with the present Court which lacks the taint of any conflict of interest.

E. Actual Innocence of the Death Penalty

The state alleges that "Defendant failed to demonstrate any good cause or prejudice" to raise this issue, Ans. Br. at 54, while completely ignoring Mr. Rippo's argument that he can demonstrate a fundamental miscarriage of justice under Leslie v. Warden, 118 Nev. 773, 776, 59 P.3d 440, 445 (2002), to receive a merits review of his claim; and he can thereby overcome the procedural bars. Op. Br. at 67-68 (citing Leslie v. Warden, 118 Nev. 773, 776, 59 P.3d 440 (2002)). Because there are no valid aggravators in Mr. Rippo's case, he is ineligible for the death penalty. Even if there were a valid aggravating circumstance, however, this Court still could not find harmless error when it has previously invalidated three aggravating circumstances, see Rippo v. State, 122 Nev. 1086, 1093, 146 P.3d 279, 284 (2006), and when Mr. Rippo has proffered compelling mitigation evidence in connection with the instant petition. See Op. Br. at 51-55; State v. Haberstroh, 119 Nev. 173, 184 n.22, 69 P.3d 676, 683 n.22 (2003). This Court must consider the totality of the circumstances in

order to provide close appellate scrutiny of Mr. Rippo's death sentence, see Parker v. Dugger, 498 U.S. 308, 322 (1990), and such an assessment can only lead to the conclusion that Mr. Rippo suffered prejudice from the invalid aggravating circumstances.

Regarding the torture aggravating circumstance, the state asserts that "discussion of this issue is precluded by the doctrine of law of the case," but ignores Mr. Rippo's analysis of why this Court's previous decision was erroneous, i.e., because this Court addressed Mr. Rippo's challenge to the torture aggravating circumstance by construing the elements of the substantive crime of murder by means of torture, Nev. Rev. Stat. § 200.030(1)(a), rather than applying its own narrowing construction to the torture aggravating circumstance. Rippo, 113 Nev. at 1263, 946 P.2d 1032. The aggravating circumstance of Nev. Rev. Stat. § 200.033(8), however, requires that the "murder involve[] torture," which this Court has construed as requiring that the defendant "inflict pain beyond the killing itself," Hernandez v. State, 124 Nev. __, 194 P.3d 1235, 1239 (2008), and "requires that the murderer must have intended to inflict pain beyond the killing itself." Dominguez v. State, 112 Nev. 683, 702, 917 P.2d 1364, 1377 (1996). This Court has never fulfilled its mandatory obligation to determine the sufficiency of the evidence supporting the torture aggravating circumstance, and it should take this opportunity to do so. See Nev. Rev. Stat. § 177.055(2)(b).

Regarding the use of Mr. Rippo's prior conviction for sexual assault as a basis for two aggravating circumstances, the state incorrectly argues that "the only good cause argued by Defendant is the oft repeated claim that his prior counsel was ineffective for not raising it sooner." Ans. Br. at 72. As explained above, the state completely ignores Mr. Rippo's allegation that he can demonstrate a fundamental miscarriage of justice under Leslie v. Warden, 118 Nev. 773, 776, 59 P.3d 440, 445 (2002).[24] Furthermore, the state completely ignores Mr. Rippo's allegation that intervening changes in law in Roper v. Simmons, 543 U.S. 541, 568-574 (2005), constitutes good cause sufficient to overcome the procedural default bars. When this Court considers the effect of the invalid aggravators in combination

[24] Accord State v. Bennett, 119 Nev. 589, 598, 81 P.3d 1, 8 (2003).

with the prejudicial impact of the Brady violations, it is clear that a fundamental miscarriage of justice would result from this Court's failure to consider the claim on the merits.

The state completely fails to address the merits of Mr. Rippo's argument related to the torture aggravating circumstance, and with regard to the use of his juvenile offense as the basis for two aggravating circumstances, the state simply argues that "Defendant's reliance on Roper is misplaced" because "[u]nlike Roper, Defendant was an adult when he committed the present capital offense." Ans. Br. at 72-73. First, the state neglects to even address Mr Rippo's allegation that the aggravators based on his juvenile offense are invalid because his plea of guilty to the underlying crime was invalid under Nevada law, and this Court should take that allegation as true for the purpose of this appeal. See NRAP 31(g). Second, the state's narrow interpretation of Roper clearly misapprehends the High Court's analysis, which most certainly applies to situations in which a person committed a crime when he was over eighteen but became eligible for the death penalty based on a crime he committed when he was under eighteen. See, e.g., United States v. Naylor, Jr., 350 F. Supp.2d 521, 524 (W.D. Va. 2005). The High Court recently addressed this very issue and applied the reasoning of Roper to circumstances where the defendant's sentence is enhanced to life without parole based on conduct committed when he was a juvenile. See Graham v. Florida, ___ S.Ct.___, 2010 WL 1946731, at *13 (2010). The Court further reiterated that "[i]t remains true that '[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult.'" Id. (citing Roper, 543 U.S. at 570).

The crux of the High Court's holdings in Roper and Graham is clear– juveniles are less culpable than adults as a matter of law. Accordingly, an offense committed as a juvenile should not be given the same weight as an offense committed as an adult when those offenses are being used to aggravate a first degree murder conviction, yet under Nevada's death penalty scheme, they are. Nevada's death penalty scheme accordingly flies in the face of the High Court's pronouncement in Graham that "[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." Id. at *19. This problem was exacerbated in Mr. Rippo's

case, where an offense he committed when he was 16 was used to twice aggravate his murder conviction – once under the prior violent felony aggravator, and once under the under sentence of imprisonment aggravator. If juveniles are less culpable as a matter of constitutional law, then Mr. Rippo should not be rendered death eligible on the basis of an offense he committed as a juvenile.

Under Roper and Graham, juveniles should be treated differently than adults with regards to punishment not only because of their reduced moral culpability, but also because "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense." Id. at *20. This concern is particularly relevant to Mr. Rippo's prior offense, where the judge became so concerned with Mr. Rippo's representation by trial counsel that he determined that Mr. Rippo could not enter a valid guilty plea because counsel had failed to explain the plea and its consequences to Mr. Rippo. 36 JA 8618. Accordingly, the sexual assault conviction cannot be used to render Mr. Rippo eligible for the death penalty. At minimum, Mr. Rippo is entitled to a reweighing of this aggravating circumstance and he should be permitted to present evidence of his reduced culpability in the prior conviction.

Mr. Rippo can further show prejudice from the inclusion of invalid aggravators because it is not possible to perform harmless error review when the jury was never properly instructed. See Clemons v. Mississippi, 494 U.S. 738, 754 (1990). Contrary to the state's allegation that "it appears that due to Defendant's failure to raise an argument regarding [the erroneous harmless error analysis], Defendant concedes that the District Court's dismissal of the claim was not in error," Ans. Br. at 55, Mr. Rippo argued in his opening brief that the error must be found harmful in circumstances where there is no mitigation verdict form, an inadequate weighing instruction, the absence of a jury instruction regarding the consideration of non-statutory aggravation, and substantial mitigation evidence contained in the instant petition. Op. Br. at 69.

F. Victim Impact Evidence

The state cites to this Court's decision on direct appeal in support of its contention that "this matter was definitely resolved by this Court over a decade ago," Ans. Br. at 53, but ignores Mr. Rippo's detailed analysis of how and why the factual circumstances before this Court are substantially different now than they were on direct appeal due to appellate counsel's ineffectiveness. The state fails to address Mr. Rippo's argument that post-conviction counsel was ineffective in failing to raise a claim of ineffective assistance of direct appeal counsel for failing to point to specific victim impact testimony that was cumulative or prejudicial. Instead, appeal counsel argued that victim impact testimony was not limited under the statutory scheme. 23 JA 5443. Post-conviction counsel was likewise ineffective for failing to allege the specific instances of improper victim impact testimony, for failing to argue the prejudicial nature of the photo albums and scrap books that were admitted at trial, and for failing to argue that direct appeal counsel was ineffective for failing to do the same. See 38 JA 9028-9185. In the instant petition, on the other hand, Mr. Rippo has made specific claims regarding the prejudicial victim impact evidence that was presented in his case. Thus, the evidence presented in the instant petition is substantially different than that which has been presented in earlier proceedings. Therefore, post-conviction counsel's ineffectiveness for failing to develop the facts necessary to support this claim both excuses any procedural default and renders the law-of-the-case doctrine inapplicable. Op. Br. at 69-70.

Contrary to the state's argument, this matter was not "definitely resolved" on direct appeal because this Court failed to consider the prejudicial impact of the many pictures of the victims when they were children. This Court recognized the impermissibility of the victim impact testimony on direct appeal. Rippo v. State, 113 Nev. 1239, 1262, 946 P.2d 1017, 1031 (1997) ("Thus, the testimony, insofar as it described the nature of the victims' deaths went beyond the boundaries set forth by the State."). However, due to direct appeal counsel's ineffectiveness for failing to include the photographic scrapbooks in the appendix, this Court was not able to make a cumulative determination of the prejudice suffered by Mr.

Rippo. The pictures were not probative of the culpability or character of Mr. Rippo or the circumstances of the offense, nor were they probative of the impact of the crimes on the victims' family members: the pictures placed before the jury portrayed events that occurred long before the respective crimes were committed and bore no direct relation to the effect of crime on the victims' family members. See 38 JA 9028-9185. Viewing the photographs in conjunction with the impermissible testimony, one cannot help but conclude that Mr. Rippo was prejudiced by the victim impact evidence, and his death sentence is invalid.

G. Deprivation of Right to Present a Defense and Confront Witnesses

The state completely fails to address the merits of this claim, opting instead to repeat the same procedural argument Mr. Rippo addressed above. Ans. Br. at 67. The undisputed facts in Mr. Rippo's opening brief demonstrate that the trial court deprived Mr. Rippo of his right to present a defense and confront the witnesses against him by denying him discovery of his own incarceration and probation records, 33 JA 7856-7895. Diana Hunt's MMPI ("Minnesota Multiphasic Personality Inventory") records, and medical records showing that Hunt had been diagnosed with mental illness and was receiving psychotropic medication. 27 JA 6428-6434. Disclosure of this information was essential for him to present a complete defense in the guilt and penalty phases of trial and to cross-examine the witnesses against him. The trial court's failure to provide these records rendered Mr. Rippo's trial fundamentally unfair.

V. CONCLUSION

For the foregoing reasons, Mr. Rippo respectfully requests that this Court reverse the order of the district court and vacate his conviction and death sentence. In the alternative, Mr. Rippo requests that this Court remand his case to the district court so that he can receive an opportunity to demonstrate cause and prejudice through discovery and an evidentiary hearing.

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DATED this 17th day of June, 2010.

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CERTIFICATE OF COMPLIANCE

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

Dated this 17th day of June, 2010.

Respectfully submitted,

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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 APPELLANT'S REPLY BRIEF 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