IN THE SUPREME COURT OF THE STATE OF NEVADA

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

MICHAEL DAMON RIPPO,

Appellant,

vs.

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

Respondent.

Case No. 53626

APPELLANT'S OPENING BRIEF

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

Eighth Judicial District Court, Clark County

FRANNY A. FORSMAN
Federal Public Defender
DAVID ANTHONY
Assistant Federal Public Defender
Nevada Bar No. 007978
411 East Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101
(702) 388-6577

Counsel for Appellant

TABLE OF CONTENTS

I. JURISDICTION. 1

II. ISSUES PRESENTED FOR REVIEW. 1

III. STATEMENT OF THE CASE. 1

IV. STATEMENT OF FACTS. 3

V. SUMMARY OF ARGUMENT. 3

VI. ARGUMENT. 5

A. The District Court Could Not Conclude as a Matter of Law that Post-Conviction Counsel Was Effective Without Permitting Discovery and an Evidentiary Hearing. 5

B. The District Court Could Not Conclude as a Matter of Law that Mr. Rippo Suffered Insufficient Prejudice from Post-Conviction Counsel's Ineffectiveness and the State's Suppression of Evidence Without Authorizing Discovery and an Evidentiary Hearing 10

1. Mr. Rippo Can Show Good Cause and Prejudice to Re-Raise His Claim of Judicial Bias Because the Facts are Substantially Different than they were on Direct Appeal. U.S. Const. amends. V, VI, VIII, XIV. 11

a. The State's Involvement in the Investigation of Judge Bongiovanni. 11

b. Judge Bongiovanni's Knowledge of the State's Victim Witness Denny Mason. 19

c. The Law Relating to Judicial Bias. 21

d. The District Court's Law of the Case Ruling Was in Error. 23

2. Mr. Rippo Can Demonstrate Good Cause and Prejudice to Receive an Evidentiary Hearing on His Claims of Prosecutorial Misconduct. U.S. Const. amends. V, VI, VIII, XIV. 27

a. Relevant Facts: the Prosecutorial Misconduct of the Clark County District Attorney's Office at the Time of Trial. 28

(i) Intimidation of a Defense Witness. 28

(ii) Failure to Disclose Exculpatory Evidence and Violation of Discovery Order. 31

b. False Testimony and Failure to Disclose Material Exculpatory and Impeachment Information Relating to

Thomas Sims. 33

c. False Testimony and Failure to Disclose Material Exculpatory and Impeachment Information Relating to Michael Beaudoin.. 36

d. Failure to Disclose Material Exculpatory and Impeachment Information Relating to Thomas Christos 39

e. False Testimony and Failure to Disclose Material Exculpatory and Impeachment Information Relating to the Jailhouse Informants.. 39

f. Prosecutorial Misconduct in Argument. 40

g. The Law Relating to Prosecutorial Misconduct. 44

3. Mr. Rippo Can Demonstrate Sufficient Prejudice to Receive an Evidentiary Hearing on His Claim of Ineffective Assistance of Trial Counsel for Failing to Investigate and Present Mitigation Evidence. U.S. Const. amends. V, VI, VIII, XIV.. 50

4. Mr. Rippo Can Show Good Cause and Prejudice to Re-Raise His Claim that the Jury Instruction Requiring Unanimity to Impose a Life Sentence is Unconstitutional. U.S. Const. amends. V, VI, VIII, XIV.. 55

a. Jury Instruction Requiring Unanimity to Find Mr. Rippo Ineligible for the Death Penalty.. 55

b. Jury Instruction Failing to Require that Mitigation be Outweighed by Statutory Aggravation Beyond a Reasonable Doubt.. 60

5. Mr. Rippo is Actually Innocent of the Death Penalty Because There are No Valid Aggravating Circumstances Remaining in His Case. U.S. Const. amends. V, VI, VIII, XIV.. 62

a. There is Insufficient Evidence to Sustain the Torture Aggravating Circumstance.. 62

b. The Aggravating Circumstances Based on Mr. Rippo's Prior Conviction for Sexual Assault are Invalid.. . . . 65

c. Prejudice.. 67

6. Mr. Rippo Can Demonstrate Good Cause and Prejudice to Challenge the Improper Admission of Prejudicial Victim Impact Evidence. U.S. Const. amends. V, VI, VIII, XIV. 69

7. Mr. Rippo Can Demonstrate Good Cause and Prejudice to Receive Consideration of His Claim that the Trial Court Prevented Him From Presenting a Defense and Confronting Witnesses Against Him. U.S. Const. amends. V, VI, VIII, XIV. 74

8. Mr. Rippo Can Demonstrate Good Cause and Prejudice to Receive Consideration of His Claims of Ineffective Assistance of Trial Counsel for Failing to Adequately Object to the Admission of Evidence Which Deprived Mr. Rippo of the Presumption of Innocence. U.S. Const. amends. V, VI, VIII, XIV.. 77

9. Mr. Rippo Can Demonstrate Good Cause and Prejudice to Raise Claims Regarding Invalid Jury Instructions.. 79

a. Premeditation Instruction. 79

b. Aiding and Abetting Instructions. 82

c. Reasonable Doubt Instruction. 83

10. Mr. Rippo Can Demonstrate Good Cause and Prejudice to Raise a Claim Regarding the Trial Court's Failure to Provide an Informant Cautionary Instruction. U.S. Const. amends. V, VI, VIII, XIV.. 85

11. Mr. Rippo Can Demonstrate Good Cause and Prejudice to Raise Claims Relating to Constitutional Errors that Occurred During Voir Dire. U.S. Const. amends. V, VI, VIII, XIV.. 86

12. Mr. Rippo Can Demonstrate Good Cause and Prejudice to Raise a Claim that Unduly Prejudicial Photographs Were Admitted at Trial. U.S. Const. amends. V, VI, VIII, XIV.. 89

13. Execution by Lethal Injection as Administered in Nevada Constitutes Cruel and Unusual Punishment. U.S. Const. amends. V, VI, VIII, XIV.. 91

14. Mr. Rippo's Convictions and Death Sentences are Invalid Due to Cumulative Error. U.S. Const. amends. V, VI, VIII, . . . 92

VII. CONCLUSION. 93

CERTIFICATE OF COMPLIANCE.. 94

CERTIFICATE OF ELECTRONIC SERVICE. 95

TABLE OF AUTHORITIES

FEDERAL CASES

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986). 21

Ainsworth v. Woodford, 268 F.3d 868 (9th Cir. 2000). 53

Ainsworth v. Woodford, 268 F.3d 868 (9th Cir. 2001). 55

Andres v. United States, 333 U.S. 740 (1948). 55

Apprendi v. New Jersey, 530 U.S. 466 (2000). 61, 62

Banks v. Dretke, 540 U.S. 668 (2004). 11, 25, 47

Baze v. Rees, 128 S. Ct. 1520 (2008). 92

Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002). 47

Berger v. United States, 295 U.S. 78 (1934). 44

Blakely v. Washington, 542 U.S. 296 (2004). 60

Bouie v. City of Columbia, 378 U.S. 347 (1964). 80

Bousley v. United States, 523 U.S. 614 (1998). 82

Boyde v. Brown, 404 F.3d 1159 (9th Cir. 2005). 50, 51

Bracy v. Gramley, 520 U.S. 899 (1997). 25

Brecht v. Abrahamson, 507 U.S. 619 (1993). 44

In re CBI Holding Co. v. Ernst & Young, 424 F.3d 265 (2d Cir. 2005). 59

Cage v. Louisiana, 498 U.S. 39 (1990). 83

Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252 (2009). 21, 23, 59

Caro v. Woodford, 280 F.3d 1247 (9th Cir. 2002). 55

Cartalino v. Washington, 122 F.3d 8 (7th Cir. 1997). 22, 23

Carter v. Bowersox, 265 F.3d 705 (8th Cir. 2001). 69

Castleberry v. Brigano, 349 F.3d 286 (6th Cir. 2003). 27

Chambers v. Mississippi, 410 U.S. 284 (1973). 5, 92

Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). 81

Clemons v. Mississippi, 494 U.S. 738 (1990). 68

Correll v. Ryan, 465 F.3d 1006 (9th Cir. 2006). 7

Custis v. United States, 511 U.S. 485 (1994). 67
Danforth v. Minnesota, 128 S. Ct. 1029 (2008). 82
Davis v. Alaska, 415 U.S. 308 (1974). 75
Davis v. Coyle, 475 F.3d 761 (6th Cir. 2007). 75
Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003). 55
Deutscher v. Whitely, 884 F.2d 1152 (9th Cir. 1989). 55
Donnelly v. DeChristoforo, 416 U.S. 637 (1974). 40
Douglas v. Woodford, 316 F.3d 1079 (9th Cir. 2003). 54
Edwards v. Balisok, 520 U.S. 641 (1997). 22
Edwards v. Carpenter, 529 U.S. 446 (2002). 5
Frances v. Franklin, 471 U.S. 307 (1985). 80
Franklin v. McCaughtry, 398 F.3d 955 (7th Cir. 2005). 22
Gantt v. Roe, 389 F.3d 908 (9th Cir. 2003). 25, 47
Gerlaugh v. Lewis, 898 F. Supp. 1388 (D. Ariz. 1995). 62
Getsy v. Mitchell, 495 F.3d 295 (6th Cir. 2007). 22
Gomez v. Ahitow, 29 F.3d 1128 (7th Cir.1994). 91
Gomez v. United States District Court, 503 U.S. 653 (1992). 92
Hall v. Director of Correction, 343 F.3d 976 (9th Cir. 2004). 26
Harris v. Pulley, 692 F.2d 1189 (9th Cir.1982). 62
Hayes v. Brown, 399 F.3d 972 (9th Cir. 2005). 46, 48
Hicks v. Oklahoma, 447 U.S. 343 (1980). 4
Hill v. McDonough, 547 U.S. 573 (2006). 91
Horton v. Mayle, 408 F.3d 570 (9th Cir. 2005). 47
Jackson v. Brown, 513 F.3d 1057 (9th Cir. 2008). 27, 48
Jennings v. Woodford, 290 F.3d 1006 (9th Cir. 2002). 55
Kolender v. Lawson, 461 U.S. 352 (1983). 81
Kyles v. Whitley, 514 U.S. 419 (1995). 27
Laird v. Horn, 414 F.3d 419 (3d Cir. 2005). 83

Lambright v. Schriro, 490 F.3d 1103 (9th Cir. 2007). 7
Lewis v. Jeffers, 497 U.S. 764 (1990). 63
Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988). 22
In re M.T.G., Inc., 400 B.R. 558 (E.D. Mich. 2009). 24
Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992). 55
Massiah v. United States, 377 U.S. 201 (1964). 40
McKenna v. McDaniel, 65 F.3d 1483 (9th Cir. 1995). 68, 77
McNeely v. Olivarez, 104 F.3d 365 (9th Cir.1996). 90
Monk v. Zelez, 901 F.2d 885 (10th Cir. 1990). 84
Murtishaw v. Woodford, 255 F.3d 926 (9th Cir. 2001). 69
Neder v. United States, 527 U.S. 1 (1999). 87
Nelson v. Campbell, 541 U.S. 642 (2004). 91, 92
Parker v. Dugger, 498 U.S. 308 (1990). 68
Parker v. Gladden, 385 U.S. 363 (1966). 86
Parle v. Runnels, 505 F.3d 922 (9th Cir. 2007). 5, 93
Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597 (1991). 71
Penry v. Lynaugh, 492 U.S. 302 (1989). 62
Pepsico, Inc. v. McMillen, 764 F.2d 458 (7th Cir. 1985). 59
Polk v. Sandoval, 503 F.3d 903 (9th Cir.2007). 79, 80
Ramirez v. Hatcher, 136 F.3d 1209 (9th Cir. 1998). 84, 85
Rohem v. Gibson, 245 F.3d 1130 (10th Cir. 2001). 69
Rompilla v. Beard, 545 U.S. 374 (2005). 50, 52
Roper v. Simmons, 543 U.S. 541 (2005) 66, 67
Ross v. Oklahoma, 487 U.S. 81 (1988). 89
Rust v. Hopkins, 984 F.2d 1486 (8th Cir. 1993). 60, 68
Sandstrom v. Montana, 442 U.S. 510 (1979). 80
Schriro v. Summerlin, 542 U.S. 348 (2004). 82
Scott v. Mullin, 303 F.3d 1222 (10th Cir. 2002). 47

Silva v. Brown, 416 F.3d 980 (9th Cir. 2005). 76
Silva v. Woodford, 279 F.3d 825 (9th Cir. 2002). 7, 55
Skipper v. South Carolina, 476 U.S. 1 (1986). 75
Spears v. Mullin, 343 F.3d 1215 (10th Cir. 2003). 91
Stallings v. Bagley, 561 F. Supp. 2d 821 (N.D. Ohio 2008). 53
Stankewitz v. Woodford, 365 F.3d 706 (9th Cir. 2004). 51
Stivers v. Pierce, 71 F.3d 732 (9th Cir. 1995). 22
Strickland v. Washington, 466 U.S. 668 (1984). 4, 7
Stringer v. Black, 503 U.S. 222 (1992). 82
Sullivan v. Louisiana, 508 U.S. 275 (1993). 60
Tumey v. Ohio, 273 U.S. 510 (1927). 22
Turner v. Calderon, 281 F.3d 851 (9th Cir. 2002). 55
U.S. v. Mouling, 557 F.3d 658 (D.C. Cir. 2009). 88
U.S. v. Nelson, 347 F.3d 701 (8th Cir. 2003). 71
U.S. v. Rodriguez, ---, F.3d -- 2009 WL 2998103 (8th Cir. 2009). 71
United States v. Blanco, 392 F.3d 382 (9th Cir. 2004). 49
United States v. Booker, 543 U.S. 220 (2005). 61
United States v. Jaramillo, 745 F.2d 1245 (9th Cir. 1984). 22
United States v. Martinez-Martinez, 295 F.3d 1041 (9th Cir. 2002). 67
United States v. Martinez-Salazar, 528 U.S. 304 (2000). 87
United States v. Naylor, Jr., 350 F. Supp. 2d 521 (W.D. Va. 2005). 66
United States v. Nell, 526 F.2d 1223 (5th Cir.1976). 86
U.S. v. Paul, 217 F.3d 989 (8th Cir. 2000). 71
U.S. v Sampson, 335 F. Supp. 2d 166 (D. Mass. 2004). 72
Village of Willowbrook v. Olech, 528 U.S. 562 (2000). 82
Virgil v. Dretke, 446 F.3d 598 (5th Cir. 2006). 87
Ward v. Village of Monroeville, 409 U.S. 57 (1972). 22
Wiggins v. Smith, 539 U.S. 510 (2004). 50, 52

Williams v. Taylor (Terry), 529 U.S. 362 (2000). . . . . Passim

Wilson v. Sirmons, 536 F.3d 1064 (10th Cir. 2008). 50

In re Winship, 397 U.S. 358 (1970). 79, 80

STATE CASES

Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006). 70, 82

Bender v. Board of Fire & Police Comm'rs, 254 Ill. App. 3d 488 (Ill. App. Ct. 1993). 59

Bennett v. State, 111 Nev. 1099, 901 P.2d 676 (1995). 5, 7

Browning v. State, 104 Nev. 269, 757 P.2d 351 (1988). 41

Buckley v. State, 95 Nev. 602, 600 P.2d 227 (1979). 85

Butler v. State, 120 Nev. 879, 102 P.3d 71 (2004). 69

Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). 80, 90

Champion v. State, 87 Nev. 542, 490 P.2d 1056 (1971). 85

Collier v. Legakes, 98 Nev. 307, 646 P.2d 1219 (1982). 45

Commonwealth v. Miller, 139 Pa. 77, 21 A. 138 (1891). 84

Commonwealth v. Weber, 59 Mass. 295 (1850). 84

Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997) . . . . . Passim

DePasquale v. State, 106 Nev. 843, 803 P.2d 218 (1990). 61

Dominguez v. State, 112 Nev. 683, 917 P.2d 1364 (1996). 63, 64

Downey v. State, 103 Nev. 4, 731 P.2d 350 (1987). 41

Dressler v. State, 107 Nev. 686, 819 P.2d 1288 (1991). 67

Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001). . . . . Passim

Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988). 41

Frevert v. Swift, 19 Nev. 363, 11 P.3d 273 (1886). 21

Garner v. State, 116 Nev. 770, 6 P.3d 1013 (2000). 80

Givens v. State, 99 Nev. 50, 657 P.2d 97 (1983). 8

Hanley v. State, 97 Nev. 130, 624 P.2d 1387 (1981). 66

Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003). 5, 10

Hern v. State, 97 Nev. 529, 635 P.2d 278 (1981). 80
Hernandez v. State, 124 Nev. __, 194 P.3d 1235 (2008). 63
Hickey v. Eighth Judicial District Court, 105 Nev. 729, 782 P.2d 1336 (1989). 76
Higby v. Sheriff, 86 Nev. 774, 476 P.2d 959 (1970). 66
Hollaway v. State, 116 Nev. 732, 6 P.3d 987 (2000). 61
Holmes v. State, 114 Nev. 1357, 972 P.2d 337 (1998). 84
Hooper v. State, 95 Nev. 924, 604 P.2d 115 (1979). 83
Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990). 41
Hsu v. County of Clark, 123 Nev. 625, 173 P.3d 724 (2007). 24, 70
James v. State, 105 Nev. 873, 784 P.2d 965 (1989). 85
Jimenez v. State, 112 Nev. 610, 918 P.2d 687 (1996). 27, 48
Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002). 58, 60, 61
Jones v. State, 101 Nev. 573, 707 P.2d 1128 (1985). 82
Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004). 70
Labastida v. State, 115 Nev. 298, 986 P.2d 443 (1999). 83
Lane v. State, 114 Nev. 299, 956 P.2d 88 (1998). 68
Lay v. State, 117 Nev. 1185, 14 P.3d 1256 (2001). 48
Leonard v. State, 117 Nev. 53, 17 P.3d 397 (2001). 88
Leslie v. State, 118 Nev. 773, 59 P.3d 440 (2002). 67
Lisle v. State, 113 Nev. 679, 941 P.2d 459 (1997). 41
Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004). 76
Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991). 84
Mann v. State, 118 Nev. 351, 46 P.3d 1228 (2002). 5
In re Marquez, 1 Cal. 4th 584, 822 P.2d 435 (1992). 7
Masonry & Tile Contractors Association v. Jolley, Urga, & Wirth, Ltd., 113 Nev. 737, 941 P.2d 486 (1997). 24
Mazzan v. Warden, 116 Nev. 48, 993 P.2d 25 (2000). 47, 48
McAllister v. State, 112 Wis. 496, 88 N.W. 212 (1901). 84

McConnell v. State, 125 Nev. __, 212 P.3d 307 (2009) 60, 62, 91
McCullough v. State, 99 Nev. 72, 657 P.2d 1157 (1983). 84
Minich v. People, 8 Colo. 440, 9 P. 4 (1885). 84
Mitchell v. State, 123 Nev. 1269, 149 P.3d 33 (2006). 83
Nicklo v. Peter Pan Playskool, 97 Nev. 73, 624 P.2d 22 (1981). 76
Nika v. State, 124 Nev. 103, 198 P.3d 839 (2008). 79, 80
P.E.T.A. v. Bobby Berosini, Ltd., 111 Nev. 431, 894 P.2d 337 (1995). 21, 58
Parodi v. Washoe Medical Ctr., 111 Nev. 365, 892 P.2d 588 (1995). 88
Paschall v. State, 116 Nev. 911, 8 P.3d 851 (2000). 67
Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001). 5, 24
Pertgen v. State, 110 Nev. 554, 875 P.2d 361 (1994). 5
Powell v. State, 108 Nev. 700, 838 P.2d 927 (1992). 80
Quillen v. State, 112 Nev. 1369, 929 P.2d 893 (1996). 70
Rice v. State, 113 Nev. 1300, 949 P.2d 262 (1997). 75
Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997). ..... Passim
Salazar v. State, 90 S.W.3d 330 (Tex. Crim. App. 2002). 72
Santillanes v. State, 104 Nev. 699, 765 P.2d 1147 (1988). 41
Scott v. United States, 559 A.2d 745 (D.C. 1989). 59
Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002). 83
Sheriff Humboldt County v. Acuna, 107 Nev. 664, 819 P.2d 197 (1991). 85
Shields v. State, 97 Nev. 472, 634 P.2d 468 (1981). 75
Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986). 90
Snyder v. Viani, 112 Nev. 568, 916 P.2d 170 (1996). 59
Somee v. State, 124 Nev. ___, 187 P.3d 152 (2008). 5
State ex re. Bullion & Exchange Bank v. Mack, 26 Nev. 430, 60 P. 862 (1902). 21
State ex rel. Shaw v. Noyes, 25 Nev. 31, 56 P. 946 (1899). 21
State v. Bennett, 119 Nev. 589, 81 P.3d 1 (2003). 47, 48

State v. Brooks, 661 N.E.2d 1030 (Ohio 1996). 56
State v. Carter, 66 Ariz. 12, 182 P.2d 90 (1947) 84
State v. Diar, 900 N.E.2d 565 (Ohio 2008). 56
State v. Haberstroh, 119 Nev. 173, 69 P.3d 676 (2003). 68
State v. O'Brien, 857 S.W.2d 212 (Mo. 1993). 83
State v. Pedersen, 802 P.2d 1328 (Utah App. 1990). 84
Stinnett v. State, 106 Nev. 192, 789 P.2d 579 (1990). 75
Summers v. State, 122 Nev. 1326, 148 P.3d 778 (2006). 58
Turner v. State, 114 Nev. 682, 962 P.2d 1223 (1998). 21, 22
Williams v. State, 103 Nev. 106, 734 P.2d 700 (1987). 70
Wilson-Bey v. United States, 903 A.2d 818 (D.C. 2006). 83

FEDERAL STATUTES

42 U.S.C. § 1983. 91

STATE STATUTES

Nev. Rev. Stat. § 34.820(1). 6
Nev. Rev. Stat. § 48.045(2). 77
Nev. Rev. Stat. § 50.155(a). 8
Nev. Rev. Stat. § 175.291(1). 48
Nev. Rev. Stat. § 175.291(1). 64
Nev. Rev. Stat. 175.554(3) 60
Nev. Rev. Stat. § 175.554(3). 61
Nev. Rev. Stat. § 176.355(2)(b). 92
Nev. Rev. Stat. § 177.055(2)(b). 64
Nev. Rev. Stat. §§ 179A.100(5), 179A.100(1)(b). 75
Nev. Rev. Stat. § 200.030(1)(a). 63
Nev. Rev. Stat. § 200.033(8). 62, 63, 64
Nev. Rev. Stat. §176.355(1). 92

I. JURISDICTION

This is an appeal from an order of the district court denying a petition for writ of habeas corpus in a capital case, Case No. C-106784. Notice of entry of decision and order were mailed on March 16, 2009. 48 JA 11648-11658.[1] A timely notice of appeal was filed on April 15, 2009. 48 JA 11659-11661. This Court has appellate jurisdiction over the instant appeal pursuant to Nev. Rev. Stats. §§ 34.575(1), 34.830, 177.015(1)(b), (3).

II. ISSUES PRESENTED FOR REVIEW

A. Did the District Court Err in Failing to Issue an Express Ruling on Mr. Rippo's Claim of Ineffective Assistance of Post-Conviction Counsel and in Failing to Permit Discovery and an Evidentiary Hearing to Demonstrate Deficient Performance of Counsel?

B. Did the District Court Err in Finding that Mr. Rippo Could Not Demonstrate Prejudice From Ineffective Assistance of Post-Conviction Counsel and the State's Suppression of Evidence Without Permitting Discovery and an Evidentiary Hearing?

C. Do the Substantive Constitutional Violations in Mr. Rippo's Petition Require the Reversal of His Convictions and Death Sentences?

III. STATEMENT OF THE CASE

Mr. Rippo was indicted by a grand jury on June 5, 1992, on charges of murder, robbery, possession of a stolen vehicle, possession of credit cards without the cardholder's consent, and unauthorized signing of a credit card. 1 JA 235-238. After several continuances, trial commenced on January 30, 1996. On February 7, 1996, the trial was continued until February 26, 1996, due to the state's failure to provide discovery to the defense. Mr. Rippo was found guilty of all the offenses against him on March 5, 1996. The penalty hearing commenced on March 12, 1996, and concluded on March 14, 1996, with verdicts of death on both first-degree murder counts. 17 JA 4037-4039. This Court affirmed Mr. Rippo's convictions and sentences of death on direct appeal. See Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997).

On December 4, 1998, Mr. Rippo filed a timely petition for writ of habeas corpus. Post-conviction counsel filed supplemental points and authorities on February 10,

[1]All citations to "JA" refer to the joint appendix of the parties. NRAP 30(a).

2004. An evidentiary hearing was held on August 20, 2004, and September 10, 2004, and the findings of fact and conclusions of law denying the petition were entered on December 1, 2004. This Court affirmed the denial of post-conviction relief, Rippo v. State, 122 Nev. 1086, 146 P.3d 279 (2006), and issued its remittitur on January 16, 2007.

On January 15, 2008, Mr. Rippo filed the instant petition for writ of habeas corpus. 19 JA 4415-4570, 20 JA 4571-5609. On April 25, 2008, the state filed a motion to dismiss and response to Mr. Rippo's petition. 27 JA 8747-8757, 36 JA 8673-8746. On May 21, 2008, Mr. Rippo filed an opposition to the state's motion, 37 JA 8758-8866, as well as a motion for leave to conduct formal discovery. 42 JA 9989-10014. On June 9, 2008, the state filed a reply the opposition to the motion to dismiss, 48 JA 11564-11574, and an opposition to Mr. Rippo's discovery motion. 48 JA 11558-11563. On September 16, 2008, Mr. Rippo filed a reply to the state's opposition to his motion for leave to conduct discovery. 48 JA 11575-11585. On September 22, 2008, the district court heard argument on the state's motion to dismiss and Mr. Rippo's motion for leave to conduct discovery. 48 JA 11586-11602.

On October 27, 2008, the district court entered a minute order granting the state's motion to dismiss and denying Mr. Rippo's discovery motion. 48 JA 11603. On November 17, 2008, the state submitted proposed findings of fact and conclusions of law which included the language from the district court's minute order, and which also contained findings of fact and law which were cut and pasted from the state's reply brief. 48 JA 11604-11411. On November 21, 2008, Mr. Rippo filed objections to the proposed order on the ground that some of the findings were contradictory, and that some of the findings were placed in the proposed order by the state were not fairly encompassed within the court's minute order. 48 JA 11612-11647. On March 5, 2009, the district court signed the state's proposed findings of fact and conclusions of law verbatim without providing any indication that the court considered the objections filed by Mr. Rippo. 48 JA 11648-11658. On March 16, 2009, notice of entry of the district court's order were mailed to Mr. Rippo. 48 JA 11648-11658. Mr. Rippo filed a timely notice of appeal. 48 JA 11659-11661.

IV. STATEMENT OF FACTS

A detailed statement of the facts of the instant case are summarized by this Court in its opinion on direct appeal. See Rippo v. State, 113 Nev. 1239, 1244-47, 946 P.2d 1017, 1021-22 (1997). The facts of the murder offense were related entirely by Mr. Rippo's co-defendant, Diana Hunt, who was given the benefit of the dismissal of all murder charges against her (and she was allowed to plead guilty to robbery), in exchange for her testimony against Mr. Rippo. 7 JA 1511-1518. As explained in more detail below, however, Mr. Rippo was never able to confront and cross-examine Ms. Hunt with evidence of her mental illness and use of psychotropic medication, as well as psychological data that was sought by the defense which demonstrated her dishonest character, 27 JA 6428-6404, because the trial court precluded the defense from obtaining or using those records. See pp. 76, infra.

Ms. Hunt's testimony was purportedly corroborated by three jail house informants who testified to incriminating statements that Mr. Rippo allegedly made to them, but the state failed to disclose material exculpatory and impeachment information that the factual details that they related were fed to them by the prosecutors and law enforcement. 27 JA 6435-6436, 27 JA 6437-6438. The other three witnesses against Mr. Rippo, Thomas Sims, Michael Beaudoin, and Thomas Christos all had pending criminal charges wherein they received benefits from the state that were not disclosed to the defense at the time of trial. See pp. 32-41, infra.

Other relevant facts will be stated in the argument section of Mr. Rippo's opening brief.

V. SUMMARY OF ARGUMENT

In the petition below, Mr. Rippo sought to vindicate his right to the effective assistance of post-conviction counsel under Crump v. Warden, 113 Nev. 293, 304-05, 934 P.2d 247, 253-54 (1997). As explained in the instant opening brief, there was no dispute between the parties below that Mr. Rippo's allegations of ineffective assistance of post-conviction counsel were timely, and that post-conviction counsel was ineffective because he failed to attempt to conduct any investigation of constitutional claims outside of the record

on direct appeal. The only dispute between the parties concerned whether Mr. Rippo could demonstrate prejudice from post-conviction counsel's ineffectiveness. 19 JA 11586-11602 [9/22/08 TT]. As explained below, effective counsel would have noticed several areas that required further investigation: (1) the brief on direct appeal contained naked allegations (presumably from recent news reports) indicating that the Clark County District Attorney's Office and state law enforcement were involved in a federal criminal investigation of the trial judge, Gerard Bongiovanni, which was contrary to the representations that were made at trial; (2) the trial record showed that virtually no mitigation evidence was presented on Mr. Rippo's behalf at sentencing; and (3) the record revealed several instances of prosecutorial misconduct in failing to disclose material exculpatory and impeachment information. Effective defense counsel would have conducted an investigation of these issues and would have discovered the same evidence that Mr. Rippo has set forth in the instant appeal. The district court's decision must therefore be reversed because there is no indication from the court's order that it ever considered Mr. Rippo's claim of ineffective assistance of post-conviction counsel, and, assuming that the order could be construed as applying controlling authority, Mr. Rippo respectfully submits that the court could not have denied his petition for failing to demonstrate prejudice without authorizing discovery and an evidentiary hearing.

In the instant appeal, Mr. Rippo has raised challenges to the effectiveness of trial, appeal, and post-conviction counsel, see Strickland v. Washington, 466 U.S. 668 (1984), as well as claims based on the substantive constitutional violations that counsel failed to raise or properly litigate. Mr. Rippo further alleges that the state law issues discussed below create a liberty interest in the application of state law under federal due process principles. See Hicks v. Oklahoma, 447 U.S. 343, 346 (1980). In addition, by demonstrating that counsel were ineffective, Mr. Rippo can demonstrate good cause and prejudice to receive a merits adjudication of the substantive federal constitutional issues that counsel failed to raise or properly litigate. See, e.g., Crump v. Warden, 113 Nev. 293, 304-05, 934

P.2d 247, 253-54 (1997).[2] Accordingly, the issue of "whether [Mr. Rippo] can show prejudice from the dismissal of his petition is intricately related to the merits of his claims." Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676, 679 (1995).[3] Mr. Rippo has therefore raised both his ineffective assistance of counsel claims and the substantive claims that counsel failed to raise to demonstrate cause and prejudice to excuse any purported procedural default, and to show that a cumulative consideration of all of the claims in the instant opening brief requires the reversal of Mr. Rippo's first-degree murder convictions and death sentences. See Chambers v. Mississippi, 410 U.S. 284 (1973); Parle v. Runnels, 505 F.3d 922, 930-34 (9th Cir. 2007).

VI. ARGUMENT

This Court reviews a district court's order granting the state's motion to dismiss and denying a petition for writ of habeas corpus without an evidentiary hearing de novo. See Mann v. State, 118 Nev. 351, 353-56, 46 P.3d 1228, 1229-31 (2002).[4] Because the district court denied all of Mr. Rippo's claims below on procedural grounds without permitting an evidentiary hearing, a de novo standard of review applies to all of the claims in Mr. Rippo's petition.

A. The District Court Could Not Conclude as a Matter of Law that Post-Conviction Counsel Was Effective Without Permitting Discovery and an Evidentiary Hearing.

The district court's decision must be reversed because the court could not conclude as a matter of law that post-conviction counsel was effective without permitting discovery and an evidentiary hearing. In his petition, Mr. Rippo alleged that post-conviction

---

[2]Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003); Edwards v. Carpenter, 529 U.S. 446, 451 (2002).

[3]Accord Pertgen v. State, 110 Nev. 554, 560, 875 P.2d 361, 364 (1994) ("because appellant's claims of ineffective assistance of counsel are directly related to the merits of his claims, we will consider appellant's claims on the merits to determine whether appellant received ineffective assistance of counsel."); overruled on other grounds, Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001).

[4]Cf. Somee v. State, 124 Nev. ___, 187 P.3d 152, 158 (2008) (adequate record necessary for clear error review of factual findings).

counsel's ineffectiveness established good cause to overcome the procedural default bars that were raised by the state. 19 JA 4424-4430. See, e.g., Crump v. Warden, 113 Nev. 293, 304-05, 934 P.2d 247, 253-54 (1997). In its motion to dismiss, the state ignored Mr. Rippo's allegations of good cause. 36 JA 8673-8746, 37 JA 8747-8757. In his opposition, Mr. Rippo explained that post-conviction counsel was appointed to represent him pursuant to Nev. Rev. Stat. § 34.820(1), and therefore, under Crump, if he "can prove that [post-conviction counsel] committed an error which rises to the level of ineffective assistance, then [he] will have established 'cause' and 'prejudice'" to overcome the procedural default rules invoked by the state. 37 JA 8758-8866 (citing Crump, 113 Nev. at 304-05, 934 P.2d at 254). At the hearing on the state's motion to dismiss, the state acknowledged that Mr. Rippo's allegations of good cause were raised in a "timely manner," 48 JA 11598 [9/22/08 RT at 47], and that Mr. Rippo could overcome the procedural default rules by showing that post-conviction counsel was ineffective:

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

48 JA 11598 [9/22/08 RT at 46-47]. The state and Mr. Rippo were (and are) in complete agreement that his allegations of ineffective assistance of post-conviction counsel are both timely raised and provide cause to overcome the state procedural default bars.

The state also never attempted to controvert Mr. Rippo's allegations that post-conviction counsel was ineffective. 48 JA 11644-11645 [9/22/08 RT at 14-17]. In both his petition and his opposition to motion to dismiss, Mr. Rippo alleged that post-conviction counsel was ineffective because he made no attempt whatsoever to investigate or raise constitutional claims outside of the record on direct appeal. 19 JA 4445-4461, 4462-4478, 4519-4523, 4527-4529, 20 JA 4579-4591, 37 JA 87-58-8764. Specifically, post-conviction counsel did not interview any witnesses, he did not send out any record requests, he did not ensure that he obtained trial counsel's entire file, he did not file a discovery motion, he did

not seek investigative expenses, and he sought no expenses for hiring a mental health expert. The supplemental brief filed by post-conviction counsel did not address any issues outside of the record on direct appeal, and consisted of no more than twenty pages of argument which failed to even contain citations to the trial record or supporting exhibits. See 38 JA 9128-9073 (supplemental points and authorities)], 38-9074-9185 [336 (opening brief on appeal)].[5] In short, counsel treated the habeas proceedings as nothing more than another review of the record created at trial. That approach is antithetical to competent counsel's duty in a habeas proceeding, which is to go beyond the record to establish constitutional violations that the record does not show or that were not adequately litigated by trial and appellate counsel. To cite only the most obvious instance, resort to evidence outside the record is virtually always required to demonstrate prejudicial ineffective assistance of trial counsel.[6] It is axiomatic that a reasonable investigation must take place before counsel can make a strategic choice regarding which issues to include in a habeas petition. See Silva v. Woodford, 279 F.3d 825, 846-47 (9th Cir. 2002); Correll v. Ryan, 465 F.3d 1006, 1015-16

---

[5]Post-conviction counsel's failure to include relevant citations to the record and exhibit references caused this Court to deny Mr. Rippo's claims on appeal. Of those issues raised by counsel that the Court deemed "worthy of comment," it rejected Mr. Rippo's claim that trial counsel was ineffective in failing to object to a 46 month delay because counsel did "not support this claim with specific factual allegations, references to the record, or citation to relevant authority. Nor does he describe the informant testimony or explain why it was prejudicial." Rippo v. State, 122 Nev. 1086, 146 P.3d 279, 286 (2006). This Court rejected post-conviction counsel's claim that trial counsel was ineffective in failing to object to the admission of prison photographs of Mr. Rippo because counsel did "not support this claim with references to the record, and the trial transcript shows that his counsel unsuccessfully objected to the admission of the photo." Id. The court rejected Mr. Rippo's claim that his jury lacked a fair cross-section of the community because counsel "did not present any evidence that the representation of African Americans in venires is unfair and unreasonable in relation to their numbers in the community, nor did he present evidence that any under representation resulted from their systemic exclusion." Id. at 286-87.

[6]Strickland v. Washington, 466 U.S. 668, 699-700 (1984); Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995); Lambright v. Schriro, 490 F.3d 1103, 1121 (9th Cir. 2007) ("we must 'compare the evidence that actually was presented to the [sentencer] with the evidence that might have been presented had counsel acted differently,' [citation], and evaluate whether the difference between what was presented and what could have been presented is sufficient to 'undermine confidence in the outcome' of the proceeding [citation]."); In re Marquez, 1 Cal.4th 584, 603, 822 P.2d 435, 446 (1992) ("To determine whether prejudice has been established, we compare the actual trial with the hypothetical trial that would have taken place had counsel competently investigated and presented the . . . defense. [Citation]").

(9th Cir. 2006) ("An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy."). Post-conviction counsel's failure to investigate and raise the issues contained in the instant petition therefore cannot be characterized as a strategic choice to which deference is owed, because counsel did not know about them and could not have made a strategic choice to omit them. The state did not attempt to controvert these allegations in its briefing or at the hearing below, these allegations are not addressed at all in the district court's order, and these allegations must therefore be accepted as true by this Court. The only point of contention between the parties was whether Mr. Rippo could demonstrate prejudice from post-conviction counsel's ineffectiveness. 48 JA 11635 [9/22/08 RT at 14-17].

Mr. Rippo further alleged that post-conviction counsel was ineffective in failing to raise appropriate objections to the limitations that were placed on the evidentiary hearing by the court which prevented Mr. Rippo from receiving a full and fair hearing. 19 JA 4430, 20 JA 4579-4591. Specifically, post-conviction counsel failed to object to the habeas judge's violation of the state law exclusionary rule, see Nev. Rev. Stat. § 50.155(a), wherein trial counsel were both allowed to testify at the same time and were instructed by the court "to be close enough to confer with one another." 19 JA 4322 [8/20/04 TT at 4] ("it may be that you'll want to confer and try to jog your memories."); see Givens v. State, 99 Nev. 50, 55, 657 P.2d 97, 103 (1983). At that point, the evidentiary hearing was reduced to a sham and a farce: the evidentiary hearing consisted of the habeas judge arguing with post-conviction counsel without permitting him to ask questions of trial counsel; multiple instances of post-conviction counsel acknowledging that he did not have a sufficient understanding of the trial record[7]; testimony from trial counsel regarding purported strategic

[7]During the hearing, it became apparent that post-conviction counsel did not have an understanding of the trial record because he was simply reading a list of issues of ineffective assistance that had been pleaded by previous counsel, David 19 JA 4338 [8/20/04 TT at 66] ("I am relying upon the supplement that was written by prior counsel, Mr. Scheick [sic]."); 19 JA 4342 [id. at 84] ("Mr. Sheik [sic] wrote this and this is what he has put in [the petition].").

considerations that were repelled by the trial record[8]; and collusive testimony by counsel. See generally 19 JA 4321-4346 [8/20/04 TT]. Mr. Rippo alleges that post-conviction counsel was ineffective in failing to object to violation of the state law exclusionary rule and in failing to make himself familiar with the trial record so that he could be adequately prepared for the evidentiary hearing.

In light of the respective positions of the parties, the district court's failure to make any express finding on Mr. Rippo's claim of ineffective assistance of post-conviction counsel requires reversal. The term "post-conviction counsel" does not appear in the district court's minute order, 48 JA 11603, and it is only mentioned in passing in its findings of fact and conclusions of law which were drafted by the state. 48 JA 11604-11611. Assuming that the district court's order could be construed as acknowledging and applying controlling authority, the court's order is internally inconsistent in rejecting Mr. Rippo's claims because they were not raised in a previous petition without reconciling that finding with Mr. Rippo's allegations that post-conviction counsel was ineffective:

---

[8]Specifically, trial counsel testified that they did not interview Thomas Sims during the break that the trial court ordered to permit Sims to be interviewed because he refused, 19 JA 4327 [8/20/04 TT at 22-23], when the trial record showed that Sims and his attorney were willing to meet with defense counsel but they did not follow up on the request, 11 JA 2434-2405 [2/28/96 TT at 30-31]; trial counsel testified that they did not object to a prejudicial prison photograph of Mr. Rippo because they were "positive it didn't have any prison or jail markings on it," 19 JA 4333 [8/20/04 TT at 47], when the actual photo did in fact show Mr. Rippo in prison clothing, 36 JA 8597 [Ex. 99 at trial]; trial counsel testified that it "helped us and I left it alone" when they failed to cross-examine Dr. Greene regarding his testimony about the absence of stun marks, 19 JA 4437 [8/20/04 TT at 61], when he testified before the grand jury that a stun gun would have left marks even if the victims were wearing clothing, and when the prosecutor argued in closing that the absence of stun marks could be explained away because the victims were wearing clothing, 14 JA 3337-3338 [3/5/96 TT at 216-17]; trial counsel testified that they called Mr. Lukens to impeach Mr. Sims' trial testimony, 19 JA 4337 [8/20/04 TT at 63-64], when Mr. Lukens' testimony was never placed before the jury; and trial counsel testified that they did not object to Mr. Levine's testimony as a Sixth Amendment violation because they did not "recall Mr. Levine getting anything after he talked to the state," 19 JA 4340 [8/20/04 TT at 74-76], when the record showed that all of the details of offense that were related by Levine came from his second statement after he had become an agent for the state, 12 JA 2818-2825 [2/29/96 TT at 188-95].

On post-conviction appeal, counsel inexplicably failed to raise any of the constitutional claims discussed above wherein the strategic justification offered by trial counsel was repelled by the trial record.

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

48 JA 11650. Mr. Rippo specifically filed objections to the district court's proposed order on the ground that it has always been his contention that issues in his petition could have been raised in his first post-conviction petition if counsel had performed effectively. 48 JA 11612-11647. The district court, however, subsequently signed the findings of fact and conclusions of law without giving any indication that it considered Mr. Rippo's objections, and without making any express ruling on his claim of ineffective assistance of post-conviction counsel.

As a matter of law, reversal is required when it is unclear whether the district court acknowledged and applied controlling law to Mr. Rippo's petition. Cf. Hathaway v. State, 119 Nev. 248, 253-55, 71 P.3d 503, 506-08 (2003). As explained above, the district court's own findings strongly indicate that post-conviction counsel was ineffective in failing to raise the issues contained in Mr. Rippo's instant petition in the first state petition. In such circumstances, the district court's failure to make an express ruling on Mr. Rippo's claim of ineffective assistance of post-conviction counsel requires reversal.

B. The District Court Could Not Conclude as a Matter of Law that Mr. Rippo Suffered Insufficient Prejudice from Post-Conviction Counsel's Ineffectiveness and the State's Suppression of Evidence Without Authorizing Discovery and an Evidentiary Hearing

As explained above, the district court's decision must be reversed because it failed to make any finding on Mr. Rippo's claim that he was deprived of effective assistance of post-conviction counsel. Assuming that the district court's decision could be construed as applying controlling law, however, its decision still must be reversed because the court could not conclude in the procedural posture of a motion to dismiss that Mr. Rippo did not suffer prejudice without authorizing discovery and an evidentiary hearing.

///

1. Mr. Rippo Can Show Good Cause and Prejudice to Re-Raise His Claim of Judicial Bias Because the Facts are Substantially Different than they were on Direct Appeal. U.S. Const. amends. V, VI, VIII, XIV.

In his petition, Mr. Rippo alleged that his convictions and death sentences are invalid due to the judicial bias of the trial court, the Honorable Gerard Bongiovanni. 19 JA 4415-4461. Specifically, Mr. Rippo alleged that the trial judge was biased because (1) he was being investigated by the state of Nevada and its agents in connection with a federal criminal investigation which he knowingly failed to disclose; (2) he knew that the Clark County District Attorney's Office was involved in the investigation but failed to disclose that fact; and (3) he knew the victim of the stolen credit card and stolen vehicle offenses, Denny Mason, but did not disclose that fact as it would have incriminated him in the federal investigation. The district court rejected Mr. Rippo's allegations of good cause to re-raise the claim, which were based on ineffective assistance of post-conviction counsel and the state's failure to disclose evidence, cf. Banks v. Dretke, 540 U.S. 668, 696-98 (2004) (reliance on representations of prosecutor allows petitioner to overcome state procedural default), on the ground that the claim was barred by the law of the case doctrine. 48 JA 11604-11611. See Rippo v. State, 113 Nev. 1239, 1248-50, 946 P.2d 1017, 1023-24 (1997). As explained below, Mr. Rippo alleges that the law of the case doctrine cannot be applied because (1) the facts before this Court are substantially different than they were on direct appeal, and (2) the facts before this Court on direct appeal were based on false representations of the state and the trial judge.

a. The State's Involvement in the Investigation of Judge Bongiovanni

On direct appeal, this Court's rejection of Mr. Rippo's claim of judicial bias was premised on the factual finding that the state of Nevada was not involved in the criminal investigation of the trial judge. Specifically, this Court found that no "evidence exists that the State was either involved in the federal investigation or conducting its own investigation of Judge Bongiovanni." Rippo, 113 Nev. at 1248, 946 P.2d at 1023. This Court therefore

concluded that no "factual basis exists for Rippo's argument that Judge Bongiovanni was under pressure to accommodate the State or treat criminal defendants in state proceedings less favorably." Id. As explained below, this Court's finding that the State of Nevada was not involved in the investigation of the trial judge and that the Clark County District Attorney's Office was not conducting its own investigation of him was based on false representations of state actors.

When the issue of the judge's disqualification was raised at trial, the state falsely represented that it was not involved in the federal investigation and was not conducting its own investigation. On February 5, 1996, trial counsel raised a motion to disqualify the trial court on the grounds that they had just learned in the newspaper that the judge faced an imminent indictment in federal court, and that "the State is – obviously has to cooperate with the feds in reviewing cases of alleged bias, that there may be pressure placed on the Court to show favor to the State." 5B JA 1401-004 to 1401-005; 11 JA 2418-2419 [2/5/96 TT at 4-5; 2/28/96 TT at 14-15]. When trial counsel admitted that they had "no idea what's going on in your case other than the fact the – ," the trial court interrupted counsel and said "Neither do I." Id. at 2409-2410. The trial court then represented that "I know as much as you do, what the newspaper writes." Id. at 2410. In response, Mr. Seaton, the prosecutor, represented that he had discussed the matter with the District Attorney, Stewart Bell and Chief Deputy District Attorney Charles Thompson and asked them: "Do you know what's going on? And they said not really . . . ." Id. at 2411. Mr. Seaton further represented that Mr. Bell disclosed that the extent of his knowledge about the case was limited to "when the search warrant occurred, that the feds called him and – just as a sort of courtesy call . . . ." Id. Mr. Seaton represented that Mr. Bell specifically instructed the federal authorities not to tell him anything about the case because of his role as a District Attorney before a sitting judge. See id.

Next, Mr. Seaton made the materially false representation that the Clark County District Attorney's Office had nothing to do with the federal investigation of the trial judge:

And so, I think the major thing that I want to point out, it is two

> different governmental entities. The State of Nevada, in terms of the District Attorney's Office at least, and through Stu [the District Attorney], I can speak for our office, we have nothing to do with any sort of – what we're reading about in the newspapers, because that's all I know, is the same thing that you read.
>
> We don't have any agreements with them, any working arrangements with them. We don't have anything with them and don't anticipate having any.
>
> And so, I can't see that the State of Nevada, in here before you now, would have any emphasis one way or the other on any rulings or decisions that you might make. In fact, we want to make it abundantly clear that there is nothing like that going on. And we just – we want to say what we believe is true anyway, which is that you are not going to take sides.

5B JA 1401-008 [2/5/96 TT at 8]. Mr. Seaton further represented that "I can say as an officer of the Court, we are not – and that is through Stu Bell, and if you want further words out of him, he will be happy to give them – but we just don't think – we just don't' think that there is anything to this motion . . . ." Id. at 1401-009. Mr. Seaton again represented that "I learned from by boss this morning, Stu Bell, that he, nor any other person in our office, to his knowledge, has had contact." Id. at 1401-011.

Next, the trial judge falsely represented that he was not aware whether the Las Vegas Metropolitan Police Department was involved in the federal investigation. When the issue arose, the trial court stated that he did not know whether Metro was involved in the investigation:

> The Court: Well, would there be any difference if Metro conducted an investigation? I don't know. I heard a rumor to that effect, but I don't know if it's true.
>
> Mr. Wolfson: It's very common for Metro's intelligence –
>
> The Court: I think I read something in the paper to that effect in one of those articles.
>
> Mr. Wolfson: It's very common for Metro's intelligence units to work with federal law enforcement agencies in a joint effort. I don't know whether they are doing that in this case or not.
>
> The Court: I don't know either.

5B JA 1401-011[2/5/96 TT at 11]. The record created at trial therefore consisted of (1) the

state's representations that neither it nor its agents were involved in any investigation of the trial judge, and (2) the trial judge's representations that he was unaware of any state involvement.

On direct appeal, Mr. Rippo raised the issue of the state's involvement in the criminal investigation of Judge Bongiovanni as requiring disqualification. See Rippo v. State, 113 Nev. 1239, 1248-49, 946 P.2d 1017, 1023 (1997).[9] Specifically, Mr. Rippo raised the claim that the district court erred in refusing to grant him an evidentiary hearing in connection with his motion for a new trial to determine "whether there was any involvement by the District Attorney's office in the investigation and indictment that should have been revealed on the record before Judge Bongiovani was allowed to proceed with the capital trial." 23 JA 5349-5452. Mr. Rippo alleged that the District Attorney's Office was a necessary participant in a sting operation against the judge which "involved a manipulation of the random assignment of cases so that particular cases would track to his department. If the office of the District Attorney were involved in any aspect of this situation then the representations put on the record during trial were inaccurate." 23 JA 5453-5488. Appeal counsel did not include any citation to the record to support this contention, presumably because recent news reports only vaguely hinted at the time that the Clark County District Attorney's Office might be involved in the sting operation.

In the instant petition, Mr. Rippo presented overwhelming evidence that the state was in fact involved in the federal investigation of the trial judge and that the judge

---

[9]The state's false and materially misleading representations regarding its involvement in the investigation of the trial judge continued on direct appeal. In its appeal brief, the state falsely represented that "the State admittedly had nothing to do with the federal probe. (11 ROA 8). The State was not in a position to do anything to Judge Bongiovanni. The judge had no reason to worry about 'what the State was going to do to him. Completely different entities were involved.'" 32 JA 7564, see 32 JA 7561. The state further made misleading representations that the District Attorney's personal involvement in the case against Bongiovanni was limited to notice after the fact of the search warrant that was executed on his home followed by his instructions not to be informed by the federal authorities of anything else about the case. 32 JA 7561. As explained above, this Court ultimately rejected Mr. Rippo's claim of judicial bias by adopting as fact the representations of the state and the trial court.

knowingly misled trial counsel on this issue. Contrary to the state's representations, the Clark County District Attorney's Office and the Chief Judge of the Eighth Judicial District Court were an essential component of the federal sting operation to bait Judge Bongiovanni into taking bribes from the litigants before him. Specifically, a "supervising attorney" in the Clark County District Attorney's Office obtained a bogus indictment in state court against Terry Salem, a government informant, and worked with the Chief Judge of the court to manipulate the random assignment system to send Salem's case to Judge Bongiovanni's department to see if the judge would accept a bribe from Salem. In the United States Attorney's trial memorandum in Bongiovanni's case, it expressly noted as follows: "With the assistance of the District Attorney's office, and as part of the undercover operation, Salem was indicted by a state grand jury on December 15, 1994 for theft charges relating to the California Federal Bank fraud, and the case was assigned to Bongiovanni." 27 JA 6448. A defense motion filed by Bongiovanni's attorneys specifically sought dismissal of the indictment against him on the ground that the government's sting operation constituted outrageous government conduct. 27 JA 6484-6511. In that motion, the defense cited to the affidavit of FBI case agent Jerry Hanford wherein Agent Hanford represented that "a supervisory attorney with the Clark County District Attorneys Office has agreed to present a state Grand Jury with an Indictment charging SALEM with forgery and obtaining money under false pretenses in regard to the fraud committed against California Federal Bank. Under the state system, the District Attorneys Office must send the target a notice of his target status and invite him to appear before the Grand Jury." 27 JA 6488-6489. Agent Hanford further explained that the same supervising attorney was necessary to manipulate the random assignment process to ensure that the case was sent to Judge Bongiovanni's department: "In any event, the deputy district attorney who is cooperating in this investigation said that he can ensure that the case is assigned to Bongiovanni if Flangas and/or Bongiovanni do not do it themselves, or the case is not randomly assigned to him, without Bongiovanni being alerted to that fact." 27 JA 6489.

///

At Bongiovanni's criminal trials, Terry Salem, LVMPD Detective John Nicholson, and Special Agent Jerry Hanford all testified about the roles of the Clark County District Attorney's Office and state law enforcement in the investigation of Bongiovanni. Salem testified that he became a government informant and that it was his understanding that a bogus indictment would be presented against him in state court and routed to Bongiovanni's department. 20 JA 66820-6673, 29 JA 6892, 6899. Metro police detective John Nicholson testified that he was involved in every aspect of the criminal investigation of Judge Bongiovanni. Nicholson testified that he was involved in the surveillance operation wherein Terry Salem handed the bribe money to Paul Dottore – the alleged intermediary between Salem and Bongiovanni – who also became a government witness against Bongiovanni at his criminal trial. 29 JA 6772-6773. Nicholson testified that he was present during all witness interviews. 29 JA 6812. Nicholson testified that he and Mike Abbot from the Nevada Division of Investigation were personally involved in the execution of a search warrant on Bongiovanni's property in October of 1995. 29 JA 6775-6790. Nicholson testified that he was the first person to walk into Bongiovanni's residence wearing his yellow police jacket which clearly identified him as a Metro police officer. 29 JA 6828. Nicholson testified that he was the first person to make contact with Bongiovanni in his residence and was the person who questioned him about the bribe money. 29 JA at 6791, 6802. Nicholson was also present when the authorities pulled over Paul Dottore after he left Bongiovanni's home. 29 JA 6780. Special Agent Hanford corroborated all of Detective Nicholson's testimony regarding state law enforcement's involvement in the investigation of Judge Bongiovanni in his testimony. 30 JA 6858, 7154, 7250.

When testifying in his defense, Bongiovanni admitted that he had actual knowledge at the time of the search warrant that Metro was involved in the federal investigation. Mr. Bongiovanni testified that he saw Nicholson as the first person entering his home wearing a Metro jacket. 31 JA 7303. ("the first person I saw was Detective Nicholson, and like they stated they were all in their FBI garbs and Metro had his raincoat on with the letters, and as I turned the corner there was Nicholson, he says I have a warrant

here."). At his second trial, Bongiovanni testified that Detective Nicholson was wearing a jacket that "had 'Metro' or 'Las Vegas Police Department'" inscribed on it. 33 JA 7916-7917, see 31 JA 7476. Bongiovanni testified that "Nicholson was the one that was very, very loud. I'm not saying it was like a drug bust, but he was very loud and he put the fear of God in my kids, I'll tell you." 34 JA 8127, 8130 ("Nicholson was right in my ear, I mean – and he could talk loud and it seemed like screaming to me, shouting."), 34 JA 8131 ("all's I could hear was Nicholson shouting in my ear."). Mr. Bongiovanni also testified that Nicholson was the officer who obtained the marked bribe money from his back pants pocket. See 34 JA 8113; 33 JA 7920-7921. Therefore, Bongiovanni's representations at Mr. Rippo's trial that he did not know whether Metro intelligence was involved in the investigation were untrue.

Bongiovanni's testimony and actions directly before Mr. Rippo's trial demonstrate that he was also aware of the involvement of the Clark County District Attorney's Office in the federal investigation. After the execution of the search warrant on October 17, 1995, Bongiovanni hired attorney Tom Pitaro, Esq., who immediately interviewed Paul Dottore, the government informant and alleged intermediary between Salem and Bongiovanni, and obtained information about the bribery investigation. 34 JA 8190; 34 JA 8032; 34 JA 8050-8051. Less than a month later, on November 7, 1995, Judge Bongiovanni disqualified himself from adjudicating Salem's criminal case to avoid the appearance of impropriety and implied bias. 32 JA 7710-7713. Contained within the district court case file for Salem was an indictment which was sought by Ulrich Smith, a deputy district attorney within Clark County District Attorney's Office. 38 JA 9191. The indictment listed the lead witness against Mr. Salem as Detective John Nicholson from Metro Intelligence. See id. Also contained within the district court file was the grand jury transcript showing that the District Attorney's Office presented the testimony of Detective Nicholson as the lead witness against Salem. 38 JA 9209-9230. On January 10, 1996, the District Attorney's Office dismissed the state criminal case against Salem. 32 JA 7712. This sequence of events demonstrates that Judge Bongiovanni knew about the Clark County District Attorney's role in the sting operation directly before Mr. Rippo's trial which began

on January 30, 1996.

Mr. Rippo presented further evidence below that the Clark County District Attorney's Office was conducting its own internal audit investigation of Judge Bongiovanni's cases at the time of Mr. Rippo's trial. At the time, media reports depicted Bongiovanni as a "liberal" who was soft on criminals. 33 JA 7906. According to the article, "The district attorney's office is reviewing its cases before Bongiovanni to determine if the judge's alleged biases affected the prosecution." Id. The same article shows that the District Attorney's Office considered Bongiovanni to be a "liberal" when it came to judging: "'We probably didn't enjoy trying cases in his department as much as we did others,' said Deputy District Attorney Chuck Thompson . . . . 'He wasn't our first choice to try a close case in front of.'" Id. Another article stated that "Clark County District Attorney J. Charles Thompson said Thursday the office is reviewing the case of Kevin Brown, the 30-year-old son of Las Vegas U.S. Marshal Service chief Herb Brown." 33 JA 7904-7906. No information regarding the District Attorney's internal audit investigation were ever disclosed by the state at trial.

The sequence of events, in combination, demonstrate that the average person in Judge Bongiovanni's position would have been biased against Mr. Rippo. Bongiovanni became aware of the nature of the federal investigation on October 17, 1995. Bongiovanni's attorney immediately began investigating the case and obtained inside information that was not known to the general public about the investigation. 34 JA 8190; 33 JA 7916; 34 JA 8050-8051. Bongiovanni apparently acted on that inside information by disqualifying himself from Terry Salem's case on November 7, 1995. Mr. Rippo alleges on information and belief that the federal grand jury convened in December of 1995. According to newspaper accounts, Bongiovanni had even been offered a guilty plea by the federal authorities directly before Mr. Rippo's trial. Jeff German, Bongiovanni Braces for Tough Fight Over Corruption Charges, Las Vegas Sun, April 18, 1996, at 1A. In addition, the District Attorney's Office, at the direction of Charles Thompson, the same person that Mr. Seaton allegedly consulted who said that the District Attorney's Office knew nothing about

the offense, was actually conducting an internal audit of all criminal cases that had come before Bongiovanni. Finally, Judge Bongiovanni's material omissions at Mr. Rippo's trial regarding the non-existence of the information contained above (when the issue of his disqualification was raised) demonstrate both apparent and actual bias.

b. Judge Bongiovanni's Knowledge of the State's Victim Witness Denny Mason

Mr. Rippo further alleged below that the trial judge was biased due to his failure to disclose his relationship to the state's victim witness, Denny Mason. 19 JA 4444. Mr. Mason was the owner of the credit cards and motor vehicle that were taken from the victim, Denise Lizzi, and purportedly used by Mr. Rippo and Diana Hunt. 9 JA 2080 [2/26/96 TT at 26-76]. In a motion for a new trial, Mr. Rippo alleged that Bongiovanni failed to disclose his business relationship with Denny Mason's business partner, Ben Spano, who was purportedly a member of the Buffalo La Cosa Nostra. 32 JA 7714-7719. Mr. Rippo specifically requested an evidentiary hearing in connection with the motion. See id. Mr. Rippo's request for an evidentiary hearing was denied by the trial court, the Honorable James Brennan, who was substituted for Judge Bongiovanni after his indictment.

As explained below, Mr. Rippo proffered newly discovered evidence in the instant petition showing that the trial judge failed to disclose his relationship to Denny Mason because it would have incriminated him in the very same federal investigation that was pending at the time of Mr. Rippo's trial. Just as above, this Court's decision on direct appeal denying relief on Mr. Rippo's claim of judicial bias was predicated upon the concealment of evidence showing the relationship between Bongiovanni and Mason. On appeal, Mr. Rippo argued that Judge Bongiovanni's failure to disclose his relationship to Mason "through Buffalo mob associate Ben Spano" merited disqualification. Rippo v. State, 113 Nev. 1239, 1249, 946 P.2d 1017, 1023-24 (1997). The absence of supporting information led the Court to conclude again, erroneously, that "no evidence exists, beyond the allegations set forth by the defense, that Judge Bongiovanni knew either Denny Mason or his alleged business partner." Rippo, 113 Nev. at 1249, 946 P.2d at 1024. In addition, the court denied Mr.

Rippo's motion for an evidentiary hearing to determine "the extent of Judge Bongiovanni's relationship with the business partner of Mason." Id. at 1250 n.3, 946 P.2d at 1024 n.3.

A material portion of the federal criminal allegations against Bongiovanni included the claim that the trial judge conducted favors for Ben Spano in the form of own recognizance releases and fixing traffic tickets for Spano and his associates, including Denny Mason.[10] Specifically, the indictment against Bongiovanni alleged that he improperly granted benefits to Spano. 32 JA 7738-7746. Ben Spano was also specifically referenced in the United States Attorney's trial memorandum. 27 JA 6445. One of the individuals for whom Spano obtained benefits from Bongiovanni was Denny Mason. Specifically, an authorization for a wiretap order, dated October 11, 1995, included the memorialization of a phone call from Mr. Spano to Judge Bongiovanni's chambers. 33 JA 7752-7756. In the conversation, "Ben Spano (Buffalo LCN ["La Cosa Nostra"] associate called Bongiovanni re his brother in Henderson jail; guy OR'd; also talked to Woofter re Denny Mason's ticket)." Id.[11] Mr. Rippo alleges on information and belief that Ben Spano personally introduced Denny Mason to Bongiovanni at a social event. At trial, Bongiovanni incorrectly represented that there was no connection between the federal investigation and the instant case. 9 JA 2068 [2/28/96 TT at 14].

///

---

[10]During Agent Hanford's testimony, the government admitted Exhibit 113, which was a recording of Ben Spano's phone call to Judge Bongiovanni's home as described above. 35 JA 8337. The government also admitted Exhibit 114, which compromised seven recorded phone conversations relating to Bongiovanni's purported favors for Spano. 35 JA 8337-8338. In his testimony, Mr. Bongiovanni testified that the own-recognizance release that he obtained for Spano's son was legitimate because he believed that Spano would make his court appearances. 31 JA 7346. On cross-examination, Bongiovanni admitted that he knew Mr. Spano: "Q He's a friend like Ben Spano was a friend, right? A – but we weren't – no, no. I knew Ben Spano a little better than Mr. O'Neill . . . .").

[11]Mr. Spano again called Bongiovanni on December 29, 1994, at his home and this phone call was intercepted by the FBI. 34 JA 8237. Bongiovanni's secretary, Diane Woofter, called Ben Spano on February 13, 1995, and this phone call was also intercepted by the FBI. 34 JA 8240. In discovery, the defense mentioned allegations from Agent Hanford's affidavit that Spano was a member of the Buffalo La Cosa Nostra who operated companies in Las Vegas. 35 JA 8248.

Mr. Rippo was prevented from developing the facts necessary to litigate his claim of judicial bias due to the concealment of evidence to support his claim by state and federal authorities. In a motion for a new trial, Mr. Rippo argued that he was entitled to an evidentiary hearing in support of his motion to show that Judge Bongiovanni should have disqualified himself due to his relationship with Denny Mason and Ben Spano, a member of the Buffalo mafia. 32 JA 7717. In opposition, the state argued that Mr. Rippo's motion should be denied due to the representations made by Judge Bongiovanni on the record at trial, 35 JA 8402, the same representations that were shown above to be untrue. The trial court, Judge Brennan, who was substituted for Judge Bongiovanni after his indictment, summarily denied the motion for a new trial without a hearing.

c. The Law Relating to Judicial Bias

Clearly established state and federal law dictate that Judge Bongiovanni should have been disqualified from adjudicating Mr. Rippo's case when he knew he was the target of a criminal investigation involving the state and law enforcement, and where he knew the victim of the stolen credit card/stolen vehicle offenses. The applicable standard is whether the facts "would cause a reasonable person to wonder whether [the judge] could be completely neutral and detached when deciding" the case. See P.E.T.A. v. Bobby Berosini, Ltd., 111 Nev. 431, 438, 894 P.2d 337, 341 (1995); Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2263 (2009) ("probability of bias" "requires a judge's recusal" under due process clause).[12] The ethical rules applicable to judges likewise require disqualification when "the judge's impartiality might reasonably be questioned." Canon 3E(1) of the Code of Jud. Cond. The High Court has articulated the legal standard as whether the "situation is one 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true.'" Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822

---

[12]See, e.g., Turner v. State, 114 Nev. 682, 686-88, 962 P.2d 1223, 1225-26 (1998) (judge disqualified from adjudicating case when previously participated as prosecuting attorney); State ex re. Bullion & Exchange Bank v. Mack, 26 Nev. 430, 60 P. 862, 863 (1902) (judge's personal interest in probate estate required disqualification); State ex rel. Shaw v. Noyes, 25 Nev. 31, 56 P. 946, 950 (1899); Frevert v. Swift, 19 Nev. 363, 11 P.3d 273, 274 (1886).

(1986) (citing Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972)). Once it is established that a judge is biased, reversal of a conviction is automatic and no harmless error analysis is permitted.[13]

In Mr. Rippo's case, "a reasonable person with knowledge of all of the facts pertaining to the nature of the indictment would question the ability of a judge facing prosecution to remain impartial as the presiding jurist in a criminal case." United States v. Jaramillo, 745 F.2d 1245, 1248 (9th Cir. 1984) (affirming grant of mistrial on grounds that district judge was indicted during trial). Mr. Rippo's case provides an even stronger basis for disqualifying Judge Bongiovanni than Jaramillo because Judge Bongiovanni was being set-up and investigated by the very same office that was prosecuting Mr. Rippo, see Jaramillo, 745 P.2d at 1248 (noting disqualification of United States Attorney's Office from District of Nevada from criminal investigation of judge from District of Nevada), cf. Getsy v. Mitchell, 495 F.3d 295, 312 (6th Cir. 2007) (finding no bias by trial judge when special prosecutor from another county prosecuted judge to avoid appearance of bias), and because the judge in Jaramillo promptly brought all of the relevant facts that were known to him regarding the criminal investigation to the attention of the parties, unlike Judge Bongiovanni in the instant case who concealed the extent of his knowledge of the state's involvement in the investigation when the issue of his disqualification arose. See, e.g., Franklin v. McCaughtry, 398 F.3d 955, 961 (7th Cir. 2005) (judge's "obvious reluctance to admit" to disqualifying facts constitutes significant evidence of actual bias); cf. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 867 (1988) ("by his silence, [the judge] deprived respondent of a basis for making a timely motion for a new trial and also deprived it of an

---

[13] See, e.g., Turner v. State, 114 Nev. 682, 688, 962 P.2d 1223, 1226 (1998) ("We conclude that it would be inconsistent with these goals to apply a harmless error analysis to a judge's improper failure to recuse himself. Therefore, we conclude that such failure mandates automatic reversal."); accord Ward v. Village of Monreville, Ohio, 409 U.S. 57, 83 (1972) Tumey v. Ohio, 273 U.S. 510, 532-34 (1927); Franklin v. McCaughtry, 398 F.3d 955, 960-61 (7th Cir. 2005); Cartalino v. Washington, 122 F.3d 8, 10 (7th Cir. 1997); Stivers v. Pierce, 71 F.3d 732, 748 (9th Cir. 1995); see also Edwards v. Balisok, 520 U.S. 641, 647 (1997) ("A criminal defendant tried before a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him.").

issue on direct appeal."). Mr. Rippo is therefore entitled to relief based solely on these facts, but he can go even farther and show that Judge Bongiovanni's failure to disclose his relationship with Denny Mason constituted actual bias because his revelation of those facts on the record would have implicated him in the very same criminal investigation that was hanging over him at the time of Mr. Rippo's trial. In such circumstances, the risk that Judge Bongiovanni was not able to hold the "balance, nice, clear and true" is simply too great, see Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2267 (2009) ("extreme cases are more likely to cross constitutional limits"); Cartalino v. Washington, 122 F.3d 8, 11 (7th Cir. 1997) (presuming bias in extreme cases), and he should have been disqualified from Mr. Rippo's case as a matter of state and federal law.

d. The District Court's Law of the Case Ruling Was in Error.

It is beyond rational dispute that the evidentiary picture presently before this Court is materially different than it was previously on direct appeal. In its motion to dismiss, the state alleged that Mr. Rippo's claim should be rejected under the law of the case doctrine because the material facts were the same. 36 JA 8702-8704. However, the state later acknowledged at the hearing the overwhelming nature of the evidence above demonstrating its involvement in the federal investigation, see 48 JA 11597 [9/22/08 RT at 38] ("we are the only ones that can file a case, so I can see how this might have come about."), and changed its position by manufacturing the newly-minted theory that everyone, including trial counsel, was aware of the state's involvement in the federal investigation. 48 JA 11565. This material factual misstatement, which was clearly repelled by the trial record, was cut and pasted wholesale into the findings of fact and conclusions of law that were ultimately signed by the district court:

> The record shows that more than a decade ago, Rippo's trial counsel knew and alleged that the State was involved in the Federal sting operation by indicting Terry Salem and manipulating the random assignment of the case and also that Bongiovanni failed to disclose a prior relationship with witness Denny Mason who was the business partner of reputed Buffalo mob associate Ben Spano. Accordingly, neither Brady nor

> ineffectiveness of post-conviction counsel constitutes good cause for re-arguing these ten-year old facts in a successive petition.

48 JA 11565. At the hearing below, Mr. Rippo pointed out that the trial record "shows that trial counsel was in the dark on this. The record shows that they were making basically bare allegations in asking for a hearing, and they never got a hearing. All they got in response were these misleading representations that we're not involved, we're not involved, don't worry about it." 48 JA 11591 [9/22/08 RT at 20]. When this material factual misstatement was cut and pasted into the court's proposed order, Mr. Rippo raised a specific objection on the ground that the trial record conclusively repelled the proposed finding. 48 JA 11612-11647. As explained above, the state's assertion and district court's finding that everyone knew about the state's involvement in the federal investigation is simply untrue.

As a matter of law, the material change in the evidentiary picture renders the law of the case doctrine inapplicable to Mr. Rippo's instant claim of judicial bias. See Hsu v. County of Clark, 123 Nev. 625, 173 P.3d 724, 729 (2007) (law of the case doctrine does not apply when "subsequent proceedings produce substantially new or different evidence").[14] Just as important, the law of the case doctrine is guided by principles of equity, see Hsu, 173 P.3d at 728 ("equitable considerations justify departure from the law of the case doctrine"), and the state's fraud on the court in the previous proceedings is exactly the type of inequitable conduct that would prevent this Court from applying the law of the case doctrine. See In re M.T.G., Inc., 400 B.R. 558, at *7 (E.D. Mich. 2009) (law of the case doctrine does not apply in the case of fraud). The district court's decision rejecting Mr. Rippo's claim under the law of the case doctrine was therefore in error, and its order must therefore be

[14] 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).

reversed and the case remanded for further factual development.[15]

Setting aside the state's material factual misstatements, it is beyond rational dispute that Mr. Rippo can show good cause to re-raise his claim of judicial bias. As explained above in detail, Mr. Rippo was thwarted by the state, by the trial court, by the judge who denied his motion for a new trial, and by this Court on direct appeal from developing the facts that would have shown that his judicial bias claim had merit. Given this overwhelming barrage of stonewalling by state actors, Mr. Rippo can hardly be blamed for any failure to develop the facts contained in the instant petition, and he can demonstrate good cause to excuse any purported state procedural default. Cf. Banks v. Dretke, 540 U.S. 668, 696-98 (2004) (reliance on representations of prosecutor allows petitioner to overcome state procedural default bar).[16] Setting aside the state's irreconcilably inconsistent representations, the state does not otherwise dispute that Mr. Rippo's allegations would establish good cause based on the suppression of evidence.

The state also never made any attempt to controvert Mr. Rippo's allegation that he could show good cause based upon the ineffective assistance of post-conviction counsel. Mr. Rippo's judicial bias claim was the centerpiece of his direct appeal. See Rippo v. State, 113 Nev. 1239, 1248-50, 946 P.2d 1017, 1023-24 (1997). Effective post-conviction counsel would have read the naked allegations contained in direct appeal counsel's brief regarding the state's involvement in the investigation, 23 JA 5361, and investigated the facts of Judge Bongiovanni's federal investigation and prosecution by reviewing the transcripts, pleadings, and other court files from Bongiovanni's criminal cases as present counsel has done. The failure to investigate those facts was not the product of a strategic decision because no

---

[15]See, e.g., Bracy v. Gramley, 520 U.S. 899, 909 (1997) (holding that district court erred in failing to permit discovery to support claim of judicial bias).

[16]Mr. Rippo's corresponding contention that trial and appeal counsel were ineffective to the extent that they could be said to have been less than diligent in investigating and presenting the facts supporting his claim of judicial bias is not mutually exclusive with his contention that he can demonstrate cause to excuse any purported state procedural default bar based on the state's failure to disclose evidence. See, e.g., Gantt v. Roe, 389 F.3d 908, 912-13 (9th Cir. 2003).

investigation was conducted by post-conviction counsel; therefore, post-conviction counsel was not in the position of declining to investigate Mr. Rippo's judicial bias claim in favor of other more promising constitutional claims. In any event, the district court could not conclude as a matter of law in the present procedural posture that post-conviction counsel was effective without authorizing discovery and an evidentiary hearing.

A reversal and remand is independently required to force the state to adhere to its ethical and constitutional obligations to set the record straight. With respect to its ethical obligations, the representative for the state must comply with NRPC 3.3(a)(3) which provides that if "a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." With respect to its constitutional obligations, the representative for the State's "present knowledge" that the prosecution's representations at trial were false requires that it correct those false representations in the instant habeas proceeding. See, e.g., Hall v. Director of Corr., 343 F.3d 976, 981 (9th Cir. 2004) ("to allow [the defendant's] conviction to stand, based on the present knowledge that the evidence was falsified, is a violation of his right to due process under the Fourteenth Amendment."). The representative for the state made it clear at the hearing below that he had not made any attempt to inform himself of the facts that were known to his office at the time of Mr. Rippo's trial. Instead, the representative for the state stated that "I wasn't here, and I don't know exactly everything that happened." 48 JA 11588. "I don't know. I wasn't there, so this isn't testimony." 48 JA at 11596. The representative for the state continued:

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

48 JA 11595 [9/22/08 RT at 36]. The state's consistent failure to make a good faith attempt

at any point in the proceedings to be adequately informed or candid regarding its role in the federal investigation of Judge Bongiovanni is precisely the reason why a remand is required, because the state will only do the right thing if this Court forces it to do so. The district court's decision must therefore be reversed and the case remanded for discovery and an evidentiary hearing on Mr. Rippo's claim of judicial bias.

2. Mr. Rippo Can Demonstrate Good Cause and Prejudice to Receive an Evidentiary Hearing on His Claims of Prosecutorial Misconduct. U.S. Const. amends. V, VI, VIII, XIV.

In his petition, Mr. Rippo alleged that the prosecution committed misconduct in failing to disclose material exculpatory and impeachment information, by intimidating defense witnesses, by failing to disclose their role in investigating the trial judge, by violating the trial court's discovery order, and by making improper arguments to the jury. 19 JA 4462-4477, 4534-4540. These allegations comprise one overarching claim of prosecutorial misconduct that must be considered in its entirety for its effect on the jury's guilt and penalty verdicts. As the High Court has acknowledged, "we follow the established rule that the state's obligation under Brady v. Maryland, 373 U.S. 83 (1963), to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government, and we hold that the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention." Kyles v. Whitley, 514 U.S. 419, 421 (1995); see, e.g., Jimenez v. State, 112 Nev. 610, 623, 918 P.2d 687, 695 (1996). Mr. Rippo will address the substantive elements of his Brady and false testimony claims below, however, for present purposes, what is important is that this Court consider all of the evidence of prosecutorial misconduct together to assess its prejudicial effect on the jury's verdicts. See, e.g., Jackson v. Brown, 513 F.3d 1057, 1071, 1076 (9th Cir. 2008).[17]

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

a. Relevant Facts: the Prosecutorial Misconduct of the Clark County District Attorney's Office at the Time of Trial

To understand the nature of Mr. Rippo's prosecutorial misconduct claim, it is necessary to discuss the procedural history of his case with the Clark County District Attorney's Office. Mr. Rippo was originally prosecuted by John Lukens and Teresa Lowry until they were removed from the case by the trial court. After their removal, Dan Seaton and Melvyn Harmon, two veteran prosecutors in the Major Violators Unit, assumed responsibility for the prosecution.

(i) Intimidation of a Defense Witness

On direct appeal, Mr. Rippo raised a claim that his due process rights were violated when the individual prosecutors on his case intimidated his alibi witness, Alice Starr. See Rippo v. State, 113 Nev. 1239, 1251, 946 P.2d 1017, 1025 (1997); 2 JA 31; 2 JA 378-399; 2 JA 334-345 [1/31/94 TT; 2/14/94 TT; 2/7/94 Motion]. At a hearing, Mr. Rippo presented evidence that he gave the state notice of Ms. Starr as an alibi witness on September 2, 1993. 2 JA 295-297. Approximately one week later, the individual prosecutors, John Lukens and Teresa Lowry, went to Ms. Starr's residence to interview her. During the interview, Mr. Lukens informed Ms. Starr of Mr. Rippo's prior conviction for sexual assault, told her that he believed Mr. Rippo was guilty of the murder offense, and interviewed her about the nature of her relationship with Mr. Rippo. 2 JA 409-410, 3 JA 509 [3/7/94 TT at 7-8, 107 (testimony of John Lukens)]. Approximately two weeks later, Mr. Lukens drafted an affidavit for a search warrant for Ms. Starr's property on the pretext that the state was looking for handwriting exemplars of Mr. Rippo's writing.[18] Mr. Lukens and Ms. Lowry

---

[18]Pursuant to the prosecutor's request, the search warrant was sealed and it was not made available for inspection by the defense at the time of the evidentiary hearing. At the hearing, LVMPD Detective Chandler incorrectly testified at first that he was the one that prepared the affidavit for the search warrant, 3/7/94 TT at 90, when Mr. Lukens was actually the individual who drafted it for Detective Chandler's signature. See id. at 110 (testimony of John Lukens); see also 5B JA 1401-181 to 1401-185 [order, search warrant application]. The order granting the state's motion to compel a sample of Mr. Rippo's handwriting was

subsequently accompanied LMVPD homicide detectives to Ms. Starr's residence and personally participated in the search of Ms. Starr's home. During the search, the police pulled their weapons on Ms. Starr. 2 JA 312, 441-442; 2 JA 444, 452, 465; 3 JA 488-489 [3/7/94 TT at 9, 38-39 (testimony of Cindy Gloria Fries, Ms. Starr's sister), 41, 49, 63 (testimony of Detective Chandler), 86-87]. Ms. Lowry eventually located what appeared to be methamphetamine in Ms. Starr's bedroom, and the police placed Ms. Starr under arrest. See 2 JA 417-418. (testimony of Ms. Starr), 2 JA 454 (testimony of Ms. Fries); 2 JA 400-402 [Affidavit of Teresa Lowry, filed 3/7/94].

At the evidentiary hearing, Mr. Rippo was able to prove that Mr. Lukens offered benefits to Ms. Starr to testify favorably for the state and also threatened her if she testified favorably for the defense. After she was placed under arrest, Mr. Lukens told Ms. Starr that the state would treat her favorably on her drug charges if she cooperated with the state, but that she would "go down" with Mr. Rippo if she testified on his behalf. 2 JA 418-419 [3/7/94 TT at 16-17 (testimony of Alice Starr), 2 JA 448-449 (testimony of Cindy Gloria Fries)]. Ms. Starr testified that she believed that Mr. Lukens was pressuring her to change her testimony. 2 JA 421. On cross-examination, Ms. Starr testified that Mr. Lukens did not physically threaten her or her children, see 2 JA 425, but that he threatened her that she would "go down" with Mr. Rippo if she testified on his behalf. See 2 JA 430. Mr. Lukens acknowledged that he discussed the drug charges with Ms. Starr during his interrogation of her and that he accused her of being dishonest with him. See 3 JA 516, 536. Mr. Lukens testified that he would not speak with defense counsel about the case outside of the

---

granted a year earlier, on September 14, 1992. 2 JA 252-253.

On direct appeal, this Court acknowledged that Mr. Lukens first disclosed the existence of jailhouse informant witnesses after receiving Mr. Rippo's notice of alibi identifying Ms. Starr. See Rippo v. State, 113 Nev. 1239, 1250-51, 946 P.2d 1017, 1024-25 (1997). This Court further acknowledged that this disclosure was made after the state had previously raised an objection to continuing the trial date, 2 JA 268-273, it never considered whether this sequence of events rendered the request for and execution of the search warrant a pre-text by Mr. Lukens to intimidate Ms. Starr. See id. Neither the state nor this Court ever sought to reconcile this sequence of events with Mr. Lukens' testimony at the evidentiary hearing that he did not know that the defense had filed a notice of alibi until the morning of the evidentiary hearing six months later. 3 JA 506-507 [3/7/94 TT at 104-05].

courtroom, see 3 JA 519-520, and defense counsel testified that Mr. Lukens had threatened to withhold discovery from the defense. See 3 JA 546-547 (testimony of Steven Wolfson). The trial court ultimately removed Mr. Lukens and Ms. Lowry from prosecuting Mr. Rippo but denied Mr. Rippo's motion to disqualify the Clark County District Attorney's Office from prosecuting Mr. Rippo. See 3 JA 568 [3/9/94 TT at 4].

On direct appeal, this Court acknowledged that the prosecutors had threatened Ms. Starr but it found no constitutional violation from the failure to disqualify the Clark County District Attorney's Office. This Court acknowledged that "Luken's statement to Starr, made after she had been arrested for possession of drugs, during a search conducted by four State authorities, may have been intimidating." Rippo, 113 Nev. at 1251, 946 P.2d at 1025. This Court also noted Ms. Starr's testimony that she did not feel physically threatened, see id., but it did not acknowledge her testimony that she believed that the prosecutor was offering her a quid pro quo arrangement and trying to get her to change her testimony. 3 JA 421 [3/7/94 TT at 19]. In reference to Mr. Rippo's motion to disqualify the Clark County District Attorney's Office, the Court noted that Mr. Lukens "was present in court for the opening statements, followed the order of the witnesses, and spoke with witness Diana Hunt during trial." Id. at 1255, 946 P.2d at 1027. However, the court ultimately found that Mr. Luken's actions did not constitute "continued involvement" in the trial thereby requiring disqualification of the office:

> First, the fact that Lukens was present for opening statements and followed the order of the witnesses may show a continued interest in the trial, but it is not evidence of continued involvement. Second, although Lukens acknowledged that he 'had occasion to have discussions with [Hunt] this week,' no evidence exists as to the content or nature of the conversations. Third, the judge admonished Lukens not to speak further with any witnesses, and no evidence has been presented that Lukens failed to abide by this order.

Id. at 1255-56, 946 P.2d at 1027-28; 11 JA 2449 [2/28/96 TT at 45].[19] The Court therefore concluded that the district court's failure to disqualify the Clark County District Attorney's

[19]Mr. Lukens was also the representative for the state who litigated Mr. Rippo's direct appeal.

Office did not deny Mr. Rippo due process. See id.

As explained below, neither the trial court nor this Court ever acknowledged Mr. Lukens' testimony at trial regarding his involvement in securing benefits for the state's witnesses and his conduct during the discovery litigation. The Clark County District Attorney's Office never purported to screen Mr. Lukens off of Mr. Rippo's case or the cases of the state's witnesses for which Mr. Lukens had inexplicably made appearances as counsel for the state. Neither the trial court nor this Court on direct appeal noted defense counsel's testimony that Mr. Lukens was conditioning providing discovery upon the receipt of information about the defense's witnesses. 3 JA 545-546 [3/7/94 TT at 143-44]. Mr. Rippo has re-raised his allegations of prosecutorial misconduct in intimidating witnesses in the instant petition 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.

(ii) Failure to Disclose Exculpatory Evidence and Violation of Discovery Order

Both before and during trial, it became apparent that the state failed to comply with its constitutional disclosure obligations and the trial court's discovery order.[20] As explained above, the prosecution caused the defense to move for an extension of the trial date in September of 1993, when Mr. Lukens revealed the existence (but not the identity) of jailhouse informant witnesses that he had not previously disclosed. 2 JA 309-313 [9/15/93 TT at 6-10]. At the evidentiary hearing on the motion to disqualify, Mr. Lukens acknowledged that he was not willing to meet with trial counsel Philip Dunleavy outside the courtroom and that he was conditioning the receipt of discovery to the defense on compliance

[20]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. Mr. Rippo alleges that appeal counsel was ineffective in failing to raise an objection to the state's violation of the discovery order, see Rippo v. State, 113 Nev. 1239, 1257 n.6, 946 P.2d 1017, 1028 n.6 (1997), given counsel's acknowledgment of the discovery order in the opening brief that he filed. 23 JA 5362.

with his own demands. 3 JA 545-546 [3/7/94 TT at 143-44]. State witness Thomas Sims testified that he had reported to Mr. Lukens after September of 1993 that Mr. Rippo had confided in him that he had accidentally killed the first victim, 9 JA 2063-2064, 2067-2068, 2070 [2/26/96 TT at 7-8, 13-14, 16], but Lukens never disclosed that information to the defense.[21] Three days before trial, the defense received discovery of a forensic report, dated February 24, 1992, stating that all of the crime scene evidence had been contaminated.9 JA 2066, 2182-2183 [2/28/96 TT at 12, 129-30]. During a previous date set for the trial, Mr. Lukens provided the defense with twelve inches of document discovery on the day of calendar call. 2 JA 332; 11 JA 2542; 3 JA 515-582 [1/13/94 TT at 11; 2/28/96 TT at 137; 3/18/94 TT]; 19 JA 4325-4326 [8/20/04 TT at 16-17]. The record created at trial therefore showed that Mr. Lukens was not complying with his constitutional disclosure obligations.

At trial, it became apparent that Mr. Seaton and Mr. Harmon had also failed to comply with their constitutional disclosure obligations when they assumed responsibility for the case. During opening argument, Mr. Harmon made reference to a purported confession of Mr. Rippo to Thomas Sims wherein Mr. Rippo purportedly said that he accidentally killed the first victim. 11 JA 2413-2415 [2/28/96 TT at 9-11].[22] Mr. Sims subsequently testified to this fact at trial. 11 JA 2425-2428 [2/28/96 TT at 22-25]. Mr. Harmon testified that he did not perceive this statement to be exculpatory and he made the

---

[21] Sims first related this information to the District Attorney's Office after his arrest for three felony charges and after he had received a copy of the state's discovery from Mr. Rippo's co-defendant, Diana Hunt. 9 JA 2065-2068 [2/26/96 TT at 11-14]. (Cont'd.) Ms. Lowry testified at trial that she had not provided a copy of her pre-trial interview notes to prosecutors Harmon and Seaton. 11 JA 2507-2508 [2/28/96 TT at 102-03]. Mr. Lukens confirmed that Ms. Lowry created notes of her interviews. 11 JA 2439 [2/28/96 TT at 35]. Mr. Lukens testified that Mr. Sims had not related information to him about accidentally killing the first victim. 11 JA 2451-2453 [2/28/96 TT at 47-49].

[22] This information was not contained in Sims' first statement to the police or in his grand jury testimony. 9 JA 2061-2063 [2/26/96 TT at 7-9]. Mr. Harmon testified at an evidentiary hearing that this information was first related to him by Sims during a pre-trial interview in January 1996. 11 JA 2522 [2/28/96 TT at 118-19].

decision not to disclose it to the defense. 11 JA 2527-2528, 2558 [See id. at 122-23, 153].[23] In the penalty phase of the trial, Mr. Harmon had a witness from the probation department read inculpatory statements that Mr. Rippo reportedly made to him into the record that were contained in a document that was never disclosed to the defense. 16 JA 3724-3726 [3/13/96 TT at 131-33]. Trial counsel again made a record of the discovery violation and moved for a mistrial which was denied by the trial court. 16 JA 3802-3803 [3/13/96 TT at 209-10].

Mr. Seaton and Mr. Harmon made it clear at trial that they had no intention of complying with their constitutional disclosure obligations or the court's discovery order. At an evidentiary hearing on the defense's motion for mistrial, Mr. Harmon testified that he had not reviewed the work product of Mr. Lukens and Ms. Lowry. 11 JA 2521-2522 [2/28/96 TT at 116-17]. Mr. Harmon testified that he had no knowledge of the court's discovery order until the issue of discovery violations arose at trial. 11 JA 2525 [See id. at 120]. Mr. Harmon testified that he did not believe that an oral statement given to him where incriminating statements are made by a defendant are covered by the state law discovery statute. 11 JA 2529 [Id. at 124]. Mr. Harmon testified that the High Court's jurisprudence regarding compliance with constitutional disclosure obligations was "very fine for judges to write about that, but it's a legal fiction," to impute information in the possession of law enforcement to the prosecution. 11 JA 2535 [2/28/96 TT at 131]. Mr. Harmon further represented that the "courts can trumpet this legal fiction that what one person in a large office knows is imputed to others," but he felt he was not responsible for exculpatory information in the possession of other prosecutors in his office. 11 JA 2554-2555 [See id. at 149-50]. The record created at trial therefore shows that the representatives for the state had no intention of complying with their constitutional disclosure obligations in Mr. Rippo's case.

///

---

[23]Mr. Harmon testified that he only believed that evidence was material if he thought that its disclosure would change the outcome of the trial.11 JA 2529-2530 [2/28/96 TT at 124-26]. Mr. Harmon also testified that he did not believe the statement was material because Mr. Rippo purportedly made other incriminating statements to state witnesses. 11 JA 2532 [Id. at 127].

b. False Testimony and Failure to Disclose Material Exculpatory and Impeachment Information Relating to Thomas Sims

In his instant petition, Mr. Rippo alleged that Thomas Sims received undisclosed benefits in exchange for his cooperation with the state on pending criminal matters both before and directly after his testimony. 19 JA 4462-4477. During his testimony, Mr. Sims acknowledged that he had previously been convicted of three felonies for possession with intent to sell controlled substances, and that he currently had felony drug and gun charges that had been pending against him for almost three years. 9JA 2131-2132; 9 JA 2062-2064 [2/7/96 TT at 78-79; 2/26/96 TT at 8-10]. Sims also testified that he was completely unaware of any potential resolution of his criminal charges, and that he was unaware of multiple bench warrants for his arrest that were quashed. 9 JA 2070-2072 [2/26/96 TT at 16-18]. Sims testified that his defense attorney was handling his criminal matters for him and that he did not know about any negotiations on his pending cases. 9 JA 2065, 2069-2070, 2072, 2074-2075, 2086-2088; 11 JA 2423-24, 2431 [2/26/96 TT at 11, 15-16, 18, 20-23, 32-34; 2/28/96 TT at 19-20, 27]. Sims specifically testified that he did not anticipate receiving probation on his current felony charges in exchange for his cooperation. 9 JA 2072-2073 [See id. at 18-19]. On re-direct examination, Sims testified that there was no connection between his pending charges and his testimony in Mr. Rippo's case. 9 JA 2076-2078 [See id. at 22-24].

To prove that Sims was receiving benefits on his pending charges, defense counsel called prosecutor John Lukens in connection with their motion for a mistrial.[24]

---

[24]Trial counsel were ineffective for failing to move to admit the portions of Mr. Lukens' testimony that contradicted Mr. Sims' testimony and in failing to move to read into the record the evidence of Lukens' conversations with federal authorities regarding potential federal gun charges against Sims. Appeal counsel was ineffective in failing to raise the issue as a federal due process and right to confrontation violation on direct appeal. Post-conviction counsel was ineffective in failing to raise the issue as one of ineffective assistance of trial and appeal counsel.

At the previous evidentiary hearing, post-conviction counsel was unaware that the defense had even called John Lukens as a witness, 19 JA 4336-4337 [8/20/04 TT at 61-66], which led trial counsel to testify that "I called Mr. Lukens to impeach Mr. Sims," 19 JA 4336 [id. at 64] ("I called Mr. Lukens during trial to impeach Mr. Sims, one of the State's

During his testimony, Lukens acknowledged 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]. Mr. Lukens testified that the extensions he sought for Mr. Sims could be construed as a benefit. 13 JA 3095-3117 [See id. at 31, 53]. Mr. Lukens also acknowledged for the first time that he had been in contact with ATF Agent Terry Clark and representatives for the United States Attorney's Office regarding the potential of charging Sims with federal gun offenses even though Lukens claimed not to recall the substance of his conversations. 8 JA 1920, 1922 [See id. at 34, 36]. However, Lukens claimed that Sims' case would be handled in the ordinary course, 8 JA 1938; 9 JA 1939 [see id. at 46-50], which he testified would include the filing of a notice of intent to seek habitual criminal treatment. 9 JA 1941-1942 [See id. at 52-53] ("we would file it. We would ask the judge to sentence him as that . . . ."). Post-conviction counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel for failing to move to have Mr. Lukens' testimony read into the record for the jury to impeach Sims and to set the record straight. See fn. 25, below.

Contrary to Mr. Lukens' testimony, Sims received even more favorable treatment on his pending charges than defense counsel suspected as well as favorable dispositions on previous charges. On June 10, 1996, the state dismissed one felony drug charge, converted the second drug charge to a gross misdemeanor, and converted the ex-felon in possession charge to a gross misdemeanor and Sims was given a $1,500 fine without any term of probation. 39 JA 9445-9450. In other words, Sims went from a potential life sentence as Lukens testified that his office would seek to a conviction for two gross misdemeanors and a $1,500 fine. In addition, Sims was arrested for another felony drug

---

primary witnesses."), without post-conviction counsel raising the appropriate claim of ineffective assistance for failing to move the trial court to have Lukens' testimony read to the jury. The trial transcript shows that Lukens' testimony was not taken in front of the jury. 8 JA 1876 [2/8/96 TT at 4].

offense on December 9, 1993, for which he was allowed to plead guilty to a misdemeanor on March 28, 1994, Case No. 93-F-9533X. 39 JA 9451 to 40 JA 9520. Mr. Sims also incurred two charges for domestic violence in 1993-94 that were dismissed. 39 JA 9451 to 40 JA 9520.[25] No information about the case dispositions above were provided to the defense at the time of Mr. Rippo's trial. The disposition of the pending felony drug charges – Mr. Sims' fifth felony drug charge after suffering three prior felony convictions – was undoubtedly a benefit that should have been disclosed to the defense.

c. False Testimony and Failure to Disclose Material Exculpatory and Impeachment Information Relating to Michael Beaudoin

Mr. Rippo alleges that state witness Michael Beaudoin received undisclosed benefits on pending charges as well as old charges for which he was on probation in exchange for his cooperation against Mr. Rippo. At trial, the prosecution elicited the fact that Mr. Beaudoin had previously suffered two felony convictions. 12 JA 2841-2842 [2/29/96 TT at 211-12]. On cross-examination, Mr. Beaudoin testified about a plea agreement regarding his arrest for felony drug trafficking charges arising from an arrest on February 1, 1992, that involved him spending thirty days in jail. 13 JA 2910-2911 [3/1/96 TT at 25-26]. On re-direct examination, Mr. Seaton asked Mr. Beaudoin about an arrest for possession of stolen property in September of 1995, and whether he anticipated receiving benefits on that case in exchange for his testimony. 13 JA 2946-2948 [3/1/96 TT at 61-63]. Mr. Seaton did not ask Mr. Beaudoin any questions about his arrest one month later for felony drug offenses which was pending against him at the time of his testimony. 13 JA 2909-2948. Mr. Seaton also failed to ask Mr. Beaudoin about the disposition of previous charges and convictions for

---

[25] At the hearing below, the representative for the state made it clear that he had not done anything to make himself aware of anything that his office may have done on Sims' behalf regarding the domestic violence charges, 48 JA 11588 [9/22/08 TT at 8], and without acknowledging the fact that Mr. Harmon had actual knowledge of the charges against Sims at trial. In a motion filed on July 19, 1994, Mr. Harmon acknowledged the domestic violence charge against Sims, the fact that Sims' girlfriend was receiving assistance from the Victim Witness Assistance Center, the fact that there was a temporary restraining order against Sims, and the fact that the victim further feared for her safety. 3 JA 621-628. Mr. Harmon noted in the same motion that Sims "assisted Rippo in cleaning up the crime scene after the crimes were perpetrated." Id.

which Beaudoin was on probation. Id.

In actuality, Mr. Beaudoin received what can only be described as exceptionally generous treatment on previous charges for which he was on probation as well as favorable treatment on a plethora of charges incurred between 1992 and 1995. Mr. Beaudoin received a favorable disposition on a felony drug trafficking conviction (89-F-06462, C-095279), wherein he was given probation for a second time one week after giving a statement to the police in Mr. Rippo's case even though he was arrested for committing two felony drug trafficking offenses after having previously received probation in the case.[26] Mr. Beaudoin was arrested for felony drug trafficking offenses on April 15, 1991 (91-F-04782), and again arrested for felony drug trafficking offenses on February 1, 1992 (92-F-01631). 26 JA, 6119, 6137. Both of the felony drug charges were merged into a single district court case, Case No. C-102962, to which Mr. Beaudoin was allowed to plead guilty on March 10, 1993 (ten days after his statement to the police), and receive dismissal of the second trafficking charge (92-F-01631), and a three-year sentence on the other trafficking offense (91-F-04782), which was ordered to run concurrent to the 1989 drug trafficking conviction to which Mr. Beaudoin had violated the terms of probation multiple times. 41 JA 9816-9829. In the middle of this criminal case activity, Mr. Beaudoin was arrested for providing false information to a police officer and using fictitious license plates on May, 12, 1992 (92-T-01630). 26 JA 6147. A bench warrant was issued in the case on March 13, 1993, and Mr. Beaudoin entered a guilty plea on January 10, 1995, but no sentence appears to have been

---

[26]Beaudoin was arrested for this offense on July 12, 1989; he was again arrested for felony drug trafficking on August 18, 1990, and was allowed to plead guilty to a misdemeanor on March 14, 1991 (90-F-05534); and he was convicted of a felony and sentenced on September 30, 1991, to four years in prison which was suspended and he was put on probation for five years. Mr. Beaudoin violated his probation when he was arrested for felony drug trafficking offenses on April 15, 1991, 25 JA 5985, 5991, and again on February 1, 1992, when he was again arrested for felony drug trafficking offenses. A revocation hearing was requested on February 25, 1992, Mr. Beaudoin gave his statement to the police in Mr. Rippo's case on February 29, 1992, and, at his hearing on March 5, 1992, he was not revoked but was instead given a second chance at probation. Mr. Beaudoin was again arrested on May 12, 1992, a bench warrant was issued for his arrest on July 1, 1992, it was quashed on August 12, 1992, and he was sentenced on December 12, 1992, to four years in prison. Mr. Beaudoin was released into the community in 1995. 25 JA 5882 through 27 JA 6334.

imposed on this offense. See id. None of this information was provided to the defense at trial even though it occurred before Mr. Beaudoin's testimony.

In addition, the state failed to disclose a quid pro quo arrangement with Mr. Beaudoin on a pending felony drug offense in which he anticipated to receive a favorable disposition. As explained above, Mr. Seaton elicited testimony from Beaudoin regarding his arrest for possession of stolen property (95-F-0518, C-130797), on July 28, 1995, 13 JA 2910-2911 [3/1/96 TT at 25-26], but did not mention his subsequent arrest one month later, on August 22, 1995, for felony drug offenses (95-F-07735, C-134430). With respect to the latter charge, Mr. Rippo included a declaration recently obtained from Mr. Beaudoin stating that he called prosecutor Melvyn Harmon upon his arrest and was able to secure a misdemeanor disposition on the felony drug offenses in exchange for his cooperation:

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

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.[27] None of these executory promises or benefits were disclosed by the prosecution to the defense.

---

[27]A bench warrant was issued in 95-FH-0518 on September 26, 1995; the state agreed to an own recognizance release in 95-F-07735, on January 19, 1996; both cases were continued on February 12, 1996; a bench warrant issued in 95-F-07735, on February 20, 1996, and was quashed the same day; a bench warrant issued in 95-FH-0518, on February 29, 1996, and was recalled on March 6, 1996. On March 22, 1996, the bench warrant was quashed in 95-FH-0518, and Mr. Beaudoin was given an OR release. Mr. Beaudoin was sentenced in 95-F-07735 (C-134430) on May 21, 1996, to 117 days on one drug count and sixth months on the second to run concurrently. 26 JA 6165-6180.

d. Failure to Disclose Material Exculpatory and Impeachment Information Relating to Thomas Christos

In his petition, Mr. Rippo alleged that the state failed to disclose material exculpatory and impeachment information relating to state witness Thomas Christos. 19 JA 4518-4523. On March 22, 1994, Thomas Christos was arrested on charges of felony home invasion, Case No. 94-F-2599X. 27 JA 6350-6403. The charges against Mr. Christos were approved by the District Attorney's Office on March 29, 1994. An arrest warrant was served on Mr. Christos on May 31, 1994. After that date, nothing happened on Mr. Christos' case for over two and a half years until after his testimony against Mr. Rippo. See id. The next proceeding on Mr. Christos' case did not occur until November 9, 1996. On June 9, 1997, the state dismissed the charges against Mr. Christos on the ground that they were not ready to proceed, even though the state had over three years to prepare. The state did not disclose any information regarding the dismissal of charges against Mr. Christos in exchange for his testimony against Mr. Rippo to the defense.

e. False Testimony and Failure to Disclose Material Exculpatory and Impeachment Information Relating to the Jailhouse Informants

To bolster Diana Hunt's credibility, the prosecution presented three jailhouse informants before the jury who testified that Mr. Rippo purportedly confessed to them, and they proceeded to provide details of the offense that only the perpetrator would have known. 12 JA 2773-2836, 13 JA 2880-2064. However, as explained below, the details to which the informant witnesses testified were fed to them by state actors, and this basis for their impeachment was not disclosed to the defense.

In his petition, Mr. Rippo alleged that details of the offense as related by jail house witnesses, James Ison and David Levine, were fed to them by state actors to bolster their credibility. 19 JA 4465-4467. Specifically, Mr. Rippo included a declaration recently obtained from David Levine stating that the critical details from his second statement to the police contained details that were fed to him by the officers and not actually conveyed to him by Mr. Rippo. 27 JA 6437-6438. In a declaration recently obtained from James Ison, he

stated that the prosecutors placed him in a room alone with all of the prosecution's discovery in Mr. Rippo's case and had him review the files so that he could testify to the details of the offense as though he had received them directly from Mr. Rippo. 27 JA 6435-6436. The state has never controverted these allegations or the implication that its representativeness encouraged jail house witnesses to manufacture false testimony against Mr. Rippo by feeding them inside details of the offense to make them appear credible to the jury. The state has also never contested Mr. Rippo's contention that post-conviction counsel was ineffective in failing to properly raise this issue at the evidentiary hearing as one of ineffective assistance of trial counsel for failing to move to suppress the statement as a violation of Mr. Rippo's right to counsel, see fn. 8, supra, and counsel did not attempt to raise the constitutional claim on appeal before this Court.[28]

Mr. Rippo also alleged that the threats against Diana Hunt to which jailhouse informant witness William Burkett (aka Don Hill) testified at trial were false. On cross-examination, Mr. Burkett revealed for the first time his status as a career criminal informant, 13 JA 2988 [3/1/96 TT at 103], as well as the fact that he received a letter from law enforcement to the parole board recommending that he receive favorable consideration for his cooperation. 13 JA 2985, 2997, 3008. Mr. Burkett also testified that Mr. Rippo solicited his assistance in an attempt to get Burkett's girlfriend to administer poison to Diana Hunt in an attempt to kill her. 13 JA 2983 [3/1/96 TT at 98]. However, in a recent declaration, Mr. Burkett stated that his testimony regarding the purported solicitation were false and that his girlfriend at the time, Amy Annette Rizzot, was not even housed in prison with Diana Hunt. 41 JA 9979. The state has never controverted these allegations.

f. Prosecutorial Misconduct in Argument

This Court's consideration of Mr. Rippo's claim of prosecutorial misconduct must include an assessment of the prejudice resulting from the misconduct committed by the prosecutors in argument. See, Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Mr.

---

[28]See Massiah v. United States, 377 U.S. 201, 204-06 (1964).

Rippo notes that the misconduct in argument was committed by Dan Seaton, a veteran prosecutor, who repeatedly committed misconduct in argument throughout his career in the face of repeated admonishments by this Court,[29] and Melvyn Harmon, another veteran prosecutor. On direct appeal, this Court correctly concluded that "the prosecutor made impermissible references to Rippo's failure to call any witnesses on his behalf and, in so doing, may have shifted the burden of proof to the defense." Rippo v. State, 113 Nev. 1239, 1253-54, 946 P.2d 1017, 1026 (1997); 14 JA 3179, 3216, 3312 [3/5/96 TT at 59, 95, 191]. The Court also correctly acknowledged that the prosecutor's reference to "interviews and 'things' [that] happen outside of the courtroom were improper references to evidence not presented at trial." Rippo, 113 Nev. at 1255, 946 P.2d at 1027; 14 JA 3335-3337 [3/5/96 TT at 212-14].

With respect to the penalty phase of trial, Mr. Seaton repeatedly referred to Mr. Rippo's prior offense as "horrendous" and a "horror" and he referred to Mr. Rippo as "evil" twice in his opening statement. 15 JA 3425, 3432. Both Seaton and Harmon improperly exhorted the jury in closing argument to sentence Mr. Rippo to death to send a message to the community. 17 JA 3937-3938; 17 JA 3996-3997 [3/14/96 TT at 97-98; 3/15/96 TT at 156-57]. Mr. Harmon improperly conveyed to the jury that a vote for the death penalty required "intestinal fortitude" and was part of the jury's "legal duty." 17 JA 3948 [3/14/96

---

[29]See, e.g., Howard v. State, 106 Nev. 713, 722-23, 800 P.2d 175, 180-81 (1990) ("The prosecutor, Dan Seaton, made three improper arguments to the jury. In all three instances the case law was unambiguous that such remarks were not permitted. Mr. Seaton is a veteran prosecutor and knows very well that these remarks were improper.") (collecting a "non-exhaustive sampling of cases" involving Mr. Seaton's misconduct); Flanagan v. State, 104 Nev. 105, 107-112, 754 P.2d 836, 837-40 (1988) (reversing capital sentence due to Mr. Seaton's improper penalty phase arguments); Santillanes v. State, 104 Nev. 699, 702, 765 P.2d 1147, 1149 (1988) ("We agree that Mr. Seaton's remarks were improper."; however, misconduct found to be harmless error); Browning v. State, 104 Nev. 269, 272, 757 P.2d 351, 353 (1988) (noting Mr. Seaton's reference to the "presumption of innocence 'as a farce'"); Downey v. State, 103 Nev. 4, 8, 731 P.2d 350, 353 (1987); see Lisle v. State, 113 Nev. 679, 701-02, 705, 941 P.2d 459, 474, 476 (1997) (noting Mr. Seaton's improper arguments but finding waiver for failure to raise issue at trial).

At the previous evidentiary hearing, the habeas judge noted that "Mr. Seaton has a habit of rangeing [sic] around the board on his closing . . . ." 19 JA 4336 [8/20/04 TT at 58]. When the issue of prosecutorial misconduct in argument was raised, the judge immediately asserted that it "had to be Dan Seaton, right?" 19 JA 4343 [Id. at 85].

TT at 108]. Mr. Harmon made the same improper comments throughout voir dire.5 JA 1056, 1073, 1080, 1091; 4 JA 808, 829, 840, 841, 894, 928; 5 JA 980, 1003, 1005, 1012, 1014 [2/1/96 TT at 31, 48, 55, 66; 1/31/96 TT at 13, 34, 45, 45, 99, 133, 185, 207, 209, 216, 218]. At the previous evidentiary hearing, the representative for the state acknowledged that "this was a phrase Mel Harmon was fond of and he used in just about every capital case that he tried . . . ." 4 JA 882 [Id. at 87]; Evans v. State, 117 Nev. 609, 633-34, 28 P.3d 498, 515 (2001) (reversing capital sentence for identical remarks in closing argument by Mr. Harmon).[30] This Court must consider the cumulative effect of the prosecutor's improper arguments that it addressed on direct appeal along with Mr. Rippo's present claim of prosecutorial misconduct.

This Court must also consider Mr. Rippo's claim that post-conviction counsel was ineffective in failing to raise claims of ineffective assistance of trial and appellate counsel in failing to object to all prosecutorial misconduct in argument. Messrs. Seaton and Harmon repeatedly committed misconduct in argument by improperly aligning themselves with the jurors by using terms such as "we" and "us" approximately sixty times in closing argument. 14 JA 3160-3219, 3304-3354; 17 JA 3936-3948, 3980-3998 [3/5/96 TT at 40-99; 183-233; 3/14/96 TT at 96-108; 140-158]. Mr. Harmon improperly vouched for the credibility of the state's witnesses. 14 JA 3313, 3319, 3352 [3/5/96 TT at 192, 198, 231]. Mr. Harmon also committed egregious misconduct by referring to facts outside of the record to suggest that the female victims had been sexually assaulted without any supporting evidence. 14 JA 3329 [See id. at 208]. Messrs. Seaton and Harmon improperly referred to

---

[30]At the evidentiary hearing, trial counsel testified that "I probably should have objected [to the argument]." 19 JA 4343 [8/20/04 TT at 87]. However, the habeas judge proceeded to reject the claim by positing a strategic justification that was not offered by counsel. 19 JA 4344 [See id. at 89]. Direct appeal counsel likewise testified that he should have raised an appropriate objection on direct appeal.19 JA 4382-4385, 4392-4393 [9/10/04 TT at 36-39, 46-47].

Mr. Rippo as "wicked" as well as "evil and depraved," 14 JA 3178 [3/5/96 TT at 58],[31] and highlighted prejudicial references to other bad acts testimony thereby depriving Mr. Rippo of the presumption of innocence.[32] Mr. Harmon also made repeated comments personally disparaging defense counsel. 14 JA 3310, 3313, 3317, 3325-3326 [3/5/96 TT at 189, 192, 196, 204-05]. In other words, two veteran prosecutors committed virtually every species of prosecutorial misconduct in argument to deprive Mr. Rippo of a fair trial, and post-conviction counsel was ineffective in failing to raise these claims of ineffective assistance of counsel.

Finally, this Court must consider the prejudice from Mr. Seaton's false representations in closing argument that none of the state's witnesses received undisclosed benefits in exchange for their testimony. In closing argument, Mr. Seaton specifically referenced the cross-examination of the state's witnesses concerning whether they received benefits for their testimony, and falsely represented that Mr. Burkett was the only witness who received any consideration for his testimony. 14 JA 3202-3203 [3/5/96 TT at 82-83]. As explained above, all of the state's witnesses either received undisclosed benefits or were subject to other impeachment. See pp. 33-41, supra. Mr. Seaton's false representations regarding the absence of benefits to the state's witnesses must be considered along with Mr. Rippo's present claim of prosecutorial misconduct as part of this Court's prejudice assessment.

///

---

[31]Mr. Seaton also argued "I say that the cruel heart in this case is the heart of Michael Rippo." 17 JA 3937 [3/14/96 TT at 97]. Mr. Harmon stated that "what we know about Michael Rippo is that he is evil and he is depraved." 17 JA 3985 [Id. at 145]. Mr. Harmon argued that "anyone who would commit murder is a fool; and he's doubly a fool if he commits murder and talks about it." 14 JA 3329 [3/5/96 TT at 208].

[32]During closing argument, Mr. Seaton emphasized improperly admitted testimony regarding Mr. Rippo's prior bad acts of sexual assault when he quoted Mr. Rippo's comments about the victims in the case at hand: "[b]oth [victims] were fine. I could have fucked both, but I didn't. That means I'm cured. See 14 JA 3197-3198 [3/5/96 TT at 77-78]. Mr. Harmon also emphasized this improper testimony during his rebuttal closing argument when he similarly argued that Mr. Rippo stated, "[t]hose ladies were fine. I could have had them both, but I didn't. I'm cured." See 14 JA 3329 [3/5/96 TT at 208].

g. The Law Relating to Prosecutorial Misconduct

The district court's decision below must be reversed because it failed to provide a cumulative assessment of the prosecutorial misconduct that occurred in Mr. Rippo's case. The pertinent language in the district court's order, which was cut and pasted from the state's reply brief without change, rejected Mr. Rippo's claim by referring solely to the new evidence contained in the petition and by failing to specifically discuss each piece of material exculpatory and impeachment evidence:

> The record shows that Rippo's trial counsel was well aware that several witnesses had past or pending charges against them and cross-examined them regarding continuances, quashed bench warrants, and future benefits. Twelve years later, the various dispositions of such collateral cases are not new evidence of undisclosed inducements, but are consistent with the trial testimony that no benefits were given and that such cases would rise and fall on their own merit.
>
> The State has never suppressed such case dispositions (which are a matter of public record), they are not favorable to the defense as either exculpatory or impeaching, and none of the allegations are material so as to undermine confidence in the verdict. None of the jailhouse informants have recanted their testimony that Rippo confessed to the murders. Accordingly, neither Brady nor ineffectiveness of post-conviction counsel constitutes good cause for re-raising these claims where no new material facts are alleged and there is no reasonable probability of a different conviction or sentence for Rippo.

48 JA 11605-11606. The district court held that Mr. Rippo's claim was procedurally barred, and should have been raised in a prior petition, 48 JA 11605, 11607 [see id. at 2, 4], without giving any indication that it considered Mr. Rippo's uncontroverted allegation that post-conviction counsel was ineffective in failing to investigate and raise the claim.

On a fundamental level, the district court's decision misapprehended the systemic nature of Mr. Rippo's prosecutorial misconduct claim which is based upon a persistent pattern of conduct that was designed to deny him his right to a fair trial. See Brecht v. Abrahamson, 507 U.S. 619, 638 n.9 (1993); Berger v. United States, 295 U.S. 78,

89 (1934).[33] At best, the district court only evaluated Mr. Rippo's claim under the lense of the federal law standard for proving a Brady violation, i.e., whether there is a reasonable probability of a more favorable outcome. However, no court has ever considered whether all of the evidence contained in the instant petition demonstrates that Mr. Rippo's due process rights were violated due to the failure of the trial court to disqualify the Clark County District Attorney's Office. Specifically, this Court has never decided whether Mr. Lukens' involvement with the state's witnesses in securing them favorable consideration on their cases, his admitted failure to provide discovery pursuant to the trial court's discovery order, and his false testimony regarding his anticipated treatment of Thomas Sims constitute "continued involvement" in the case demonstrating prejudice from the failure to disqualify the office. See Collier v. Legakes, 98 Nev. 307, 309, 646 P.2d 1219, 1220 (1982); 11 JA 2567 [2/28/96 TT at 162]. The representative for the state took the position below that Mr. Lukens' testimony about his intended course of action as counsel for the state of Nevada against the state witnesses – even if he knew it was false at the time he testified – did not matter if Sims purported to believe Mr. Lukens at the time he testified.[34] The problem of a

---

[33]This issue of systemic misconduct requiring the disqualification of the Clark County District Attorney's Office has been argued consistently from the time of trial by defense counsel. 11 JA 2416-2417 [2/28/96 TT at 12-13].

[34]At the hearing below, the representative for the state stated

> that the case with Tom Sims was a drug case, and John Lukens was off spouting about how we were going to habitualize Tom Sims. All that may have done was impress upon Tom Simms that he's not getting any deal out of the State, we're going full bore on him.
>
> The fact that we may not have actually filed habitual after trial and had a drug case reduced to gross misdemeanors is not inconsistent with the negotiations that everyone else in the community gets. We simply don't have the time to go hard on drug cases.
>
> The fact that John Lukens may have been saying – saying we're going for a life sentence, if anything bolsters the fact that Simms didn't think he was getting anything. He thought he was going away for life. The reality is we can't habitualize somebody on a drug case.

48 JA 11600 [9/22/08 RT at 55].

disqualified prosecutor vouching for the credibility of a state witness who feigns ignorance of the benefits that his attorney and Mr. Lukens are working out on his behalf received no consideration by the district court. Cf. Hayes v. Brown, 399 F.3d 972, 981 (9th Cir. 2005) (en banc). As the court explained in Hayes, it is not relevant whether Sims was aware of the benefits he was receiving:

> 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. That the witness is unaware of the falsehood of his testimony makes it more dangerous, not less so.

Hayes, 399 F.3d at 981 (footnote omitted). This is precisely the prejudice that demonstrates why the Clark County District Attorney's Office had to be disqualified from prosecuting Mr. Rippo under state and federal due process principles.

This systemic prejudice was further exacerbated by Messrs. Seaton and Harmon's false representations that their office had no involvement in the federal investigation of the trial judge, their representations that they had no intention of making themselves aware of anything that Mr. Lukens or law enforcement did for the state's witnesses, their own failure to disclose material exculpatory and impeachment evidence, and their intentional and systemic misconduct in argument. The evidence in Mr. Rippo's petition further indicates that the prosecutors had actual knowledge of benefits that they secured for the state's witnesses that were not disclosed.[35] When all of this evidence is considered together, it is apparent that Mr. Rippo's due process rights were violated due to the failure to disqualify the entire Clark County District Atttorney's Office after their representatives intimidated a defense witness.

The district court's conclusion that Mr. Rippo's claim was procedurally barred because his trial attorneys went to such great lengths to explore the possibility that the state's

---

[35]Mr. Beaudoin's statement indicates that he obtained benefits directly from Mr. Harmon in exchange for his testimony, 41 JA 9934-9935, and the misleading nature of Mr. Seaton's re-direct examination of Beaudoin, wherein he chose to question Beaudoin about one pending case but not the other one where benefits were received, id., strongly indicates that the prosecutors had actual knowledge of the undisclosed benefits.

witnesses received undisclosed benefits, 48 JA 1605-11606, is contrary to clearly established state and federal law. At best, the court's finding is only relevant to the extent that this Court must evaluate the issue of prejudice, which requires it to weigh the impeachment that occurred at trial against what would have been available for impeachment if the state had complied with its constitutional disclosure obligations.[36] As to the issue of good cause, however, trial counsel's diligence is completely independent of the state's free-standing obligation to set the record straight in the instant case. See, e.g., Gantt v. Roe, 389 F.3d 908, 912-13 (9th Cir. 2003).[37] 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).[38] 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.

Even if this Court segregated the state's systemic misconduct into discrete parts, it would still be obligated to reverse the district court because it failed to apply the controlling state law materiality standard or the applicable false testimony standard. Given the vigorous attempt by defense counsel to uncover the existence of undisclosed benefits received by the state's witnesses, the applicable state law materiality standard merely requires

---

[36]On that score, the executory benefits received by Sims, Beaudoin, and Christos would have been considered unique and material as a source of impeachment evidence. See, e.g., Horton v. Mayle, 408 F.3d 570, 580 (9th Cir. 2005); Benn v. Lambert, 283 F.3d 1040, 1057 (9th Cir. 2002) (withholding evidence of probation revocation proceeding until after testimony of state witness held material).

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

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

that Mr. Rippo demonstrate a reasonable *possibility* of a more favorable outcome. See Lay v. State, 117 Nev. 1185, 1194, 14 P.3d 1256, 1262 (2001).[39] The standard for relief for a false testimony claim requires a showing of "any reasonable likelihood that the false testimony could have affected the judgement of the jury." Hayes v. Brown, 399 F.3d 972, 985 (9th Cir. 2005) (en banc) (emphasis added); Jimenez v. State, 112 Nev. 610, 622, 918 P.2d 687, 694 (1996). "'[I]f it is established that the government knowingly permitted the introduction of false testimony, reversal is virtually automatic."' Jackson v. Brown, 513 F.3d at 1076, quoting United States v. Wallach, 935 F.2d 445, 456 (2nd Cir. 1991). It is clear that the district court did not apply the controlling prejudice standards to Mr. Rippo's prosecutorial misconduct claim; however, this Court is obligated to do so, and applying these standards requires that the district court's decision be reversed. In Nevada, state law requires corroboration of the testimony of Diana Hunt, see Nev. Rev. Stat. § 175.291(1), and the first prosecutor on the case, William Hehn, informed law enforcement that they did not have enough evidence against Mr. Rippo to secure a conviction without obtaining additional admissions from him. 41 JA 9986. Mr. Rippo can therefore show that the failure to disclose the impeachment information discussed above was material to the jury's guilt and penalty verdicts.

The district court's decision must therefore be reversed so that Mr. Rippo can conduct discovery and an evidentiary hearing. Mr. Rippo notes that he has not received a single page of discovery from the state, he has received no assurance from the representative for the state that he has made any attempt to make himself aware of benefits received by the state's witnesses, and it is therefore reasonable to assume that the evidence discussed above

---

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

is merely the "tip of the iceberg" and that additional exculpatory evidence is currently in the state's possession. See, United States v. Blanco, 392 F.3d 382, 394 (9th Cir. 2004). The representative for the state made it clear that he has not made himself aware of the information known to this office, 48 JA 11588, 11600 [9/22/08 RT at 9, 56], and the state should therefore not be heard to make any representations in the present procedural posture. Even worse, the representative for the state persisted at the hearing below in making factual representations regarding the absence of benefits that were repelled by Mr. Lukens' testimony at trial.[40] Discovery of information in the possession of state and federal authorities that was created contemporaneously to the events in question will be the best evidence of the benefits that were received by the state's witnesses. The district court therefore could not have concluded as a matter of law in the procedural posture of a motion to dismiss that Mr. Rippo's claim was meritless without permitting discovery and an evidentiary hearing.

///

///

---

[40]The state took the position in its motion to dismiss that the continuation of Thomas Sims' criminal charges until after Mr. Rippo's trial was not done to procure his testimony, 36 JA 8712-8715, and the state continued to maintain this position at the hearing below, 48 JA 11588 [9/22/08 RT at 8], in spite of Mr. Lukens' testimony that the District Attorney's Office was in fact intentionally continuing Sims' case. 25 JA 5813-5881.

At the previous post-conviction hearing, the representative for the state, Steven Owens, the same individual who represented the state below, acknowledged that his office did intentionally continue Sims' case to obtain his testimony:

> it was elicited from John Lukens about that Tom Sims had a case pending and that Mr. Lukens intentionally delaying the resolution of that case and I think successfully suggests to the jury that there might be, although there was no formal promises made, that there might have some benefit to Mr. Sims down the road by having his case delayed and who knows what the eventual outcome would be, and was waiting to see how he testified, indicating the State still had some leverage and control over how Mr. Sims testified.
>
> That was my reading of [the record].

19 JA 4337 [8/20/04 TT at 63]. The state's representative has never attempted to reconcile his representations below with his own inconsistent representations during the prior post-conviction proceedings.

3. Mr. Rippo Can Demonstrate Sufficient Prejudice to Receive an Evidentiary Hearing on His Claim of Ineffective Assistance of Trial Counsel for Failing to Investigate and Present Mitigation Evidence. U.S. Const. amends. V, VI, VIII, XIV.

In his petition, Mr. Rippo alleged that post-conviction counsel was ineffective in failing to investigate and raise a claim that trial counsel were ineffective in failing to investigate and present mitigation evidence at his sentencing hearing. 19 JA 4427-4428. Mr. Rippo also alleged in considerable detail what mitigation evidence effective trial counsel would have investigated and presented if they had performed effectively. 19 JA 4482-4513. The district court rejected Mr. Rippo's claim and held that

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

48 JA 11606. This holding is in error, however, because it fails to appreciate the material change in the evidentiary picture. Clearly established federal law demonstrates that there is a reasonable probability of a more favorable outcome under the circumstances if trial counsel had performed effectively.

The district court erred in holding that the mitigating evidence presented for the first time in the instant proceeding is cumulative because courts have consistently held that a defendant is prejudiced when his counsel presents some, but not all, of the reasonably available mitigating evidence.[41] The information contained in the instant petition adds

---

[41] See, e.g., Rompilla v. Beard, 545 U.S. 374, 392-93 (2005); Wiggins v. Smith, 539 U.S. 510, 532, 535 (2004); Williams v. Taylor (Terry), 529 U.S. 362, 396-98 (2000); Wilson v. Sirmons, 536 F. 3d 1064 (10th Cir. 2008) ("The Supreme Court, however, has made 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."); Boyde v.

measurably to the qualitative weight of the psycho-social stressors in Mr. Rippo's background. The only witness at trial who even hinted at the difficult upbringing to which Mr. Rippo was subjected was Stacie Campanelli. As Ms. Campanelli explained in her declaration, the entire mitigation "investigation" by trial counsel consisted of a short meeting with the immediate family on the morning of the penalty hearing. 39 JA 9282. Ms. Campanelli explained that this short interview did not give her an opportunity to relate detailed information regarding Mr. Rippo's childhood and family background:

> At the penalty hearing, I testified generally about the difficulties that Michael faced growing up. However, if Michael's trial attorneys had interviewed me before my testimony, I could have told them much more about Michael and my family. I tried to hint at what my step-father, Ollie Anzini, had done to antagonize Michael and others in my family during my testimony.

39 JA 9282. Specifically, the evidentiary presentation at trial failed to contain any of the allegations of sexual abuse, extreme physical abuse, and sadism perpetrated by Mr. Rippo's step-father, Ollie Anzini, on his step-children. Evidence of Mr. Anzini's abuse and mistreatment of his children was corroborated by other collateral reporting sources which counsel unreasonably failed to investigate and present.[42] 39 JA 9281-9328, 9375-9381. Trial counsel further failed to compile this data into a social history, 35 JA 8422-8496, 36 JA 8497-8538, in order to provide it to a mental health expert for the purposes of a diagnosis. The qualitative difference between the two evidentiary presentations is pronounced: instead of portraying Mr. Rippo's actions as a child and teenager as a simple act of defiance against a stern step-father, the evidentiary picture before this Court shows that Mr. Rippo was literally raised in a toxic environment of abuse and sadism at the hands of Mr. Anzini. In comparing the evidence in Mr. Rippo's instant petition against what was presented on his

---

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.").

[42] See 39 JA 9281-9328, 39 JA 9375-9381 (declarations of Stacie Campanelli, Domiano Campanelli, Sari Heslin, Melody Anzini, Catherine Campanelli, Jessica Parket-Asaro, Mark Beeson, Jay Anzini, and Robert Anzini).

behalf at trial, Mr. Rippo has demonstrated the existence of psycho-social stressors from his background that mitigate his offenses, particularly his prior sexual assault conviction which was used as a statutory aggravating circumstance at sentencing.

As a matter of state and federal law, the psycho-social evidence contained in Mr. Rippo's instant petition would have had a reasonable probability of a more favorable outcome if counsel had presented it. In Boyde v. Brown, 404 F.3d 1159, 1176 (9th Cir. 2005), trial counsel presented the testimony of the petitioner's younger sister at his capital sentencing hearing after having his investigator interview her. Trial counsel, however, failed to adequately interview the sister to discover her "allegation that she, Boyde and the other siblings were regularly and violently abused by Boyde's mother and step-father. She also explained that the stepfather had sexually molested the female siblings, and that Boyde had been aware of this abuse from an early age." Id. The court held that "Boyde's history of suffering violent physical abuse, as well as the family history of sexual abuse he had known about growing up, is the sort of evidence that could persuade a jury to be lenient." Id. The court explained that the anecdotal evidence related by the petitioner's younger sister about his childhood was much more persuasive than her testimony at the sentencing hearing. See id. at 1176-77. The court further explained that effective counsel would have used that information to interview other individuals in the petitioner's family to confirm the allegations of abuse. See, id. The court therefore granted the petitioner a new sentencing hearing on the grounds that his trial attorney provided ineffective assistance of counsel in the penalty phase of his trial.

Just like Boyde, trial counsel's failure to conduct an adequate interview with Stacie Campanelli prevented them from proffering a much more significant body of mitigation evidence at Mr. Rippo's sentencing hearing, and from pursuing additional investigative leads to corroborate that evidence. Courts have routinely found prejudice from trial counsel's ineffectiveness when counsel failed to investigate and present a much larger body of evidence showing extreme physical abuse and sexual abuse in the defendant's family background. See, e.g., Rompilla v. Beard, 545 U.S. 374, 392-93 (2005); Wiggins v. Smith,

539 U.S. 510, 532, 535 (2004); Williams v. Taylor (Terry), 529 U.S. 362, 396-98 (2000). A cumulative assessment of the evidence that trial counsel failed to present in Mr. Rippo's case would likewise have had a reasonable probability of a more favorable outcome if counsel had presented it.

Second, the district court erred in holding that the recent psychological testing would not have militated in favor of a life verdict because courts have consistently found a reasonable probability of a more favorable outcome where trial counsel failed to present similar evidence of neuropsychological dysfunction. See, e.g., Ainsworth v. Woodford, 268 F.3d 868, 876 (9th Cir. 2000) ("It is likely that the introduction of expert testimony would also have been important in the jury's determination.") (holding that petitioner suffered prejudice from the failure to investigate and present expert testimony regarding the effect of psycho-social stressors on petitioner's mental state); Stallings v. Bagley, 561 F.Supp.2d 821 (N.D. Ohio 2008) (finding prejudice where trial counsel failed to investigate and present evidence of defendant's brain damage, and further failed to explain the significance of defendant's diagnoses of ADHD). No mental health experts testified at Mr. Rippo's penalty hearing so it is easy for this Court to compare what happened at his trial with what should have happened if trial counsel had performed effectively. Given counsel's 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 relative to the probability of adverse outcomes in the community. 36 JA 8566-8596. Just as important, evidence of Mr. Rippo's neuropsychological impairment, attention deficit hyperactivity disorder, obsessive compulsive disorder, and poly-substance abuse would have been considered mitigating by the jury, particularly when viewed in conjunction with the psycho-social stressors in Mr. Rippo's background. All of this evidence could have been submitted to the jury by counsel in a special verdict form for their consideration in connection with their weighing of that evidence against the statutory aggravating circumstances. 19 JA 4512-4513. The prejudice from the failure to present a mitigation verdict form was exacerbated by the fact that the instructions told the jury to designate

mitigating circumstances, but the only verdict form to which they were referred was the special verdict form for designating aggravating circumstances. 16 JA 3538-3539. It is therefore clear that there is at least a reasonable probability of a more favorable outcome if trial counsel had performed effectively.

Mr. Rippo also suffered prejudice from trial counsel's failure to offer expert testimony that he would perform constructively in the structured setting of a prison. At his penalty hearing, trial counsel presented the testimony of a lay witness, Reverend James Cooper, to testify regarding Mr. Rippo's behavior in prison but that testimony "lacked force without some expert testimony to back it up." Douglas v. Woodford, 316 F.3d 1079, 1090 (9th Cir. 2003). Specifically, a violence risk assessment expert could have explained to the jury that the statistical base rate for violence in prison is low, 36 JA 8540-8564, and could have explained that Mr. Rippo was less likely than the average inmate to commit acts of violence in prison. Such evidence would have been particularly important given Mr. Cooper's limited knowledge of Mr. Rippo's institutional record and the state's emphasis in the penalty hearing on presenting evidence and argument on the issue of future dangerousness. A cumulative consideration of all of the evidence discussed above would therefore have had a reasonable probability of a more favorable outcome if counsel had presented it.

Finally, the district court erred in holding that the capital offense was so heinous that no sentence other than death would have been imposed. If there is anything that is certain in the analysis of prejudice in capital proceedings, it is that no offense is so aggravated that imposition of a death sentence is a foregone conclusion. In Williams v. Taylor (Terry), 529 U.S. 362 (2000), the Supreme Court held that ineffective assistance in failing to present mitigating evidence of the defendant's "childhood, filled with abuse and privation," and borderline retardation, was prejudicial, in a case where the capital offense was committed with a mattock, and that included aggravating evidence of two prior felony convictions, an assault on an elderly victim after staring in front of his house, a brutal assault on another elderly victim that left her in a vegetative state, and an arson in jail while the

defendant was awaiting trial. See Williams, 529 U.S. at 368-370, 397. Mr. Rippo has also cited other cases in which death sentences were vacated, despite the particularly heinous nature of the capital offense, due solely to the failure of trial counsel to investigate and present mitigating evidence at sentencing.[43] The mitigating evidence left out of the sentencing equation due to counsel's ineffectiveness in this case had the same potential for altering the jury's selection of the penalty as the evidence in Williams, and Mr. Rippo can accordingly demonstrate prejudice from counsel's ineffectiveness. Accordingly, this Court must remand the case to the district court for an evidentiary hearing.

4. Mr. Rippo Can Show Good Cause and Prejudice to Re-Raise His Claim that the Jury Instruction Requiring Unanimity to Impose a Life Sentence is Unconstitutional. U.S. Const. amends. V, VI, VIII, XIV.

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

On post-conviction appeal, this Court addressed Mr. Rippo's claim that the penalty instructions improperly told the jury that they had to be unanimous to find him ineligible for the death penalty. See Rippo v. State, 122 Nev. 1086, 1094-95, 146 P.3d 279, 285 (2006); 22 JA 5124-5143. Specifically, the instruction required juror unanimity to prevent a finding that the aggravating circumstances outweighed the mitigation. See id. This instruction violated Mr. Rippo's Sixth and Fourteenth Amendment right to a jury trial, see, e.g., Andres v. United States, 333 U.S. 740, 746-52 (1948) (unanimity requirement part of right to jury trial where "one juror can prevent a verdict which requires the death penalty"), as well as his Eighth Amendment right to a reliable sentence. See, e.g., Davis v. Mitchell, 318 F.3d 682, 689 (6th Cir. 2003) (instruction violates Eighth Amendment when it "'would' lead a reasonable juror to conclude that the only way to get a life verdict is if the jury unanimously finds that the aggravating circumstances do not outweigh the mitigating

[43] E.g., Silva v. Woodford, 279 F.3d 825, 828 (9th Cir. 2002); Turner v. Calderon, 281 F.3d 851 (9th Cir. 2002); Caro v. Woodford, 280 F.3d 1247 (9th Cir. 2002); Jennings v. Woodford, 290 F.3d 1006 (9th Cir. 2002); Ainsworth v. Woodford, 268 F.3d 868 (9th Cir. 2001); Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992) (thirteen murders); Deutscher v. Whitely, 884 F.2d 1152 (9th Cir. 1989).

circumstances. . .).[44] Three justices on this Court would have reversed Mr. Rippo's death sentence on this ground, and they independently found that this error precluded the Court from conducting harmless error analysis after invalidating three aggravating circumstances. See Rippo, 122 Nev. at 1099-1100, 146 P.3d at 287-88 (Rose, C.J., concurring in part and dissenting in part, joined by Maupin, J., and Gibbons, J.). As explained below, Mr. Rippo can demonstrate good cause to re-raise this claim before the Court.

Mr. Rippo is entitled to the reversal of his death sentence because the jury instruction used in his case improperly informed the jury that they had to be unanimous to prevent a finding that he was eligible for the death penalty. Instruction No. 7 told the jury that "the entire jury must agree unanimously, however, as to whether the aggravating circumstances outweigh the mitigating circumstances or whether the mitigating circumstances outweigh the aggravating circumstances." Rippo v. State, 122 Nev. 1086, 1095, 146 P.3d 279, 285 (2006); 16 JA 3815. This Court's decision correctly concludes that the second clause of this sentence was inaccurate:

> The final sentence of this instruction should have read simply: "The entire jury must agree unanimously as to whether the aggravating circumstances outweigh the mitigating circumstances." The emphasized language implied that jurors had to agree unanimously that mitigating circumstances outweigh aggravating circumstances, when actually "a jury's finding of mitigating circumstances in a capital penalty hearing does not have to be unanimous."

Id. (footnote omitted). But the decision proceeded to find the error harmless on the theory that "[i]t is extremely unlikely that the jurors were misled to believe that they could not give effect to a mitigating circumstance without the unanimous agreement of the other jurors." Id. The implication that the jury would have construed this clause as requiring unanimity in the finding of individual mitigating circumstances is a straw man: there is no question that the instruction unequivocally told the jury that "any one juror can find a mitigating circumstance without the agreement of any other jurors."

---

[44] Accord State v. Brooks, 661 N.E.2d 1030, 1040-42 (Ohio 1996); see also State v. Diar, 900 N.E.2d 565, 600-01 (Ohio 2008) (confession of error by the state).

The vice of the last clause is that it told the jury directly that it had to be unanimous in order to prevent a finding that the aggravating circumstances outweighed the mitigation.[45] The analogy would be an instruction on the element of the offense telling the jury that "the entire jury must agree unanimously that the element is proved beyond a reasonable doubt or that the element is not proven"; and such an instruction would be recognized instantly as an impermissible reversal of the burden of proof. The fact that the erroneous burden of proof instruction was contradicted by another part of the same instruction that stated the correct rule did nothing to dispel its unconstitutionality, because rational jurors would have believed both parts of the instruction, that is, while the finding that aggravation outweighed mitigation had to be found unanimously in order to establish death-eligibility, a finding that mitigation outweighed aggravation also had to be found unanimously in order to prevent death-eligibility, as the decision acknowledges, entirely wrong. In turn, this instruction prevented the jurors from giving full effect to mitigating evidence, but not because it suggested that the jurors had to agree unanimously on the existence of any mitigating factor: rather, it erroneously prevented each individual juror from avoiding a finding of death eligibility by stating that a finding that mitigation outweighed aggravation had to be unanimous, rather than correctly informing them that any single juror could prevent a finding of death eligibility by finding that mitigation outweighed aggravation. This instruction therefore prevented individual jurors from giving full effect to the mitigation evidence that each of them found when weighing it against aggravating circumstances.

Mr. Rippo can demonstrate good cause to re-raise his claim because he has alleged that the tie-breaking justice in the 4-3 split, former Justice Nancy Becker, was seeking employment with the Clark County District Attorney's Office at the time of this

---

[45]The decision states that the second clause of the instruction only "implied that jurors had to agree unanimously that mitigating circumstances outweigh aggravating circumstances," Rippo v. State, 122 Nev. 1086, 146 P.3d 279, 285 (2006) (emphasis added), but this is simply wrong: the instruction told the jury directly that "the entire jury must agree unanimously as to . . .whether the mitigating circumstances outweigh the aggravating circumstances."

Court's decision. The factual circumstances in the instant case indicate that Justice Becker was seeking and/or negotiating employment with the Clark County District Attorney's Office at the time she decided appellant's appeal. On November 7, 2006, Justice Becker lost her bid for re-election, and apparently began seeking other employment. 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. See Rippo v. State, 122 Nev. 1086, 146 P.3d 279 (2006). On December 22, 2006, this Court denied appellant's timely petition for rehearing with Justice Becker recusing herself from that decision. See Rippo v. State, No. 44094, Order Denying Rehearing (filed December 22, 2006). That same day, this Court approved and signed an order amending the commentary to Nev. Code Jud. Cond. Canon 3(E)(1) with Justice Becker as a signatory to the amendment. On December 28, 2006, decisions in two first-degree murder appeals were issued by this Court involving the Clark County District Attorney's Office, in which Justice Becker participated.[46] On January 4, 2007, it was reported in the Las Vegas Review Journal that the Clark County District Attorney's Office had extended an offer of employment to former Justice Becker. See John L. Smith, Las Vegas Review Journal, January 4, 2007. On January 16, 2007, the official announcement was made that Ms. Becker was employed by the Clark County District Attorney's Office.[47]

As a matter of law, former Justice Becker's participation in the decision on appellant's appeal when seeking or negotiating for employment with the District Attorney's Office was improper because "a reasonable person, knowing all the facts would harbor reasonable doubts about [the judge's] impartiality." PETA v. Bobby Berosini, Ltd., 111 Nev.

---

[46]This Court issued a sharply divided 4-3 decision in Summers v. State, 122 Nev. 1326, 148 P.3d 778 (2006), with former Justice Becker once again providing the crucial tie-breaking vote, in a decision where this Court ignored the High Court's recent Sixth Amendment jurisprudence which clearly holds that the protections associated with a jury trial on guilt or innocence extend to the jury's finding of statutory aggravating circumstances. See Summers, 122 Nev. at 1336-43, 148 P.3d at 785-90 (Rose, C.J., concurring in part and dissenting in part, joined by Maupin, J., and Douglas, J.). Accord Johnson v. State, 122 Nev. 1344, 1360, 148 P.3d 767, 778 (2006) (Rose, C.J., concurring, joined by Maupin, J., and Douglas, J.).

[47]This official announcement was made the day after the deadlines for filing petitions for rehearing in Johnson and Summers.

431, 438, 894 P.2d 337, 341 (1995); Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2263 (2009). Specifically, it is improper for a judge to participate in the adjudication of a case when they are seeking employment with one of the parties.[48] It was therefore improper for Justice Becker not to recuse herself from deciding appellant's appeal, as the facts indicate that she was seeking or negotiating employment with counsel for one of the parties at the time of her participation in the case. This Court cannot assume that Justice Becker complied with her ethical obligations given her failure to recognize that she could not be opposing counsel after previously participating in the decision on a defendant's direct appeal.[49] There is therefore 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 discovery and an evidentiary hearing.

Mr. Rippo can therefore demonstrate good cause to re-raise his claim of jury instructional error. 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. In the alternative, Mr. Rippo has alleged that post-conviction counsel were ineffective in failing to adequately brief and raise the instant issue of jury instructional error during the post-conviction proceedings. Effective post-conviction counsel would have read the jury instructions and realized that the penalty instruction in question contained a major typographical error, and would have raised Sixth, Eighth, and Fourteenth Amendment challenges to the instruction. Mr. Rippo can therefore demonstrate good cause to re-raise his

---

[48] See, e.g., In re CBI Holding Co. v. Ernst & Young, 424 F.3d 265, 266-67 (2d Cir. 2005); Pepsico, Inc. v. McMillen, 764 F.2d 458, 461 (7th Cir. 1985); Scott v. United States, 559 A.2d 745, 747 (D.C. 1989); see Bender v. Board of Fire & Police Comm'rs, 254 Ill. App.3d 488, 491 (Ill. App. Ct. 1993); Judicial Conference of the United States, Committee on Code of Judicial Conduct for United States Judges, Compendium of Selected Opinions, § 2.5 (2003).

[49] See Bickom v. State, Nev. Sup. Ct. No. 48564, Order Granting Motion in Part (filed June 29, 2007) (order of the Court removing Ms. Becker as counsel for Clark County District Attorney's Office).

claim regarding the invalid penalty instruction.

b. Jury Instruction Failing to Require that Mitigation be Outweighed by Statutory Aggravation Beyond a Reasonable Doubt

In his petition, Mr. Rippo alleged that the jury instruction requiring the jury to weigh aggravating circumstances against mitigation, 19 JA 4514-4517, is unconstitutional because it did not require that finding to made beyond a reasonable doubt. 16 JA 3815. In the proceedings below, Mr. Rippo argued that he could demonstrate good cause to raise this claim based upon intervening law in Blakely v. Washington, 542 U.S. 296 (2004), and due to post-conviction counsel's ineffectiveness in failing to raise the claim. 37 JA 8848-8849. Under Nevada law, eligibility for the death penalty requires two factual findings: (1) the existence of one or more statutory aggravating circumstances, and (2) that the aggravating circumstances are not outweighed by mitigation. See Nev. Rev. Stat. 175.554(3). Mr. Rippo's jury was never instructed that it had to find the second element of death-eligibility – that the aggravating circumstances were not outweighed by the mitigating circumstances – beyond a reasonable doubt. As explained below, Mr. Rippo can demonstrate prejudice from post-conviction counsel's ineffective assistance because the jury instruction violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights, and constitutes structural error. See Sullivan v. Louisiana, 508 U.S. 275, 279-82 (1993).

This Court recently held in McConnell v. State, 125 Nev. __, 212 P.3d 307, 314-15 (2009), that "[n]othing in the plain language of [the statutes] 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 "[s]imilarly, this court has imposed no such requirement." The Court's first statement regarding the text of the statute is accurate, but that is the very reason why it is unconstitutional. The Court's second holding regarding its own case law is simply wrong: this Court has, in fact, held that the aggravators must be found by the jury to not be outweighed by mitigation beyond a reasonable doubt before the death penalty can be imposed. See Johnson v. State, 118 Nev. 787, 802-803, 59 P.3d 450, 460 (2002); cf. Rust v. Hopkins, 984 F.2d 1486, 1492-94 (8th

Cir. 1993). However, even if this Court had not so held, both the statute and this Court's interpretation of it are nonetheless subject to federal due process and jury trial guarantees, which under recent and controlling Supreme Court case law require any and all death eligibility factors to be found beyond a reasonable doubt.[50]

Under Nevada law, the finding that the aggravators outweigh the mitigation exposes the defendant to a greater punishment than that authorized by the guilty verdict alone, and that factual finding is necessary to impose the death penalty.[51] Accordingly, under Apprendi, the finding that the aggravators are outweighed by the mitigators must be made beyond a reasonable doubt, whether the statute expressly says so or not. This Court held as much in Johnson:

> 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, 530 U.S. at 482-483). Thus, the failure to instruct the jury that it must find that the aggravating circumstances outweigh the mitigation beyond a reasonable doubt violated Mr. Rippo's due process and jury trial rights under Johnson.

This Court's decision in McConnell clearly misapprehends recent development in the High Court's case law, which apply the reasonable doubt standard to all death eligibility factors. With the exception of DePasquale v. State, 106 Nev. 843, 803 P.2d 218

---

[50]See Apprendi v. New Jersey, 530 U.S. 466, 483 (2000); United States v. Booker, 543 U.S. 220, 244 (2005).

[51]Nev. Rev. Stat. § 175.554(3) ("The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found."); see also Hollaway v. State, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000).

(1990), which was decided prior to Ring and Apprendi, and is now invalid under those cases, all of the cases cited by this Court in McConnell deal with the decision of whether to impose the death penalty, and not the decision of whether the defendant is eligible for the death penalty.[52] This Court held in McConnell that "the jury's decision whether to impose a sentence of death is a moral decision that is not susceptible to proof." McConnell, 212 P.3d at 216-172 (citing Penry v. Lynaugh, 492 U.S. 302, 319 (1989)). While true, this fact is completely inapposite to the issue of whether the aggravating factors are outweighed by mitigation which must be made beyond a reasonable doubt where, under Nevada law, such a finding is necessary to render a defendant eligible for the death penalty. The issue in McConnell, as in this case, is not whether the decision to impose the death penalty must be made beyond a reasonable doubt, but whether one of the eligibility factors must be found beyond a reasonable doubt. As explained in detail above, Supreme Court precedent clearly mandates that it must. Cf. Apprendi, 530 U.S. at 494.

Thus, 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. Accordingly, this Court must reverse the district court, vacate Mr. Rippo's sentence and order a new penalty hearing at which the jury will be properly instructed concerning the elements of death eligibility.

5. Mr. Rippo is Actually Innocent of the Death Penalty Because There are No Valid Aggravating Circumstances Remaining in His Case. U.S. Const. amends. V, VI, VIII, XIV.

a. There is Insufficient Evidence to Sustain the Torture Aggravating Circumstance.

In his petition, Mr. Rippo alleged that there was constitutionally insufficient evidence to sustain the torture aggravating circumstance, Nev. Rev. Stat. § 200.033(8). 19

---

[52] See Gerlaugh v. Lewis, 898 F. Supp. 1388, 1421 (D. Ariz. 1995) (aggravators need not outweigh mitigators beyond reasonable doubt where, under Arizona law, weighing of aggravators against mitigators is not part of eligibility determination, but is part of selection process); Harris v. Pulley, 692 F.2d 1189, 1195 (9th Cir.1982) (weighing of aggravators against mitigators in California is part of selection determination, not the eligibility determination).

JA 4561-4566. On direct appeal, 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. Cf. Lewis v. Jeffers, 497 U.S. 764, 780 (1990) (arbitrary or capricious construction of aggravating circumstance violates constitutional rights). Likewise, the jury in Mr. Rippo's case was instructed in the language of section 200.030(1)(a). 16 JA 3823. As explained below, there is constitutionally insufficient evidence to support the torture aggravating circumstance, which means that Mr. Rippo can demonstrate prejudice from the erroneous jury instruction and from this Court's erroneous construction of the aggravating factor on direct appeal.

Neither the penalty instruction nor this Court's construction of it on direct appeal contained the narrowing requirement that the torture be beyond the act of killing. On direct appeal, this Court construed Nev. Rev. Stat. § 200.030(1)(a), which applies when the murder is committed by "means of torture." Rippo, 113 Nev. at 1263, 946 P.2d 1032 ("Under the instruction as given, the jury was required to find that the acts of torture must have 'caused the death' and must have 'involve[d] a high degree of probability of death.'"). However, the aggravating circumstance of Nev. Rev. Stat. § 200.033(8) requires that the "murder involved 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). As explained above, this Court acknowledged that the jury instruction tracked the language of the substantive offense rather than the aggravating circumstance, 16 JA 3823, and it proceeded to improperly apply the substantive offense construction in Mr. Rippo's case. This Court has therefore never fulfilled its mandatory obligation to determine the sufficiency of the evidence

supporting the torture aggravating circumstance. See Nev. Rev. Stat. § 177.055(2)(b).[53] Mr. Rippo alleges that this Court's failure to properly apply the torture aggravating circumstance in his case violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution.

Had this Court properly construed Nev. Rev. Stat. § 200.033(8), it would have been forced to find that there was constitutionally-insufficient evidence to support the torture aggravating circumstance. This Court never identified any acts or intent *beyond* the act of killing as required by Hernandez and Dominguez. As in Dominguez, there is "no evidence that [either victim] suffered any act of torture or mutilation in addition to the ligature strangulation." Dominguez, 112 Nev. at 702-03, 917 P.2d at 1378. On the contrary, the co-defendant, Diana Hunt, testified that the restraint of the victims was done for the purpose of subduing them so that they could be robbed of drugs, 1 JA 32-39; 5B JA 1401-060 to 1401-065 [6/4/92 TT at 32-39;02/05/96 TT at 60-65], and the only other evidence of intent was from state witness Tom Sims who testified that Mr. Rippo told him that he accidentally killed the first victim. 5B JA 1401-167. There was therefore constitutionally-insufficient evidence of torture, because there was no evidence that Mr. Rippo had the intent to inflict cruel pain and suffering beyond the act of killing that was also done for the purpose of revenge, extortion, persuasion, or for any sadistic purpose.

Mr. Rippo can further show that there is constitutionally-insufficient evidence of torture based upon ineffective assistance of trial and post-conviction counsel in failing to raise the claim. Under state law, the aggravating circumstances of the offense which were related only by Diana Hunt, such as the use of a stun gun, were insufficient absent corroboration. See Nev. Rev. Stat. § 175.291(1). In the instant case, the only witness who could have corroborated Ms. Hunt's testimony was Sheldon Green, M.D., but he testified that he found no stun marks on the victims. 10 JA 2362-2363, 2382-2383 [2/27/96 TT at 130-31,

---

[53]This Court also refused to apply the construction that it had given to the substantive offense of murder by means of torture when it held that Mr. Rippo "will not be allowed to escape the murder-by-torture aggravating factor merely because the torturing is not the actual cause of death." Rippo, 113 Nev. at 1264, 946 P.2d at 1032.

150-51]. Mr. Rippo alleged below that trial counsel were ineffective for failing to cross-examine Dr. Green with his testimony at the grand jury hearing that stun marks would have been present even if the victims were shocked through their clothing, 1 JA 224-225 [6/4/92 TT at 224-25]. However, counsel failed to cross-examine Dr. Green on this point which allowed the prosecution to improperly argue (outside of the facts) in closing that the reason that there were no stun marks was because the victims were wearing clothing. 14 JA 3337-3338 [See 3/5/96 TT at 216-17]. Mr. Rippo can therefore demonstrate good cause to raise his claim of insufficient evidence of torture based upon post-conviction counsel's ineffectiveness in failing to raise the issue of ineffective assistance of trial counsel.

b. The Aggravating Circumstances Based on Mr. Rippo's Prior Conviction for Sexual Assault are Invalid.

Mr. Rippo alleged in his petition that the trial court erred in failing to strike two invalid aggravating circumstances that were predicated on an invalid conviction for sexual assault, that trial counsel were ineffective in failing to re-raise the claim at trial, and further that appellate counsel were ineffective for failing to raise the claim on direct appeal. 19 JA 4427-4430, 4561-4566. Mr. Rippo can demonstrate good cause for raising this claim now due to post-conviction counsel's ineffectiveness in failing to apprise himself of the trial record (which reflected that trial counsel had abandoned the motion to strike), in failing to attach the relevant exhibits demonstrating that the sexual assault conviction was invalid, in failing to cite to relevant portions of the record, and in generally failing to adequately brief the issue. See 19 JA 4445.

Mr. Rippo's jury was instructed that the crime of murder could be aggravated by Mr. Rippo's prior violent felony conviction for sexual assault in 1982. See 36 JA 8635. Mr. Rippo's conviction should not have been presented to the jury, however, because it was invalid, being the result of a guilty plea that was deficient. There, Mr. Rippo was improperly instructed by the trial court regarding his eligibility for probation, thus rendering the guilty plea invalid because it was not knowingly and intelligently given. 36 JA 8614. Furthermore, Mr. Rippo failed to admit to having committed the necessary elements of the offense, further

rendering the plea invalid under Nevada law.[54] Higby v. Sheriff, 86 Nev. 774, 476 P.2d 959 (1970). See also Hanley v. State, 97 Nev. 130, 624 P.2d 1387 (1981). Because Mr. Rippo's plea of guilty to the crime of rape was invalid, his conviction of the offense was invalid and it should not have been submitted as a statutory aggravating circumstance. Trial counsel initially filed a motion to strike the invalid aggravating circumstances, but later abandoned the motion and failed to re-raise it before the penalty hearing. See 3 JA 597-598 [4/14/94 TT at 7-8]. Mr. Rippo alleges that he suffered prejudice as a result of the trial court's failure to strike the invalid aggravating factors, and from trial counsel's failure to re-raise their motion to strike the aggravating factors, as there is a reasonable probability of a more favorable outcome had the invalid aggravating circumstance been stricken.

Mr. Rippo further alleged that his prior conviction could not be considered as a statutory aggravating circumstance under Roper v. Simmons, 543 U.S. 541, 568-574 (2005), because it was committed when Mr. Rippo was under the age of eighteen. In Nevada, a person convicted of murder can only receive the death penalty if the jury finds that a statutory circumstance exists and that the aggravating circumstances are not outweighed by any mitigation. One of the aggravating circumstances which made Mr. Rippo eligible for the death penalty was his 1982 conviction, which occurred when he was sixteen. While Roper held that the death penalty was an unconstitutional punishment for crimes committed when a person was under eighteen, its analysis applies to situations in which a person committed a crime when he was over eighteen but became eligible for the death penalty based on a crime he committed when he was under eighteen. See, e.g., United States v. Naylor, Jr., 350 F. Supp.2d 521, 524 (W.D. Va. 2005). Because of their impulsiveness and susceptibility, the Supreme Court in Roper found that juveniles are more likely to engage in

---

[54] The canvass went as follows:

COURT: Did you actually insert your penis inside of her vagina?

RIPPO: No.

36 JA 8625.

reckless behavior without fully understanding the consequences of that behavior, and thus they should not be eligible for the death penalty. See Roper, 543 U.S. at 568-574. The same rationale applies here. Because of his reduced culpability for the 1982 offense, Mr. Rippo should not have been made eligible for the death penalty in the instant case based on that offense.

The district court's order denying Mr. Rippo's petition held that "[t]he validity of a prior conviction used for sentence enhancement may not be collaterally attacked in a subsequent offense. See e.g., U.S. v. Martinez-Martinez, 295 F. 3d 1041 (9th Cir. 2002)." 48 JA 1609. However, this language was not contained in any of the state's pleadings or in the district court's minute order. This statement is contrary to controlling state law which provides that "a defendant must be allowed to challenge the constitutional sufficiency of a prior judgment of conviction in any proceeding where that judgment is offered for enhancement purposes." Dressler v. State, 107 Nev. 686, 692, 819 P.2d 1288, 1292 (1991).[55] The case cited by the district court, United States v. Martinez-Martinez, 295 F.3d 1041 (9th Cir. 2002), is based upon Custis v. United States, 511 U.S. 485 (1994), and Custis has been expressly rejected by this Court. See Paschall v. State, 116 Nev. 911, 913 n.2, 8 P.3d 851, 852 n.2 (2000). Mr. Rippo filed a specific formal objection to the proposed order, 48 JA 11612-11647; however, there is no indication that his objection was considered before the district court signed the order. Accordingly, this Court should reverse the order of the district court and hold that the prior violent felony and under sentence of imprisonment aggravators are invalid as applied to Mr. Rippo due to the invalidity of his prior conviction.

c. Prejudice

Mr. Rippo can demonstrate actual innocence of the death penalty under Leslie v. State, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002), because there is a reasonable probability of a more favorable outcome in the absence of the invalid aggravating

---

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

circumstances. Setting aside the three aggravating circumstances above, there are no remaining aggravating circumstances in Mr. Rippo's case. Even if there was 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 pp. 51-55, supra; 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 circumstance(s).

Mr. Rippo can further show prejudice 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).[56] As explained above, the jury instructions given in Mr. Rippo's case requiring unanimity to find that he was not eligible for the death penalty "renders reweighing too speculative." Rippo v. State, 122 Nev. 1086, 1099, 146 P.3d 279, 288 (2006) (Rose, C.J., concurring in part and dissenting in part, joined by Maupin, J., and Gibbons, J.). In addition, this Court clearly erred on direct appeal in holding that the jury found "no mitigating circumstances." Rippo v. State, 113 Nev. 1239, 1264, 946 P.2d 1017, 1033 (1997). On the contrary, the jury was not given a special verdict form with which to designate mitigating circumstances. See Lane v. State, 114 Nev. 299, 305, 956 P.2d 88, 92 (1998).[57] The instructions given referred solely to the special verdict form for aggravating circumstances and told the jury to use that form to indicate "the presence or absence and

---

[56] Accord Rippo v. State, 122 Nev. 1086, 1099, 146 P.3d 279, 288 (2006) (Rose, C.J., concurring in part and dissenting in part, joined by Maupin, J., and Gibbons, J.); see, e.g., Rust v. Hopkins, 984 F.2d 1486, 1494 (8th Cir. 1993) (appellate harmless error assessment is "not the replacement of invalid proceedings with correct proceedings in the appellate court").

[57] Accord McKenna v. McDaniel, 65 F.3d 1483, 1490 (9th Cir. 1995).

weight to be given . . . any mitigating circumstances." 16 JA 3833. In circumstances where there was no mitigation verdict form, an inadequate weighing instruction, cf. Rohem v. Gibson, 245 F.3d 1130, 1137-38 (10th Cir. 2001) (absence of weighing instruction), and no jury instruction regarding consideration of non-statutory aggravation, see Butler v. State, 120 Nev. 879, 894-95, 102 P.3d 71, 82-83 (2004), this Court cannot conduct harmless error under Clemons,[58] and Mr. Rippo's death sentence is invalid.

6. Mr. Rippo Can Demonstrate Good Cause and Prejudice to Challenge the Improper Admission of Prejudicial Victim Impact Evidence. U.S. Const. amends. V, VI, VIII, XIV.

In his petition, Mr. Rippo alleged that the trial court erred in admitting cumulative and highly prejudicial victim impact evidence at the penalty phase of his trial. See 19 JA 4551. Mr. Rippo further alleged that post-conviction counsel was ineffective for failing to adequately raise a claim of ineffective assistance of direct appeal counsel for failing to raise this claim. 19 JA 4426-4430.

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 prejudicial victim impact evidence that was presented in his case. Thus, the evidence presented in the instant petition is substantially

[58]See, e.g., Carter v. Bowersox, 265 F.3d 705, 714-15 (8th Cir. 2001); Murtishaw v. Woodford, 255 F.3d 926, 969-73 (9th Cir. 2001).

different than that which has been presented in earlier proceedings.[59] 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.

On the merits, this Court has held that "admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence" are prohibited under Booth, and that Payne only permits admission of "evidence and argument relating to the victim and the impact of the victim's death." Kaczmarek v. State, 120 Nev. 314,340, 91 P.3d 16, 34 (2004). Here, the witnesses violated all the prohibitions of Booth by testifying that they were amazed that another person was capable of committing "such a heinous crime and is [still] liv[ing] on this planet," 16 JA 3797, 3799 [03/13/96 TT at 204, 206], classifying the crime as the "selfish act of another," 16 JA 3779 [03/13/96 TT at 186], and stating it was difficult to "contain the rage" they harbored for Mr. Rippo, 16 JA 3773-3774 [03/13/96 TT at 180-81]. One witness even testified that every time she went out in public, she feared that the person responsible for daughter's death would be standing next to her, and that four years is a "long time to wait for justice." 16 JA 3791 [03/13/96 TT at 198]. The trial court also improperly allowed the victims' families to testify regarding future holidays and life events that the victims would never experience. "This Court has repeatedly held that so-called 'holiday' arguments are inappropriate ... [because they] 'have no purpose other than to arouse the jurors' emotions." Quillen v. State, 112 Nev. 1369, 1382, 929 P.2d 893, 901 (1996) (quoting Williams v. State, 103 Nev. 106, 109, 734 P.2d 700, 702 (1987)). Here, the witnesses testified to the anger they felt when they realized that they would never see Ms. Lizzi "in a wedding dress" or bear grandchildren. 16 JA 3785

---

[59]The law-of-the-case doctrine does not bar reconsideration of this claim because "subsequent proceedings [have] produce[d] substantially new or different evidence." See Hsu v. County of Clark, 123 Nev. 625, 173 P. 3d 724, 729 (2007) (recognizing exceptions to law of case doctrine adopted by courts in other states and federal system); see also Bejarano v. State, 122 Nev. 1066, 1074, 146 P. 3d 265, 271 (2006) (holding "the doctrine of the law of the case is not absolute, and we have the discretion to revisit the wisdom of our legal conclusions if we determine such action is warranted.").

[3/13/96 TT at 192]. This testimony was irrelevant, impermissible, and designed solely to inflame the passions of the jury. The trial court erred in failing to exclude this evidence, which was inadmissible, and was more prejudicial than probative.

Under Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597 (1991), the relevance of victim impact evidence must be weighed against its prejudicial effect to determine if it rendered the trial fundamentally unfair. When weighing the probative value of the evidence against its potential for prejudice, courts must consider the nature and amount of mitigation evidence presented by the defense.[60] Where the defense makes a strong mitigation presentation, victim impact evidence may not be as prejudicial, but where the defense presents little or no mitigation, the risk of prejudice resulting from a strong victim impact presentation is increased substantially. See U.S. v. Nelson, 347 F.3d 701 (8th Cir. 2003) (victim impact testimony, comprising approximately 101 of the more than 1100 pages of trial transcript and consisting of statements by victim's sisters, mother, classmate, friend, and teacher, was not so unduly prejudicial as to render capital defendant's murder trial fundamentally unfair, particularly in light of defendant's presentation of mitigating evidence on his own behalf, including testimony from a psychologist, his mother, brothers, aunts, and numerous other witnesses). Where trial counsel fails to present significant mitigation evidence, the risk of prejudice resulting from victim impact testimony is great, and courts must therefore limit the presentation of victim impact testimony in cases where there is little or no mitigation being presented by the defense.

Here, only three people testified in mitigation and only eight pictures were introduced of Mr. Rippo when he was a child, while five people testified to victim impact and over thirty pictures of the victims were introduced along with other mementos in the form of photo albums and scrapbooks chronicling the victim's lives. See 39 JA 9339-9374.

---

[60]See U.S. v. Rodriguez, --- F.3d ----, 2009 WL 2998103 (8th Cir. 2009) (rejecting challenge to victim-impact testimony because defendant "presented numerous mitigation witnesses who testified about the value of his life and the emotional pain his execution would cause them"); U.S. v. Paul, 217 F.3d 989 (8th Cir. 2000) (rejecting challenge to victim-impact testimony because the defendant "was also able to present extensive mitigating evidence through the testimony of his mother").

When the voluminous victim impact testimony in this case is compared against the weak mitigation presentation, the prejudice to Mr. Rippo becomes clear. See Rippo v. State, 122 Nev 1086, 1094, 146 P. 3d 279, 284 (2006) ("This evidence in mitigation was not particularly compelling."). The trial court's failure to limit the victim impact presentation resulted in Mr. Rippo's penalty hearing being fundamentally unfair.

Furthermore, even considering the victim impact testimony alone, without regard for the weak mitigation presentation, the volume and nature of the evidence was prejudicial and rendered Mr. Rippo's trial fundamentally unfair. In Salazar v. State, 90 S.W.3d 330, 337-39 (Tex. Crim. App. 2002), the Texas Court of Criminal Appeals found the admission of a video montage of the victim's life to be improper victim impact evidence. In so holding, the court noted that "the punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial." Id. at 335-36. The court cautioned that "'victim impact and character evidence may become unfairly prejudicial through sheer volume. Even if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice. . .'" Id. at 336 citing Mosley v. State, 983 S.W.2d 249, 261-62 (Tex. Crim. App.1998) (emphasis in original). The court found particularly objectionable the number of photographs introduced of the victim when he was a child, given that he had ben murdered as an adult. Id. at 337. Similarly, in U.S. v Sampson, 335 F. Supp.2d 166, 192 (D. Mass. 2004), a federal district court excluded a video montage of the victim's life, concluding that the video was unfairly prejudicial "in light of the fact that the jury heard powerful, poignant testimony about [the victim's] full life and the impact of his loss on his family, and saw photographs of him in conjunction with this testimony. The video, given its length and the number of photos displayed, would have constituted an extended emotional appeal to the jury and would have provided much more than a 'quick glimpse' of the victim's life."

Mr. Rippo's case is very similar to Salazar and Sampson. Though the state presented photo albums and scrapbooks, rather than a video tape, the volume and nature of

the evidence was very similar to that which the court found inappropriate in Salazar. The State presented dozens of pictures of the victims, most of which depicted the victims when they were children. See 39 JA 9339-9374. The many pictures of the victims when they were children, combined with testimony of five family members, posed an extreme risk of prejudice to Mr. Rippo, and resulted in a penalty hearing that was fundamentally unfair. The pictures were not probative of the culpability or character of Mr. Rippo or the circumstances of the offense, nor were they particularly 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 that bore no direct relation to the effect of crime on the victims' family members.

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 found that Mr. Rippo had not been prejudiced by the improper victim impact testimony. There can be no doubt that direct appeal counsel was ineffective, since he admitted at the post-conviction evidentiary hearing: (1) that when representing criminal defendants on direct appeal, it is not his practice to retrieve the trial exhibits from the district court evidence vault, 19 JA 4362 [9/10/04 RT at 16] ("I wouldn't have that unless I went to the evidence vault and went through everything, which is something we usually don't do on direct appeal."); and (2) that in this case he failed to "federalize [the claim regarding improper admission of victim impact evidence] as being a violation of the Eighth Amendment," 19 JA 4400 [9/10/04 RT at 55]. 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.

///

7. Mr. Rippo Can Demonstrate Good Cause and Prejudice to Receive Consideration of His Claim that the Trial Court Prevented Him From Presenting a Defense and Confronting Witnesses Against Him. U.S. Const. amends. V, VI, VIII, XIV.

In his petition, Mr. Rippo alleged that post-conviction counsel was ineffective in failing to raise a claim that the trial court and trial counsel denied Mr. Rippo the right to discovery of evidence in support of his defense and to confront the witnesses against him. 19 JA 4427-4430. Effective defense counsel would have litigated the Attorney General's motion to quash his subpoena to obtain discovery of his own institutional files, 41 JA 9931-9933, as well as Diana Hunt's mental health records. 27 JA 6428-6434. See 2 JA 318 [9/20/93 TT at 3]. Post-conviction counsel never did any investigation, so there can be no assertion that he had a strategic justification for failing to conduct discovery to support a claim of ineffective assistance of prior state counsel.

Mr. Rippo can demonstrate prejudice from post-conviction counsel's ineffectiveness because he can show that the trial court's order and trial counsel's ineffectiveness deprived him of the right to present a defense. The state's penalty phase evidentiary presentation devoted substantial effort to showing that Mr. Rippo purportedly would be a danger to others if sentenced to life in prison. See, e.g., 15 JA 3538-3545, 3559-3575; 16 JA 3631-3657, 3712-3729, 3736-3746, 3760-3764 [3/12/96 TT at 126-33 (testimony of Don Miner, probation officer for Clark County Juvenile Services, regarding Mr. Rippo's confinement in Spring Mountain Youth Camp), 147-163 (testimony of Robert Sergi, probation officer at Spring Mountain Youth Camp and Mr. Rippo's case worker), 3/13/96 TT at 38-64 (testimony of Tom Maroney, probation supervisor at the Clark County Family Court, regarding Mr. Rippo's certification as an adult and alleged escape from juvenile facility), 119-136 (testimony of Howard Lee Saxon, adult parole and probation officer regarding Mr. Rippo's violation of the conditions of his parole), 143-153 (testimony of Eric Karst, correctional officer with the Nevada Department of Prisons regarding the discovery of contraband in Mr. Rippo's cell), 167-171 (testimony of Gerry Lynne Shehan, correctional officer with the Las Vegas Metropolitan Police Department regarding purported

threats from Mr. Rippo).] To rebut this evidence, Mr. Rippo required discovery of his prior incarceration and probation files to show that he had never committed any acts of assault against any other inmates or correctional officers during his previous stay in prison. Had Mr. Rippo been able to provide this information to an expert, he would have been able to present expert testimony that he would perform positively in a structured setting and would not pose a danger to others. The district court's order must therefore be remanded for Mr. Rippo to conduct discovery to obtain his own institutional records.

As a matter of state and federal law, the failure to permit Mr. Rippo discovery of his own incarceration and probation records constituted a deprivation of due process and a reliable sentence. "Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of Lockett [v. Ohio, 438 U.S. 586 (1978)] and Eddings [v. Oklahoma, 455 U.S. 104 (1982)] that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.' Gardner v. Florida, 430 U.S. 349, 362, 97 S.Ct. 1197, 1207, 51 L.Ed.2d 393 (1977)." Skipper v. South Carolina, 476 U.S. 1, 5 n.1 (1986); accord Davis v. Coyle, 475 F.3d 761, 770-74 (6th Cir. 2007). In addition, as a matter of state law, the department of corrections was required to provide Mr. Rippo's records to him upon his request. Nev. Rev. Stat. §§ 179A.100(5), 179A.100(1)(b), 179A.150(1)(b); accord 83 Nev. Op. Att'y Gen. 9, *1 (1983). The failure to provide Mr. Rippo with his own records as required by statute requires reversal of the sentencing verdict, see, e.g., Shields v. State, 97 Nev. 472, 473, 634 P.2d 468, 468-69 (1981) (police reports attached to pre-sentence report must be disclosed pursuant to statute), and the result would be the same even without a statute requiring disclosure when it is necessary to protect Mr. Rippo's constitutional rights.[61] Mr. Rippo can therefore demonstrate that the trial court's

[61] See, e.g., Davis v. Alaska, 415 U.S. 308, 319-21 (1974); Rice v. State, 113 Nev. 1300, 1315-16, 949 P.2d 262, 271-72 (1997) (defendant entitled to third party's pre-sentence report when report used against defendant at sentencing); Stinnett v. State, 106 Nev.

refusal to provide him with his own records (and trial counsels' acquiescence in this refusal) deprived him of due process and a reliable sentence.

The trial court also deprived Mr. Rippo of his right to due process and confrontation by failing to disclose Diana Hunt's MMPI ("Minnesota Multi phasic Personality Inventory") records, and medical records showing that she had been diagnosed with mental illness and was receiving psychotropic medication, for the purposes of impeachment. Cf. Silva v. Brown, 416 F.3d 980, 986 (9th Cir. 2005) (suppression of evidence of co-defendant's mental illness was improper because it prevented defendant from impeaching co-defendant's testimony). As Mr. Rippo explained in his petition, Ms. Hunt scored well above the average on the amorality scale on her MMPI. See 27 JA 6428-6434. By definition, an amoral person is not a credible person who can be trusted to tell the truth. It follows that defense counsel should have been able to obtain discovery of Ms. Hunt's MMPI scores for the purpose of impeaching her. Given the importance of Ms. Hunt's testimony as Mr. Rippo's co-defendant and the only witness who allegedly placed Mr. Rippo in the victims' home on the day of the offense, Mr. Rippo should have been permitted discovery of Ms. Hunt's MMPI scores and other mental health data for the purposes of impeaching her credibility. Cf. Lobato v. State, 120 Nev. 512, 521, 96 P.3d 765, 771-72 (2004). Mr. Rippo can therefore demonstrate prejudice from post-conviction counsel's ineffectiveness in failing to raise this claim, and he is entitled to a remand where he is allowed to obtain and develop all the evidence necessary to his defense, and prove that the failure to provide this information rendered his trial fundamentally unfair.

///

///

///

///

192, 195-96, 789 P.2d 579, 581 (1990) (granting defendant discovery of confidential reports to show bias of government witness); Hickey v. Eighth Judicial District Court, 105 Nev. 729, 733-34, 782 P.2d 1336, 1339 (1989); Nicklo v. Peter Pan Playskool, 97 Nev. 73, 76-77, 624 P.2d 22, 24-25 (1981).

8. Mr. Rippo Can Demonstrate Good Cause and Prejudice to Receive Consideration of His Claims of Ineffective Assistance of Trial Counsel for Failing to Adequately Object to the Admission of Evidence Which Deprived Mr. Rippo of the Presumption of Innocence. U.S. Const. amends. V, VI, VIII, XIV.

In his petition, Mr. Rippo alleged that post-conviction counsel was ineffective in failing to raise meritorious claims of ineffective assistance of trial counsel for failing to object to the admission of prejudicial evidence of other bad acts. 19 JA 4478-4513; Nev. Rev. Stat. § 48.045(2).[62] Prior to trial, counsel filed a motion in limine to prevent the prosecution from presenting evidence of Mr. Rippo's prior conviction for sexual assault. 2 JA 282-001 to 282-005. As explained below, however, trial counsel were ineffective in failing to raise appropriate objections to the admission of evidence of other bad acts by Mr. Rippo which deprived him of the presumption of innocence.

Trial and appeal counsel were ineffective in failing to adequately object to the admission of a prison photograph of Mr. Rippo that was admitted at the guilt phase of trial. 36 JA 8597. At trial, counsel raised an objection to the admission of the photograph on the ground that it was not relevant, 7 JA 1678-1679 [2/6/96 TT at 171-72]; however, counsel never raised an objection on the ground that the photo was unduly prejudicial as it showed Mr. Rippo in blue prison clothing and conveyed to the jury that he had been previously convicted of a felony offense. 36 JA 8597 [Ex. 99 at trial]; 19 JA 4358-4364 [9/10/04 TT at 12-18]. At the evidentiary hearing, trial counsel testified that he did not object on the grounds of prejudice because "I'm almost positive it didn't have any prison of jail markings on it." 19 JA4333 [8/20/04 TT at 47]. Post-conviction counsel, however, did not have the actual photograph to show that Mr. Rippo was in blue prison clothing. See id. Counsel was therefore not in a position to identify the prejudice from the admission of the photo, and he was further unable to raise a claim that counsel were ineffective in failing to simply request that the photo be cropped to prevent the jury from seeing Mr. Rippo in blue prison clothing. On appeal, this Court rejected the claim because post-conviction counsel failed to include

[62] See McKinney v. Rees, 993 F.2d 1378, 1380-82 (9th Cir. 1993).

any relevant citations to the record in his brief. See Rippo v. State, 122 Nev. 1086, 1096, 146 P.3d 279, 286 (2006) ("Rippo does not support this claim with references to the record, and the trial transcript shows that his counsel unsuccessfully objected to the admission of the photo."). Mr. Rippo can therefore show deficient performance and prejudice from post-conviction counsel's failure to adequately raise a claim regarding trial and appeal counsel's failure to properly object to the admission of the prison photograph.

Trial counsel were ineffective in failing to move to object to testimony by Thomas Sims regarding Mr. Rippo's prior conviction. On direct examination of Mr. Sims, the state elicited testimony from him that Mr. Rippo purportedly said that he "could have fucked both of [the victims], but [he] didn't . . . [and] He said [he was] cured. That means [he was] cured." 10 JA 2295 [2/27/96 TT at 63]. Mr. Sims' testimony constituted an improper reference to Mr. Rippo's prior conviction for sexual assault, and was inadmissible as evidence of prior bad acts. This statement was first mentioned by Mr. Harmon in his opening statement,10 JA 2298 [2/2/96 TT at 68], which caused the defense to move for a mistrial based upon the failure to provide discovery of Sims' statement. 5 JA 1290-1296 [2/2/96 TT at 72-78]; see Rippo v. State, 113 Nev. 1239, 1256, 946 P.2d 1017, 1028 (1997). However, counsel never proffered a reason for failing to raise a motion in limine to exclude the prejudicial portion of the statement in connection their motion for a mistrial (which was raised outside the presence of the jury) after Mr. Harmon's opening statement. 5 JA 1290-1296. Trial counsel unreasonably failed to raise a motion to exclude the portion of Sims' statement wherein Mr. Rippo purportedly said he was "cured" as an improper reference to prior bad acts. At the evidentiary hearing, counsel testified that they did not object to Sims testimony at trial, 8 JA 1829 [2/7/96 TT at 63], because that would have drawn attention to the statement. 19 JA 4334 [8/20/04 TT at 51-52]. Both prosecutors subsequently referred to that particular piece of Sims' testimony and emphasized the prejudicial portion of his testimony in closing argument. 14 JA 3197-3198, 3329 [3/5/96 TT at 77-78, 208]. Mr. Rippo can therefore demonstrate prejudice from post-conviction counsel's failure to adequately litigate this issue of ineffective assistance of trial counsel and his failure to raise

it on the post-conviction appeal.

Trial counsel were ineffective in opening the door to the admission of evidence of threats against state witness David Levine. On direct appeal, this Court rejected Mr. Rippo's claim that the his due process rights were violated from the prosecution's elicitation of testimony from Levine on re-direct examination regarding threats against him that were not made by Mr. Rippo, 12 JA 2802-2804 [2/29/96 TT at 172-176], because defense "counsel opened the door when, on cross-examination, he asked Levine about his confinement at the psychiatric facility and the reasons why he was housed there." Rippo, 113 Nev. at 1253, 946 P.2d at 1026. Mr. Rippo alleges that trial counsel were ineffective in failing to request discovery of Mr. Levine's institutional records to ascertain the reason for him being transported to a psychiatric facility. Had trial counsel conducted such discovery and learned that Mr. Levine was transferred to a psychiatric facility because of threats against him that were not attributable to Mr. Rippo, they would not have asked him about it on cross-examination. Mr. Rippo suffered prejudice from the admission of this evidence because it permitted the jury to infer (incorrectly) that Mr. Rippo had threatened Levine.

9. Mr. Rippo Can Demonstrate Good Cause and Prejudice to Raise Claims Regarding Invalid Jury Instructions.

a. Premeditation Instruction

The definition of premeditation, deliberation, and wilfulness as a single term, given in Rippo's jury instructions, 15 JA 3368, violated the federal and state constitutions by describing the applicable mental state vaguely and thereby blurring any distinction between first- and second-degree murder. See Polk v. Sandoval, 503 F.3d 903 (9th Cir.2007); cf. Nika v. State, 124 Nev. 103, 198 P.3d 839 (2008). The definition of all intent elements as a single term also allowed the jury to convict Mr. Rippo in the absence of evidence supporting the element of deliberation. In re Winship, 397 U.S. 358, 364 (1970). The court below held that this claim did not apply retroactively to Mr. Rippo. 48 JA 11608-11609. Mr. Rippo alleged below that he could demonstrate good cause to re-raise this claim due to intervening changes in the law, Evans v. State, 117 Nev. 609, 644, 28 P.3d 498, 521

(2001), and ineffective assistance of trial, appellate and post-conviction counsel in failing to raise a constitutional vagueness challenge to the instruction.[63]

In Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), the Ninth Circuit reviewed the Kazalyn instruction and this Court's holding in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). The court held that this Court failed to recognize due process problems in the Kazalyn instruction; that this Court failed to apply Sandstrom v. Montana, 442 U.S. 510 (1979); Frances v. Franklin, 471 U.S. 307 (1985); and In re Winship, 397 U.S. 358 (1970), and that the Kazalyn instruction ignored clearly established Supreme Court law requiring the state to prove every element of the offense beyond a reasonable doubt. Polk, 503 F.3d at 911.

After Polk was handed down, in Nika v. State, 124 Nev. 103, 198 P.3d 839 (2008), this Court discussed its historical interpretations of terms willfulness, premeditation, and deliberation, and concluded that it had attributed different meanings to these terms at different times. See Nika, 198 P.3d at 845. However, the decision also acknowledged that premeditation and deliberation "are not synonyms for 'malice aforethought,'" otherwise, the definition of the intent elements "would obliterate the distinction between the two degrees of murder." Nika, 198 at 845-846 (citing Hern v. State, 97 Nev. 529, 532, 635 P.2d 278, 280 (1981)). Nika acknowledged that the decision in Powell v. State, 108 Nev. 700, 838 P.2d 927 (1992), "reduced 'premeditation and deliberation' to 'intent.'" Id. However, this Court held that Byford, announced a change in the law – rather than a clarification – and summarily concluded that the change had no constitutional implications. Nika, 198 P.3d at 849. This retroactive and unforeseeable change in this Court's interpretation of the state of the law pre-Byford, see Garner v. State, 116 Nev. 770, 789 n.9, 6 P.3d 1013, 1025 n.9 (2000) (characterizing Byford as a clarification of the law), violates Mr. Rippo's federal due process rights, see Bouie v. City of Columbia, 378 U.S. 347, 354 (1964), and fails to address the

---

[63]This Court's previous decision only addressed Mr. Rippo's claim of ineffective assistance of appeal counsel for failing to raise the issue as one of omitting the element of deliberation, see Rippo v. State, 122 Nev. 1086, 1096-97, 146 P.3d 279, 286 (2006), rather than as a constitutional vagueness challenge.

constitutional vagueness of the Kazalyn instruction.

The complete absence of any distinction between first- and second-degree murder was not mentioned 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 malice aforethought and first-degree murder. This Court's language in Nika and Byford is clear and unmistakable: at the time of 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 murder, as defined in the Kazalyn instruction was unconstitutionally vague at the time of trial. See Kolender v. Lawson, 461 U.S. 352, 358 (1983).

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 adequate standards does not merely "encourage arbitrary and discriminatory enforcement," Kolender, 461 U.S. at 357 (citations omitted), but virtually ensures it.[64]

---

[64]This constitutional violation leads, in turn, to two other constitutional violations. First, the "standardless sweep" of the definition necessarily results in disparate treatment of similarly situated defendants, whose offenses are legally indistinguishable but whose treatment, by conviction of first- or second-degree murder, will be determined by the "personal predilections" of juries. This gives rise to a violation of the equal protection guarantee that "all persons similarly situated should be treated alike," Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985), unless there is a "rational basis for the difference

Further, this Court failed to determine, in Nika, whether Byford should apply retroactively as a substantive rule of criminal law, which also resulted in a violation of Mr. Rippo's federal due process rights. The retroactivity principles enunciated in Schriro v. Summerlin, 542 U.S. 348 (2004), and Bousley v. United States, 523 U.S. 614, 619-20 (1998), establish a constitutional floor that binds state courts under the federal due process clause. 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 characterized Byford as a correction of previous erroneous decisions, or as a super-legislative change in the law, or as a non-constitutional ruling, Summerlin and Bousley both require retroactive application when a decision of the court narrows the scope of a criminal statute. Otherwise, as this Court itself has acknowledged, "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), quoting Schriro v. Summerlin, 541 U.S. at 352; Bousley v. United States, 523 U.S. at 619-20 (retroactivity not an issue when the court "decides the meaning of a criminal statute"). This Court must therefore apply Byford to Mr. Rippo and reverse his first-degree murder convictions.

b. Aiding and Abetting Instructions

The jury instructions defining aiding and abetting that were given at Mr. Rippo's trial, 15 JA 3381-3385 [Instructions 22-26], are unconstitutional because they failed

---

in treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam) (citations omitted). Second, Nevada law restricts imposition of the death penalty to cases involving convictions of first-degree murder. NRS 200.030(4)(a). 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.

to require that Mr. Rippo have the specific intent to commit first-degree murder. In his petition, Mr. Rippo alleged that trial, appellate, and post-conviction counsel were ineffective in failing to raise the issue. 19 JA 4524-4526. In its decision below, the district court correctly acknowledged that instructional claim applied retroactively to Mr. Rippo, but it subsequently concluded that "the basis for the claim was always available to Rippo and is now procedurally barred." 48 JA 1608. This finding by the court is consistent with Mr. Rippo's claim that prior state counsel were ineffective in failing to raise the issue on his behalf. As explained below, Mr. Rippo suffered prejudice from the invalid aiding and abetting instruction.

Trial counsel was ineffective for failing to submit an instruction informing the jury that they were required to find that Mr. Rippo possessed the specific intent to commit first-degree murder under an aiding and abetting theory. See, e.g., Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002); Mitchell v. State, 123 Nev. 1269, 149 P.3d 33, 38 (2006); Laird v. Horn, 414 F.3d 419 (3d Cir. 2005). Effective trial counsel would have submitted an instruction requiring that he possess the same intent as his co-defendant, Diana Hunt. See, e.g., Hooper v. State, 95 Nev. 924, 927 n.2, 604 P.2d 115, 116 n.2 (1979). Such an instruction would have permitted trial counsel to argue to the jury that Mr. Rippo was not guilty of first-degree murder under an aiding and abetting theory unless he himself premeditated and deliberated the murder of the victims. See State v. O'Brien, 857 S.W.2d 212, 217-20 (Mo. 1993). There is a reasonable probability of a more favorable outcome if trial counsel had requested a specific intent instruction.[65]

c. Reasonable Doubt Instruction

The definition of reasonable doubt that was given to the jury, 15 JA 3387, improperly minimized the state's burden of proof. See Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam). Mr. Rippo is aware that this Court has rejected this claim on numerous

[65] See Labastida v. State, 115 Nev. 298, 302-05, 986 P.2d 443, 445-47 (1999); accord Wilson-Bey v. United States, 903 A.2d 818, 822, 842 n.41 (D.C. 2006) ("Because the instruction given in this case [on aiding and abetting] omitted the mens rea element of the offense charged, the error was of constitutional magnitude.").

occasions, but it has found it meritorious when it is combined with other instructions and prosecutorial argument which minimize the state's burden of proof. See Holmes v. State, 114 Nev. 1357, 1365-66, 972 P.2d 337, 342-43 (1998); McCullough v. State, 99 Nev. 72, 74-75, 657 P.2d 1157, 1158-59 (1983). The language in the instruction does not define proof beyond a reasonable doubt, but instead defines its opposite, i.e., the quantum of doubt. 15 JA 3387, 16 JA 3827 [Instruction No. 28, Penalty instruction No. 19]. The "govern and control a person in the more weighty affairs of life language" in combination with the "actual" language would have misled the jury into thinking that the quantum of doubt had to exceed the level of proof which was only defined as "an abiding conviction of the truth of the charge," and the instruction made no attempt to clarify that this abiding conviction had to exceed a preponderance of the evidence.[66] Therefore, in viewing the instruction together with the other jury instructions and arguments of the prosecutor, the instruction on reasonable doubt improperly minimized the state's burden of proof and requires reversal.[67]

///

///

---

[66]As a helpful reference, the problematic language above was substantially derived from the seminal case of Commonwealth v. Weber, 59 Mass. 295, 320 (1850), wherein it was counterbalanced against the following savings language:

> For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond a reasonable doubt.

Id. In other words, despite the use of potentially problematic language, the savings language in Weber clearly instructs the jury that the standard of proof is greater than a preponderance of the evidence, and it actually purports to define a higher standard.

[67]See Monk v. Zelez, 901 F.2d 885, 889-90 (10th Cir. 1990); McAllister v. State, 112 Wis. 496, 88 N.W. 212 (1901), Commonwealth v. Miller, 139 Pa. 77, 21 A. 138, 140 (1891); see also Minich v. People, 8 Colo. 440, 9 P. 4, 13 (1885); State v. Carter, 66 Ariz. 12, 182 P.2d 90, 94 (1947); State v. Pedersen, 802 P.2d 1328, 1322 (Utah App. 1990) (dictum); contra Lord v. State, 107 Nev. 28, 40, 806 P.2d 548, 555-56 (1991); Ramirez v. Hatcher, 136 F.3d 1209 (9th Cir. 1998).

10. Mr. Rippo Can Demonstrate Good Cause and Prejudice to Raise a Claim Regarding the Trial Court's Failure to Provide an Informant Cautionary Instruction. U.S. Const. amends. V, VI, VIII, XIV.

In his petition, Mr. Rippo alleged that direct appeal counsel was ineffective in failing to raise a state law and federal constitutional objection to the trial court's refusal to provide the defense's proposed informant cautionary instruction. 19 JA 4548-4850 [Petition at 133-135]. Trial counsel proposed a jury instruction near the close of trial which required the jury to "consider the prospect of vulnerable persons fabricating testimony as an inducement of leniency from the [S]tate" where testimony comes from a witness "who is incarcerated." 14 JA 3125-3126. [03/05/96 TT at 5-6]. The proposed instruction would have cautioned the jury regarding the testimonies of Diana Hunt, David Levine, James Ison, Donald Hill, Thomas Sims, Thomas Christos, and Michael Beaudoin. The court denied the proposed jury instruction. 14 JA 3127 [Id. at 7]. On appeal, counsel failed to preserve a challenge to the trial court's failure to give a cautionary instruction, and post-conviction counsel unreasonably failed to raise the issue in Mr. Rippo's first state petition.

When the state adduces testimony from a witness who has received benefits as a result of the testimony, the terms of the quid pro quo must be fully disclosed to the jury, the defense must be allowed to fully cross-examine the witness concerning the terms of the bargain, and the jury must be given a cautionary instruction. See Sheriff Humboldt County v. Acuna, 107 Nev. 664, 669, 819 P.2d 197, 200 (1991); Champion v. State, 87 Nev. 542, 543, 490 P.2d 1056, 1057 (1971). Buckley indicates that a cautionary instruction is "favored" even when the testimony is corroborated in "critical respects." Buckley v. State, 95 Nev. 602, 604, 600 P.2d 227, 228 (1979); see also James v. State, 105 Nev. 873, 875, 784 P.2d 965, 967 (1989). Here, several witnesses received benefits in exchange for their testimony, therefore, the jury should have been instructed to view their testimony with caution. This error was not harmless because Diana Hunt was the state's star witness who received benefits from the state, and six other witnesses for the state either received benefits, were accomplices, and/or were jailhouse informants. Mr. Rippo further incorporates the

discussion of prosecutorial misconduct for failing to disclose material impeachment information as discussed above. See pp. 32-50 supra. Had the jury been properly instructed to view the testimony of all of these witnesses with caution, there is a reasonable probability of a more favorable outcome.

11. Mr. Rippo Can Demonstrate Good Cause and Prejudice to Raise Claims Relating to Constitutional Errors that Occurred During Voir Dire. U.S. Const. amends. V, VI, VIII, XIV.

In his petition, Mr. Rippo alleged that post-conviction counsel was ineffective for failing to raise a claim regarding trial counsel's ineffective assistance during the voir dire stage of the proceedings. 19 JA 4426-4429. Mr. Rippo also alleged that trial counsel performed ineffectively during voir dire and that counsel on direct appeal was ineffective in failing to raise meritorious constitutional challenges to the voir dire process. 19 JA 4514-4517, 4541-4547. Specifically, Mr. Rippo alleged that trial counsel were ineffective (1) in failing to specifically ask each of the members of the venire whether they could impose two sentences of life with parole in the circumstances of his case; (2) in failing to ask the jurors whether they could consider specific mitigation evidence; (3) in contaminating the venire and failing to object to the court and prosecution's contamination of the venire by improperly stating that the jurors would have to provide equal consideration to each of the three penalties in the abstract; (4) in failing to move to excuse three biased jurors for cause; (5) in failing to object to the prosecution's overly narrow definition of mitigation evidence; (6) in failing to ensure that a record of peremptory challenges exercised by the parties was made; (7) in failing to raise an objection regarding the trial court's improper injection of levity in the proceedings; and (8) in failing to raise an objection to the prosecution's comments that the decision to vote for the death penalty required a strength of character that a life verdict did not.

A defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." Parker v. Gladden, 385 U.S. 363, 366 (1966). "Doubts about the existence of actual bias should be resolved against permitting the juror to serve." United

States v. Nell, 526 F.2d 1223, 1228-30 (5th Cir.1976). If a biased juror is seated because of error, rather than strategy, Strickland's prejudice prong has been meet and a new trial is warranted. See, e.g., United States v. Martinez-Salazar, 528 U.S. 304, 316-17 (2000); Neder v. United States, 527 U.S. 1, 8 (1999) (holding that the presence of a biased decisionmaker is structural error "subject to automatic reversal"). Here, trial counsel's numerous errors during voir dire were clearly deficient, and not the result of strategic decision-making.

Most importantly, Mr. Rippo can demonstrate that trial counsel's failure to raise meritorious challenges for cause prevented him from removing a biased juror who was seated on his jury.[68] During questioning of potential juror Carter Ruess, she stated that she could not consider a sentence of life with parole after convicting a person of premeditated first-degree murder. 5 JA 997 [1/31/96 TT at 201.] Ms. Ruess subsequently stated that she would consider a sentence of life with parole, 5 JA 998 [see id. at 202], but trial counsel never sought an assurance from her that she could consider that sentence after finding a person guilty of premeditated murder. 5 JA 999-1000 [See id. at 203-04.] During questioning of Isabel Garcia, she stated that she was recently the victim of a bank robbery where she was accosted by the robber, 4 JA 799-800, 807 [1/31/96 TT at 4-5, 12]; her daughter was recently "beaten and left half dead" by her boyfriend, 4 JA 802 [see id. at 7], and she was not able to give an unequivocal answer about whether she could be fair to Mr. Rippo. 4 JA 803, 809-810 [See id. at 8, 14-15.] During voir dire of Gerald Berger, he expressed his opinion that a sentence of life without parole did not really mean that Mr. Rippo would never get out of prison. 4 JA 918 [1/31/96 TT at 123]. Defense counsel unreasonably failed to follow up with Mr. Berger to ensure that he could follow the jury instructions regarding the meaning of life without parole, as well as whether he could even consider a sentence of life without parole. Trial counsel were ineffective in failing to move to remove Carter Ruess, Isabel Garcia, and

---

[68] See Virgil v. Dretke, 446 F.3d 598, 609-10 (5th Cir. 2006) ("We hold that [the jurors'] unchallenged statements during voir dire that they could not be 'fair and impartial' obligated Virgil's counsel to use a peremptory or for-cause challenge on these jurors. Not doing so was deficient performance under Strickland.") (reversing conviction under AEDPA after finding deficient performance and prejudice for trial counsel's failure to challenge or strike biased jurors during voir dire).

Gerald Berger from the venire for cause, and Mr. Berger sat on Mr. Rippo's jury as a result.

In addition, trial counsel were ineffective for failing to object to errors committed by the court and the prosecution during voir dire, thus increasing the likelihood that at least one of the jurors seated on Mr. Rippo's jury was biased. See U.S. v. Mouling, 557 F.3d 658 (D.C. Cir. 2009) (remanding for evidentiary hearing on claims of ineffective assistance of counsel, including failure to object to improper questioning by the court during voir dire). Trial counsel failed to object to the prosecution's comments that the decision to vote for the death penalty required a strength of character that a life verdict did not. See 5 JA 1056 [2/01/96 TT at 31] (Mr. Harmon asked whether potential juror had "the intestinal fortitude, the strength of... conviction, to come back into... open court, in full view of the defendant" and return the death penalty); see also 5 JA 1073, 1080, 1091 [2/01/96 TT at 48, 55, 66]; 4 JA 808, 829, 840, 894, 928, 980, 1003, 1005, 1012, 1014 [1/31/96 TT at 13, 34, 45, 99, 133, 185, 207, 209, 216, 218].[69] Trial counsel failed to object to the use of "equal consideration of penalties" language, which is prohibited by this Court as mistating state and federal law. See Leonard v. State, 117 Nev. 53, 68, 17 P. 3d 397, 406 (2001). Trial counsel failed to object to the trial court's injection of levity into the proceedings. 3 JA 671-672, 673, 678, 680-682, 683, 692, 695-697, 701-703, 708-709; 4 JA 734, 736, 744, 747 [1/30/96 TT at 38-39, 40, 45, 47-49, 50, 59, 62-64, 68-70, 71, 75, 76, 101, 103, 111, 114]; see Parodi v. Washoe Med. Ctr., 111 Nev. 365, 367-68, 892 P. 2d 588, 589 (1995) (finding that trial court's injection of levity during voir dire "prejudiced appellant's right to a fair trial"). The state was permitted to inform the jury that Mr. Rippo allegedly murdered two women by means of asphyxiation, 3 JA 648 [1/30/96 TT at 15], but trial counsel never specifically asked the jurors who sat on his case whether they could consider two sentences of life with parole in such circumstances. Trial counsel also never conducted an adequate mitigation investigation and therefore were not in a position to ask the persons on the venire whether they could consider that evidence in their sentencing determination. Counsel's performance

---

[69] See Evans v. State, 117 Nev. 609, 633-34, 28 P. 3d 498, 515 (2001).

was so deficient during voir dire that the process itself was inadequate to ensure a fair trial before an impartial jury.

In combination, the cumulative effect of trial counsels' ineffective assistance during voir dire was prejudicial. Mr. Rippo can therefore show that post-conviction counsel was ineffective in failing to raise a claim that trial and appellate counsel were ineffective for failing to raise the constitutional issues contained in his petition at trial and on direct appeal. See Ross v. Oklahoma, 487 U.S. 81, 85 (1988) ("Had [the biased juror] sat on the jury that ultimately sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's failure to remove [the juror] for cause, the sentence would have to be overturned").

12. Mr. Rippo Can Demonstrate Good Cause and Prejudice to Raise a Claim that Unduly Prejudicial Photographs Were Admitted at Trial. U.S. Const. amends. V, VI, VIII, XIV.

In his petition, Mr. Rippo alleged that post-conviction counsel was ineffective in failing to raise claims of ineffective assistance of trial counsel for failing to renew an objection to the admission of gruesome photographs when they were admitted at trial, and that counsel on direct appeal was ineffective for failing to raise appropriate state law and state and federal constitutional objections. 20 JA 45757-4576. During the post-conviction hearing, appeal counsel testified that it was not his practice to review the evidence at the court evidence vault that was admitted at trial. 19 JA 4362 [9/10/04 TT at 16]. Counsel therefore did not have a strategic justification for failing to raise the claim on appeal.

Mr. Rippo's right to due process was violated by the state's admission of gruesome photographs for no purpose other than to inflame the jury. The state introduced a total of twenty six photographs of various parts of the victim's bodies, twenty-two of which depicted the victim's injuries. See 39 JA 9335-9360, 41 JA 9942-9965 [state's exhibits 21, 24, 26, 27, 28, 31, 32, 34, 38, 39, 40, 41, 42, 45, 46, 47, 48, 51, 53, 54, 56, 57, 58, 60, 61, 62]. Of the photographs introduced, State's Exhibits 31, 53, and 54 are the most prejudicial, and the least probative. See 39 JA 9335-9360, 41 JA 9966-9967 [state's exhibits 31, 53, 54]. The admission of these photographs was more prejudicial than probative, and so infected Mr.

Rippo's trial with unfairness as to result in a denial of due process and a reliable sentence.

This Court has held that gruesome photographs are admissible only where they "aid in ascertaining the truth." Byford v. State, 116 Nev. 215, 231, 994 P.2d 700, 711 (2000). Similarly, the Ninth Circuit has found them admissible only where they "are relevant to the crime charged and aid in proving an element of the crime." McNeely v. Olivarez, 104 F.3d 365, 368 (9th Cir.1996). Here, State's Exhibits 31 (39 JA9335-9336) and in particular 53 (39 JA 9337-9338), have no probative value whatsoever, and do not, therefore, aid in ascertaining the truth, or aid in proving any elements of the crime. Any injuries depicted in State's Exhibit 31 (39 JA9335-9336) were better depicted in State's Exhibits 26, 32, and 34 (41 JA 9945, 9948, 9949), rendering State's Exhibit 31 (39 JA9335-9336) duplicative and of no significant probative value. 41 JA 9945, 39 JA 9335-9335, 1 JA 9948-9949 [State's exhibits 26, 31, 32, 34]. State's Exhibit 31 (39 JA9335-9336) was gruesome, and because the injuries depicted in that photograph were already depicted in other less gruesome photographs, the probative value of the photograph was outweighed by its prejudicial effect. More importantly, State's Exhibit 53 does not depict any injuries, and is extremely gruesome. See 39 JA 9337-9338 [State's exhibit 53]. The only thing State's Exhibit 53 depicts is the extent of decomposition the victim's body had undergone prior to being discovered–a fact which had no bearing on Mr. Rippo's trial and was of no probative value whatsoever. This exhibit was extremely prejudicial, and was introduced solely to inflame the passions of the jurors to convict Mr. Rippo.

"A photograph lends dimension to otherwise non-dimensional testimonial evidence. That an erroneous admission of a photograph would cause undue prejudice is certain. The extent of that prejudice is immeasurable." Sipsas v. State, 102 Nev. 119, 124 n.6, 716 P.2d 231, 234 n.6 (1986). In Mr. Rippo's case, there were twenty-six disturbing photographs introduced, and two in particular – State's Exhibits 31 and 53 (39 JA9335-933, 9337-9338)–were extremely gruesome and prejudicial. Because the gruesome photographs admitted against Mr. Rippo were irrelevant to the facts in issue, were introduced solely to inflame the passions of the jurors, and so infected his trial with unfairness as to result in a

denial of due process, the trial court erred in admitting them. See Spears v. Mullin, 343 F.3d 1215, 1227-29 (10th Cir. 2003) (finding trial court's improper admission of gruesome photographs resulted in fundamental unfairness); Gomez v. Ahitow, 29 F.3d 1128, 1139 (7th Cir.1994) (holding that the district court erred in admitting "gruesome" photographs of victim's body). Furthermore, trial counsel were ineffective for failing to object to these photographs at the time of admission, and direct appeal counsel was ineffective in failing to raise state and federal constitutional objections on appeal. Mr. Rippo alleges that there is a reasonable probability of a more favorable outcome in the guilt and penalty phase if counsel had performed effectively.

13. Execution by Lethal Injection as Administered in Nevada Constitutes Cruel and Unusual Punishment. U.S. Const. amends. V, VI, VIII, XIV.

In his petition, Mr. Rippo alleged that the protocol existing in Nevada for executing a sentence of death by lethal injection constitutes cruel and unusual punishment. 20 JA 4594-4607. In its order, the district court held that Mr. Rippo's claim was not cognizable in the instant habeas corpus proceeding, 48 JA 11605,11608, and this Court recently declined to entertain a challenge to the lethal injection protocol on the same grounds. See McConnell v. State, 125 Nev. __, 212 P.3d 307, 309-11 (2009).

Although the Supreme Court has entertained a challenge to an execution protocol brought in a civil rights action under 42 U.S.C. § 1983, Nelson v. Campbell, 541 U.S. 642 (2004); and Hill v. McDonough, 547 U.S. 573 (2006), these cases do not preclude raising such claims in a habeas petition. In fact, the Supreme Court in Hill recognized that federal courts could dismiss 42 U.S.C. § 1983 suits challenging a lethal injection protocol to protect the states against piecemeal litigation, leaving habeas corpus as a single avenue for such challenges. Hill, 547 U.S. at 583. Nowhere in its opinions did the Supreme Court state or suggest that habeas corpus proceedings cannot be used for lethal injection challenges. Indeed, in Nelson, the court characterized a section 1983 action in this context as "at the margins of habeas," Nelson, 541 U.S. at 646, and explicitly stated that it "need not here reach the difficult question of how to characterize method-of-execution claims generally," id. at

644, which it "left open." Id. at 646. Further, and most important, in Gomez v. United States District Court, 503 U.S. 653 (1992) (per curiam), the court rejected a last-minute § 1983 challenge to a method of execution, partly on the basis of laches, but also because the inmate had not raised the challenge in his four previous habeas petitions. Id. at 653-654. It thus remains an open question how much of the federal habeas corpus jurisprudence - - including the requirement of exhaustion - - and how much of the § 1983 jurisprudence - - including the requirement that the claim be ripe for adjudication will be applied to this claim and Mr. Rippo, out of an abundance of caution, must present it to this Court.

Nevada's execution protocol fails to include the same safeguards as the Kentucky protocol at issue in Baze v. Rees, 128 S.Ct. 1520 (2008). Nev. Rev. Stat. § 176.355(1) provides that a sentence of death in Nevada "must be inflicted by an injection of a lethal drug." Pursuant to Nev. Rev. Stat. § 176.355(2)(b), the Director of the Department of Corrections shall "[s]elect the drug or combination of drugs to be used for the execution after consulting with the State Health Officer." Unlike Kentucky's execution protocol, Nevada's execution protocol does not require a physician's participation; does not specify what, if any, training the execution team must have; does not require regular practice sessions of the execution protocol; and, does not require monitoring of the inmate's level of consciousness and IV lines. 22 JA 5144-5186, 22 JA 5215-5298, 23 JA 5299-5340. In addition, in Nevada, the person injecting the lethal chemicals is in a separate room and cannot tell if the inmate is unconscious when the final drug is administered. 22 JA 5221-5227, 5228-5230. The absence of Kentucky's safeguards compels the conclusion that Nevada's protocol violates the Eighth Amendment's ban on cruel and unusual punishments.

14. Mr. Rippo's Convictions and Death Sentences are Invalid Due to Cumulative Error. U.S. Const. amends. V, VI, VIII, XIV.

Mr. Rippo's convictions and death sentences are invalid due to the cumulative effect of the constitutional errors enumerated in the instant opening brief. See Chambers v. Mississippi, 410 U.S. 284, 294, 302-03 (1973). Mr. Rippo hereby incorporates all of the allegations contained in his opening brief as if fully set forth herein. In order to provide

adequate appellate review, this Court is obligated to consider the cumulative effect of the constitutional errors that it found on direct appeal, see generally Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997), and on post-conviction appeal, see generally Rippo v. State, 122 Nev. 1086, 146 P.3d 279 (2006), on the jury's guilt and penalty verdicts. These errors must be considered by this Court to determine whether Mr. Rippo suffered prejudice from post-conviction counsel's ineffective assistance. Considering all of the constitutional errors enumerated demonstrates that Mr. Rippo's defense was "far less persuasive than it might have been," Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007), and he is entitled to reversal of his convictions and death sentences.

VII. CONCLUSION

For the foregoing reason, Mr. Rippo respectfully requests that this Court reverse the order of the district court and vacate his convictions and death sentences. 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.

DATED this 16th day of October, 2009.

Respectfully submitted,

FRANNY A. FORSMAN
Federal Public Defender

David Anthony
Assistant Federal Public Defender
david_anthony@fd.org

CERTIFICATE OF COMPLIANCE

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

Dated this 16th day of October, 2009.

Respectfully submitted,

David Anthony
Assistant Federal Public Defender
Nevada Bar No. 007978
411 E. Bonneville Ave., #250
Las Vegas, Nevada 89101
david_anthony@fd.org

Attorney for Appellant

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that pursuant to NRCP 5(b)(2)(D) this document was filed electronically with the Nevada Supreme Court on the 16th day of October, 2009. Electronic Service of the foregoing APPELLANT'S OPENING 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