TABLE OF AUTHORITIES

STATUTES

Petitioner WILLIAM CASTILLO respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Nevada, entered on February 5, 2004.

OPINION BELOW

The opinion of the Nevada Supreme Court, affirming the post-conviction petition for writ of habeas corpus is reported at Castillo v. State. The Court's opinion is reproduced in the Appendix hereto at pages A8-A18.

STATEMENT OF JURISDICTION

The Nevada Supreme Court entered an Opinion affirming the post-conviction petition for writ of habeas corpus, on February 5, 2004. CASTILLO did not file a Petition for Rehearing.

A Motion for Stay of Remittitur was filed and an Order was entered on March 10, 2004, by the Nevada Supreme Court granting a stay of the Remittitur up to and including May 25, 2004. Allowing CASTILLO up to and including May 5, 2004 to file the Writ. Additionally, the Nevada Supreme Court will issue the remittitur on May 26, 2004, if the Writ of Certiorari is not filed.

The jurisdiction of the Court is invoked under 28 U.S.C. section 1457(a).

STATUTES AND CONSTITUTIONAL AUTHORITIES INVOLVED

The Sixth, Fifth, Eighth and Fourteenth Amendments of the United States Constitution are involved in the issues raised herein. Nevada Revised Statutes 193.165 are set forth in the Appendix at pages A-1 - A8.

STATEMENT OF THE CASE

On January 19, 1996, William Castillo (hereinafter referred to as CASTILLO) was indicted by the Clark County Grand Jury on the charges of Conspiracy to Commit burglary and/or Robbery, Burglary, Robbery of Victim Over the Age of Sixty-Five Years, Murder with Use of a Deadly Weapon, Conspiracy to Commit Burglary and Arson, and First Degree Arson. CASTILLO entered a plea of not guilty and waived his right to a trial within sixty days. The State filed a Notice of Intent to seek the death penalty alleging as aggravating circumstances.

On September 4, 1996, after three days of testimony, the jury returned a verdicts of guilty to all counts. The penalty hearing began on September 19, 1996, and concluded on September 24, 1996. A verdict of death was returned on September 25, 1996.

On February 28, 1997, Mr. Castillo filed a direct appeal. On April 2, 1998, the Nevada Supreme Court affirmed Mr. Castillo's convictions. On January 22, 1999, Mr. Castillo filed a Petition for Writ of Cert with the United States Supreme Court. On March 22, 1999, this Court denied Mr. Castillo's Petition.

On April 2 ,1999, Mr. Castillo filed a Petition for Writ of Habeas Corpus. On January 22, 2003, the Eighth Judicial District Court denied Mr. Castillo's Petition for Writ of Habeas Corpus. On February 19, 2003, Mr. Castillo filed his notice of appeal. On February 5, 2004, the Nevada Supreme Court Affirmed Mr. Castillo's convictions.

STATEMENT OF THE FACTS

A. TRIAL PHASE

Eighty six year old Isabelle Berndt lived at 13 North Yale, Las Vegas, Nevada. During the latter part of November, 1995, Berndt had a roofing job done on her house and she went to spend the Thanksgiving holiday in California.

Twenty-three (23) year old Duane Wright was driving along I- 95 approaching the Decatur off ramp on December 17, 1995, when he observed smoke coming out of a house, and

he decided to check it out. An attempt was also made to enter the rear door of the house but the fire prevented any entry.

Arson investigator Ben Hoge was called to the scene at about 3:26 A.M. It was his opinion that each of the fires were independently set by human hands with some type of accelerant.

Berndt's family was notified of her death and the fire and a search of the house was made to determine items that may have been missing. One of the items was a set of silverware that had little flowers around the handles and a B engraved on each piece. The silverware was usually kept in a wooden box on a shelf in her bedroom. Also missing from the house was a VCR that had been kept on the console in the living room and Christmas booties being knitted by Berndt and eight (8) United States saving bonds in the amount of fifty (50) dollars each.

Isabelle Berndt had multiple crushing-type injuries with lacerations to the head, crushing injuries of the jaw, the jaws were fractured and the teeth were broken. The injuries extended to the ears over the forehead, over the face, the chin, and one deep laceration on the back of her head. Cause of death was intracranial hemorrhage due to blunt force trauma to the face and head. The blunt force trauma was consistent with that which would result from being hit with a crow bar or a tire iron.

Tammy Jo Bryant met CASTILLO in August, 1995, and they developed a relationship as boyfriend and girlfriend and moved in together. A short time later Michelle Platou also moved in. At about 6 P.M. or shortly thereafter on December 16, 1995, CASTILLO and Platou left the residence together in Platou's vehicle. They returned to the apartment at about 3:00 o'clock the following morning.

When CASTILLO and Platou returned to the apartment they had with them a VCR, a box containing silverware and a bag containing booties. After a short time, CASTILLO and Platou

left again and returned after about twenty minutes. At about nine or ten o'clock on the morning of December 17, 1995, CASTILLO and Platou told Bryant that they had robbed a house and that there had been two people in the house and that Platou hit a wall or made a noise and that they panicked and were scared and then CASTILLO hit the person and they both freaked out and left. CASTILLO indicated that he had hit the person with a tire iron from Platou's vehicle. The tire iron was then thrown into a dumpster. They told Bryant that they had gone back the second time because they believed that Platou had left finger prints and that they going to burn the house to destroy any fingerprints. CASTILLO was nervous and upset as he was describing the incident to Bryant. After he told her he continued to feel bad and guilty.

On December 19, 1995, the police came to Bryant's apartment with a search warrant and also asked for permission to search which she granted. The police recovered the silverware, VCR and booties from the apartment. The police also found a bottle of Rosonol lighter fluid in the apartment, which is the kind that CASTILLO used to fuel his cigarette lighter.

When the police came to search the residence CASTILLO was cooperative with them and did not try to hide anything, and actually pointed things out during the search.

CASTILLO had worked for Rasmussen for a period of about five months. CASTILLO lived in close proximity to Rasmussen and Rasmussen would regularly provide transportation to and from work at Dean Roofing. Rasmussen was aware that CASTILLO found a key in a hideaway box at the Berndt house. On Monday, December 18, 1995, during the ride to work, CASTILLO was kind of quite and had a weird look on his face. After some small talk, CASTILLO told Rasmussen that he had murdered and eighty six (86) year old lady in her sleep. CASTILLO told him that he did not know it was a women when it occurred. The intention was to sell the property stolen to obtain money.

Detective Dwayne Morgan arrested CASTILLO after the conclusion of the apartment

search and took him to the police department. After CASTILLO received his Miranda rights he gave two separate taped statements to Morgan. During the first interview CASTILLO indicated that he had received the property from a friend who he wouldn't identify by name. A short period of time after the first interview, he was interviewed again and told that information had been gathered from Bryant and Rasmussen. CASTILLO then became sullen and after a pause told Morgan that it was he that had committed the killing, robbery, and arson.

B. PENALTY HEARING

Testimony at the penalty hearing concentrated a great deal on CASTILLO'S extensive juvenile history. CASTILLO offers a condensed version of most of said testimony due to its lengthy nature.

Juvenile records showed that CASTILLO received psychiatric testing on a number of occasions and the results did not show any psychosis or mental health issues. CASTILLO was considered to be normal, but delinquent.

CASTILLO'S first interaction with the juvenile system was in 1981 when he was brought in for emotional instability of a child. The juvenile history then continued for a number of years including incidents of runaway, emotional instability of a child, attempt murder, arson, petty larceny, threat to life, and destruction of county property. Starting in 1985 there were a number of other juvenile contacts that involved violation of his parole status, resulting in CASTILLO being recommitted to the Nevada Youth Training Center in Elko. CASTILLO was then in and out of the Elko facility and charged with a number of charges, including grand larceny auto, no driver's license, petty larceny, attempted burglary, possession of an unregistered handgun and escape from Elko. For the attempted burglary charge he was certified as an adult and that was where his juvenile record ended.

At age ten (10) years CASTILLO was assessed by Dr. Kirby Reed, a neurologist, who indicated in his findings, inter alia, that:

> Under assessment this ten year old male who demonstrates normal growth and early development presently neurological examination reveals neither hard nor soft findings. I do not feel that there is a neurological basis for the patient's ongoing personality disorder. I feel that he does need to be in at least 24 hour residential placement for the safety of not only himself but for the general public.

The State of Nevada Youth Resources Panel saw the diagnosis for CASTILLO very poor, and looked into placement in out of state programs, but due to the expense and poor prognosis the State was unwilling to provide any specialized care for CASTILLO. By the time he had reached age thirteen CASTILLO had been through every program available in Nevada, including parole, formal probation, mental health counseling, Children's Behavioral Services, foster home placement, Spring Mountain Youth Camp and the Third Cottage Program.

As of age fifteen CASTILLO had been committed to, paroled and revoked at the Nevada Youth Treatment Center three times. He admitted to the use of marijuana, speed, crack, cocaine, and alcohol by that age. Ultimately he totaled five separate commitments to Elko. Each time he was able to achieve the requirements set by the facility and go before a parole panel consisting of a classification counselor, school teacher, dormitory staff and cottage staff and again a recommendation to the superintendent that he be released to the community and his family. At age seventeen, due to continued criminal activity and new criminal activity and new charges of attempted burglary and escape from NYTC CASTILLO was certified as an adult by the juvenile court.

He was determined to be moderately successful at NYTC but when returned home he would revert to the old behaviors that got him into trouble in the first place. Juvenile authorities were aware that CASTILLO had an abusive upbringing and that he may have been abused.

An attempt had been made to place CASTILLO with his maternal grandmother in St.

Louis. This placement also failed and the report from the Missouri Department of Social Services reflected that CASTILLO was a seriously disturbed child who was beyond the scope of their services and that he came from a dysfunctional family.

CASTILLO called Dr. Lewis Etcoff to testify concerning his findings and opinions based on his examinations of CASTILLO. Etcoff, was Board certified in neuropsychology. Etcoff had reviewed the available information concerning CASTILLO and had conducted interview with him.

During the first five years of life CASTILLO moved about twenty times thorough various states. There was an enormous amount of family dysfunction in the parents, and his father left his mother after placing a knife to her throat and threatening to kill her. His mother was very young and suffered a sever depressive disorder for which she was eventually hospitalized and had to undergo electroconvulsive therapy. CASTILLO was seriously disturbed emotionally, mentally, and behaviorally sufficient that he suffered a reactive attachment disorder which is a very serious psychiatric disorder. By the age of five he was unable to formal normal human bonds and was doing some very significant violent misbehavior.

Reactive attachment disorder is a type of disorder that can only rarely be overcome with treatment. Such children can work in society and marry, but the chances of them being successfully employed or successful in normal social situation is very much reduced. There were many components of CASTILLO'S history that validated the diagnosis. To compound the problem at age nine or ten CASTILLO was diagnosed with Attention Deficit Hyperactivity Disorder. ADHD is a neurological disturbance wherein, there is essentially a lack of one of the neurotransmitters in the brain, dopamine, reaching the frontal lobes. The only way to successfully treat someone with the combination fo the two disorders found by Dr. Etcoff is a long term residential treatment center with a small number of other children until they are

eighteen. Such treatment is not available and was not available during the time that CASTILLO was involved with the juvenile system.

The final factor found by Etcoff that contributed to the problems of CASTILLO was that his stepfather was physically and mentally abusive. The instances of abuse, included locking him in his room and making him urinate in a pan, forced to each hot chilies until he vomited, and hitting him with a inch thick leather strap. CASTILLO was so afraid of his stepfather that he would run away all of the time.

As a result of all the factor, CASTILLO also developed a childhood onset conduct disorder. This is an oppositional behavior that goes beyond having a chip on your shoulder and is a very serious pre-sociopathic behavior that has to be dealt with at some point or it worsens. Most people who suffer the type of childhood as did CASTILLO either turn out to be criminals or very mentally ill or is some other ways so dysfunctional that their lives are wasted in comparison to the way their lives might have turned out.

Jerry Harring had worked at the Nevada Youth Training Center since November, 1974.. At the time of his testimony he was a classification counselor. He first met CASTILLO in 1982 when he was just twelve years old. CASTILLO had written a letter to Harring to be read to the other kids that went through the program, telling them of all the mistakes that he had made and that they should listen to what the counselors told them. The letter was to be read to the kids when they were being orientated through the Reception and Classification procedure. The letter has had a very positive impact on the teaching of the classes. CASTILLO was a very troubled child and the resources of the Elko facility were and are limited.

Tammy Bryant, testified concerning her relationship with CASTILLO. When she first met him he had no social skills and wouldn't really go anywhere. CASTILLO talked about wanting to change his life, and she was the first person to ever really show him any attention and

affection. CASTILLO did not even know how to cook such simple items as chilly hot dogs, and he was happy when she showed him how.

The last witness called by CASTILLO at the penalty hearing was his mother Barbra Sullivan. CASTILLO was born in St. Louis on December 28, 1972. She was only eighteen when he was born and at the time was floating back and forth between her mother's house and her in-laws. She got thrown out of both houses after CASTILLO was born and then left him with the in-laws and went to Lake Tahoe. She made a living for the first four years on Billy's life by working different waitress jobs. CASTILLO'S father was in the military and they were stationed oversea when she became pregnant and after she was thrown down a flight of stairs by the father she was returned to the States and the father was sent to the brig. The father, William Thorpe was a very violent individual that had numerous run-ins with the law for robbery and beating people. He even spent time in prison. All of Thorpe's brother's were also involved in criminal activities and were violent individuals. Thorpe's father had shot him with a shotgun on one occasion. Thorpe tried to kill Sullivan on three occasions and the last time he put a gun in her mouth and flipped out and ended up in an institution.

After Sullivan was thrown out of the residences available to her and CASTILLO, she turned to prostitution to support herself. After six months in Lake Tahoe she had gotten a job, married and a home and she returned to St. Louis and picked up CASTILLO and brought him to Nevada. She had to fight for custody in Missouri because CASTILLO'S grandmother's filed to get custody of him.

With respect to the early years of CASTILLO'S life, Sullivan admitted that she didn't love him like she should have and like she did her later born children. This was because she hated his father so much, she saw to his needs but didn't give him any love, she just didn't have it in her during that period of her life.

CASTILLO gave an unsworn statement to the jury explaining some of his feelings, regrets, and expressing remorse for his conduct.

ARGUMENT

I. MR. CASTILLO IS ENTITLED TO HAVE HIS SENTENCE OF DEATH AND CONVICTIONS REVERSED BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL.

Standard of review for ineffective assistance of counsel. To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, petitioner must demonstrate that:

1. counsel's performance fell below an objective standard of reasonableness,
2. counsel's errors were so severe that they rendered the verdict unreliable.

Lozada v. State, 110 Nev. 349, 353, 871 P. 2d 944, 946 (1994). (Citing Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 205, (1984)). Once the defendant establishes that counsels performance was deficient, the defendant must next show that, but for counsels error the result of the trial would probably have been different. Strickland, 466 U.S. at. 694, 104 S. Ct. 2068; Davis v. State, 107 Nev. 600, 601,602, 817 P. 2d 1169, 1170 (1991).

II. MR. CASTILLO WAS DENIED DUE PROCESS BY THE IMPROPER ARGUMENT AT THE PENALTY HEARING WHEREIN THE PROSECUTOR ASKED THE JURY TO VOTE AGAINST MR. CASTILLO AND IN FAVOR OF FUTURE INNOCENT VICTIMS PURSUANT TO THE JURY'S DUTY.

During the penalty hearing the prosecutor was permitted by the trial court to engage in an argument that has been disapproved for many years. The objectionable argument during the penalty hearing was as follows:

> The issue is to you, as the trial jury, this afternoon have the resolve and the courage, the determination, the intestinal fortitude, the sense of commitment to do you legal and moral duty, for what ever your decision is today, and I say this based upon the violent propensities that Mr. Castillo has demonstrated on the streets, I

> say it based upon the testimony of Dr. Etcoff and correctional officer Berg about the threat he is to other inmates, and I say it based upon the analysis of his inherent future dangerousness, whatever the decision is, you will be imposing a judgement of death and it's just a question of whether it will be an execution sentence for the killer of Mrs. Berndt or for a future victim of this defendant.
> Mr. Schieck: I am going to object your honor to this argument of future victims.

Mr. Schieck objected to this argument. On direct appeal appellate counsel raised this exact issue. On April 2, 1998, the Nevada Supreme Court specifically rejected this argument. The Nevada Supreme Court only addressed the argument of appellate counsel regarding the future dangerousness contention made by the prosecutor. The Nevada Supreme Court held that,

> In Howard v. State, we held that it is also improper to ask the jury to vote in favor of future victims and against the defendant. 106 Nev. 713, 719, 800 P.2d 175, 178 (1990) (Supreme Court Decision pp. 12). In the instant case the prosecutor presented to the jurors just a choice when he said "You will be imposing a judgment of death and it is just a question of whether it will be an execution sentence for the killer of Mrs. Berndt or for the future victim of this defendant This language improperly suggests that the jury must decide whether to execute the defendant or bear responsibility for the death of an innocent future victim. Presenting the jury's decision as a choice between killing a guilty person or an innocent person will likely result in jurors decision to impose the death penalty more often then if the jury's decision had been portrayed in it's proper light.

The Nevada Supreme Court then rejected Mr. Castillo's argument based upon the prosecutor's statement of future dangerousness. The Nevada Supreme Court found the prosecutor's statements were improper, however, they did not rise to the level of reversible error. It is important to note, that the prosecutor that made this argument against Mr. Castillo was Chief Deputy District Attorney Mel Harmon. It is also important to note, that appellate counsel only argued that the prosecutor's comments should be reversed based upon future dangerousness. Appellate counsel failed to make any argument regarding the prosecutor's reference to the jury's legal and moral duty. It is Mr. Castillo's contention that appellate counsel was ineffective for failing to raise the argument that Mr. Mel Harmon's statements resulted in reversible error based upon advising the jury that they had legal and moral duty to execute.

As was previously stated, the Nevada Supreme Court issued an opinion affirming Mr. Castillo's sentence of death in 1998.

On July 24, 2001, the Nevada Supreme Court decided the case of Vernell Ray Evans v. State of Nevada, 117 Nev. Ad.Op. 50. In Evans, the defendant had been sentenced to die as a result of being convicted of four counts of first degree murder.

The facts surrounding Mr. Evan's case are horrendous. Apparently, Mr. Evans entered an apartment seeking revenge against a lady who had assisted the authorities on a drug investigation. Id. As a result, Mr. Evans and a cohort proceeded to shoot and kill four human beings. The intended target was in fact tortured in her bathtub. A four year old child was present in the apartment and hiding in the closet. She testified that it was the defendant who had committed the murders. Id. pp.3.

The Nevada Supreme Court reversed Mr. Evans' sentence of death based in part upon the improper argument of the prosecutor during closing arguments. The following is an excerpt of the prosecutor's improper argument during Mr. Evans' penalty phase, it is important to note, that the prosecutor who made the argument was again Chief Deputy District Attorney Mel Harmon. It is also important to compare the improper arguments made by Mr. Harmon in Mr. Evans' case to the arguments made in Mr. Castillo's. The arguments in question are almost identical. Moreover, the Court will find that the arguments in Mr. Castillo's are slightly more egregious than the arguments made against Mr. Evans by the same prosecutor. In Evans, during rebuttal closing the prosecutor stated,

> Do you as a jury have the resolve, the determination, the courage, the intestinal fortitude, the sense of commitment to do you legal duty? pp. 14-15. The Nevada Supreme Court explained, " Asking the jury if it had the intestinal fortitude to do it's legal duty was highly improper the United States Supreme Court held that a prosecutor erred in trying to exhort the jury to it's job; that kind of pressure. . . has no place in the administration of criminal justice. There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to

> stir the passion and can only distract a jury from it's actual duty; impartiality. The prosecutor's words here "resolve", "determination", "courage", "intestinal fortitude", "commitment", "duty", were particularly designed to stir the jury's passion and appeal to partiality. Id.

The Nevada Supreme Court then held,

> Although this Court noted a similar argument in Castillo v. State, 114 Nev. 271, 279, 280, 959 P.2d 103, 109,(corrected by McKenna v. State, 114 Nev. 1044, 1058, 968 P.2d 739, 748 (1998), it addressed only the prosecutor's argument on future dangerousness, not the reference to the jury's duty. Id

The Nevada Supreme Court specifically stated in Evans, that, Appellate counsel for Castillo only argued future dangerousness regarding his comment and did not raise the issue of the jury's duty. It appears that the Nevada Supreme Court had indicated that the remarks made by Mr. Harmon in Evans, were improper and resulted in a reversal of a death sentence based upon his argument regarding the jury's duty portion of Mr. Harmon's argument. The Nevada Supreme Court specifically states, " that we considered a similar type argument by Mr. Castillo however, he only argued future dangerousness and not the jury's duty." Therefore, it seems obvious that Mr. Castillo's appellate counsel was ineffective for failing to raise the correct issue regarding Mr. Harmon's statements.

It is important to compare Mr. Harmon's statements in both Evans and Castillo to demonstrate the identical nature of his arguments. In Castillo, Mr. Harmon states, "The issue is to you, as the trial jury, this afternoon have the resolve, and the courage, the determination, the intestinal fortitude, the sense of commitment to do your legal and moral duty, for what ever your decision is today, and I say this based upon the violent propensities that Mr. Castillo has demonstrated on the streets. . ." In Evans, Mr. Harmon stated "Do you as a jury have the resolve the determination, the intestinal fortitude, the sense of commitment to do your legal duty?"

The Nevada Supreme Court specifically held in Evans that it was improper for the prosecutor to use such word to as resolve, determination, courage, intestinal fortitude,

commitment, and duty. In Mr. Castillo's case the prosecutor used the word resolve, courage, determination, intestinal fortitude, and went one step further by saying the commitment legal and moral duty.

In Evans, Mr. Harmon simply stated, "Do you have the commitment to do your legal duty." In Castillo, Mr. Harmon went one step further and asked the jury regarding their commitment to their legal and moral duty. Subsequently, the Evans case demonstrates that Mr. Harmon's argument's in Castillo were more egregious than the Evans case based upon his question regarding the jurors legal and moral duty. However, it appears that the arguments by Mr. Harmon in both cases are identical. The arguments appear to come from the same script. However, the Nevada Supreme Court has determined that Mr. Evans should receive a new penalty phase for the horrendous and brutal murder of four innocent people whereas, Mr. Castillo was not entitled to a new penalty phase based upon the same identical argument.

The Nevada Supreme Court specifically, addressed the comparison of Evans to Castillo and determined that unfortunately, appellate counsel only raised the argument regarding Mr. Harmon's statement of future dangerousness. Therefore, Mr. Castillo now contents that appellate counsel was ineffective pursuant to the Strickland standard. Had appellate counsel raised the argument that the prosecutor had violated his constitutional rights based upon his arguments to the jury regarding their legal and moral duty that the outcome of the case would have resulted in a new penalty phase.

At the evidentiary hearing of August 02, 2002, appellate counsel, Mr. Schieck explained that he had raised the issue on the grounds of future dangerousness and did not raise it on the grounds of the jury's moral and legal duty. (A.A. Vol. 6, pp. 1320). The comparison of the argument's made by Mr. Harmon in both cases is remarkably similar. However, that the argument made in Mr. Castillo's case is somewhat more egregious. In fact, the Nevada Supreme

Court explained in Evans , the prosecutor's words, "resolve", "determination", "courage", "intestinal fortitude", "commitment", "duty" – were particularly designed to stir the jury's passion and appeal to partiality. Id. page 15 .

It would be Mr. Castillo's contention that the State of Nevada has clearly treated him differently that Mr. Evans. The State can contend that there is overwhelming evidence against Mr. Castillo. It is obvious that there was overwhelming evidence over Mr. Evans. A young child was able to identify Mr. Evans as the person she saw in the apartment committing those brutal acts. The question then becomes why has the Nevada Supreme Court determined that Mr. Evans is entitled to a new hearing based in part upon the arguments of Mr. Harmon, yet, determined that Mr. Castillo is not entitled to a new penalty phase with the identical argument made by the same prosecutor. The Fourteenth Amendment of the Untied States Constitution section one states,

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state in wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunity of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it's jurisdiction the equal protection of the law. emphasis added.

In Regents of the University of California v. Bakke, 438 U.S. 265; 98 S.ct. 2733; 57 L.Ed. 2d 750, (1978), the United States Supreme Court reasoned that, "[P]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." Id. at headnote 12. Additionally, this Court explained that,

> Without findings of Constitutional or Statutory violations, it can not be said that the Governments has any greater interest in helping one individual than in refraining from harming another. Thus, the Government has no compelling justification for inflicting such harm. Id. at headnote 13.

A review of Mr. Evans case compared to Mr. Castillo' s case demonstrates that Mr. Castillo is absolutely entitled to a reversal of his death sentence based upon the improper comments of the prosecutor. In the event he is not entitled to a new penalty phase Mr. Castillo

specifically raises the argument that the State of Nevada has violated the equal protection clause and protected the rights of Mr. Evans, a African American, over the rights of Mr. Castillo, a white man. The State of Nevada has denied Mr. Castillo equal protection of the laws based upon his race.

Based upon the foregoing argument Mr. Castillo respectfully requests that this Court reverse his sentence of death and permit him a new penalty phase based upon the violations Mr. Castillo's rights under the United States Constitution, Amendments Fourteen, Eight, Five, and Six.

III. MR. CASTILLO'S SENTENCE OF DEATH FOR THE USE OF A DEADLY WEAPON IN COMBINATION WITH HIS FIRST DEGREE MURDER CONVICTION MUST BE OVERTURNED BASED UPON A CROWBAR NOT BEING A DEADLY WEAPON.

As was outlined in the statement of facts, the State alleged that Mr. Castillo attacked the victim with a tire iron which Mr. Castillo allegedly brought into the house. The coroner testified that the victim died as a result of a intracranial hemorrhage due to blunt force trauma to the face and head. The coroner further testified that these injuries were consistent with blows from a crow bar or tire iron. A crow bar or tire iron does not amount to a deadly weapon.

It is important to note that the Nevada Legislature appears to have attempted to overrule Zgombic v. State, 106 Nev. 571, 578, 598 P.2d 548 (1990), when the Nevada Legislature enacted what NRS 193.165(b) which states:

> Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

As the Court is aware, almost anything can be used to kill somebody. For example, if a defendant hit somebody in the face with his fist knocking the victim unconscious and then throws the victim into a swimming pool and the victim dies as a result of drowning. Is the water

in the pool a deadly weapon? If a defendant chokes a victim into unconsciousness and then places the victim out in the desert because he believes the victim is dead, thereafter, the victim dies of exposure from the sun. Is the sun a deadly weapon?

Compare those examples to the 1998 case of State of Nevada v. Buff, 114 Nev. 1237, 970 P.2d 564, (Nev. 1998).

In Buff, the Nevada Supreme Court held that the trial Court erred in applying the functional test for determining whether a Swiss army knife was a deadly weapon, for purposes of enhancement sentence. In Buff, appellant was convicted of murder in the first degree with the use of a deadly weapon for the stabbing death of a victim with a Swiss army knife. In Buff, the Nevada Supreme Court held that the "[w]e conclude that the matter at bar presents the type of close case anticipated in Zgombic, and the district court could not determine as a matter of law that the Swiss army knife used by appellants was a deadly weapon." *Id at* 970 P.2d 564, 568.

If the Nevada Supreme Court determines that taking both hands and plunging a Swiss army knife into ones throat is a close issue how can it be determined that the a tire iron/crow bar should be enhanced for the use of a deadly weapon. If a tire iron/crow bar is a deadly weapon, than what object could possibly be used in a murder that would not enhance somebody for the use of a deadly weapon.

NRS 193.165(b) defined what a deadly weapon is, "[a]ny weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death". Under the new statute, all of these examples provided above can be applied as a deadly weapon pursuant to the definition given by our legislature. This issue should be explored under the section that this statute is unconstitutionally vague and ambiguous.

If this is the case then every single object used in the commission of a murder must be enhanced for a deadly weapon.

NRS 193.165(5) IS UNCONSTITUTIONALLY VAGUE AND AMBIGUOUS.

The Instruction provided to the jury states "a deadly weapon is any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

In Sheriff, Clark County v. Luqman, 101 Nev. 149, 697 P.2d 107 (1985) the Nevada Supreme Court held that:

> [I]t is basic to the principles of the due process clause of the fourteenth amendment that an individual may not be held criminally responsible for conduct which he could not reasonably understand to be proscribed. Sheriff v. Martin, 99 Nev. at 339, 662 P.2d at 636 (quoting United States v. Harris, 347 U.S. 612, 74 S.C. 808, 98 LED. 989 (1954)). The law must afford a person of ordinary intelligence the opportunity to know what is prohibited so that he may act accordingly, and it must also provide explicit standards of application in order to avoid arbitrary and discriminatory enforcement. Sheriff v. Martin, above; see also Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926), cited by this Nevada Supreme Court in Sheriff v. Martin, 99 Nev. 336, 662 P.2d 634 (1983); State of Nevada v. Glusman, 98 Nev. 412, 651 P.2d 639 (1982), appeal dismissed, 459 U.S. 1192, 103 S.Ct. 1170, 75 L.Ed.2d 423 (1983); Wilmeth v. State, 96 Nev. 403, 610 P.2d 735 (1980); In re Laiolo, 83 Nev. 186, 426 P.2d 726 (1967).

These cases stand for the proposition that if a person of common intelligence must guess at it's meaning than the statute is unconstitutionally vague and ambiguous. In the instant case, it is impossible to tell by the instruction (which is directly from the statute) what constitutes the use of a deadly weapon.

The statute as written provides the District Attorney's Office with a clear abuse of enforcement. The District Attorney's Office may decide that Mr. Castillo has used a deadly weapon. However, a person accused or convicted of smother a person with a pillow or using a

controlled substances to shove down their throat may not be applied as a deadly weapon. Yet, under the statute they both could be applied the same way. This leads to the conclusion that the due process clause of the Fourteenth Amendment is being violated based upon a statute that is so vague that men or women of common intelligence must guess at the meaning and differ as to the application.

The statute is unconstitutional because it gives the District Attorney's office an opportunity to apply the law in a discriminatory and arbitrary fashion. Moreover, the statute itself is so vague that people of ordinary intelligence (even in this case) have disputed whether or not this is a deadly weapon.

IV. MR. CASTILLO RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEREIN TRIAL AND APPELLATE COUNSEL FAILED TO OBJECT TO THE BAD CHARACTER EVIDENCE WHICH WAS IMPROPERLY RAISED IN FRONT OF THE JURY.

On August 02, 2002, Mr. Schieck testified that,

> Well, in light of the decision in Evans, clearly the jury was not properly instructed on the use of character evidence and the weighing of aggravating and mitigating circumstances, and the instruction that the Supreme Court set forth in Evans correctly describes how that process should take place. If we didn't object to that we should have. (A.A. Vol. 6, pp. 1325).

During the penalty phase, it was brought out that: 1) Mr. Castillo had been in a Nevada youth training facility in Elko; 2) that Mr. Castillo's first interaction with the juvenile system was in 1981 for an emotionally instability of a child; 3) that as a juvenile Mr. Castillo had been a runaway, accused of attempted murder, arson, petty larceny, threat to life, and destruction of county property; 4) Mr. Castillo was in and out of the Elko facility and additionally charged as a juvenile with grand larceny auto, attempt burglary, possession of an unregistered firearm, and escape; 5) Mr. Castillo had attempted to drown his grandmother's dog when he was five years

old and had killed birds by smashing their skulls into rocks; 6) Mr. Castillo was accused of attempting to lite the Circus Circus casino on fire in 1983; 7) Mr. Castillo was at age eleven, the youngest person ever committed to the Nevada youth training center; 8) Mr. Castillo admitted the use of marijuana, speed, crack, cocaine, and alcohol as a juvenile; 9) as an adult Mr. Castillo had been disciplined on a assault on a inmate, having tattooing equipment in his cell and jamming a door lock. In sum, Mr. Castillo had a great deal of his character used as evidence against him in an effort to have the jury return a sentence of death.

In Evans v. Nevada, supra, the Nevada Supreme Court considered this issue. On appeal, in Evans, this Court explained, " [I]n this case we conclude that Evans trial and appellate counsel in not challenging the prosecutor's improper argument, and we conclude that Evans was prejudiced as a result." Evans, pp. 17. The Nevada Supreme Court was concerned with the fact that Nevada jurys are not being properly instructed on how the weighing process must occur regarding a capital case. In Evans, post conviction counsel had complained that the jury had been permitted to consider other character evidence against Mr. Evans before they properly found an aggravating circumstance and then weighed that against the mitigating circumstance. Hence, the Nevada Supreme Court issued an instruction that is to be used in all further capital cases.

In Evans v. State, 117 Nev. Ad. Op. No. 50, the Nevada Supreme Court issued the following instruction,

> For future capital cases, we provide the following instruction to guide the jury's consideration of evidence at the penalty hearing:
> In deciding on an appropriate sentence for the defendant, you will consider three types of evidence: evidence relevant to the existence of aggravating circumstances, evidence relevant to the existence of mitigating circumstances, and other evidence presented against the defendant. You must consider each type of evidence for its appropriate purposes.
> In determining unanimously whether any aggravating circumstance has been proven beyond a reasonable doubt, you are to consider only evidence relevant to that aggravating circumstance. You are not to consider other evidence against the defendant.

> In determining individually whether any mitigating circumstance exists, you are to consider only evidence relevant to that mitigating circumstance. You are not to consider other evidence presented against the defendant.
> In determining individually whether any mitigating circumstances outweigh any aggravating circumstances, you are to consider only evidence relevant to any mitigating and aggravating circumstances. You are not to consider other evidence presented against the defendant.
> If you find unanimously and beyond a reasonable doubt that at least one aggravating circumstance exists and each of you determines that any mitigating circumstances do not outweigh the aggravating, the defendant is eligible for a death sentence. At this point, you are to consider all three types of evidence, and you still have the discretion to impose a sentence less than death. You must decide on a sentence unanimously.
> If you do not decide unanimously that at least one aggravating circumstance has been proven beyond a reasonable doubt or if at least one of you determines that the mitigating circumstances outweigh the aggravating, the defendant is not eligible for a death sentence. Upon determining that the defendant is not eligible for death, you are to consider all three types of evidence in determining a sentence other than death, and you must decide on such a sentence unanimously.
> In this case, we conclude that Evans's trial and appellate counsel were deficient in not challenging the prosecutor's improper argument, and we conclude that Evans was prejudiced as a result.

In the instant case, it appears that trial and appellate counsel failed to raise this issue. Mr. Schieck freely admitted at the evidentiary hearing that this should have been objected. In Evans, this error was also used to find that Mr. Evans deserved a new penalty phase. This instruction provided in the Evans decision was obviously was not provided in Mr. Castillo's case. Moreover, it appears that trial and appellate counsel failed to raise this issue.

In the instant case, there was a tremendous amount of character evidence that used by the prosecution against Mr. Castillo. The character evidence listed above has no bearing on whether there is an aggravating circumstance. The evidence listed above is evidence simply listed to demonstrate the poor character of Mr. Castillo. Based upon the fact that there was no objection by trial and appellate counsel and the fact that the jury was not properly instructed, compounded by the prosecutor being able to argue this character evidence without a jury being properly instructed demonstrates that Mr. Castillo is entitled to a reversal of his sentence of death based

upon a violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

V. MR. CASTILLO'S IS ENTITLED TO HAVE A REVERSAL OF HIS SENTENCE OF DEATH AND CONVICTIONS BASED UPON THE FAILURE OF TRIAL COUNSEL TO PROPERLY INVESTIGATE HIS CASE AND MR. CASTILLO IS ENTITLED TO A NEW TRIAL AND PENALTY PHASE BASED UPON THE FAILURE OF TRIAL COUNSEL TO PRESENT A PSYCHOLOGICAL DEFENSE TO THE TRIAL PHASE OF THE CASE.

In the Nevada Supreme Court's opinion affirming Mr. Castillo's direct appeal, the Supreme Court noted, "[t]he defense did not put on a case in chief." (A.A. Vol. 6, pp. 1234-1249). In the instant case, as the Supreme Court noted, the defense failed to present any form of defense whatsoever, the defense actually waived their opening argument. More importantly, the following statement was the entire closing argument by the defense counsel:

> Good day, ladies and gentleman. If it please the court, Mr. Bell, Mr. Harmon, and my co-counsel Mr. Schieck, as the Judge informed you, when he was reading the instructions, this is the time known as closing argument. You've heard Mr. Harmon's closing argument. I think it's better to characterize what I'm about to say as some closing comments, as to this phase of the proceedings.
>
> I first want to thank you for your participation in this and the patience that I know you've had to exercise over these past couple of weeks. As Mr. Harmon has correctly state, you've always been on stage here. Now you are taking center stage.
>
> You have not heard much from the defense during this phase, as it has become quite obvious to you, as the events unfolding in here, but that doesn't lessen your burden or your sworn duty that you took an oath to. All the defense asks you to do is to perform your sworn duty. Your burden is no less because we presented very little and had very little participation. Your duty, as we see it, is to review each and every count, each and every element. Make sure that you believe beyond a reasonable doubt that the State has proven beyond a reasonable doubt each and every element within each and every count. Once you have done that, follow your convictions accordingly.
>
> Additionally, after you have done that, you've done your duty. You've been fair to all the parties, which is all that any of us can ask of you and for that, the defense both thanks you and applauds you in you efforts. I thank you. (A.A. Vol. 3, pp. 637-638).

This was the entire defense for Mr. Castillo. Yet, as was outlined in the statement of facts (penalty phase), there was a great deal of evidence that Mr. Castillo suffered from extreme emotional disturbance. In fact, it can be characterized that Mr. Castillo is mentally ill. The jury found that the instant murder was committed while the defendant was under the influence of extreme emotional distress and disturbance as one of Mr. Castillo's three mitigating circumstances. However, it should be noted that this same jury would have been unaware of any of the extensive psychological difficulties that Mr. Castillo had suffered throughout his life. Without reiterating all the psychological evidence presented at the penalty phase, (which has been listed in the statement of facts), it is obvious that the defense should have presented this evidence at the trial portion of Mr. Castillo's case.

In a similar case the Nevada Supreme Court considered that case of Zollie Dumas v. the State of Nevada.

In Dumas v. State, 111 Nev. 1270, 903 P.2d 1816 (1995), the Nevada Supreme Court overturned the first degree murder conviction of Zollie Dumas.

In Dumas, the Nevada Supreme Court held, " we reverse on the ground that failure to present psychological or other evidence pertaining to mental status renders Dumas's representation ineffective under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 252, 80 L.Ed.2 674 (1984), and particularly under the case's holding that counsel has a duty to make reasonable investigation. Dumas at 111.

In rendering the holding in Dumas, the Nevada Supreme Court reasoned that:

> In Riley, we refused to reverse the conviction on this ground because the pre-trial evaluation of Riley was not such that would render counsel's representation ineffective merely because counsel failed to heed the information contained in that report. The Riley opinion distinguished the facts in that case from Deutscher v. Whitley, 964 F.2d 1443, 1446, (9th Cir. 1991), *vacated,* 506 U.S. 935, 113 S.Ct.

> 367, 121 L.Ed.2d 279 (1992) aff'd sub nom., Deutscher v. Angelone, 16 F.3d 981, 984, (9th Cir. 194), in which counsel failed to investigate and offer evidence concerning the defendant's history of schizophrenia, pathological intoxication and organic brain damage, and Evans v. Lewis, 855 F.2d 631, 636-39 (9th Cir., 1998), in which defense counsel failed to inquire into prior diagnosis of schizophrenia that could have shown an impairment of mental state at the time of crime. See also Riley v. State, 110 Nev. 638, 650, 878 P.2d 272, 280 (1994).

As the Nevada Supreme Court recognized in Dumas,

> Counsel's failure to investigate and present Dumas' mental condition as a defense virtually assured the jury would find Dumas guilty of first degree murder. With proper investigation, preparation and presentation, defense counsel could very well have presented a cogent defense of mental incapacity or, at least , that Dumas' mental state was inconsistent with premeditated and deliberated first-degree murder. The district court erred when it concluded that defense counsel's failure to pursue the only defense available to Dumas was within the bounds of acceptable advocacy. Counsel's failure to provide effective assistance renders the jury's verdict unreliable. We reverse the district court's order denying appellant's petition for post-conviction relief and remand the matter to the district court for a new trial. Id. at 1271.

Mr. Castillo's defense attorney's should have put forward Mr. Castillo's psychological state of mind at the time of the crime. The defense attorney's put forth no arguments to attempt to mitigate a conviction from first degree murder conviction to a conviction of possibly second degree murder based upon the psychological difficulties suffered throughout Mr. Castillo's life. Therefore, based upon the facts of the instant case, combined with a review the State of Nevada v. Dumas, it was reversible error based upon ineffective assistance of counsel for the defense to fail to place this evidence before the jury.

In the instant case, Mr. Castillo's trial counsel failed to present any of the psychological evidence pertaining to Mr. Castillo with the exception of Dr. Etcoff. Dr. Etcoff testified at the penalty phase and summarized the extensive psychological history of Mr. Castillo. The defense made absolutely no effort to present to the jury witnesses who had previously diagnosed Mr. Castillo.

It is quite obvious that the failure to properly prepare and investigate this case resulted in the defense simply permitting Mr. Castillo to be convicted of murder of the first degree without any form of defense whatsoever. It would have been prudent if not absolutely required pursuant to the Strickland standard to present and investigate any possible psychological defense to a jury during the trial phase. It appears the defense woefully failed in their preparation, investigation, and presentation to the jury of a psychological defense. It is probable that a jury may have convicted Mr. Castillo of murder of the second degree had they been aware of the full scope of Mr. Castillo's mental deficiencies.

In State of Nevada v. Love, 865 P.2d 322, 109 Nev. 1136, (1993), the Nevada Supreme Court considered the issue of ineffective assistance of counsel for failure of trial counsel to properly investigate and interview prospective witnesses. In Love, the Nevada Supreme Court reversed a murder conviction of Rickey Love based upon trial counsel's failure to call potential witnesses coupled with the failure to personally interview witnesses so as to make an intelligent tactical decision and making an alleged tactical decision on misrepresentations of other witnesses testimony. Love, 109 Nev. 1136, 1137.

The Nevada Supreme Court reviews claims of ineffective assistance of counsel under a reasonable effective assistance standard enunciated by this Court in Strickland and adopted by the Nevada Supreme Court in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504, (1984); *see* Dawson v. State, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992). Under this two-prong test, a defendant who challenges the adequacy of his or her counsel's representation must show (1) that counsel's performance was deficient and (2) that the defendant was prejudiced by this deficiency. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

Under Strickland, defense counsel has a duty to make reasonable investigations or to

make a reasonable decision that makes particular investigations unnecessary. *Id. at* 691, 104 S.Ct. at 2066. (Quotations omitted). Deficient assistance requires a showing that trial counsel's representation of the defendant fell below an objective standard of reasonableness. *Id. at* 688, 104 S.Ct. at 2064. If the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's errors, the result of the trial probably would have been different. *Id. at* 694, 104 S.Ct. at 2068.

Thus Strickland also requires that the defendant be prejudiced by the unreasonable actions of counsel before his or her conviction will be reversed. The defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id. at* 694, 104 S.Ct. at 2068.

During the evidentiary hearing, Mr. Schieck testified that he was aware of the Zolie Dumas case. Mr. Schieck was asked the following questions and gave the following answers:

> Q: Okay, why was Doctor Etcoff not put on the guilt phase to try to argue to the jury that there was a diminished capacity and therefore was perhaps to convict of second degree murder and not first.
>
> A: I didn't see any diminished capacity defense that the jury would accept. Mr. Castillo was – his intelligence was not similar to Mr. Dumas. I mean, there is a number of distinctions between factually Zolie Dumas's situation, the defense that could have been put on in that case and Mr. Castillo's, the facts of this case and his own character.
>
> Q: So your testimony is that you didn't see that it wasn't necessary to put on a psychological defense because you did not have one.
>
> A: I did not believe we had one.
>
> Q: Did you have anyone analyze Mr. Castillo other than Dr. Etcoff.
>
> A: I don't recall.

In fact, Mr. Schieck did not dispute that the Supreme Court had stated that no defense had been contended at the time of the guilty phase. Mr. Schieck agreed that opening argument had been waived and that no real defense at the guilt phase was provided.

Based upon the testimony of Mr. Schieck and the legal analysis provided, Mr. Castillo would respectfully request that this Court reverse his convictions and sentence of death based upon violations of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Dated this 13 May, 2004.

William P. Castillo #51918

WILLIAM CASTILLO, No 51918
Ely State Prison
12000 North Bothwick
P.O. Box 1989
Ely, Nevada 89301

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

October 4, 2004

Clerk
Supreme Court of Nevada
Capitol Complex
Supreme Court Building
Carson City, NV 89710

Re: William P. Castillo
v. Nevada
No. 04-5032
(Your No. 40982)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk

04-19005

0232
FRANNY A. FORSMAN
Federal Public Defender
Nevada Bar No. 00014
GARY A. TAYLOR
Nevada Bar No. 11031C
Assistant Federal Public Defender
NISHA N. BROOKS
Nevada Bar No. 11032C
Assistant Federal Public Defender
411 E. Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101
Telephone (702) 388-6577
Facsimile (702) 388-5819

Attorneys for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM P. CASTILLO,

Petitioner,

v.

E.K. McDANIEL, Warden, and, CATHERINE CORTEZ MASTO, Attorney General of the State of Nevada,

Respondents.

Case No. C133336
Department No. XVIII

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

Hearing Date: 11-4-09
Hearing Time: 8:15 AM

Petitioner, William P. Castillo, by and through counsel, files this Petition for a Writ of Habeas Corpus (Post-Conviction) pursuant to NRS 34.724 and NRS 34.820. Mr. Castillo alleges that he is being held in custody in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution of the United States of America, articles I and IV of the Nevada Constitution, and the rights afforded him under international law enforced under the Supremacy Clause of the United States Constitution. U.S. Const. art. VI; U.S. Const. amends. V, VI, VIII, and XIV; Nev. Const. art. I, §§ 3, 6 and 8, and art. IV, § 21.

MC

REQUEST FOR AN EVIDENTIARY HEARING

Mr. Castillo respectfully requests the Court grant an evidentiary hearing on the allegations in this petition. It is through the adversarial process that the record herein may be developed to better demonstrate not only that Mr. Castillo's conviction and death sentence are unconstitutional, but also that he may more fully present his complex factual allegations and legal arguments.

Procedural Allegations

1. Petitioner, William P. Castillo, is currently in the custody of the State of Nevada at Ely State Prison in Ely, Nevada, pursuant to a state court judgment of conviction and death sentence. Ex. 1.[1] Respondent, E. K. McDaniel, is the Warden of Ely State Prison. Mr. Castillo's conviction and sentence were entered on November 4, 1996, in the Eighth Judicial District Court of Clark County, Nevada, by the Honorable A. William Maupin. TT, 11/4/96, at 1-11, Ex. 174 at 1-11.[2]

2. On January 11, 1996, a Clark County, Nevada grand jury indicted Mr. Castillo and his co-defendant, Michelle C. Platou, for (1) conspiracy to commit burglary and/or robbery; (2) burglary; (3) robbery where the victim is sixty-five years of age or older; (4) first-degree murder with use of a deadly weapon; (5) conspiracy to commit burglary and arson; and, (6) first-degree arson. NRS 193.165, 193.167, 199.480, 200.010, 200.030, 205.010, 205.060, 200.380.

3. On January 19, 1996, Clark County prosecutors filed the indictment in open court. The indictment charged Mr. Castillo and Platou with the aforementioned felony offenses. Ex. 2.

4. On January 23, 1996, pursuant to NRS 175.552 and 200.033, prosecutors filed their "Notice of Intent To Seek Death Penalty." The notice identified five aggravating circumstances which prosecutors intended to prove at Mr. Castillo's penalty

---

[1] Citations to exhibits are designated as follows: Ex. ___ (number of exhibit).

[2] Citations to transcripts are designated as follows: TT, 1/01/01, Ex. _____ (transcript testimony then the date and the exhibit number).

trial: (1) the murder was committed by a person who was previously convicted of a felony involving the use of threat of violence to the person of another; (2) the murder was committed while the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit any robbery; (3) the murder was committed while the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit any burglary; (4) the murder was committed to avoid or prevent lawful arrest; and (5) the murder was committed to receive money or any other thing of monetary value. NRS 200.033.

5. On January 24, 1996, Mr. Castillo pled not guilty to all charges. TT, 1/24/96, at 5-6, Ex. 149 at 5-6. The Nevada State Public Defender's Office was appointed to represent Mr. Castillo at his arraignment.

6. On April 13, 1996, the trial judge appointed David M. Schieck as Mr. Castillo's co-counsel. Ex. 3.

7. On May 29, 1996, prosecutors filed an amended indictment which alleged the same offenses as the original indictment. Ex. 4.

8. On August 26, 1996, jury selection began. Prosecutors and trial counsel completed jury selection on August 28, 1996. TT, 8/28/96 (afternoon session), at 94-95, Ex. 160 at 94-95.

9. On August 28, 1996, Mr. Castillo's trial began, and on September 4, 1996, the jury found him guilty of: (1) conspiracy to commit burglary and/or robbery; (2) burglary; (3) robbery where the victim is 65 years of age or older; (4) first-degree murder with the use of a deadly weapon; (5) conspiracy to commit burglary and arson; and (6) first-degree arson. TT, Trial, 9/4/96, at 83-86.

10. On September 19, 1996, Mr. Castillo's penalty trial began, and on September 25, 1996, the jury sentenced him to death. TT, 9/25/96, at 5-10, Ex. 173 at 5-10. The jury found four aggravating circumstances beyond a reasonable doubt: (1) Mr. Castillo committed the murder after he was previously convicted of a violent felony, to

wit: a robbery committed on December 14, 1992; (2) Mr. Castillo committed the murder while engaged in a burglary; (3) Mr. Castillo committed the murder while engaged in a robbery; and (4) Mr. Castillo committed the murder to avoid or prevent his lawful arrest. Id. at 5-6; Ex. 5. The jury found three mitigating circumstances: (1) Mr. Castillo's youth at the time of the offense; (2) Mr. Castillo committed the murder while he was under the influence of extreme mental or emotional disturbance; and (3) any other mitigating circumstances. Id. at 7; Ex. 6. The jury sentenced Mr. Castillo to death after it determined that the aggravating circumstances outweighed the mitigating circumstances. Id.; Ex. 7.

11. On September 25, 1996, Mr. Castillo's co-defendant, Michelle Platou, pled guilty to burglary, robbery, and first-degree murder. Ex. 8.

12. On November 4, 1996, the Honorable A. William Maupin sentenced Mr. Castillo and Michelle Platou. Platou received a 120-month sentence for her burglary conviction; a 180-month sentence for her robbery conviction; and a life sentence (with the possibility of parole) for the first-degree murder conviction; Judge Maupin ordered that her sentences be served concurrently. TT, 11/4/96, at 4-5, Ex. 174 at 4-5. Mr. Castillo received a 72-month sentence for his conspiracy to commit burglary conviction; a 120-month sentence for his burglary conviction; a 180-month sentence for his robbery with the victim being over the age of 65 years with a consecutive 180-month sentence for use of a deadly weapon; a 72-month sentence for conspiracy to commit burglary and arson conviction; a 120-month sentence for his burglary conviction; a 180-month sentence for first-degree arson; and the death sentence for his conviction of first-degree murder with a deadly weapon. Judge Maupin ordered that Mr. Castillo's sentences be served consecutively. Id. at 8-10.

13. On November 4, 1996, Mr. Castillo filed a timely notice of appeal. Ex. 9.

14. On February 28, 1997, Mr. Castillo's appellate counsel, Mr. David Schieck, filed his brief to the Nevada Supreme Court. Ex. 10. Mr. Schieck raised eight issues:

1. Was it error for the court to allow repeated and prejudicial reference to the booties knitted by the victim.

2. Was it prejudicial error for the court to admit a photograph of the victim and her daughter and granddaughter at the trial.

3. Whether the court should have granted the motion for mistrial after a state witness informed the jury that Castillo had another case in violation of the motion in limine filed by Castillo.

4. Whether improper argument during the penalty hearing mandates a new hearing.

5. Was it error to admit the gruesome pictures taken at the autopsy.

6. Whether the victim impact evidence should have been allowed to the extent presented.

7. Was it reversible error to give an anti-sympathy instruction to the jury.

8. Was it reversible error for the court to refuse to instruct the jury on the defense theory of mitigating circumstances.

15. On April 30, 1997, Mr. Schieck filed a reply brief with the Nevada Supreme Court. Ex. 11.

16. On April 2, 1998, the Nevada Supreme Court affirmed Mr. Castillo's convictions and death sentence. See Castillo v. State, 114 Nev. 271, 956 P.2d 103 (1998).

17. On August 21, 1998, Mr. Schieck filed a petition for rehearing, Ex. 12, which the Nevada Supreme Court denied on November 30, 1998. Ex. 13.

18. On January 25, 1999, Mr. Schieck filed a petition for certiorari with the United States Supreme Court, which the Court denied on March 22, 1999. See Castillo v. Nevada, 526 U.S. 1031 (1999).

19. On April 2, 1999, Mr. Castillo filed a Petition for Writ of Habeas Corpus in the Eighth Judicial District Court. Ex. 14.

20. On April 28, 1999, the Nevada Supreme Court issued its remittitur order. Ex. 15.

21. On October 26, 2000, the Honorable Mark Gibbons appointed Christopher Oram to represent Mr. Castillo in his state post-conviction habeas proceedings. TT, 10/26/00, at 1-4, Ex. 178 at 1-4.

22. On October 12, 2001, Mr. Oram filed a Supplemental Brief in Support of Mr. Castillo's Petition for Writ of Habeas Corpus. Ex. 16. Mr. Oram raised eleven issues:

1. Mr. Castillo is entitled to have his sentence of death and convictions reversed based upon ineffective assistance of counsel.

2. Mr. Castillo was denied due process by the improper argument at the penalty hearing wherein the prosecutor asked the jury to vote against Mr. Castillo and in favor of future innocent victims pursuant to the jury's duty.

3. Mr. Castillo's sentence of death for the use of a deadly weapon in combination with his first degree murder conviction must be overturned based upon a crowbar not being a deadly weapon.

4. Nev. Rev. Stat. §193.165(5) is unconstitutionally vague and ambiguous.

5. Mr. Castillo is entitled to have a reversal of his sentence of death and convictions based upon the failure of trial counsel to properly investigate his case.

6. The district court erred in failing to hold a requested evidentiary hearing to permit Mr. Castillo to establish facts outside of the record.

7. Mr. Castillo is entitled to a new trial and penalty hearing based upon the failure of trial counsel to present a psychological defense to the trial phase of the case.

8. Mr. Castillo's conviction is unconstitutional because of cumulative error.

9. Mr. Castillo's death sentence is invalid under the federal constitutional guarantees of due process, equal protection, and a reliable sentence, as well as his rights under international law, because the death penalty is cruel and unusual punishment. U.S. Constitution Article VI, Amendments VIII & XIV.

10. Mr. Castillo's conviction and sentence are invalid pursuant to the rights and protections afford [sic] to him under the International Covenant on Civil and Political Rights. U.S. Const. Art. VI.

11. Mr. Castillo's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because the Nevada capital punishment system operates in an arbitrary and capricious manner. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. In SACS. 3, 6 and 8; Art IV, Sec. 21.

Id.

23. On May 8, 2002, the Honorable Nancy M. Saitta granted a limited evidentiary hearing for the sole purpose of investigating Mr. Castillo's claims of ineffective assistance of counsel. TT, 5/8/02, at 1-5, Ex. 182 at 1-5.

24. On August 2, 2002, Judge Saitta held an evidentiary hearing regarding trial counsel's mitigation investigation and direct appeal counsel's advocacy. TT, 8/2/02, at 1-24, Ex. 183 at 1-24. After the evidentiary hearing, Judge Sattia ordered supplemental briefing.

25. On September 27, 2002, Mr. Oram filed a Second Supplemental Brief in Support of Mr. Castillo's Petition for Writ of Habeas Corpus. Mr. Oram raised three issues:

1. Mr. Castillo was denied due process of law pursuant to the United States Constitution by improper argument at the penalty hearing wherein the prosecutor asked the jury to vote against Mr. Castillo and in favor of future innocent victims pursuant to the jury's duty.

2. Mr. Castillo received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution, wherein trial and appellate counsel failed to object to the bad character evidence which was improperly raised in front of the jury.

3. Mr. Castillo is entitled to a new trial and penalty phase based upon the failure of trial counsel to present a psychological defense to the trial phase of the case.

26. On January 22, 2003, Judge Saitta heard oral arguments regarding the initial and supplemental briefing and denied Mr. Castillo's habeas petition. TT, 1/22/03, at 1-7,

Ex. 184 at 1-7. Judge Saitta requested the prosecutor draft "Findings of Fact, Conclusions of Law and Order" for her signature.[3]

27. On February 19, 2003, Mr. Oram filed a timely notice of appeal. Ex. 17.

28. On June 11, 2003, Judge Saitta filed "Findings of Fact, Conclusions of Law and Order" which were drafted by prosecutors. Ex. 18.

29. On October 2, 2003, Mr. Oram filed Mr. Castillo's opening brief to the Nevada Supreme Court. Ex. 19. Mr. Oram raised ten issues:

1. Mr. Castillo is entitled to have his sentence of death and convictions reversed based upon ineffective assistance of counsel.

2. Mr. Castillo was denied due process by the improper argument at the penalty hearing wherein the prosecutor asked the jury to vote against Mr. Castillo and in favor of future innocent victims pursuant to the jury's duty.

3. Mr. Castillo's sentence of death for the use of a deadly weapon in combination with his first degree murder conviction must be overturned based upon a crowbar not being a deadly weapon.

4. Mr. Castillo received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution, wherein trial and appellate counsel failed to object to the bad character evidence which was improperly raised in front of the jury.

5. Mr. Castillo is entitled to have a reversal of his sentence of death and convictions based upon the failure of trial counsel to properly investigate his case and Mr. Castillo is entitled to a new trial and penalty phase based upon the failure of trial counsel to present a psychological defense to the trial phase of the case.

6. Mr. Castillo's conviction is unconstitutional because of cumulative error.

---

[3] Mr. Peterson: Judge, would the Court prefer that we prepare the order?...

The Court: Absolutely, yes. Thank you. Would you please prepare that order and run it by Mr. Oram?

Mr. Peterson: I will, Judge, absolutely.

Id. at 7.

7. Mr. Castillo's death sentence is invalid under the federal constitutional guarantees of due process, equal protection, and a reliable sentence, as well as his rights under international law, because the death penalty is cruel and unusual punishment. U.S. Constitution Article VI and Amendments VIII and XIV.

8. Mr. Castillo's death sentence is invalid under the federal constitutional guarantees of due process, equal protection, and a reliable sentence, as well international law, because execution by lethal injection violates the constitutional prohibition against cruel and unusual punishments. U.S. Constitution Article VI, Amendments VIII & XIV.

9. Mr. Castillo's conviction and death sentence are invalid pursuant to the rights and protections afforded to him under the international covenant on civil and political rights. U.S. Const. Art. VI.

10. Mr. Castillo's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence, because the Nevada capital punishment system operates in an arbitrary and capricious manner. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. IN SACS. 3, 6 and 8; Art. IV, Sec. 21.

Id.

30. On January 20, 2004, Mr. Oram filed a reply brief to the Nevada Supreme Court. Mr. Oram addressed the same issues raised in his opening brief.

31. On February 5, 2004, the Nevada Supreme Court affirmed the denial of post-conviction relief. Ex. 20.

32. On May 5, 2004, Mr. Castillo submitted his petition for certiorari to the United States Supreme Court, which the Court denied on October 4, 2004. See Castillo v. Nevada, 543 U.S. 879 (2004).

33. On June 22, 2004, Mr. Castillo filed a pro se petition for writ of habeas corpus in the United States District Court for the District of Nevada. On July 7, 2004, the Law Offices of the Federal Public Defender was appointed to represent Mr. Castillo. An amended petition for writ of habeas corpus was filed on December 15, 2008. The federal habeas corpus petition is pending.

34. **Statement with Respect to Previous Proceedings**

a. The failure to raise any of the claims asserted in this petition, which were susceptible to decision on direct appeal, was the result of ineffective assistance of counsel on appeal.

b. The failure to raise any of the claims asserted in this petition, which were susceptible of being raised in the state post-conviction proceeding, and appeal, was the result of ineffective assistance of counsel, in a proceeding in which Mr. Castillo had a right to effective assistance of counsel under state and federal law; was the result of representation by counsel which violated state and federal constitutional due process standards; and/or was induced by the state post-conviction court's refusal to appoint post-conviction counsel or permit counsel adequate time or resources to identify and present all of the available constitutional claims in violation of the right to an adequate opportunity to be heard as guaranteed by the due process clause of the Fourteenth Amendment. Mr. Castillo did not consent to the failure to raise any available constitutional claim and did not knowingly and intelligently waive any such claim. Mr. Castillo did not conceal from, or fail to disclose to appointed counsel, at any stage of the proceedings, any fact relevant to any available constitutional claim.

c. Mr. Castillo and previous counsel were prevented from discovering and alleging all of the claims raised in this petition by the prosecutors' actions in failing to disclose all material evidence in possession of its agents.

d. The Nevada Supreme Court has deemed counsel's failure to raise claims in prior proceedings or in a timely manner as sufficient cause to allow new claims to be considered and has disregarded such failures and addressed constitutional claims in the cases of similarly-situated litigants. Barring consideration of the merits of Mr. Castillo's claims will violate the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution.

1) The Nevada Supreme Court exercised complete discretion to address constitutional claims, when an adequate record was presented to resolve them, at

any stage of the proceedings, despite the default rules contained in NRS 34.726, 34.800, and 34.810. A purely discretionary procedural bar is not adequate to preclude review of the merits of constitutional claims. E.g., Valerio v. Crawford, 306 F.3d 742, 774 (9th Cir. 2002) (en banc); Morales v. Calderon, 85 F.3d 1387, 1391 (9th Cir. 1996). Although the Nevada Supreme Court asserted in Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001), that application of the statutory default rules, some of which were adopted in the 1980's, was mandatory, 34 P.3d at 536, the examples cited below demonstrate that the Nevada Supreme Court always exercised, and continues to exercise, complete discretion in their application. See also, Ybarra v. Warden, No. 43981, Order Affirming in Part, Reversing in Part, and Remanding (November 28, 2005), Ex. 133; Ybarra v. Warden, No. 43981, Order Denying Rehearing (February 2, 2006), Ex. 134 (reiterating that application of the statutory default rules is mandatory despite alleged inconsistencies in application).

2) The Nevada Supreme Court has complete discretion to address constitutional claims, when an adequate record is presented to resolve them, at any stage of the proceedings, despite the default rules contained in NRS 34.726, 34.800, and 34.810. The Nevada Supreme Court has disregarded default rules and addressed constitutional claims, at any stage of capital proceedings, in the exercise of its complete discretion to do so.

3) The Nevada Supreme Court has now provided a laboratory example of this disparate, and therefore unconstitutional, treatment in the Rippo case. There, the Supreme Court, on appeal from the denial of post-conviction habeas corpus relief, sua sponte directed the parties to argue an issue arising from a penalty phase jury instruction, regarding whether the jury had to be unanimous in finding that the mitigating evidence outweighed the aggravating factors to preclude death-eligibility. Rippo v. State, No. 44094; Bejarano v. State, No. 44297, Order Directing Oral Argument (March 16, 2006), Ex. 135 at 2. The Nevada Supreme Court addressed this issue on the merits. Rippo v. State, 122 Nev. 1086, 146 P.3d 279, 285 (2006). The issue was never raised in any previous proceeding, cf. NRS 34.810(1)(b),(2), or in the habeas proceedings in the

trial court, or in the Nevada Supreme Court itself. The only issue raised with respect to this jury instruction was whether it adequately informed the jury that non-statutory aggravating evidence, that was not relevant to the statutory aggravating circumstances, could be considered in the weighing process for finding death-eligibility. Exs. 136 at 30-33; 137; 138 at 31-34; 139 at 30-32; 140 at 20-23, and 141. The Supreme Court first raised the issue sua sponte in its order directing oral argument in 2006, long after the one year rule, NRS 34.726(1), and the five year rule, NRS 34.800(2), elapsed from the finality of the conviction and sentence in 1998. Rippo v. State, 113 Nev. 1239, 946 P.3d 1017 (1997), cert. denied 524 U.S. 841 (October 5, 1998).

4) Despite the Nevada Supreme Court's repeated claims that it applied its default rules consistently, State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 112 P.3d 1070, 1074-1082 (2005); Pellegrini v. State, 117 Nev. 860, 880-886, 34 P.3d 519 (2001), there can be no rational dispute that in Rippo the Court sua sponte raised and addressed on the merits a claim that was barred under the statutory default rules. If those same rules are applied to bar consideration of the merits of any of Mr. Castillo's claims, the constitutional violation based on arbitrarily disparate treatment of similarly-situated litigants will be complete. See e.g., Bush v. Gore, 531 U.S. 98, 106-109 (2000) (per curiam); Village of Willowbrook v. Olech, 528 U.S. 564-565 (2000) (per curiam); and Myers v. Ylst, 897 F.2d 917, 921 (9th Cir. 1990) (equal protection requires consistent application of state law to similarly-situated litigants).

5) In Rippo, the Supreme Court's decision made no mention of its mandatory default rules. See also, Bejarano v. State, 106 Nev. 840, 843, 801 P.2d 1388 (1990) (on appeal from denial of collateral relief, "[w]e consider sua sponte whether failure to present such [mitigating] evidence constitutes ineffective assistance"); Bejarano v. Warden, 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (addressing claim on merits despite default rules); Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676 (1995) (addressing claims asserted to be barred by default rules; "[w]ithout expressly addressing the remaining procedural bases for the dismissal of Bennett's Petition, we therefore

choose to reach the merits of Bennett's contentions" (emphasis supplied); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules); Hill v. Warden, 114 Nev. 169, 178-179, 953 P.2d 1077 (1998) (addressing merits claims raised for first time on appeal from denial of third post-conviction petition because claims "of constitutional dimension which, if true, might invalidate Hill's death sentence and the record is sufficiently developed to provide an adequate basis for review."); see also, Lane v. State, 110 Nev. 1156, 1168, 881 P.2d 1358 (1994) (vacating aggravating circumstance based on instructional error on mandatory review without noting the issue was not raised at trial or on appeal); Lord v. State, 107 Nev. 28, 38, 806 P.2d 548 (1991) ("Normally a proper objection is a prerequisite to our considering the issue on appeal. However, since this issue is of constitutional proportions, we elect to address it now.") (citation omitted); Powell v. State, 108 Nev. 700, 705-06, 838 P.2d 921 (1992) (addressing issue of delay in probable cause determination without indicating that the issue was not raised at trial or on appeal); Farmer v. Director, Nevada Dept. Of Prisons, No. 18052, Order Dismissing Appeal (March 31, 1988) (addressing two substantive claims on merits [guilty plea involuntary, insufficiency of aggravating circumstances] despite failure to raise on direct appeal), Ex. 104; Farmer v. State, No. 22562, Order Dismissing Appeal (February 20, 1992) (denying claim of improper admission of victim impact evidence on merits despite default), Ex. 105; Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, Ex. 107 at 5-6 (November 14, 2002) (granting penalty phase relief sua sponte [on appeal of first state habeas corpus petition] on basis of ineffective assistance of post-conviction counsel without requiring petitioner to plead "cause" under NRS 34.726(1) or 34.810)), id.; Hardison v. State No. 24195, Order of Remand (May 24, 1994) (addressing claims and granting relief despite timeliness and successive petition procedural bars raised by prosecutor), Ex. 109; Hill v. State No. 18253, Order Dismissing Appeal (June 29, 1987) (dismissing untimely appeal from denial of second post-conviction relief

petition but sua sponte directing trial court to entertain merits of new petition), Ex. 110; Milligan v. State, No. 21504, Order Dismissing Appeal (June 17, 1991) (rejecting two substantive claims on merits [error to admit uncorroborated testimony of accomplice, death penalty was cruel and unusual] despite failure to raise on direct appeal), Ex. 113; Neuschafer v. Warden No. 18371, Order Dismissing Appeal (August 19, 1987) (addressing merits of claims without discussion of default rules, in case decided without briefing, and in which court expressed "serious doubts" about authority of counsel to pursue appeal, but "elected" to entertain appeal due to "gravity of appellant's sentence"), Ex. 116; Nevius v. Sumner (Nevius I) Nos. 17059, 17060, Order Dismissing Appeal and Denying Petition (February 19, 1986) (reviewing first and second collateral petitions in consolidated opinion, without addressing default rules as to second petition), Ex. 117; Nevius v. Warden (Nevius II), Nos. 29027, 29028, Order Dismissing Appeal and Denying Petition for Writ of Habeas Corpus (October 9, 1996) (entertaining claim in petition filed directly with Nevada Supreme Court despite failure to raise claim in district court; noting that district court had "discretion to dismiss appellant's petition . . . . "), Ex. 118; Nevius v. Warden (Nevius III), Nos. 29027, 29028, Order Denying Rehearing (July 17, 1998) (same), Ex.119; Rogers v. Warden, No. 22858, Order Dismissing Appeal (May 28, 1993) (addressing two claims on merits [objection to M'Naughten test for insanity, error to place the burden on defendant to prove insanity] despite successive petition bar and direct appeal bar; claims rejected under law of the case), Ex. 124; Stevens v. State, No. 24138, Order of Remand (July 8, 1994) (finding cause on basis of failure to appoint counsel in proceeding in which appointment of counsel not mandatory, cf. Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247 (1997)), Ex. 128; Williams v. State, No. 20732, Order Dismissing Appeal (July 18, 1990) (addressing claim in third collateral proceeding on merits without discussion of default rules), Ex. 130; Ybarra v. Director, No. 19705, Order Dismissing Appeal (June 29, 1989) (addressing previously-raised claim without reference to default rules), Ex. 132.

6) The Nevada Supreme Court disregards the procedural bar arising from the failure to raise claims in earlier proceedings. See Valerio v. Crawford, 306 F.3d 742, 778 (9th Cir. 2002); see also Rippo v. State, 122 Nev. 1086, 146 P.3d 279, 285; Bejarano v. Warden, 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (addressing claim on merits despite default rules); Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676 (1995) (addressing claims asserted to be barred by default rules; "[w]ithout expressly addressing the remaining procedural bases for the dismissal of Bennett's petition, we therefore choose to reach the merits of Bennett's contentions" (emphasis supplied)); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules); Hill v. Warden, 114 Nev. 169, 178-179, 953 P.2d 1077 (1998) (addressing merits of claims raised for first time on appeal from denial of third post-conviction petition because claims "of constitutional dimension which, if true, might invalidate Hill's death sentence and the record is sufficiently developed to provide an adequate basis for review."); Farmer v. State No. 22562, Order Dismissing Appeal (February 20, 1992) (denying claim of improper admission of victim impact evidence on merits despite default), Ex. 105; Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, at 5-6 (November 14, 2002) (granting penalty phase relief sua sponte [on appeal of first state habeas corpus petition] on basis of ineffective assistance of post-conviction counsel without requiring petitioner to plead or prove "cause" in a successive petition), Ex. 107; Hardison v. State No. 24195, Order of Remand (May 24, 1994) (addressing claims and granting relief despite timeliness and successive petition procedural bars raised by state), Ex. 109; Neuschafer v. Warden No. 18371, Order Dismissing Appeal (August 19, 1987) (addressing merits of claims without discussion of default rules, in case decided without briefing, and in which court expressed "serious doubts" about authority of counsel to pursue appeal, but "elected" to entertain appeal due to "gravity of appellant's sentence"),

Ex. 116; Ybarra v. Director No. 19705, Order Dismissing Appeal (June 29, 1989) (addressing previously-raised claim without reference to default rules), Ex. 132.

7) The Nevada Supreme Court consistently failed to apply the time bar provisions of NRS 34.726, or the rebuttable presumption of NRS 34.800 (2) to capital habeas petitioners. Rippo v. State, 122 Nev. 1086, 146 P.3d at 285 (issue raised by Nevada Supreme Court sua sponte in 2006, when conviction and sentence was final in 1998); Bejarano v. Warden, 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (addressing claim on merits despite default rules; successive petition filed approximately five years after direct appeal remittitur issued on January 10, 1989); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules; successive petition filed November 12, 1991, approximately five years after direct appeal remittitur issued on April 29, 1986); Hill v. State, 114 Nev. 169, 953 P.2d 1077 (1998) (addressing claims on merits filed directly with the Nevada Supreme Court; successive petition claims filed September 19, 1996, approximately ten years after direct appeal remittitur issued on September 5, 1986); Farmer v. State, No. 29120, Order Dismissing Appeal (November 20, 1997) (successive petition filed August 28, 1995, approximately ten years after direct appeal remittitur issued on September 17, 1985), Ex. 106; Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (addressing all three-judge panel claims on merits; successive petition filed May 1, 2000, approximately nine years after direct appeal remittitur issued on October 25, 1991), Ex. 112; Milligan v. Warden, No. 37845, Order of Affirmance (July 24, 2002) (successive petition filed December 1992, approximately seven years after direct appeal remittitur issued on October 15, 1986), Ex. 114; Nevius v. Warden (Nevius II), No. 29027, Order Dismissing Appeal (October 9, 1996) (successive petition filed August 23, 1996, approximately eleven years after direct appeal remittitur issued on December 31, 1985), Ex. 118; Nevius v. Warden (Nevius III), No. 29027, Order Denying Rehearing (July 17, 1998) (successive petition filed February 7, 1997,

approximately twelve years after direct appeal remittitur issued on December 31, 1985), Ex. 119; O'Neill v. State, No. 39143, Order of Reversal and Remand, at 2 (December 18, 2002) (petition filed "more than six years after entry of judgment of conviction" and issuance of remittitur on direct appeal on March 13, 1996), Ex. 121; Riley v. State, No. 33750, Order Dismissing Appeal (November 19, 1999) (successive petition filed August 26, 1998, approximately seven years after direct appeal remittitur issued on July 18, 1991), Ex. 123; Sechrest v. State, No. 29170, Order Dismissing Appeal (November 20, 1997) (successive petition filed July 27, 1996, approximately eleven years after direct appeal remittitur issued on September 18, 1985), Ex. 126; Williams v. Warden, No. 29084, Order Dismissing Appeal (August 29, 1997) (addressing claim that trial counsel failed to rebut aggravating evidence; claim rejected under law of the case, successive petition filed December, 1992, approximately five years after direct appeal remittitur issued on July 17, 1987), Ex. 131.

8) The Nevada Supreme Court has also applied inconsistent rules when deciding whether a petitioner demonstrated "cause" to excuse a procedural default. One particularly striking inconsistency is the Court's treatment of cases in which trial and/or appellate counsel acted as habeas counsel in the first state post-conviction petition. Compare Moran v. State, No. 28188, Order Dismissing Appeal (March 21, 1996) (finding that trial and appellate counsel's representation in first habeas proceeding did not establish "cause" to review merits of claims in subsequent habeas proceeding), Ex. 115, with Nevius v. Warden (Nevius II), Nos. 29027, 29028, Order Dismissing Appeal and Denying Petition (October 9, 1996) (Petitioner arguabl[y] established "cause" under same circumstances), Ex. 118; Wade v. State, No. 37467, Order of Affirmance (October 11, 2001) (holding sua sponte that petitioner established "cause" to allow filing of successive petition in same circumstances), Ex. 129; Hankins v. State, No. 20780, Order of Remand (April 24, 1990) (remanding sua sponte for hearing and appointment of new counsel on first habeas petition due to representation by same office at sentencing and in post-conviction proceeding), Ex. 108.

9) The Nevada Supreme Court reached inconsistent results on the issue of whether a procedural rule, which did not exist at the time of a purported default, may preclude the review of the merits of meritorious constitutional claims. Compare Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (applying NRS 34.726 to preclude review of merits of successive habeas petition when one-year default rule announced for the first time in that case); Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (same), Ex. 112; with State v. Haberstroh, 119 Nev. 173, 180-181, 69 P.3d 676, 681-82 (2003) (refusing to retroactively apply rule that parties may not stipulate to avoid procedural default rules); Smith v. State, No. 20959, Order of Remand (September 14, 1990) (refusing to apply default rule that was not in existence at the time of the purported default), Ex. 127; Rider v. State, No. 20925, Order of Remand (April 30, 1990) (same), Ex. 122.

10) The Nevada Supreme Court took opposite positions on whether application of procedural default rules is waivable by prosecutors. State v. Haberstroh, 119 Nev. 173, 180-181, 69 P.3d 676, 681-682 (2003), (holding that parties could not stipulate to overcome state's procedural defenses, but construing a stipulation as establishing cause to overcome default rules without identifying any theory of cause that such a stipulation would establish or how it existed before the stipulation was entered); contra Doleman v. State, No. 33424, Order Dismissing Appeal (March 17, 2000) (finding stipulation with prosecutor to allow adjudication of merits of claim ineffective because of petitioner's failure to seek rehearing on claim and failing to find "cause" on the basis of the stipulation), Ex. 103. See also, Jones v. State, No. 24497, Order Dismissing Appeal (August 28, 1996) (holding challenge to jurisdiction of court waived by guilty plea), Ex. 111. The definition of cause is completely amorphous, because it is whatever the Nevada Supreme Court says it is on any particular occasion. See also, Leslie v. State, 118 Nev. 773, 59 P.3d 440, 445 (2002) (sua sponte expanding definition of miscarriage of justice exception to default rules to include "innocence" of aggravating circumstance); contra Colwell v. State, 118 Nev. 807, 59 P.3d 463

(2002)(case decided same day as Leslie with the same aggravating circumstance and similar factual circumstances (a robbery case) but failing to take notice of petitioner's "innocence" of aggravating circumstance) (verdict form showing conviction of random and motiveless aggravating circumstance) Ex. 102; Rogers v. Warden, No. 36137, Order of Affirmance, Ex. 125 at 5-6 (May 13, 2003) (raising miscarriage of justice exception sua sponte but failing to analyze petitioner's challenge to aggravating circumstance under actual innocence standard), Ex. 125. See also Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part (November 14, 2002) (sua sponte reaching both theory of cause not litigated in District Court or Supreme Court, and substantive issue, post-Pellegrini), Ex. 107.

11) Prosecutors admitted that the Nevada Supreme Court disregards procedural default rules on grounds that cannot be reconciled with a theory of consistent application of procedural default rules. Bennett v. State, No. 38934, Respondent's Answering Brief at 8 (November 26, 2002) ("upon appeal the Nevada Supreme Court graciously waived the procedural bars and reached the merits" (emphasis supplied)), Ex. 101; Nevius v. McDaniel, D. Nev., No. CV-N-96-785-HDM-(RAM), Response to Nevius' Supplemental Memorandum at 3 (October 18, 1999) (Nevada Supreme Court noted the issue raised only on petition for rehearing in successive proceeding, "but it did not procedurally default the claim. Instead, 'in the interests of judicial economy' and, more than likely, out of its utter frustration with the litigious Mr. Nevius and to get the matter out of the Nevada Supreme Court once and for all, the court addressed the claim on its merits"), Ex. 120.

e. Default bars which are "graciously waived," or disregarded out of "frustration," are not "rules" that bind the actions of courts at all, but are the result of mere exercises of unfettered discretion; and such impediments cannot constitutionally bar review of meritorious claims. Lonchar v. Thomas, 517 U.S. 314, 323 (1996) ("'There is no such thing in the Law, as Writs of Grace and Favour issuing from the Judges.' Opinion on the Writ of Habeas Corpus, Wilm. 77, 87, 97 Eng. Rep. 29, 36 (1758) (Wilmot, J.).").

The Nevada Supreme Court's practices make review of the merits of constitutional claims a matter of "grace and favor," and they cannot constitutionally be applied to bar consideration of Mr. Castillo's claims.

f. The Nevada Supreme Court could not apply any supposed default rules to bar consideration of Mr. Castillo's claims when it has failed to apply those rules to similarly-situated petitioners, and thus has failed to provide notice of what default rules will be enforced, without violating the equal protection and due process clause. Bush v. Gore, 531 U.S. 98, 104-109 (2000) (per curiam); Village of Willowbrook v. Olech, 528 U.S. 562, 564-565 (2000) (per curiam); Ford v. Georgia, 498 U.S. 411, 425 (1991).

35. Mr. Castillo is filing this Petition more than one year following the filing of the decision on direct appeal. Any delay in filing this Petition was not his "fault" within the meaning of NRS 34.726(2). Mr. Castillo was continuously represented by counsel since the beginning of the proceedings in this case, and counsel were responsible for conducting the litigation. Mr. Castillo committed no "fault," within any rational meaning of that term as used in NRS 34.726(1), in connection with the failure to raise any issue in the litigation. Any failure to raise these claims was the fault of counsel, which is not attributable to Mr. Castillo under Pellegrini v. State, 117 Nev. 860, 36 P.3d 519, 526 n. 10 (2001).

36. **The attorneys who previously represented Mr. Castillo were:**

a. Arraignment and Plea:
Peter LaPorta

b. Trial, Guilt and Penalty and Sentencing:
Peter La Porta and David Schieck

c. Direct Appeal:
David Schieck

d. Post-Conviction:
Christopher Oram

e. Post-Conviction Appeal:
Christopher Oram

Statement of Facts

37. Mr. Castillo worked for Dean Roofing Company and, during Thanksgiving, 1995, he and several co-workers installed a new roof on the victim's home. According to the prosecutors' evidence, the victim died on December 17, 1995, from injuries sustained by blunt force trauma.

38. Mr. Castillo and his roommate, Michelle Platou, were arrested. Mr. Castillo gave police a recorded statement wherein he admitted that he burglarized the victim's home, believing it to be unoccupied. Mr. Castillo was startled when he heard a person in the house, and hit that person with a crowbar. Mr. Castillo and Platou left the victim's home.

39. Some time later, when Mr. Castillo and Platou discovered that Platou did not wear gloves, and possibly left her fingerprints in the victim's home, Mr. Castillo and Platou returned and set fire to the house.

40. Trial counsel did not provide an opening statement and presented no witnesses in the guilt/innocence trial. Mr. Castillo was convicted of First-Degree Murder, Robbery, Burglary and Arson.

41. In the penalty trial, prosecutors presented evidence of Mr. Castillo's juvenile and adult criminal history and victim impact evidence from the victim's daughter and two granddaughters. Prosecutors argued that such evidence, along with the evidence presented in the guilt/innocence trial, was sufficient to support five aggravating circumstances.

42. Mr. Castillo's trial attorneys presented five witnesses in the penalty trial: Mr. Castillo's mother; his girlfriend; a counselor from the Nevada Youth Training Center; a correctional officer employed by the Clark County Detention Center; and, a neuropsychologist. Trial counsel argued the existence of several mitigating circumstances based upon this limited presentation of Mr. Castillo's life and childhood, his remorse and recent behavior in jail.

///

43. The jury found that four aggravating circumstances, and three mitigating circumstances, were proven. The jury held that the mitigating circumstances did not outweigh the aggravating circumstances, and sentenced Mr. Castillo to death.

44. Trial counsel, and their mental health expert, never demonstrated the circumstances in which Mr. Castillo was born, lived and failed to develop as a child. The failure to conduct an adequate investigation into the circumstances of Mr. Castillo's life tainted the entire proceedings and resulted in his conviction and death sentence.

CLAIM ONE

Mr. Castillo's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, and a reliable sentence due to the ineffective assistance of counsel. U.S. Const. amends. V, VI, VIII & XIV; Nevada Const. art. I, §§ 1, 3, 6 & 8.

SUPPORTING FACTS

1. Mr. Castillo's trial, appellate, and state post-conviction counsel violated his state and federal rights to the effective assistance of counsel throughout Mr. Castillo's trial, appeal, and state post-conviction proceedings.

2. Mr. Castillo's counsel failed to conduct a thorough, independent, and complete investigation of available evidence, and present such evidence to the jury; failed to develop a thorough, complete, and comprehensive social history; failed to conduct or present to the jury a thorough, independent, and complete investigation of witnesses to support any mitigation theory; failed to research, discover, investigate, and present available mitigating evidence on the effect Mr. Castillo's childhood and upbringing had on his life; failed to present a viable and reliable argument for a sentence less than death; failed to raise substantial constitutional issues on appeal; and, failed to raise substantial constitutional issues during state post-conviction proceedings.

3. There was no strategic or tactical reason for counsels' failures in these areas other than their own indifference, inexperience, or inability to represent a capital defendant. Counsel, appointed to represent a defendant in a death penalty case, were obligated to bring such skills to bear which would provide their client with high quality legal representation in all phases of his trial, appeal, and post-conviction proceedings. Counsel were obligated to investigate and present evidence to rebut the prosecution's case and to take advantage of all opportunities to argue the death penalty was inappropriate. Counsel failed in their obligations to provide effective legal assistance to Mr. Castillo.

I. Guilt/Innocence Trial

A. The Jury Selection Process

4. During jury selection, trial counsel entered into a stipulation with the prosecutor to allow the trial judge broad discretion to excuse prospective jurors. TT, 8/27/96, at 31, Ex. 158 at 31. The trial judge exercised such discretion when he excused prospective jurors numbered 347, 352, 351, 356, 357, 136, 96, 115, 97, 142, 303, 147, 306, 365, 314, 318, 322, 330, 335, 336, 337, 338, 340, 325, 112, and 331. Id. at 31-54.

5. The trial judge was allowed to excuse any prospective juror without challenge by trial counsel or the prosecutor. Moreover, trial counsels' stipulation resulted in the failure of the record to demonstrate the reasons each of the prospective jurors was excused. See, e.g., TT, 8/27/96, at 38, Ex. 158 at 38. Without an adequate record of the proceedings, Mr. Castillo and the Nevada Supreme Court were denied the opportunity to review the trial judge's decision to excuse prospective jurors. Trial counsel erroneously allowed this flawed procedure and failed to object to and defend Mr. Castillo's right to a fair and impartial jury, and an adequate trial record.

6. Mr. Castillo was entitled to a fair and unbiased jury, selected pursuant to the Nevada statutes. The jury selection process was flawed when the trial judge, without objection, re-ordered the jury list and moved those prospective jurors, who were seeking excusal, to the end of the jury list. TT, 8/27/96, at 32-49, Ex. 158 at 32-49. This procedure allowed the trial judge to increase the likelihood that a prospective juror who sought to be excused for a "non-statutory" reason, such as an economic reason, would not be selected to serve on Mr. Castillo's jury. However, this procedure also denied Mr. Castillo the right to a randomly selected jury and allowed the trial judge to influence which prospective jurors would be questioned, and ultimately serve on the jury. Trial counsel erred in their failure to object, and preserve Mr. Castillo's objections, to this procedure.

7. Appellate counsel and post-conviction counsel held a duty to identify those constitutional errors in Mr. Castillo's trial and raise those issues in the appropriate

proceedings. Mr. Castillo was denied his state and federal constitutional rights to effective assistance of counsel when his appellate and state post-conviction habeas counsel failed to raise these substantial issues.

B. Trial Counsel Failed to Present a Psychological Defense

8. Trial counsel failed to give an opening statement or present any evidence in Mr. Castillo's guilt/innocence trial. Counsel provided the following closing argument:

> Good day, ladies and gentleman. If it please the court, Mr. Bell, Mr. Harmon, and my co-counsel Mr. Schieck, as the Judge informed you, when he was reading the instructions, this is the time known as closing argument. You've heard Mr. Harmon's closing argument. I think it's better to characterize what I'm about to say as some closing comments, as to this phase of the proceedings.
>
> I first want to thank you for your participation in this and the patience that I know you've had to exercise over these past couple of weeks. As Mr. Harmon has correctly stated, you've always been on the stage here. Now you are taking center stage.
>
> You have not heard much from the defense during this phase, as has become quite obvious to you, as the events unfolded in here, but that doesn't lessen your burden or your sworn duty that you took an oath to. All the defense asks you to do is to perform that sworn duty. Your burden is no less because we presented very little and had very little participation. Your duty, as we see it, is to review each and every count, each and every element. Make sure that you believe beyond a reasonable doubt the State has proven beyond a reasonable doubt each and every element within each and every count.
>
> Once you have done that, follow your convictions accordingly.
>
> Additionally, after you've done that, you've done your duty. You've been fair to all the parties, which is all that any of us can ask of you and for that, the defense both thanks and applauds you in your efforts.
>
> I thank you.

TT, 9/4/96, at 67-68, Ex. 166 at 67-68. The jury found Mr. Castillo guilty of, among other things, first-degree murder.

9. Unlike the guilt/innocence trial, trial counsel presented some evidence in the penalty trial. Mr. Castillo's evidence was offered as mitigating circumstances which, if sufficient to outweigh the aggravating circumstances, would have resulted in a sentence less than the death penalty. Counsel presented expert testimony from Dr. Lewis Etcoff, a neuropsychologist, to illustrate Mr. Castillo's background and the effects those

circumstances had on his childhood development. TT, 9/20/96 (afternoon session), at 53-107, Ex. 170 at 53-107. Dr. Etcoff described the psychological findings of experts who evaluated Mr. Castillo during his adolescent years.

10. Based upon his review of the records provided by trial counsel, and a short interview with Mr. Castillo, Dr. Etcoff concluded that Mr. Castillo suffered from several disorders including reactive attachment disorder, attention deficit hyperactivity disorder, conduct disorder, and personality disorder. See TT, 9/20/96 (afternoon session), at 60, 65, 73, 95, Ex. 170 at 65, 73, 95.

11. Counsel essentially presented no defense to the charges of first-degree murder. However, as illustrated by Dr. Etcoff's later testimony, counsel possessed evidence which could have been presented during the guilt/innocence trial– evidence which helped to explain Mr. Castillo's actions– at the same time as the prosecutors presented evidence of the crime. Additionally, an adequate investigation into Mr. Castillo's life, family, and social history would have yielded substantial additional evidence which not only corroborated Dr. Etcoff's limited conclusions, but illustrated a tragic childhood filled with traumatic events such as abuse, neglect, abandonment, mental illness, drug abuse, and violent behaviors.

12. Had trial counsel conducted an adequate investigation, the jury would have been able to examine Mr. Castillo's conduct in light of the host of psychological disorders, including post traumatic stress disorder, from which he suffered, as well as the extreme emotional duress he experienced during this offense. Exs. 36; 38. Such evidence would have allowed a reasonable juror to convict Mr. Castillo of second-degree murder. Even though trial counsel failed to adequately investigate these circumstances, they presented an abbreviated similar theory in the penalty trial which persuaded the jury that Mr. Castillo was under the influence of extreme emotional distress and disturbance at the time of the offense.

13. At the time the jury considered Mr. Castillo's guilt of first- or second-degree murder, the jury was unaware of Mr. Castillo's extensive mental health history, or

the physical abuse, emotional abuse, and neglect he suffered from birth. Such evidence, presented during Mr. Castillo's guilt/innocence trial, would have persuaded at least one juror that Mr. Castillo was only guilty of second-degree murder.

14. During an abbreviated evidentiary hearing in the state post-conviction habeas proceedings, trial counsel admitted they waived Mr. Castillo's opening statement, and presented no real defense in the guilt/innocence trial. TT, 8/2/02, at 10, Ex. 183 at 10. Counsel was questioned regarding his decision not to present the psychological evidence during the guilt/innocence trial:

Post-Conviction Counsel:	Okay, why was Dr. Etcoff not put on in the guilt phase to try to argue to the jury that there was a diminished capacity and therefore there was perhaps a right to convict of second degree murder but not first?
Trial Counsel:	I didn't see any diminished capacity defense that the jury would accept. Mr. Castillo was–his intelligence was not similar to Mr. Dumas'. I mean, there's a number of distinctions between factually Zolie Dumas' situation, the defense that could have been put on in that case and Mr. Castillo's, the facts of this case and his own character.
Post-Conviction Counsel:	So, your testimony is that you did not see it as necessary to put on a psychological defense because you didn't have one?
Trial Counsel:	I did not believe we had one.
Post-Conviction Counsel:	Did you have anybody analyze Mr. Castillo other than Dr. Etcoff.?
Trial Counsel:	I don't recall.

Id. at 10-11. Despite trial counsel's belief that it was not "necessary to put on a psychological defense," extensive evidence existed which would have mitigated Mr. Castillo's first-degree murder conviction and convinced a reasonable juror to convict Mr. Castillo only of second-degree murder. Id; see infra Parts II.A.2-7.

///

///

15. Reasonably effective counsel would have presented evidence which demonstrated Mr. Castillo's state of mind at the time of the offense. Because trial counsel failed to present evidence which was available, and questioned Mr. Castillo's mens rea in this offense, Mr. Castillo's state and federal constitutional rights were violated.

II. Penalty Trial

A. Trial Counsel Failed to Investigate, Identify, and Present Overwhelming Mitigating Evidence in the Penalty Trial

16. Mr. Castillo was denied his right to the effective assistance of counsel when trial counsel unreasonably failed in their duties to investigate, develop, and present significant mitigating evidence.

17. The Sixth Amendment right to effective assistance of counsel extends to the penalty trial in a capital case. Silva v. Woodford, 279 F.3d 825, 836 (9th Cir. 2002). Under the prevailing standards at the time of Mr. Castillo's trial, counsel had an obligation to conduct a thorough investigation of Mr. Castillo's background. See Williams v. Taylor, 529 U.S. 362, 395-98 (2000); Strickland v. Washington, 466 U.S. 668, 688 (1984).

18. In a capital penalty trial, "it is imperative that all relevant mitigating information be unearthed for consideration." Caro v. Calderon, 165 F.3d 1223, 1227 (9th Cir. 1999). "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty 'in the event of conviction.'" Rompilla v. Beard, 545 U.S. 374, 387 (2005) (quoting ABA Standard 4-4.1)); see also ABA Guideline 11.4.1.

19. The Nevada Supreme Court has held that defense counsel in a capital case is obligated to diligently investigate mitigation evidence. See Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 281 (1996).

20. Mr. Castillo's trial counsel failed to discover and present extensive mitigating evidence related to Mr. Castillo's traumatic childhood, his dysfunctional and

violent family environment, his family's history of mental illness and substance abuse, and the effect of these circumstances on Mr. Castillo's cognitive and developmental function. Mr. Castillo's jury was denied overwhelming mitigating evidence that was available and easily obtained.

1. The Mitigating Evidence Trial Counsel Presented to Mr. Castillo's Jury Was Insufficient in Light of Readily Available Evidence

21. In his opening statement at the penalty trial, trial counsel claimed the evidence would show that Mr. Castillo:

> ... came from a[n] extremely troubled and dysfunctional family during his early years. That on his father's side of the family, from the Thorpe side of the family, there is a history of mental illness, violent criminal behavior associated with that illness.

TT, 9/19/96 (morning session), at 28, Ex. 167 at 28. Trial counsel explained that Mr. Castillo spent the early years of his life moving from state to state, and that a degree of stability came to his home life only after his mother married Joe Castillo, his adoptive father. Yet the stability had little impact because of the effect of Mr. Castillo's early childhood. Trial counsel assured the jury that it would:

> ... see that Billy [Mr. Castillo] is really a product of those early years and of his family heritage from his father's side, that he has lived, basically, his life since age eight or nine as a ward of the State of Nevada, in and out of various facilities throughout those years of his youth until he reached the age of 18 and incurred an adult conviction.

Id. at 29. Trial counsel asked the jury to consider these circumstances and spare Mr. Castillo's life.

22. Although trial counsel's opening statement suggested the jury would learn substantial evidence regarding Mr. Castillo's tragic and traumatic childhood, counsel presented only five witnesses whose testimony barely scratched the surface of the dysfunctional and troubling environment in which Mr. Castillo was born and raised. Mr. Castillo's mother was the only relative who testified and the only witness who was personally familiar with much of Mr. Castillo's life. She testified to the lack of stability in the early years of his life, the physical abuse he suffered from an uncle, the violence

she suffered from his biological father, and her own lack of affection for him. TT, 9/24/96, at 25- 49, Ex. 167 at 25-49. According to trial counsel, Mr. Castillo's mother testified to "shed a little light on [his] background." Id. at 49. However, as an adequate investigation revealed, see infra Part II.A.2-7. Mr. Castillo's mother provided the jury with only a limited understanding of Mr. Castillo's social history that was filtered through her own biases or prejudices.

23. Dr. Lewis Etcoff, a neuropsychologist retained by trial counsel, testified to his knowledge of Mr. Castillo's background and the effects of that background on his development. TT, 9/20/96 (afternoon session), at 53-107, Ex. 170 at 53-107. Dr. Etcoff testified that Mr. Castillo suffered from reactive attachment disorder,[4] attention deficit

---

[4] Reactive Attachment Disorder is defined as:

> A. Markedly disturbed and developmentally inappropriate social relatedness in most contexts, beginning before age 5 years, as evidenced by either (1) or (2):
>
> (1) persistent failure to initiate or respond in a developmentally appropriate fashion to most social interactions, as manifest by excessively inhibited, hypervigilant, or highly ambivalent and contradictory responses (e.g., the child may respond to caregivers with a mixture of approach, avoidance, and resistance to comforting, or may exhibit frozen watchfulness);
>
> (2) diffuse attachments as manifest by indiscriminate sociability with marked inability to exhibit appropriate selective attachments (e.g., excessive familiarity with relative strangers or lack of selectivity in choice of attachment figures).
>
> B. The disturbance in Criterion A is not accounted for solely by developmental delay (as in Mental Retardation) and does not meet criteria for a Pervasive Developmental Disorder.
>
> C. Pathogenic care as evidenced by at least one of the following:
>
> (1) persistent disregard of the child's basic emotional needs for comfort, stimulation, and affection;
>
> (2) persistent disregard of the child's basic physical

hyperactivity disorder, conduct disorder, and personality disorders. Id. at 60, 65, 73, 95. He concluded Mr. Castillo suffered from neglect and physical abuse. Id. at 60.

24. Tammy Jo Bryant, Mr. Castillo's girlfriend, described her short relationship with Mr. Castillo. TT, 9/24/96 (morning session), at 14-21, Ex. 171 at 14-21. She testified that Mr. Castillo was employed. He lacked social skills, but he tried to improve his life. Id.

25. Sonny Carlman, a correctional officer with the Clark County Detention Center, knew Mr. Castillo for less than three months. TT, 9/24/96 (morning session), at 7-14, Ex. 171 at 7-14. Carlman testified to his supervision of Mr. Castillo's work and that Mr. Castillo caused no problems in the Detention Center. Id.

26. Jerry Harring, a classification counselor for Nevada Youth Training Center, was familiar with Mr. Castillo's juvenile history. TT, 9/20/96 (afternoon session), at 107-126, Ex. 170 at 107-126. Harring described an unsolicited letter from Mr. Castillo in which Mr. Castillo disclosed his criminal problems and advised incoming juvenile offenders to listen to the counselors' advice. Harring routinely read Mr. Castillo's letter to juvenile offenders at the Nevada Youth Training Center and believed the letter had a "very positive impact" on them. Id. at 114.

27. Trial counsel presented minimal mitigating evidence of Mr. Castillo's background and family history. Counsel failed to demonstrate the substantial neglect and abuse Mr. Castillo suffered at the hands of his mother and adoptive father, his routine

---

needs;

(3) repeated changes of primary caregiver that prevent formation of stable attachments (e.g., frequent changes in foster care).

D. There is a presumption that the care in Criterion C is responsible for the disturbed behavior in Criterion A (e.g., the disturbances in Criterion A began following the pathogenic care in Criterion C).

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 130 (4th ed., text revision, 2000).

placement in the foster care system, his mother's abandonment of him, the head injuries he suffered, his family's history of drug and alcohol abuse, his biological father's physical abuse towards him, his biological father's criminal history, his families' extensive mental health history, and his experiences as a child and adolescent in countless residential treatment programs and youth behavioral institutions.

28. Had trial counsel conducted an adequate investigation, counsel would have discovered the substantially mitigating history of Mr. Castillo's family and the traumatic life experiences he suffered.[5] See infra Parts II.A.2-6. With such evidence, trial counsel could have provided Mr. Castillo's jury with an accurate picture of Mr. Castillo's life, and could have provided such information to his mental health expert who would have explained the impact of such circumstances on Mr. Castillo's childhood development. See infra Parts II.A.7.

29. Trial counsels' failure to present such evidence to the jury resulted from the marginal investigation conducted, or lack of investigation, and the insufficient interviews of witnesses prior to trial. Trial counsel expended less than five hours preparing their witnesses, Dr. Etcoff, Mr. Castillo's mother, and Tammy Jo Bryant, for their testimony. Ex. 45.

30. Trial counsel further failed to investigate, prepare, and present mitigating evidence which demonstrated that Mr. Castillo suffered from posttraumatic stress disorder at the time of the offense and throughout his life. See infra Parts II.A.7.ii.-iii. Had trial counsel investigated, or hired an investigator, readily available mitigating evidence would have been discovered. Such mitigating evidence would have explained Mr. Castillo's troubled life and actions to the jury. See infra Parts II.A.2-7.

31. An adequate and complete investigation would have revealed the following mitigating evidence:

---

[5] Attached hereto, as Ex. 73, is Mr. Castillo's family tree. Attached hereto, as Ex. 74, is a historical view of Mr. Castillo's social history. These exhibits are incorporated herein by reference as if fully copied and set forth at length.

2. Trial Counsel Should Have Presented Readily Available Mitigating Evidence that Mr. Castillo was Traumatized Before His Birth

32. Mr. Castillo's destiny was determined long before his birth. He was born to a mother whose own childhood was filled with neglect as well as physical and emotional abuse. His mother prostituted herself, was mentally unstable, and verbally abusive. Mr. Castillo was born to a man who grew up watching his own father beat his mother, was consistently in trouble with the law, and spent a considerable amount of time in juvenile detention facilities. Mr. Castillo's father was addicted to heroin.

33. The repeating cycle of physical and emotional abuse, neglect, violence, and mental illnesses which plagued Mr. Castillo's family and its effect on Mr. Castillo's development were never fully investigated and presented to the jury. Such mitigating evidence would have proved important to demonstrate the environment into which Mr. Castillo was born, and explained his childhood development as a result.[6]

i. His Parents' Physically and Emotionally Abusive Relationship

34. Mr. Castillo's mother, Barbara Becker-Thorpe-Castillo-Sullivan-Wickham (hereinafter "Barbara Wickham"), was seventeen years old when she married Mr. Castillo's father, William Thorpe, Sr. Ex. 50, at 27, and 46. Barbara Wickham was forced to marry William Thorpe, Sr. See Ex. 29, at 4.[7] Indeed, Barbara Wickham was "afraid" of William Thorpe, Sr. and "married him because he told [her] if [she] didn't, he would cut [her] up... ." Id. at 4; TT, 9/24/96 (morning session), at 33, Ex. 171 at 33.

35. The physical abuse began shortly after their marriage. William Thorpe, Sr. began to slap Barbara Wickham's face. The "slaps got progressively harder and more intense until they turned into beatings." Ex. 29, at 5. Thereafter, William Thorpe, Sr.

---

[6] Mr. Castillo's records from Independence High School, the Clark County, Nevada Juvenile Division, and St. Louis County, Missouri Family Court are attached hereto as Exs. 67; 79; 80.

[7] Barbara Wickham executed a written declaration which is attached hereto as Ex. 29, and incorporated by reference as if fully copied and set forth at length.

"beat the shit out of" Barbara Wickham on a "regular basis." Id. at 4. Barbara Wickham vividly recalled the abuse:

> [William Thorpe, Sr.] beat me for any reason, or even no reason. I was beaten simply because a man looked at me in a store. If a man looked at me, [William Thorpe, Sr.] would say, 'Do you want to fuck him!?'
>
> ***
>
> [William Thorpe, Sr.] hung me over a highway overpass by my legs and said he was going to drop me.
>
> ***
>
> My sexual relationship with [William Thorpe, Sr.] was as one sided as the rest of my life. [William Thorpe, Sr.] controlled me. If [William Thorpe, Sr.] wanted sex, he took it. He raped me under our Christmas tree one year. [William Thorpe, Sr.] controlled what I wore; if he didn't like it, I didn't wear it. Simply put, [William Thorpe, Sr.] controlled every aspect of my life.

Id. at 5.

36. William Thorpe, Sr.'s beatings continued and grew worse even after Barbara Wickham became pregnant with Mr. Castillo. Id. Indeed, William Thorpe, Sr. threw Barbara Wickham down a flight of concrete steps while she was eight months pregnant with Mr. Castillo. TT, 9/24/96 (afternoon session), at 32-33, Ex. 172 at 32-33. The injuries were so severe that Barbara Wickham was taken to the hospital where doctors informed her that if she suffered another beating, she would have a miscarriage. Ex. 29, at 5.

37. William Thorpe, Sr. was "crazy." Id. at 4. He used various drugs, including heroin, marijuana, and LSD. Id. at 5; Ex. 47, at 10. William Thorpe, Sr. became "more explosive and crazier" after he used drugs. His drug usage and constant beatings made Barbara Wickham a wreck, both "emotionally and mentally." Ex. 29, at 6.

38. Barbara Wickham accepted William Thorpe, Sr.'s beatings and verbal abuse because "he told her he loved [her]." Id. at 5. Eventually Barbara Wickham became unstable and could no longer cope with the abuse. She attempted suicide several times. See id. at 6.

39. Testimony concerning the constant beatings and mental instability Mr. Castillo's mother suffered and the drugs his father abused around the time of his conception were never presented to the jury. Such mitigating evidence "is important because having family members with mental illnesses and substance abuse related problems increases an individual's risk of developing these types of problems." Ex. 36, at 13.[8] To understand the environment that nurtured and produced Mr. Castillo, it was important to understand his family background.

ii. Barbara Wickham's (Mr. Castillo's Mother) Chaotic and Unstable Life Destroyed Her Ability to Nurture Mr. Castillo as a Child

40. At the penalty trial, Barbara Wickham testified she resented Mr. Castillo in the first years of his life. TT, 9/24/96 (morning session), at 44, Ex. 171 at 44. Barbara Wickham "didn't love [Mr. Castillo] like [she] should have. Not th[e] way [she] loved [her] other two children." Id. Because she hated Mr. Castillo's father so much, Barbara Wickham "didn't give [Mr. Castillo] the love he needed." Id. Trial counsel failed to investigate and present readily available evidence which supported and explained Barbara Wickham's failure to nurture or love Mr. Castillo.

41. Had trial counsel conducted an adequate investigation, counsel would have discovered Mr. Castillo's mother was abused and neglected as a child: she was physically abused by Mr. Castillo's father; she and her family members had extensive mental health problems; she abused drugs; she routinely abandoned Mr. Castillo to the foster care system; and she failed to maintain a job or a stable home environment during Mr. Castillo's childhood. Barbara Wickham's childhood and upbringing affected the decisions she made, and the manner in which she raised Mr. Castillo.

///

///

[8] Dr. Rebekah Bradley, a well known and respected psychologist, who specializes in Posttraumatic Stress Disorder, evaluated Mr. Castillo and his social history. Dr. Bradley executed a written declaration which is attached hereto as Ex. 36, and incorporated by reference as if fully copied and set forth at length. Dr. Bradley's curriculum vitae is attached hereto as Ex. 37.

a. His Mother was Neglected as a Child

42. Mr. Castillo's mother was born on October 26, 1954, to eighteen-year-old Allegria Dehry-Becker-Gavan-Brawley-Rosene-Hensel-Thieret (hereinafter "Allegria Thieret") and 24-year-old Robert Becker. Exs. 48, at 2; 46. Barbara Wickham was the youngest of her parents' three children.[9] Her parents met in French Morocco. Her father was 21 years old when he married 15-year-old Allegria Thieret. The marriage ended less than a year after Barbara Wickham's birth.

43. Allegria Thieret remarried Clifford Gavan, and they had one child, Ramona Gavan. When her marriage to Gavan failed, Allegria Thieret was left to raise four children alone.

44. Barbara Wickham's mother believed she was too young to be burdened with four children and wanted nothing more than to have a good time. Ex. 48, at 74. Allegria Thieret abandoned Ramona Gavan to the care of Clifford Gavan's mother and step-father. Id. She abandoned Barbara Wickham and her older siblings to the care of German St. Vincent's Children's Catholic Charities (Catholic Charities) in St. Louis, Missouri.

45. Allegria Thieret placed her children in the Catholic Charities orphanage because she wanted to "marry again and ... for money." See Ex. 48, at 74. She was described by case workers as self-centered and she cared more about herself than her children. Ex. 48, at 31. Although Allegria Thieret may have been "interested in the children," it was the case worker's "feeling that it was rather superficial feeling[s]." Id. [10]

---

[9] Allegria Thieret and Robert Becker are also the parents of Yolanda Norris and Max Becker.

[10] Allegria Thieret's daughter, Lora Brawley, executed a written declaration which is attached hereto as Ex. 35, and incorporated by reference as if fully copied and set forth at length. Lora Brawley believed her mother was more interested in herself than her children. Lora Brawley indicated, that she and her siblings

> ... grew up in a very unstable and emotionally traumatic environment mostly because of the poor choices and abusive nature of our mother. ... My mother was always more interested in herself than she was in the welfare of her children and she failed to provide us with a safe and loving home environment.

46. Barbara Wickham was three years old when her mother left her and her siblings at the orphanage. Ex. 48, at 24. The caseworker noted the following:

> There appeared to be more rejection operating in regards to Barbara. From May through August, Barbara was living with her aunt, Mrs. (redacted). During this period, [Allegria Thieret] did not visit her even once, nor did she send any money for her clothes and upkeep. Barbara appears rather listless emotionally, and might require a good deal of individual attention and affection. Apparently, she has not recovered this sufficiently from her mother. Behaviorwise she is not a problem, though she appears rather withdrawn in respect to people and fearful of them.

Id. at 3. Barbara Wickham remembered the day her mother left her at the orphanage. Allegria Thieret "told [her] she had to go to the bathroom and never returned to even say good-bye." Ex. 29, at 1.

47. Barbara Wickham and her older siblings spent most of their childhood in the orphanage.[11] Barbara Wickham's "earliest memories involve [her] time at the Catholic Charities orphanage." Id. The nuns at the orphanage smacked Barbara Wickham with rulers and made her stand on her knees with her hands behind her back. Id. She was never shown "affection or love" from the nuns. Id. at 2. Barbara Wickham does not remember love or affection in her life. Id. Instead, Barbara Wickham believed that:

> ... love hurt. I do not remember that anyone ever told me they loved me-just pure love. Instead, when people told me they loved me, it ... always came with a beating or abuse.

Id.

48. Had trial counsel adequately investigated Mr. Castillo's family history, and interviewed Barbara Wickham before her testimony, the jury would have learned that Barbara Wickham suffered the same abandonment and lack of love and affection as a child that she failed to express towards Mr. Castillo. The jury would have learned the history of abandonment in Mr. Castillo's family.

Ex. 35, at 1.

[11] Barbara Wickham's father, Robert Becker was also placed in a foster home as a child. Ex. 48, at 74. Robert Becker and his siblings spent approximately ten years in the foster care system. Id.

b. His Mother was Physically and Sexually Abused

49. Barbara Wickham was seven years old when she was removed from the orphanage. Ex. 48, at 107. Her mother remarried to Alton Brawley, and they had one child, Lora Brawley. Barbara Wickham had a difficult time adjusting to her new home. She failed all of her subjects and her conduct was poor in school. Ex. 48, at 50. A caseworker from the orphanage followed Barbara Wickham's progress and noted her failure in school seemed to be "emotional rather than her ability." Id.

50. Barbara Wickham suffered from much more than emotional problems. She lived in a physically abusive home. Barbara Wickham's mother, Allegria Thieret, was "really scarey and crazy when [she and her siblings] lived with Mr. Brawley." Ex. 29, at 2. Whenever Allegria Thieret became angry with Barbara Wickham and her siblings, "she would tie [the kids] to a post in the basement with no light." Ex. 32, at 1.[12] Barbara Wickham remembered her mother's abuse:

> If she [Allegria Thieret] wanted Max, Ramona, or me to do something, she threw high heeled shoes at us or put a hot iron next to our faces or bodies. One time during this time period mother tied me to the downstair's banister with a rope and forced me to spend the night in the dark. I also remember that mother beat us with an electric cord when she was angry.

Ex. 29, at 3. Barbara Wickham was "punished a lot." Id. at 4. Her mother's "punishment was generally physical or psychological." Id.

51. While the physical abuse Barbara Wickham endured from her mother continued, sexual abuse from her stepfather, Alton Brawley, began. Barbara Wickham was sexually abused on a regular basis by her stepfather. Ex. 32, at 1. Barbara Wickham described Brawley's abuse:

> When I sat on Mr. Brawley's lap, his hand was always in my pants. If I did not let him touch me, he threatened to punish me in some way-like not letting me go out with my friends or to a party, or not giving me spending money. I let him touch me because I wanted out of the house.

[12] Ramona Gavan-Kennedy executed a written declaration which is attached hereto as Ex. 32 and incorporated by reference as if fully copied and set forth at length.

Ex. 29, at 3. Brawley also sexually abused Barbara Wickham's older sister, Yolanda Norris. Barbara Wickham recalled when she learned of the abuse:

> I learned about Yolanda's abuse when she, my mother, and I were in the kitchen one day. I do not remember what exactly happened, but my mother yelled at Yolanda and Yolanda yelled back, 'If I don't let Brawley touch my tits I can't go to the dance.'

Id.

52. Initially, Barbara Wickham's mother was upset and saddened by news that Alton Brawley sexually abused her daughters. She took her daughters to the police station to report Alton Brawley's unlawful conduct but later forced her daughters to recant their story. Allegria Thieret did not want her husband "to go to jail because she could not support [her children]." Ex. 29, at 3. Even after this incident, Brawley sexually abused Barbara Wickham. "Nothing was ever done to stop the abuse." Ex. 32, at 1.

53. Barbara Wickham frequently took things that did not belong to her while she lived with her mother and Alton Brawley. Ex. 29, at 3. Barbara Wickham stole "things for everyone [in her family]—makeup, tennis shoes, and clothing." Id. Barbara Wickham became a better thief as she got older. Id. She "once stole an entire tray of fake diamond rings from a jewelry store." Id.

54. Barbara Wickham's relationship with her mother slowly deteriorated. Barbara Wickham noticed that her mother gave more attention and care to her various husbands than to her and her siblings. Barbara Wickham recalled that, when her mother was married to Alton Brawley,

> ... she [her mother] bought expensive stuff for him to eat—like steaks and hams. She bought bologna for my brother, sisters and me. Max, Ramona, and I always stole Mr. Brawley's food. I remember that my mother made us wait to eat until after her husband ate; she sent us outside while they ate, and once they finished, she called us back in to eat. Mother always put whatever man was in her life first. She always showed them love and affection telling us 'I have to show these men great love and affection, because who's going to marry a woman with 3 children?'

Id. at 4.

55. The neglect, physical abuse, and sexual abuse Barbara Wickham suffered strained her relationship with her mother. Barbara Wickham "did not, and still do[es] not, have a healthy, loving relationship with [her] mother." Id.

56. Had trial counsel adequately investigated and presented evidence of Barbara Wickham's childhood, which included the four years she spent in the orphanage, the physical abuse she sustained from the nuns and her mother, the lack of affection or love shown towards her, and the sexual abuse she suffered by her stepfather, counsel would have been able to support and explain Barbara Wickham's statements to the jury about her inability to love, care, nurture, or protect Mr. Castillo when he was a child. Such mitigating evidence would have convinced at least one reasonable juror to return a sentence of less than death.

c. His Maternal Family's History of Mental Illness

57. Barbara Wickham was mentally unstable. She attempted suicide on at least six occasions. See Ex. 29, at 6; Ex. 66, at 16. After one of her suicide attempts, Barbara Wickham was admitted to St. Vincent's Hospital. Initially, she was treated with psychotherapy, antidepressant drugs, and tranquilizers. Ex. 66, at 65. She was later forced to undergo a course of electroshock therapy.

58. Barbara Wickham underwent electroshock therapy treatment three times a week. She believed the treatment would erase the horrible memories of the beatings she suffered from Mr. Castillo's father, William Thorpe, Sr. Ex. 29, at 6. This did not happen. Instead, she "turned ... into a completely different person." Id. at 7.

59. Barbara Wickham was admitted to Missouri Baptist Hospital after an attempted suicide. Ex. 66, at 16-17; Ex. 68. Barbara Wickham was twenty-one years old and had taken an overdose of pills because her older "sister had an affair with her ex-husband [Mr. Castillo's father]." Ex. 68, at 8. Barbara Wickham related to medical personnel that she did not trust herself and requested that she be "transfer[ed] to St. Louis State Hospital." Id. Barbara Wickham admitted that she abused amphetamines. A psychiatrist evaluated Barbara Wickham and diagnosed her with depression and a

personality disorder. Ex. 68, at 2. Barbara Wickham was subsequently transferred to St. Louis State Hospital for mental health treatment. Id.

60. Barbara Wickham's sister, Yolanda Norris, had a history of mental problems. Yolanda Norris was diagnosed with depression, post traumatic stress disorder, and bipolar disorder. Exs. 71, at 13; Ex. 53. Like Barbara Wickham, Yolanda Norris attempted suicide on many occasions. Indeed, another sister, Lora Brawley, recalled an occasion in which Yolanda Norris attempted suicide:

> My mother was briefly married to a man named Bruno who was a foreigner. About two weeks into the marriage, Bruno came upon a situation where my sister Yolanda attempted suicide by slitting her wrists in the bathroom.

Ex. 35, at 1. When "Bruno" immediately contacted Allegria Thieret concerning Yolanda Norris's attempted suicide, Allegria Thieret was unconcerned and upset that Bruno interrupted her at work. Id.

61. Barbara Wickham and her sister, Yolanda Norris, discussed potential methods of killing themselves. Indeed, Lora Brawley overheard her sisters,

> ... Barbara and Yolanda discussing the best methods of committing suicide in the livingroom in our home. They discussed taking pills, slitting their wrists and someone brought up shooting one's self but the other thought it would be too painful and they both agreed not to try that.

Id. at 3-4. After this conversation, Barbara Wickham attempted suicide again. Id. at 4.

62. Barbara Wickham's father, Robert Becker, suffered from a mental illness which required his hospitalization. Ex. 48, at 5. Becker was discharged from the United States Navy after he attempted suicide, and he was later admitted to the psychiatric ward in a military hospital. Id.

63. Barbara Wickham's mother also appeared to suffer from some form of mental illness. Allegria Thieret experienced several nervous breakdowns and was once admitted to the hospital. Ex. 35, at 2. Allegria Thieret was addicted to prescription medication, and frequently took "nerve pills." Id.

///

///

64. Had trial counsel conducted an adequate investigation into Mr. Castillo's family mental health history, the jury would have learned that his mother, aunt, and grandfather attempted suicide. His aunt suffered various mental illnesses and his mother and grandmother suffered mental health problems requiring hospitalization. Such mitigating evidence would have convinced at least one juror to return a verdict of less than death.

iii. William Thorpe, Sr.'s (Mr. Castillo's Father) Criminal History and Instability Destroyed His Ability to Nurture Mr. Castillo as a Child

65. Mr. Castillo's father, William Thorpe, Sr., was born on December 30, 1953[13], to Vida and Mark Thorpe. William Thorpe, Sr. was the third oldest of his siblings: Chuck Nottingham,[14] Michael Thorpe, Mark Allen Thorpe[15] (hereinafter "Mark Allen"), and Robert Thorpe.

66. Trial counsel failed to interview Mr. Castillo's paternal relatives. Had trial counsel conducted such an investigation, counsel would have discovered mitigating evidence related to the Thorpe family history of domestic violence, unlawful conduct, drug abuse, and the mental health issues which ran rampant in the Thorpe family. The jury, in determining Mr. Castillo's moral culpability, was entitled to learn the relevant mitigating evidence relating to Mr. Castillo's father and his family.

///

///

///

///

---

[13] William Thorpe, Sr. was thirty-one years old when he died on July 17, 1984. Ex. 51.

[14] Chuck Nottingham was conceived prior to Vida Thorpe's marriage to Mark Thorpe.

[15] Mark Allen Thorpe was conceived during his father, Mark Thorpe's prior relationship and marriage to his mother, Georgia Rose Whalen-Thorpe-Forrest. Ex. 33, at 1.

a. His Father, Grandfather, and Great-Grandfather's History of Abuse

67. The men in the Thorpe family had a long history of abusing women. Mr. Castillo's great-grandfather physically abused his wife, Henrietta Thorpe. Ex. 30, at 1.[16] Mr. Castillo's grandfather was an alcoholic and physically abused his wife, Vida. Id; Ex. 29, at 6; Ex. 47, at 4, 15. Mr. Castillo's father and his siblings frequently witnessed their father beat their mother. Ex. 31, at 1;[17] See Ex. 33, at 2.[18]

68. William Thorpe, Sr. and his brother, Michael Thorpe followed in their father's and grandfather's footsteps with their abusive treatment towards woman. Michael Thorpe's wife, Regina Albert, divorced him "due to the physical abuse that [she] suffered at Michael's hands, as well as his constant drug abuse." Ex. 30, at 1.

69. William Thorpe, Sr. sexually, physically, and emotionally abused the women in his life. He routinely beat Mr. Castillo's mother. William Thorpe, Sr. had an explosive personality and "beat the shit out of" Barbara Wickham repeatedly. Ex. 29, at 4. He beat Barbara Wickham for any reason, or no reason at all. Id. Barbara Wickham was "beaten simply because a man looked at [her] in a store. If a man looked at [her], [William Thorpe, Sr.] would say, 'Do you want to fuck him!?'" Id. at 5.

70. William Thorpe, Sr.'s physical abuse oftentimes included other violent acts such as setting fires. Once, when William Thorpe, Sr. had no money to purchase drugs, he attempted to obtain money from his mother and his wife, Barbara Wickham. Both women refused to give him money. William Thorpe, Sr. took actions into his own hands. He locked the women in a bedroom, "doused it with lighter fluid, and set the room on fire." Ex. 29, at 5; see also Ex. 47, at 11.

---

[16] Regina Albert executed a written declaration which is attached hereto as Ex. 30 and incorporated by reference as if fully copied and set forth at length.

[17] Cecilia Boyles executed a written declaration which is attached hereto as Ex. 31 and incorporated by reference as if fully copied and set forth at length.

[18] Michael Thorpe executed a written declaration which is attached here as Ex. 33 and incorporated by reference as if fully copied and set forth at length.

71. William Thorpe, Sr.'s brother, Michael Thorpe, remembered when William Thorpe, Sr. attempted to set his mother on fire. He "tied his mother to a bed, poured gasoline on top of the mattress, lit it on fire and then left." Ex. 33, at 5. William Thorpe, Sr. blamed the way his mother raised him in order to explain his actions. Id.

72. The beatings and violent conduct continued when Mr. Castillo's father married Cecilia Boyles.[19] Cecilia Boyles recalled the first time that William Thorpe, Sr. hit her:

> The first time I was physically abused by William was in 1975. We were in Texas visiting one of William's best friends, Jeff Waters. We were at a bar with Jeff and his wife. When we came out of the bar, William viciously attacked me without provocation or reason. I still don't know what happened because we were all having a good time and there were no arguments or disagreements. This was the first of several beatings I would endure while I was married to William.

Ex. 31, at 1.

73. William Thorpe, Sr. put a knife to Cecilia Boyle's throat and threatened to slit her neck. Id. She was afraid of William Thorpe, Sr. and feared for her life throughout their marriage. Id. Cecilia Boyles stated that she spent her entire marriage never knowing whether William Thorpe, Sr. would actually kill her. Id.

74. Cecilia Boyles feared for her child's life after she became pregnant with William Thorpe, Sr.'s child, Joseph Thorpe. She later left William Thorpe, Sr., and never allowed their son to have a relationship with his father. Thereafter, William Thorpe, Sr.'s physical and sexual abuse was directed toward Denean Firle, a 15-year-old girl.

75. William Thorpe, Sr. was "charming and gentle" when he first met Denean Firle. Ex. 27, at. 1.[20] William Thorpe, Sr.'s personality quickly changed and he began to abuse her soon after their relationship started. Id. The drugs and alcohol William

---

[19] William Thorpe, Sr. and Cecilia Boyles had one child together, Joseph Thorpe.

[20] Herbert Duzant is an investigator at the Law Offices of the Federal Public Defender and executed a written declaration which is attached hereto as Ex. 27 and incorporated by reference as if fully copied and set forth at length.

Thorpe, Sr. abused "made it easier for [him] to fly off the handle and beat [Denean Firle] for little or no reason at all." Id. at 2.

76. When William Thorpe, Sr. became violent, he appeared to be unattached–as if he had no control over himself, and he had a distant look in his eyes. Id. William Thorpe, Sr.'s appearance terrified Denean Firle. She described one of the worse beatings she received from William Thorpe, Sr.:

> William ... told her [Denean Firle] to run to the store, literally, but she could not do so because she was wearing clog shoes. William ... then made [Denean Firle] remove her clogs and proceeded to beat her about her body and face with her own clogs. [Denean Firle's] eye was injured during this incident.

Id. William Thorpe, Sr.'s abuse intensified with frequent slaps to Firle's face and punches to her stomach. Id.

77. William Thorpe, Sr. nicknamed Denean Firle "slave girl," and he forced her to have sex with members of his gang. Id. at 2. See infra Part b. Denean Firle had "sex with multiple gang members at a time on a single day or evening." Id. at 1. William Thorpe, Sr. further forced Firle to have sex with him. Whenever Firle told William Thorpe, Sr. she was not interested in having sex, he beat her and "forcibly had sex with [her] against her will." Id. at 3.

78. William Thorpe, Sr. threatened to kill Denean Firle if "she ever got him into trouble with the authorities or screwed him over in any way." Id.

b. His Father's Criminal History

79. William Thorpe, Sr. was a juvenile delinquent and spent much of his adolescent years in juvenile residential facilities. His criminal behavior began at the age of fourteen. Ex. 47, at 3. He had committed offenses such as auto theft, stealing under $150, and truancy. Id.

80. Due to his delinquent behavior, William Thorpe, Sr., at fifteen years old, was committed to Lakeside Center for Boys, a juvenile facility. He resided at Lakeside for eleven or twelve months. Id. At sixteen years old, William Thorpe, Sr. was committed to the Division of Youth Services and placed at the Training Center for Boys

in Boonville, Missouri. Id. He resided at the training center for three months and was later transferred to the Camp Avery facility in which he resided for six months. Id.

81. William Thorpe, Sr.'s criminal record continued to grow as he became an adult. He burglarized a business establishment and was sentenced to three years probation. Id. He frequently stole merchandise from various departments stores. Ex. 47, at 3. William Thorpe, Sr. was charged with, and pled guilty to, disturbing the peace and tampering with a motor vehicle. Ex. 52, at 67.

82. Over time, William Thorpe, Sr.'s crimes became more severe. In 1981, William Thorpe, Sr. was indicted for selling morphine. Ex. 52, at 25. He pled guilty to an amended charge of conspiracy to attempt the sale of a controlled substance. Ex. 52, at 69. William Thorpe, Sr. was sentenced to one year in the county jail. Id.

83. William Thorpe, Sr. had a quick temper. Ex. 47, at 12. On one occasion, William Thorpe Sr.'s temper flared and he beat his wife, Barbara Wickham with his fists. Id. at 11. William Thorpe, Sr. brandished a knife and made threatening gestures towards his own father. Id. Although William Thorpe, Sr. escaped his parents' home without arrest, he returned the next day to cause more harm. Id.

84. William Thorpe, Sr. returned to his parents' home and beat his mother with his fists. He drug Barbara Wickham from her bed and beat her. Id. He smashed furniture, causing extensive damage to his parents' home. Id. William Thorpe, Sr. was arrested for his conduct, and admitted to the Maximum Security Unit of Fulton State Hospital ("Fulton Hospital"). Id.

85. At Fulton Hospital, William Thorpe, Sr. underwent a psychiatric evaluation and examination in order to determine whether he was competent to stand trial. The mental health experts determined that William Thorpe, Sr. suffered from "anti-social character disorder." Ex. 47, at 15-16. In his report, the physician noted that, as William Thorpe, Sr. discussed his actions, he "showed no guilt." Id. at 15. The physician further noted, "[t]he most remarkable finding in the psychiatric examination is the lack of guilt or

remorse while discussing his past antisocial behavior." Id. at 16. The physician ultimately found William Thorpe, Sr. competent to stand trial. Id.

86. William Thorpe, Sr. displayed erratic and extreme behavior on Christmas day in 1981. He had spent Christmas Eve partying and drinking. Ex. 52, at 63. When William Thorpe, Sr. returned home around 4 a.m., he repeatedly rang his parents' door bell to wake them. Ex. 52, at 56-61. As William Thorpe, Sr.'s mother unlocked the door, he yelled at his father, "what are you going to do you son-of-a bitch? You were going to jump me." Id. William Thorpe, Sr.'s parents tried to calm him down, however, their attempts failed. William Thorpe, Sr. eventually pulled a gun and aimed it at his father's head. He told his father "you know I can blow your head off! So go ahead and try something if you want to." Id. at 57.

87. William Thorpe, Sr. ordered his parents into a bedroom, and at that point William Thorpe, Sr. pulled the trigger of the gun, the bullet barely missing his father. Ex. 52, at 58. Police arrived to the Thorpe residence and arrested William Thorpe, Sr. He pled guilty to first-degree assault. Ex. 47, at 8. He was sentenced to five years probation. Id.

88. William Thorpe, Sr. violated his probation when he assaulted two women and displayed a weapon. Ex. 52, at 17. He was committed to the Department of Corrections and Human Resources to serve a term of five years for his offense. Ex. 47, at 7.

89. William Thorpe, Sr.'s criminal conduct continued during his membership with the "Brotherhood of the G[y]psy Outlaw" gang, which was also known as "BGO" and "the Brotherhood." Ex. 33, at 3. The BGO was a large and feared gang in Missouri during the 1970s, and they engaged in various criminal acts which included murder, contract killings, rapes, robberies, extortions, assaults, and the sale of narcotics. Id; see also Ex. 72.

90. The BGO members referred to William Thorpe, Sr. as "Animal" because he was a wild person who was capable of doing anything. William Thorpe, Sr. proudly

displayed his affiliation with the BGO with tattoos of swastikas on his chest and a large eagle over it. Ex. 33, at 3. Many members of the BGO had tattoos of "FTW" or "Fuck the World" on various parts of their bodies. Id.

91. William Thorpe, Sr. committed criminal acts as a member of the BGO. He attacked and raped women. Ex. 33. William Thorpe, Sr.'s brother, Michael Thorpe was a member of the BGO. He recalled an incident which involved William Thorpe, Sr.'s criminal acts as a BGO member:

> ... a girl working at a local McDonald's was kidnapped and taken out into the woods after she had been flirting with Bill Sr. [William Thorpe Sr.] and other members of the gang outside. When I met up with the group in the woods, Bill Sr. was in the middle of raping [sic] the girl with 5 or 6 other members lined up and waiting for their turn.
>
> ***
>
> One of the gang members was admiring the girl's breast while my brother Bill Sr. was raping her and told Bill to cut one of them off so they could hang it on the front of a vehicle or on the clubhouse wall. Without thinking twice, Bill Sr. pulled out a large knife, lifted one of the girls breast and was preparing to cut it off when I yelled out for him to stop.

Id. at 4.

92. Trial counsel failed to elicit testimony or discover records regarding William Thorpe, Sr.'s criminal history. Such evidence would have supported and demonstrated the similarities between Mr. Castillo's conduct and that of his father, and the effect his father's criminal behavior had on his life. Such mitigating evidence would have led at least one juror to return a sentence of less than death.

iv. His Paternal Family's History of Mental Illness and Violent Conduct

93. William Thorpe, Sr.'s siblings engaged in unlawful conduct. His brother, Michael Thorpe, was approximately twelve years old when he was arrested for theft and assault. Ex. 33, at 1. He was committed to a juvenile detention facility for his actions. Id. As an adult, Michael Thorpe was alleged to have been involved in a robbery and rape to which he entered into a plea agreement. Id. at 7. He also robbed a store while under the influence of LSD. Id. Michael Thorpe spent at least five years in prison. Id. at 8.

94. Michael Thorpe joined the military and served in Vietnam for approximately one year. Id. He experienced several traumatic events during his service in Vietnam. Id. Michael Thorpe watched men, women, and children burned alive. He witnessed a superior officer and other soldiers killed. He was frequently attacked by gunshots. Michael Thorpe was honorably discharged from the military. Id. at 2. He is disabled and suffers from post traumatic stress disorder. Id.

95. William Thorpe, Sr.'s brother, Chuck Nottingham, was "a habitual offender and he spent most of his life going in and out of correctional institutions, mostly for robberies and violent acts." Id. at 6; See Ex. 57. Nottingham was committed to a juvenile detention facility as a teenager, and ran away. Id. Nottingham and William Thorpe, Sr. committed robbery together. Michael Thorpe recalled his brothers' conduct and related the following:

> [Chuck and Bill] robbed various types of establishments, but their favorite targets were pharmacies because they could [get] money as well as prescription drugs.
>
> ***
>
> [They] robbed a jewelry store. After the robbery, Chuck and Bill Sr. came to our house with bags of jewelry. I remember seeing a picture of Barbara, Billy Castillo [sic] mom, adorned with several diamond necklaces, and rings on all of her fingers and toes, all which were retrieved from this robbery. Bill Sr.'s mom, [Vida] was also given several items of jewelry and she was well aware of their origin.
>
> ***
>
> Chuck and Bill Sr.'s last caper occurred when the two decided to rob the South St. Louis Savings Bank ... the plans did not turn out as they had plan [sic] because Bill Sr. caught a case of cold feet and left the scene while his brother was still inside of the bank making the illegal withdrawal. [For this offense], Chuck was sentenced to 15 years in prison and spent the final years of his life at the correctional facility in Moberly, MO.

Id. at 5-6.

96. Had trial counsel conducted an adequate investigation and discovered this evidence relating to Mr. Castillo's father – and his extended paternal family – the jury would have learned the violent and criminal history which ran throughout Mr. Castillo's

family. Such mitigating evidence would have convinced at least one juror to return a sentence of less than death.

3. Trial Counsel Should Have Presented Mitigating Evidence that Mr. Castillo was Exposed to Repeated Traumatic Events From Birth, Childhood, and Adolescence

i. Mr. Castillo was Abandoned Multiple Times at a Young Age

97. Mr. Castillo "never had a chance to have a normal life from the day he was born." Ex. 33, at 8. Indeed, Mr. Castillo was denied a normal childhood and the ability to develop as a normal child.

98. Mr. Castillo was born on December 28, 1972, in Flourissant, Missouri. Ex. 66, at 3. His parents were teenagers. He was shuffled between caretakers within the first few months of his birth. Ex. 35, at 4. Rather than care for Mr. Castillo, his mother spent time "running the streets and partying." Ex. 34, at 2. Barbara Wickham disappeared for weeks at a time without checking to ensure Mr. Castillo was properly cared for in a safe and healthy environment. See id.; Ex. 35, at 4.

99. A number of circumstances hindered Barbara Wickham's ability to care for Mr. Castillo. Most notably, the physical and mental abuse Barbara Wickham suffered from her husband made her a "wreck." Ex. 29, at 6. She attempted suicide on several occasions and was admitted to St. Vincent's Hospital for psychiatric treatment.

100. The months Barbara Wickham spent in psychiatric treatment, which included electroshock therapy, was months she spent away from Mr. Castillo. Ex. 66, at 65, 5. Although Barbara Wickham believed the electroshock therapy would erase her memories of William Thorpe, Sr.'s violent beatings, the memories remained and Barbara Wickham became a different person. Ex. 29, at 6-7.

101. Barbara Wickham's life spiraled out of control. She suffered a nervous breakdown, was unable to maintain employment or a home, and her mother would no longer care for Mr. Castillo. Barbara Wickham began "spanking" Mr. Castillo even before he was a year old. Ex. 66, at 6. Barbara Wickham's emotional instability, and her

mother's refusal to continue to care for Mr. Castillo, led her to seek placement for Mr. Castillo in the foster care system.

102. Barbara Wickham met with a social worker at Catholic Charities to seek placement for Mr. Castillo. Barbara Wickham explained that she was "fearful that she may be abusive to [Mr. Castillo] when he gets on her nerves although she has never done more than spank him up to this time." Ex. 66, at 6. The social worker believed Barbara Wickham was "not emotionally able to work through her own problems and care for the child at th[at] time." Ex. 66, at 7. It was further noted that Barbara Wickham was "immature and dependent." Id.

103. Mr. Castillo was recommended for placement for "his own welfare." Ex. 66, at 8. However, Barbara Wickham changed her mind about placing Mr. Castillo in a foster home. Id. She and William Thorpe, Sr. decided that Mr. Castillo's paternal grandparents would care for him. Ex. 66, at 9.

104. Two weeks after Barbara Wickham sought placement of Mr. Castillo in the foster care system, Mr. Castillo was admitted to St. Louis Children's Hospital. Mr. Castillo was hospitalized for four days and discharged with a diagnoses of gastroenteritis and pneumonia. It was noted that Mr. Castillo's grandmother was more familiar with his problems than Barbara Wickham. Ex. 58, at 3. The discharge summary noted that Mr. Castillo lived in a "poor home situation." Id. at 4. The family was referred to social services for an evaluation. Ex. 58, at 20.

105. Barbara Wickham abused drugs and routinely left Mr. Castillo's care to his grandparents. Ex. 66, at 8. Mr. Castillo's paternal grandmother, Vida Thorpe was no longer able to care for Mr. Castillo because she attempted suicide and she was hospitalized. Ex. 66, at 9. His maternal grandmother wanted Barbara Wickham out of the house and for her to make plans for Mr. Castillo. Id. Barbara Wickham could not find or maintain employment and she had attempted suicide. Id. Barbara Wickham again turned to Catholic Charities for placement of Mr. Castillo, who was then one and a half years old. Id.

106. Mr. Castillo was placed with the Delbo foster family in 1974, and resided with the family for three months. Ex. 66, at 10-11. He was accepted by the family. Barbara Wickham made "little progress toward rehabilitating herself" during Mr. Castillo's placement. Ex. 66, at 10. Within three months of his placement, Barbara Wickham decided to remove Mr. Castillo from the Delbo home. She was worried that Mr. Castillo would be permanently taken away from her. Ex. 66, at 11. Barbara Wickham told the social worker that she was able to care for Mr. Castillo but refused to state where she was employed. Id.

107. Mr. Castillo was moved from place to place frequently. His mother moved him from St. Louis to Florida. Ex. 66, at 11. She returned to St. Louis to seek someone to care for Mr. Castillo. Barbara Wickham's mother-in-law again took on the responsibility of Mr. Castillo. Ex. 66, at 12. Barbara Wickham left Mr. Castillo in St. Louis to return to Florida.

108. Barbara Wickham's routine of placing Mr. Castillo into foster care presented itself again when his grandparents became unable to care for him. Barbara Wickham sought placement of Mr. Castillo for the third time in a foster care home. Ex. 66, at 12. Mr. Castillo was four years old.

109. Mr. Castillo was placed with a foster care family. He resided with the Knowles family almost a year, while Barbara Wickham met David Abramson and lived with him in Colorado Springs, Colorado. Barbara Wickham informed the social worker that she and David planned to marry. Barbara Wickham decided to remove Mr. Castillo from the Knowles' home and move to New York. The social worker was concerned with Barbara Wickham's plans and requested an agency in Colorado to interview the couple. The caseworker in Colorado conducted an interview and reported:

> Several factors concerned me about Barbara's plans, such as lack of stable employment, and difficulty of follow-up if they move to New York. I question whether Barbara has really given this plan serious consideration for any length of time (for example, she was unable to give me the spelling of her fiance's last name). On the other hand, Barbara and David verbally expressed a great deal of concern for Billy's well-being. They seemed to me to be very enthusiastic about the idea of having Billy with them. Since

> they do not have a particularly stable history, however, I would be concerned for Billy's welfare should their enthusiasm wane significantly.

Ex. 66, at 27.

110. A temporary detention order was issued and a petition was filed with the juvenile court to delay Mr. Castillo's removal based on "anticipated neglect or abuse." Ex. 66, at 28-29; see Ex. 66, at 3. The court rescinded the temporary detention order and refused to authorize the filing of the petition based on "anticipatory" allegations. Id. Catholic Charities further requested the court to intervene on behalf of Mr. Castillo because his parents "have failed to cooperatively plan for [his] well being and provide a reasonably consistent environment for his proper nutrients and development." Ex. 66, at 28-29.

111. Barbara Wickham removed Mr. Castillo from the Knowles' home. The constant moves and disruptions to Mr. Castillo's life began once again. Barbara Wickham and Mr. Castillo relocated to Colorado. Ex. 66, at 20. Thereafter, the relationship between Barbara Wickham and David Abramson failed. Id. Barbara Wickham returned to St. Louis and again requested family members to care for Mr. Castillo. Id. Barbara Wickham and Mr. Castillo were eventually thrown out of her mother's home. Barbara Wickham and Mr. Castillo moved to Lake Tahoe. Id.

112. Barbara Wickham was unable to control Mr. Castillo's behavior and again decided to seek his placement in a foster home through Catholic Charities. Mr. Castillo was about six years old. Catholic Charities informed Barbara Wickham that it could not consider "placement unless the court gave us custody." Ex. 66 at 20, 23-25.

113. Mr. Castillo was sent to live with Barbara Wickham's sister temporarily. Ex. 66, at 21. Barbara Wickham later decided to relocate and left Mr. Castillo behind. Barbara Wickham wrote a letter to William Thorpe, Sr., and requested he take care of Mr. Castillo. In the letter, she asked for William Thorpe Sr.'s help with Mr. Castillo because:

> I no longer can care for Billy right now, because the Catholic Charities won't help unless they have full custody of him and other agency says I have to be living here in St. Louis well I can't right now because I have to get back to Lake Tahoe.

She further noted her concern with Mr. Castillo' stability:

> Billy really needs a good solid home someone to be around him all the time to watch him. He needs special care and I just can't give that to him right now.

Ex. 50, at 18-19. Barbara Wickham attached this letter to her six-year-old son (Mr. Castillo) and left him on his grandparents' doorstep. Ex. 29, at 9.

114. Three days after Barbara Wickham left Mr. Castillo, his father and paternal grandmother reported the circumstances to the court as child abandonment. Ex. 63, at 5-6. Mr. Castillo was removed to the custody of St. Louis Welfare Division of Family Services. A petition was filed indicating that the "parents or other persons legally responsible for the care and support of [Mr. Castillo] neglect or refuse to provide proper support, education which is required by law, medical, surgical or other care necessary for his well-being." Id. The petition was ultimately dismissed, and Mr. Castillo was once again placed into Barbara Wickham's care.

115. The vast majority of the first six years of Mr. Castillo's life was spent in the care of his grandparents, or a foster home. For sporadic periods of time, Mr. Castillo lived with his mother and traveled to various states. Growing up in such uncertain circumstances, Mr. Castillo was denied the opportunity to bond with his mother, or to develop in a stable environment. Whenever Barbara Wickham grew tired of caring for Mr. Castillo, she handed him off to someone else. Such mitigating evidence may have persuaded at least one juror to return a verdict of less than death.

ii. The Stability Mr. Castillo Finally Gained from His Foster Family Was Quickly Destroyed by His Mother

116. As a child, Mr. Castillo experienced, for the first time, some measure of stability in his life when he was placed with the Knowles' Family. He spent almost a year with the family, which consisted of Mary Knowles, John Knowles, and their adoptive daughter Kelly Knowles. The transition was not easy. Mr. Castillo suffered substantial problems initially, but made significant progress throughout his stay with the Knowles' family.

117. Mr. Castillo was three years old when he was placed with the Knowles' family. He had "imaginary playmates and [a] preoccupation with 'monsters.'" Ex. 66, at 14. Mr. Castillo was troubled with nightmares. Id. The Knowles' family grew attached to Mr. Castillo and "loved [him] from the beginning." Ex. 43, at 2.[21]

118. Mr. Castillo was "a mess, physically, emotionally, and socially," when he came to live with the Knowles. Id. It was almost as if he had "been raised by wolves." Id. Mary Knowles described the condition of Mr. Castillo's clothing when he arrived:

> The few clothes that were sent with him were unwearable, being either torn, stained, or much too small. I remember a few socks without mates and a pair of pants with the entire crotch ripped out. The shirt he wore the day he arrived was a girl's shirt, cut off at mid-chest. The canvass shoes on his feet were so small that his toes were curled under. He also had no underwear or pajamas.

Id. Mr. Castillo did not know how to use silverware and ate with his hands. Id. He lacked any social skills, especially in his interactions with other children. Id.

119. Mr. Castillo's first few weeks with the Knowles' family proved difficult. He "often awoke at night screaming and crying." Id. Mr. Castillo believed snakes were crawling on him or that his mother was hurt. During these instances, Mr. Castillo was visibly "sweating, shaking, and really scared." Id. Mr. Castillo's nightmares disappeared as he spent more time in the Knowles' home.

120. Mary and John Knowles spent a significant amount of time with Mr. Castillo, showing him love and affection. Id. at 3. These were feelings he never received from his mother. The Knowles taught Mr. Castillo to brush his teeth, provided him with clean clothes, and read him bedtime stories. Id. Mr. Castillo was not affectionate when he arrived at the Knowles' home but, as time progressed he began to enjoy "snuggling" with the Knowles' adopted daughter, Kelly Knowles. Id

121. Mary and John Knowles enrolled Mr. Castillo in kindergarten. There, the teacher noted that Mr. Castillo was an "outgoing, fun loving boy with a lot of leadership qualities." Ex. 66, at 15. The teacher further stated that Mr. Castillo had problems with

[21] Mary Kathleen Knowles executed a written declaration which is attached hereto as Ex. 43 and incorporated by reference as if fully copied and set forth at length.

socializing but was "learning to channel his aggressiveness." Id. The teacher believed Mr. Castillo was "responding to structure and consistency." Id. This was the first time in Mr. Castillo's life that he experienced either.

122. Barbara Wickham rarely visited Mr. Castillo while he lived with Mary and John Knowles. Barbara Wickham "would be gone for months – no one knew where – and then she would suddenly pop up and demand to see [Mr. Castillo.]" Ex. 43, at 4. Mary Knowles explained how she felt about the relationship between Barbara Wickham and Mr. Castillo:

> [I] never really felt that Barbara had a true bond with [Mr. Castillo]. She showed little interest in his development. I felt that she showed up just often enough so that she would retain custody of him, but that he was more a possession to her than a human being.

Id. at 5.

123. Approximately one year later, Barbara Wickham removed Mr. Castillo from the Knowles' home. After a year of being with a stable family, where he learned to act rationally, show affection, and experienced love and affection, Mr. Castillo once again found himself in uncertain circumstances. The Knowles' family, who considered adopting Mr. Castillo, was "devastated and angry" when he was removed from their home. Id. at 6.

124. Mary Knowles described Mr. Castillo as a "smart, cute, loveable little boy with endless possibilities who had no control over the parents he was born to, the people he was left with, or the way he was cared for. In [her] opinion, [Mr. Castillo] [wa]s as much a victim as those he victimized." Id. at 8.

125. Had trial counsel conducted an adequate investigation, counsel would have discovered evidence which related to Mr. Castillo's early childhood, his placement in the foster care system, and his positive experiences. Such evidence demonstrated that, at least for a short time, Mr. Castillo had a stable and normal life–and he responded well. However, this short time period, less than one year, was insufficient to overcome the trauma and abandonment he suffered throughout his childhood. Such experiences

impacted Mr. Castillo's development. This evidence would have convinced at least one juror to return a sentence of less than death.

4. Trial Counsel Should Have Presented Readily Available Mitigating Evidence that Mr. Castillo was Physically and Emotionally Abused

126. Throughout his childhood and adolescence Mr. Castillo was abused by a host of family members.

i. His Father's (William Thorpe, Sr.) Abuse

127. William Thorpe, Sr. had difficulty controlling his anger and became physically violent towards Mr. Castillo. Ex. 47, at 11-16. One incident occurred when Mr. Castillo was fifteen months old. William Thorpe, Sr. became angry with Mr. Castillo and "fling[ed] [him] against a wall." Id.

128. As a child, Mr. Castillo visited his father and stepmother, Cecilia Boyles. Ex. 31, at 1. William Thorpe, Sr. "was not interested in [Mr. Castillo] and barely spent any time with him." Id. Meanwhile, Mr. Castillo's mother was "absent and running in the streets at the time." Id. Cecilia Boyles spent most of her time caring for Mr. Castillo.

129. Cecilia Boyles remembered that "[w]henever William [Thorpe, Sr.] was around [Mr. Castillo] he spent most of the time yelling at or beating [Mr. Castillo], and just generally being mean to him." Id. at 2. Thorpe got upset at Mr. Castillo for "the smallest and insignificant reasons." Id.

130. William Thorpe, Sr. physically abused Mr. Castillo whenever he did anything which Thorpe perceived as wrong. For instance, Thorpe "got very upset with [Mr. Castillo] and picked him up and threw him across the room." Id. at 2. This was not the first time Mr. Castillo's stepmother intervened to protect him from his father. Id.

131. Steve Reed was one of William Thorpe, Sr.'s best friends. Reed spent a considerable amount of time with Thorpe and had numerous opportunities to observe his conduct. Reed knew Thorpe had a "reputation of abusing women," and he observed Thorpe's relationship with Mr. Castillo. Ex. 27, at 4.

132. Reed witnessed William Thorpe Sr.'s physical abuse of Mr. Castillo. Id. Indeed, Thorpe took two-year-old Mr. Castillo out of Reed's lap, and threw him across a room and onto a couch. Id. This was Thorpe's way of disciplining Mr. Castillo for bitting one of Reed's fingers. Id. at 4-5. Reed believed Thorpe's actions were "uncalled for and told him to relax." Id.

133. Trial counsel failed to conduct an adequate investigation and discover the type of relationship Mr. Castillo had with his biological father. Had counsel conducted an adequate investigation, counsel would have discovered evidence of the physical abuse Mr. Castillo suffered as a young child at the hands of his biological father. The jury needed such evidence in order to fully consider Mr. Castillo's life and the mitigating effect inherent in his tragic childhood. Learning of such evidence, at least one juror would have returned a verdict of less than death.

ii. His Mother's and Adoptive Father's Abuse

134. The physical abuse Mr. Castillo suffered from his mother began before he was one years old. See Ex. 66, at 5-6. Barbara Wickham began to spank Mr. Castillo and was "fearful that she may be abusive to [him] when he gets on he nerves." Id. at 7.

135. Barbara Wickham frequently told Mr. Castillo that "he was not worth anything and that he was just like his father." Ex. 35, at 5. After Mr. Castillo was adopted by her husband, Joe Castillo, Barbara Wickham continued her verbal insults. She told Mr. Castillo "that he still had his father's blood and the adoption made no difference because he would still amount to nothing." Id.

136. Joe Castillo was a strict disciplinarian. Ex. 28, at 3.[22] He married Barbara Wickham in 1979, and later adopted Mr. Castillo. See Exs. 49; 55. [23] Joe Castillo "beat

[22] Joe Castillo executed a written declaration which is attached hereto as Ex. 28 and incorporated by reference as if fully copied and set forth at length.

[23] The prosecution presented testimony through Bruce Kennedy which suggested Barbara Wickham and Joe Castillo were concerned parents. TT, 9/19/96 (afternoon session), at 4-72, Ex. 168 at 4-72. Trial counsel failed to rebut such testimony with the overwhelming available evidence which demonstrated Barbara Wickham and Joe Castillo abused Mr. Castillo. Moreover, Barbara Wickham repeatedly abandoned Mr. Castillo to the care of family members, the foster care system, and juvenile treatment facilities. See supra Part II.A.3; see infra Part II.A.6.

and yelled at [Mr. Castillo] whenever he did something wrong." Id. Joe Castillo believed he could beat the bad behavior out of Mr. Castillo. Joe Castillo recalled a few occasions where he would:

> ... beat [Mr. Castillo] so bad that Barbara intervened out of fear that I might injure [him]. The beatings involved belts and other objects, slapping [Mr. Castillo's] face or other parts of his body, and shaking [him].

Id.

137. Joe Castillo tried various methods to discipline Mr. Castillo. On occasions, he routinely locked Mr. Castillo in his room, "place[d] a frying pan in the corner, and expect[ed] Mr. Castillo to relieve himself in the frying pan." Ex. 26, at 8. Mr. Castillo was forced to "write sentences until the little finger on his writing hand bled." Id.

138. Mr. Castillo was at times forced to eat red hot chilli peppers until he vomited. Joe Castillo's other forms of punishment included, kicking Mr. Castillo in the ribs, and making Mr. Castillo put his hands out in front of himself and hitting them with an "inch-thick leather belt six or seven times." Id.

139. Mr. Castillo's aunt, Yolanda Norris, spent time in the Castillo home. She observed Barbara Wickham and Joe Castillo's "mistreatment" of Mr. Castillo. She witnessed "[Mr. Castillo] receiving severe beatings at the hands of Joe Castillo. Joe Castillo would often fly-off-the-handle over the slightest issues and beat [Mr. Castillo] very badly." Ex. 34, at 3.

140. The Clark County Department of Family Services investigated a report of physical abuse involving Mr. Castillo. Ex. 64, at 8. A child abuse report revealed that Joe Castillo caused physical injuries to Mr. Castillo when he was twelve years old. Id.[24]

---

[24] During a clinical evaluation, Mr. Castillo reported that "[Joe Castillo] uses excessive physical punishment." Ex. 61. On another occasion, Mr. Castillo explained that Joe Castillo blamed him for everything and if he were placed in a foster home, "[he] would stop doing bad things." Ex. 62.

141. In addition to their abuse, Mr. Castillo's parents clearly favored their daughter, Crystal Castillo.[25] In 1983, on Christmas, Mr. Castillo and Crystal Castillo celebrated the day with their family. Joe Castillo videotaped and narrated as the children opened their gifts. A copy of this and other family videotapes are attached hereto. See Ex. 70.

142. Mr. Castillo sat on a nearby sofa expressionless as he watched his sister open gift after gift. Barbara Wickham helped Crystal Castillo open her gifts as Joe Castillo spoke with excitement as he described each gift. Crystal received baby dolls, a kitchen set, and other gifts typically given to little girls. She received a race track set and hot wheel toy cars, gifts generally reserved for little boys. At least on the family's videotape, Mr. Castillo did not open any gifts.

143. The following year, Christmas was again videotaped by Joe Castillo. Joe Castillo narrated the day's events. Mr. Castillo was excited and happy as he opened his gifts. Mr. Castillo told his mother and Joe Castillo about each gift he opened. Mr. Castillo constantly sought his mother's attention to look at his gifts, and Barbara Wickham, in most instances, simply ignored Mr. Castillo. Mr. Castillo hugged his mother after he opened a gift she gave him – but she did not return his hug. Ex. 70.

144. Joe Castillo and Barbara Wickham responded to Mr. Castillo's statements some times, with statements such as "oh, pretty nice" or "we'll see how long that one will last." Barbara Wickham's and Joe Castillo's focus remained on Crystal Castillo. They expressed excitement over Crystal's gifts. Ex. 70.

145. Barbara Wickham did not provide Mr. Castillo with "the same love, affection, and tenderness that she gave her other two children." Ex. 34, at 3.[26] Barbara Wickham prepared elaborate meals for everyone to eat, with the exception of Mr.

---

[25] Barbara Wickham and Joe Castillo had two children, Crystal Castillo and Joseph Castillo.

[26] Since December of 1995, Mr. Castillo was detained in correctional facilities. His mother, Barbara Wickham visited him seven times during this thirteen year period. Exs. 76; 77.

Castillo. Id. Crystal Castillo and Joseph Castillo had their own bedrooms, while Mr. Castillo slept in the garage and was confined to that area. Id. at 4.

146. Mr. Castillo's birthdays were not a time for celebration, but rather a time to scold him. Joe Castillo videotaped Mr. Castillo's eleventh and twelfth birthdays. On his eleventh birthday, Joe Castillo asked Mr. Castillo what he planned to do in the years to come. Mr. Castillo responded that he wanted to make positive changes to his life. He wanted to stay out of trouble, get a job, and play baseball. Barbara Wickham stated that Mr. Castillo needed to give love rather than receive love. She told him that "what goes around comes around." Joe Castillo advised Mr. Castillo to straighten up and do what he needed to do or he was going to suffer. Ex. 70.

147. Mr. Castillo's twelfth birthday was also videotaped by Joe Castillo. Barbara Wickham, Crystal Castillo, and Joe Castillo sang to Mr. Castillo and presented him with a small cake. Mr. Castillo appeared sad and depressed. Joe Castillo stated that Mr. Castillo did not have a good eleven years, that he made a lot of promises and did not live up to any of them. Mr. Castillo said that he would make no more promises and that he would try to stay out of trouble. Barbara Wickham indicated she had nothing to say to Mr. Castillo for his birthday, and stated that "there will be no next year." Barbara Wickham stated that "one more screw up and that's it, he's gone and I don't care who knows it." Ex. 70.

iii. His Uncle's (Max Becker) Abuse

148. Mr. Castillo lived with his uncle, Max Becker for a short period. Max was a strict disciplinarian. Ex. 34, at 4. He beat Mr. Castillo "frequently and severely." Id.

149. When Mr. Castillo wore the same pair of underwear twice, Max took "a long willow stick and smack[ed] [him] with [it]." Ex. 26, at 10. Mr. Castillo was beaten so severely that he had to "stay home three or four days at a time. Once Max almost killed [Mr. Castillo], and [he] was home for a week with [his] face all beat[en] up." Id.

150. When Barbara Wickham removed Mr. Castillo from Max Becker's care, she observed Mr. Castillo's "legs and back [were] covered with purple marks." Ex. 29, at 9.

151. Trial counsel failed to conduct an adequate investigation which would have disclosed the physical and emotional abuse Mr. Castillo suffered from his mother and adoptive father. An adequate investigation would have recovered videotapes which demonstrated the treatment of Mr. Castillo by his parents – and the disparate treatment of his sister, Crystal Castillo. The abuse Mr. Castillo suffered affected his development. Had trial counsel presented such mitigating evidence, at least one juror would have returned a sentence of less than death.

5. Trial Counsel Should Have Presented Readily Available Evidence that Mr. Castillo was Surrounded by Violent and Sexual Conduct; Drug Abuse; and Physical and Emotional Abuse

152. Mr. Castillo was "often exposed to narcotics and alcohol." Ex. 35, at 5. His mother and father "both drank and did drugs in front of [him] all of the time." Id.

153. Mr. Castillo's mother abused cocaine and marijuana. Ex. 29, at 9. She admitted to a social worker that she abused drugs during the time she sought foster care placement for Mr. Castillo. Ex. 66, at 13. His biological father abused drugs. William Thorpe, Sr. became addicted to heroin in the Army and experimented with LSD and marijuana. Ex. 47, at 12.

154. Mr. Castillo witnessed his father's violent behavior. William Thorpe, Sr. took Mr. Castillo to a bar. Mr. Castillo observed an altercation between his father and another man. The men had a "really bloody fight" Ex. 26, at 6. Mr. Castillo cried in the bar after observing the fight. Id.

155. Mr. Castillo witnessed his parents' abusive relationship. After a visit with his mother, Mr. Castillo stated to his foster parents, "I'm afraid my daddy might hurt my mommy. I want to see my mommy but without my daddy. Sometimes I like him;

sometimes he's mean." Ex. 66, at 15. Mr. Castillo then re-enacted how his dad pounded his fists when he became angry. Id. Mr. Castillo was three years old at the time.

156. Mr. Castillo's mother was, for some period of time, a prostitute. See Exs. 29, at 8; 35, at 4; 33, at 3; 56. She began prostituting herself before Mr. Castillo was born and "throughout much of his adolescence." Ex. 34, at 2. Indeed, Barbara Wickham's sister, Yolanda Norris, remembered Mr. Castillo was present during Barbara Wickham's prostitution:

> I remember taking a trip with Barbara and one of Barbara's friends to the Florida Keys to visit our brother Max. Barbara and her friends prostituted themselves almost the entire time of the trip, and they also tried to pressure me into prostitute[sic] myself during this trip ... Barbara and her friends would hitch hike all over the Keys, and sometimes even when young Billy was tagging along.

Id. at 3.

157. Trial counsel failed to conduct an adequate investigation into Mr. Castillo's family history of violent and sexual conduct; drug abuse, and physical and emotional abuse. Had counsel discovered such evidence and presented it, the jury would have had a better understanding of the environment in which Mr. Castillo grew up. Learning such mitigating evidence, at least one juror would have returned a verdict of less than death.

6. Trial Counsel Should Have Presented Mitigating Evidence that Explained Mr. Castillo's Childhood and Adolescent Behaviors

158. Mr. Castillo had a long history of conduct problems. These problems began at a young age and continued throughout his adolescence. Mr. Castillo was placed in juvenile detention facilities and correctional facilities more than 20 times as a child and adolescent, starting at age 8. He spent more than half of his life in either foster homes, residential treatment programs, juvenile detention facilities, or correctional facilities.

159. At the penalty trial, the prosecution introduced testimony that Mr. Castillo drowned his grandmother's dog and killed several birds. TT, 9/19/96 (afternoon session), at 12, Ex. 168 at 12. The prosecution offered testimony related to Mr. Castillo's juvenile misconduct, which occurred from 1981-1990 and included incidents of running away, attempted murder, arson, threat to life, destruction of county property, vagrancy prowling,

violation of parole, carrying a concealed weapon, petty larceny, curfew, grand larceny auto, grand larceny, battery, unlawfully mingle of a poison or other harmless substance in food, escape, and possession of an unregistered handgun. TT, 9/19/96 (morning session), at 30-51, Ex. 167 at 30-51; 9/19/96 (afternoon session) at 4-73, Ex. 168 at 4-73. The prosecution further presented evidence of Mr. Castillo's adult criminal behaviors, which included attempted burglary, robbery, and battery charges. TT, 9/20/96 (morning session), at 6-22, Ex. 168 at 6-22.

160. As a juvenile, Mr. Castillo was routinely placed within residential treatment programs, such as Children Behavioral Services' ("CBS") Oasis Program and CBS' Parsons' Program. He was placed in the juvenile detention center, boys shelter care, and he was later committed to the Nevada Youth Training Center[27] and the Third Cottage Program.

161. Trial counsel responded to the prosecution's evidence by offering testimony from Dr. Lewis Etcoff. Dr. Etcoff testified that Mr. Castillo suffered from reactive attachment disorder, attention deficit hyperactivity disorder, conduct disorder, and personality disorders. TT, 9/20/96 (afternoon session), at 60-80, Ex. 170 at 60-80. Dr. Etcoff seemed to indicate that Mr. Castillo's reaction to these disorders resulted in his "significant misbehaviors and violent misbehaviors." TT, 9/20/96 (afternoon session), at 60, Ex. 170 at 60.

162. Dr. Etcoff testified that Mr. Castillo's constant runaways from home were related to the abuse he suffered from his adoptive father. However, on cross-examination, the prosecution led Dr. Etcoff to admit that he never reviewed any evidence which indicated Mr. Castillo ran away from residential treatment facilities because of any physical abuse. TT, 9/20/96 at 84, Ex. 170 at 84.

163. Trial counsel failed to investigate, prepare, and provide evidence which described the abuse, neglect, and violence Mr. Castillo experienced while housed in

[27] Mr. Castillo's records from the Nevada Youth Training Center are attached hereto as Ex. 65.

various residential facilities. Counsel further failed to demonstrate how such abuse, violence, and neglect affected Mr. Castillo's development.

164. Undersigned counsel requested Dr. Rebekah Bradley, a well respected assistant professor in the Department of Psychiatry and Behavior Science at Emory University, and the Director of a Post-Traumatic Stress Disorder ("PTSD") treatment program for the Veteran's Administration in Atlanta, to evaluate Mr. Castillo's life and family history, and to determine the impact of Mr. Castillo's exposure to traumatic and other stressful events.

165. Dr. Bradley interviewed Mr. Castillo. He related several instances of inappropriate conduct he observed while housed in multiple juvenile treatment and correctional facilities. Indeed, Mr. Castillo "observed multiple incidents of violence including violence between other children in those institutions as well as violence from institutional staff towards the children in the institutions." Mr. Castillo further reported "one instance of observing a sexual assault between an older and younger child." Ex. 36, at 2.

166. Mr. Castillo was physically abused while housed in the juvenile treatment facilities. He recalled one specific incident in which "a woodshop counselor at the Nevada Youth Training Center at Elko beat him." Id. at 4. The counselor "beat [Mr. Castillo] with a metal clamp" because he stole a pack of cigarettes from the counselor. Id. Mr. Castillo was beaten in the face, head, back, and chest. After he was beaten, the counselor placed "wood putty in [Mr. Castillo's] hair." Id. An allegation of physical abuse was charged against John Moncrief, an instructor at the Nevada Youth Training Center. The State of Nevada Child Welfare Services found the allegation of physical abuse to be substantiated. Id.; Ex. 69, at 5-9.

167. The staff at Nevada Youth Training Center encouraged troubled youth to fight each other. Mr. Castillo described the facility as a "gladiator school." Id. Mr. Castillo was encouraged to fight on two occasions. He recalled, "I won one, I lost one." Id.

168. Barbara Wickham repeatedly abandoned Mr. Castillo to the care of juvenile treatment facilities as she had previously abandoned Mr. Castillo to the care of the foster care system and family members.

169. Barbara Wickham allowed Mr. Castillo to be placed in the Oasis Residential Program when he was eight years old. Within three months of his placement, Barbara Wickham insisted to the teaching parent that: "[Mr. Castillo] not go home as 'that's [not] what we had planned.'" Ex. 59, at 2. The teaching parent noted Mr. Castillo's emotional state while in the program:

> Several times [Mr. Castillo] has gone into a depressive state, saying his mother always sends him to foster homes and relatives and doesn't like to have him around. Mrs. Castillo made only one phone call to the agency this week. We are beginning to feel that [Barbara Wickham] is not interested in [Mr. Castillo] going home at all. She shows very little interest in seeing him and [Mr. Castillo] is very aware of this.

Id.

170. Mr. Castillo appeared to respond well to the Oasis Residential Program. However, Barbara Wickham "seem[ed] to avoid participating in the program." Ex. 59, at 3. The teaching parent stated:

> [Barbara Wickham] seldom attends sessions, will have groceries in the car and needs to leave, or, on two occasions, just failed to pick [Mr. Castillo] up and later sent his father.

Id. The teaching parent felt that

> ... [Barbara Wickham] is not interested in our program but would rather have [Mr. Castillo] in a long-term residential placement out of the home. Another reason for this feeling is that phone calls which [Mr. Castillo] makes to home are often short (less than one minute) and end with [Mr. Castillo] crying, stating his mother is busy. (This has happened about five times.)... .

Id.

171. Barbara Wickham was "seriously lacking in parenting skills." The teaching parent indicated that "[w]hen confronting [Mr. Castillo,] [Barbara Wickham] has trouble with her temper." Ex. 59, at 5.

///

///

CERTIFICATE OF SERVICE

In accordance with Rule 5(b) of the Federal Rules of Civil Procedure, the undersigned hereby certifies that on the 3rd day of August, 2004, a true and correct copy of the foregoing **NOTICE OF ACCEPTANCE OF APPOINTMENT AS COUNSEL FOR PETITIONER 21 U.S.C. § 848(q)(4)**, was deposited in the United States mail, first class postage prepaid, addressed to counsel as follows:

Brian Sandoval
Attorney General
David K. Neidert
Deputy Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

An employee of the Federal Public Defender

98

ORIGINAL FILED

2001 DEC 12 PM 2:24

CLERK

OPPS
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO,
#1153209

Defendant.

Case No. C133336
Dept. No. XVIII

OPPOSITION TO DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: 1-28-02
TIME OF HEARING: 9:00

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through H. LEON SIMON, Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

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

///

///

Castillo, William
Rcv'd 10/20/04 8JDC-068
8th JDC recs.

S15

STATEMENT OF THE CASE

On January 19, 1996, the Defendant William Patrick Castillo was charged by Indictment with Conspiracy To Commit Burglary and / or Robbery (Felony - NRS 199.480, 205.060, 200.380); two counts of Burglary (Felony - NRS 205.060); Robbery, Victim Sixty-Five Years of Age, or Older (Felony - NRS 200.380, 193.167); Murder With Use of A Deadly Weapon (Felony - NRS 200.010, 200.030, 193.165); Conspiracy To Commit Burglary and Arson (Felony - NRS 199.480, 205.060, 205.010); and First Degree Arson (Felony - NRS 205.010). On January 23, 1996, the State filed a Notice of Intent To Seek the Death Penalty setting forth five aggravating circumstances.

Trial commenced on August 26, 1996, and on September 4, 1996, the jury returned a verdict of guilty on all counts. A penalty hearing commenced on September 19, 1996. On September 25, 1996, the jury returned a verdict of death, finding four aggravating circumstances and three mitigating circumstances. The jury found that the aggravating circumstances were that the murder was committed (1) by a person previously convicted of a felony involving the use or threat of violence, specifically, a robbery committed on December 14, 1992; (2) while Castillo was committing burglary; (3) while Castillo was committing robbery; and (4) to avoid or prevent a lawful arrest. The jury found the following mitigating circumstances: (1) the youth of the defendant at the time of the crime; (2) the murder was committed while the defendant was under the influence of extreme emotional distress or disturbance; and (3) any other mitigating circumstances.

On February 28, 1997, the Defendant filed a direct appeal raising seven issues. On April 2, 1998, the Nevada Supreme Court issued an Order affirming Defendant's conviction. On April 2, 1998, Defendant filed a petition for rehearing of his direct appeal. On November 25, 1998, the Court issued an Order denying rehearing. Issuance of remittitur was stayed pending Defendant's petition to the United States Supreme Court for a writ of certiorari.

On January 22, 1999, the Defendant filed a petition for writ of certiorari with the United States Supreme Court. On March 22, 1999, the Supreme Court denied Defendant's petition. Remittitur for Defendant's direct appeal was issued on April 28, 1999 in the Nevada Supreme

Court.

On April 2, 1999, Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction) and Motion for Appointment of Counsel in Proper Person. Defendant's petition did not state any claims with any degree of particularity. Counsel was appointed, and a Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) was filed on October 12, 2001.

STATEMENT OF FACTS

The following statement of facts is adopted from the Nevada Supreme Court's opinion affirming Defendant's conviction. Castillo v. State, 114 Nev. 271, 273-77, 956 P.2d 103, 105-107 (1998).

In late November 1995, the Defendant William Patrick Castillo held a job as a roofer in Las Vegas. Harry Kumma, a former co-worker, contacted Castillo and two other roofing employees, Kirk Rasmussen and Jeff Donovan, about completing a side job. The side job involved re-roofing the residence of the victim, Isabelle Berndt.

Kumma, Rasmussen, Donovan, and Castillo worked on Berndt's roof on November 25, 1995. While performing ground cleanup at Berndt's residence, Castillo indicated to Donovan that he found a key to Berndt's home and wanted to enter. Donovan told Castillo that he should not and directed Castillo to return the key to the place where he found it. In response, Castillo stated "I'll just come back later at nighttime."

At some time during the roofing job, Castillo asked Kumma to lend him $500 so that Castillo could pay his lawyer for services rendered in connection with an unrelated criminal battery charge. Kumma did not lend Castillo the money.

Prior to these events, Castillo began residing with his girlfriend, Tammy Jo Bryant, and a friend, Michelle Platou. At about 6:00 p.m. on December 16, 1995, Castillo left the apartment with Platou in Platou's car. The two returned to the apartment at approximately 3:00 a.m. on the morning of December 17, 1995, with a VCR, a box containing silverware, and a bag containing knit booties. A few minutes later, Castillo and Platou again departed. They returned about twenty minutes later.

At about 9:00 or 10:00 a.m. on December 17, 1995, Castillo and Platou allegedly informed Bryant that they had committed a robbery and stolen several items. According to Bryant, Castillo and Platou further informed her that while in the house, Platou inadvertently bumped into a wall and made some noise. Castillo and Platou allegedly told Bryant that Castillo then hit a sleeping person with a tire iron Castillo brought into the house. The two then departed the scene. According to Bryant, they further stated that, out of fear that they left incriminating fingerprints on the wall of the house, they returned to the residence at 3:00 a.m. to burn down the house.

In the early morning hours of December 17, 1995, neighbors notified the police that Berndt's residence was ablaze. Firefighters found Berndt's body inside the house. An arson investigator determined that two independent fires, set by "human hands," using some type of accelerant, caused the blaze. Investigators found a charred bottle of lighter fluid at the scene and several spots in the living room where an accelerant was present. Laboratory tests confirmed these findings.

According to the coroner's autopsy report, Berndt suffered "multiple crushing-type injuries with lacerations of the head, crushing injuries of the jaws," and several broken teeth. Berndt also had deep lacerations on the back of the head and injuries to the face and ears. According to the coroner, all injuries were contemporaneous. The coroner testified that Berndt died as a result of an intracranial hemorrhage due to blunt force trauma to the face and head. The coroner further testified that these injuries were consistent with blows from a crowbar or tire iron.

A Las Vegas Metropolitan Police Department crime analyst investigated Berndt's residence and observed fire, smoke and water damage in the living room, kitchen and master bedroom. He noted that dresser drawers had been opened, two jewelry boxes had been opened, and the house had been "ransacked." The crime analyst also observed blood marks on the wall next to Berndt's body, which was found lying on a bed.

On December 17, 1995, Berndt's only child, Jean Marie Hosking, arrived at Berndt's residence. She searched the house and determined that her mother's silverware was missing. This

silverware featured a distinctive floral pattern, had an engraved "B" on each piece, and was stored in a wooden box on the shelf in Berndt's bedroom. Also missing were a VCR, Christmas booties Berndt was knitting for her grandchildren, and eight $50 U.S. savings bonds.

On December 19, 1995, Rasmussen, one of Castillo's coworkers, contacted the police. According to Rasmussen, during the car pool to work on December 18, 1995, Castillo said, "This weekend I murdered an 86-year-old lady in her sleep." Castillo also allegedly stated that he entered Berndt's house with the intent to steal Berndt's valuables, hit Berndt numerous times with a tire iron, and heard her "gurgling" in her own blood, before he put a pillow over her head to smother her. Castillo also allegedly told Rasmussen that he had stolen a VCR, money, and silverware and that he intended to sell these items to raise money to pay his attorney.

The following morning, Castillo allegedly told Rasmussen that the crime had been reported on the news. On December 19, Rasmussen drove by Berndt's residence, saw that it had been burned, and contacted the police to report what he had learned.

On the evening of December 19, 1995, Charles McDonald, another roofer, visited Castillo's apartment. Castillo offered to sell a set of silverware to McDonald for $500. McDonald testified that the silverware was in a wooden box. When McDonald later viewed Berndt's silverware, he noted that it appeared to be the same silverware that Castillo tried to sell to him.

Based upon the information provided by Rasmussen, police obtained and executed a search warrant on the apartment shared by Castillo, Bryant, and Platou at 10:00 p.m. on December 19, 1995. Castillo and Bryant were present when the police arrived and permitted them to enter; both Castillo and Bryant gave their consent to a search of their apartment. Police recovered the silverware, the VCR, the booties, and a bottle of lighter fluid from the apartment. The officers also located a notebook with the notation "$50, VCR, $75, camera, silverware."

After execution of the search warrant, the officers arrested Castillo. At the detective bureau, Castillo waived his Miranda rights and made statements during two separate, consecutive interviews. During the first interview, Castillo indicated that he had received the VCR and other property from a friend. Shortly after the first interview ended, the detectives

returned and informed Castillo of the evidence that had been obtained against him from Bryant and Rasmussen. Castillo then confessed to the killing, robbery, and arson.

Subsequently, Castillo pleaded not guilty on all counts, and a jury trial commenced August 26 and concluded on September 4, 1996. The prosecution presented all the evidence cited above in its case in chief. The defense did not put on a case in chief. The jury returned guilty verdicts on all counts: conspiracy to commit burglary, burglary, robbery of a victim sixty-five years or older, first-degree murder with use of a deadly weapon, conspiracy to commit burglary and arson, and first-degree arson.

Castillo's penalty hearing took place from September 19 to September 24, 1996. Bruce Kennedy of the Nevada Youth Parole Board testified about Castillo's extensive juvenile history and record. Kennedy became acquainted with Castillo in 1984 while Kennedy was a parole counselor at the Nevada Youth Training Center in Elko. Kennedy's testimony revealed: (1) Castillo began running away from home regularly when he was nine years old, (2) by 1984, Castillo had already been charged with attempted murder, petty larceny, and six counts of arson (including an incident in which he tried to burn down the Circus Circus Hotel in Las Vegas), and (3) much of Castillo's criminal misbehavior remained uncharged. Kennedy also testified that, by the age of fifteen, Castillo had already used marijuana, speed, cocaine, and alcohol.

Due to his extensive misbehavior, Castillo participated in numerous Nevada state juvenile programs, lived with family members in different areas of the country for short periods of time and ultimately returned to Nevada. During his adolescence, doctors determined that Castillo understood the difference between right and wrong, did not suffer from a neurological disorder, but suffered from a personality disorder.

Other State witnesses testified that in 1990, at age seventeen, Castillo escaped from a Nevada youth training facility. Castillo was arrested for attempted burglary and later certified to adult status on charges arising from this incident. Castillo served fourteen months in prison, expiring his term. In April 1993, Castillo was convicted of robbery arising from an incident which occurred in December 1992. Castillo had a gun during that robbery. Castillo was sentenced to three years, served just under two years, committed multiple disciplinary infractions

while in prison, and was released in May 1995.

In June 1995, Castillo participated in the armed robbery of a cashier, but was not formally charged. In December 1995, Castillo was charged with battery upon one of his neighbors. These charges were pending at the time of the instant trial.

After this extensive testimony about Castillo's prior criminal behavior, the State introduced victim impact evidence through testimony by Berndt's granddaughters and Berndt's daughter, Hosking. These individuals testified about their personal interaction with Berndt, the quality of Berndt's life, and the effect of Berndt's death on their lives.

The first defense witness, a neuropsychologist, testified that Castillo had been emotionally, mentally, physically and behaviorally abused; suffered from "reactive attachment disorder" and "attention deficit hyperactivity disorder;" and came from a dysfunctional family. One correctional officer and one juvenile facility counselor testified as to several positive episodes regarding Castillo.

Thereafter, Castillo's girlfriend, Bryant, testified that Castillo had few social skills, acted like a "big kid," but was trying to improve. Castillo's mother testified that Castillo had a difficult upbringing due to the physical and emotional abuse he received from his biological father, her own lack of affection for Castillo, and the family's instability. At the hearing's conclusion, Castillo read an unsworn statement to the jury expressing his feelings including regret and remorse concerning his conduct.

ARGUMENT

I.

DEFENSE COUNSEL WAS NOT INEFFECTIVE

In Claim I, Defendant claims his trial counsel was ineffective. Defendant cites the standard for ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 205 (1984) and its progeny, but does not cite a single instance where counsel was ineffective. Defendant's broad assertion unsupported by fact or citation to the record amounts to a bare allegation and cannot be a basis for ineffective assistance of counsel. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

II.

CLAIM THAT PROSECUTOR'S CLOSING ARGUMENT DURING PENALTY PHASE DENIED DEFENDANT DUE PROCESS IS BARRED BY LAW OF THE CASE

In Claim II, Defendant claims the prosecutor, in addressing the Defendant's future dangerousness to the community, improperly argued that in determining whether the death penalty should be imposed, the jury must choose between an execution of the killer or a future victim of the Defendant. This issue was raised by the Defendant on direct appeal, and the Nevada Supreme Court considered the issue in its published opinion. Castillo v. State, 114 Nev. at 279-81, 956 P.2d at 108-10. The Supreme Court concluded that although the prosecutor's argument was improper, it did not unfairly prejudice the Defendant in light of the overwhelming evidence of his guilt. Id. at 281, 956 P.2d at 110. Defendant raised the issue again in his petition for writ of certiorari to the United States Supreme Court. The Supreme Court denied Defendant's petition. Since the Nevada Supreme Court has already ruled on this issue, the issue is barred from reconsideration in this Court by law of the case. Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

III.

CLAIMS III, V, VIII, IX, X AND XI SHOULD HAVE BEEN RAISED ON DIRECT APPEAL AND ARE NOT PROPERLY BEFORE THIS COURT

In Claims III, V, VIII, IX, X and XI, the Defendant raises several substantive issues that should have been raised on direct appeal. See NRS 34.810(1)(b)(2). When a criminal defendant fails to raise a claim in a direct appeal, then attempts to revive that claim in a petition for writ of habeas corpus, that complaint is deemed waived unless the defendant therein can present facts constituting good cause for the failure. NRS 34.810(3); Kimmel v. Warden, 101 Nev. 6, 692 P.2d 1282 (1985); Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983). Defendant has not shown good cause for not raising these issues on direct appeal and they should not be considered by this Court.

In Claim III, Defendant argues that NRS 193.165 is unconstitutionally vague and ambiguous because almost any item may be characterized as a deadly weapon under the statute

and that thereby the State may arbitrarily enforce NRS 193.165(5)(b). However, Defendant's argument must fail because the statute is not vague as applied to Defendant.

If the challenged statute is reasonably clear in its application to the conduct of the person bringing the challenge, it cannot be stricken on its face for vagueness. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 445 U.S. 489, 494-95, 102 S.Ct. 1186, 1190-1191 (1982). "One to whose conduct a statue clearly applies may not successfully challenge it for vagueness." Parker v. Levy, 417 U.S. 733, 756, 94 S.Ct. 2547, 2562 (1974)

Moreover, if a statute is not vague when considered under those facts, then by definition it cannot be vague in all of its applications. See United States v. Powell, 423 U.S. 87, 96 S.Ct. 316 (1975); Chapman v. United States, 500 U.S. 453, 111 S.Ct. 1919 (1991).

In the instant case, the district court determined that the tire iron that the Defendant used to bash the victim's face in, killing her, was used as a deadly weapon. Since the district court was correct in making the determination that the tire iron used in this case was a deadly weapon, by definition the statute cannot be vague. U.S. v. Powell, supra. NRS 193.165 is clear in its application to the conduct of the person bringing the challenge; and therefore, cannot be successfully challenged for vagueness. Village of Hoffman Estates, supra; Parker, supra.

Moreover, an analysis of a statute under the vagueness doctrine does not include conjuring up a host of absurd examples to illustrate how, in other situations, certain objects should not be considered deadly weapons. In Travis v. State, 700 So.2d 104 (Fla.1997), the Florida Supreme Court, citing to Village of Hoffman Estates, stated that a court reviewing a statute for vagueness should "not entertain countless hypothetical situations in which the statute might be considered vague, but rather the court must begin by applying the enactment to the facts of the case at hand. Id. at 106; Village of Hoffman Estates, 445 U.S. at 495, 102 S.Ct. at 1191. Thus, Defendant's five (5) pages of hypothetical after hypothetical of possible deadly weapons is completely irrelevant.

It is again important to note that "[a] challenger who has engaged in conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." Sheriff of Washoe County v. Martin, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983). In

other words, a defendant may not be heard to argue that a statute is unconstitutional if his conduct apparently falls within the behavior which the law prohibits. See Lyons v. State, 105 Nev. 317, 775 P.2d 219 (1989). Therefore, the district court properly found that the tire iron Defendant used in this case was a deadly weapon, and Defendant's challenge of NRS 193.165 fails.

In Claim V, the Defendant makes an unsupported request for an evidentiary hearing to go on a fishing expedition to determine whether there is any evidence outside the record to support any of Defendant's aforementioned claims. Defendant cites Hatley v. Nevada, 100 Nev. 214, 678 P.2d 1160 (1984), and Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983), in support of his request.

In Hatley, the court states, " [i]t is well settled that when 'a petition for post-conviction relief contains allegations of facts outside the record which, if true, would entitle the petitioner to relief, an evidentiary hearing thereon is required.'" 100 Nev. at 216, 678 P.2d at 1161; citing Bolden at 183, 659 P.2d at 887; and Doggett v. State, 91 Nev. 768, 542 P.2d 1066 (1975). In all of these cases, some facts must first be alleged to warrant an evidentiary hearing. Here, Defendant alleges nothing. Defendant merely wishes to ferret out facts that might assist him in establishing a claim. A Defendant cannot be granted an evidentiary hearing on bare unsupported allegations. See Hargrove, 100 Nev. 498, 686 P.2d 222.

In Claims VIII, IX and X, Defendant attacks the constitutionality of the death penalty as cruel and unusual punishment. In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976), the United States Supreme Court addressed the question of whether the death penalty, as punishment for the crime of murder, violates the Eighth Amendment. In reaching its decision, the Court outlined the history of the death penalty in the United States. Id. The Court noted that, prior to 1900, the constitutionality of the sentence of death itself was not at issue. 428 U.S. at 169-170, 96 S.Ct. at 2923-2924. The court simply considered whether the mode of execution was similar to "torture" and other "barbarous" methods. Id.

In support of its decision, the Gregg court cited an early Supreme Court opinion, Wilkerson v. Utah, 99 U.S. 130 (1879), as follows: "'[i]t is safe to affirm that punishments of

torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment . . ." 428 U.S. at 170, 96 S.Ct. at 2924. The Gregg court also quoted its opinion in In re Kemmler, 136 U.S. 436, 447, 10 S.Ct. 930, 933 (1890), which held that "[p]unishments are cruel when they involve torture or a lingering death . . ." 428 U.S. at 170, 96 S.Ct. at 2924.

In Gregg, the Court noted that in 1910 for the first time the Court held that "the Clause forbidding cruel and unusual punishments is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." 428 U.S. at 171, 96 S.Ct. at 2924; quoting Weems v. United States, 217 U.S. 349, 373, 30 S.Ct. 544, 551 (1910). In Weems, the Court first held that the punishment of death should be proportionate to the offense committed. 217 U.S. at 366-67, 30 S.Ct. at 549.

The Gregg court stated that the death penalty is unconstitutional if it is excessive to the defendant's offense. The court defined excessiveness as follows:

> . . . [t]he inquiry into 'excessiveness' has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. [citations omitted]. Second, the punishment must not be grossly out of proportion to the severity of the crime. [citations omitted].

Gregg, at 173, 96 S.Ct. at 2925.

Here, Defendant's punishment is not "excessive" and, thus, it does not offend the constitution. First, the death sentence in Nevada does not involve the unnecessary and wanton infliction of pain. Defendants who are sentenced to death receive a lethal injection; and lethal injections do not involve the unnecessary and wanton infliction of pain. See Id. at 153, 96 S.Ct. at 2909. Second, the death sentence in this case is not even remotely out of proportion to the severity of the crime. The court has held that ". . . when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of cases." Id. at 187, 96 S.Ct. at 2932.

In the instant case, the Defendant bashed an eighty-six-year-old woman's face in with a tire iron while she slept because he was afraid she might awaken and discover him burglarizing her home. Under these circumstances, it can hardly be argued that the death penalty is not proportional to the crime committed. Defendant's argument that the death penalty constitutes

cruel and unusual punishment is without merit, and must be rejected.

In Claim XI, Defendant claims that the death penalty is unconstitutional because it is arbitrarily and capriciously imposed. Defendant's claim lacks merit.

In Furman v. Georgia, 409 U.S. 238, 93 S.Ct. 566 (1972), the United States Supreme Court mandated that the discretion afforded a sentencing body "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

Generally, the cases have held that to avoid a pattern of arbitrary and capricious sentencing, "the decision to impose [the death penalty] must be guided by standards so that the sentencing authority [will] focus on the particularized circumstances of the crime and the defendant." Gregg, 428 U.S. at 199, 96 S.Ct. at 2940; see also Zant v. Stephens, 462 U.S. 862, 879 (1983).

The Nevada Supreme Court has held that the provisions of NRS 200.030, which provides for the death penalty for a conviction of murder in the first degree, were constitutional under the standards established by the United States Supreme Court in Furman and its progeny. Ybarra v. State, 679 P.2d 797 (Nev. 1984). Nevada has strict criteria for the adjudication of a murder case as a capital crime. See Supreme Court Rule 250. In Nevada, before the death penalty can be imposed the State is required to prove beyond a reasonable doubt the existence of statutory aggravating circumstances; a defendant is allowed to present evidence of any mitigating circumstances; the jury is instructed to determine whether mitigating factors outweighed aggravating factors; and the sentence is reviewed by the Nevada Supreme Court to determine if it is arbitrary or disproportionate. See Id.; NRS 175.554, 177.055 and 200.030(4). In Lowenfield v. Phelps, 484 U.S. 231, 244, 108 S.Ct. 546, 554 (1988), the Supreme Court held that statutory death penalty schemes like the one used in Nevada pass constitutional muster because they "... genuinely narrow the class of death-eligible persons and thereby channel the jury's discretion."

In rendering an appropriate sentence for Defendant's murder of Ms. Berndt, the jury exercised its discretion guided by specific standards which comport with the United States Supreme Court's ruling in Furman. Thus, there was a meaningful basis for the jury to

distinguish the Defendant's case from others in which the death penalty was not imposed. Defendant's claim that the death penalty is arbitrarily and capriciously imposed in Nevada is without merit.

IV.

COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ASSERT A PSYCHOLOGICAL DEFENSE

In Claims IV and VI, Defendant claims counsel was ineffective for failing to properly investigate Defendant's psychological history or assert a psychological defense. However, all of Defendant's prior psychological records were subpoenaed for this case. The records were provided to the defense. In those records, the Defendant had historically proven to be emotionally unstable, but was never diagnosed as having any mental inability to understand the nature of his actions.

Under Nevada law, in order to succeed on a mental deficiency defense, a defendant must be able to show that he lacked sufficient mental capacity to form the requisite intent to commit the crime. NRS 193.220. NRS 193.220 sets forth the requirement for introducing evidence of insanity as a defense and reads:

> "No act committed by a person while in a state of insanity or voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of his insanity or intoxication may be taken into consideration in determining the purpose, motive or intent."

"Intention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused." NRS 193.200 "A person is of sound mind who is not an idiot and who has arrived at the age of 14 years, or before that age if he knew the distinction between good and evil." NRS 193.210.[1]

---

[1] These statutory provisions of the Nevada Revised Statutes adopting the "mens rea" model of the insanity defense replaced the former M'Naughten test in Nevada in 1995. These statutory provisions took effect prior to Defendant committing his crimes. In a recent decision,

In order to assert a defense based on psychological deficiency or illness there must be some evidence to support it. Defense counsel did investigate the Defendant's psychological history and had a psychological evaluation performed by Dr. Lewis Etcoff. In past psychological evaluations, the Defendant was characterized as extremely intelligent and manipulative. Defendant was not under any type of mental incapacity when he committed the crimes for which he was charged. In fact, the Defendant had the intelligence to know not to leave finger prints at the crime scene but was thorough enough to return and set the residence on fire to cover up any finger prints his accomplice may have left behind. Defendant set the residence on fire because he knew what he did was wrong, and he would get caught if he didn't destroy the evidence. In his taped confession, the Defendant describes his thought process in committing the crime and the subsequent cover up. Defendant admitted to killing Ms. Berndt to avoid being recognized and ending up back in jail. The Defendant clearly and intelligently articulated a logical progression of events and thought processes as he described his actions to the police. There was never any indication that the Defendant did not understand what he was doing or could not control his actions because of some mental abnormality that compelled him to act.

Prior to committing this crime, the Defendant had been in and out of State programs since the age of nine because of his disruptive behavior. Several psychological evaluations of the Defendant had been conducted over the years to determine the cause of his behavior. Defendant was never found to have any mental illness. The Defendant has never been treatment for any mental disorder except for a two-year period when he was a youth in which he was experimentally given ritalin to see if it would be of any benefit. The results of that experimental period were inconclusive.

In all of Defendant's psychological evaluations, the Defendant was determined to be of

---

the Nevada Supreme Court held the "mens rea" model adopted in 1995 to be unconstitutional. Finger v. State, 117 Nev. Adv. Op. 48, 27 P.3d 66 (2001). Issuance of remittitur in Finger has been stayed pending petition to the United States Supreme Court for writ of certiorari. Decision on the petition is still pending.

The Nevada Supreme Court's decision in Finger calls into question Nevada's current insanity defense, but even under the former M'Naughten test, which provided a defense where a defendant did not possess sufficient reason to know what he was doing was wrong, the Defendant could not have succeeded on a psychological defense.

above average intelligence with no mental deficiencies. Defendant's problems were determined to be a result of immaturity and poor judgment.

Dr. Lewis Etcoff testified for the defense at the penalty hearing. During his testimony, Dr. Etcoff concluded from a review of the Defendant's record and an interview with the Defendant that the Defendant suffered from a detachment disorder which prevented him from forming normal emotional bonds with others. Penalty Phase Transcript (PPT), 9/20/96, pp. 60, 62-63. Defendant's inability to bond with others causes him to act out in a disruptive manner. Id. In addition, the Defendant fosters a certain amount of anger as a result of an abusive upbringing. Id.

It must be pointed out that Dr. Etcoff's evaluation was based in part on what was represented to him by the Defendant. Dr. Etcoff admitted that the Defendant may have been embellishing some of the negative aspects of his upbringing to rationalize his actions or to mitigate his culpability.

Ultimately, Dr. Etcoff concluded that the Defendant did not suffer from any mental illness. PPT, 9/20/96, p. 92. In fact, Dr. Etcoff's psychological evaluation of the Defendant would have been harmful to any kind of defense counsel may have proffered. Dr. Etcoff concluded that the Defendant is intelligent, rebellious and hostile. PPT, 9/20/96, pp. 93-95. Defendant feels no remorse for harming others, in fact, he enjoys it. Id. Defendant is immune to punishment, and it only serves to fuel his anger. Id.

Not only was counsel not ineffective for failing to pursue a psychological defense, but counsel's attempt to mitigate Defendant's actions through Dr. Etcoff's testimony turned out to be more detrimental than beneficial. There is nothing in the record to indicate that a psychological defense would have been successful, and Defendant has failed to proffer any evidence outside the record to support his claim.

Under Strickland v. Washington, supra, for a claim of ineffective assistance of counsel to succeed Defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. See Strickland, 466 U.S. at 687-88 &

694, 104 S.Ct. at 2065 & 2068. In considering whether counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information . . . pertinent to his client's case." Doleman v State, 112 Nev. 843, 847, 921 P.2d 278, 281 (1996); citing Strickland, 466 U.S. at 690-91, 104 S.Ct. at 2066. Once this decision is made, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 847, 921 P.2d 281; citing Strickland, 466 U.S. at 690-91, 104 S.Ct. at 2066. Finally, counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 847, 921 P.2d 281; see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066; State v. Meeker, 693 P.2d 911, 917 (Ariz. 1984).

This Court must begin with the presumption of effectiveness and then determine whether or not the Defendant has demonstrated, by "strong and convincing proof," that counsel was ineffective. Homick v State, 108 Nev. 127, 141, 825 P.2d 600, 607 (1992); citing Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981). The role of a court in considering allegations of ineffective assistance of counsel, is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978); citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711; citing Cooper, 551 F.2d at 1166. In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

Since defense counsel had Defendant's prior psychological history available to him prior to trial, and the Defendant has not demonstrated how a psychological defense could have had any degree of success, Defendant has failed under both prongs of Strickland to establish that counsel was ineffective for failing to investigate his psychological background or to pursue a

psychological defense.

V.

DEFENDANT'S CLAIM OF CUMULATIVE ERROR IS WITHOUT MERIT

In Claim VII, Defendant asserts that his conviction is invalid due to "cumulative errors in the admission of evidence and instructions, gross misconduct by state officials and witnesses, and the systematic deprivation of petitioner's right to the effective assistance of trial and appellate counsel." In his broad assertion, Defendant in essence declares that every aspect of his trial was conducted in violation of his constitutional rights. Defendant has failed, however, to make a proper showing for post-conviction relief on any of his claims, therefore, there can be no accumulation of errors sufficient to render his conviction constitutionally invalid. As Justice Gunderson put it in his dissenting opinion in LaPena v. State, 92 Nev. 1, 14, 544 P.2d 1187, 1195 (1976), "nothing plus nothing plus nothing is nothing." Defendant's claim of cumulative error is without merit.

CONCLUSION

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

DATED this 10 day of December, 2001.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY H. Leon Simon
H. LEON SIMON
Deputy District Attorney
Nevada Bar #000411

P:\WPDOCS\WRITS\514\51445601.WPD\kjh

Castillo, William
Rev'd 10/20/04 8JDC-984
8th JDC recs.

RECEIPT OF COPY

RECEIPT OF A COPY of the attached OPPOSITION TO DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) is hereby acknowledged this 12 day of December, 2001.

CHRISTOPHER R. ORAM, ESQ.

By Christopher R. Oram/kk
520 S. Fourth Street, 2nd Fl.
Las Vegas, Nevada 89101

Castillo, William
Rec'd 10/20/04 8JDC-985
8th JDC recs.

P:\WPDOCS\WRITS\514\51445601.WPD\kjh

15

FILED

2002 MAR -5 PM 4:44

CLERK

SUPP
CHRISTOPHER R. ORAM, ESQ.
Nevada State Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Petitioner
WILLIAM CASTILLO

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA Plaintiff, vs. WILLIAM CASTILLO, Defendant.	CASE NO. C133336 DEPT. NO. XVIII DOCKET NO.

REPLY TO STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION

COMES NOW, the Defendant, WILLIAM CASTILLO, by and through his counsel of record, CHRISTOPHER R. ORAM, ESQ. and does hereby submit his Reply to State's Response to Defendant's Supplemental Brief in support of Defendant's Writ of Habeas Corpus filed with this Honorable Court.

///

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

S15

Castillo, William
Rcv'd 10/20/04 8JDC-990
8th JDC recs.

This supplement is made and based upon the pleadings and papers on file herein, the foregoing Memorandum of Points and Authorities, and any oral argument adduced at the time of hearing.

DATED this 5th day of March, 2002.

Respectfully submitted by:

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563
Attorney for Petitioner

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

STATEMENT OF THE CASE

Petitioner hereby adopts the statement of the case as annunciated in the Supplemental Brief.

STATEMENT OF THE FACTS

Petitioner hereby adopts the statement of the facts as annunciated in the Supplemental Brief.

ARGUMENT

I. MR. CASTILLO IS ENTITLED TO HAVE HIS SENTENCE OF DEATH AND CONVICTIONS REVERSED BASED UPON INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL.

According to the State's opposition, Mr. Castillo did not receive ineffective assistance of trial counsel. (State's opposition, pp. 7, lines 23-28). In fact, the State claims that Mr. Castillo did not provide a single instance where counsel was ineffective. Apparently, the State has failed to realize that Mr. Castillo raised ineffective assistance of counsel as to both trial and appellate counsel. The State appears to have made an extremely significant mistake in the drafting of their opposition. As argument two will demonstrate, Mr. Castillo suffered ineffective assistance of appellate counsel. Moreover, Mr. Castillo received ineffective assistance of trial counsel. Mr. Castillo does not dispute the legal authority cited by the State as to ineffective assistance of counsel in argument one.

II. MR. CASTILLO WAS DENIED DUE PROCESS BY THE IMPROPER ARGUMENT AT THE PENALTY HEARING WHEREIN THE PROSECUTOR ASKED THE JURY TO VOTE AGAINST MR. CASTILLO AND IN FAVOR OF FUTURE INNOCENT VICTIMS PURSUANT TO THE JURY'S DUTY IN VIOLATION OF THE U.S. CONSTITUTION, FIFTH, SIXTH,

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

EIGHTH AND FOURTEENTH AMENDMENTS.

During the penalty hearing the prosecutor was permitted by the trial court to engage in an argument that has been disapproved for many years. The objectionable argument during the penalty hearing was as follows:

> The issue is to you, as the trial jury, this afternoon have the resolve and the courage, the determination, the intestinal fortitude, the sense of commitment to do you legal and moral duty, for what ever your decision is today, and I say this based upon the violent propensities that Mr. Castillo has demonstrated on the streets, I say it based upon the testimony of Dr. Etcoff and correctional officer Berg about the threat he is to other inmates, and I say it based upon the analysis of his inherent future dangerousness, whatever the decision is, you will be imposing a judgement of death and it's just a question of whether it will be an execution sentence for the killer of Mrs. Berndt or for a future victim of this defendant.
> Mr. Schieck: I am going to object your honor to this argument of future victims.

Mr. Schieck objected to this argument. On direct appeal appellate counsel raised this exact issue. On April 2, 1998, the Nevada Supreme Court specifically rejected this argument. (See attached exhibits). However, this Supreme Court only addressed the argument of appellate counsel regarding the future dangerousness contention made by the prosecutor.

In the State's opposition, they have made the most grave error. According to the State, this issue has already been raised by Mr. Castillo and the Supreme Court has rejected this argument. The State further argues that this Court can not consider this issue based upon the Nevada Supreme Court already denying this issue. (State's opposition, pp. 8, lines 4-15). **Again, the State has absolutely failed to respond to this issue and the State is absolutely incorrect. Emphasis added.** The following analysis demonstrates that this issue was not correctly raised on direct appeal and the Supreme Court did not address this issue. Specifically, the Supreme

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

Court addressed Mr. Castillo's issue in the State of Nevada v. Vernell Evans. It is important to note that on direct appeal Mr. Castillo's appellate counsel only raised the objection to Mr. Harmon's statement that it was reversible error based upon future dangerousness. The Supreme Court rejected the argument as to future dangerousness. Thereafter, the Supreme Court heard the case of Vernell Ray Evans v. State of Nevada, 117 Nev. Ad. Op. 50 (July 24, 2001) (this exhibit was provided an attached to Mr. Castillo's supplemental brief). In Evans, the defendant had been sentenced to die as a result of being convicted of four counts of first degree murder. During the rebuttal closing argument of the penalty phase, Chief Deputy District Attorney, Mel Harmon made an almost identical argument to the one that was objected to in Mr. Castillo's direct brief. However, a comparison between both Mr. Harmon's quotes in the Castillo case and in the Evans case demonstrates that the statement is more egregious in Mr. Castillo's case. In Evans, during rebuttal closing the prosecutor stated,

> "Do you as a jury have the resolve, the determination, the courage, the intestinal fortitude, the sense of commitment to do you legal duty?" pp. 14-15. The Nevada Supreme Court explained, " Asking the jury if it had the intestinal fortitude to do it's legal duty was highly improper the United States Supreme Court held that a prosecutor erred in trying to exhort the jury to it's job; that kind of pressure. . . has no place in the administration of criminal justice. There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir the passion and can only distract a jury from it's actual duty; impartiality. The prosecutor's words here "resolve", "determination", "courage", "intestinal fortitude", "commitment", "duty", were particularly designed to stir the jury's passion and appeal to partiality. Id.
>
> In considering Mr. Evans objections, the Nevada Supreme Court that,
>
> " Although this Court noted a similar argument in Castillo v. State, 114 Nev. 271, 279, 280, 959 P.2d 103, 109,(corrected by McKenna v. State, 114 Nev. 1044, 1058, 968 P.2d 739, 748 (1998), it addressed only the prosecutor's argument on future dangerousness, not the reference to the jury's duty". Id

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

Therefore, the Supreme Court specifically considered the previous ruling in Castillo in Vernell Evans case. The Supreme Court noted that although the quotes by Mr. Harmon appeared to be identical, Mr. Evans' case where a death sentence was reversed, whereas, Mr. Castillo's was not. The Supreme Court specifically stated that in Castillo appellate counsel addressed only the prosecutor's argument on future dangerous, not the reference to the jury's duty. Therefore, Mr. Evans' death sentence for the four brutal murders was reversed. Based upon the improper prosecutorial argument regarding the jury's duty. The Supreme Court specifically indicated that Mr. Castillo's counsel only raised the issue on future dangerousness and not on a reference to the jury's duty. Therefore, appellate counsel has clearly been ineffective for failing to raise the argument regarding Mr. Harmon's improper statement in the proper legal context.

According to the State, this argument being raised by the undersigned has already been addressed by the Court. That is absolutely false. Mr. Castillo would indicate that the State has made a grave mistake in their opposition. The Supreme Court distinguished that the Castillo argument made on direct appeal regarding future dangerousness versus Mr. Evans' contention that Mr. Harmon's argument was a violation regarding the jury's duty. Hence, Mr. Castillo now raises the following argument: 1) his appellate counsel was ineffective for failing to raise the argument that Mr. Harmon had violated Mr. Castillo's legal rights when he improperly addressed the jury's duty; 2) appellate counsel was ineffective for raising the argument that Mr. Castillo deserved a new trial and penalty phase based upon future dangerousness based on Mr. Harmon's argument; 3) Mr. Castillo now contends that the argument made by Mr. Harmon is reversible error based upon **his improper argument to Mr. Castillo's jury regarding their duty.**

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

In their anemic half page response to this argument, the State has utterly failed to address the recent decision of Vernell Evans. The State has decided to simply ignore this argument and simply tried to improperly convince this Court that this issue has been raised. Perhaps, if someone spent five minutes reviewing this issue they may believe the State's contention. However, a careful review of Mr. Castillo's argument demonstrates that the Supreme Court has essentially already decided this issue. The logic is quite simple. Mr. Harmon made an identical argument in both Mr. Castillo's penalty phase and in Mr. Evan's penalty phase. Unfortunately, Mr. Castillo's appellate counsel did not raise the proper legal rational for a reversal. Mr. Evan's attorney did raise the proper rational. In fact, Mr. Evan's attorney raised the argument that his death sentences should be reversed based upon Mr. Harmon violating the principals of the jury's duty. Whereas, Mr. Castillo's counsel raised it as a future dangerous argument.

The Supreme Court specifically stated in Mr. Evan's case that the argument made by Mr. Evans had already been made by Mr. Castillo with the exception the Mr. Castillo made the wrong argument. Therefore, we are making the argument that Mr. Harmon's statement that is identical if not worse in Mr. Castillo's case was a violation of the jury's duty. The Supreme Court has already ruled in Vernell Evan's case that the identical statement is reversible error. It is therefore, the opinion of Mr. Castillo that he deserves to have his sentence of death and convictions reversed based upon this contention. Mr. Castillo would also request that this Court carefully consider the lenghty argument made in his supplement regarding this issue. It is difficult to properly reply to this issue based upon the State's utter failure to realize that this is a completely different issue and has already been cited by the Nevada Supreme Court. Surely, the State should have made some

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

type of argument to distinguish Mr. Castillo's case from Mr. Evans. They chose not to do so. Mr. Castillo demands a reversial of his sentence of death. Mr. Castillo would remind the State that it was Mr. Evans who was convicted of killing four innocent human beings. Mr. Castillo would remind the State that Mr. Evans tortured one of those victims as she was preparing to take a shower.

Addtionally, Mr. Castillo is a white man. Mr. Evan's is an african american man it is not our contention, yet, that there is any equal protection violation of the fourteenth amendment to the United States Constitution. However, the similarities in the case are apparent. Mr. Harmon was a prosecutor in both cases. Mr. Evans an African American man, was convicted of a heinous murder of four innocent individuals. Mr. Castillo a white man had been convicted of the murder of one individual. The same prosecutor had made identical argument's in both Mr. Evans and Mr. Castillo's penalty phase. Mr. Evans had his sentnece of death reversed. Mr. Castillo demands that his sentence of death be reversed for the identical issue. In the event that this issue is not granted, Mr. Castillo alledges that he has an equal protection argument and that he is being treated differently based upon his race. In violation of the fourteenth amendment.

III. MR. CASTILLO IS ENTITLED TO A NEW TRIAL AND PENALTY PHASE BASED UPON THE FAILURE OF TRIAL COUNSEL TO PRESENT A PSYCHOLOGICAL DEFENSE TO THE TRIAL PHASE OF THE CASE.

In the Supreme Court's opinion affirming Mr. Castillo's direct appeal, the Supreme Court noted, "[t]he defense did not put on a case in chief." In the instant case, as the Supreme Court noted, the defense failed to present any form of defense whatsoever, the defense actually waived their opening argument. More importantly, the following statement was the entire closing

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

argument by the defense counsel:

> "Good day, ladies and gentleman. If it please the court, Mr. Bell, Mr. Harmon, and my co-counsel Mr. Schieck, as the Judge informed you, when he was reading the instructions, this is the time known as closing argument. You've heard Mr. Harmon's closing argument. I think it's better to characterize what I'm about to say as some closing comments, as to this phase of the proceedings.
>
> I first want to thank you for your participation in this and the patience that I know you've had to exercise over these past couple of weeks. As Mr. Harmon has correctly state, you've always been on stage here. Now you are taking center stage.
>
> You have not heard much from the defense during this phase, as it has become quite obvious to you, as the events unfolding in here, but that doesn't lessen your burden or your sworn duty that you took an oath to. All the defense asks you to do is to perform your sworn duty. Your burden is no less because we presented very little and had very little participation. Your duty, as we see it, is to review each and every count, each and every element. Make sure that you believe beyond a reasonable doubt that the State has proven beyond a reasonable doubt each and every element within each and every count. Once you have done that, follow your convictions accordingly.
>
> Additionally, after you have done that, you've done your duty. You've been fair to all the parties, which is all that any of us can ask of you and for that, the defense both thanks you and applauds you in you efforts. I thank you. (7 ROA pp. 1533-1534).

This was the entire defense for Mr. Castillo. Yet, as was outlined in the statement of facts (penalty phase), there was a great deal of evidence that Mr. Castillo suffered from extreme emotional disturbance. In fact, it can be characterized that Mr. Castillo is mentally ill. The jury found that the instant murder was committed while the defendant was under the influence of extreme emotional distress and disturbance as one of Mr .Castillo's three mitigating circumstances. However, it should be noted that this same jury would have been unaware of any of the extensive psychological difficulties that Mr. Castillo had suffered throughout his life. Without reiterating all the psychological evidence presented at the penalty phase, (which has been listed in the statement of facts), it is obvious that the defense should have presented this evidence

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

at the trial portion of Mr. Castillo's case.

In a similar case the Nevada Supreme Court considered that case of Zollie Dumas v. the State of Nevada.

In Dumas v. State, 111 Nev. 1270, 903 P.2d 1816 (1995), this Court overturned the first degree murder conviction of Zollie Dumas.

In Dumas, this Court held, " we reverse on the ground that failure to present psychological or other evidence pertaining to mental status renders Dumas's representation ineffective under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 252, 80 L.Ed.2 674 (1984), and particularly under the case's holding that counsel has a duty to make reasonable investigation. Dumas at 111

In the State's opposition, the State concludes that it would be incorrect for the defense to have provided a psychological defense for Mr. Castillo because he was neither mentally ill nor did he fail to understand the ramifications and consequences of his actions. Again, the State misses the point. In the Dumas case, the Nevada Supreme Court esentially concluded that in the event that there is no defense to a first degree murder conviction. A trial counsel should attempt to put on some psychological defense if there is any evidence of psychological disturbance. In the instant case, the Nevada Supreme Court noted that counsel for Mr. Castillo failed to put on any type of case in chief or defense. In fact, the jury found that on the mitigating circumstance that Mr. Castillo was under the influence of extreme emotional distress and disturbance. Mr. Castillo had suffered from psychological throughout his life. It is true that he has never been to be viewed as mentally ill or insane. However, an argument regarding diminished mental capacity can

possible result in a verdict of guilty of second degree murder as oppose to first degree murder. This is exactly why you put forth you psychological evidence in the trial portion of the case, if in fact you have no defense. There is no particular advantage to waiting until a jury has convicted your client of first degree murder to then attempt to explain the jury that he may have diminished capacity for psychologcial reasons. In the instant case, pursuant to State of Nevada v. Dumas, Mr. Castillo's attorney's were ineffective for failing to call or to present a psychological defense for Mr. Castillo. For example, the defense could have put forth the psychological evidence and explained to the jury that this surely diminishes his capactiy to form the prerequiste intent to commit first degree murder pursuant to Dumas, Mr. Castillo should have had a psychological defense presented since apparently he had no defense whatsoever.

Therefore, based upon trial counsel's failure to effectively represent Mr. Castillo pursuant to the Strickland standard and reling upon Dumas v. State. Mr. Castillo asks that his convictions and sentenece of death be reversed based upon violations of the fifth, sixth, eighth, and fourteenth amendments of the United States Constitution.

///

///

///

///

///

///

///

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CONCLUSION

Argument's III, IV, V, VIII, IX, X, and XI, will stand submitted as outlined in Mr. Castillo's supplemental brief. Therefore, based upon the arguments herein, Mr. Castillo would respectfully request the reversal of his sentence of death and convictions based upon violations of the United States Constitutions Amendments Fourteen, Eight, Five, and Six.

DATED this ___ dated this March, 2002.

Respectfully submitted:

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563
Attorney for Petitioner
WILLIAM CASTILLO

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

ORIGINAL

8

SUPP
CHRISTOPHER R, ORAM, ESQ.
Nevada State Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Defendant
WILLIAM CASTILLO

FILED
SEP 27 2 34 PM '02
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. WILLIAM CASTILLO, Defendant.	CASE NO. C133336 DEPT. NO. XVIII

SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT 'S POST CONVICTION PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Defendant, WILLIAM CASTILLO, by and through his counsel of record, Christopher R. Oram, Esq., hereby submits his Second Supplemental Brief in support of Defendant's Writ of Habeas Corpus. (Post-Conviction).

///

///

///

///

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

S2

Castillo, William
Rcv'd 10/20/04 8JDC-1039
8th JDC recs.

This Supplement is made and based upon the pleadings and papers on file herein, the Points and Authorities attached hereto, and any oral arguments adduced at the time of hearing this matter.

DATED this 26 day of September, 2002.

Respectfully submitted:

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563
Attorney for Defendant
WILLIAM CASTILLO

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

PROCEDURAL HISTORY

On August 02, 2002, this Court permitted Mr. Castillo an evidentiary hearing on the Writ of Habeas Corpus. During the evidentiary hearing, Mr. David Schieck provided testimony regarding his efforts at Mr. Castillo's trial, penalty phase, and on direct appeal. As a result of the evidentiary hearing, this Court ordered supplemental briefing. This supplement follows.

ARGUMENT

I. MR. CASTILLO WAS DENIED DUE PROCESS OF LAW PURSUANT TO THE UNITED STATES CONSTITUTION BY IMPROPER ARGUMENT AT THE PENALTY PHASE HEARING WHEREIN THE PROSECUTOR ASKED THE JURY TO VOTE AGAINST MR. CASTILLO AND IN FAVOR OF FUTURE INNOCENT VICTIMS PURSUANT TO THE JURY'S DUTY.

In Mr. Castillo's first supplement he briefed extensively the issue regarding the improper argument by former Chief Deputy District Attorney Mel Harmon. During the penalty hearing Mr. Harmon stated the following argument:

> The issue is to you, as the trial jury, this afternoon have the resolve and the courage, the determination, the intestinal fortitude, the sense of commitment to do

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

> you legal and moral duty, for what ever your decision is today, and I say this based upon the violent propensities that Mr. Castillo has demonstrated on the streets, I say it based upon the testimony of Dr. Etcoff and correctional officer Berg about the threat he is to other inmates, and I say it based upon the analysis of his inherent future dangerousness, whatever the decision is, you will be imposing a judgement of death and it's just a question of whether it will be an execution sentence for the killer of Mrs. Berndt or for a future victim of this defendant.
> Mr. Schieck: I am going to object your honor to this argument of future victims.

In Evans v. State of Nevada, 117 Nev. Ad. Op. 50 (2001), the Nevada Supreme Court reversed the sentence of death against Mr. Evans who had been convicted of murdering four people. One of the determining factors by the Supreme Court in overturing Mr. Evans's case was an improper argument made by Chief Deputy District Attorney Mr. Mel Harmon. In Evans, during rebuttal closing argument Mr. Harmon explained,

> Do you as a jury have the resolve, the determination, the courage, the intestinal fortitude, the sense of commitment to do you legal duty?" pp. 14-15. The Nevada Supreme Court explained, " Asking the jury if it had the intestinal fortitude to do it's legal duty was highly improper the United States Supreme Court held that a prosecutor erred in trying to exhort the jury to it's job; that kind of pressure. . . has no place in the administration of criminal justice. There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir the passion and can only distract a jury from it's actual duty; impartiality. The prosecutor's words here "resolve", "determination", "courage", "intestinal fortitude", "commitment", "duty", were particularly designed to stir the jury's passion and appeal to partiality. Id.

As in Evans, Mr. Harmon apparently has made almost the identical argument in Castillo. In fact, the Nevada Supreme Court specifically cited to Mr. Harmon's statement made in Castillo in the Evans case. The Nevada Supreme Court explained that, "Mr. Castillo only addressed the improper part of Mr. Harmon's argument as being an argument regarding future dangerousness and not a reference to the jury's duty." Id. page 15 f. n. 52.

In essence, the prosecutor made an almost identical argument in both cases. Appellate counsel for Mr. Castillo raised the issue on direct appeal that the prosecutor's argument was improper based upon future dangerousness. The Supreme Court found that there was error but

that the error was harmless. See Castillo (opinion attached). However, the Supreme Court heard Mr. Evans's case and determined that his sentence of death must be reversed partially based upon the improper arguments by Mr. Harmon that was made in Mr. Castillo's case.

At the evidentiary hearing of August 02, 2002, appellate counsel, Mr. Schieck explained that he had raised the issue on the grounds of future dangerousness and did not raise it on the grounds of the jury's moral and legal duty. (Evidentiary Hearing, pp. 6). The comparison of the argument's made by Mr. Harmon in both cases is remarkably similar. However, that the argument made in Mr. Castillo's case is somewhat more egregious. In fact, the Nevada Supreme Court explained in Evans , the prosecutor's words, "resolve", "determination", "courage", "intestinal fortitude", "commitment", "duty" – were particularly designed to stir the jury's passion and appeal to partiality. Id. page 15 .

In Mr. Castillo's case, Mr. Harmon in the almost identical argument uses the words, "resolve", "determination", "courage", "intestinal fortitude", "commitment", and "legal and moral duty". Mr. Harmon actually mentioned the moral duty of the jury in Mr. Castillo's case, whereas he did not mention that in Mr. Evans's case. However, the prosecutor's arguments made in both cases appear to be almost identical. Mr. Evans, was convicted of brutally murdering four people. The Supreme Court found this argument to be error and used it as one the factors to reverse Mr. Evan's sentence of death.

The Supreme Court has clearly established the appropriate task for determining whether a defendant received constitutionally ineffective counsel. To demonstrate ineffective assistance of counsel, a convicted defendant must show both that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 566 U.S. 668, 687, 104 S. Ct. 2052, 2064, (1984). A deficient performance is one in which counsel made errors so serious that he/she was not functioning as counsel guaranteed by the Sixth Amendment.

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

Strickland v. Washington, supra. A defendant must show that the representation of defense counsel were not within the range of the competence demanded of attorneys in criminal cases. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985) . The proper standard for evaluating an attorney's performance is that of reasonable effective assistance of counsel. Strickland v. Washington, *supra.*

Additionally, the defendant must establish that defense counsel's action were so deficient, and that the defendant must show that the deficient performance prejudiced his defense Strickland v. Washington, *Id.*

Appellate counsel should have raised this issue in a context of a violation of prosecutorial argument to urge the jury on their legal and moral duty.

In United States v. Young, 470 U.S. 1 18, 84 L.E.2d 1, 105 S.Ct. 1038 (1985), the United States Supreme Court has held that a prosecutor erred in trying to "exhort the jury to do it's job; the kind of pressure. . . has no place in the administration of criminal justice."

It seems unusual that two defendants similarly situated on death row would have the same prosecutor make the identical argument, Mr. Evans received a reversal of his sentence of death partially based upon this argument. Yet, Mr. Castillo, still faces a sentence of death. Mr. Evans murder four people. Yet, Mr. Castillo was only convicted of killing one person.

Mr. Castillo should have had his sentence of death reversed based upon an argument that Mr. Harmon's statement's to the jury were improper based upon the jury's legal and moral duty. However, Mr. Schieck indicated that he did not make such an argument but instead concentrated on the future dangerousness portion of Mr. Harmon's argument. Therefore, but for counsel's errors Mr. Castillo would have had his sentence reversed. This argument is further strengthened by the Supreme Court specifically mentioning Mr. Castillo in footnotes 52 in Mr. Evan's case. There, the Supreme Court specifically addresses the fact that Mr. Castillo made a different

contention regarding Mr. Harmon's argument then appellate counsel did for Mr. Evans. Therefore, it appears quite obvious that Mr. Castillo should be treated similarly to Mr. Evans and his sentence of death should be reversed based upon this argument.

Based upon the foregoing argument, Mr. Castillo respectfully requests that this Court reverse his sentence of death and permit him a new penalty phase based upon violations under the United States Constitution Amendments Fourteen, Five, and Six.

II. MR. CASTILLO RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEREIN TRIAL AND APPELLATE COUNSEL FAILED TO OBJECT TO THE BAD CHARACTER EVIDENCE WHICH WAS IMPROPERLY RAISED IN FRONT OF THE JURY.

On August 02, 2002, Mr. Schieck testified that,

> Well, in light of the decision in Evans, clearly the jury was not properly instructed on the use of character evidence and the weighing of aggravating and mitigating circumstances, and the instruction that the Supreme Court set forth in Evans correctly describes how that process should take place. If we didn't object to that we should have. (Evidentiary Hearing, pp. 11).

In the instant case, it appears that this issue was not raised. In Mr. Castillo's first supplement he outlines the extensive character evidence that was used against him at the penalty phase. See supplemental brief in support of post conviction, pages 11-21.

During the penalty phase, it was brought out that: 1) Mr. Castillo had been in a Nevada youth training facility in Elko; 2) that Mr. Castillo's first interaction with the juvenile system was in 1981 for an emotionally instability of a child; 3) that as a juvenile Mr. Castillo had been a runaway, accused of attempted murder, arson, petty larceny, threat to life, and destruction of county property; 4)Mr. Castillo was in and out of the Elko facility and additionally charged as a juvenile with grand larceny auto, attempt burglary, possession of an unregistered firearm, and

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

escape; 5) Mr. Castillo had attempted to drown his grandmother's dog when he was five years old and had killed birds by smashing their skulls into rocks; 6) Mr. Castillo was accused of attempting to lite the Circus Circus casino on fire in 1983; 7) Mr. Castillo was at age eleven, the youngest person ever committed to the Nevada youth training center; 8) Mr. Castillo admitted the use of marijuana, speed, crack, cocaine, and alcohol as a juvenile; 9) as an adult Mr. Castillo had been disciplined on a assault on a inmate, having tattooing equipment in his cell and jamming a door lock. In sum, Mr. Castillo had a great deal of his character used as evidence against him in an effort to have the jury return a sentence of death.

In Evans v. Nevada, supra, the Supreme Court considered this issue. On appeal, in Evans, the Nevada Supreme Court explained, " [I]n this case we conclude that Evans trial and appellate counsel in not challenging the prosecutor's improper argument, and we conclude that Evans was prejudiced as a result." Evans, pp. 17. The Nevada Supreme Court was concerned with the fact that Nevada jurys are not being properly instructed on how the weighing process must occur regarding a capital case. In Evans, post conviction counsel had complained that the jury had been permitted to consider other character evidence against Mr. Evans before they properly found an aggravating circumstance and then weighed that against the mitigating circumstance. Hence, the Nevada Supreme Court issued an instruction that is to be used in all further capital cases. In Evans v. State, 117 Nev. Ad. Op. No. 50, the Nevada Supreme Court issued the following instruction,

> For future capital cases, we provide the following instruction to guide the jury's consideration of evidence at the penalty hearing:
> In deciding on an appropriate sentence for the defendant, you will consider three types of evidence: evidence relevant to the existence of aggravating circumstances, evidence relevant to the existence of mitigating circumstances, and other evidence presented against the defendant. You must consider each type of evidence for its appropriate purposes.
> In determining unanimously whether any aggravating circumstance has been proven beyond a reasonable doubt, you are to consider only evidence relevant to

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

that aggravating circumstance. You are not to consider other evidence against the defendant.

In determining individually whether any mitigating circumstance exists, you are to consider only evidence relevant to that mitigating circumstance. You are not to consider other evidence presented against the defendant.

In determining individually whether any mitigating circumstances outweigh any aggravating circumstances, you are to consider only evidence relevant to any mitigating and aggravating circumstances. You are not to consider other evidence presented against the defendant.

If you find unanimously and beyond a reasonable doubt that at least one aggravating circumstance exists and each of you determines that any mitigating circumstances do not outweigh the aggravating, the defendant is eligible for a death sentence. At this point, you are to consider all three types of evidence, and you still have the discretion to impose a sentence less than death. You must decide on a sentence unanimously.

If you do not decide unanimously that at least one aggravating circumstance has been proven beyond a reasonable doubt or if at least one of you determines that the mitigating circumstances outweigh the aggravating, the defendant is not eligible for a death sentence. Upon determining that the defendant is not eligible for death, you are to consider all three types of evidence in determining a sentence other than death, and you must decide on such a sentence unanimously.

In this case, we conclude that Evans's trial and appellate counsel were deficient in not challenging the prosecutor's improper argument, and we conclude that Evans was prejudiced as a result.

In the instant case, it appears that trial and appellate counsel failed to raise this issue. Mr. Schieck freely admitted at the evidentiary hearing that this should have been objected. In Evans, this error was also used to find that Mr. Evans deserved a new penalty phase. This instruction provided in the Evans decision was obviously was not provided in Mr. Castillo's case. Moreover, it appears that trial and appellate counsel failed to raise this issue.

In the instant case, there was a tremendous amount of character evidence that used by the prosecution against Mr. Castillo. The character evidence listed above has no bearing on whether there is an aggravating circumstance. The evidence listed above is evidence simply listed to demonstrate the poor character of Mr. Castillo. Based upon the fact that there was no objection by trial and appellate counsel and the fact that the jury was not properly instructed, compounded by the prosecutor being able to argue this character evidence without a jury being properly

instructed demonstrates that Mr. Castillo is entitled to a reversal of his sentence of death based upon a violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

III. MR. CASTILLO IS ENTITLED TO A NEW TRIAL AND PENALTY PHASE BASED UPON THE FAILURE OF TRIAL COUNSEL TO PRESENT A PSYCHOLOGICAL DEFENSE TO THE TRIAL PHASE OF THE CASE.

Mr. Castillo would rely on the arguments and case law he raised on this issue in his first supplement and the reply brief. During the evidentiary hearing, Mr. Schieck testified that he was aware of the Zolie Dumas case. (Page 10). Mr. Schieck was asked the following questions and gave the following answers:

> Q: Okay, why was Doctor Etcoff not put on the guilt phase to try to argue to the jury that there was a diminished capacity and therefore was perhaps to convict of second degree murder and not first.
>
> A: I didn't see any diminished capacity defense that the jury would accept. Mr. Castillo was – his intelligence was not similar to Mr. Dumas. I mean, there is a number of distinctions between factually Zolie Dumas's situation, the defense that could have been put on in that case and Mr. Castillo's, the facts of this case and his own character.
>
> Q: So your testimony is that you didn't see that it wasn't necessary to put on a psychological defense because you did not have one.
>
> A: I did not believe we had one.
>
> Q: Did you have anyone analyze Mr. Castillo other than Dr. Etcoff.
>
> A: I don't recall. (Transcripts, pp. 10-11).

In fact, Mr. Schieck did not dispute that the Supreme Court had stated that no defense had been contended at the time of the guilty phase. (Evidentiary Hearing, pp. 10). Mr. Schieck agreed that opening argument had been waived and that no real defense at the guilt phase was provided.

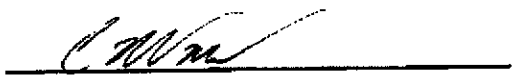
///

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

Based upon the testimony of Mr. Schieck and the legal analysis provided in the first supplement brief, (argument four) and the reply brief, Mr. Castillo would respectfully request that this Court reverse his convictions and sentence of death based upon violations of the fifth, sixth, eighth, and fourteenth Amendments to the United States Constitution.

DATED this 26 day of September, 2002.

Respectfully submitted by:



CHRISTOPHER R. ORAM, ESQ.
Nevada Bar No. 004349
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101
Attorneys for the Defendant
WILLIAM CASTILLO

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM PATRICK CASTILLO,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

No. 29512

FILED

APR 02 1998

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Appeal from a judgment of conviction entered pursuant to a jury verdict of guilty of one count of murder with use of a deadly weapon, and from a sentence of death. Eighth Judicial District Court, Clark County; A. William Maupin, Judge.

Affirmed.

David M. Schieck, Las Vegas, for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Stewart Bell, District Attorney, Clark County, and James Tufteland, and Ronald C. Bloxham, Chief Deputy District Attorneys, Clark County, for Respondent.

O P I N I O N

PER CURIAM:

In late November 1995, appellant William Patrick Castillo held a job as a roofer in Las Vegas. Harry Kumma, a former co-worker, contacted Castillo and two other roofing employees, Kirk Rasmussen and Jeff Donovan, about completing a side job. The side job involved re-roofing the residence of the victim, Isabelle Berndt.

Kumma, Rasmussen, Donovan, and Castillo worked on Berndt's roof on November 25, 1995. While performing ground cleanup at Berndt's residence, Castillo indicated to Donovan that he found a key to Berndt's home and wanted to enter. Donovan told Castillo that he should not and directed Castillo

to return the key to the place where he found it. In response, Castillo stated "I'll just come back later at nighttime."

At some time during the roofing job, Castillo asked Kumma to lend him $500 so that Castillo could pay his lawyer for services rendered in connection with an unrelated criminal battery charge. Kumma did not lend Castillo the money.

Prior to these events, Castillo began residing with his girlfriend, Tammy Jo Bryant, and a friend, Michelle Platou. At about 6:00 p.m. on December 16, 1995, Castillo left the apartment with Platou in Platou's car. The two returned to the apartment at approximately 3:00 a.m. on the morning of December 17, 1995, with a VCR, a box containing silverware, and a bag containing knit booties. A few minutes later, Castillo and Platou again departed. They returned about twenty minutes later.

At about 9:00 or 10:00 a.m. on December 17, 1995, Castillo and Platou allegedly informed Bryant that they had committed a robbery and stolen several items. According to Bryant, Castillo and Platou further informed her that while in the house, Platou inadvertently bumped into a wall and made some noise. Castillo and Platou allegedly told Bryant that Castillo then hit a sleeping person with a tire iron Castillo brought into the house. The two then departed the scene. According to Bryant, they further stated that, out of fear that they left incriminating fingerprints on the wall of the house, they returned to the residence at 3:00 a.m. to burn down the house.

In the early morning hours of December 17, 1995, neighbors notified the police that Berndt's residence was ablaze. Firefighters found Berndt's body inside the house. An arson investigator determined that two independent fires, set by "human hands," using some type of accelerant, caused the blaze. Investigators found a charred bottle of lighter fluid at the

scene and several spots in the living room where an accelerant was present. Laboratory tests confirmed these findings.

According to the coroner's autopsy report, Berndt suffered "multiple crushing-type injuries with lacerations of the head, crushing injuries of the jaws," and several broken teeth. Berndt also had deep lacerations on the back of the head and injuries to the face and ears. According to the coroner, all injuries were contemporaneous. The coroner testified that Berndt died as a result of an intracranial hemorrhage due to blunt force trauma to the face and head. The coroner further testified that these injuries were consistent with blows from a crowbar or tire iron.

A Las Vegas Metropolitan Police Department crime analyst investigated Berndt's residence and observed fire, smoke and water damage in the living room, kitchen and master bedroom. He noted that dresser drawers had been opened, two jewelry boxes had been opened, and the house had been "ransacked." The crime analyst also observed blood marks on the wall next to Berndt's body, which was found lying on a bed.

On December 17, 1995, Berndt's only child, Jean Marie Hosking, arrived at Berndt's residence. She searched the house and determined that her mother's silverware was missing. This silverware featured a distinctive floral pattern, had an engraved "B" on each piece, and was stored in a wooden box on the shelf in Berndt's bedroom. Also missing were a VCR, Christmas booties Berndt was knitting for her grandchildren, and eight $50 U.S. savings bonds.

On December 19, 1995, Rasmussen, one of Castillo's coworkers, contacted the police. According to Rasmussen, during the carpool to work on December 18, 1995, Castillo said, "This weekend I murdered an 86-year-old lady in her sleep." Castillo also allegedly stated that he entered Berndt's house with the

intent to steal Berndt's valuables, hit Berndt numerous times with a tire iron, and heard her "gurgling" in her own blood, before he put a pillow over her head to smother her. Castillo also allegedly told Rasmussen that he had stolen a VCR, money, and silverware and that he intended to sell these items to raise money to pay his attorney.

The following morning, Castillo allegedly told Rasmussen that the crime had been reported on the news. On December 19, Rasmussen drove by Berndt's residence, saw that it had been burned, and contacted the police to report what he had learned.

On the evening of December 19, 1995, Charles McDonald, another roofer, visited Castillo's apartment. Castillo offered to sell a set of silverware to McDonald for $500. McDonald testified that the silverware was in a wooden box. When McDonald later viewed Berndt's silverware, he noted that it appeared to be the same silverware that Castillo tried to sell to him.

Based upon the information provided by Rasmussen, police obtained and executed a search warrant on the apartment shared by Castillo, Bryant, and Platou at 10:00 p.m. on December 19, 1995. Castillo and Bryant were present when the police arrived and permitted them to enter; both Castillo and Bryant gave their consent to a search of their apartment. Police recovered the silverware, the VCR, the booties, and a bottle of lighter fluid from the apartment. The officers also located a notebook with the notation "$50, VCR, $75, camera, silverware."

After execution of the search warrant, the officers arrested Castillo. At the detective bureau, Castillo waived his Miranda rights and made statements during two separate, consecutive interviews. During the first interview, Castillo indicated that he had received the VCR and other property from

a friend. Shortly after the first interview ended, the detectives returned and informed Castillo of the evidence that had been obtained against him from Bryant and Rasmussen. Castillo then confessed to the killing, robbery, and arson.

Subsequently, Castillo pleaded not guilty on all counts, and a jury trial commenced August 26 and concluded on September 4, 1996. The prosecution presented all the evidence cited above in its case in chief. The defense did not put on a case in chief. The jury returned guilty verdicts on all counts: conspiracy to commit burglary, burglary, robbery of a victim sixty-five years or older, first degree murder with use of a deadly weapon, conspiracy to commit burglary and arson, and first-degree arson.

Castillo's penalty hearing took place from September 19 to September 24, 1996. Bruce Kennedy of the Nevada Youth Parole Board testified about Castillo's extensive juvenile history and record. Kennedy became acquainted with Castillo in 1984 while Kennedy was a parole counselor at the Nevada Youth Training Center in Elko. Kennedy's testimony revealed: (1) Castillo began running away from home regularly when he was nine years old, (2) by 1984, Castillo had already been charged with attempted murder, petty larceny, and six counts of arson (including an incident in which he tried to burn down the Circus Circus Hotel in Las Vegas), and (3) much of Castillo's criminal misbehavior remained uncharged. Kennedy also testified that, by the age of fifteen, Castillo had already used marijuana, speed, cocaine, and alcohol.

Due to his extensive misbehavior, Castillo participated in numerous Nevada state juvenile programs, lived with family members in different areas of the country for short periods of time and ultimately returned to Nevada. During his adolescence, doctors determined that Castillo understood the

difference between right and wrong, did not suffer from a neurological disorder, but suffered from a personality disorder.

Other State witnesses testified that in 1990, at age seventeen, Castillo escaped from a Nevada youth training facility; Castillo was arrested for attempted burglary and later certified to adult status on charges arising from this incident. Castillo served fourteen months in prison, expiring his term. In April 1993, Castillo was convicted of robbery arising from an incident which occurred in December 1992. Castillo had a gun during that robbery. Castillo was sentenced to three years, served just under two years, committed multiple disciplinary infractions while in prison, and was released in May 1995.

In June 1995, Castillo participated in the armed robbery of a cashier, but was not formally charged. In December 1995, Castillo was charged with battery upon one of his neighbors. These charges were pending at the time of the instant trial.

After this extensive testimony about Castillo's prior criminal behavior, the State introduced victim impact evidence through testimony by Berndt's granddaughters and Berndt's daughter, Hosking. These individuals testified about their personal interaction with Berndt, the quality of Berndt's life, and the effect of Berndt's death on their lives.

The first defense witness, a neuropsychologist, testified that Castillo: had been emotionally, mentally, physically and behaviorally abused; suffered from "reactive attachment disorder" and "attention deficit hyperactivity disorder;" and came from a dysfunctional family. One correctional officer and one juvenile facility counselor testified as to several positive episodes regarding Castillo.

Thereafter, Castillo's girlfriend, Bryant, testified that Castillo had few social skills, acted like a "big kid," but

was trying to improve. Castillo's mother testified that Castillo had a difficult upbringing due to the physical and emotional abuse he received from his biological father, her own lack of affection for Castillo, and the family's instability. At the hearing's conclusion, Castillo read an unsworn statement to the jury expressing his feelings including regret and remorse concerning his conduct.

The jury returned a verdict of death, finding four aggravating circumstances and three mitigating circumstances. The jury found that the aggravating circumstances were that the murder was committed: (1) by a person previously convicted of a felony involving the use or threat of violence, specifically, a robbery committed on December 14, 1992; (2) while Castillo was committing burglary; (3) while Castillo was committing robbery; and (4) to avoid or prevent a lawful arrest. The jury found the following mitigating circumstances: (1) the youth of the defendant at the time of the crime; (2) the murder was committed while the defendant was under the influence of extreme emotional distress or disturbance; and (3) any other mitigating circumstances.

Castillo alleges that the district court committed seven reversible errors, three during the guilt phase of his trial.

First, Castillo contends that the district court improperly allowed repeated testimonial references to the booties Berndt knitted for her grandchildren. He contends that this testimony was irrelevant and prejudicial; Castillo further contends that the references amounted to an improper emotional appeal to consider the victim's family and constituted improper victim impact evidence. Castillo also contends that the admission of the testimony relating to the booties violated his rights to due process and a fair trial.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. Although generally admissible, relevant evidence is inadmissible if its probative value is substantially outweighed by unfair prejudice, if it confuses the issues, or if it amounts to the needless presentation of cumulative evidence. NRS 48.025; NRS 48.035. District courts are vested with considerable discretion in determining the relevance and admissibility of evidence. Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996), cert. denied, ___ U.S. ___, 117 S. Ct. 1267 (1997).

Hosking and Rasmussen each briefly discussed the booties in their testimony. Testimony about the booties served to connect the booties found at Castillo's apartment with the crime scene. We conclude that this testimony was generally relevant, sufficiently brief so as not to have prejudiced Castillo, and not unnecessarily cumulative. Thus, we conclude that its admission did not deprive Castillo of his rights to due process or a fair trial.

Second, Castillo contends that admission of a family photograph and autopsy photographs depicting Berndt amounted to impermissible victim impact evidence. Castillo contends that the prejudicial effect of these photographs substantially outweighed their probative value.

The admissibility of photographs is within the sound discretion of the district court. Greene v. State, 113 Nev. 157, 167, 931 P.2d 54, 60 (1997). It is within the district court's discretion to exclude photographs when their prejudicial effect substantially outweighs their probative value. Id.

We conclude that the family photograph was relevant on the issue of Berndt's identity and accurately depicted her six months prior to the killing; this photograph also provided a comparison with her appearance in the autopsy photographs. Accordingly, we conclude that the probative value of the family photograph outweighed its prejudicial effect thus the district court did not abuse its discretion by admitting it.

With respect to the autopsy photographs, this court recently reiterated its position that even gruesome photographs are admissible if they aid in ascertaining the truth, and that "'despite gruesomeness, photographic evidence has been held admissible when . . . utilized to show the cause of death and when it reflects the severity of wounds and the manner of their infliction.'" Browne v. State, 113 Nev. 305, 314, 933 P.2d 187, 192 (1997) (Quoting Theriault v. State, 92 Nev. 185, 193, 547 P.2d 668, 674 (1976).

Here, the autopsy photographs reveal the extent and severity of Berndt's injuries. In light of the considerable discretion afforded the trial court in deciding whether to admit photographic evidence and this court's pronouncements in Browne, we conclude that the district court did not abuse its discretion in admitting the autopsy photographs.

Third, Castillo contends that the State improperly elicited testimony from Kumma indicating the subject of another case in which Castillo was involved. The district court judge made a pretrial ruling barring admission of evidence of "why the fees [to his attorney] were incurred" but allowing evidence of the fact of Castillo's debt to his attorney on the issue of motive. Despite this pretrial ruling, the district court permitted Kumma to testify that Castillo was involved in "another case." Castillo contends that in light of its pretrial ruling, the district court abused its discretion by allowing

this testimony and erred in refusing to declare a mistrial on the basis of this admission.

Our review of the challenged testimony reveals that the testimony the prosecutor elicited from Kumma did not disclose the nature of the other case in which Castillo was involved, namely, whether it was criminal or civil; thus, the prosecutor did not violate the district court's pretrial ruling on the matter. We conclude that even if Kumma's testimony was improper, the inadvertent reference to Castillo's prior criminal conduct did not warrant a mistrial. Therefore, we conclude that the district court did not err in refusing to declare a mistrial on this basis.

Castillo contends that the district court committed four additional, reversible errors during his penalty hearing.

Castillo contends that the prosecutor's improper argument concerning future victims mandates a new penalty hearing pursuant to Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990) ("Howard II"). Castillo further contends that the prosecutor's argument "went far beyond that Castillo might be a future danger."

This improper prosecutorial argument to which Castillo objected at trial, was as follows:

> The issue is do you, as the trial jury, this afternoon have the resolve and the intestinal fortitude, the sense of commitment to do your legal and moral duty, for whatever your decision is today, and I say this based upon the violent propensities that Mr. Castillo has demonstrated on the streets, I say it based upon the testimony of Dr. Etcoff and Corrections Officer Berg about the threat he is to other inmates, and I say it based upon the analysis of his inherent future dangerousness, whatever your decision is today, and it's sobering, whatever the decision is, you will be imposing a judgment of death and it's just a question of whether it will be an execution sentence for the killer of Mrs. Berndt or for a future victim of this defendant.

This court has held that a prosecutor may argue the future dangerousness of a defendant during a penalty hearing even "where there is no evidence of violence independent of the murder in question." Jones v. State, 113 Nev. 454, 469, 937 P.2d 55, 64 (1997) (citing Redman v. State, 108 Nev. 227, 235, 828 P.2d 395, 400 (1992)). Here, the prosecutor presented to the jury copious evidence of Castillo's dangerous propensities. Specifically, Dr. Etcoff, a psychologist for the defense, testified on cross-examination that Castillo told him: (1) he had a "God-like" complex when he had a gun, (2) he had committed many crimes, and (3) he was not afraid of punishment. Dr. Etcoff also testified that due to Castillo's attitude, Castillo was likely to be more rebellious in prison, act aggressively and anti-socially, and injure people without remorse. Dr. Etcoff further testified that in the past, Castillo had been violent in prison, even in the high security wing, and that Castillo would continue to pose a security threat.

Corrections Officer Mark Berg testified that while serving a sentence in the Northern Nevada Corrections Center in 1992 and 1993, Castillo assaulted other inmates on at least two separate occasions, and breached other prison security regulations. We conclude that in addition to the violent nature of the crime in this case, we conclude that there exists copious evidence to support the future dangerousness theory presented by the prosecution.

We also conclude, however, that portions of the prosecutor's future dangerousness argument were improper. We take this opportunity to sharpen the line that separates proper from improper future dangerousness argument.

In Jones v. State, this court admonished the prosecutor for suggesting that the defendant, Jones, might have intended to use weapons, found in his cell before trial, to

inflict bodily harm upon members of the jury. 113 Nev. 454, 469, 937 P.2d 55, 64-65 (1997). Our admonition in the Jones case clarified our position that personalizing the identity of a defendant's potential future victim is improper. Absent abundant evidence of guilt, such conduct might merit a new penalty hearing. We affirmed this position in McGuire v. State, 100 Nev. 153, 158, 677 P.2d 1060, 1064 (1984) where we declared improper a prosecutor's attempt to personalize the identity of a future victim, by suggesting that individual jurors place themselves in the position of the victim or a member of the victim's family.

In Howard v. State we held that it is also "improper to ask the jury to vote in favor of future victims and against the defendant." 106 Nev. 713, 719, 800 P.2d 175, 178 (1990). In the instant case, the prosecutor presented to the jurors just such a choice when he said, "you will be imposing a judgment of death and it's just a question of whether it will be an execution sentence for the killer of Mrs. Berndt or for a future victim of this defendant." This language improperly suggests that the jury must decide whether to execute the defendant or bear responsibility for the death of an innocent future victim. Presenting the jury's decision as a choice between killing a guilty person or an innocent person will likely result in a juror's decision to impose the death penalty more often than if the jury's decision had been portrayed in its proper light.

The test for evaluating whether an inappropriate comment by the prosecutor merits reversal of the defendant's conviction is whether the inappropriate comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Bennett v. State, 111 Nev. 1099, 1105, 901 P.2d 676, 680 (1995). We conclude that although a portion of the prosecutor's argument was improper, the improper portion

did not unfairly prejudice Castillo in light of the overwhelming evidence of his guilt.

Castillo contends that testimony from Berndt's daughter and two granddaughters was unduly repetitive and constituted improper and cumulative victim impact evidence. Castillo contends that the district court's failure to limit "the nature and scope of this testimony to avoid the arbitrary and capricious entry of the death penalty" violated the Due Process Clause and the Nevada Constitution.

The three victim impact witnesses were each related to Berndt. They testified about the quality of Berndt's life and the impact of her death upon themselves and other family members. They also spoke about periods of time they spent with Berndt. This court has previously concluded that similar testimony did not violate the defendant's constitutional rights. See Wesley v. State, 112 Nev. 502, 519-20, 916 P.2d 793, 804 (concluding that repetitive testimony of victim's three friends, two of whom testified that the victim was a father figure in their lives, did not violate the defendant's constitutional rights). The policy underlying admission of victim impact evidence in penalty hearings strongly favors affirming the decision and penalty in the instant case. Furthermore, Castillo's position is untenable because it contradicts relevant case law and requires reinterpretation of the Nevada Constitution. Accordingly, we conclude that the district court did not abuse its discretion in permitting all three witnesses to testify.

Castillo contends that "the anti-sympathy" jury instruction violated his Eighth Amendment rights because "it undermined the jury's constitutionally mandated consideration of mitigating evidence."

The district court instructed the jury as follows: "A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law." This court approved this instruction in Wesley, 112 Nev. at 519, 916 P.2d at 803-04, stating that it is proper when offered in conjunction with an instruction regarding the consideration of mitigating factors. The record here reveals that Castillo's counsel argued mitigation during his penalty phase closing argument, that the district court properly instructed the jury regarding mitigation, and that the jury in fact found three mitigating factors. Accordingly, we conclude that this argument lacks merit.

Castillo contends that the district court erred in refusing to instruct the jury regarding five nonstatutory mitigating circumstances.

At the penalty phase, the district court approved the defense's request to give jury instructions as to three statutory mitigating circumstances: the youth of the defendant, that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, and "any other mitigating circumstances." The district court denied the defendant's request to instruct the jury separately on five nonstatutory mitigating circumstances, namely, that the defendant: (1) has admitted his guilt of the offense charged, (2) has demonstrated remorse for the commission of the offense, (3) cooperated with police after he was identified as a suspect, (4) had not planned to commit the murder; and (5) had a difficult childhood.

This court reviews a district court's refusal to give a proposed nonstatutory mitigating jury instruction for an abuse of discretion, or judicial error. Howard v. State, 102 Nev.

572, 578, 729 P.2d 1341, 1345 (1986) ("Howard I"). Castillo cites Lockett v. Ohio, 438 U.S. 586 (1978) in support of his argument. There, a four-justice plurality of the United States Supreme Court concluded that a death penalty statute entirely precluding the sentencer from considering as a mitigating factor any aspect of the defendant's character or record violates the Eighth and Fourteenth Amendments. Id. at 606-08. In Boyde v. California, 494 U.S. 370, 380-86 (1990), however, the Court determined that a mitigating circumstances instruction similar to the Nevada "catchall" provision satisfied constitutional standards.

Here, the district court instructed the jury to consider three mitigating circumstances, including the "catchall" provision. The jury returned a verdict of death after finding four aggravating circumstances and three mitigators. Clearly, the jury considered the mitigating circumstances. Thus, we conclude that the district court properly refused to give Castillo's proposed instructions on the grounds that they would have amounted to inappropriate comment on the evidence by the court and that Castillo was free to argue these outside factors under the "catchall" mitigation instruction.

Finally, we conclude that the death sentence imposed upon Castillo was not the product of passion, prejudice, or any arbitrary factor, nor was it excessive in light of the gravity of the crime and the defendant. See NRS 177.055(2). Thus, we

affirm the jury verdict and sentencing in all respects.[1]

Springer, C. J.

Shearing, J.

Rose, J.

Young, J.

[1]The Honorable A. William Maupin, Justice, did not participate in the decision of this appeal.

ORIGINAL

ROC

CHRISTOPHER R, ORAM, ESQ.
Nevada State Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

FILED

Oct 8 4 28 PM '02

Shirley B. Fangione
CLERK

Attorney for Defendant
WILLIAM CASTILLO

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. WILLIAM CASTILLO, Defendant.	CASE NO. C133336 DEPT. NO. XVIII

RECEIPT OF COPY

RECEIPT OF A COPY of the attached **SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S POST CONVICTION WRIT OF HABEAS CORPUS** is hereby acknowledged this 27 day of September, 2002.

STEWART BELL, DISTRICT ATTORNEY

By Eileen Davis
DEPUTY DISTRICT ATTORNEY
200 S. Third Street, 7th Floor

98

ORIGINAL

FILED

Nov 26 3 05 PM '02

CLERK

RSPN
STEWART L. BELL
Clark County District Attorney
Nevada Bar #000477
CLARK PETERSON
Chief Deputy District Attorney
Nevada Bar #006088
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO,
#1153209

Defendant.

CASE NO: C133336

DEPT NO: XVIII

STATE'S RESPONSE TO DEFENDANT'S SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S POST CONVICTION PETITION FOR WRIT OF HABEAS CORPUS

DATE OF HEARING: 12-4-02
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through CLARK PETERSON, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Second Supplemental Brief In Support Of Defendant's Post Conviction Petition For Writ Of Habeas Corpus.

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

///

STATEMENT OF THE CASE

The State adopts the Statement of the Case as set forth in the State's Opposition to Defendant's Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus at pp. 2-3, and adds the following.

On December 12, 2001, the State filed an Opposition to Defendant's Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus. On March 5, 2002, Defendant filed a Reply to the State's Opposition.

On August 2, 2002, this Court held an evidentiary hearing on Defendant's Writ of Habeas Corpus regarding the defense attorney's efforts at Defendant's trial, penalty phase, and direct appeal. Thereafter, this Court ordered supplemental briefing. On September 27, 2002, Defendant filed a Second Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus.

STATEMENT OF FACTS

The State adopts the Statement of Facts as set forth in the State's Opposition to Defendant's Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus at pp. 3-7, and adds the following.

Defendant's trial attorney, David Schieck, testified at an evidentiary hearing conducted on August 2, 2002. Mr. Schieck also represented Defendant at the penalty phase and on direct appeal. During the evidentiary hearing, Mr. Schieck testified regarding the issues of alleged prosecutorial misconduct, alleged improper bad character evidence against Defendant, and failure to present a psychological defense.

ARGUMENT

DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, DURING THE PENALTY PHASE, AND ON DIRECT APPEAL

Defendant claims that he received ineffective assistance of counsel when: 1) his attorney failed to raise the issue of prosecutorial misconduct on the grounds of the jury's moral and legal duty rather than on the grounds of future dangerousness, 2) his attorney failed to object to the bad character evidence which was allegedly improperly raised in front

of the jury, and 3) his attorney failed to present a psychological defense to the trial phase of the case.

To demonstrate ineffective assistance of counsel, a convicted defendant must show both that his counsel's performance was deficient, and that the deficient performance prejudiced his defense. Strickland v. Washington, 566 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). The Nevada Supreme Court has adopted this test articulated by the Supreme Court. Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995).

Counsel's performance is deficient where counsel made errors so serious that the adversarial process cannot be relied on as having produced a just result. Strickland, at 686. The proper standard for evaluating an attorney's performance is that of "reasonably effective assistance." Strickland, at 687. This evaluation is to be done in light of all the circumstances surrounding the trial. Id. To be reasonably effective, counsel need not be perfect, nor must counsel raise and litigate every meritorious issue. Poland v. Stewart, 151 F.3d 1014, 1019 (9th Cir. 1998). The Supreme Court has created a strong presumption that defense counsel's actions are reasonably effective:

> Every effort [must be made] to eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . .A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id at 689-690. "[S]trategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992). The Nevada Supreme Court has held that it is presumed counsel fully discharged his duties, and said presumption can only be overcome by strong and convincing proof to the contrary. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978).

///

///

Castillo, William
Rcv'd 10/20/04 8JDC-1068
8th JDC recs.

It is not enough for a defendant to show deficient performance on the part of counsel, a defendant must also demonstrate that the deficient performance prejudiced the outcome of his case. Strickland v. Washington, 566 U.S. 668, 686, 104 S.Ct. 2052, 2065 (1984). In meeting the prejudice requirement of an ineffective assistance of counsel claim, a defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 401, 990 P.2d 1263, 1268 (1999) *citing* Strickland, 566 U.S. 668, 687, 104 S.Ct. 2052, 2066 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. *citing* Strickland, 466 U.S. at 687-89, 694.

A. Counsel Was Not Ineffective for Failing to Raise the Issue of Prosecutorial Misconduct on the Grounds of the Jury's Moral and Legal Duty During the State's Closing Argument

Defendant claims that his attorney was ineffective regarding his appeal when his attorney raised the issue of prosecutorial misconduct on the grounds of future dangerousness of the defendant and did not raise it on the grounds of the jury's moral and legal duty. The Supreme Court has discussed a similar situation in which a defendant filed an appeal of a dismissal of a habeas petition that "merely supplie[d] a more focused review of the issues stemming from the illumination of hindsight." Hogan v. Warden, 109 Nev. 952, 959, 860 P.2d 710, 715 (1993). The Court looked to its previous ruling in Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975), and held that "[a]s we stated in Hall, however, the 'doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings.'" Hogan, 109 Nev. at 959, 860 P.2d at 715 (quoting Hall, 91 Nev. at 316, 535 P.2d at 798-99). See also Valerio v. State, 112 Nev. 383, 915 P.2d 874 (1996)(claims previously raised were properly dismissed when they had been previously decided on the merits because the Supreme Court's "prior orders dismissing them constitute the law of the case.").

///

Castillo, William
Rcv'd 10/20/04 8JDC-1069
8th JDC recs.

In Defendant's direct appeal, he argued prosecutorial misconduct regarding the State's closing argument. The ground on which counsel raised the issue was future dangerousness. Defendant now argues that appellate counsel should have argued the issue on the grounds of improper reference to the jury's legal and moral duty. Based on the law of the case, the issue of prosecutorial misconduct has been resolved and Defendant is not entitled to now argue different grounds on the same issue that was decided on the merits in his direct appeal.

Defendant also cites to Evans v. State, 117 Nev. ---, 28 P.3d 498 (2001), arguing that because the Nevada Supreme Court reversed Evan's death sentence partially based upon the improper arguments by the prosecutor, that Defendant's death sentence should also be reversed.

Defendant is mistaken for two reasons. First, even if appellate counsel had based its prosecutorial misconduct argument on the grounds of an improper reference as to the jury's moral duty, there is no way to determine whether the Court would have decided otherwise. Evans was decided in 2001 and Castillo v. State, 114 Nev. 271, 956 P.2d 103 (1998), was decided in 1998. Further, there is no way Defendant's attorney could have projected what the law would be three years into the future. Second, Defendant's attorney did object to the argument on ground of future dangerousness, but if he had tacked on an extra objection on the grounds of the jury's moral duty, this would not necessarily have changed the harmless error analysis done by the Court. The Court determined that although the prosecutor's argument was improper, it did not unfairly prejudice the Defendant in light of the overwhelming evidence of his guilt. Castillo v. State, 114 Nev. 271, (1998).

///

///

///

///

///

///

///

Castillo, William
Rcv'd 10/20/04 8JDC-1070
8th JDC recs.

B. Defense Counsel Was Not Ineffective for Not Objecting to the Bad Character Evidence Which Was Allegedly Improperly Raised in Front of the Jury

Defendant now raises a claim alleging that bad character evidence was improperly raised during the penalty phase of his trial and that because his attorney did not raise the issue on appeal, he received ineffective assistance of counsel. Defendant cites to the first supplement to his Petition for Writ of Habeas Corpus stating that he outlined the extensive character evidence used against him at the penalty phase. (Second Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus, p. 6).

Defendant again cites to Evans in support of his claim that he is entitled to reversal of his death sentence based on the bad character evidence presented at the penalty phase having been considered contemporaneously with the evidence of aggravating circumstances and the evidence of mitigating circumstances. In Evans, the Nevada Supreme Court issued an instruction to guide the jury's consideration of evidence at the penalty hearing in all further capital cases. Notably, Defendant's appeal was completed in 1998 and Evans was decided in 2001.

Defendant's appellate counsel, Mr. Schieck was questioned by both Mr. Oram and Ms. Robinson regarding this issue during an evidentiary hearing held on August 2, 2002. The following excerpts are from that hearing:

REDIRECT EXAMINATION

***

Mr. Oram: And, you also stated on direct examination that there was an argument made in Vernell Evans regarding the penalty phase jury instruction that you're not sure if you objected to, but you are saying that you either objected to it or you should have objected to it, is that fair to say?

Mr. Schieck: Correct, and offered -- offered one that correctly described the function to the jury.

Mr. Oram: How so? Could you say, could you tell the Court?

Mr. Schieck: Well, in addition to objecting to the standard one that the state wanted to give, we should have offered one that correctly described, such as the one that's in Evans.

Mr. Oram: And, what was that? How would it correctly describe?

Mr. Schieck: That you can't use the character evidence until such time as you've already determined the Defendant is death eligible, which is --

Mr. Oram: And --

Mr. Schieck: -- finding the aggravators beyond a reasonable doubt, and then weighing them against the mitigating circumstances.

Mr. Oram: And did you raise that on direct appeal?

Mr. Schieck: No.

Mr. Oram: Should you have raised that on direct appeal?

Mr. Schieck: In light of the decision in Evans and in other cases that we did raise it, I should have raised it in Castillo.

Mr. Oram: Thank you, I have nothing further.

The Court: Anything further?

RECROSS EXAMINATION

Ms. Robinson: In light of the case in Evans which was decided three years after the decision in Castillo, you think you should have raised it then?

Mr. Schieck: Correct, and I would -- we started raising that issue a long time before Evans was decided, that that was raised in Witter, in a whole series of additional cases going back to, I know it was raised in Kevin Lyle's (phonetic) case, it was raised prior to Lyle in, I want to say Domingues, and so at what point we started raising that objection, it might have been even prior to Mr. Castillo's trial. It's just that it wasn't until 2001 that the Supreme Court finally decided that we were right in what we'd been telling them for a number of years.

Castillo, William
Rev'd 10/20/04 8JDC-1072
8th JDC recs.

(Recorder's Transcript Re: Evidentiary Hearing, August 2, 2002, pp. 17-20).

Because Mr. Schieck could not project into the future as to what the law would be in 2001, it is not reasonable to argue that he should have raised this issue on appeal in 1998. Therefore, Defendant's claim of ineffective assistance of counsel fails in this instance.

C. Counsel Was Not Ineffective for Failing to Assert a Psychological Defense

This issue was raised in Defendant's first Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus and the State responded to it in the State's Opposition to Defendant's Supplemental Brief. However, at the evidentiary hearing from August 2, 2002, Defendant's current attorney referenced the Zolie Dumas case (Dumas v. State, 111 Nev. 1270, 903 P.2d 816 (1995)), and specifically questioned Mr. Schieck as to why he did not pursue a diminished capacity defense in attempt to get a conviction of second degree murder and not first degree murder. Mr. Schieck testified that he did not see any diminished capacity defense that the jury would accept because Defendant's intelligence was not similar to Mr. Dumas' and also that there were a number of factual distinctions between the two cases. (Recorder's Transcript Re: Evidentiary Hearing, August 2, 2002, pp. 10-11). For example, Dumas was found to be in the second percentile of intelligence and functioned at about third-grade level, Dumas at 1270, whereas Defendant in the instant case was determined to be of above average intelligence. (State's Opposition to Defendant's Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus, pp. 14-15; filed on December 12, 2001).

"[S]trategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992). The Nevada Supreme Court has held that it is presumed counsel fully discharged his duties, and said presumption can only be overcome by strong and convincing proof to the contrary. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Defendant has not provided any proof, let alone strong and convincing proof to the contrary that counsel did not fully discharge his duties. Therefore, Defendant's claim of ineffective assistance of counsel fails on this issue.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court deny Defendant's Petition for Writ of Habeas Corpus. As explained above, Defendant has no proper legal grounds upon which to have this Court grant his Writ of Habeas Corpus.

DATED this 26th day of November, 2002.

Respectfully submitted,

STEWART L. BELL
Clark County District Attorney
Nevada Bar #000477

BY _____
CLARK PETERSON
Chief Deputy District Attorney
Nevada Bar #006088

Castillo, William
Rcv'd 10/20/04 8JDC-1074
8th JDC recs.

P:\WPDOCS\OPP\FOPP\514\51445601.doc\kjk

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing State's Response to Defendant's Second Supplemental Brief In Support Of Defendant's Post Conviction Petition For Writ Of Habeas Corpus. is hereby acknowledged this 26 day of November, 2002.

CHRISTOPHER R. ORAM, ESQ.
ATTORNEY FOR DEFENDANT

BY Christopher R. Oram/kjk
520 S. Fourth St., 2nd Fl.
Las Vegas, Nevada 89101

Castillo, William
Rev'd 10/20/04 8JDC-1075
8th JDC recs.

P:\WPDOCS\OPP\FOPP\514\51445601.doc\kjk

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

WILLIAM CASTILLO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 40982

APPEAL FROM ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE A. WILLIAM MAUPIN, PRESIDING

APPELLANT'S REPLY BRIEF

ATTORNEY FOR APPELLANT
CHRISTOPHER R. ORAM, ESQ.
Attorney at Law
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

ATTORNEY FOR RESPONDENT
DAVID ROGER
District Attorney
Nevada Bar No. 002781
200 S. Third Street, 7th Floor
Las Vegas, Nevada 89155
Telephone: (702) 455-4711

BRIAN SANDOVAL
Nevada Attorney General
Nevada Bar No. 003805
100 North Carson Street
Carson City, Nevada 89701-4717

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

WILLIAM CASTILLO, Appellant, vs. THE STATE OF NEVADA, Respondent.	S.C. CASE NO. 40982

APPEAL FROM ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE A. WILLIAM MAUPIN, PRESIDING

APPELLANT'S REPLY BRIEF

ATTORNEY FOR APPELLANT
CHRISTOPHER R. ORAM, ESQ.
Attorney at Law
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

ATTORNEY FOR RESPONDENT
DAVID ROGER
District Attorney
Nevada Bar No. 002781
200 S. Third Street, 7th Floor
Las Vegas, Nevada 89155
Telephone: (702) 455-4711

BRIAN SANDOVAL
Nevada Attorney General
Nevada Bar No. 003805
100 North Carson Street
Carson City, Nevada 89701-4717

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

TABLE OF CONTENTS

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

TABLE OF AUTHORITIES

ISSUES PRESENTED FOR REVIEW

I. **MR. CASTILLO IS ENTITLED TO HAVE HIS SENTENCE OF DEATH AND CONVICTIONS REVERSED BASED UPON INEFFECTIVE AS APPELLANT COUNSEL FAILED TO PROPERLY ARGUE THAT THE PROSECUTOR MADE AN IMPROPER ARGUMENT AT THE PENALTY HEARING WHEN THE PROSECUTOR ASKED THE JURY TO VOTE AGAINST MR. CASTILLO IN FAVOR OF FUTURE INNOCENT VICTIMS PURSUANT TO THE JURY'S DUTY.**

II. **MR. CASTILLO RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEREIN TRIAL AND APPELLATE COUNSEL FAILED TO OBJECT TO THE BAD CHARACTER EVIDENCE WHICH WAS IMPROPERLY RAISED IN FRONT OF THE JURY. (ARGUMENT TWO OF THE REPLY IS FROM ARGUMENT FOUR OF APPELLANT'S OPENING BRIEF.**

III. **MR. CASTILLO'S IS ENTITLED TO HAVE A REVERSAL OF HIS SENTENCE OF DEATH AND CONVICTIONS BASED UPON THE FAILURE OF TRIAL COUNSEL TO PROPERLY INVESTIGATE HIS CASE AND MR. CASTILLO IS ENTITLED TO A NEW TRIAL AND PENALTY PHASE BASED UPON THE FAILURE OF TRIAL COUNSEL TO PRESENT A PSYCHOLOGICAL DEFENSE TO THE TRIAL PHASE**

OF THE CASE.

IV. MR. CASTILLO SHOULD HAVE HIS SENTENCE OF DEATH REVERSED BASED UPON CUMULATIVE ERROR.

STATEMENT OF THE CASE

Appellant hereby adopts the statement of the facts as annunciated in Appellant's Opening Brief.

STATEMENT OF FACTS

Appellant hereby adopts the statement of the facts as annunciated in Appellant's Opening Brief.

ARGUMENT

I. MR. CASTILLO IS ENTITLED TO HAVE HIS SENTENCE OF DEATH AND CONVICTIONS REVERSED BASED UPON INEFFECTIVE AS APPELLANT COUNSEL FAILED TO PROPERLY ARGUE THAT THE PROSECUTOR MADE AN IMPROPER ARGUMENT AT THE PENALTY HEARING WHEN THE PROSECUTOR ASKED THE JURY TO VOTE AGAINST MR. CASTILLO IN FAVOR OF FUTURE INNOCENT VICTIMS PURSUANT TO THE JURY'S DUTY.

During the penalty hearing the prosecutor made the following argument:

> The issue is to you, as the trial jury, this afternoon have the resolve and the courage, the determination, the intestinal fortitude, the sense of commitment to do you legal and moral duty, for what ever your decision is today, and I say this based upon the violent propensities that Mr. Castillo has demonstrated on the streets, I say it based upon the testimony of Dr. Etcoff and correctional officer Berg about the threat he is to other inmates, and I say it based upon the analysis of his inherent future dangerousness, whatever the decision is, you will be imposing a judgement of death and it's just a question of whether it will be an execution sentence for the killer of Mrs. Berndt or for a future victim of this defendant.

Mr. Schieck objected to this argument. On direct appeal appellate counsel raised this issue . On April 2, 1998, the Court specifically rejected this argument. The Court specifically rejected Mr. Schieck's appellate argument that the prosecutor's statement of future dangerousness was improper. However, on July 24, 2001, this Court decided the case of Vernell Ray Evans v. State of Nevada, 117 Nev. 609, 28 P.d 498 (2001).

In Evans, the Court heard arguments that the prosecutor in Evans had made an almost

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

identical argument that was objected to by Mr. Schieck. This Court, in Evans, determined that the prosecutor's argument was at least one factor for reversal of the death sentence of Vernell Evans. Id. Mr. Evans was convicted of killing four innocent human beings. Mr. Castillo, was convicted of murdering one human being.

In the State's answering brief, they provide several arguments against the reversal of Mr. Castillo's sentence of death based upon the prosecutor's improper argument.

First, the State contends that this issue was already raised before this Court and is therefore barred from reconsideration by the doctrine of law of the case. In fact, the State cites to Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975), and Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993), and cites to those cases for the proposition that this issue is barred by the doctrine of law of the case. (State's Answering Brief, 4-5). However, the two cases cited by the State are easily distinguishable from the instant issue. For instance, in Hall v. State, an appellant filed an appeal with this Court arguing that his plea of guilty was not freely and voluntarily made. This Court in Hall noted that Mr. Hall had previously raised this identical issue before the Court. Id. This Court concluded that the law of his first appeal was the law of the case on his subsequent appeal given the fact that the issue was substantially the same. In Hogan v. Warden, this Court considered Mr. Hogan's argument that he was factually innocent of the aggravating circumstances. Id. In a subsequent appeal, Mr Hogan argued the identical matter and this Court determined that since the matter had been previously upheld it constituted law of the case. Id.

In the instant case, Mr. Castillo is not raising the identical issue before this Court. Mr. Castillo has made a claim that he received ineffective assistance of counsel based upon the failure of appellate counsel to properly raise the issue on the improper argument of the prosecutor. Specifically, appellate counsel raised the issue that the prosecutor's argument was

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

improper on "future dangerousness". Yet, appellate counsel did not argue to this Court that the prosecutor's argument was a violation because it was basing its contention on "the jury's duty". Thhis is best illustrated by the Court's reasoning in Evans, wherein the Court explained,

> Although this Court noted a similar argument in Castillo v. State, 114 Nev. 271, 279, 280, 959 P.2d 103, 109,(corrected by McKenna v. State, 114 Nev. 1044, 1058, 968 P.2d 739, 748 (1998), it addressed only the prosecutor's argument on future dangerousness, not the reference to the jury's duty. Id

Therefore, Mr. Castillo raises the issue that: 1) he received ineffective assistance of counsel; and 2) that his attorney should have raised the argument that the prosecutor's statement was improper based upon the "jury's duty" and not just future dangerousness. In fact, this Court specifically differentiated the argument made by Mr. Castillo's appellate counsel versus the argument being made by appellate counsel for Mr. Evans.

This issue has not been properly decided for Mr. Castillo and therefore is not the same issue. The Court even noted in it's decision in Evans that the arguments that were made by Mr. Castillo were different than were made for Mr. Evans. Mr. Castillo would therefore request that this Court consider that he receive ineffective assistance of counsel and that but for counsel's error in failing to raise the "jury's duty" argument, that would have resulted in his penalty being reversed.

The State's argument in their answering brief that the doctrine of law of the case applies is entirely misplaced.

In their answering brief, the State argues that the prosecutor's comments in Evans were not the sole reason for the reversal of his sentence of death. (Answering brief, pp. 5, lines 18-24). Mr. Castillo agrees that this was not the only reason that this Court reversed the sentence of death of Mr. Evans. However, as this Court will note, Mr. Castillo also raised the issue that his

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

trial and appellate counsel failed to object to the bad character evidence that was improperly raised in front of the jury. As this Court will note, from argument number four of the appellant's opening brief, this was another factor that this Court used in reversing Mr. Evan's sentence of death. Again, Mr. Castillo seems to be identically situated to Mr. Evans in two of the factors used by this Court in reversing Mr. Evans death sentence. Mr. Castillo had a prosecutor who made an identical argument to which this Court found to be improper. Mr. Castillo had bad character evidence used against without a proper jury instruction. Again, a basis this Court used to reverse Mr. Evans' sentence.

Mr. Evans an African American who murdered four innocent human beings had his sentence reversed.. Mr. Castillo, a Caucasian man, who was convicted of murder of one person did not have his sentence of death reversed, based upon what appears to be identical arguments. This seems to Mr. Castillo a violation of the Fourteenth and Fifth Amendments to the United States Constitution wherein he has been treated differently by the State of Nevada based upon factors other than his legal issues. The State can not contend that Mr. Castillo's facts are anywhere near as egregious as the facts in Evans. Mr. Evans received a new penalty phase for the same errors that Mr. Castillo is made to endure. Yet, Mr. Castillo has not received a reversal of his death sentence. See Regents of the University of California v. Bakke, 438 U.S. 265; 98 S.Ct. 2733; 57 L.Ed. 2d 750, (1978).

In Bakke, the United States Supreme Court reasoned that "[P]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." Id. at headnote 12. Interestingly enough, the State utterly failed to address in their answering brief the issue of reverse discrimination raised by Mr. Castillo in the Post-Conviction and his opening brief. The question becomes why, is Mr. Castillo being treated

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

differently than Mr. Evans, a convicted multiple murderer? This Court heard that the prosecutor had made identical arguments and used that improper argument as one of the factors to reverse Mr. Evans but did not do so for Mr. Castillo. Mr. Castillo is aware that his appellate counsel failed to raise the correct argument, however, he should not be made to suffer a sentence of death without a fair hearing. This Court has made it clear that Mr. Evans did not receive a fair hearing. Mr. Castillo endured at least two of the same errors suffered by multiple murderer, Evans.

Lastly, the State contends that the Evans matter was not to be applied retroactively. (State's answering brief, pp. 7). Mr. Castillo has raised the argument that he received ineffective assistance of counsel at both trial and on appeal. Mr. Castillo simply requests that this Court review the errors suffered by him and compare them to Evans. They appear to be very similar if not identical. Mr. Castillo case was no where near as egregious as Mr. Evans. This Court has not reversed Mr. Castillo's sentence of death but has reversed Mr. Evans' sentence of death. This Court is aware that the same arguments were made by the prosecutor. Additionally, Mr. Castillo had an abundance of bad character evidence entered into his trial and appellate counsel failed to raise the proper argument, which was another factor used by this Court to reverse Mr. Evans' sentence of Death. These are plain errors which have resulted in a confusing decision given the fact that it appears that Mr. Castillo and Mr. Evans are similarly situated and Mr. Evans' case is more egregious, and that he has been permitted a new penalty phase by the Court. Mr. Castillo is not requesting that this Court reverse his trial based on these errors but simply permit the opportunity to argue to a jury that his life should be spared. Based on the foregoing arguments, Mr. Castillo would respectfully request that this Court reverse his sentence of death. Based upon violations of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

II. MR. CASTILLO RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEREIN TRIAL AND APPELLATE COUNSEL FAILED TO OBJECT TO THE BAD CHARACTER EVIDENCE WHICH WAS IMPROPERLY RAISED IN FRONT OF THE JURY. (ARGUMENT TWO OF THE REPLY IS FROM ARGUMENT FOUR OF APPELLANT'S OPENING BRIEF.[1]

On August 02, 2002, Mr. Schieck testified that,

Well, in light of the decision in Evans, clearly the jury was not properly instructed on the use of character evidence and the weighing of aggravating and mitigating circumstances, and the instruction that the Supreme Court set forth in Evans correctly describes how that process should take place. If we didn't object to that we should have. (A. A., Vol. 6 pp. 1325).

Additionally, Mr. Schieck testified at the evidentiary hearing.

In a capital penalty hearing, under the decision in Evans, if - - and there's some previous cases to Evans also. Evans just sets out the instruction that he Court wants to be given. The jury is allowed to hear a great deal of character evidence about a defendant, and certainly in Mr. Castillo's case there was a lot of non-aggravating – bad character evidence that the State introduced because - - 'cause Bill had a very extensive criminal history, and not just the felony that was used as an aggravator, but a lot of juvenile activity, just a long history that the record will show. The jury cant' use that character evidence in deciding the existence of aggravating circumstances against the mitigating circumstances. And, at that point in time, we weren't instructing juries on that, and at a later point we started arguing that hey should be so instructed, and finally have convinced the Supreme Court of that. (A. A., Vol. 6 pp. 1325-1326).

Later in the hearing, the following question and answer occurred :

Mr. Oram: And, in this case, in Castillo, did you do something different than just asking the Court to give the statutory mitigating circumstances?

Mr. Schieck: We asked the Court not to give any of the statutory mitigating circumstances that we did not feel were present in this case, and additionally asked that the jury be given no specific mitigating circumstances that we believe were present instead of just the catch-all category of any other mitigating circumstance.

Mr. Oram: And, did the District Court judge grant your proposed instruction?

Mr. Schieck: No.

---

[1] Appellant is addressing the arguments in order that the State argued in their answering brief.

Mr. Oram: Did you raise that on direct appeal.
Mr. Schieck: Yes. (A.A., Vol. 6 pp. 1327).

It appears, that Mr. Castillo and Mr. Evans are closely related in terms of the errors that they endured during the penalty phase. On one hand, Mr. Evans an African American, who murdered four people had his sentence of death reversed on the factor that the prosecutor made an improper argument. Mr. Castillo suffered extensive use of character evidence against him at the penalty hearing without the jury being properly instructed. Mr. Castillo's attorney went so far as to argue that only the mitigating circumstances he wanted listed should be given. He raised it on appeal and this Court denied the issue. (This is law of the case). However, Mr. Castillo's sentence of death has not been reversed. Mr. Castillo feels frustration at his legitimate belief that someone similarly situated to him, has received much different treatment by the State and the courts in the State of Nevada. Mr. Castillo is concerned that he is being treated differently based upon other factors. Mr. Castillo had at least two of the same errors in his penalty phase that Mr. Evans had at his penalty phase. Mr. Evans has a new chance at life. This Court and the district courts have found several reasons why the same issues are not reversible error in Mr. Castillo's case. The State of Nevada is treating Mr. Castillo differently and Mr. Castillo would argue pursuant to Bakke. Supra, that he is being treated improperly pursuant to the Fifth and Fourteenth Amendments to the United States Constitution.

Additionally, Mr. Castillo is specifically putting the State on notice that he is making a reverse discrimination argument. The State made no effort in their answering brief to respond to this issue. Apparently, the State does not want to address it or sees the issue as frivolous. Mr. Castillo does not believe that this Court would see the issue in that manner.

The State argues that the Evans matter should not be retroactively considered. Mr. Castillo ponders why the courts have determined that the subsequent case of Evans should be the

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

case to reverse a sentence of death on the same errors that Mr. Castillo suffered. Yet, his appeal was heard earlier than Mr. Evans'. Mr. Castillo wonders why his case was not used to establish that the errors suffered by Mr. Evans should have been reversible when Mr. Castillo's case was litigated in the courts. The State again makes many technical arguments to try to distinguish Evans from Castillo. Mr. Castillo is used to having technicalities used against him so that his sentence of death is not reversed. Apparently Mr. Evans did not have to suffer the same technicalities. Mr. Evan an African American man has received a second chance. Mr. Castillo has not. This is a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Next, the State argues:

> Appellant counsel was objectively reasonable in failing to raise the claim, especially considering that appellate counsel had previously raised the issue of an instruction on "other matter" evidence repeatedly in previous appeals without success. (Answering Brief, pp. 8, lines 24-27).

Now, the State would ask this Court to affirm Mr. Castillo's sentence of death based upon appellate counsel raising this issue in previous matters but finally not raising it in Mr. Castillo's because he had no success. First, this is another technicality used to affirm the death penalty on Mr. Castillo, as Caucasian. Additionally, it establishes that appellate counsel was well aware that this was a viable issue, appellate counsel testified that he should have objected to this issue if he had not. Apparently, Mr. Evans raised this issue and it was one of issues used to reverse his sentence of death. Again, Mr. Castillo is rasing the issue pursuant to ineffective assistance of counsel, yet, the State argues that he should not receive a reversal of his sentence, based upon this error. Appellate counsel, Mr. Schieck, must also feel frustration given the fact he had raised this issue and not been successful, the Court then choose Mr. Evans' case to use this error as a

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

factor in the reversal and Mr. Schieck was not the attorney of record. It seems that at least Mr. Evans and Mr. Castillo are being completely given different treatment.

As in Bakke, the appellant was disturbed at the different treatment he received when people of a different race. Mr. Castillo feels the same. There seems to be different factors being used by the State and the State courts in determining who has a second chance at life. Mr. Castillo objects and asks this Court only to give him a second chance at a penalty hearing based upon two errors that this Court found and considered in the reversal of Mr. Evans' sentence of death.

III. MR. CASTILLO'S IS ENTITLED TO HAVE A REVERSAL OF HIS SENTENCE OF DEATH AND CONVICTIONS BASED UPON THE FAILURE OF TRIAL COUNSEL TO PROPERLY INVESTIGATE HIS CASE AND MR. CASTILLO IS ENTITLED TO A NEW TRIAL AND PENALTY PHASE BASED UPON THE FAILURE OF TRIAL COUNSEL TO PRESENT A PSYCHOLOGICAL DEFENSE TO THE TRIAL PHASE OF THE CASE.

Mr. Castillo would respectfully request that this Court consider the arguments made in his opening brief and would submit this argument on the briefs.

IV. MR. CASTILLO SHOULD HAVE HIS SENTENCE OF DEATH REVERSED BASED UPON CUMULATIVE ERROR.

In the State's answering brief, they failed to address numerous issues raised by Mr. Castillo. In fact, the State claims, "[I]n the remaining claims of the defendant's appeal arguments II, III, VII, VIII, IX, and X, the defendant raises several substantive issues that should have been raised on direct appeal. (Answering Brief, pp. 11, lines 3-5). The State's contention is meritless. Mr. Castillo has raised the issue in his Post-Conviction Writ and in this appeal that he received ineffective assistance of trial and appellate counsel.

NRS 34.810(b) provides that grounds raised in a Petition for Writ of Habeas Corpus

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

should be dismissed if the grounds could have been presented to the trial court, raised on direct appeal, or in any other proceedings taken by the Petitioner. Mr. Castillo hereby reasserts each of his issues raised on direct appeal, both substantive as stated and having been denied as a result of ineffective assistance of counsel in violation of the State and Federal Constitutional rights of his.

Mr. Castillo raises each and every argument in his opening brief as an independent substantive claim. Additionally, Mr. Castillo should not be precluded from raising issues before this Court based upon the ineffective assistance of trial and appellate counsel for failing to raise the issues. The State again attempts to use a technicality to preclude Mr. Castillo a reversal. Mr. Castillo is not educated in the law and had no ability to tell that his trial and appellate counsel had provided him ineffective assistance of counsel.

The Sixth Amendment guarantees that a person accused of a crime receive effective of counsel for his defense. The right extends from the time the accused is charged up and through direct appeal and includes effective assistance for any arguable legal point. Anders v. California, 3386 U.S. 738, 87 S. Ct. 1396 18 L. Ed2 493 (1967). The United States Supreme Court has consistently recognized that the right to counsel is necessary to protect the fundamental rights to a fair trial guaranteed under the Fourteenth Amendments Due Process Clause. Powell v. Alabama 287 U.S. 45, 53 S. Ct. 55, 77 L.Ed 158(1932); Gideon v. Waynewright, 372 U.S. 335 83 S.Ct. 792, 9 L.Ed 799 (1963). Mere presence of counsel does not fulfill the constitutional requirements: the right to counsel is the right to effective counsel, that is, "an attorney who plays the role necessary to ensure that the trial is fair." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 80 L. Ed.2d 657 (1984); McMahon v. Richardson, 439 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed2d 763 (1970). Mr. Castillo is entitled to have all of his issues considered by this Court. Mr. Castillo was entitled to have the State respond to each and every one of his issues. It is

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

insufficient for the State to argue that the issues should not be considered by this Court because they were not raised on direct appeal. This is exactly what Mr. Castillo is complaining about when he raises the issue that he received ineffective assistance of trial and appellate counsel for failing to raise these issues.

CONCLUSION

Mr. Castillo would respectfully request the reversal of his sentence of death and convictions based upon violations of the United States Constitutions Amendments Fourteen, Eight, Five, and Six.

DATED this 16 day of January, 2004.

Respectfully submitted by:

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar No. 004349
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 16 day of January, 2004.

Respectfully submitted by,

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563
Attorney for Appellant

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CERTIFICATE OF MAILING

I hereby certify that I am an employee of CHRISTOPHER R. ORAM, ESQ., and that on the 14 day of January, 2004, I did deposit in the United States Post Office, at Las Vegas, Nevada, in a sealed envelope with postage fully pre-paid thereon, a true and correct copy of the above and foregoing **APPELLANT'S REPLY BRIEF**, addressed to:

David Roger
District Attorney
200 S. Third Street, 7th Floor
Las Vegas, Nevada 89155

Brian Sandoval
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

Simone Mujica

An employee of Christopher R. Oram, Esq.

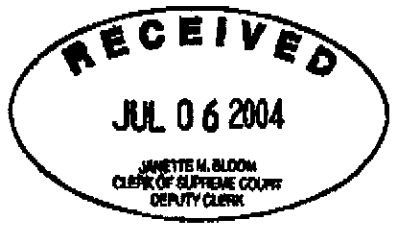
CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

June 30, 2004

Clerk
Supreme Court of Nevada
Capitol Complex
Supreme Court Building
Carson City, NV 89710



Re: William P. Castillo
v. Nevada
No. 04-5032
(Your No. 40982)

Dear Clerk:

The petition for a writ of certiorari in the above entitled case was filed on May 5, 2004 and placed on the docket June 30, 2004 as No. 04-5032.

Sincerely,

William K. Suter, Clerk

by Melissa Blalock

Melissa Blalock
Case Analyst

04-12326

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

WILLIAM CASTILLO, Petitioner

v.

THE STATE OF NEVADA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR WRIT OF CERTIORARI

*RICHARD, SCHONFELD
520 South Fourth Street
Second Floor
Las Vegas, Nevada 89101
(702) 384-5563

*Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

1. IS MR. CASTILLO ENTITLED TO HAVE HIS SENTENCE OF DEATH AND CONVICTIONS REVERSED BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL?

2. WAS MR. CASTILLO DENIED DUE PROCESS BY THE IMPROPER ARGUMENT AT THE PENALTY HEARING WHEREIN THE PROSECUTOR ASKED THE JURY TO VOTE AGAINST MR. CASTILLO AND IN FAVOR OF FUTURE INNOCENT VICTIMS PURSUANT TO THE JURY'S DUTY.

3. SHOULD MR. CASTILLO'S SENTENCE OF DEATH FOR THE USE OF A DEADLY WEAPON IN COMBINATION WITH HIS FIRST DEGREE MURDER CONVICTION BE OVERTURNED BASED UPON A CROWBAR NOT BEING A DEADLY WEAPON, AND IS NRS 193.165(5) IS UNCONSTITUTIONALLY VAGUE AND AMBIGUOUS.

4. DID MR. CASTILLO RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEREIN TRIAL AND APPELLATE COUNSEL FAILED TO OBJECT TO THE BAD CHARACTER EVIDENCE WHICH WAS IMPROPERLY RAISED IN FRONT OF THE JURY.

5. IS MR. CASTILLO ENTITLED TO HAVE A REVERSAL OF HIS SENTENCE OF DEATH AND CONVICTIONS BASED UPON THE FAILURE OF TRIAL COUNSEL TO PROPERLY INVESTIGATE HIS CASE AND IS MR. CASTILLO ENTITLED TO A NEW TRIAL AND PENALTY PHASE BASED UPON THE FAILURE OF TRIAL COUNSEL TO PRESENT A PSYCHOLOGICAL DEFENSE TO THE TRIAL PHASE OF THE CASE?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings before the Nevada Supreme Court were Petitioner WILLIAM CASTILLO (Appellant below) and Respondent State of Nevada (Respondent below). In the trial court (The Eighth Judicial District Court of the State of Nevada in and for the County of Clark), the parties were Petitioner (then the Defendant) and Respondent (then the Plaintiff).

TABLE OF CONTENTS

In the Supreme Court of the State of Nevada

WILLIAM P. CASTILLO, Petitioner, vs. E.K. McDANIEL, Warden, Ely State Prison, CATHERINE CORTEZ MASTO, Attorney General for Nevada, Respondents.	No. 56176

APPELLANT'S APPENDIX

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

Eighth Judicial District Court, Clark County

VOLUME 1 of 21

FRANNY A. FORSMAN
Federal Public Defender
GARY A. TAYLOR
Assistant Federal Public Defender
Nevada Bar No. 11031C
411 East Bonneville Ave, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Counsel for Appellant

INDEX

B. Jury sentences

Volume 10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 31st day of January 2011. Electronic Service of the foregoing APPELLANT'S APPENDIX shall be made in accordance with the Master Service List as follows:

Steven S. Owens
Chief Deputy District Attorney

Catherine Cortez Masto
Attorney General

Katrina Manzi
An employee of the Federal Public Defender's Office

VER

FILED IN OPEN COURT
SEP 0 4 1996
19 6 am
LORETTA BOWMAN, CLERK
BY [signature]
Deputy

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO,

Defendant(s).

Case No. C133336
Dept. No. VII
Docket P

VERDICT

We, the jury in the above entitled case, find the defendant WILLIAM PATRICK CASTILLO, Guilty of COUNT I - CONSPIRACY TO COMMIT BURGLARY AND/OR ROBBERY.

DATED this 4th day of September, 1996.

JOHN R. RUHLMANN

FOREPERSON

CE31

Castillo, William
Rev'd 10/20/04 8JDC-553
8th JDC recs.

1453

#CASTILL0049-0000000006

VER

FILED IN OPEN COURT
SEP 0 4 1996 19
LACEY B. BOWMAN, CLERK
BY _____ Deputy

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO,

Defendant(s).

Case No. C133336
Dept. No. VII
Docket P

VERDICT

We, the jury in the above entitled case, find the defendant WILLIAM PATRICK CASTILLO, Guilty of COUNT II - BURGLARY.

DATED this 4th day of September, 1996.

John R Rubinson
FOREPERSON

CE371

1455

VER

FILED IN OPEN COURT
SEP 0 4 1996 19 6 12 pm
SHIRLEY B. BOWMAN, CLERK
By: _____ Deputy

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO,

Defendant(s).

Case No. C133336
Dept. No. VII
Docket P

VERDICT

We, the jury in the above entitled case, find the defendant WILLIAM PATRICK CASTILLO, Guilty of COUNT III - ROBBERY, VICTIM SIXTY-FIVE YEARS OR OLDER.

DATED this 4TH day of September, 1996.

JOHN R. RUHLMANN

FOREPERSON

Castillo, William
Rev'd 10/20/04 8JDC-555
8th JDC recs.

1457

WCASTILLO040-0000000003

VER

FILED IN OPEN COURT
SEP 0 4 1996 19 6:12 pm
LORETTA BOWMAN, CLERK
BY [signature] Deputy

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO,

Defendant(s).

Case No. C133336
Dept. No. VII
Docket P

VERDICT

We, the jury in the above entitled case, find the defendant WILLIAM PATRICK CASTILLO, Guilty of COUNT IV - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON.

DATED this 4th day of September, 1996.

JOHN R. RUHLMANN

FOREPERSON

459

VER

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO,

Defendant(s).

Case No. C133336
Dept. No. VII
Docket P

VERDICT

We, the jury in the above entitled case, find the defendant WILLIAM PATRICK CASTILLO, Guilty of COUNT V - CONSPIRACY TO COMMIT BURGLARY AND ARSON.

DATED this 4th day of September, 1996.

JOHN R. RUHLMANN

FOREPERSON

CE311

VER

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO,

Defendant(s).

Case No. C133336
Dept. No. VII
Docket P

VERDICT

We, the jury in the above entitled case, find the defendant WILLIAM PATRICK CASTILLO, Guilty of COUNT VI - BURGLARY.

DATED this 4TH day of September, 1996.

JOHN R. RUHLMANN

FOREPERSON

1463

VER

FILED IN OPEN COURT
SEP 0 4 1996 19 6 4 pm
LORETTA BOWMAN, CLERK
BY _____ Deputy

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO,

Defendant(s).

Case No. C133336
Dept. No. VII
Docket P

VERDICT

We, the jury in the above entitled case, find the defendant WILLIAM PATRICK CASTILLO, Guilty of COUNT VII - FIRST DEGREE ARSON.

DATED this 4TH day of September, 1996.

JOHN R. RUHLMANN
FOREPERSON

Castillo, William
Rev'd 10/20/04 8JDC-559
8th JDC recs.

1465

ORIGINAL

SUPP
CHRISTOPHER R. ORAM, ESQ.
Nevada State Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Petitioner
WILLIAM CASTILLO

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA Plaintiff, vs. WILLIAM CASTILLO, Defendant.	CASE NO. C133336 DEPT. NO. XVIII DOCKET NO.

SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, the Defendant, WILLIAM CASTILLO, by and through his counsel of record, CHRISTOPHER R. ORAM, ESQ. and does hereby submit his supplemental brief in support of Defendant's Writ of Habeas Corpus filed with this Honorable Court.

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

This supplement is made and based upon the pleadings and papers on file herein, the foregoing Memorandum of Points and Authorities, and any oral argument adduced at the time of hearing.

DATED this 11 day of October, 2001.

Respectfully submitted by:

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563
Attorney for Petitioner

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

STATEMENT OF THE CASE

On January 19, 1996, William Castillo (hereinafter referred to as CASTILLO) was indicted by the Clark County Grand Jury on the charges of Conspiracy to Commit burglary and/or Robbery, Burglary, Robbery of Victim over the age of sixty-five years, Murder with Use of a Deadly Weapon, Conspiracy to Commit Burglary and Arson, and First Degree Arson (1 ROA 1-5). CASTILLO entered a plea of not guilty and waived his right to a trial within sixty days (Minutes, pp. 1). The State filed a Notice of Intent to seek the death penalty alleging as aggravating circumstances that (1) the murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to another; (2) the murder was committed while engaged, alone or with others in the commission of or an attempt to commit or flight after committing any robbery; (3) the murder was committed while engaged in the commission of or an attempt to commit or flight after committing a burglary; (4) the murder was committed to avoid or prevent a lawful arrest; and (5) the murder was committed to receive money or other thing of monetary value (1ROA 218-220).

Jury selection commenced on August 26, 1996, and concluded with a death qualified jury being seated on August 28, 1996 (Minutes pp.10-11).

After three days of testimony the matter was submitted to the jury and a verdict returned on September 4, 1996, of guilty on all counts contained in the Amended Indictment (Minutes pp. 14-15). The penalty hearing took place from September 19, 1996, through September 24, 1996 (Minutes pp. 15-17). A verdict of death was returned on September 25, 1996, with the jury entering special verdicts finding the existence of four aggravating circumstances and three

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

mitigating circumstances and that the aggravating circumstances outweighed the mitigating circumstances (10 ROA 2101-2106).

STATEMENT OF THE FACTS

A. TRIAL PHASE

Isabelle Berndt moved into 13 North Yale, Las Vegas, Nevada in 1959 and she continued to reside in the home until mid December, 1995 (5 ROA 985). As of that time she was eighty six (86) years of age, haveing been born on August 3, 1909 (5 ROA 986-987). She was a neat housekeeper and would have no reason to leave a book of matches on the floor of her house or to have Ronsonol lighter fluid in her house (5 ROA 986-987). During the latter part of November, 1995, Berndt had a roofing job done on her house and she went to spend the Thanksgiving holiday in California.

Harry Kumma had been a roofer for about twenty-five (25) years and at one time was employed at Dean Roofing Company (5 ROA 1028-9). He would occasionally work side jobs for a small independent contractor (5 ROA 1030). On the Thanksgiving weekend of 1995 he did a side job on a house on Yale Street (5 ROA 1031). Kumma got three other individuals that worked for Dean Roofing to help him with the job; Kirk Rasmussen, Jeff Donovan and William CASTILLO (5 ROA 1033). Work started at approximately 6 a.m. on the 25th of November with the first phase being, the tearing off the old roof (5 ROA 1036). The tear off was completed by about 12:30 at which time CASTILLO and Donovan were assigned to do the cleanup on the ground (5 ROA 1037).

At one time, CASTILLO had asked to borrow $500.00 to pay his lawyer, however,

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

Kumma did not lend him the money because he was in no financial position to do so (5 ROA 1038). Whenever CASTILLO worked with Kumma at Dean Roofing he was a good worker and that is why he had asked him to help on the side job (5 ROA 1040).

Jeff Donovan had been employed at Dean Roofing for about two and a half years (5 ROA 1041). As of the time of the Yale Street side job he had known CASTILLO for about four or five months (5 ROA 1043). While he was assisting in the clean up on the ground, Donovan came around the corner of the house and CASTILLO was holding up a key (5 ROA 1046). CASTILLO stated that he wanted to go into the house with the key, however, Donovan told him no and to put the key back (5 ROA 1047). CASTILLO then stated that he would just come back later at nighttime. (5 ROA 1048).

Twenty-three (23) year old Duane Wright was driving along I- 95 approaching the Decatur off ramp on December 17, 1995, when he observed smoke coming out of a house, and he decided along with his friend and passenger, Joe Giles, to check it out (6 ROA 1066). When they pulled over in front of the house, he observed a guy kicking at the front door trying to get in (6 ROA 1066). He observed a car in the driveway and a neighbor came out and was screaming that there was an old lady in the house (6 ROA 1068). After unsuccessfully attempting to get the front door open, the window to the left of the door was broken out and they started squirting the fire with the garden house (6 ROA 1070). Wright was able to crawl into the house about thirty (30) feet, but was unable to make it into the back bedroom because of the smoke and fire (6 ROA 1071). An attempt was also made to enter the rear door of the house but the fire prevented any entry (6 ROA 1072). Also helping to try to put out the fire was neighbor John Russo and his son

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

(6 ROA 1237).

Arson investigator Ben Hoge was called to the scene at about 3:26 A.M. (6 ROA 1087). Hoge entered the house and determined that the heaviest smoke patterns were coming out of the living room front (6 ROA 1093). He also went into the back bedroom and noticed a fire origin against the north bedroom window (6 ROA 1094). There was no accidental causes for fire in the bedroom or in the living room (6 ROA 1095 and 1104). It was his opinion that each of the fires were independently set by human hands with some type of accelerant (6 ROA 1107). The accelerant had been applied in an up and down motion rather that having been poured (6 ROA 1109). A Ronsonal lighter fluid bottle was found in the kitchen area of the house (6 ROA 1112). There was no fire damage to the bed and no fire damage to the body (6 ROA 1125-1126).

Cliff Mitchell is the canine handler for the Clark County Fire Department and works with the yellow Labrador Josie (6 ROA 1132). Josie located several spots in the living room where an accelerant was present (6 ROA 1140). The findings made by Josie were verified by the crime lab (6 ROA 1146).

Berndt's family was notified of her death and the fire and a search of the house was made to determine items that may have been missing. One of the items was a set of silverware that had little flowers around the handles and a B engraved on each piece (5 ROA 997). The silverware was usually kept in a wooden box on a shelf in her bedroom (5 ROA 998-999). Also missing from the house was a VCR that had been kept on the console in the living room and Christmas booties being knitted by Berndt and eight (8) United States saving bonds in the amount of fifty (50) dollars each (5 ROA 1000; 1015-1016).

The lug wrench or tire iron was still in the trunk of Berndt's vehicle and she would have no reason to keep such an item in her house. (5 ROA 1025-1026).

Dr. Roger Buckland performed the autopsy on Isabelle Berndt (6 ROA 1158). Berndt had multiple crushing-type injuries with lacerations to the head, crushing injuries of the jaw, the jaws were fractured and the teeth were broken (6 ROA 1162). All injuries were contemporaneous, i.e., withing the same general time frame (6 ROA 1167). The injuries extended to the ears over the forehead, over the fact, the chin, and one deep laceration on the back of her head (6 ROA 1163). Cause of death was intracranial hemorrhage due to blunt force trauma to the face and head (6 ROA 1164). The blunt force trauma was consistent with that which would result from being hit with a crow bar or a tire iron (6 ROA 1165). There was no burning or charring of the body and there was no smoke or burning noted in the lungs or air passages (6 ROA 1166).

Senior Crime Scene Analyst Gary Reed assisted in processing the Yale Street residence (6 ROA 1169). When he entered th house he observed fire, smoke, and water damage in the front room, kitchen, and master bedroom (6 ROA 1171). The northwest bedroom did not have much fire damage, however, the dresser drawers were pulled open, the bed was messed up, the closet doors were open and there was some sign of displacement in the room (6 ROA 1172). There were signs of ransacking and a jewelry box had been left in an open condition (6 ROA 1173). Items appeared to be missing from several places (6 ROA 1174). A pillow was located on the bed partially covering the face of the victim, and was matched to a pillow that was located in the other bedroom of the residence (6 ROA 1159).

Berndt's family was notified of her death and a search of the house was made to determine

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

that the items that may have been missing. One of the items was a set of silverware that had little flowers around the handles and a B engraved on each piece (5 ROA 997). The silverware was usually kept in a wooden box on a shelf in her bedroom (5 ROA 998-999). Also missing from the house was a VCR that had been kept on the console in the living room and Christmas booties being knitted by Berndt and eight (8) United States savings bonds in the amount of fifty (50) dollars each (5 ROA 1000; 1015-1016).

The lug wrench or tire iron was still in the trunk of Berndt's vehicle and she would have no reason to keep such an item in her house. (5 ROA 1025-1026).

Tammy Jo Bryant met CASTILLO in August, 1995, and they developed a relation ship as boyfriend and girlfriend and moved in together (6 ROA 1198). A short time later Michelle Platou also moved in (6 ROA 1199). Platou had a white Mazda automobile while neither Bryant nor CASTILLO had a car (6 ROA 1201). At about 6 P.M. or shortly thereafter on December16, 1995, CASTILLO and Platou left the residence together in Platou's vehicle (6 ROA 1203). They returned to the apartment at about 3:00 o'clock the following morning (6 ROA 1203).

When CASTILLO and Platou returned to the apartment they had with them a VCR, a box containing silverware and a bag containing booties (6 ROA 1204-1205). After a short time, CASTILLO and Platou left again and returned after about twenty minutes (6 ROA 1206). At about nine or ten o'clock on the morning of December 17, 1995, CASTILLO and Platou told Bryant that they had robbed a house and that there had been two people in the house and that Platou hit a wall or made a noise and that they panicked and were scared and then CASTILLO hit the person and they both freaked out and left (6 ROA 1208). CASTILLO indicated that he had

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

hit the person with a tire iron from Platou's vehicle (6 ROA 1208-9). He thought the person was a man because the snoring was very loud (6 ROA 1223). The tire iron was then thrown into a dumpster (6 ROA 1209). They told Bryant that they had gone back the second time because they believed that Platou had left finger prints and that they going to burn the house to destroy any fingerprints (6 ROA 1210). CASTILLO was nervous and upset as he was describing the incident to Bryant (6 ROA 1222). After he told her he continued to feel bad and guilty (6 ROA 1224).

On December 19, 1995, the police came to Bryant's apartment with a search warrant and also asked for permission to search which she granted (6 ROA 1211). The police recovered the silverware, VCR and booties from the apartment (6 ROA 1211). The police also found a bottle of Rosonol lighter fluid in the apartment, which is the kind that CASTILLO used to fuel his cigarette lighter (6 ROA 1214). A notebook taken from the apartment during the search had notation on one of the pages $50.00, VCR, camera, and silverware in the handwriting of CASTILLO (6 ROA 1216).

When the police came to search the residence CASTILLO was cooperative with them and did not try to hide anything, and actually pointed things out during the search (6 ROA 1221).

Kirk Rasmussen contacted police officer Thomas Lau on December 19, 1995, and gave him some information about the Berndt homicide (6 ROA 1241). Lau then contacted the assigned homicide detectives (6 ROA 1243). It was based on the information from Rasmussen that the police obtained the search warrant that was served on the Bryant apartment (6 ROA 1244). Lau assisted in the execution of the warrant (6 ROA 1246).

CASTILLO had worked for Rasmussen for a period of about five months (6 ROA 1256).

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CASTILLO lived in close proximity to Rasmussen and Rasmussen would regularly provide transportation to and from work at Dean Roofing (6 ROA 1257). Rasmussen was aware that CASTILLO found a key in a hideaway box at the Berndt house (6 ROA 1261). CASTILLO actually showed him the key (6 ROA 1262). Rasmussen told him to put it back and CASTILLO did so, stating that he shouldn't think that way (6 ROA 1263).

On Monday, December 18, 1995, during the ride to work, CASTILLO was kind of quite and had a weird look on his face (6 ROA 1267). After some small talk, CASTILLO told Rasmussen that he had murdered and eighty six (86) year old lady in her sleep (6 ROA 1267). CASTILLO then proceeded to give him the details (6 ROA 1268-1270). CASTILLO told him that he did not know it was a women when it occurred (6 ROA 1271). The person was gurgling in it's own blood and he took a pillow and put it over the person's face an smothered the person out (6 ROA 1272). The intention was to sell the property stolen to obtain money (6 ROA 1273). Rasmussen was in disbelief and shock and did not press CASTILLO for details (6 ROA 1275).

The next morning on the way to work, CASTILLO asked Rasmussen if he had watched the news, and then proceeded to tell him what the news reports had said (6 ROA 1280). On the way home on Tuesday, Rasmussen drove past the Yale Street residence and after observing that it had been burned, went to the police and talked to Officer Lau (6 ROA 1282).

After work on December 19, 1995, Charles McDonald went over to the apartment of CASTILLO (7 ROA 1311). He was at the apartment for about an hour or so and during that period of time CASTILLO asked him if he wanted to buy some silverware (7 ROA 1312). CASTILLO showed him a set of silverware in a box and told him it was work $1,500.00 but was

willing to discount the price to $500.00 (7 ROA 1314). When McDonald indicated that he could not afford the silverware, CASTILLO offered to put him on a payment plan (7 ROA 1314).

Detective Donald Tremel was one of the primary investigating officers assigned to the homicide of Isabelle Berndt (7 ROA 1320). He was involved in the service of the search warrant on the apartment of CASTILLO (7 ROA 1321). CASTILLO immediately let the police into the apartment when they knocked on the door (7 ROA 1346). Both CASTILLO and Bryant consented to the search of the apartment and were cooperative and did not impede the investigation in any way (7 ROA 1326; 1347). Both a VCR and a silverware box were found in the apartment (7 ROA 1326). Tremel also recovered the single booty from the Russo house and then went back to the Bryant apartment and recovered the plastic bag containing other booties in it (7 ROA 1334-1335).

Detective Dwayne Morgan arrested CASTILLO after the conclusion of the apartment search and took him to the police department (7 ROA 1376). After CASTILLO received his Miranda rights he gave two separate taped statements to Morgan (7 ROA 1379). During the first interview CASTILLO indicated that he had received the property from a friend who he wouldn't identify by name (7 ROA 1380). A short period of time after the first interview, he was interviewed again and told that information had been gathered from Bryant and Rasmussen (7 ROA 1382). CASTILLO then became sullen and after a pause told Morgan that it was he that had committed the killing, robbery, and arson (7 ROA 1384-85).

B. PENALTY HEARING

Testimony at the penalty hearing concentrated a great deal on CASTILLO'S extensive

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

juvenile history. CASTILLO offers a condensed version of most of said testimony due to its lengthy nature.

Bruce Kennedy of the Nevada Youth Parole Bureau first became acquainted with CASTILLO in 1984 when he was assigned to his case load while he was a parole counselor and he supervised CASTILLO while he was on parole between stints at the Nevada Youth Training Center in Elko (8 ROA 1598; 1601). Juvenile records showed that CASTILLO received psychiatric testing on a number of occasions and the results did not show any psychosis or mental health issues (8 ROA 1606). CASTILLO was considered to be normal, but delinquent (8 ROA 1606).

CASTILLO'S first interaction with the juvenile system was in 1981 when he was brought in for emotional instability of a child (8 ROA 1610). The juvenile history then continued for a number of years including incidents of runaway, emotional instability of a child, attempt murder, arson, petty larceny, threat to life, and destruction of county property (8 ROA 1610-1630). Starting in 1985 there were a number of other juvenile contacts that involved violation of his parole status, resulting in CASTILLO being recommitted to the Nevada Youth Training Center in Elko (8 ROA 1619). CASTILLO was then in and out of the Elko facility and charged with a number of charges, including grand larceny auto, no driver's license, petty larceny, attempted burglary, possession of an unregistered handgun and escape from Elko (8 ROA 1620). For the attempted burglary charge he was certified as an adult and that was where his juvenile record ended (8 ROA 1620).

Certain dispositional reports from the various juvenile proceedings were admitted into

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

evidence detailing some of the events that had transpired (8 ROA 1622-1626). Included within the reports were descriptions of CASTILLO drowning his grandmother's dog when he was five years old and killing several birds by smashing their skulls with rocks (8 ROA 1626). In one incident CASTILLO was caught with another child attempting to light the Circus Circus casino on fire in January, 1983 (8 ROA 1630). At age ten (10) years CASTILLO was assessed by Dr. Kirby Reed, a neurologist, who indicated in his findings, inter alia, that:

> "Under assessment this ten year old male who demonstrates normal growth and early development presently neurological examination reveals neither hard nor soft findings. I do not feel that there is a neurological basis for the patient's ongoing personality disorder. I feel that he does need to be in at least 24 hour residential placement for the safety of not only himself but for the general public"(8 ROA 1632).

CASTILLO, at age eleven, was one of the youngest persons ever committed to the Nevada Youth Training Center (8 ROA 1640). Over the years perhaps only one or two younger persons were ever committed to the Elko facility (8 ROA 1660). Elko is usually reserved for the worst of the juvenile offenders (8 ROA 1664).

The State of Nevada Youth Resources Panel saw the diagnosis for CASTILLO very poor, and looked into placement in out of state programs, but due to the expense and poor prognosis the State was unwilling to provide any specialized care for CASTILLO (8 ROA 1644). By the time he had reached age thirteen CASTILLO had been through every program available in Nevada, including parole, formal probation, mental health counseling, Children's Behavioral Services, foster home placement, Spring Mountain Youth Camp and the Third Cottage Program (8 ROA 1646). CASTILLO was treated based on the diagnosis of conduct disorder and

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

treatment plans that were tried included counseling, vocational assignments and education (8 ROA 1671).

As of age fifteen CASTILLO had been committed to, paroled and revoked at the Nevada Youth Treatment Center three times (8 ROA 1647). He admitted to the use of marijuana, speed, crack, cocaine, and alcohol by that age (8 ROA 1648). Ultimately he totaled five separate commitments to Elko (8 ROA 1673). Each time he was able to achieve the requirements set by the facility and go before a parole panel consisting of a classification counselor, school teacher, dormitory staff and cottage staff and again a recommendation to the superintendent that he be released to the community and his family (8 ROA 1674). At age seventeen, due to continued criminal activity and new criminal activity and new charges of attempted burglary and escape from NYTC CASTILLO was certified as an adult by the juvenile court (8 ROA 1652-1654).

CASTILLO was the beneficiary of virtually all of the options that juvenile court services had to offer and had received a high school education and graduated from high school while at NYTC (8 ROA 1681). He was determined to be moderately successful at NYTC but when returned home he would revert to the old behaviors that got him into trouble in the first place (8 ROA 1681). Juvenile authorities were aware that CASTILLO had an abusive upbringing and that he may have been abused (8 ROA 1677).

An attempt had been made to place CASTILLO with his maternal grandmother in St. Louis (8 ROA 1674). This placement also failed and the report from the Missouri Department of Social Services reflected that CASTILLO was a seriously disturbed child who was beyond the scope of their services and that he came from a dysfunctional family (8 ROA 1674).

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

Charmaine Smith was the Parole and Probation Officer assigned to prepare CASTILLO'S pre- sentence report on the attempt burglary case (8 ROA 1694). CASTILLO plead guilty on March 19, 1991, and on April 16, 1991, was sentenced to two (2) years in prison (8 ROA 1697;1705). The case involved a situation where CASTILLO and another youth attempted to kick in the front door of a house and were chased away by the female occupant wielding a mace canister (8 ROA 1706).

CASTILLO was also convicted on a robbery arising out of a December 14, 1992, incident wherein, he had grabbed a purse from a pedestrian as his co-defendant drove the vehicle along the sidewalk (8 ROA 1712). CASTILLO was convicted after a jury trial on April 15, 1993, (8 ROA 1714). He was sentenced to three years in prison on May 20, 1993 (8 ROA 1717). CASTILLO expired the sentence in just under two years and was released from prison on May 8, 1995, (8 ROA 1720).

Senior correctional officer for the Nevada Department of Prisons, Mark Berg testified that he had contact with CASTILLO at the Northern Nevada Correctional Center (8 ROA 1753). While in prison CASTILLO had been disciplined for being involved in an assault on another inmate, having tattooing equipment in his cell and jamming a door lock (8 ROA 1758-1760). CASTILLO was also disciplined for hitting another inmate with a lock, and yelling threats at the inmate after he informed the correctional officers of the incident (8 ROA 1762).

Michael Blanford of the National Park Service testified that he was dispatched on June 30, 1995, to the Callville Bay dock cashier on the report of an armed robbery (8 ROA 1781). When he arrived on the scene the dock cashier, Jeannie O'Brien indicated that she had been robbed of

over a thousand dollars by a man with a chrome plated handgun (8 ROA 1782). Attempts were made to catch the described individual, and CASTILLO was stopped but released because he did not match the description (8 ROA 1784). Four days later O'Brien was re-interviewed and she admitted that she had lied and that CASTILLO had come up with a plan whereby she would report a robbery and give the wrong description to the police (8 ROA 1786). CASTILLO had told her that if she did not cooperate with the robbery she had better watch her back and that she would be shot and killed (8 ROA 1788). CASTILLO had not been charged with any involvement in the incident (8 ROA 1789).

On October 3, 1995, Jill Russell was living in a apartment complex on North Rainbow Boulevard and called the police because of a disturbance and when CASTILLO was arrested by the police he threatened to get her as he was taken away (8 ROA 1798-99). The next day CASTILLO forced his way into her apartment and the door hit her on the side of her face (8 ROA 1800). CASTILLO was charged with two counts of battery and the matter was still pending on December 17, 1995 (8 ROA 1802).

The granddaughter of Berndt, Lisa Keimach testified concerning the death of her grandmother and the impact on her life (9 ROA 1811). She would see her grandmother several times per year and on holidays (9 ROA 1812). Keimach also testified at some length concerning the quality of her grandmother's life and what she would do during the course of her days (9 ROA 1813-1816).

Ronda, another granddaughter and the sister of Lisa was also called by the State (9 ROA 1822). She was a school teacher just like her grandmother and related a number of stories

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

concerning becoming a school teacher and the value of her grandmother to her as a teacher (9 ROA 1822-1825). She also talked about the effect of the death of her grandmother on her life (9 ROA 1825-1840).

Finally, the State recalled the daughter of Berndt, Jean Marie Hosking (9 ROA 1840). She told the jury about her early childhood and living with her mother and about how she had moved out west and then her mother had followed (9 ROA 1841-1843). She also talked about the early years of Berndt's career as a school teacher (9 ROA 1844). Hosking concluded her testimony with a description of the impact on her life of the loss of a mother (9 ROA 1851-1853).

CASTILLO called Dr. Lewis Etcoff to testify concerning his findings and opinions based on his examinations of CASTILLO (9 ROA 1859). Etcoff, was Board certified in neuropsychology and had testified as an expert in the Eight Judicial District about two dozen times (9 ROA 1861). Etcoff had reviewed the available information concerning CASTILLO and had conducted a two and one half hour interview with him (9 ROA 1862-1864).

During the first five years of life CASTILLO moved about twenty times thorough various states (9 ROA 1864). There was an enormous amount of family dysfunction in the parents, and his father left his mother after placing a knife to her throat and threatening to kill her (9 ROA 1865). His mother was very young and suffered a sever depressive disorder for which she was eventually hospitalized and had to undergo electroconvulsive therapy (9 ROA 1865). CASTILLO was seriously disturbed emotionally, mentally, and behaviorally sufficient that he suffered a reactive attachment disorder which is a very serious psychiatric disorder (9 ROA 1866). By the age of five he was unable to formal normal human bonds and was doing some very significant

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

violent misbehavior (9 ROA 1866).

Reactive attachment disorder is a type of disorder that can only rarely be overcome with treatment (9 ROA 1868). Such children can work in society and marry, but the chances of them being successfully employed or successful in normal social situation is very much reduced (9 ROA 1869).There were many components of CASTILLO'S history that validated the diagnosis (9 ROA 1870). To compound the problem at age nine or ten CASTILLO was diagnosed with Attention Deficit Hyperactivity Disorder (9 ROA 1871). ADHD is a neurological disturbance wherein, there is essentially a lack of one of the neurotransmitters in the brain, dopamine, reaching the frontal lobes (9 ROA 1872). The only way to successfully treat someone with the combination fo the two disorders found by Dr. Etcoff is a long term residential treatment center with a small number of other children until they are eighteen (9 ROA 1874). Such treatment is not available and was not available during the time that CASTILLO was involved with the juvenile system (9 ROA 1875).

The final factor found by Etcoff that contributed to the problems of CASTILLO was that his stepfather was physically and mentally abusive (9 ROA 1876). The instances of abuse, included locking him in his room and making him urinate in a pan, forced to each hot chilies until he vomited, and hitting him with a inch thick leather strap (9 ROA 1877). CASTILLO was so afraid of his stepfather that he would run away all of the time (9 ROA 1877).

As a result of all the factor, CASTILLO also developed a childhood onset conduct disorder (9 ROA 1879). This is an oppositional behavior that goes beyond having a chip on your shoulder and is a very serious pre-sociopathic behavior that has t be dealt with at some point or it

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

worsens (9 ROA 1880). Most people who suffer the type of childhood as did CASTILLO either turn out to be criminals or very mentally ill or is some other ways so dysfunctional that their lives are wasted in comparison to the way their lives might have turned out (9 ROA 1881).

Jerry Harring had worked at the Nevada Youth Training Center since November, 1974, (9 ROA 1914). At the time of his testimony he was a classification counselor (9 ROA 1914). He first met CASTILLO in 1982 when he was just twelve years old (9 ROA 1915). CASTILLO had written a letter to Harring to be read to the other kids that went through the program, telling them of all the mistakes that he had made and that they should listen to what the counselors told them (9 ROA 1916). The letter was to be read to the kids when they were being orientated through the Reception and Classification procedure (9 ROA 1918). The letter has had a very positive impact on the teaching of the classes (9 ROA 1920). CASTILLO was a very troubled child and the resources of the Elko facility were and are limited. (9 ROA 1920).

Sonny Carlman, a correctional officer with the Clark County Detention Center, was familiar with CASTILLO from inside of the jail (9 ROA 1941). CASTILLO was a worker in the unit and had not given Carlman any problems during the two and one half months that he had been supervising him (9 ROA 1949).

Tammy Bryant, testified concerning her relationship with CASTILLO (9 ROA 1947). When she first met him he had no social skills and wouldn't really go anywhere (9 ROA 1949). He was working everyday and then just basically coming home (9 ROA 1949). CASTILLO talked about wanting to change his life, and she was the first person to ever really show him any attention and affection (9 ROA 1950). CASTILLO did not even know how to cook such simple

items as chilly hot dogs, and he was happy when she showed him how (9 ROA 1951).

The last witness called by CASTILLO at the penalty hearing was his mother Barbra Sullivan (9 ROA 1958). CASTILLO was born in St. Louis on December 28, 1972 (9 ROA 1959). She was only eighteen when he was born and at the time was floating back and forth between her mother's house and her in-laws (9 ROA 1960). She got thrown out of both houses after CASTILLO was born and then left him with the in-laws and went to Lake Tahoe (9 ROA 1962). She made a living for the first four years on Billy's life by working different waitress jobs (9 ROA 1964). CASTILLO'S father was in the military and they were stationed oversea when she became pregnant and after she was thrown down a flight of stairs by the father she was returned to the States and the father was sent to the brig (9 ROA 1966). The father, William Thorpe was a very violent individual that had numerous run-ins with the law for robbery and beating people (9 ROA 1967). He even spent time in prison (9 ROA 1968). All of Thorpe's brother's were also involved in criminal activities and were violent individuals (9 ROA 1969). Thorpe's father had shot him with a shotgun on one occasion (9 ROA 1970). Thorpe tried to kill Sullivan on three occasions and the last time he put a gun in her mouth and flipped out and ended up in an institution (9 ROA 1978).

After Sullivan was thrown out of the residences available to her and CASTILLO, she turned to prostitution to support herself (9 ROA 1970). After six months in Lake Tahoe she had gotten a job, married and a home and she returned to St. Louis and picked up CASTILLO and brought him to Nevada (9 ROA 1973). She had to fight for custody in Missouri because CASTILLO'S grandmother's filed to get custody of him (9 ROA 1974).

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

With respect to the early years of CASTILLO'S life, Sullivan admitted that she didn't love him like she should have and like she did her later born children (9 ROA 1977). This was because she hated his father so much, she saw to his needs but didn't give him any love, she just didn't have it in her during that period of her life (9 ROA 1980-81).

CASTILLO had his first contact with the authorities when he was five years of age and Sullivan just was not equipped to deal with it (9 ROA 1980-81).

CASTILLO gave an unsworn statement to the jury explaining some of his feelings, regrets, and expressing remorse for his conduct.

ARGUMENT

I. MR. CASTILLO IS ENTITLED TO HAVE HIS SENTENCE OF DEATH AND CONVICTIONS REVERSED BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL.

Standard of review for ineffective assistance of counsel. To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, petitioner must demonstrate that:

1. counsel's performance fell below an objective standard of reasonableness,

2. counsel's errors were so severe that they rendered the verdict unreliable.

Lozada v. State, 110 Nev. 349, 353, 871 P. 2d 944, 946 (1994). (Citing Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 205, (1984)). Once the defendant establishes that counsels performance was deficient, the defendant must next show that, but for counsels error the result of the trial would probably have been different. Strickland, 466 U.S. at. 694, 104 S. Ct. 2068; Davis v. State, 107 Nev. 600, 601,602, 817 P. 2d 1169, 1170 (1991). The defendant must

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

also demonstrate errors were so egregious as to render the result of the trial unreliable or the proceeding fundamentally unfair. State v. Love, 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993), citing Lockhart v. Fretwell, 506 U. S. 364,113 S. Ct. 838 122 2d, 180 (1993); Strickland, 466 U. S. at 687 104 S. Ct. at 2064.

II. MR. CASTILLO WAS DENIED DUE PROCESS BY THE IMPROPER ARGUMENT AT THE PENALTY HEARING WHEREIN THE PROSECUTOR ASKED THE JURY TO VOTE AGAINST MR. CASTILLO AND IN FAVOR OF FUTURE INNOCENT VICTIMS PURSUANT TO THE JURY'S DUTY.

During the penalty hearing the prosecutor was permitted by the trial court to engage in an argument that has been disapproved for many years. The objectionable argument during the penalty hearing was as follows:

> The issue is to you, as the trial jury, this afternoon have the resolve and the courage, the determination, the intestinal fortitude, the sense of commitment to do you legal and moral duty, for what ever your decision is today, and I say this based upon the violent propensities that Mr. Castillo has demonstrated on the streets, I say it based upon the testimony of Dr. Etcoff and correctional officer Berg about the threat he is to other inmates, and I say it based upon the analysis of his inherent future dangerousness, whatever the decision is, you will be imposing a judgement of death and it's just a question of whether it will be an execution sentence for the killer of Mrs. Berndt or for a future victim of this defendant.
> Mr. Schieck: I am going to object your honor to this argument of future victims.

Mr. Schieck objected to this argument. On direct appeal appellate counsel raised this exact issue. On April 2, 1998, the Nevada Supreme Court specifically rejected this argument. (See attached exhibits). However, this Supreme Court only addressed the argument of appellate counsel regarding the future dangerousness contention made by the prosecutor. The Supreme Court held that,

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

> "In Howard v. State, we held that it is also improper to ask the jury to vote in favor of future victims and against the defendant. 106 Nev. 713, 719, 800 P.2d 175, 178 (1990) (Supreme Court Decision pp. 12). In the instant case the prosecutor presented to the jurors just a choice when he said "You will be imposing a judgment of death and it is just a question of whether it will be an execution sentence for the killer of Mrs. Berndt or for the future victim of this defendant" This language improperly suggests that the jury must decide whether to execute the defendant or bear responsibility for the death of an innocent future victim. Presenting the jury's decision as a choice between killing a guilty person or an innocent person will likely result in jurors decision to impose the death penalty more often then if the jury's decision had been portrayed in it's proper light.

The Nevada Supreme Court then rejected Mr. Castillo's argument based upon the prosecutor's statement of future dangerousness. The Nevada Supreme Court found the prosecutor's statements were improper however, they did not rise to the level of reversible error. It is important to note, that the prosecutor that made this argument against Mr. Castillo was Chief Deputy District Attorney Mel Harmon. It is also important to note, that appellate counsel only argued that the prosecutor's comments should be reversed based upon future dangerousness. Appellate counsel failed to make any argument regarding the prosecutor's reference to the jury's legal and moral duty. It is Mr. Castillo's contention that appellate counsel was ineffective for failing to raise the argument that Mr. Mel Harmon's statements resulted in reversible error based upon advising the jury that they had legal and moral duty to execute.

As was previously state, the Nevada Supreme Court issued an opinion affirming Mr. Castillo's sentence of death in 1998.

On July 24, 2001, the Nevada Supreme Court decided the case of Vernell Ray Evans v. State of Nevada, 117 Nev. Ad.Op. 50, (a copy of which is attached as Exhibit B). In Evans, the defendant had been sentenced to die as a result of being convicted of four counts of first degree murder.

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

The facts surrounding Mr. Evan's case are horrendous. Apparently, Mr. Evans entered an apartment seeking revenge against a lady who had assisted the authorities on a drug investigation. Id. As a result, Mr. Evans and a cohort proceeded to shoot and kill four human beings. The intended target was in fact tortured in her bathtub. A four year old child was present in the apartment and hiding in the closet. She testified that it was the defendant who had committed the murders. Id. pp.3.

The Supreme Court reversed Mr. Evans sentence of death based in part upon the improper argument of the prosecutor during closing arguments. The following is an excerpt of the prosecutor's improper argument during Mr. Evans' penalty phase, it is important to note, that the prosecutor who made the argument was again Chief Deputy District Attorney Mel Harmon. It is also important to compare the improper arguments made by Mr. Harmon in Mr. Evans' case to the arguments made in Mr. Castillo's. The arguments in question are almost identical. Moreover, the Court will find that the arguments in Mr. Castillo's are slightly more egregious than the arguments made against Mr. Evans by the same prosecutor. In Evans, during rebuttal closing the prosecutor stated,

> "Do you as a jury have the resolve, the determination, the courage, the intestinal fortitude, the sense of commitment to do you legal duty?" pp. 14-15. The Nevada Supreme Court explained, " Asking the jury if it had the intestinal fortitude to do it's legal duty was highly improper the United States Supreme Court held that a prosecutor erred in trying to exhort the jury to it's job; that kind of pressure. . . has no place in the administration of criminal justice. There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir the passion and can only distract a jury from it's actual duty; impartiality. The prosecutor's words here "resolve", "determination", "courage", "intestinal fortitude", "commitment", "duty", were particularly designed to stir the jury's passion and appeal to partiality. Id.

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

The Nevada Supreme Court then held,

> " Although this Court noted a similar argument in Castillo v. State, 114 Nev. 271, 279, 280, 959 P.2d 103, 109,(corrected by McKenna v. State, 114 Nev. 1044, 1058, 968 P.2d 739, 748 (1998), it addressed only the prosecutor's argument on future dangerousness, not the reference to the jury's duty". Id

The Nevada Supreme Court specifically stated in Evans, that, Appellate counsel for Castillo only argued future dangerousness regarding his comment and did not raise the issue of the jury's duty. It appears that the Nevada Supreme Court had indicated that the remarks made by Mr. Harmon in Evans, were improper and resulted in a reversal of a death sentence based upon his argument regarding the jury's duty portion of Mr. Harmon's argument. The Nevada Supreme Court's specifically states, " that we considered a similar type argument by Mr. Castillo however, he only argued future dangerousness and not the jury's duty." Therefore, it seems obvious that Mr. Castillo's appellate counsel was ineffective for failing to raise the correct issue regarding Mr. Harmon's statements.

It is important to compare Mr. Harmon's statements in both Evans and Castillo to demonstrate the identical nature of his arguments. In Castillo, Mr. Harmon states, "The issue is to you, as the trial jury, this afternoon have the resolve, and the courage, the determination, the intestinal fortitude, the sense of commitment to do your legal and moral duty, for what ever your decision is today, and I say this based upon the violent propensities that Mr. Castillo has demonstrated on the streets. . ." In Evans, Mr. Harmon stated "Do you as a jury have the resolve the determination, the intestinal fortitude, the sense of commitment to do your legal duty?"

The Nevada Supreme Court specifically held in Evans that it was improper for the prosecutor to use such word to as resolve, determination, courage, intestinal fortitude,

commitment, and duty. In Mr. Castillo's case the prosecutor used the word resolve, courage, determination, intestinal fortitude, and went one step further by saying the commitment legal and moral duty.

In Evans, Mr. Harmon simply stated, "Do you have the commitment to do your legal duty." In Castillo, Mr. Harmon went one step further and asked the jury regarding their commitment to their legal and moral duty. Subsequently, the Evans case demonstrates that Mr. Harmon's argument's in Castillo were more egregious than the Evans case based upon his question regarding the jurors legal and moral duty. However, it appears that the arguments by Mr. Harmon in both cases are identical. The arguments appear to come from the same script. However, the Nevada Supreme Court has determined that Mr. Evans should receive a new penalty phase for the horrendous and brutal murder of four innocent people whereas, Mr. Castillo was not entitled to a new penalty phase based upon the same identical argument.

The Nevada Supreme Court specifically, addressed the comparison of Evans to Castillo and determined that unfortunately, appellate counsel only raised the argument regarding Mr. Harmon's statement of future dangerousness. Therefore, Mr. Castillo now contents that appellate counsel was ineffective pursuant to the Strickland standard. Had appellate counsel raised the argument that the prosecutor had violated his constitutional rights based upon his arguments to the jury regarding their legal and moral duty that the outcome of the case would have resulted in a new penalty phase.

Surely, the State of Nevada can not argue that somehow Mr. Castillo who is convicted of the murder of one individual is somehow presents a more egregious case then Mr. Evans who

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

brutally murdered and tortured at least one of the four victims. The evidence in Mr. Evans' case appears to be overwhelming. Hence, an argument that the evidence in Mr. Castillo's case is overwhelming is of no bearing.

Additionally, it should be noted that Mr. Castillo is a white man. Mr. Evan is a African American man. It is not our contention, yet, that there is any equal protection violation of the Fourteenth Amendment to the United States Constitution. However, the similarities in the case are apparent. Mr. Harmon was a prosecutor in both cases. Mr. Evans, a African American man, was convicted of the heinous murder of four innocent individual. Mr. Castillo, a white man has been convicted of murdering one individual. The same prosecutor has made an identical argument in both Mr. Evans and Mr. Castillo's penalty phase. Mr. Evans' has had his sentence of death reversed. Mr. Castillo has not.

In the event that the outcome of this case is affirmed it would be Mr. Castillo's contention that the State of Nevada has clearly treated him differently that Mr. Evans. The State can content that there is overwhelming evidence against Mr. Castillo. It is obvious that there was overwhelming evidence over Mr. Evans. A young child was able to identify Mr. Evans as the person she saw in the apartment committing those brutal acts. The question then becomes why has the Court determined that Mr. Evans is entitled to a new hearing based in part upon the arguments of Mr. Harmon, yet, determined that Mr. Castillo is not entitled to a new penalty phase with the identical argument made by the same prosecutor. The Fourteenth Amendment of the Untied States Constitution section one states,

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state in wherein they reside.

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

> No state shall make or enforce any law which shall abridge the privileges or immunity of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it's jurisdiction the equal protection of the law." emphasis added.

Again, Mr Castillo reserves the right to argue an equal protection violation in the event that there is no reasonable grounds to affirm his sentence of death as compared to Mr. Evans. A review of Mr. Evans case compared to Mr. Castillo' s case demonstrates that Mr. Castillo is absolutely entitled to a reversal of his death sentence based upon the improper comments of the prosecutor. In the event he is not entitled to a new penalty phase Mr. Castillo specifically raises the argument that the State of Nevada has violated the equal protection clause and protected the rights of Mr. Evans, a African American, over the rights of Mr. Castillo, a white man. The State of Nevada has denied Mr. Castillo equal protection of the laws based upon his race. Based upon the foregoing argument Mr. Castillo demands that this Court reverse his sentence of death and permit him a new penalty phase based upon the violations Mr. Castillo's rights under the United States Constitution, Amendments Fourteen, Eight, Five, and Six.

///

///

III. MR. CASTILLO'S SENTENCE OF DEATH FOR THE USE OF A DEADLY WEAPON IN COMBINATION WITH HIS FIRST DEGREE MURDER CONVICTION MUST BE OVERTURNED BASED UPON A CROWBAR NOT BEING A DEADLY WEAPON.

On September 4, 1996, the jury returned guilty verdicts as to all counts. Specifically, Mr. Castillo was found guilty of first degree murder with the use of a deadly weapon. As was outlined in the statement of facts, the State alleged that Mr. Castillo attacked the victim with a tire iron which Mr. Castillo allegedly brought into the house. The coroner testified that the victim died as

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

a result of a intracranial hemorrhage due to blunt force trauma to the face and head. The coroner further testified that these injuries were consistent with blows from a crow bar or tire iron. A crow bar or tire iron does not amount to a deadly weapon.

It is important to note that the Nevada Legislature appears to have attempted to overrule Zgombic v. State, 106 Nev. 571, 578, 598 P.2d 548 (1990), when the Nevada Legislature enacted what NRS 193.165(b) which states:

> Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

This Court has addressed this issue on a number of occasions. In Milton v. State, 908 P.2d 684 (1995), this Court considered whether there was a use of a deadly weapon when a knife was used to kill the victim. This Court indicated that District Court must determine, as a matter of law, whether the instrument is an inherently dangerous weapon. Specifically, this Court held:

> "[f]inally, Gregory contends that there is no basis in the record to support his enhanced sentences for use of a deadly weapon in the commission of the crimes. We are forced to agree. In Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990), this court overruled the functional test and applied the inherently dangerous weapon test for determining whether an instrumentality is a deadly weapon for purposes of NRS 193.165. The inherently dangerous weapon test means that the instrumentality itself, if used in the ordinary manner contemplated by its design and construction, will or is likely to, cause a life-threatening injury or death. ***Id. at*** 576-77, 798 P.2d at 551. Under Zgombic, it is the district court's duty to determine whether the instrument is an inherently dangerous weapon, except in a few close cases where the court cannot determine as a matter of law whether the weapon is or is not a deadly weapon, the judge will need to submit the entire issue to the jury after instructing it on the previously stated definition of a deadly weapon. ***Id. at*** 577, 798 P.2d at 552. (quotations omitted).

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

> In Hutchins, this court discussed the classification of knives under the inherently dangerous weapon test, stating: Here the State argues that scissors are analogous to a knife, something which could clearly be classified as a deadly weapon even under the inherently dangerous standard.... In addition to their more commonplace uses, knives are often designed as weapons and have been so used throughout history. Id. 110 Nev. at 111, 867 P.2d at 1141. Although Hutchins allows for the possibility of finding that a knife is a deadly weapon, that case does not stand for the proposition that all knives are considered deadly weapons under the inherently dangerous weapon test. In determining whether a knife is a deadly weapon, the district court must consider the particular type of knife that was used in the crime and determine whether it satisfies the inherently dangerous weapon test.

It is important to note that the cases cited above were prior to the legislative change in 1995.

As the Court is aware, almost anything can be used to kill somebody. For example, if a defendant hit somebody in the face with his fist knocking the victim unconscious and then throws the victim into a swimming pool and the victim dies as a result of drowning. Is the water in the pool a deadly weapon? If a defendant chokes a victim into unconsciousness and then places the victim out in the desert because he believes the victim is dead, thereafter, the victim dies of exposure from the sun. Is the sun a deadly weapon? If in the middle of a domestic dispute a wife takes out a frozen turkey and hits the husband over the head, is the frozen turkey a deadly weapon. If a husband throws his wife off a boat in Lake Mead wherein she drowns, the water in Lake Mead a deadly weapon. A defendant who smashes another victims head into the pavement causing death, is the pavement a deadly weapon. If a victim is rendered unconscious by a beating from the defendant's fist, thereafter the defendant believes the victim to be dead and thereafter places the victim in a large industrial freezer to hide the body and the body dies as a result of

hypothermia was the freezer a deadly weapon. If a man renders a victim unconscious as a result of a fight believing him to be dead but places him in a trash compactor, is a trash compactor a deadly weapon.

Mr. Castillo would suggest that a tire iron/crow bar is no more a deadly weapon than the water in Lake Mead, the water in a swimming pool, an industrial freezer, pavement, a frozen turkey, a frozen ham, a glass pain that a victim was thrown through.

Compare those examples to the 1998 case of State of Nevada v. Buff, 114 Nev. 1237, 970 P.2d 564, (Nev. 1998).

In Buff, this Court held that the trial Court erred in applying the functional test for determining whether a Swiss army knife was a deadly weapon, for purposes of enhancement sentence. In Buff, appellant was convicted of murder in the first degree with the use of a deadly weapon for the stabbing death of a victim with a Swiss army knife. In Buff, this Court held that the "[w]e conclude that the matter at bar presents the type of close case anticipated in Zgombic, and the district court could not determine as a matter of law that the Swiss army knife used by appellants was a deadly weapon." *Id at* 970 P.2d 564, 568.

Again, it is important to note that this Court determined that the use of Swiss army knife to kill a victim by plunging it into his throat was a close case in terms of whether this could be construed as a deadly weapon.

If this Court determines that taking both hands and plunging a Swiss army knife into ones throat is a close issue how can it be determined that the a tire iron/crow bar should be enhanced for the use of a deadly weapon. If a tire iron/crow bar is a deadly weapon, than what object could possibly be used in a murder that would not enhance somebody for the use of a deadly weapon. For example, if a defendant smothers a victim with a pillow. The victim dies of asphyxiation, is

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

the pillow not a deadly weapon. If a controlled substance is forced down someone's throat causing them to overdose, is the controlled substance not a deadly weapon. If a person forced a stocking down someone's throat in an attempt to quit the victim, the victim dies of asphyxiation, is the sock not a deadly weapon.

NRS 193.165(b) defined what a deadly weapon is, "[a]ny weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death". Under the new statute, all of these examples provided above can be applied as a deadly weapon pursuant to the definition given by our legislature. This issue should be explored under the section that this statute is unconstitutionally vague and ambiguous.

The undersigned can find no new Nevada cases establishing the exact terms to what must be considered a deadly weapon. If this is the case then every single object used in the commission of a murder must be enhanced for a deadly weapon.

NRS 193.165(5) IS UNCONSTITUTIONALLY VAGUE AND AMBIGUOUS.

The Instruction provided to the jury states "a deadly weapon is any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

In Sheriff, Clark County v. Luqman, 101 Nev. 149, 697 P.2d 107 (1985) this Court held that:

> [i]t is basic to the principles of the due process clause of the fourteenth amendment that an individual may not be held criminally responsible for conduct which he could not reasonably understand to be proscribed. Sheriff v. Martin, 99 Nev. at 339, 662 P.2d at 636 (quoting United States v. Harris, 347 U.S. 612, 74 S.C. 808, 98 LED. 989 (1954)). The law must afford a person of ordinary

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

> intelligence the opportunity to know what is prohibited so that he may act accordingly, and it must also provide explicit standards of application in order to avoid arbitrary and discriminatory enforcement. Sheriff v. Martin, above; see also Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926), cited by this Nevada Supreme Court in Sheriff v. Martin, 99 Nev. 336, 662 P.2d 634 (1983); State of Nevada v. Glusman, 98 Nev. 412, 651 P.2d 639 (1982), appeal dismissed, 459 U.S. 1192, 103 S.Ct. 1170, 75 L.Ed.2d 423 (1983); Wilmeth v. State, 96 Nev. 403, 610 P.2d 735 (1980); In re Laiolo, 83 Nev. 186, 426 P.2d 726 (1967).

These cases stand for the proposition that if a person of common intelligence must guess at it's meaning than the statute is unconstitutionally vague and ambiguous. In the instant case, it is impossible to tell by the instruction (which is directly from the statute) what constitutes the use of a deadly weapon.

A review of the examples provided above as applied to this statute clearly demonstrate that every single every object used during the commission of a murder must be considered a deadly weapon. For example, the use of the water in swimming pool must be considered a deadly weapon under this statute. For a deadly weapon is any material or substance (H2O or water) which under the circumstances in which its used, attempts to be used or threatened to be used is readily capable of causing substantial bodily harm or death.

In the case of a swimming pool anybody thrown into a swimming pool or kept under the water for five to ten minutes most certainly will have either brain damages or suffer death. Therefore, a clear reading of the statute demonstrates that the water in the pool must be considered a deadly weapon.

Next example, a pillow placed over the victim's head. Under the statute clearly a pillow

could be considered either a material, substance or instrument which when used to smother a human being is capable of causing substantial body harm or death. Therefore, shoving a pillow over someone's head for ten minutes not letting them breath causing death by asphyxiation most certainly should be applied as a deadly weapon under this statute.

Next, the use of the pavement to bash the victim's head. Pavement clearly is concrete which is a material. The pavement or material under the circumstances in which it is used (to bang a victim's head), is readily capable of causing substantial bodily harm or death. Therefore, the pavement is clearly a deadly weapon under this statute.

Next, industrial freezer. Clearly the freezer can be defined as a device or instrument. In placing a person in a freezer is readily capable of causing substantial bodily harm or death by hypothermia. Therefore, clearly the industrial freezer should be considered a deadly weapon under this statute.

Next, the sock shoved down the victim's throat in order to keep the victim quit. Clearly the sock can be defined as a material. The sock being shoved down the throat and the circumstances of which is being used is readily capable of causing substantial bodily harm or death by way of asphyxiation. Therefore, the sock should be considered a deadly weapon and the defendant's sentence should be enhanced.

Next, the water at Lake Mead. As with the pool the water in Lake Mead must clearly been seen as a deadly weapon, because it is a substance and when you place someone's head under that substance for five to ten minutes it is most certainly is going to cause substantial bodily harm or death. Therefore, the water in Lake Mead must be considered a deadly weapon.

Next, the frozen turkey. A turkey is clearly a material or substance (i.e. Meat) under the circumstances in which it is used bashing someone over the head is readily capable of causing

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

substantial bodily harm or death. Under this statute clearly the frozen turkey should be considered a deadly weapon.

Next, a neck tie used to strangle the victim to death. A neck tie is a material and under the circumstances in which it used (to choke someone) is readily capable of causing substantial bodily harm or death. A neck tie under this statute is clearly a deadly weapon.

Next, the hypothetical wherein the defendant believes that the victim is dead and places the victim out in the desert. However, the victim dies of exposure of the sun. The sun clearly can be considered made up of a material or substances which under the circumstances in which it used (placing the victim in the scorching Las Vegas sun) is readily capable of causing substantial bodily harm or death. Is the sun a deadly weapon? Pursuant to this statute it most certainly should be applied that way.

Next, the victim is thrown down a long stair case causing the victim to die as a result of a broken neck. The stairs clearly qualify as a material (wood and carpet) which under the circumstances in which it used (thrown the victim down the stairs) is readily capable of causing substantial bodily harm or death. Pursuant to this statute the stairs are a deadly weapon. The State should remember in citing in their criminal information that a deadly weapon can be considered to wit: the sun; to wit: the pavement; to wit: the water within the pool; to wit: the water in Lake Mead; to wit: the frozen turkey; to wit: the frozen ham; to wit: the stairs; to wit: the pillow; to wit: the controlled substance and the list goes on and on of ridiculous examples like this.

The point of these examples is that the law in our State regarding the definition for use of a deadly weapon does not afford a person or ordinary intelligence the opportunity to know what is prohibited so that he or she may act accordingly and it provides a manner that will give the

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

District Attorney's Office arbitrary and discriminatory enforcement of the statute. The statute as written provides the District Attorney's Office with a clear abuse of enforcement. The District Attorney's Office may decide that Mr. Castillo has used a deadly weapon. However, a person accused or convicted of smother a person with a pillow or using a controlled substances to shove down their throat may not be applied as a deadly weapon. Yet, under the statute they both could be applied the same way. This leads to the conclusion that the due process clause of the Fourteenth Amendment is being violated based upon a statute that is so vague that men or women of common intelligence must guess at the meaning and differ as to the application.

The statute is unconstitutional because it gives the District Attorney's office an opportunity to apply the law in a discriminatory and arbitrary fashion. Moreover, the statute itself is so vague that people of ordinary intelligence (even in this case) have disputed whether or not this is a deadly weapon.

In Buff, this Court found that a Swiss army knife was a close case. Mr. Castillo would agree with that interpretation. However, if a Swiss army knife is a close case, how can anyone argue that a tire iron/crow bar should be applied as a deadly weapon, anything can be a deadly weapon pursuant to this statute.

IV. MR. CASTILLO'S IS ENTITLED TO HAVE A REVERSAL OF HIS SENTENCE OF DEATH AND CONVICTIONS BASED UPON THE FAILURE OF TRIAL COUNSEL TO PROPERLY INVESTIGATE HIS CASE.

In the instant case, Mr. Castillo's trial counsel failed to present any of the psychological evidence pertaining to Mr. Castillo with the exception of Dr. Etcoff. Dr. Etcoff testified at the penalty phase and summarized the extensive psychological history of Mr. Castillo. The defense

made absolutely no effort to present to the jury witnesses who had previously diagnosed Mr. Castillo.

The evidence presented at the penalty phase demonstrates that Mr. Castillo had been diagnosed with sever mental problems from the age of approximately ten (10) years old. The defense most certainly should have investigated the individuals who conducted these psychological tests and diagnosis of Mr. Castillo. Additionally, as has been previously noted in a previous argument this type of evidence should have been presented to the jury in the trial phase.

It is quite obvious that the failure to properly prepare and investigate this case resulted in the defense simply permitting Mr. Castillo to be convicted of murder of the first degree without any form of defense whatsoever. It would have been prudent if not absolutely required pursuant to the Strickland standard to present and investigate any possible psychological defense to a jury during the trial phase. It appears the defense woefully failed in their preparation, investigation, and presentation to the jury of a psychological defense. It is probable that a jury may have convicted Mr. Castillo of murder of the second degree had they been aware of the full scope of Mr. Castillo's mental deficiencies.

In State of Nevada v. Love, 865 P.2d 322, 109 Nev. 1136, (1993), this Court considered the issue of ineffective assistance of counsel for failure of trial counsel to properly investigate and interview prospective witnesses. In Love, this Court reversed a murder conviction of Rickey Love based upon trial counsel's failure to call potential witnesses coupled with the failure to personally interview witnesses so as to make an intelligent tactical decision and making an alleged tactical decision on misrepresentations of other witnesses testimony. Love, 109 Nev. 1136, 1137.

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

Additionally, in Warner v. State, 729 P.2d 1359, 102 Nev. 635, 638, (1986), this Court considered a similar issue as that in Love. In Warner, Mr. James Warner provided his defense counsel with a list of three possible witnesses, however, defense counsel did not contact them. Id. at 637. Moreover, in addition to defense counsel's failure to contact potential witnesses provided to him, defense counsel failed to investigate and defense counsel's lack of preparation for trial left Mr. Warner without a defense at trial. Id at 638. Therefore, this Court reversed and remanded Mr. Warner's case for a new trial based upon the following: (1) trial counsel's failure to conduct an adequate investigation; (2) trial counsel's failure to adequately prepare for trial; and (3) trial counsel's failure to interview witnesses.

"The question of whether a defendant has received ineffective assistance of counsel at trial in violation of the Sixth Amendment is a mixed question of law and fact and is thus subject to independent review." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, at 2070, 80 L.Ed.2d 674 (1984). This Court reviews claims of ineffective assistance of counsel under a reasonable effective assistance standard enunciated by the United States Supreme Court in Strickland and adopted by this Court in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504, (1984); *see* Dawson v. State, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992). Under this two-prong test, a defendant who challenges the adequacy of his or her counsel's representation must show (1) that counsel's performance was deficient and (2) that the defendant was prejudiced by this deficiency. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

Under Strickland, defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id. at* 691, 104 S.Ct. at

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

2066. (Quotations omitted). Deficient assistance requires a showing that trial counsel's representation of the defendant fell below an objective standard of reasonableness. *Id. at* 688, 104 S.Ct. at 2064. If the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's errors, the result of the trial probably would have been different. *Id. at* 694, 104 S.Ct. at 2068.

"An error by trial counsel, even if professionally unreasonable, does not warrant setting aside a judgment of a criminal proceeding if the error had no effect on the judgment. Strickland, 466 U.S. at 691, 104 S.Ct. at 2066. Thus Strickland also requires that the defendant be prejudiced by the unreasonable actions of counsel before his or her conviction will be reversed. The defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id. at* 694, 104 S.Ct. at 2068. Additionally, the Strickland court indicated that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id. at* 696, 104 S.Ct. at 2069.

V. THE DISTRICT COURT ERRED IN FAILING TO HOLD A REQUESTED EVIDENTIARY HEARING TO PERMIT MR. CASTILLO TO ESTABLISH FACTS OUTSIDE OF THE RECORD.

In Hatley v. Nevada, 100 Nev. 214, 678 P.2d 1160 (1984), this Court held that:

> We conclude that it was an error for the District Court to deny the petition without first holding and evidentiary hearing. It is well settled that when a petition for Post-Conviction Relief contains allegations of fact outside the record which, if true, would entitle the petitioner to relief, an evidentiary hearing thereon is required

(quotations and citations omitted) Id.

See also Bolden v State 99 Nev. 181, 659 P.2d 886 (1983).

Clearly, the court should hold an evidentiary hearing to permit Mr. Castillo to call his trial and appellate counsel.

In fact, an evidentiary hearing would establish the actual reason that trial and appellate counsel failed to raise the issues raised herein. It is incumbent upon the court to hold the evidentiary hearing as opposed to attempting to divine the reason that trial and appellate counsel failed to raise these issues.

In sum, Mr. Castillo requests an evidentiary hearing to establish facts not in evidence in support his post-conviction writ of habeas corpus. These issues should be permitted to be explored at an evidentiary hearing. As in Hatley, this Court concluded that it is error for the District Court to deny an evidentiary hearing to a petition for post-conviction writ of habeas corpus, wherein allegations of facts outside the record, if true, would entitled petitioner relief. Mr. Castillo has clearly established that there existed facts outside the record, if true, would entitle him to a new trial. For the foregoing reason, Mr. Castillo would respectfully request that this Court grant him an evidentiary hearing.

VI. MR. CASTILLO IS ENTITLED TO A NEW TRIAL AND PENALTY PHASE BASED UPON THE FAILURE OF TRIAL COUNSEL TO PRESENT A PSYCHOLOGICAL DEFENSE TO THE TRIAL PHASE OF THE CASE.

In the Supreme Court's opinion affirming Mr. Castillo's direct appeal, the Supreme Court noted, "[t]he defense did not put on a case in chief." (See attached opinion pp.4). In the instant

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

case, as the Supreme Court noted, the defense failed to present any form of defense whatsoever, the defense actually waived their opening argument. More importantly, the following statement was the entire closing argument by the defense counsel:

> "Good day, ladies and gentleman. If it please the court, Mr. Bell, Mr. Harmon, and my co-counsel Mr. Schieck, as the Judge informed you, when he was reading the instructions, this is the time known as closing argument. You've heard Mr. Harmon's closing argument. I think it's better to characterize what I'm about to say as some closing comments, as to this phase of the proceedings.
>
> I first want to thank you for your participation in this and the patience that I know you've had to exercise over these past couple of weeks. As Mr. Harmon has correctly state, you've always been on stage here. Now you are taking center stage.
>
> You have not heard much from the defense during this phase, as it has become quite obvious to you, as the events unfolding in here, but that doesn't lessen your burden or your sworn duty that you took an oath to. All the defense asks you to do is to perform your sworn duty. Your burden is no less because we presented very little and had very little participation. Your duty, as we see it, is to review each and every count, each and every element. Make sure that you believe beyond a reasonable doubt that the State has proven beyond a reasonable doubt each and every element within each and every count. Once you have done that, follow your convictions accordingly.
>
> Additionally, after you have done that, you've done your duty. You've been fair to all the parties, which is all that any of us can ask of you and for that, the defense both thanks you and applauds you in you efforts. I thank you. (7 ROA pp. 1533-1534).

This was the entire defense for Mr. Castillo. Yet, as was outlined in the statement of facts (penalty phase), there was a great deal of evidence that Mr. Castillo suffered from extreme emotional disturbance. In fact, it can be characterized that Mr. Castillo is mentally ill. The jury found that the instant murder was committed while the defendant was under the influence of extreme emotional distress and disturbance as one of Mr .Castillo's three mitigating circumstances. However, it should be noted that this same jury would have been unaware of any of the extensive psychological difficulties that Mr. Castillo had suffered throughout his life.

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

Without reiterating all the psychological evidence presented at the penalty phase, (which has been listed in the statement of facts), it is obvious that the defense should have presented this evidence at the trial portion of Mr. Castillo's case.

In a similar case the Nevada Supreme Court considered that case of Zollie Dumas v. the State of Nevada.

In Dumas v. State, 111 Nev. 1270, 903 P.2d 1816 (1995), this Court overturned the first degree murder conviction of Zollie Dumas.

In Dumas, this Court held, " we reverse on the ground that failure to present psychological or other evidence pertaining to mental status renders Dumas's representation ineffective under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 252, 80 L.Ed.2 674 (1984), and particularly under the case's holding that counsel has a duty to make reasonable investigation. Dumas at 111

This Court noted, "Dumas is mentally deficient being in the second percentile in intelligence, with an I.Q. of 69. He is illiterate and functions at about the third grade level. Dr. Jurasky, a psychiatrist employed by the State, reported that Dumas probably suffered organic damage to his intellectual capabilities and was incapable of premeditating an act such as the killing that is subject to this prosecution." At the post conviction hearing, Dr. Jurasky testified that Dumas was acting on impulse and out of emotional desperation rather than with deliberation." Id.

In rendering the holding in Dumas, this Court reasoned that:

> "In Riley, we refused to reverse the conviction on this ground because the pre-trial evaluation of Riley was not such that would render counsel's representation ineffective merely because counsel failed to heed the information contained in that report. The Riley opinion distinguished the facts in that case from Deutscher v.

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

> Whitley, 964 F.2d 1443, 1446, (9th Cir. 1991), *vacated*, 506 U.S. 935, 113 S.Ct. 367, 121 L.Ed.2d 279 (1992) aff'd sub nom., Deutscher v. Angelone, 16 F.3d 981, 984, (9th Cir. 194), in which counsel failed to investigate and offer evidence concerning the defendant's history of schizophrenia, pathological intoxication and organic brain damage, and Evans v. Lewis, 855 F.2d 631, 636-39 (9th Cir., 1998), in which defense counsel failed to inquire into prior diagnosis of schizophrenia that could have shown an impairment of mental state at the time of crime. See also Riley v. State, 110 Nev. 638, 650, 878 P.2d 272, 280 (1994)."

As this Court recognized in Dumas,

> " counsel's failure to investigate and present Dumas' mental condition as a defense virtually assured the jury would find Dumas guilty of first degree murder. With proper investigation, preparation and presentation, defense counsel could very well have presented a cogent defense of mental incapacity or, at least , that Dumas' mental state was inconsistent with premeditated and deliberated first-degree murder. The district court erred when it concluded that defense counsel's failure to pursue the only defense available to Dumas was within the bounds of acceptable advocacy. Counsel's failure to provide effective assistance renders the jury's verdict unreliable. We reverse the district court's order denying appellant's petition for post-conviction relief and remand the matter to the district court for a new trial." id. at 1271.

Mr. Castillo's defense attorney's should have put forward Mr. Castillo's psychological state of mind at the time of the crime. The defense attorney's put forth no arguments to attempt to mitigate a conviction from first degree murder conviction to a conviction of possibly second degree murder based upon the psychological difficulties suffered throughout Mr. Castillo's life. Therefore, based upon the facts of the instant case, combined with a review the State of Nevada v. Dumas, it was reversible error based upon ineffective assistance of counsel for the defense to fail to place this evidence before the jury.

VII. MR. CASTILLO'S CONVICTION IS UNCONSTITUTIONAL BECAUSE OF CUMULATIVE ERROR.

Mr. Castillo's conviction is invalid under the federal and state constitutional guarantees of

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

due process, equal protection, the effective assistance of counsel, a fair tribunal and an impartial jury due to the cumulative errors in the admission of evidence and instructions, gross misconduct by state officials and witnesses, and the systematic deprivation of petitioner's right to the effective assistance of trial and appellate counsel. Const. Amends. V, VI, VIII, & XIV, and Nevada Constitution Art. I and IV.

Each of the claims specified in the post-conviction petition for a writ of habeas corpus, requires that the judgment of conviction be vacated. Mr. Castillo incorporates each and every factual allegation and the leal authority contained in the petition as if fully set forth herein.

The cumulative effect of the errors demonstrated in the petition was to deprive the proceedings against Mr. Castillo of fundamental fairness and to result in a constitutionally unreliable sentence. Whether or not any individual error requires that the judgment or sentence be vacated, the totality of these multiple errors and omissions resulted in substantial prejudice to Petitioner.

The State cannot show, beyond a reasonable doubt that the cumulative effect of these numerous constitutional errors was harmless beyond a reasonable doubt; in the alternative, the totality of these constitutional violations substantially and injuriously affected the fairness of the proceedings and prejudiced Petitioner. Big Pond v. State, 101 Nev. 1, 692 P.2d 1288 (1985).

VIII. MR. CASTILLO'S DEATH SENTENCE IS INVALID UNDER THE FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, AS WELL AS HIS RIGHTS UNDER INTERNATIONAL LAW, BECAUSE THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT. U.S. CONSTITUTION ARTICLE VI AND AMENDMENTS VIII AND XIV.

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

The Eighth Amendment guarantee against cruel and unusual punishment prohibits punishment which is inconsistent with the evolving standards of decency theat mark the progress of a maturing society.

The worldwide trend is toward the abolition of capital punishment and most civilized nations no longer conduct executions. Portugal outlawed capital punishment in 1867; Sweden and Spain abolished the death penalty during the 1970's; and France abolished capital punishment in 1981. In 1990, the United Nations called on member nations to take steps toward the abolition of capital punishment. Since this call by the United Nations, Canada, Mexico, Germany, Haiti, and South Africa, pursuant to international law provisions that outlaw "cruel, unusual and degrading punishment" have abolished capital punishment. The death penalty has recently been abolished in Azerbaijan and Lithuania. Many of the "third world" nations have rejected capital punishment on moral grounds. As demonstrated by the world-wide trend toward abolition of the death penalty, state-sanctioned killing is inconsistent with the evolving standards of decency that mark the progress of a maturing society.

The death penalty is unnecessary to achieve any legitimate societal or penal logical interests in Mr. Castillo's case. His mental illness, his neurological deficits, and the circumstances surrounding the case make a death sentence cruel and unusual punishment.

The death penalty constitutes cruel and unusual punishment under any and all circumstances, and constitutes cruel and unusual punishment under the circumstances of this case. The petitioner's death sentence violates international law, which prohibits the arbitrary deprivation of life, and cruel, inhuman or degrading treatment or punishment .1 International

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

Covenant on Civil and Political Rights, Articles VI and VII: U.S. Const, Art. VI.

IX. MR. CASTILLO'S DEATH SENTENCE IS INVALID UNDER THE FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, AS WELL AS UNDER INTERNATIONAL LAW, BECAUSE EXECUTION BY LETHAL INJECTION VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS. U.S. CONSTITUTION ARTICLE VI, AMENDMENTS VIII & XIV.

State law requires that execution be inflicted by an injection of a lethal drug. Nev. Rev. Stat. §. 176.355(1).

The ethical standard of the American Medical Association prohibit physicians from participating in an execution other than to certify that a death had occurred. American Medical Association, House of Delegates, Resolution 5 (1992); American Medical Association, Judicial Council, Current Opinion 2.06 (1980). As a result non-physicians staff from the Department of Corrections have assumed the responsibility of locating veins and injecting needles into the arms of the individual being executed.

In recent executions in states employing lethal injections, prolonged and unnecessary pain have been suffered by the condemned individuals because of difficulty in the insertion of needles, unexpected chemical reactions among the lethal drugs or violent reactions to the drugs by the condemned individuals.

The following lethal injections executions, among other, have produced prolonged and unnecessary pain.

a. Stephen Peter Morin – March 13, 1985 (Texas) – Had to probe both arms and legs with needles for 45 minutes before they found the vein.
b. Randy Woolls– August 20, 1986 (Texas)– A drug addict, Woolls had to help the

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

executioner technicians find a good vein for the execution.

c. Raymond Landry – December 13, 1988 (Texas)– Pronounced dead 40 minutes after being strapped to the execution gurney and 24 minutes after the drugs first started flowing into his arms. Two minutes into the killing, the syringe came out of Landry's vein, spraying the deadly chemical across the room toward the witnesses. The execution team had to reinsert the catheter into the vein. The curtain was drawn for 14 minutes so witnesses could not see the intermission.

d. Stephen McCoy – May 24, 1989 (Texas) Had such a violent physical reaction to the drugs (heaving chest, gasping, choking, etc.) that one of the witnesses (male) fainted, crashing into and knocking over another witness. Houston attorney Karen Zellars, who represented McCoy and witnesessed the execution, thought that the fainting would catalyze a chain reaction. The Texas Attorney General admitted the inmate "seemed to have a somewhat stronger reaction," adding "The drugs might have been administered in a heavier dose or more rapidly."

e. Rickey Ray Rector– January 24, 1992 (Arkansas)– It took medical staff more than 50 minutes to find a suitable vein in Rector's arm. Witnesses were not permitted to view this scene, but reported hearing Rector's loud moans throughout the process. During the ordeal, Rector (who suffered serous brain damage from a lobotomy) tried to help the medical personnel find a vein. The administrator of the State's Department of Corrections medical programs said (paraphrased by a newspaper reporter) "the moans did come as a team of two medical people that had grown to five worked on both sides of his body to find a vein." The administrator said "that may have contributed to his occasional outbursts."

f. Robyn Lee Parks – March 10, 1992 (Oklahoma – Parks had a violent reaction to the drugs used in the lethal injection. Two minutes after the drugs were administered, the muscles in his jaw, neck, and abdomen, began to react spasmodically for approximately 45 seconds. Parks continued to gasp and violently gag. Death came eleven minutes after the drugs were administered. Said Tulsa World Reporter Wayne Greene, "the death looked ugly and scary."

g. Billy Wayne White – April 23, 1992 (Texas) – It took 47 minutes for authorities to find a suitable vein, and White eventually had to help.

h. Justin Lee May – May 7, 1992 (Texas) – May had an unusually violent reaction to the lethal drugs. According to Robert Wernsman, a reporter for the item (Huntsville), Mr. May "gasped, coughed and reared against his heavy leather restraints, coughing once again before his body froze. . ." Associated Press reporter Michael Graczyk wrote, "He went into coughing spasms, groaned and gasped, lifted his head from the death chamber gurney and would have arched his back if he had not been belted down. After he stopped breathing his eyes and mouth remained open."

i. John Wayne Gacy - May 19, 1994 (Illinois) – After the execution began, one of the three lethal drugs clogged the tube leading to Gacy's arm, and therefore, stopped flowing. Blinds, covering the window through which witness observe the

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

execution, were then drawn. The clogged tube was replaced with a new one, the blinds were opened, and the execution process resumed. Anesthesiologist blamed the problem on the inexperience of the prison officials who were conduction the execution, saying that proper procedures taught in "IV 101" would have prevented the error.

j. Emmitt Foster– May 3, 1995 (Missouri)– Foster was not pronounced dead until 30 minutes after the executioners began the flow of the death chemicals into his arms. Seven minutes after the chemicals began to flow, the blinds were closed to prohibit witnesses from viewing the scene; they were not reopened until three minutes after the death was pronounced. According to the coroner, who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the gurney; it was so tight that the flow of chemicals into his veins was restricted. It was several minutes after a prison worker finally loosened the strap that death was pronounced. The coroner entered the death chamber twenty minutes after the execution began, noticed the problem and told the officials to loosen the strap so that the execution could proceed.

k. Tommie Smith – July 18, 1996 (Indiana)– Smith was not pronounced dead until an hour and 20 minutes after the execution team began to administer the lethal combination of intravenous drugs. Prison officials said the team could not find a vein in Smith's arm and had to insert an angio-catheter into his hear, a procedure that took 35 minutes. According to authorities, Smith remained conscious during the procedure.

The procedures utilized to conduct the inhumane executions described above are substantially similar to those utilized by the State of Nevada.

Because of the inability of the State of Nevada to carry out Mr. Castillo's execution must be vacated. The practice is also invalid under the international law, which prohibits cruel, inhuman or degrading treatment or punishment. International Covenant on Civil and Political Rights, Article VII; U.S. Const., Art. VI.

X. MR. CASTILLO'S CONVICTION AND SENTENCE ARE INVALID PURSUANT TO THE RIGHTS AND PROTECTIONS AFFORD HIM UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, U.S. CONST. ART.VI.

The International Covenant on Civil and Political Rights, (Ex. 127) and international

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

human rights treaty, prohibits the arbitrary deprivation of life and restrict the imposition of the death penalty in countries which have not abolished it to "only the most serious crimes in accordance with the law in force at the time of the commission of the frame and not contrary to the provisions of the present Covenant. . ." ICCPR, Article VI, Sect. 2. The Covenant further prohibits torture and "cruel, inhuman or degrading treatment or punishment," (Article VII); and guarantees every person a fair and public hearing by a competent, independent and impartial tribunal. (Article XIV).

Among the additional protections secured by the Covenant for any person charged with a criminal offense are the guarantees: to be informed promptly and in detail in a language which [the accused] understands of the nature and cause of the charge against him; to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing; to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and not to be compelled to testify against himself or to confess guilt. 9Article XIV).

All of the specific rights listed above that are guaranteed in the Covenant were violated in the Petitioner's case, and are pleaded elsewhere throughout this petition. Petitioner incorporates each and every factual reference as if fully set forth herein. The rights afforded under Article XIV are guaranteed "in full equality," and thus apply in full force to Mr. Castillo, the indigent petitioner in this capital case.

The violations of Mr. Castillo's rights under international law are prejudicial per se and

require that his conviction and sentence be vacated.

XI. MR. CASTILLO'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, BECAUSE THE NEVADA CAPITAL PUNISHMENT SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER. U.S. CONST. AMENDS. V, VI, VIII AND XIV; NEV. CONST. ART. In SACS. 3, 6 AND 8; ART IV, SEC. 21.

In support of this claim, Mr. Castillo alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power and an evidentiary hearing:

Mr. Castillo hereby incorporates each and every allegation contained in this petition as if fully set forth herein.

The Nevada capital sentencing process permits the imposition of the death penalty for any first degree murder that is accompanied by an aggravating circumstance. NRS 200.020(4)(a). The statutory aggravating circumstances are so numerous and so vague that they arguable exist in every first-degree murder case. *See* NRS 200.033. Nevada permits the imposition of the death penalty for all first-degree murders that are "at random and without apparent motive." NRS 200.033(9). Nevada statutes also appear to permit the death penalty for murders involving virtually every conceivable kind of motive: robbery, sexual assault, arson, burglary, kidnapping, to receive money, torture, to prevent lawful arrest, and escape. *See* NRS 200.033. The scope of the Nevada death penalty statute is thus clear: The death penalty is an option for all first degree murders that involve a motive, and death is also an option if the first degree murder involves no motive at all.

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

The death penalty is accordingly permitted in Nevada for all first-degree murders, and first-degree murder, in turn, are not restricted in Nevada within traditional bounds. As the result of unconstitutional form jury instructions defining reasonable doubt, express malice and premeditation and deliberation, first degree murder convictions occur in the absence of proof beyond a reasonable doubt, in the absence of any rational showing of premeditation and deliberation, and as a result of the presumption of malice aforethought. Consequently, a death sentence is permissible under Nevada law in every case where the prosecution can present evidence, not even beyond a reasonable doubt, that an accused committed an intentional killing.

As a result of plea bargaining practices, and imposition of sentences by juries, sentences less than death have been imposed for offenses that are more aggravated than the one for which Mr. Castillo stands convicted; and in situations where the amount of mitigating evidence was less than the mitigation evidence that existed here. The untrammeled power of the sentencer under Nevada law to declines to impose the death penalty, even when no mitigating evidence exists at all, or when the aggravating factors far outweigh the mitigating evidence, means that the imposition of the death penalty is necessarily arbitrary and capricious.

Nevada law fails to provide sentencing bodies with any rational method for separating those few cases that warrant the imposition of the ultimate punishment form the many that do not. The narrowing function required by the Eighth Amendment is accordingly non-existent under Nevada's sentencing scheme, and the process is contaminated even further by Nevada Supreme Court decisions permitting the prosecution to present unreliable and prejudicial evidence during sentencing regarding uncharged criminal activities of the accused. Consideration of such evidence

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

necessarily diverts the sentencer's attention from he statutory aggravating circumstances, whose appropriate application is already virtually impossible to discern. The irrationality of the Nevada capital punishment system is illustrated by State of Nevada v. Jonathan Daniels, Eighth Judicial District Court Case No.C126201. Under the undisputed facts of that case, Mr. Daniels entered a convenience store on January 20, 1995, with the intent to rob the store. Mr. Daniels then held the store clerk at gunpoint for several seconds while the clerk begged for his life; Mr. Daniels then shot the clerk in the head at point blank range, killing him. A moment later, Mr. Daniels shot the other clerk. Mr. Daniels and two friends then left the premises calmly after first filling up their car with gas. Despite these egregious facts, and despite Mr. Daniels' lengthy criminal record, he was sentenced to life in prison for these acts.

There is not rational basis on which to conclude that Mr. Daniels deserves to live whereas Mr. Castillo deserves to die. These facts serve to illustrate how the Nevada capital punishment system is inherently arbitrary and capricious. Other Clark County cases demonstrate this same point: In State v. Brumfield, Case No. C145043, the District Attorney accepted a plea for sentence of less than death for a double homicide; and in another double homicide case involving a total of 12 aggravating factors resulted in sentences of less than death for two defendants. State v. Duckworth and Martin, Case No. C108501. Other Nevada cases as aggravated as the one for which Mr. Castillo was sentenced to death have also resulted in lesser sentences. See Ewish v. State, 110 Nev. 221, 223-25, 871 P.2d 306 (1994); Callier v. Warden, 111 Nev. 976, 979-82, 901 P.2d 619 (1995); Stringer v. State, 108 Nev. 413, 415-17 836 P.2d 609 (1992).

Because the Nevada capital punishment system provides no rational method for

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

distinguishing between who lives and who dies, such determinations are made on the basis of illegitimate considerations. In Nevada capital punishment is imposed disproportionately on racial minorities: Nevada's death row population is approximately 50% minority even though Nevada's general minority population is less than 20%. All of the people on Nevada's death row are indigent and have had to defend with the meager resources afforded to indigent defendants and their counsel. As this case illustrates, the lack of resources afforded to indigent defendants and their counsel. As this case illustrates, the lack of resources provided to capital defendants virtually ensures that compelling mitigating evidence will not be presented to, or considered by, the sentencing body. Nevada sentencers are accordingly unable to, and do not, provide the individualized, reliable sentencing determination that the constitution requires.

These systemic problems are not unique to Nevada. The American Bar Association has recently called for a moratorium on capital punishment unless and until each jurisdiction attempting to impose such punishment "implements policies and procedures that are consistent with . . . . longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed . . . . " as the ABA has observed in a report accompanying its resolution, "administration of the death penalty, from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency" (ABA Report). The ABA concludes that this morass has resulted from the lack of competent counsel in capital cases, the lack of a fair and adequate appellate review process, and the pervasive effects of race. Like wise, the states of Illinois and Nebraska have recently enacted or called for a

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

moratorium on imposition of the death penalty.

The United Nations High Commissioner for Human Rights has recently studied the American capital punishment process, and has concluded that "guarantees and safeguards, as well as specific restrictions on Capital Punishment, are not being respected. Lack of adequate counsel and legal representation for many capital defendants is disturbing." The High Commissioner has further concluded that "race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive a sentence of death." The report also described in detail the special problems created by the politicization of the death penalty, the lack of an independent and impartial state judiciary, and the racially biased system of selecting juries. The report concludes:

> The high level of support for the death penalty, even if studies have shown that it is not as deep as is claimed, cannot justify the lack of respect for the restrictions and safeguards surrounding its use. In many countries, mob killings an lynching enjoy public support as a way to deal with violent crime and are often portrayed as "popular justice." Yet they are not acceptable in civilized society.

The Nevada capital punishment system suffers from all of the problems identified in the ABA and United Nations reports - the under funding of defense counsel, the lack of a fair and adequate appellate review process and the pervasive effects of race. The problems with Nevada's process, moreover, are exacerbated by open-ended definitions of both first degree murder and the accompanying aggravating circumstances, which permits the imposition of a death sentence for virtually every intentional killing. This arbitrary, capricious and irrational scheme violates the constitution and is prejudicial *per se*.

///

///

///

///

///

///

///

CONCLUSION

Therefore, based upon the arguments herein, Mr. Castillo would respectfully request the reversal of his sentence of death and convictions based upon violations of the United States Constitutions Amendments Fourteen, Eight, Five, and Six.

DATED this 4 dated this October, 2001.

Respectfully submitted:

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563
Attorney for Petitioner
WILLIAM CASTILLO

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

FRANNY A. FORSMAN
Federal Public Defender
Nevada Bar No. 00014
MICHAEL PESCETTA
Assistant Federal Public Defender
Nevada Bar No. 2437
330 South Third Street, Suite 700
Las Vegas, Nevada 89101
Telephone (702) 388-6577
Facsimile (702) 388-5819

Attorneys for Petitioner/Appellant

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WILLIAM P. CASTILLO, Petitioner/Appellant, vs. E.K. McDANIEL, et al., Respondents/Appellees.	Case No. CV-S-04-0868-RCJ(PAL) **NOTICE OF ACCEPTANCE OF APPOINTMENT AS COUNSEL FOR PETITIONER 21 U.S.C. § 848(q)(4)** (Death Penalty Habeas Corpus Case)

Pursuant to this Court's order of July 7, 2004, the Federal Public Defender hereby accepts appointment as counsel to represent the petitioner in this matter.

Respectfully submitted this 3rd day of August, 2004.

FRANNY A. FORSMAN
Federal Public Defender

MICHAEL PESCETTA
Assistant Federal Public Defender

Attorneys for Petitioner/Appellant